To the Honorable The Chief Justice and the Associate Justices of

The Supreme Court of the State of Minnesota:

Sirs:

The Advisory Committee appointed pursuant to the provisions of Laws, 1947, Chapter 498, has prepared, and recommends to the Court for adoption, amendments to the Rules of Civil Procedure which are transmitted herewith.

Respectfully,

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# INTRODUCTION

In its study of amendments to the Rules of Civil Procedure, the Advisory Committee has considered the 1963 and the 1966 Amendments to the Federal Rules of Civil Procedure, the recommendations of the Minnesota State Bar Association and its Court Rules Committee, recommendations of the District Judges Association and Recommendations of individual judges and lawyers. All proposals have received serious and individual consideration. The amendments recommended reflect the Committee's judgment as to the desirability of modifying what is now established and familiar rule procedure in Minnesota. The Committee believed that the Minnesota Rules should conform as closely as possible to the Federal Rules while still preserving the traditions of our state law and our state court system. All of the major Federal Amendments have been adopted verbatim or with limited variances, so that decisions interpreting and applying the Federal Rules may aid in applying the Minnesota Rules. Particular attention is called to the amendments to Rules 18, 19, 20, 23 and 24, where very basic revisions have been made following similar amendments to the Federal Rules.

As a matter of policy the Advisory Committee did not follow the Federal Rules in unifying admiralty procedure and civil procedure. Admiralty and maritime claims are not specifically included in the Minnesota Rules; and the Federal Amendments relating to such practice have not been recommended.

Among the major proposals made to the Advisory Committee and not recommended by it to the Supreme Court are the following:

Adoption of the federal practice of filing the complaint with the clerk of court and having the summons issued by the clerk.

Adoption of the debate form of closing argument, i.e. plaintiff - defendant - plaintiff.

Alteration of the subpoena requirements to permit more convenient methods of altering the time of required appearances after the subpoena has been served.

Alteration of the method of conducting the voir dire examination. Two proposals were received. One proposal was to adopt Federal Rule 47(a) in its entirety. The other was to insure the right of oral interrogation to trial counsel. The Committee believes the present rule is sufficient to give the trial judge all the necessary discretion. The elimination of the last portion of Federal Rule 47(a) from Minnesota Rule 47.01 is not significant and reflects merely the elimination of redundant material.

Adoption of an amendment to Rule 49.01 to overrule McCourtie v. U.S. Steel, 253 Minn. 501, 93 N.W.2d 522 (1958), and permit the judge to allow comment on the effect of the answers to the special interrogatories.

Adoption of a requirement for jury instructions to precede the closing arguments.

Adoption of a rule providing that notice from the clerk of court is the official notice from which time for motions, appeals, etc., would begin to run.

4.04 Service by Publications; Personal Service out of State.

The summons may be served by three weeks' published notice in any of the cases enumerated hereafter when there shall have been filed with the court the complaint and an affidavit of the plaintiff or his attorney stating the existence of one of such cases, and that he believes the defendant is not a resident of the state, or cannot be found therein, and either that he has mailed a copy of the summons to the defendant at his place of residence or that such residence is not known to him. The service of the summons shall be deemed complete 21 days after the first publication. Personal service of such summons without the state, proved by the affidavit of the person making the same sworn to before a person authorized to administer an oath, shall have the same effect as the published notice herein provided for.

Such service shall be sufficient to confer jurisdiction:

(1) When the defendant is a resident individual having departed from the state with intent to defraud his creditors, or to avoid service, or keeps himself concealed therein with like intent;

(2) When the plaintiff has acquired a lien upon property or credits within the state by attachment or garnishment, and

(a) The defendant is a resident individual who has departed from the state, or cannot be found therein, or

(b) The defendant is a nonresident individual, or a foreign corporation, partnership or association;

<u>When quasi in rem jurisdiction has been obtained, a party defending such action thereby submits personally to the jurisdiction of the court. An appearance solely to contest the validity of such quasi in rem jurisdiction is not such a submission.</u>

(3) When the action is for divorce or separate maintenance and the court shall have ordered that service be made by published notice;

(4) When the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding him from any such interest or lien;

(5) When the action is to foreclose a mortgage or to enforce a lien on real estate.

Note

The amendment to Rule 4.04 prohibits limited appearances in Minnesota in quasi in rem actions. Prior to the amendment it was an open question in Minnesota whether or not a defendant in a quasi in rem action could defend on the merits without submitting generally to the jurisdiction of the court. A limited appearance must be distinguished from a special appearance and a motion to dismiss for lack of jurisdiction over the person. Special appearances were abolished by the rules in 1952. Under existing rule practice the defense of lack of jurisdiction over the person is properly raised by motion or pleading under Rule 12.02. A limited appearance is an appearance in which the defendant in a quasi in rem action is permitted to defend on the merits and submit to the court's jurisdiction only to the extent of the property seized. In the opinion of the Committee, limited appearances are inconsistent with the general philosophy of rule procedure requiring that all litigation be handled with dispatch. Limited appearances merely permit the defendant to litigate the same question more than once. See 1A Barron & Holtzoff, Federal Practice and Procedure (Wright ed.), Sec. 370.1; 38 Minn. L. Rev. 676, 679; 51 Columbia L. Rev. 242. A majority of the state and federal courts considering the question have rejected the limited appearance. Brignall v. Merkle, 28 N.E.2d 311 (Ill. 1940); Cunningham v. Kansas City Ry., 56 Pac. 502 (Kan. 1899); State ex rel, Methodist Old Peoples' Home v. Crawford, 80 P.2d 873 (Ore. 1938); Sands v. Lefcourt Realty Corp., 117 A.2d 365 (Del. 1955); Burg v. Winquist, 124 N.Y.S.2d 133 (N.Y. Sup. Ct. 1953); U.S. v. Balanovski, 131 F. Supp. 898 (S.D.N.Y. 1955); Anderson v. Benson, 117 F. Supp. 765 (D. Neb. 1953); Grant v. Kellogg, 3 F.R.D. 229 (1943); Contra, Cheshire Nat'l v. Jaynes, 112 N.E. 500 (Mass. 1916); McInnes v. McKay, 141 A. 699 (Me. 1928); Miller Bros. Co. v. State, 95 A.2d 286 (Md. 1953); Osborn v. White Eagle Oil Co., 355 P.2d 1041 (Okla. 1960); Salmon Falls Mfg. Co. v. Midland Tire and Rubber Co., 285 Fed. 214 (6th Cir. 1922); McQuillan v. Nat'l Cash Register Co., 112 F.2d 877 (4th Cir. 1940).

The only strong arguments that can be made in favor of limited appearances are: (1) an undue extension of state jurisdiction in personal claims through the fiction of asserting jurisdiction against property located within the state (2) the question of local prejudice or inconvenient forum for defendant. The matter of fictitious exercise of jurisdiction was resolved long ago when the United States Supreme Court approved of quasi in rem jurisdiction in Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565 (U.S. 1877). With regard to local prejudice or an inconvenient forum the defendant may have the possibility of removal to a federal court on diversity jurisdiction in spite of his submission to the personal jurisdiction of the state court. Similarly, the defendant may move to dismiss on the basis of forum non conveniens after submitting to the personal jurisdiction of the court. The court in resolving the forum non conveniens question should decide the issue after personal jurisdiction has attached on the same grounds as would have been applicable were the action commenced by personal service within the state rather than by quasi in rem jurisdiction. The only factor that would distinguish the case from a typical forum non conveniens case is the security the plaintiff acquired to insure partial satisfaction of any resultant judgment, which security would be lost if the action were dismissed. The existence of security is merely a factor to be considered with all the other factors in determining whether or not to dismiss the action.

Under the last sentence of the amendment to Rule 4.04, a motion to dismiss which contests plaintiff's compliance with the statutory and rule requirements for quasi in rem jurisdiction may still be made without submitting to the personal jurisdiction of the court. Such a jurisdictional attack is not a defense going to the merits.

5.01 Service; When Required; Appearance.

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties~~, affected thereby, but~~ No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. A party appears when he serves or files any paper in the proceeding.

Note

This rule is changed to clarify the rule and to conform the rule to the companion federal rule as amended in 1963. The words "affected thereby" are stricken and the rule now provides for a full exchange of documents between the parties by service of all documents on all of the other parties. Pursuant to this rule, all parties will receive copies of all documents that are to be served unless the specific rule that relates to that document provides to the contrary. For an example of a rule providing to the contrary, see Rule 14.

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 ~~after~~ from which the designated period of time begins to run ~~is~~ shall not ~~to~~ be included. The last day of the period so computed ~~is to~~ shall be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is ~~neither~~ not a Saturday, a Sunday, ~~nor~~ or a legal holiday. 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.

Note

The amendment makes clarifying language changes. The only change of substance is the addition of Saturday as a day which automatically extends time if Saturday is the last day of a stated time period or, if less than 7 days notice is required, Saturday is a day which is to be excluded in computing time. Saturday is added in recognition of the common practice of closing courthouses on Saturday as well as Sunday.

12.02 How Presented.

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be

asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) Lack of jurisdiction over the subject matter; (2) lack of jurisdiction over the person; (3) insufficiency of process; (4) insufficiency of service of process; (5) failure to state a claim upon which relief can be granted; and (6) failure to join ~~an indispensable~~ a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Note

The amendment to Rule 19 necessitates amendment to Rule 12.02(6).

12.07 Consolidation of Defenses in Motion.

A party who makes a motion under this rule may join with it the other motions herein provided for and then available to him. If a party makes a motion under this rule ~~and does not include therein all defenses and objections~~ but omits therefrom any defense or objection then available to him which this rule permits to be raised by motion, he shall not thereafter make a motion

based on ~~any of the defenses as objections~~ the defense or objection so omitted, except a motion as provided in Rule 12.08 (2) hereof on any of the grounds there stated.

Note

Minnesota Rule 12.07 and Federal Rule 12 (g) have been identical. The purpose of Rule 12.07 is to forbid a defendant who has made a motion asserting Rule 12 defenses, with the exceptions noted in Rule 12.08, from asserting other Rule 12 defenses not included in the original motion either in his answer or in a subsequent motion. The language of the existing Rule 12.07 is ambiguous. It is clear that Rule 12.07 intended to require consolidation of Rule 12 defenses if raised by motion and to prevent piecemeal assertion of technical defenses. However, the language of 12.07 when considered with Rule 12.08 did not clearly spell out this effect of Rules 12.07 and 12.08. A few courts have permitted omitted defenses to be asserted by an answer or by an amended motion. The amendment to Rule 12.07 and the subsequent amendment to Rule 12.08 are for purposes of clarification. No change in existing practice is involved.

12.08 Waiver or Preservation of Certain Defenses.

~~A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, except (1) that the defense of failure to state a claim upon which relief can be granted, the defense of failure to join an indispensable party, and the objection of failure to state a legal defense to a claim may also be made by a later pleading, if one is permitted, or by motion for judgment on the pleadings or at the trial on the merits and except (2) that, whenever it appears by suggestion of parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. If made at the trial, the objections or defenses shall be disposed of as provided in Rule 15.02 in the light of any evidence that may have been received.~~

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in Rule 12.07, or (B) if it is

neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7.01, or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Note

The existing Minnesota Rule 12.08 and the former Federal Rule 12 (h) were identical. As stated in the Note to Rule 12.07, clarification of Rules 12.07 and 12.08 is desired. Subdivision (1) (A) eliminates the existing ambiguity and specifies the defenses that are waived by the party when a motion is made prior to answer and the motion did not include the specified defenses. The Minnesota rule and federal rule are not identical in that the Minnesota rule does not include the defense of lack of proper venue as a non waivable Rule 12 defense.

Subdivision (1) (B) eliminates the possibility of using a discretionary amendment of a pleading under Rule 15.01 to raise waivable Rule 12 defenses. Subdivision (1) (B) now refers only to that part of Rule 15.01 where an amendment to a pleading could be made as a matter of right. The new subdivisions (2) and (3) are identical in effect with the existing rule.

13.08 ~~Additional-Parties-May-be-Brought-in.~~ Joinder of Additional Parties.

~~When-the-presence-of-parties-other-than-those-to-the-original-action is-required-for-the-granting-of-complete-relief-in-the-determination-of-a counterclaim-or-cross-claim,-the-court-shall-order-them-to-be-brought-in-as defendants-as-provided-in-these-rules.~~ Persons other than those made parties to the original action may be made parties to a counterclaim or cross-claim in accordance with the provisions of Rules 19 and 20.

Note

The amendment is a clarifying amendment and conforms the Minnesota rule to a similar amendment to Federal Rule 13(h). The reference in the former rule to those persons whose presence is "required" for the granting of complete relief has been considered by some courts to refer only to Rule 19 parties. In fact, Rule 13.08 should properly refer to both Rule 19 and Rule 20 parties. The amendment makes this provision clear.

15.03 Relation Back of Amendments.

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits, and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

Note

The amendment conforms Minnesota Rule 15.03 to Federal Rule 15(c). The amendment permits substitution of parties and relation back of the claim, where the intended party knows that the lawsuit has been commenced and should know that a mistake in naming the party has been made. See Nelson v. Glenwood Hills Hospital, 240 Minn. 505, 62 N.W.2d 73 (1953); Halloran v. Blue and White Liberty Cab Co., Inc., 253 Minn. 436, 92 N.W. 2d 794 (1958). The relation back of amendments changing plaintiff is not expressly provided for in Rule 15.03. This problem generally is one of a real party in interest under Rule 17.

17.01 Real Party in Interest.

Every action shall be prosecuted in the name of the real party in interest~~,~~ but An executor, administrator, guardian, bailee, trustee of an express trust, a party with whom or in whose name a contract has been made for the benefit of another, or a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought. No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

Note

The amended Federal Rule 17 (a) and amended Minnesota Rule 17.01 are identical to the point where the Minnesota rule terminates. The federal rule also contains a provision for actions brought for the use and benefit of another in the name of the United States pursuant to a United States Statute. Such a provision is not needed in Minnesota. The new portion of Rule 17.01 will permit the substitution of plaintiffs when objection has been made on the ground of lack of a real party in interest. Bailees have been added as parties who may sue in a representative capacity.

18.01 Joinder of Claims.

~~The plaintiff in his complaint or in a reply setting forth a counter-claim and the defendant in an answer setting forth a counterclaim may join either as independent or as alternative claims as many claims either legal or equitable or both as he may have against an opposing party provided they do not require separate places of trial. There may be a like joinder of claims when there are multiple parties if the requirements of Rules 19, 20, and 22 are satisfied. There may be a like joinder of cross claims or third-~~

~~party claims if the requirements of Rules 13 and 14, respectively, are satisfied.~~ A party asserting a claim to relief as an original claim, counterclaim, cross-claim, or third-party claim, may join, either as independent or as alternate claims, as many claims, legal, or equitable, as he has against an opposing party.

Note

The amendment removes an ambiguity in Rule 18 where the action involves multiple parties and the claimant wishes to assert more than one claim against some but not all of the parties. A possible interpretation of the prior Rule 18 has led some courts to hold that the rules regulating joinder of parties (Rules 19, 20 and 22) carry back to Rule 18 and impose some limits on joinder of claims in multi-party cases. In particular, Rule 20.01 has been read to prohibit joinder of claims unless all parties are interested in all claims. See Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).

Rule 18.01 is amended to clarify the rule and to override the Christianson decision by clearly stating that a party may assert a claim as an original claim, a counterclaim, a cross-claim, or a third-party claim and join with it as many claims as he has against an opposing party. No distinction is made between single party and multiple party actions. The joinder of parties is governed by different rules operating independently from Rule 18. In the opinion of the Committee, it is more compatible with the purpose of the rules to permit free joinder of claims in all cases and leave to the trial court's discretion separation of trials of the various claims if fairness or convenience dictates separate trials. The present amendment makes the Minnesota rule identical with Federal Rule 18(a).

~~Rule 19.--Necessary Joinder of Parties~~
Rule 19. Joinder of Persons Needed for Just Adjudication

~~19.01--Necessary Joinder.~~

~~Subject to the provisions of Rules 19.02 and 23, persons having a joint interest which is not also a several interest shall be made parties and be joined on the same side as plaintiffs or defendants.--When a person who should join as a plaintiff refuses to do so, he may be made a defendant.~~

~~19.02--Effect of Failure to Join.~~

~~When persons who are not indispensable, but who ought to be parties~~

~~if complete relief is to be accorded between those already parties, have not been made parties and are subject to the jurisdiction of the court as to service of process, the court shall order them summoned to appear in the action. The court in its discretion may proceed in the action without making such persons parties if its jurisdiction over them can be acquired only by their consent or voluntary appearance, but the judgment rendered therein does not affect the rights or liabilities of absent persons.~~

~~19.03 Names of Omitted Persons and Reasons for Nonjoinder to be Pleaded.~~

~~In any pleading in which relief is asked, the pleader shall set forth the names, if known to him, of persons who ought to be parties if complete relief is to be accorded between those already parties, but who are not joined, and shall state why they are omitted.~~

19.01 Persons to be Joined if Feasible.

A person who is subject to service of process shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

19.02 Determination by Court Whenever Joinder not Feasible.

If a person as described in Rule 19.01 (1)-(2) hereof cannot be made a party, the court shall determine whether in equity and good conscience the

action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable. The factors to be considered by the court include: first, to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; second, the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; third, whether a judgment rendered in the person's absence will be adequate; fourth, whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder.

19.03 Pleading Reasons for Nonjoinder.

A pleading asserting a claim for relief shall state the names, if known to the pleader, of any persons as described in Rule 19.01 (1)-(2) hereof who are not joined, and the reasons why they are not joined.

19.04 Exception of Class Actions.

This rule is subject to the provisions of Rule 23.

Note

The amendment conforms Minnesota Rule 19 to the amended Federal Rule 19. Since 1952, Minnesota Rule 19 has been substantially identical to Federal Rule 19. In 1966, Federal Rule 19 was amended to remove ambiguities in the rule and to overcome certain decisions interpreting Rule 19 in a manner not deemed desirable by the Federal Advisory Committee. The purpose of Rule 19 is to compel joinder of parties whenever feasible so that a complete disposition of a claim can be made in the pending case. Decisional law interpreting the word "indispensable" under the original subdivision (b) of the federal rule equated indispensable party with persons having a joint interest in subdivision (a). The Federal Advisory Committee indicated that such restrictive definition of indispensable was not the original intent of the rule. The expression "indispensable" was intended to be an all inclusive reference to those persons in whose absence it would be advisable, all factors considered, to dismiss the action. In addition, several federal decisions equated lack of an indispensable party with lack of jurisdiction over the cause of action. Such an interpretation again was not intended in the original rule. For a discussion of the defects in the original rule, see Notes of Federal Advisory Committee, Rule 19 and Reed, Compulsory Joinder of Parties in Civil Actions, 55 Mich. L. Rev. 327.

Most courts, including Minnesota, have used the basic test of Shields v. Barrow, 58 U.S. (17 How.) 130 (U.S. 1854), to classify parties as necessary or indispensable. Minnesota by decisional law has adopted the Shields test but recognized that that test was not an absolute one and that determination of an indispensable party involves balancing many considerations and rests ultimately on the facts of each particular case. McAndrew v. Krause, 245 Minn. 85, 71 N.W.2d 153 (1955). Thus Minnesota by decisional law has avoided many of the difficulties experienced by the federal courts in interpreting Rule 19. As such, the existing law in Minnesota is compatible with the amended provisions of Rule 19.

As set forth in the Federal Advisory Committee's notes, the intent of each of the new subdivisions is as follows: (Minnesota rule numbering is adopted as are the interpretations in the Federal Advisory Committee Notes) Rule 19.01 defines persons whose joinder in the action is desirable. Clause (1) of Rule 19.01 stresses the desirability of joining all persons in whose absence the court would be obligated to grant less than complete relief to the parties before the court. This reflects the public's interest in having a single lawsuit rather than repeated lawsuits on essentially the same subject matter. Clause (2)(i) of Rule 19.01 recognizes the importance of protecting a person whose joinder is in question against the practical prejudice to him which may arise through a disposition of the case in his absence. Clause (2)(ii) recognizes the importance of considering whether or not a party may be left in the situation where he will be subject to a double or otherwise inconsistent liability by later claims of non joined parties. Rule 19.01 defines persons who should be joined but eliminates the abstract terms of the former rule regarding the nature of their interest, i.e. joint, united, separable, etc. The new description of parties does not effect the existing decisional law holding that a tortfeasor with the normal joint and several liability is merely a permissive party and not a Rule 19 party.

In adopting Minnesota Rule 19.01 the Minnesota Committee eliminated reference to joinder of a party whose joinder would deprive the court of jurisdiction, as that provision involves matters particularly related to diversity jurisdiction in the federal court and does not have a similar counterpart in state practice. In like measure, Minnesota Rule 19.01 has eliminated the last sentence of Federal Rule 19(a) since dismissal for improper venue is not compatible with existing state practice.

Rule 19.02 sets forth factors to be considered by the court in determining whether in equity and good conscience the lawsuit should continue in the absence of a person described in 19.01 or if the action should be dismissed. This decision ultimately is to be made in light of pragmatic considerations. The factors set forth in 19.02 are acknowledged to be overlapping to some extent and are not intended to exclude other considerations which may be particularly applicable in certain cases. The first factor set forth in Rule 19.02 is consideration of what impact, if any, a judgment in the pending action would have on the absentee. Would the absentee be adversely affected in a practical sense and, if so, would the prejudice be immediate and serious or remote and minor? The second factor requires consideration of methods whereby the prejudice to absent parties may be averted or lessened by shaping relief. The court is also to consider the extent to which a party may avoid prejudice by other means such as intervention. A third factor is whether or not an adequate judgment can be rendered in the absence of a given person. This focuses attention on the extent and nature of the relief that can be accorded among the parties actually joined. The fourth factor looks to the practical effect of a dismissal and

indicates that the court should consider among other things, whether the action could be more effectively sued out in another jurisdiction. The word "indispensable" is used only as a short hand expression to designate a person who must be joined upon consideration of all the factors and if not joined his absence would require dismissal of the action.

Rule 19.03 is identical in effect with the former provisions of Rule 19.

Rule 19.04 repeats an exception contained in the prior Rule 19.01.

20.01 Permissive Joinder.

All persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative ~~any right to relief~~ in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of fact or law common to all ~~of them~~ these persons will arise in the action. All persons may be joined in one action as defendants if there is asserted against them jointly, severally, or in the alternative, any right to relief in respect of or arising out of the same transaction, occurrence, or series of transactions or occurrences and if any question of law or fact common to all ~~of them~~ defendants will arise in the action. A plaintiff or defendant need not be interested in obtaining or defending against all the relief demanded. Judgment may be given for one or more of the plaintiffs according to their respective rights to relief, and against one or more defendants according to their respective liabilities.

Note

The Minnesota amendment adopts the federal amendment to Rule 20. The change in Rule 20 is purely a clarification change necessitated by the amendment to Rule 18. The word "them" is now changed to "defendants" to eliminate the interpretation given to Rule 18 and Rule 20 in Federal Housing Administrator v. Christianson, 26 F. Supp. 419 (D. Conn. 1939).

## Rule 23. Class Actions

23.01--Representation.

If persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued, when the character of the right sought to be enforced for or against the class is

(1) joint, or common, or secondary in the sense that the owner of a primary right refuses to enforce that right and a member of the class thereby becomes entitled to enforce it;

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

23.02--Secondary Action by Shareholder.

In an action brought to enforce a secondary right on the part of one or more shareholders in a corporation or members in an unincorporated association because the corporation or association refuses to enforce rights which may properly be asserted by it, the complaint shall set forth with particularity the efforts of the plaintiff to secure from the managing directors or trustees and, if necessary, from the shareholders or members such action as he desires, and the reasons for his failure to obtain such action or the reason for not making such effort.

23.03--Dismissal or Compromise.

A class action shall not be dismissed or compromised without the

approval of the court. If the right sought to be enforced is one defined in Rule 23.01(1), notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs. If the right is one defined in Rule 23.01(2) or (3), notice shall be given only if the court requires it.

23.04 Orders to Insure Adequate Representation.

The court at any stage of an action under Rule 23.01 may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended. It may order that notice be given, in such manner as it may direct, of the pendency of the action, of a proposed settlement, of entry of judgment or of any other proceedings in the action, including notice to the absent persons that they may come in and present claims and defenses if they so desire. Whenever the representation appears to the court inadequate fairly to protect the interests of absent persons who may be bound by the judgment, the court may, at any time prior to judgment, order an amendment of pleadings by eliminating therefrom all reference to representation of the absent persons, and order the entry of judgment in such form as to affect only the parties to the action and those adequately represented.

23.01 Prerequisites to a Class Action.

One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

23.02 Class Actions Maintainable.

An action may be maintained as a class action if the prerequisites of

Rule 23.01 are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

23.03 Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

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

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

(3) The judgment in an action maintained as a class action under Rule 23.02(1) or 23.02(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under Rule 23.02(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in Rule 23.03(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

23.04 Orders in Conduct of Actions.

In the conduct of actions to which this rule applies, the court may

make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

23.05 Dismissal or Compromise.

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

23.06 Derivative Actions by Shareholders or Members.

In a derivative action brought by one or more shareholders or members to enforce a right of a corporation or of an unincorporated association, the corporation or association having failed to enforce a right which may properly be asserted by it, the complaint shall allege that the plaintiff was a shareholder or member at the time of the transaction of which he complains or that his share or membership thereafter devolved on him by operation of law. The complaint shall also allege with particularity the efforts, if any, made by the plaintiff to obtain the action he desires from the directors or comparable authority and, if necessary, from the shareholders or members, and the reasons for his failure to obtain the action or for not making the effort. The deri-

vative action may not be maintained if it appears that the plaintiff does not fairly and adequately represent the interests of the shareholders or members similarly situated in enforcing the right of the corporation or association. The action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to shareholders or members in such manner as the court directs.

23.07 Actions Relating to Unincorporated Associations.

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

Note

Prior to 1966, Minnesota Rule 23.01 and Federal Rule 23(a) were identical in their respective provisions. The Minnesota rule adopted the interpretation of the federal rule establishing three separate classifications for class actions, namely true, hybrid, and spurious. Minnesota also adopted the federal case interpretation regarding the effect of the class action in each of the three classifications, namely true class action - binding upon all members of the class; hybrid class action - binding upon all persons joined in the action or who received notice and an invitation to participate in the action; spurious class action - binding only upon those actually named or joined as parties to the lawsuit. Minnesota also followed the general federal format requiring that the class be so numerous as to make it impracticable to try the lawsuits individually and requiring that the representation be adequate to insure fairness to all represented.

As the comment to the amended federal rules indicates, substantial difficulty has been encountered in applying the three classifications to the various fact situations arising in class actions. The words "joint," "common," etc., also have proven to be obscure and uncertain. In many respects, the federal cases classified the class action in accordance with the opinion of the trial court regarding the best res judicata application for that particular action. The pre 1966 federal rule did not give the trial court discretion to adjust the class actions to conform to the most desirable procedural implications and res judicata implications as the case developed through the course

of discovery, etc. Further, the original federal rule did not specifically set forth measures that might be taken during the pendency of the action to assure procedural fairness to members of the class. Minnesota corrected many of the difficulties in the federal rule by adoption of Rule 23.04 in March of 1959. Federal Rule 23 had no counterpart to the former Minnesota Rule 23.04. The amended federal rule in many respects gives the trial court the same powers as set forth in the former Minnesota Rule 23.04. In view of the close legal effect of the former Minnesota provision and the new federal provision, it is desirable to adopt the new federal provisions so that consistency between federal decisions and the Minnesota decisions will be more likely.

The amended rule describes in practical terms the occasions when a class action can be maintained. The familiar concept of a large number of persons composing the class and adequate representation for the interests of all members of the class is retained in the new Rule 23.01. The new Rule 23.01 abolishes the arbitrary classifications of the classes. The court is given the power throughout the course of the lawsuit to determine what the res judicata effect of the actions will be. Guidelines are set forth in the rule to guide the exercise of discretion by the judges. Specifically, subdivision (.01) states the prerequisites for maintaining a class action in terms of numbers and qualifications of representatives. Subdivision (.02) sets forth the elements to be considered in determining if a class action can be maintained. The considerations stated in clauses 23.02(1)(A) and (B) are somewhat comparable to the elements used in determining whether or not a person is a Rule 19 party. Clause (A) relates to claims by an individual or against an individual where conflicting standards or decisions would be incompatible with proper judicial results; e.g. separate actions by individuals against a municipality to declare a bond issue invalid or to condition or limit it, would be incompatible with the need of the municipality to finance government services because of multiplicity and the desirability for a single result.

Clause (B) of Rule 23.02(1) concerns itself with cases where as a practical matter persons not included in the lawsuit might be bound, i.e. policyholders in a fraternal benefit association where the issue is the propriety of a reorganization of the association. The primary consideration under this clause is the adverse practical effect upon the interest of the other members of the class who are similarly situated but not joined as technical parties to the lawsuit and thus not bound by the result unless considered a member of a class.

Subdivision (2) of Rule 23.02 involves situations where injunctive relief or declaratory action is taken and it effects the interest of a large number of persons. Illustrative of this type of case is the civil rights litigation. No case involving money damages falls under this subdivision.

Subdivision (3) of Rule 23.02 involves cases that have not traditionally fallen within the class action concept but might well be tried better as a class action to achieve economies of time and expense and to promote uniformity of decision without sacrificing procedural fairness to the individuals who might be involved. A prerequisite to defining a class action under this subdivision is that the common questions predominate over the individual questions. Generally the mass accident cases would not fall within this subdivision because of the individual liability and damage issues, but a group fraud case might well be a class action on liability even though separate damage issues are involved.

Rule 23.03(1) requires the court to determine as early in a proceeding as practicable whether or not the class action may be maintained as a class action. Under Rule 23.03(1) the court can make a conditional determination that a class action will or will not be maintained. Such a determination can be altered or amended before final disposition of the case. The court has the power to condition its order that the action will be a class action, e.g. additional or different representatives, notice to the members of the class, etc.

Rule 23.03(2) protects the interest of individuals who may be the subject matter of a class action under Rule 23.02(3) by requiring that notice be given to each member of the class of that member's right to be excluded from the lawsuit in the event that he requests such exclusion. A person receiving such notice may, if he wishes, enter an appearance through his own counsel, may permit the action to continue as a class action, or, upon his request, may be excluded.

Rule 23.03(3) makes specific provision for the various types of class actions set forth in Rule 23.02(1)(2)(3). It provides generally that class actions maintained under Rule 23.02(1) or (2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. If the judgment is maintained as an action under Rule 23.02(3) the court shall specify by name or describe those to whom the notice was sent and who have not requested exclusion and whom the court finds to have been included as members of the class in the lawsuit. Rule 23.03(3) excludes a procedural device known as a one way intervention. Under existing federal practice many federal courts have permitted parties to intervene in spurious class actions after decision or judgment for purposes of being included in the class when the judgment was favorable to the class. Rule 23.03(3) will bar this procedure and will require that the class be determined prior to judgment.

Rule 23.03(4) permits class actions with respect to particular issues and permits classes to be divided into subclasses and each subclass treated as a class.

Rule 23.04 is concerned with the fair and efficient conduct of the trial. It makes provisions for discretionary power in the court to determine the best method of conducting the class action, including handling of evidence, amendment of pleadings, etc. In many respects the power set forth under Rule 23.04 is similar to the power of the court under Rule 16 and contains some of the features formerly set forth in the Minnesota Rule 23.04.

Rule 23.05 preserves the present requirement of court approval for dismissal or compromise of class actions.

A new Rule 23.06 is added to the rules. It is similar to the former Minnesota Rule 23.02. The new rule relates to derivative action by shareholders. Shareholders as a class may bring class actions to enforce shareholder rights under the other subsections of Rule 23, e.g. action to compel declaration of a dividend. A derivative lawsuit by a shareholder or a member of an unincorporated association has distinctive aspects which require special treatment. The rule recognizes that the class may be composed of one or more than one shareholder. The rule requires that the plaintiff be a shareholder at the time of the transaction of which he complains or that his share was obtained by him by operation

of law. The purpose is to prevent persons from purchasing stock solely for purposes of maintaining shareholders' derivative actions. Derivative actions require approval of the court if the action is to be dismissed or compromised. The rule also recognizes the power of the court to question the adequacy of the representation by the plaintiff shareholders. Minnesota Rule 23.06 eliminates the federal requirement of verification of the complaint and the federal provision prohibiting a collusive action to confer diversity jurisdiction upon a United States court. The latter provision has no state jurisdiction counterpart. Verification under this rule as an exception to the complaint form generally seems undesirable and could constitute an unnecessary technical trap for counsel.

A new Rule 23.07 is added relating to actions against unincorporated associations. Actions against unincorporated associations have traditionally been treated as class actions. Rule 23.07 will permit this type of class action subject to the general rules regarding class actions or derivative actions when for some reason the association cannot be sued as an entity under local procedure.

24.01 Intervention of Right.

Upon timely application anyone shall be permitted to intervene in an action ~~(1)~~ when the ~~applicant has such an interest in the matter in litigation that he may either gain or lose by the direct legal effect of the judgment therein whether or not he were a party to the action, or~~ applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties. ~~(2) when the representation of the applicant's interest by existing parties is or may be inadequate and the applicant is or may be bound by a judgment in the action, or (3) when the applicant is so situated as to be adversely affected by a distribution or other disposition of property which is in the custody or subject to the control or disposition of the court or an officer thereof.~~

Note

The Minnesota amendment adopts the amended Federal Rule 24(a)(2) as Minnesota Rule 24.01. The prior Minnesota Rule 24.01 and Federal Rule 24(a) were not identical. The prior Minnesota Rule 24.01(1) had been interpreted as a rule codification of the Minnesota Supreme Court's decision in Faricy v. St. Paul Investment and Society, 110 Minn. 311, 125 N.W. 676 (1910). See In Re Application of Sister Kenny Foundation, Inc., 267 Minn. 352, 126 N.W.2d 640 (1964); Wright, Joinder of Claims and Parties, 36 Minn. L. Rev. 580, 628. In the Sister Kenny case the court stressed that the language did not contemplate a "possible" gain or loss as opposed to a "necessary" gain or loss. Subdivision (2) and subdivision (3) of prior Minnesota Rule 24.01 were identical to the former federal provisions (2) and (3). It is fair to say that the prior subdivisions (2) and (3) are meaningless in the former Minnesota rule since all cases encompassed within those two clauses would also be encompassed within the Minnesota version of subdivision (1).

The amendment to the federal rule eliminates federal subdivisions (2) and (3) and substitutes as subdivision (2) provisions permitting intervention as a matter of right if the party is so situated that as a practical matter decision in the pending action would impair or impede his ability to protect his interest. Federal rule provision (1) is not included in the present Minnesota rule and is not adopted in the amended Minnesota Rule 24.01. Federal subdivision (1) relates to intervention in an action when a statute of the United States confers an unconditional right to intervene. This subdivision merely states the necessary result if there is a statutory right to intervene.

The amended Rule 24.01 represents a change in Minnesota law. Minnesota has been much more stringent in determining necessity of gain or loss by direct legal effect of the judgment than have the federal courts. The proposed federal provision, while closer to the former Minnesota subdivision (1) than the prior federal rules, still permits the court to permit intervention as of right if a practical result of the decision rather than a necessary result of the decision will injure the plaintiff. The amendment is desirable purely for clarification and for the sake of consistency with the federal rule. The former provision in the Minnesota rule is an ambiguous provision in the sense that the court is to speculate whether or not the person would lose or gain if he became a party. It is difficult to see how a person would not gain or lose if he became a party.

24.03 Procedure.

A person desiring to intervene shall serve a motion to intervene upon ~~all~~ the parties ~~affected thereby~~ as provided in Rule 5. The motion shall state the grounds therefor and shall be accompanied by a pleading setting forth the claim or defense for which intervention is sought.

Note

This amendment conforms Rule 24.03 to the requirements in the amended Rule 5.01.

26.02 Scope of Examination.

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.

Note

This amendment permits discovery of insurance coverage where such coverage technically may not be relevant to the subject matter of the action. See Jeppesen v. Swanson, 243 Minn. 547, 68 N.W.2d 649 (1955). The rule applies to claimants and defendants and is not limited to liability insurance. By its terms the amendment will apply in any action in which insurance coverage may be involved and where the amount of coverage will have a bearing on settlement of the litigation. Such things as coverage of

medical insurance, collision coverage, etc., will be subject to discovery under this amendment. Production of the insurance policy is specifically made subject to the requirements of Rule 34. It is expected that production of the policy will generally be limited to those cases where coverage is denied or disputed.

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 evidence if the witness were then present and testifying.

Note

Reference to Rule 28.02 is added. See Note to Rule 28.02.

28.02 In Foreign Countries.

In a foreign ~~state or~~ country, depositions ~~shall~~ may be taken (1) on notice before a ~~secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States,~~ person authorized to administer oaths in the place in which the examination is held, either by the law thereof or by the law of the United States, or (2) before ~~such~~ a person ~~or officer as may be appointed by commission or under letters rogatory~~ commissioned by the court, and a person so commissioned shall have the power by virtue of his commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letters rogatory shall be issued ~~only when necessary or convenient,~~ on application and notice, and on ~~such~~ terms ~~and with such directions as~~ that are just and appropriate. It is not requisite to the issuance of a commission or a letter rogatory that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter rogatory may be issued in proper

cases. ~~Officers may be designated in notices or commissions~~ A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. and A letters rogatory may be addressed "To the Appropriate Judicial Authority in (here name the country)." Evidence obtained in response to a letter rogatory need not be excluded merely for the reason that it is not a verbatim transcript or that the testimony was not taken under oath or for any similar departure from the requirements for depositions taken within the United States under these Rules.

Note

This amendment follows the federal rule amendment. The purpose is to facilitate the taking of depositions in foreign countries. Clause (1) is amended to broaden the class of persons before whom depositions may be taken. Under clause (1) persons authorized to administer oaths either by the laws of the foreign state where the examination will be held or by the laws of the United States is a person before whom a deposition may be taken. Clause (2) clarifies the power of the court to constitute authority to administer oaths in a person appointed by commission. Clause (3) expands the letters rogatory and permits the use of letters even though no showing of impossibility or impracticability of taking the deposition under clauses (1) or (2) is established. Some foreign countries will enforce, by legal process of that country, the obligation of the witness to appear at the deposition only under a letter rogatory but not in aid of a commission. The last subdivision is added in recognition of the fact that depositions taken by persons in foreign countries pursuant to a letter rogatory will commonly be taken in the manner familiar to the bench in that country. Such deposition procedures may not conform to the established procedures of the United States. In this event, the deposition may still be used as a deposition so long as the procedures of the foreign country are observed.

Rule 33. Interrogatories to Parties.

~~Any party may serve upon any adverse party written interrogatories to be answered by the party served or, if the party served is the state or any political subdivision thereof or a public or private corporation or a partnership or association, by any officer or managing agent, who shall furnish such information as is available to the party. Interrogatories may be served after commencement of the action and without leave of court, except that, if service~~

is made by the plaintiff within 10 days after such commencement, leave of court granted with or without notice must be first obtained. The interrogatories shall be answered separately and fully in writing under oath. The answers shall be signed by the person making them, and the party upon whom the interrogatories have been served shall serve a copy of the answers on the party submitting the interrogatories within 15 days after the service of the interrogatories, unless the court, on motion and notice and for good cause shown enlarges or shortens the time. Within 10 days after service of interrogatories a party may serve written objections thereto, together with a notice of hearing the objections at the earliest practicable time. Answers to interrogatories to which objection is made shall be deferred until the objections are determined.

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 order as justice may require. The number of interrogatories or of sets of interrogatories to be served is not limited except as justice requires to protect the party from annoyance, expense, embarrassment, or oppression. The provisions of Rule 30.02 are applicable for the protection of the party from whom answers to interrogatories are sought under this rule.

(1) Any party may serve upon any other party written interrogatories after commencement of the action without leave of court, except that if service is made by the plaintiff within 10 days after the commencement of such action, leave of court granted with or without notice must be obtained first. 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 a good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.

(2) Within 15 days after service of interrogatories, separate written answers and objections to each interrogatory shall be served by the responding party, unless the court on motion and notice and for good cause shown 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.

(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 order 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.

Note

Rule 33 has been rearranged and subdivided for purposes of clarity. The word "adverse" in Rule 33 has been eliminated. The Committee believes that any party should have the right to direct interrogatories to any other party without regard to the assertion or non assertion of a claim between the parties. Amended Rule 33 requires objection by the responding party to each interrogatory served and permits the objection to be stated separately or within the same document containing the answers to the other interrogatories. If objection is made to an interrogatory, the grounds for the objection must be stated with particularity. The amended Rule 33 casts upon the inquiring party the obligation of bringing the objection on for hearing. If notice for hearing is not served within 15 days from the service of the objection, the right to require a response to the interrogatory is waived. This amendment is designed to permit greater flexibility in the use of Rule 33 and to relieve the trial court from the automatic hearing now required under Rule 33 if objections are made to interrogatories. Often an inquiring party, obtaining the information from some other source or not deeming it that important, does not desire or does not feel the need to compel a response to the particular interrogatory to which objection has been made.

The rule has been clarified to clearly impose upon the answering party the obligation of signing the responses to the interrogatory. All responses to interrogatories are to be signed under oath.

Rule 33 has been amended to limit the number of interrogatories that may be served by any party upon any other party, without prior approval by the court, to 50 separate questions. All 50 questions may be contained in one set of interrogatories or may be divided between two or more sets of interrogatories. The amended rule states that each separate question shall be counted as a separate interrogatory even though it is related to a prior question or is a subdivision of a question.

35.03 Waiver of Medical Privilege.

If at any stage of an action a party voluntarily places in controversy the physical, mental or blood condition of himself or a person under his control, such party thereby waives any privilege he may have in that action regarding the testimony of every person who has examined or may thereafter examine him or the person under his control in respect of the same mental, physical or blood condition.

Note

Waiver of medical privilege by the person affirmatively putting his physical, mental or blood condition in issue in a lawsuit is in accordance with the general purpose and philosophy of rule procedure. Mutual fact

knowledge regarding all facts in issue by all parties is a foundation stone of rule procedure. Fifteen states do not recognize medical privilege. Five other states provide for compulsory waiver by a claimant seeking damages for personal injury, or by a party who puts his physical condition in issue. The amendment is consistent with the concept that medical privilege should exist as a shield, not a sword. See Nelson v. Ackerman, 249 Minn. 582, 83 N.W.2d 500 (1957); Snyker v. Snyker, 245 Minn. 405, 72 N.W.2d 357 (1955).

The amendment requires that the person who has the medical privilege or who has control over the person with the privilege affirmatively place the physical, mental or blood condition in issue. A denial of an affirmative allegation by an opposing party is not an affirmative placing of the condition in issue and is not a "voluntary" act by the person with the privilege. In such a situation, there would be no waiver. As an example, a plaintiff seeking damages for personal injury has voluntarily and affirmatively put his physical condition in issue by his complaint and has waived medical privilege regarding that condition. If, however, plaintiff in his complaint should allege or should otherwise assert that defendant was negligent in driving an automobile without eye glasses because defendant had extremely poor vision, defendant by denying the allegation or by taking issue with the quality of his vision, has not voluntarily or affirmatively raised an issue regarding his physical condition. In such a case, there would be no waiver of the medical privilege.

Protective orders under Rule 30.02 are available to the parties to limit or prevent involuntary medical examinations or disclosure of medical information in those cases where protection in whole or in part is necessary. Protective orders under Rule 30.02 and the discretionary power of the court to grant or limit production of documents under Rule 34 will provide protection against attempts to secure medical information not relevant to the medical issues involved in the pending action.

38.03 Placing Action on Calendar.

A party desiring to have an action placed on the calendar for trial shall, after issue is joined, prepare a note of issue setting forth the title of the action, whether the issue is one of fact or of law, and if an issue of fact whether it is triable by court or by jury, and the names and addresses and the telephone numbers of the respective counsel, and shall serve the same on counsel for all parties not in default and file it, with proof of service, with the clerk within 10 days after such service in all districts where but one term of court is held annually and in all other districts at least ~~8~~ 28 days before the beginning of a general term; and thereupon the action shall be placed on the calendar for trial and shall remain thereon from term to term

until tried or stricken therefrom. The party serving a note of issue shall, and any other party may, serve a note of issue upon counsel for any person who becomes a party to the action subsequent to the initial service.

Note

Filing the note of issue 8 days before the beginning of a term of court is insufficient time from the commencement of the action to trial to permit the use of discovery and other pretrial devices. 28 days was selected as an appropriate minimum time after answer and before trial and a time that would end on a Monday, Tuesday or Wednesday, rather than a weekend. Adding the telephone number of counsel to the note of issue is designed purely as a convenience to the clerk and opposing counsel.

39.03 Preliminary Instructions in Jury Trials.

After the jury has been impaneled and sworn, and before opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and sequence to be followed. Preliminary instructions may also embrace such matters as burden of proof and preponderance of evidence, the elements which the jury may consider in weighing testimony or determining credibility of witnesses, rules applicable to opinion evidence, and such other rules of law as the court may deem essential to the proper understanding of the evidence.

Note

This rule is permissive, not mandatory. In some cases preliminary instructions may not be desirable. In other cases substantive rules of law may not be desirable for preliminary instructions, but "boiler plate" instructions would be helpful. Preliminary instructions on such matters as are commonly encompassed in the "boiler plate" instructions will generally aid the jury in their decisional process. Such procedure will also protect trial counsel better than the present procedure of preinstructing juries only at the time of welcoming or orienting the new jury panel. Group instructions given at the time jurors are called for jury service without regard to a particular case prevent trial counsel from knowing the instructions and other material given to the jury and does not give him an opportunity to correct any errors. Rule 39.03 will correct this difficulty.

39.04 Opening Statements by Counsel.

Before any evidence is introduced, plaintiff may make an opening statement; whereupon any other party may make an opening statement or may reserve the same until his case in chief is opened. Opening statements may be waived by any party to the action without affecting the right of any other party to make such an opening statement.

Note

The amendment adding Rule 39.04 restates the existing law of Minnesota. However, to clarify the law and to conform generally to the procedure set forth in the local rules of procedure for the Federal District Courts for the District of Minnesota, Rule 39.04 is added.

41.02 Involuntary Dismissal; Effect Thereof.

(3) Unless the court in its order for dismissal otherwise specifies, a dismissal under this rule and any dismissal not provided for in this rule or in Rule 41.01, other than a dismissal for lack of jurisdiction, for forum non conveniens ~~or for lack of an indispensable party~~, or for failure to join a party indispensable under Rule 19, operates as an adjudication upon the merits.

Note

Minnesota Rule 41.02 and Federal Rule 41(b) are not identical at the present time. The Minnesota rule is more liberal than the federal rule regarding the court's power to dismiss matters upon the court's own motion. No change is made in that portion of Rule 41.02. The amended Rule 41.02(3) reflects the change in Rule 19 to modify the indispensable party concept, and adds dismissals now permitted under forum non conveniens as a dismissal not considered to be on the merits.

42.02 Separate Trials.

The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to expedition and economy, may order

a separate trial of any claim, cross-claim, counterclaim, or third-party claim, or of any separate issue or of any number of claims, cross-claims, counterclaims, third-party claims, or issues.

Note

The amendment conforms generally to the federal amendment. Separation of liability and damage issues are permitted under the existing Rules of Civil Procedure. The amendment merely reflects that one of the grounds for separation will be expedition and economy.

43.07 Interpreters.

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

Note

Minnesota previously had no rule relating to interpreters. The rule follows the federal rule. Presently no state funds are available to compensate interpreters except under M.S.A. 253.053. This rule would permit interpreters for deaf or dumb persons.

Rule 44. Proof of Official Record.

44.01 Authentication ~~of Copy~~.

(1) Domestic. An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy, and accompanied by a certificate that such officer has the custody. ~~If the office~~

~~in-which-the-record-is-kept-is-within-the-United-States-or-within-a-territory-or-insular-possession-subject-to-the-dominion-of-the-United-States.~~ The certificate may be made by a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office. ~~If-the-office-in-which-the-record-is-kept-is-in-a-foreign-state-or-country,-the-certificate-may-be-made-by-a-secretary-of-embassy-or-legation,-consul-general,-consul,-vice-consul,-or-consular-agent-or-by-any-officer-in-the-foreign-service-of-the-United-States-stationed-in-the-foreign-state-or-country-in-which-the-record-is-kept,-and-authenticated-by-the-seal-of-his-office.~~

(2) Foreign. A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown, (i) admit an attested copy without final certification or (ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.

44.02 ~~Proof of~~ Lack of Record.

A written statement ~~signed by an officer having the custody of an official record, or by his deputy~~ that after diligent search no record or entry of a specified tenor is found to exist in the records ~~of his office,~~ designated by the statement, ~~accompanied by a certificate as above provided,~~ authenticated as provided in Rule 44.01(1) in the case of a domestic record, or complying with the requirements of Rule 44.01(2) for a summary in the case of a foreign record, is admissible as evidence that the records ~~of his office~~ contain no such record or entry.

44.03 Other Proof.

This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law. ~~any applicable statute or by the rules of evidence at common law.~~

44.04 Determination of Foreign Law.

A party who intends to raise an issue concerning the law of a foreign country shall give notice in his pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under Rule 43. The court's determination shall be treated as a ruling on a question of law.

Note

The prior Minnesota rule and the prior federal rule were identical. The amendment continues this identity. With regard to proof of official records kept in the United States the amended provisions are in substance the same as the prior Rule 44. The amendments are really more exact descriptions of the geographical areas covered. In the area of foreign publications substantial amendments have been made. The amended rule recognizes that generally proof of foreign official records will be covered by the rule. However, instances will occur when it will be difficult or impossible to satisfy the rule because there is no United States consul in a particular foreign country and the foreign officials will not cooperate. It is for this reason that the final sentence of Rule 44.01(2) is inserted. Rule 44.02 is changed to reflect the changes made in Rule 44.01.

The amendment to Rule 44.04 is a new provision and has the effect of changing foreign law from a question of fact to a question of law. This rule was adopted by the Federal Advisory Committee on Rules and the Committee on International Rules of Judicial Procedure. The rule requires that notice of intent to raise an issue of foreign law be given. Existing Rule 8.01 creates some doubt whether or not such reliance on foreign law must be pleaded. Amendment to Rule 44 now provides that notice alone is required. It need not be in the pleadings. The notice must be written. No time is set on the party's obligation to give notice of raising an issue of foreign law except the general one of reasonable time. The second portion of the new Rule 44.04 makes provision for the various sources from which the court may determine the foreign law.

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 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 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 and 45.02.

Rule

The amendment is designed to permit use of the Minnesota subpoena power to assist in taking depositions in Minnesota where the trial is pending in another state. The former rule was ambiguous regarding the propriety of issuing a Minnesota subpoena to aid in discovery in a case pending in a sister state. Proof of compliance with the discovery rules of the state where the action is pending is sufficient proof to permit the issuance of a Minnesota subpoena.

47.03 Separation of Jury.

After the jury has retired for its deliberations, the court, in its discretion, may permit the jury to separate overnight and return to its deliberations the following morning.

Note

The practice of requiring the jury to remain together from the time the case is submitted to the jury until the final verdict of the jury creates hardships and undue expense in many cases. In many counties suitable accommodations for sleeping are not in existence. In other counties the cost of providing such sleeping accommodations is becoming prohibitive. Few, if any, civil cases require that the jury be locked up during the course of its deliberations. An adequate warning to the jury by the trial judge prior to the jury's separation should be sufficient in most cases to prevent any outside influence on the verdict. The proposed rule permits the trial judge in his sole discretion to allow the jury to separate during the deliberations. In some cases, such as protracted trials or cases involving substantial public interest, the trial judge may feel that separation is not desirable. In many other cases the trial judge may believe that separation will not effect the integrity of the jury verdict. In the opinion of the Committee, it is better practice to permit separation of the jury during its deliberations than to compel the jury to remain at the deliberations throughout the night and, perhaps, coercing a verdict through physical exhaustion.

The purpose of the amendment is related to solving the problem of overnight sleeping accommodations and is not intended to permit separation of the jury over weekends or holidays, or to permit the jury to avoid early evening deliberations. The trial judge is not to instruct the jury that they may adjourn at a given time in the evening, but rather should permit the separation at a time when it is clear that deliberations should not continue further into the night.

The proposed rule is consistent with the Minnesota practice in the use of sealed verdicts. See Colstad v. Levine, 243 Minn. 279, 64 N.W.2d 648 (1954). The same considerations set forth in the Colstad case should be considered by the trial judge in determining whether or not a separation should be permitted.

50.01 Directed Verdict; When Made; Effect.

A motion for a directed verdict may be made at the close of the evidence offered by an opponent or at the close of all the evidence. A party who moves for a directed verdict at the close of the evidence offered by an opponent shall, after denial of the motion, have the right to offer evidence as if the motion had not been made. A motion for a directed verdict which is not granted is not a waiver of trial by jury even though all parties to the action have moved for directed verdicts. A motion for a directed verdict shall state the specific grounds therefor. If the evidence is sufficient to sustain a verdict

for the opponent, the motion shall not be granted. The order of the court granting the motion for a directed verdict is effective without any assent of the jury.

Note

The amendment does not change the existing law of Minnesota. The amendment conforms to a similar federal amendment and clarifies the law. It removes the necessity for compelling jurors to express agreement with a verdict which they did not reach and which may be contrary to their own opinion of the case. No change is made in the standards for directing a verdict.

50.02 Judgment Notwithstanding Verdict.

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

(2) A motion for judgment notwithstanding the verdict may include in the alternative a motion for a new trial. ~~When such alternative motion is made and the court grants the motion for judgment notwithstanding the verdict, the court shall at the same time grant or deny the motion for a new trial, but in such case the order on the motion for a new trial shall become effective only if and when the order granting the motion for judgment notwithstanding the verdict is reversed, vacated, or set aside.~~

(3) A motion for judgment notwithstanding the verdict or notwithstanding the jury has disagreed and been discharged shall be made within the time specified in Rule 59 for the making of a motion for a new trial and may be made on the files, exhibits and minutes of the court. On a motion for judgment notwithstanding the jury has disagreed and been discharged, the date of

discharge shall be the equivalent of the date of rendition of a verdict within the meaning of that rule, but such motion must in any event be made before a retrial of the action is begun.

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

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

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

Note

The amendment to Rule 50.02(3) is a clarifying amendment and makes the rule consistent with the amended Rule 59.02. The amendment to Rule 50.02 by adding subd. (4)(5)(6) conforms the Minnesota rule to the federal rule. The effect of this amendment is to encourage a single appeal rather than multiple appeals. A second appeal related to a matter that has already been decided by the trial court prior to the first appeal is not a sensible or economic use of the appellate procedure.

Rule 51. Instructions to Jury; Objection.

At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. The court shall inform the counsel of its proposed action upon the requests prior to their arguments to the jury, and such action shall be made a part of the record, ~~but~~ The court shall instruct the jury after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. No party may assign as error unintentional misstatements and verbal errors, or omissions in the charge, unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objections. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.

Note

Amendment to Rule 39.03, permitting preliminary instructions to jurors, requires a modification to Rule 51 permitting the judge to avoid unnecessary repetition of instructions. The amendment creates a discretionary power and generally will be applicable only to the "boiler plate" portion of the preliminary instructions and where the trial has been of a short time duration.

52.02 Amendment.

Upon motion of a party made not later than the time allowed for a motion for new trial pursuant to Rule 59.03, the court may amend its findings or make additional findings, and may amend the judgment accordingly if judgment has been entered. The motion may be made with a motion for a new trial and may be made on the files, exhibits and minutes of the court. When findings of fact are made in actions tried by the court without a jury, the question of the sufficiency of the evidence to support the findings may thereafter be raised whether or not the party raising the question has made in the district court an objection to such findings or has made a motion to amend them or a motion for judgment.

Note

This amendment is a clarifying amendment and conforms to the provisions of Rule 59.02.

58.02 Stay.

The court may order a stay of entry of judgment upon a verdict or decision for a period not exceeding the time required for the hearing and determination of a motion for new trial or for judgment notwithstanding the verdict or to set the verdict aside or to dismiss the action or for amended findings, and after such determination may order a stay of entry of judgment for not more than 30 days. In granting a stay of entry of judgment under this rule for any period exceeding thirty (30) days after verdict or decision, the court, in its discretion, may impose such conditions for the security of the adverse party as may be deemed proper.

Note

Although Rule 62.01 provides security to the prevailing party as a

condition for staying the execution of a judgment pending disposition of various motions made under the Rules and M.S.A. 550.36 provides for staying execution on a money judgment for six (6) months on posting bond, there has been no express provision providing for any security during a stay of the entry of judgment where delays may be encountered in disposing of various post-trial motions. The amendment to Rule 58.02 is designed to cover this need.

59.01 Grounds.

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:

(1) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;

(2) Misconduct of the jury or prevailing party;

(3) Accident or surprise which could not have been prevented by ordinary prudence;

(4) Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;

~~(5) A transcript of the proceedings at the trial cannot be obtained;~~

~~(6)~~ (5) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;

~~(7)~~ (6) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made under Rules 46 and 51, plainly assigned in the notice of motion;

~~(8)~~ (7) The verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence.

On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

Note

There is no longer a need for Subdivision 5 as a ground for a new trial since other amendments to Rule 59 eliminate the necessity for a transcript or a settled case as a basis for a motion for a new trial. Under the amended Rule 59 the inability to obtain a transcript relates solely to appellate practice. If a transcript cannot be obtained or a record cannot be established sufficient to present the questions properly on appeal, the appellate court should resolve the matter by dismissing the appeal or granting a new trial as that court deems best.

59.02 Basis of Motion.

~~If the motion be made for a cause mentioned in Rule 59.01, clauses (1) to (5), pertinent facts not appearing of record shall be shown by affidavit; if for any other cause, a case shall first be settled and included in the record, unless the moving party notices the motion to be heard on the minutes of the court. If the motion is made on the minutes, it shall be heard on the minutes of the judge or of the reporter and it shall not be necessary for the moving party to furnish the court or the opposing party a transcript of the reporter's minutes, or of any part thereof, as a condition to having the motion heard; but, if the order be appealed from, a case~~

~~shall be proposed by the appellant and be settled and returned with the record to the supreme court. The records and files of the court pertaining to the case may be referred to without being mentioned in the notice of motion.~~

A motion made under Rule 59.01 shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit. A full or partial transcript of the court reporter's notes may be used on the hearing of the motion.

Note

The amendment to Rule 59 eliminates the prior practice of basing the motion either on a transcript or the minutes of the court plus affidavits for certain enumerated grounds. Under the amended Rule 59.02 the motion will be heard on the minutes of the court plus the exhibits introduced and other matters on file. Affidavits are permitted to supply facts not otherwise shown as a part of the minutes. Minutes include the unofficial and untranscribed notes of the court reporter, notes of the deputy clerk of court indicating which exhibits have been received, and the notes made by the trial judge during the course of the trial. The file includes the pleadings, depositions on file, etc. Exhibits relate to exhibits introduced into evidence.

Rule 63.01 adequately covers the problem of presenting new trial motions in the event of the death or incapacity of the trial judge following the trial and before determination of the motion for a new trial.

59.03 Time for Motion.

~~(1) A notice of motion for a new trial for a cause not appearing of record, but shown by affidavit, shall be served not later than 60 days after verdict or notice of the filing of the decision or report, unless the time be extended by the court for cause upon application made during such 60 day period.~~

~~(2) A notice of motion for a new trial where the record must include a settled case shall be served not later than 30 days after the case is settled, unless the time be extended by the court for cause upon application made during such 30 day period.~~

~~(3) A notice of motion for a new trial to be heard on the minutes~~

~~shall be served within 15 days after verdict or notice of the filing of the decision or report, and the motion shall be heard within 30 days after verdict or notice, unless the time for hearing be extended by the court for good cause shown during such 30 day period.~~

A notice of motion for a new trial shall be served within 15 days after a general verdict or service of notice by a party of the filing of the decision or order; and the motion shall be heard within 30 days after such general verdict or notice of filing, unless the time for hearing be extended by the court within the 30 day period for good cause shown.

Note

The rule preserves the existing practice of requiring notice from the adverse party in all cases, except those involving a general jury verdict, in order to start the time running for the motion for a new trial. The clerk's notice of the decision or order is not a notice which will commence time running under Rule 59.03. Either party may serve a notice of the filing of the decision or order for purposes of commencing the running of time. Time for the new trial motion is limited to and is identical with the time requirement under the former Rule 59.03(3). Former Rules 59.03(1) and 59.03 (2) are eliminated. The 15 day provision in Rule 59.03 is subject to the three day extension of time when notice is given by mail as provided in Rule 6.05.

Special verdicts under Rule 49.01 and general verdict with interrogatories under Rule 49.02 are not "verdicts" within Rule 59.03, but are verdict forms looking toward a decision or order by the trial judge prior to the time that it is an effective conclusion to the litigation. Rule 58.01 clearly imposes upon the trial judge the obligation of directing the appropriate judgment upon a special verdict or upon a general verdict accompanied by interrogatories. Time will not commence running on either a Rule 49.01 verdict or a Rule 49.02 verdict until notice has been given by a party of the filing of the decision or order following such verdicts. In like respect, the report of a referee is subject to the time limitation for decisions or order of the court.

59.04 Time for Serving Affidavits.

When a motion for new trial is based upon affidavits, they shall be served with the notice of motion. The opposing party ~~has~~ shall have 10 days after such service ~~within~~ in which to serve opposing affidavits, which period

may be extended ~~for an additional period, not exceeding 20 days, either by the court for good cause shown or by the parties by written stipulation~~ by the court upon an order extending the time for a hearing under Rule 59.03. The court may permit reply affidavits.

Note

The amendment eliminates the provision of former Rule 59.04 permitting the parties by written stipulation or the court by order to extend the time for serving opposing affidavits for an additional period not exceeding 20 days. Rule 59.04 now permits such extension only upon court order made upon a motion also seeking to extend the time for the hearing under Rule 59.03. The former provision in Rule 59.04 permitted the parties to extend the time for hearing by written stipulation without the concurrence of the trial judge. In view of the change in Rule 59.02 requiring the hearing to be on the minutes of the court, the trial judge should have the discretion to decide whether or not the hearing time will be extended.

59.05 On Initiative of Court

Not later than ~~10~~ 15 days after ~~entry of judgment~~ a general verdict or the filing of the decision or order, the court of its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. ~~and in the order shall specify the grounds therefor.~~ After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

Note

Judges in some judicial districts in Minnesota stay the entry of judgment automatically following a jury verdict. In other districts the clerks of court do not comply with Rule 58 requiring entry of judgment forthwith but rather delay the entry of judgment until time for motions has elapsed or until costs and disbursements have been filed. Further, Minnesota practice permits appeals from intermediate orders rather than limiting appeals as the federal courts generally do to final judgments. For these reasons it is desirable to change Rule 59.05 by eliminating the word "judgment" and substituting therefore the words "after a general verdict or the filing of the decision or order." In federal practice, judgment is generally entered

immediately following the verdict or order and is generally entered before appeal. Equating 15 days from the general verdict or filing of order for judgment under Minnesota practice to the 15 days following judgment in federal practice gives the Minnesota trial judges in practical terms the same power to grant new trials immediately after termination of the case as the federal judges have. The former Rule 59.05 permited a trial judge to grant a new trial on his own initiative long after the case had been completed and even after the case had been appealed and decided on appeal by the Supreme Court of Minnesota. Rule 60.02 is amended to provide that the trial judge has the power to grant a new trial if the judge finds grounds to vacate the judgment.

A narrow interpretation of former Rules 59.03 and 59.05 would seem to limit the trial court's power to grant a motion for a new trial, timely made by a party, to the grounds stated by the party in his motion. The amendment clearly specifies that the court may grant a motion for a new trial made by a party for reasons not specified by the party in his motion if the court gives the parties notice and an opportunity to be heard upon the matter. Whether the new trial is granted upon the court's own motion or upon grounds not stated in the party's motion, the court is required to specify in its order the grounds for the order. This portion of the amendment conforms Minnesota practice to Federal Rule 59(d).

59.06 Stay of Entry of Judgment.

A stay of entry of judgment under Rule 58 shall not be construed to extend the time within which a party may serve a motion ~~or settle a case.~~

Note

Amendment to Rule 59.02 renders the last four words of Rule 59.06 unnecessary.

~~59.07 Case; How and When Settled.~~

~~A case shall mean a written statement of the proceedings in the cause, excluding all pleadings and other papers properly filed with the clerk. It should contain only the evidence and other proceedings on the trial material to the questions of law or fact that the parties may choose to present for review. The transcript must have been ordered, and the order accepted by the reporter, not later than 30 days after verdict or notice of the filing of the decision. The date of delivery of the transcript shall~~

~~be-reported-by-the-reporter-to-the-clerk-and-recorded-by-the-clerk.--The party-preparing-a-case-shall-serve-the-same-on-the-adverse-party,-by-copy, within-10-days-after-delivery-of-the-transcript.--The-party-served-may-in like-manner-propose-amendments-thereto-within-5-days.--Such-case,-with-the amendments,-if-any,-shall-within-10-days-after-the-service-of-such-amendments be-presented-to-the-judge-or-referee-who-tried-the-cause,-for-settlement, upon-notice-of-5-days.--If-a-motion-be-heard-on-the-minutes,-the-aggrieved party-may-order-a-transcript-within-10-days-after-notice-of-decision-thereon and-propose-a-case-as-provided-by-this-rule.--The-times-herein-limited-may be-extended-by-order-of-the-court;-and-the-court,-in-its-discretion-and-upon proper-terms,-may-grant-leave-to-propose-a-case-after-the-time-herein-allowed therefor-has-expired.~~

Note

The procedure set forth in Rule 59.02 eliminates the need for a settled case. A transcript of all or part of the proceeding can be ordered and used in support of the new trial motion under Rule 59.02, but the transcript is not official and has no greater standing than other items constituting the minutes of the court. Inability to obtain the unofficial transcript in time for the hearing is not grounds for automatic delay of the hearing on the new trial motion.

~~59.08--Settling-Case;-When-Judge-Incapacitated.~~

~~When-the-judge-who-tried-the-cause-ceases-to-be-such,-or-dies-or-becomes-incapacitated-from-sickness-or-other-cause,-or-is-without-the-state-at the-time-limited-for-such-settlement,-such-case-may-be-settled-by-a-judge-of the-same-or-an-adjoining-district;-and-when-a-referee-dies,-or-becomes-incapacitated,-or-is-so-absent,-the-case-may-be-settled-by-a-judge-of-the-court in-which-the-action-is-pending.--In-either-case-the-allowance-or-settlement shall-be-made-upon-the-files-in-the-cause,-the-minutes-of-the-judge-or-referee, or-of-the-stenographer,-if-obtainable,-and-upon-such-proof-of-what-occurred~~

~~at the trial as may be presented by affidavit with like effect as if settlement were by the judge or referee who tried the cause.~~

Note

Since there is no longer a settled case, no provision is needed to handle the problem arising upon the incapacity of the judge. Rule 63.01 adequately covers the situations that may arise under Rule 59.

60.02 Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud; etc.

On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment (other than a divorce decree), order, or proceeding and may order a new trial or grant such other relief as may be just for the following reasons: (1) Mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59.03; (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this Rule 60.02 does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Rule

4.043, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Note

The amendment to Rule 59.05 makes the amendment to Rule 60.02 desirable for purposes of clarification. By amendment to Rule 59.05, the trial court is deprived of its existing power to grant a new trial upon its own motion for a period of time limited by the entry of judgment. Under existing practice if a trial judge grants a motion to vacate a judgment, then obviously under Rule 59.05, no judgment now being in existence, the court also has the power to grant a new trial. By limiting the power to grant a new trial to a time period following a general verdict or notice of decision or order, the addition of new trial power under Rule 60.02 in the event that the judgment is vacated is necessary.

Rule 65. Injunctions.

~~The procedure for granting restraining orders and temporary and permanent injunctions shall be as provided by statute.~~

65.01 Temporary Restraining Order; Notice; Hearing; Duration.

A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (a) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (b) the applicant's attorney states to the court in writing the efforts, if any, which have been made to give notice or the reasons supporting his claim that notice should not be required. In the event that a temporary restraining order is based upon any affidavit, a copy of such affidavit must be served with the temporary restraining order. In case a temporary restrain-

ing order is granted without notice, the motion for a temporary injunction shall be set down for hearing at the earliest practicable time and shall take precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a temporary injunction, and, if he does not do so, the court shall dissolve the temporary restraining order. On written or oral notice to the party who obtained the ex parte temporary restraining order, the adverse party may appear and move its dissolution or modification, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

65.02 Temporary Injunction.

(1) No temporary injunction shall be granted without notice of motion or an order to show cause to the adverse party.

(2) A temporary injunction may be granted if by affidavit, deposition testimony, or oral testimony in court it appears that sufficient grounds exist therefor.

(3) Before or after the commencement of the hearing of a motion for a temporary injunction, the court may order the trial of the action on the merits to be advanced and consolidated with the hearing on the motion. Even when this consolidation is not ordered, any evidence received upon a motion for a temporary injunction which would be admissible upon the trial on the merits becomes part of the record on the trial and need not be repeated upon the trial. This subdivision shall be so construed and applied as to save to the parties any rights they may have to trial by jury.

65.03 Security.

(1) No temporary restraining order or temporary injunction shall be

granted except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained.

(2) Whenever security is given in the form of a bond or other undertaking with one or more sureties, each surety submits himself to the jurisdiction of the court and irrevocably appoints the clerk of the court as his agent upon whom any papers affecting his liability on the bond or undertaking may be served. His liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

Note

The amended rule is based upon Federal Rule 65, modified to reflect state practice under M.S.A. 585.03 and 585.04. Rule 65.01 contemplates an informal conference prior to the issue of the restraining order if time and circumstances permit such a preliminary conference. The notice of conference can be oral or written. In the event notice cannot be given or if circumstances will not permit a conference, the facts evidencing the reasons must be contained in the attorney's statement. An ex parte restraining order (without notice) can be dissolved or modified upon oral or written notice to the party obtaining the order. Rule 65.02 generally follows existing practice regarding the hearing on the temporary injunction. Rule 65.02(3) permits the court by order to consolidate the temporary injunction hearing with the trial on the merits.

81.01 Statutory and Other Procedures.

(2) Procedures Abolished. The ~~writ of mandamus and the~~ writ of quo warranto and information in the nature of quo warranto are abolished. The relief heretofore available thereby may be obtained by appropriate action or appropriate motion under the practice prescribed in these rules.

Note

Difficulty has been experienced by the bench and bar regarding the proper form of civil action to accomplish the purposes of the former writ of mandamus. By statute M.S.A. 586.03, the writ of mandamus was either alternative or peremptory. M.S.A. 586.04 permitted the court to enter a peremptory writ in those cases where no valid excuse for non performance could be given. Under the existing provision of Rule 81.01(2) elimination of the writ of mandamus also had the practical effect of eliminating the peremptory writ. This result was not intended by the Rules Committee. Members of the bench expressed great reluctance to sign a mandatory order when an action had not previously been commenced by a summons and complaint. If the action had been commenced by a summons and complaint the bench was reluctant to summarily decide the matter on ex parte application before answer time had expired.

Further confusion has arisen regarding the proper form of civil action to secure the mandatory relief. Declaratory judgment and the injunction form have been used. See William v. Rolfe, 257 Minn. 237, 101 N.W.2d 923 (1960); Maine v. Whipple, 259 Minn. 18, 104 N.W.2d 657 (1960). Under either of these forms, 20 days must be allowed for answer in the main action. Such time lag may well be detrimental in the ordinary mandamus type action. In addition, bond requirements for mandatory injunctions created some difficulty in applying this rule. In view of the uncertainty existing in the minds of the bench and bar regarding proper procedures, the Committee felt it appropriate to resolve the questions by restoring the writ as a statutory writ not affected by the Rules of Civil Procedure in its initial stages.

86.02 Effective Date of Amendments.

The amendments adopted on ~~March 3rd, 1959,~~ _____, will take effect on ~~July 1st, 1959~~ _____. They govern all proceedings in actions brought after they take effect, and also all further proceedings in actions then pending, except as to the extent that in the opinion of the court their application in a particular action pending when the amendments take effect would not be feasible, or would work injustice, in which event the former procedure applies.

## MUNICIPAL COURT RULES

1. It is recommended that all amendments adopted in the Rules of Civil Procedure for the District Court be adopted for the Municipal Courts and that the Rules of Civil Procedure for Municipal Courts be amended accordingly, so far as consistent with the jurisdiction of the Municipal Court.

2. It is recommended that Municipal Court Rules 4.041, 12.01, 12.06, 15.01, 26.01, and 56.01 be amended by deleting reference in each of those rules to 10 days where the corresponding District Court Rule provides 20 days and that 20 days be added in its place and stead in each such place in each rule.

### Note

It is desirable that the Municipal Court Rules and the District Court Rules be identical. Therefore as the District Court Rules are amended there should be a corresponding amendment to the Municipal Court Rules so far as applicable to the Municipal Courts. Experience has shown that 10 days to answer or reply or take other action is insufficient time in Municipal Court. The amendment will make the time elements in Municipal Court Rules correspond to the established 20 day time limits in the District Court Rules. District Court Rule 12.01 provides a 20 day period for responding pleadings, but provides a 10 day period to serve responding pleadings following certain rulings on Rule 12 motions. The 10 day periods under Municipal Court Rule 12.01(1) and (2) are not changed by this amendment.

## APPENDIX A

It is recommended that Appendix A be amended by adding writ of mandamus as a special proceeding which is excepted from the rules insofar as they are inconsistent with the special proceeding.

### Note

Amendment to Rule 81.01(2) by deleting the writ of mandamus as one of the writs subject to the rules, necessitates that the writ of mandamus be restored in Appendix A as one of the writs excepted from the rules. Chapter 586 of the Minnesota Statutes will control procedure for the issuance of the writ.