C6-84-2134

STATE OF MINNESOTA
IN SUPREME COURT

In re:

Supreme Court Advisory Committee
on Rules of Civil Procedure

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

Final Report

July 22, 1996

Hon. Mary Jeanne Coyne, Chair

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Reporter

ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

Summary of Committee Recommendations

This Court's Advisory Committee on Rules of Civil Procedure met to review a number of sets of amendments to the federal rules of civil procedure and also to consider correspondence and suggestions received from the public since the committee's last meetings in 1993. The committee recommends a number of these for adoption as part of the Minnesota Rules of Civil Procedure, and also recommends that a number of the federal rules not be adopted here.

Advisory Committee Process

The advisory committee met three times in 1996 to discuss all developments in the rules of civil procedure since its last meetings and report to this Court. That report occurred in late 1993, and resulted in the amendments becoming effective January 1, 1994. Since our last meeting, the Federal Rules of Civil Procedure have been amended three times, including once during the committee's work. (The 1996 amendments were adopted by the United States Supreme Court on April 23, 1996, but will not go into effect until 180 days after adoption, and then only in the event Congress does not act to prevent their becoming effective.)

The advisory committee also reconsidered the amendments to the federal rules adopted 1991 in order to review those amendments and their operation in federal court. Those amendments included the restructuring and renaming of motions for directed verdict and post-trial motions.

In addition to consideration of the federal rules amendments, the committee considered all recommendations it has received from the bench, bar, and public regarding the civil rules. Generally, those suggestions have been accepted by the committee, and are included in this report.

Summary of Advisory Committee Recommendations

The advisory committee recommends adoption of certain amendments to the Minnesota Rules of Civil Procedure. Specifically, the committee recommends the following changes.

Minn. R. Civ. P.	Summary of Change
1	Adds "and administered" to expand applicability of rule.
4.04	Adds federal provision for service outside the United States.
5.02, 5.04, & 5.05	Permits service by facsimile; conforms filing requirement to federal rule; and adds federal rule provision that administrator not reject papers for filing for technical deficiencies.

6.01, 6.04 & 6.05	Conforms to federal rule on timing; clarifies requirement of service of filing of affidavit; and adds one day to response time for service after business hours.
16.03	Conforms rule to federal counterpart.
26.01, 26.02, 26.05, & 26.07	Adopts expert disclosure rules, rule on limitations of discovery and supplementation; requires privilege log; and applies signing requirement to any required disclosure.
28	Conforms foreign deposition practice to federal rule.
29	Conforms rule on stipulations to federal rule.
30.02, 30.03, 30.04, 30.05, & 30.06	Conforms rule to federal rule on deposition objections and limitations; signing and filing of depositions; and incorporates rules of evidence.
31	Adopts federal procedures for written question depositions.
32.03	Adopts federal rule on presentation of deposition testimony at trial.
33.01	Deletes requirement that party seeking hearing on objections to interrogatories must move within fifteen days.
37.01 & .03	Adopts federal rules on disclosure sanction procedure.
43	Deletes all provisions relating to evidence from Rules of Civil Procedure, incorporates statutes, the Minnesota Rules of Evidence, or other Supreme Court rules as the source of evidence law.
44	Adopts federal rule on proof of official record, for both domestic and foreign records.
81	Deletes provision for abolition of Writ of Quo Warranto
Appendix A	List of special proceedings is updated.
Form 24	New form to correspond to change in expert disclosure requirements.

Federal Changes Not Recommended for Minnesota

The committee continues to believe that, as a general principle, it is desirable to have the rules governing practice in the state courts parallel as closely as practicable the rules in federal court. This general principle guides some of the recommendations made above. The committee has always recognized, however, that litigation in the state courts is different from that in the federal courts, and that Minnesota concerns may dictate different rules.

Adoption of the changes in the federal court rules has been made more difficult—and probably less wise—by the constant stream of proposed, pending, and adopted federal rule changes. Amendments have been made three times since this committee last reported to this Court. The federal practice has also become significantly less uniform, due to amendments not in force in all federal courts. The 1993 amendments to the federal rules were very nearly defeated in Congress and the most recent report from the Federal Judicial Center reveals that one of the rules is applied in slightly less than half of the 96 federal districts. *See* Donna Stienstra, *Implementation of Disclosure in United States District Courts, With Specific Attention to Courts' Responses to Selected Amendments to Federal Rule of Civil Procedure* 26 (Mar. 22, 1996), *reprinted in* 164 F.R.D. LXXXIII, LXXXIX (pamph. ed., Apr. 1996) (mandatory initial disclosures in effect without significant revision in only 47 of 96 districts). In some states with split districts, one district has opted-out while one has adopted amended Rule 26. *See* Bedora A. Sheronick, *Comment, Rock, Scissors, Paper: The Federal Rule 26(a)(1) "Gamble" in Iowa*, 80 Iowa L. Rev. 363, 389 n.191 (1995). These federal changes have resulted in the "Balkanization" of the federal courts, and have generally been viewed by commentators as an unwise development in the federal courts. *See, e.g.*, Carl Tobias, *Civil Justice Reform and the Balkanization of Federal Civil Procedure*, 24 Ariz. St. L.J. 1393 (1992). The federal court experience with initial disclosure has included anecdotal evidence of additional cost and an additional "layer" of discovery. *See* Carl Tobias, *A Progress Report on Automatic Disclosure in the Federal Districts*, 155 F.R.D 229 (1994). Accordingly, this committee does not recommend that Minnesota adopt these changes unless and until they become accepted in federal court. Even uniform adoption in federal court should only trigger consideration of the practice in state court if the initial disclosure produces benefits in federal practice that outweigh the distinct problems that have been identified with the federal rules, particularly as applied to the different caseload and judicial structure of the state courts.

Initial Disclosures. The committee recommends that the initial disclosure provisions of Federal Rule 26(a)(1) not be adopted in Minnesota. Fed. R. Civ. P. 26(a)(1) requires each party to initially disclose information such as names of individuals likely to have relevant information, categorical descriptions of documents that will be available for inspection and copying, calculation of damages claimed by the disclosing party, and any relevant insurance agreements. Federal Rule 26(a)(1) requires initial disclosure, yet allows traditional discovery methods to be utilized after disclosure. If Minnesota were to adopt Federal Rule 26(a)(1), it would merely add an additional and costly layer of discovery. The disclosure of initial facts and the identity of witnesses has not traditionally been a significant problem in Minnesota.

Minnesota's adoption of Federal Rule 26(a)(1) would likely foster increased litigation in Minnesota state courts. "Zealous advocates" would likely refuse to disclose numerous documents, on the grounds of privilege or that the documents are not "discoverable information relevant to disputed facts alleged with particularity in the pleadings." Challenges to this failure to disclose could result in increased litigation in state courts rather than a decrease in litigation as intended by drafters

of Federal Rule 26(a)(1). Accordingly, the advisory committee does not recommend adoption of Federal Rule 26(a)(1) due to the increased potential for litigation, the increased costs and burdens of the Rule, and the lack of need for such a rule.

Amendments Relating to Post-Trial and Dispositive Motions. The federal rules were amended in 1991 to alter post-trial motion practice and dispositive motion practice during trial. Under these changes motions for directed verdict and for j.n.o.v. were renamed motions for judgment as a matter of law. See Fed. R. Civ. P. 50. Rule 52 was amended to permit entry of judgment in bench trials at any point it becomes clear party is entitled to judgment. The 1995 amendments to the federal rules established a uniform timing mechanism for filing post-trial motions under Rules 50, 52, and 59.

The advisory committee recommends that these changes be considered, if at all, in conjunction with the next revisions to the Minnesota Rules of Civil Appellate Procedure; it does not appear necessary nor desirable to adopt them now.

Sanctions under Rule 11. Fed. R. Civ. P. 11 was amended in 1993. These amendments were extensive and were generally intended to ameliorate the harshness of the federal rule on sanctions as it was applied in the federal courts. Sanctions have not been a substantial problem in Minnesota practice. Minn. R. Civ. P. 11 has functioned well. This Court's decision in *Uselman v. Uselman*, 464 N.W.2d 130 (Minn. 1990), has played a significant role in establishing clear standards for the lower courts and resolving many of the potential issues that spawned the federal court litigation. The committee believes that adoption of the federal amendments is therefore not necessary in Minnesota.

Amendments Relating to Juries. There have been a number of changes in the federal rules relating to jury practice. Fed. R. Civ. P. 48 was amended in 1996 (subject to review by Congress) to require a 12-person jury and require alternates to deliberate. Fed. R. Civ. P. 47 as amended in 1991 altered excuse of jurors for cause; Rule 48 provides for service of all jurors unless excused from service.

The committee is aware of ongoing study of these issues by the Minnesota State Bar Association and a multi-faceted report on a wide array of jury-related issues. Because these issues and any proposed amendments involve numerous non-rule aspects, including funding and statutory changes, the advisory committee believes any rule changes should be addressed in conjunction with consideration of non-rule changes to jury practice. The advisory committee is ready to undertake that analysis if the Court wishes.

Service of Process. The federal rules relating to service of summons (Rule 4) and issuance and service of subpoenas (Rue 45) have been amended. The advisory committee believes the existing provisions in Minnesota are working well and that amendment of these rules would create unnecessary risk that important substantive rights would be compromised without a corresponding benefit. Accordingly, we recommend that these federal amendments not be adopted in Minnesota now. (The committee does recommend adoption of federal service of process amendments to

conform it to current treaty law. A companion change is recommended to Rule 28.02 to update deposition practice in foreign countries.)

Miscellaneous Provisions. The committee has considered a number of additional provisions which it recommends not be adopted at this time. Many of these rules are unnecessary because they deal with subjects already covered by Minnesota rules. These rules include Fed. R. Civ. P. 26(a)(3), dealing with disclosure of trial evidence (covered by Minn. Gen. R. Prac. 112); Fed. R. Civ. P. 26(c), adding a "meet and confer" requirement for motions for protective order (covered by Minn. Gen. R. Prac. 115.10 for all motions); Fed. R. Civ. P. 26(f), requiring a discovery conference and 26(d) deferring discovery until after the conference (covered by case management under Minn. Gen. R. Prac. 111).

For the Court's convenience, an appendix to this report identifies each of the federal rule changes not recommended for adoption, including the a brief statement of the reason for not recommending them.

Effective Date

The advisory committee recommends that these amendments be scheduled for a public hearing and that the Court attempt to issue any order on these recommendations so the amendments can take effect on January 1, 1997. The committee believes this will facilitate dissemination of the new rules and permit their immediate application to all actions.

The committee believes the new provisions can be applied to actions pending on January 1, 1997, as well as those filed thereafter.

Respectfully submitted,

MINNESOTA SUPREME COURT ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE

RULE 1 SCOPE OF RULES

These rules govern the procedure in the district courts of the State of Minnesota in all suits of a civil nature, with the exceptions stated in Rule 81. They shall be construed and administered to secure the just, speedy, and inexpensive determination of every action.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms the rule to its federal counterpart. The amendment is intended to make clear that the goals of just, speedy, and inexpensive resolution of litigation are just as important—if not more important—in questions that do not involve interpretation of the rules. These goals should guide all aspects of judicial administration, and this amendment expressly so states.

RULE 4 SERVICE

* * *

4.04 Service by Publications; Personal Service out of State

(a) Service by Publications. Service by publication shall be sufficient to confer jurisdiction:

(a1) When the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent;

(b2) When the plaintiff has acquired a lien upon property or credits within the state by attachment or garnishment, and

(1A) The defendant is a resident individual who has departed from the state, or cannot be found therein, or

(2B) The defendant is a nonresident individual or a foreign corporation, partnership or association;

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

(c3) When the action is for marriage dissolution or separate maintenance and the court has ordered service by published notice;

(d4) 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 the defendant from any such interest or lien;

(e5) When the action is to foreclose a mortgage or to enforce a lien on real estate within the state.

The summons may be served by three weeks' published notice in any of the cases enumerated herein when the complaint and an affidavit of the plaintiff or the plaintiff's attorney have been filed with the court. The affidavit shall state the existence of one of the enumerated cases, and that affiant believes the defendant is not a resident of the state or cannot be found therein, and either that the affiant has mailed a copy of the summons to the defendant at the defendant's place of residence or that such residence is not known to the affiant. The service of the summons shall be deemed complete 21 days after the first publication.

(b) Personal Service Outside State. Personal service of such summons outside 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 provided for herein.

(c) Service Outside United States. Unless otherwise provided by law, service upon an individual from whom a waiver has not been obtained and filed, other than an infant or an incompetent person, may be effected in a place not within the state:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice:

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

Rule 4.04 is amended to conform the rule to its federal counterpart, in part. The new provision adopts verbatim the provisions for service of process outside the United States contained in the federal rules. This modification is appropriate because this subject is handled well by the federal rule and because it is advantageous to have the two rules similar. This is

particularly valuable given the dearth of state-court authority on foreign service of process. Existing portions of the rule are renumbered for clarity.

RULE 5 SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

* * *

5.02 Service; How Made

Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Written admission of service by the party or the party's attorney shall be sufficient proof of service. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party; transmitting a copy by facsimile machine to the attorney or party's office; or by mailing a copy to the attorney or party at ~~either's~~ the attorney's or party's last known address or, if no address is known, by leaving it with the court administrator. Delivery of a copy within this rule means: Handing it to the attorney or to the party; or leaving it at ~~either's~~ the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service by facsimile is complete upon completion of the facsimile transmission.

* * *

5.04 Filing Certificate of Service

~~Upon the filing of any paper with the court, all papers required to be served upon a party shall be filed with the court either before service or within a reasonable time thereafter, but unless filing is ordered by the court on motion or upon its own initiative, depositions, interrogatories, requests to admit, and requests for production and answers and responses thereto shall not be filed. Unless required to be filed for issuance of a subpoena for a deposition, a notice of taking deposition need not be filed.~~ All papers after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, except expert disclosures and reports, depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless upon order of the court or for use in the proceeding.

5.05 Filing; Facsimile Transmission

Any paper may be filed with the court by facsimile transmission. Filing shall be deemed complete at the time that the facsimile transmission is received by the court and the filed facsimile shall have the same force and effect as the original. Only facsimile transmission equipment that satisfies the published criteria of the Supreme Court shall be used for filing in accordance with this rule.

Within 5 days after the court has received the transmission, the party filing the document shall forward the following to the court:

(a) a $5 transmission fee; and

(b) the original signed document; and

(c) the applicable filing fee, if any.

Upon failure to comply with the requirements of this rule, the court in which the action is pending may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, staying further proceedings until compliance is complete, or dismissing the action, proceeding, or any part thereof.

The administrator shall not refuse to accept for filing any paper presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

Most of Rule 5.02 is new and for the first time provides for service by facsimile. Service by this method has become widespread, generally handled either by express agreement of counsel or acquiescence in a service method not explicitly authorized by rule.

The committee considered a suggestion that the provision for leaving a document with the court administrator be changed, deleted, or clarified. Although it is not clear from the rule what the administrator should do in the rare event that a document is filed with the administrator rather than delivered or mailed to the attorney, the committee believes the rule should be retained as it provides notice to the court that although service may comply with the rule, effective notice has not been received by the party entitled to notice. This will facilitate the court's consideration of the sufficiency of service under all the circumstances.

The amendment to Rule 5.02 provides an express mechanism for service by facsimile. Service by facsimile has become widely accepted and is used in Minnesota either by agreement or presumption that it is acceptable under the rules or at least has not been objected to by the parties. The committee believes an express authorization for service by facsimile is appropriate and preferable to the existing silence on the subject. The committee's recommendation is modeled on similar provisions in the Wisconsin and Florida rules. *See* Wis. Stat. §§ 801.14(2) & .15(5)(b); Fla. R. Civ. P. 1.080(b)(5). Service by facsimile is allowed in other jurisdictions as well. *See, e.g.*, Ill. S. Ct. R. 11(b)(4); S. Dak. R. 15-6-5(b); Cal. R. Civ. P. 2008.

In addition providing for service by facsimile, Rule 6.05 is amended to create a specific deadline for timely service. This rule adds an additional day for response to any paper served by any means other than mail (where 3 extra days are allowed under existing Rule 6.05, which is retained) and where service is not effected until after 5:00 p.m., local time. This rule is intended to discourage, or at least make unrewarding, the inappropriate practice of serving papers after the close of a normal business day. Service after 5:00 p.m. is still *timely* as of the day of service if the deadline for service is that day, but if a response is permitted, the party

served has an additional day to respond. This structure parallels directly the mechanism for dealing with service by mail under the existing rule.

Rule 5.05 is amended to add a provision relating to filing that was adopted as part of Fed. R. Civ. P. 5(e) in 1991. It is important that Rule 5 specifically provide that the court administrator must accept for filing documents tendered for that purpose regardless of any technical deficiencies they may contain. The court may, of course, direct that those deficiencies be remedied or give substantive importance to the deficiencies of the documents. The sanction of closing the courthouse to the filing should not be imposed or if imposed, should be imposed by a judge only after reviewing the document and the circumstances surrounding its filing. The rejection of documents for filing may have dire consequences for litigants and is not authorized by stature or rule.

RULE 6 TIME

6.01 Computation

In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a Saturday, a Sunday, or a legal holiday, or, when the act to be done is the filing of a paper in court, a day on which weather or other conditions have made the office of the court administrator inaccessible, in which event the period runs until the end of the next day which is not ~~a Saturday, a Sunday, or a legal holiday~~ one of the aforementioned days. When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation. As used in this rule and in Rule 77(c), "legal holiday" includes any holiday defined or designated by statute.

* * *

6.04 For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served no later than 5 days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. ~~A motion may be supported by papers on file by reference; supporting papers not on file~~ When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59.04, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

6.05 Additional Time After Service by Mail or Service Late in Day

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party, ~~or whenever such service is required to be made a prescribed period before a specified event,~~ and the notice or paper

is served upon the party by mail, three days shall be added to the prescribed period. If service is made by any means other than mail and accomplished after 5:00 p.m. local time on the day of service, one additional day shall be added to the prescribed period.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

The amendment to Rule 6.01 conforms the rule to its federal counterpart. The committee believes it is desirable to define explicitly what constitutes a "legal holiday." Given the nature of Minnesota's weather, the committee believes specific provision for dealing with inclement weather should be made in the rules. The federal rule enumerates specific holidays. That drafting approach is not feasible in Minnesota because Minn. Stat. § 645.44, subd. 5, defines legal holidays, but allows the judiciary to pick either Columbus Day or the Friday after Thanksgiving as a holiday. Whichever is selected is defined to be a holiday under the rule.

The amendment to Rule 6.05 conforms the rule to the federal rule except for the last sentence which is new and has no federal counterpart. This provision is intended to discourage the unseemly practices of sliding a "service" under the door of opposing counsel or sending a facsimile transmission after the close of business and asserting timely service. Such service will be timely under the rules, but will add a day to the time to respond. If the paper is due to be served a fixed number of days before an event, that number should be increased by one as well, making it necessary to serve late in the day before the deadline.

RULE 16 PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

* * *

16.03 Subjects for Consideration

~~The participants~~ aAt any conference ~~held pursuant to~~ under this rule ~~may consider and take~~ consideration may be given, and the court may take appropriate action, with respect to:

(a) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(b) the necessity or desirability of amendments to the pleadings;

(c) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(d) the avoidance of unnecessary proof and of cumulative evidence~~;~~, and limitations or restrictions on the use of testimony under Rule 702 of the Minnesota Rules of Evidence;

(e) the appropriateness and timing of summary adjudication under Rule 56;

(f) ~~the advisability of referring matters pursuant to Rule 53;~~ the control and scheduling of discovery, including orders affecting disclosures and discovery pursuant to Rule 26 and Rules 29 through 37;

(~~e~~g) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(fh) the advisability of referring matters pursuant to Rule 53;

~~(g) the possibility of settlement or the use of extrajudicial procedures to resolve the dispute;~~

(i) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or rule;

(~~h~~j) the form and substance of the pretrial order;

(i~~k~~) the disposition of pending motions;

(j~~l~~) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems; ~~and~~

~~(k) such other matters as may aid in the disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed.~~

(m) an order for a separate trial pursuant to Rule 42.02 with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(n) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a directed verdict under Rule 50.01 or an involuntary dismissal under Rule 41.02(b);

(o) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(p) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms Rule 16.03 to its federal counterpart. The rule is expanded to enumerate many of the functions with which pretrial conferences must deal. Although the courts have inherent power to deal with these matters even in the absence of a rule, it is desirable to have the appropriate subjects for consideration at pretrial conferences expressly provided for by rule. The federal changes expressly provide for discussion of settlement, in part, to remove any confusion over the power of the court to order participation in court-related settlement efforts. *See, e.g., G. Heileman Brewing Co. v. Joseph Oat Corp.*, 871 F.2d 648 (7th Cir. 1989); *Strandell v. Jackson County, Ill. (In re Tobin)*, 838 F.2d 884 (7th Cir. 1988)*Klothe v. Smith*, 771 F.2d 667 (2d Cir. 1985); *Buss v. Western Airlines, Inc.*, 738 F.2d 1053 (9th Cir. 1984).

RULE 26 GENERAL PROVISIONS GOVERNING DISCOVERY; DUTY OF DISCLOSURE

26.01 Discovery Methods

(a) Discovery. Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission.

(b) Disclosure of Expert Testimony.

(1) A party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Minnesota Rules of Evidence.

(2) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(3) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under paragraph (b)(2), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under Rule 26.05(a).

26.02 Discovery, Scope and Limits

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

(a) In General. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the

existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. ~~It is not ground for objection that the information sought will be inadmissible~~ The information sought need not be admissible at the trial if ~~that~~ the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

~~The frequency or extent of use of the discovery methods set forth in Rule 26.01 shall be limited by the court if it determines that:~~

~~(1) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is either more convenient, less burdensome, or less expensive;~~

~~(2) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or~~

~~(3) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a Rule 26.03 motion.~~

The court may alter the limits in these rules on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

(b) Insurance Agreements. In any action in which there is an insurance policy which may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable thereunder and, pursuant to Rule 34, may obtain production of the insurance policy; provided, however, that this provision will not permit such disclosed information to be introduced into evidence unless admissible on other grounds.

(c) Trial Preparation: Materials. Subject to the provisions of Rule 26.02(d) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(a) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when

the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

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

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

~~(1)(A)A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02(d)(3), concerning fees and expenses, as the court may deem appropriate.~~

A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under Rule 26.01(b)(2), the deposition shall not be conducted until after the report is provided.

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

(3) Unless manifest injustice would result, (A) the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery ~~pursuant to Rules 26.02(d)(1)(B) and 26.02(d)(2);~~ under this subdivision and (B) with respect to discovery obtained ~~pursuant to~~ under ~~Rule~~

~~26.02(d)(1)(B), the court may require, and with respect to discovery obtained pursuant~~ to Rule 26.02(d)(2) the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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

* * *

26.05 Supplementation of Responses

~~A party whose response to a request for discovery was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:~~

A party who has made a disclosure under Rule 26.01(b) or responded to a request for discovery with a disclosure or response is under a duty to supplement or correct the disclosure or response to include information thereafter acquired if ordered by the court or in the following circumstances:

(a) A party is under a duty seasonably to supplement ~~the response with respect to any question directly addressed to (1) the identity and location of persons having knowledge of discoverable matters, and (2) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony, and~~ at appropriate intervals its disclosures under Rule 26.01(b)(2) if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert from whom a report is required under subdivision (a)(2)(B) the duty extends both to information contained in the report and to information provided through a deposition of the expert.

(b) A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party ~~obtains information upon the basis of which (1) the party knows that the response was incorrect when made, or (2) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.~~ learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing.

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

26.07 Signing of Disclosures Discovery Requests, Responses and Objections

In addition to the requirements of Rule 33.01(d), every request for discovery or response or objection thereto, or disclosure required by any rule, made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address shall be stated. A party who is not represented by an attorney shall sign the request, response, disclosure, or objection and state the party's address. The signature constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response, or objection, and a party shall not be obligated to take any action with respect to it until it is signed.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

The amendments to Rule 26 include the most significant of the changes recommended at this time. Although discovery abuse and overuse may be slightly less pervasive than a decade ago, they are still significant problems that result in substantial expense and delay for litigants and may interfere with the resolution of civil disputes on their merits. The committee continues to believe that the problems should primarily be addressed by heightened adherence to and enforcement of the existing rules rather than further rule changes. Nonetheless, the changes to Rule 26 recommended in 1996 should make it easier for courts and litigants to prepare for a trial or settlement in a fair and efficient manner.

Federal Rule 26(a)(2) as amended in 1993 requires parties to disclose expert testimony that may be presented at trial. A party must disclose reports signed by witnesses who are "retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony." The report must address several specific areas, including: (1) a complete statement of all opinions to be expressed and the basis and

reasons therefore; (2) the data or other information considered by the witness in forming the opinions; (3) any exhibits to be used as a summary of or support for the opinion; (4) the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; (5) the compensation to be paid for the report and the testimony; and (6) a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. Each area must be addressed in the report.

While the report must be written in a manner that reflects the testimony to be given by the witness and must be signed by the witness, the federal rules anticipate attorneys will assist the witness in preparing the report. The rule as adopted in Minnesota specifically allows the report to be drafted by counsel and signed by the witness. However, the authorship would be a proper subject of cross-examination, either at a deposition or at trial. The committee believes that considerations of cost may make it necessary to have the report substantially prepared by counsel with consultation with the expert. The purpose of the signing requirement is to permit more effective examination of the expert about the opinions disclosed. The existing procedure for interrogatory answers, signed by the party only as required by Minn. R. Civ. P. 33.01(d), is not satisfactory.

The committee believes that automatic disclosure of expert information is a desirable change for Minnesota practice. The federal rule amendments in 1993 made disclosure automatic and both standardized and expanded the amount of information that must be disclosed. This information, including greater detail on the bases for opinions, is intended to streamline the expert discovery process.

Rule 26.01 defines witnesses whose opinions must be disclosed in a very straight-forward way: by reference to the nature of their testimony. If a witness is to offer opinion evidence under Minn. R. Evid. 702, 703 or 705, the information about witness's opinions and bases for those opinions must be disclosed pursuant to the rule.

The federal rule also provides time frames for disclosing the expert report. Federal Rule 26(a)(2)(C) contemplates the court will set the schedule for the expert report disclosures. However, in the absence of direction from the court or stipulation by the parties, the disclosures must be made at least 90 days before trial date or the trial ready date. If the evidence is intended solely to rebut evidence on the same subject matter of another party's expert, the party must make the rebuttal disclosure within 30 days after the other party makes its disclosure or at least 60 days prior to the trial date or trial ready date. The parties must supplement this disclosure as required by Federal Rule 26(e)(1).

The advisory committee learned of serious problems in Minnesota courts because parties fail adequately or timely to disclose their experts and the substance of the expert's testimony. As a result, parties are unable to adequately cross-examine and rebut expert testimony. Adoption of Federal Rule 26(a)(2) should address and possibly eliminate many of these problems. Litigants must adhere to disclosure time schedules and provide detailed explanations of the basis of the expert's testimony before the testimony will be allowed at trial. Minnesota should also include a provision for mandatory supplementation of expert reports. This disclosure process should provide the parties with better information about the qualifications of the expert and allow the parties to adequately respond to the expert's testimony.

As a corollary to the expert report disclosure requirement under Rule 26.01(a), amended Rule 26.02(d)(1) allows a party to depose an expert whose opinions may be presented at trial. However, the deposition may not be conducted until after the expert report is disclosed. The Federal Advisory Committee expects that the expert report disclosure will either eliminate the need for expert depositions or at least reduce the length and cost of expert depositions.

Rule 26.02(a) is amended to delete the existing reference to limitation on frequency or extent of use of discovery and to replace it with new Rule 26.02. The new rule follows its federal counterpart verbatim.

Minnesota Rule 26.02(d)(1) currently allows a party to discover the opinions of expert witnesses the other party expects to call at trial through interrogatories. The interrogatories may ask the party to state the subject matter on which the expert is expected to testify, to state the substance of the facts and opinions to which the expert is expected to testify, and a summary of the grounds for each opinion. Parties routinely depose expert witnesses in Minnesota practice. The importance of assessing expert evidence suggests that any limit on a party's right to do so through the give-and-take of a deposition should be eliminated. By requiring detailed expert reports months prior to trial, parties will be able to adequately respond to the expert opinions and be able to conduct more efficient expert depositions, if they are necessary.

Rule 26.02(e) is a new rule adopted directly from its federal counterpart. The requirement of a privilege log is necessary to permit consideration, but opposing counsel and ultimately by the courts, of the validity of privilege claims. Privilege logs have been in use for years and are routinely required when a dispute arises. *See generally Nevada Power Co. v. Monsanto Co.*, 151 F.R.D. 118, 122 & n.6 (D. Nev. 1993) (deficiencies in log enumerated); *Allendale Mutual Ins. Co. v. Bull Data Sys., Inc.*, 145 F.R.D. 84 (N.D. Ill. 1992) (privilege log ordered, detailed requirements); *Grossman v. Schwarz*, 125 F.R.D. 376, 386-87 (S.D.N.Y. 1989)(failure to provide privilege log deemed "presumptive evidence" claim of privilege not meritorious). It is the intention of the rule, however, to require their production routinely to encourage the earlier resolution of privilege disputes and to discourage baseless assertions of privilege. Fed. R. Civ. P. 45(d)(2) requires production of a privilege log by a non-party seeking to assert a privilege in response to a subpoena. Although the committee does not recommend adoption of the extensive changes that have been made in federal Rule 45, this recommendation is made to minimize disruption in Minnesota subpoena practice. The difference in rules should not limit a court from ordering production of a privilege log by a non-party in appropriate cases. The cost of producing such a log may be properly shifted to the party serving the subpoena under Rule 45.06.

Rule 26.05 is amended to adopt in Minnesota the same supplementation requirement as exists in federal court. It is a more stringent and more explicit standard, and reflects a sounder analysis of when supplementation is necessary. The committee believes this is an issue where it is particularly desirable to have state practice conform to federal practice in order that compliance with the requirements is more common and sanctions can more readily be imposed for failure to supplement.

Rule 26.07 is amended only to make it clear that disclosures made pursuant to rule are also subject to the same signature requirements and potential sanctions as discovery requests and responses. The remaining changes to the federal rule made in 1993 are not recommended for Minnesota for the reason they appear unnecessary.

RULE 28 PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN

* * *

28.02 In Foreign Countries

~~In a foreign country, depositions may be taken (1) on notice before a 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 a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony, or (3) pursuant to a letter rogatory. A commission or a letter rogatory shall be issued on application and notice, and on terms 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. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter rogatory may be addressed "To the Appropriate 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 pursuant to these rules.~~

Depositions may be taken in a foreign country (1) pursuant to any applicable treaty or convention, or (2) pursuant to a letter of request (whether or not captioned a letter rogatory), or (3) on notice before a person authorized to administer oaths in the place where the examination is held, either by the law thereof or by the law of the United States, or (4) before a person commissioned by the court, and a person so commissioned shall have the power by virtue of the commission to administer any necessary oath and take testimony. A commission or a letter of request shall be issued on application and notice and on terms that are just and appropriate. It is not requisite to the issuance of a commission or a letter of request that the taking of the deposition in any other manner is impracticable or inconvenient; and both a commission and a letter of request may be issued in proper cases. A notice or commission may designate the person before whom the deposition is to be taken either by name or descriptive title. A letter of request may be addressed "To the Appropriate Authority in [here name the country]." When a letter of request or any other device is used pursuant to any applicable treaty or convention, it shall be captioned in the form prescribed by that treaty or convention. Evidence obtained in response to a letter of request need not be excluded merely because it is not a verbatim transcript, because the testimony was not taken under oath, or because of any similar departure from the requirements for depositions taken within the United States under these rules.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms the rule to its federal counterpart. The committee believes it is especially desirable to have this rule identical to the federal rule because of its subject matter. In addition to the usual factors favoring uniformity, this is a provision governed largely by federal law and which may need to be understood and applied by court reporters, consular or embassy officials, and other non-lawyers. Conformity to the federal rule increases the prospects that the rule will be followed and will not impose significant additional burdens on the litigants.

RULE 29 STIPULATIONS REGARDING DISCOVERY PROCEDURE

Unless otherwise directed by the court ~~T~~the parties may by stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions, and (2) modify ~~the procedures provided in these rules for other methods of discovery.~~ other procedures governing or limitations placed upon

discovery, except that stipulations extending the time provided in Rules 33, 34, and 36 for responses to discovery may, if they would interfere with any time set for completion of discovery, for hearing of a motion, or for trial, be made only with the approval of the court.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms the rule to its federal counterpart. The committee believes it is desirable to permit stipulations regarding discovery whenever those stipulations do not impact the court's handling of the action. Particularly in state court practice, it is often necessary to extend discovery deadlines—without affecting other case management deadlines—and the parties should be encouraged to do so. Counsel agreeing to discovery after a deadline should not expect court assistance in enforcing discovery obligations nor should non-completion affect any other motions, hearings, or other case management procedures.

RULE 30 DEPOSITIONS UPON ORAL EXAMINATION

* * *

30.02 Notice of Examination: General Requirements: Special Notice; Non-Stenographic Method of Recording; Production of Documents and Things; Deposition of Organization; Depositions by Telephone.

(a) A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the name and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) ~~Leave of court is not required for the taking of a deposition by plaintiff if the notice states that the person to be examined will be unavailable for examination within the state unless the person's deposition is taken before expiration of the 30-day period, and sets forth facts to support the statement. The plaintiff's attorney shall sign the notice, certifying thereby that to the best of the attorney's knowledge, information, and belief, the statement and supporting facts are true. Rule 11 sanctions are applicable to the certification. If a party shows that, after being served with notice hereunder, the party was unable through exercise of diligence to obtain counsel to represent the party at the taking of the deposition, the deposition may not be used against such party.~~

The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded by sound, sound-and-visual, or stenographic means, and the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means.

(c) ~~The court may for cause shown enlarge or shorten the time for taking the deposition.~~ With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders.

~~(d) The court may upon motion order that the testimony at a deposition be recorded by other than stenographic means, in which event the order shall designate the manner of recording, preserving, and filing the deposition, and may include other provisions to assure that the recorded testimony will be accurate and trustworthy. If the order is made, a party may nevertheless arrange to have a stenographic transcription made at the party's own expense.~~

Any deposition pursuant to these rules may be taken by means of simultaneous audio and visual electronic recording without leave of court or stipulation of the parties if the deposition is taken in accordance with the provisions of this rule.

In addition to the specific provisions of this rule, the taking of video depositions is governed by all other rules governing the taking of depositions unless the nature of the video deposition makes compliance impossible or unnecessary.

(d) Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes (A) the officer's name and business address; (B) the date, time, and place of the deposition; (C) the name of the deponent; (D) the administration of the oath or affirmation to the deponent; and (E) an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(e) The notice to a party deponent may ~~include or~~ be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(f) A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or

reasonably available to the organization. This provision does not preclude taking a deposition by any other procedure authorized in these rules.

(g) The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28.01, 37.01(a), 37.02(a) and 45.04, a deposition taken by ~~telephone~~ such means is taken in the district and at the place where the deponent is to answer questions ~~propounded~~.

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

Examination and cross-examination of witnesses may proceed as permitted at the trial ~~pursuant to Rule 43.02~~ under the provisions of the Minnesota Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence, record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Rule 30.02(d). If requested by one of the parties, the testimony shall be transcribed.

All objections made at the time of the examination to the qualifications of the officer taking the deposition, ~~or~~ to the manner of taking it, ~~or~~ to the evidence presented, ~~or~~ to the conduct of any party, ~~and~~ or to any other ~~objection to~~ aspect of the proceedings shall be noted by the officer upon the deposition~~:~~; but the examination shall proceed, with the testimony being ~~Evidence objected to shall be~~ taken subject to the objections. In lieu of participating in the oral examination, a party may serve written questions in a sealed envelope on the party taking the deposition and ~~that~~ the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

30.04 Schedule and Duration; Motion to Terminate or Limit Examination

~~At any time during the taking of the deposition, on motion of a party or the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26.03. If that order terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in connection with the motion.~~

(a) Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A party may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (c).

(b) By order the court may limit the time permitted for the conduct of a deposition, but shall allow additional time consistent with Rule 26.02(a) if needed for a fair examination of the deponent or if the deponent or another party impedes or delays the examination. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(c) At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26.03. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion.

30.05 ~~Submission to~~ Review by Witness; Changes; Signing

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

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in

which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by Rule 30.06(1) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

30.06 Certification and Filing by Officer; Exhibits; Copies; Notices of Filing

(a) The officer shall certify ~~upon the deposition~~ that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness, and shall certify that the deposition has been transcribed, that the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court or agreed to by the parties, the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of (herein insert the name of witness)," and shall promptly send it to the attorney or party ~~taking the deposition, who shall be identified on the record.~~ who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration.

Documents and things produced ~~by or~~ for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition, and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, the person may (1) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals, if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (2) offer the originals to be marked for identification, after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition pending final disposition of the.

(b) Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(c) The party taking the deposition shall give prompt notice of its receipt from the officer to all other parties.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

These amendments substantially conforms the rule to its federal counterpart. The committee believes it is particularly desirable to have the rules governing the mechanics of taking depositions conform to the federal rules because many depositions are taken for use in parallel state and federal proceedings or in distant locations before reporters who can be expected to know the federal procedures but may not know idiosyncratic Minnesota rules.

Rule 30.04 is largely new and includes important provisions governing the conduct of depositions. Most important is Rule 30.04(a), which is intended to constrain the conduct of attorneys at depositions. The rule limits deposition objections to concise statements that are directed to the record and not so suggesting a possible answer to the deponent. This rule is intended to set a high standard for conduct of depositions. The problem of deposition misconduct, though probably not as severe as has been noted in some reported cases, is still a frequent and unfortunate part of Minnesota practice. *See, e.g., Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993); *Paramount Communications, Inc. v. QVC Network, Inc.*, 637 A.2d 34, 51-57 (Del. 1994); *Kelvey v. Coughlin*, 625 A.2d 775 (R.I. 1993).

Rule 30.06 is amended to follow its federal counterpart, retaining the existing mechanism for delivering transcripts of depositions to the lawyer or party noticing the deposition rather than filing them with the court. This difference is necessary because Minn. R. Civ. P. 5.04 does not permit filing discovery in the absence of an order.

RULE 31 DEPOSITIONS OF WITNESSES UPON WRITTEN QUESTIONS

31.01 Serving Questions; Notice

(a) ~~After service of the summons, any~~ A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (2). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(b) ~~A party desiring to take the deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership, association, or governmental agency in accordance with the provisions of Rule 30.02(f).~~

~~Within 30 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 10 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 10 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.~~

A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26(b)(2), if the person to be examined is confined in prison or if, without the written stipulation of the parties, the person to be examined has already been deposed in the case.

(c) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and

address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30.02(f).

(d) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may for cause shown enlarge or shorten the time.

31.02 Officer to Take Responses and Prepare Record

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rules 30.03, 30.05, and 30.06, to take the testimony of the witness in response to the questions and to prepare, certify, and ~~return them to the party taking the deposition. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the deposition to any party or to the deponent~~ file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

* * * *

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms the rule to its federal counterpart. The federal rule was amended in 1993 to create a more usable mechanism for exchanging questions and submitting them to the witness. One goal of this change is to make depositions on written questions a more useful discovery device, recognizing that if it can be used effectively it has good potential for reducing the cost of litigation.

The amendment of this rule also serves the goal of facilitating the handling of these depositions by court reporters and others not regularly exposed to Minnesota practice.

RULE 32 USE OF DEPOSITIONS IN COURT PROCEEDINGS

* * *

32.03 ~~Effect of Taking or Using Depositions~~ Form of Presentation

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

Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

* * *

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms the rule to its federal counterpart. As is true for the amendments to Rules 30 and 31, the committee believes it is advantageous to have great uniformity in practice in the area of deposition practice because of the likelihood that some of the players in many depositions are totally unfamiliar with Minnesota Procedure.

RULE 33 INTERROGATORIES TO PARTIES

33.01 Availability

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

(b) The party upon whom the interrogatories have been served shall serve separate written answers or objections to each interrogatory within 30 days after service of the interrogatories, except that a defendant may serve answers or objections within 45 days after service of summons and complaint upon that defendant. The court, on motion and notice and for good cause shown, may enlarge or shorten the time.

(c) Objections shall state with particularity the grounds for the objection and may be served either 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~~. The party submitting the interrogatories may move for an order under Rule 37.01 with respect to any objection to or other failure to answer an interrogatory. Answers to interrogatories to which objection has been made shall be deferred until the objections are determined.

(d) 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, a corporation, a partnership, or an association, by any officer or managing agent, who shall furnish such information as is available. A party shall restate the interrogatory being answered immediately preceding the answer to that interrogatory.

Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 50 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26.02(a).

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change retains the existing rule on interrogatories, and does not adopt the 1993 amendment to its federal counterpart. The federal courts adopted in 1993 an express numerical limitation on the number of interrogatories, limiting them to 25. Minnesota took this action to limit discovery in the 1975 amendments to the rules, limiting interrogatories to 50, and this limit has worked well in practice. The committee believes that the other changes in the federal rules are not significant enough in substance to warrant adoption in Minnesota.

The rule, however, is amended in one important way. The existing provision requiring a party receiving objections to interrogatories to move within 15 days to have the objections determined by the court and the waiver of a right to answers if such a motion is not made within the required time has not worked well. There is no reason to require such prompt action, and much to commend more orderly consideration of the objections. The absolute waiver of the old rule gives way to an explicit right to have the matter resolved by the court, and permits that to be done at any time. This permits the party receiving objections to determine their validity, attempt to resolve any dispute, consider the eventual importance of the information, and possibly to take the matter up with the court in conjunction with other matters. All of these reasons favor a more flexible rule.

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

37.01 Motion for Order Compelling Disclosure or Discovery

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

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

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

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

(1) If a party fails to make a disclosure required by Rule 26.01(b), any other party may move to compel disclosure and for appropriate sanctions. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the party not making the disclosure in an effort to secure the disclosure without court action.

(2) If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30.02(f) or 31.01(c), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) ~~**Evasion or Incomplete Answer**~~. **Evasive or Incomplete Disclosure, Answer, or Response.** For purposes of this ~~rule~~ subdivision, an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(d) ~~**Award of Expenses of Motion.**~~ **Expenses and Sanctions.**

(1) If the motion is granted, or if the disclosure or requested discovery is provided after the motion was filed, the court shall, after affording an opportunity ~~for hearing~~ to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in ~~obtaining the order~~, making the motion, including attorney fees, unless the court finds that the ~~opposition to the motion~~ motion was filed without the movant's first making a good faith effort to

obtain the disclosure or discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity ~~for hearing~~ to be heard, require the moving party or the attorney ~~advising~~ filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

* * *

37.03 ~~Expenses on Failure to Admit~~ Failure to Disclose; False or Misleading Disclosure; Refusal to Admit

(a) A party that without substantial justification fails to disclose information required by Rule 26.01(b) shall not, unless such failure is harmless, be permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37.02(b) (1), (2), and (3) and may include informing the jury of the failure to make the disclosure.

(b) If a party fails to admit the genuineness of any documents or the truth of any matter as requested pursuant to Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of any such matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

* * *

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

This change conforms the rule to its federal counterpart.

The rule is expanded to authorize sanctions against lawyers for improper disclosures as well as improper discovery requests or responses.

Rule 37.03(a) provides sanctions for failure to make expert disclosures. A party that does not properly disclose information required under Rule 26.01(b) shall not be allowed to use the evidence at trial or at a hearing or motion unless the party has "substantial justification" for failing to disclose and the failure is "harmless." In addition to excluding the evidence, the court may impose the sanctions authorized under Rule 37.02(b)(1), (2), and (3). Those sanctions include: designating facts as established; refusing to allow the disobedient party to support or oppose designated claims or defenses; prohibiting that party from introducing designated matters in evidence; striking pleadings or parts thereof; staying the proceeding until the order is obeyed; or dismissing the action or parts thereof. A party may also recover reasonable expenses and attorney fees caused by the failure to disclose.

These requirements place the burden squarely on the party possessing the information to come forward with the information, or to provide a justification for not disclosing the information. This should lessen the burden of the other party in compelling disclosure. While Federal Rule 37 mandates exclusion of evidence not disclosed pursuant to Federal Rule 26, federal courts do retain significant discretion to determine what constitutes "substantial justification" or lack of harm and to shape appropriate sanctions.

RULE 43 ~~EVIDENCE~~ TAKING OF TESTIMONY

43.01 Form ~~and Admissibility~~

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by statute or by these rules~~.~~, the Minnesota Rules of Evidence, or other rules adopted by the Supreme Court. ~~All evidence shall be admitted which is admissible under the statutes of this state or under the Minnesota Rules of Evidence. In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.~~

43.02 Examination of Hostile Witnesses and Adverse Parties

~~A party may interrogate an unwilling or hostile witness by leading questions. A party may call an adverse party or a witness identified with an adverse party, and interrogate either by leading questions and contradict and impeach the party or witness on material matters in all respects as if either had been called by the adverse party. A witness who is an adverse party may be examined by the attorney of the witness upon the subject matter of examination in chief under the rules applicable to direct examination, and may be cross-examined, contradicted, and impeached by any other party adversely affected by the testimony of the witness. A witness identified with an adverse party may be cross-examined, contradicted, and impeached by any party to the action.~~

[Abrogated.]

43.03 Record of Excluded Evidence

~~In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what the attorney expects to prove by the answer of the witness. The court may require the offer to be made out of hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. In actions tried without a jury the same procedure may be followed, except that the court, upon request, shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.~~

[Abrogated.]

* * *

43.06 Res Ipsa Loquitur

~~Res ipsa loquitur shall be regarded as nothing more than one form of circumstantial evidence creating a permissive inference of negligence. The plaintiff shall be given the benefit of its natural probative force existing at the close of all the evidence even though the plaintiff has introduced specific evidence of negligence or made specific allegations of negligence in the plaintiff's pleadings.~~

[Abrogated.]

* * *

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

The changes to this rule conforms it to its federal counterpart. The existing rule predates the adoption of the Minnesota Rules of Evidence, and creates conflicts with those rules in practice. It is appropriate to have all provisions relating to evidence contained in a single location, and to have the rules of civil procedure only refer to those rules where necessary.

RULE 44 PROOF OF OFFICIAL RECORD

44.01 Authentication

(a) Domestic. An official record ~~or an entry therein~~, 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, 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 the officer's deputy, and accompanied by a certificate that such officer has the custody. 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 that office.~~ or within a territory subject to the administrative or judicial jurisdiction of the United States, 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 the officer's deputy, and accompanied by a certificate that such officer has the custody. 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 the officer's office.

(b) 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 ~~of the attesting person, or 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, admit an attested copy without final certification or permit the foreign official record to be evidenced by an attested summary with or without a final certification.~~ (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, 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. The final certification is unnecessary if the record and the attestation are certified as provided in a treaty or convention to which the United States and the foreign country in which the official record is located are parties.

* * *

~~44.04 Determination of Foreign Law~~

~~A party who intends to raise an issue concerning the law of a foreign country shall give notice by 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 pursuant to Rule 43. The court's determination shall be treated as a ruling on a question of law.~~

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

These changes conform the rule to its federal counterpart. These amendments reflect the view that questions of evidence should be determined under the Minnesota Rules of Evidence and the decisional law arising under those rules. The existing rule is not helpful to courts or litigants.

RULE 81 APPLICABILITY; IN GENERAL

81.01 Statutory and Other Procedures

(a) Procedures Preserved. These rules do not govern pleadings, practice and procedure in the statutory and other proceedings listed in Appendix A insofar as they are inconsistent or in conflict with the rules.

(b) Procedures Abolished. ~~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.~~

[Abrogated].

(c) Statutes Superseded. Subject to provision (a) of this rule, the statutes listed in Appendix B and all other statutes inconsistent or in conflict with these rules are superseded insofar as they apply to pleading, practice, and procedure in the district court.

ADVISORY COMMITTEE COMMENTS—1996 AMENDMENTS

Rule 81.01(b) should be abrogated to reflect the decision of the Minnesota Supreme Court in *Rice v. Connolly*, 488 N.W.2d 241, 244 (Minn.1992), in which the court held: "[W]e have determined that quo warranto jurisdiction as it once existed in the district court must be reinstated and that petitions for the writ of quo warranto and information in the nature of quo warranto shall be filed in the first instance in the district court. The court recognized its retention of original jurisdiction under Minn. Stat. § 480.04 (1990), and also indicated its " future intention to exercise that discretion in only the most exigent of circumstances. We comment further that the reinstatement of quo warranto jurisdiction in the district court is intended to exist side by side with the appropriate alternative forms of remedy heretofore available . . . ." 488 N.W.2d at 244. The continued existence of a rule purporting to recognize a procedural remedy now expressly held to exist can only prove misleading or confusing in future litigation. Abrogation of the rule is appropriate to obviate any lack of clarity.

Although Rule 81.01(a) is not amended, the committee recommends that the list of special proceedings exempted from the rules by this rule be updated. An updated Appendix A is included in these proposed amendments.

APPENDIX A. SPECIAL PROCEEDINGS UNDER RULE 81.01

Following is a list of statutes and special proceedings which will be excepted from these rules insofar as they are inconsistent or in conflict with the procedure and practice provided by these rules:

~~M.S.A. 1949~~	
Minn. Stat. (1996)	
~~48.525 to 48.527~~	~~Escheated funds of banks and trust companies~~
~~64.32~~ 64B.30	Quo warranto against fraternal benefit association
~~67.42~~ 67A.241	Quo warranto against town mutual fire insurance company
~~73.09 to 73.16~~	~~Actions on orders of State Fire Marshal~~
~~80.14, subd. 2~~	~~Actions by Commissioner of Securities~~
~~80.225~~	~~Proceedings by Commissioner of Securities~~
Chapters ~~105 to 113~~ 105–106, 110–112	Drainage
Chapter 117	Eminent domain proceedings (see also Gen. R. Prac. 141)
~~160.26~~	~~Drainage of roads~~
~~162.20~~	~~Establishment of roads by judicial proceedings~~
~~Chapter 166~~	~~Roads or cartways jointly constructed or improved~~
Chapter 209	Election contests
Chapter 253A.01	Hospitalization and commitment
Chapter 259	Adoption; change of name
Chapter 271.06(7)	Proceedings in tax court
Chapter 277	Delinquent personal property taxes
Chapter 278	Objections and defenses to taxes on real estate
Chapter 279	Delinquent real estate taxes
284.07 to 284.26	Actions involving tax titles
Chapter 299F.10–.17	Actions on orders of state fire marshall
~~325.21~~	~~Quo warranto for violation of statutes regulating trade~~
~~462.56~~	~~Development plan~~
501.33 to 501.38	Proceedings relating to trusts
Chapter 503	Townsite lands
Chapter 508	Registration of title to lands (see also Gen.R. Prac. 201-216)
514.01 to 514.17	Mechanics liens
~~514.35 to 514.39~~	~~Motor vehicle liens~~
Chapter 518	~~Divorce~~ Dissolution of marriage
540.08	Insofar as it provides for action by parent for injury to minor child (see also Gen. R. Prac. 145)
Chapter 556	Action by attorney general for usurpation of office, etc.
Chapter 558	Partition of real estate (except that part of second sentence of 558.02 beginning 'a copy of which')
Chapter 559	Actions to determine adverse claims (except that part of third sentence of 559.02 beginning 'a copy of which')

1146	561.11 to 561.15	Petition by mortgagor to cultivate lands
1147	573.02	Action for death by wrongful act ~~(as amended by Laws 1951, Chapter 697, and Laws 1965, Chapter 837)~~ (see also Gen. R. Prac. 142-144)
1148		
1149		
1150	Chapter 579	Actions against boats and vessels
1151	Writ of certiorari	
1152	Writ of habeas corpus	
1153	Writ of ne exeat	
1154	Writ of mandamus	

FORM 24. DISCLOSURE OF INFORMATION ABOUT EXPERTS

[Party] discloses the following information about each of the persons it may call to offer opinion testimony at the trial of this action. These disclosures are made pursuant to Minn. R. Civ. P. 26.01(b).

1. A complete statement of all opinions to be expressed and the basis and reasons for each such opinion.

2. Description of the data or other information considered by the witness in forming the opinions.

3. Description of any exhibits to be used as a summary of or support for the opinions.

4. The qualifications of the witness.

5. A list of all publications authored by the witness within the preceding ten years.

6. The compensation to be paid for the study and testimony.

7. A listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

Certification

I certify that the foregoing accurately and completely states the opinions I may testify to in the above-entitled action and the grounds and bases for each of those opinions. The factual information provided is complete and accurate, under penalty of perjury.

_____

Name of Expert

[Address]

Signed: _____

Appendix A

Federal Rules Amendments Not Recommended for Adoption In Minnesota

Table A 1996 Federal Rules Amendments

Table B 1995 Federal Rules Amendments

Table C 1993 Federal Rules Amendments

Table D 1991 Federal Rules Amendments

Table A

1996 Federal Rules Amendments

Rule Number	Summary of Change	Comments
Rule 9(h)	Amendment relating to admiralty practice.	This amendment has no impact on Minnesota practice.
Rule 26(c)	This amendment is a long-debated amendment related to modification or dissolution of protective orders, and the procedures to be followed to obtain that relief.	The Committee recommends against modifying this change until experience is gained under the federal rule, if it becomes final.
Rule 47	Changes voir dire procedure to require the court to permit lawyers to conduct voir dire.	This change is not necessary in Minnesota because Minnesota lawyers routinely are allowed to conduct voir dire.
Rule 48	The change requires a 12-person jury and requires and allows alternates (unless otherwise agreed to) to decide the case.	This change is either not appropriate in Minnesota or should be the subject of discussions which includes court and court administration personnel.

Table B

1995 Federal Rules Adoptions

Rule Number	Summary of Change	Comments
50, 52, and 59	Establishes a uniform period for *filing* post-judgment motions (10 days after entry of judgment). Prior wording was inconsistent and alternatively used "filing," "making," and "serving" of motions as the required act.	These changes would create significant and unnecessary disruption of post-trial motion practice, with possible appellate ramifications.
83	Adds a provision that local rule that imposes a requirement of form cannot be enforced to cause a party to lose rights for a nonwillful failure to comply.	This provision is inconsistent with Minnesota Rule 83 which limits adoption of local rules.

Table C

1993 Federal Rules Amendments

Rule Number	Summary of Change	Comments
4(a), (b), (c) & (e)	Various changes to federal rule on summons.	These changes have no applicability to Minnesota state-court practice.
4(d)	Alters waiver of service provision; allows additional time to answer.	This amendment appears unnecessary for Minnesota.
4(k)	Expands federal service to conform to state law.	These changes have no applicability to Minnesota state-court practice.
4(m)	Alters rule on dismissal for failure to serve within time limits.	Existing rules are not similar; no clear reason to consider changes in Minnesota.
5(e)	Permits fax filing if allowed by local rule.	Minnesota already allows uniformly; no reason to change rule.
11(a)	Adds detail to effect of certification.	Federal rules change is consistent with *Uselman* decision in Minnesota; amendment not needed.
11(c)	Creates "safe harbor" opportunity to respond to motion; authorizes monetary or non-monetary sanctions	"
11(d)	Specifically exempts discovery from Rule 11 sanctions.	"
12(a)	Time to answer amended to dovetail with new Rule 4 provisions for service abroad or by waiver of service.	Not needed as Rule 4 change not made.
15(c)	Cross-reference corrected; clerical only.	Not applicable in Minnesota.
16(b)	Incorporates new rule 26(f) report on discovery conference.	Not recommended as Rule 26 change not recommended.

Table C

1993 Federal Rules Amendments

Rule Number	Summary of Change	Comments
26(a)	Initial Disclosure Provisions	These changes have not been uniformly implemented in federal court, and remain controversial.
26(d)	Alters timing to dovetail with disclosure provisions.	"
26(g)	Extends signing requirements to disclosure documents.	"
	Other rules amended to curtail use of discovery until disclosure occurs.	"
26(c)	Requires party seeking protective order to outline efforts to resolve dispute.	Requirement now part of Minnesota practice by Minn. Gen. R. Prac. 115.
26(f)	Requires formulation of discovery plan.	Not necessary under existing case management rules.
30(a)	Limits depositions to 10 per side.	Minnesota removed a similar, but more onerous, limitation in 1993. Fixed numerical limits are not recommended.
30(f)	Requires party taking depo. to be responsible for original transcripts.	Consideration of this amendment appears warranted for Minnesota.
33(a)	Establishes 25-interrogatory limit.	Minnesota has had 50-interrogatory limit for years. No change is necessary.
33(b)	Creates specific duty to answer to extent interrogatory is not objectionable; requires enumeration of grounds for any objection.	This amendment appears unnecessary for Minnesota..
38	Rule requires both service and filing of jury demand.	Change in the jury demand process would likely result in inadvertent waiver or needless litigation.
50(a)	Technical correction to 1991 amendment.	Not needed unless 1991 amendment adopted.
53	Numerous changes to rule on masters.	Not recommended as Minnesota referee practice is already different from the federal practice.

Table C

1993 Federal Rules Amendments

Rule Number	Summary of Change	Comments
54(d)	Establishes separate procedure for asserting claims for attorneys' fees; requires motion within 14 days after judgment.	Minnesota practice differs from federal; this amendment is not necessary.
58	Allows trial court to delay entry of judgment to permit all issues to be decided.	Minnesota practice differs from federal; this amendment is not necessary.
71A	Relates to condemnation; no state-court counterpart.	Not applicable in Minnesota.
72, 73, 74, 75 & 76	Rules relating to federal Magistrate Judges.	Not applicable in Minnesota.
Forms	Various forms updated to reflect rules changes.	Forms should be amended only to extent related rule is changed.

Table D

1991 Federal Rules Adoptions

Rule Number	Summary of Change	Comments
5(d)	Requires filing a certificate of service and permits facsimile filing.	Facsimile filing is already covered by the Minnesota rule.
15(c)	Changes rule on relation back of amendments.	This amendment does not appear necessary in Minnesota.
24	Change requires notice to a State Attorney General if constitutionality is in question.	Minnesota rules provide for notice to Minnesota A.G.
35	Expands rule to allow variety of "examiners."	Previously adopted in Minnesota.
41	Portion of rule relating to use as method to test sufficiency of evidence at trial by plaintiff deleted. Similar provision added to Rule 52.	The Advisory Committee recommends against changing the nomenclature of post-trial motions and related motions during trial (JNOV and directed verdict).
45	Rule governing subpoenas was substantially rewritten to (1) clarifying large protections to persons receiving subpoenas, (2) facilitate non-deposition access to non-party documents (on notice to all parties), (3) facilitate the service of deposition subpoenas and improve the organization.	The rule is not recommended for adoption because of the complexity of the changes and the differences between state and federal subpoena practice. The Committee believes the existing Minnesota rule is working well, and is reluctant to propose change for the sake of change.
47	Expressly authorizes excuse of juror for good cause.	The recommendation relating to jurors does not appear necessary nor desirable in Minnesota.
48	Provides that all members of the jury participate in a verdict unless excused from service or the consideration.	The recommendation relating to jurors does not appear necessary nor desirable in Minnesota.

Table D

1991 Federal Rules Adoptions

Rule Number	Summary of Change	Comments
50	Permits trial judge to enter judgment at any time during the trial when it is clear the party is entitled to judgment. Rule abandons "directed verdict" language in favor of "judgment as a matter of law" and defines standard for entry of this relief.	The Advisory Committee recommends against changing the nomenclature of post-trial motions and related motions during trial (JNOV and directed verdict).
52	Makes a similar change for court trials permitting entry of judgment at any point it becomes clear party's entitled to such judgment. This changes a companion change to Rule 50.	"
53	Requires masters to deliver copies of reports to the parties (reduce dependence on clerks of court to do this).	The Committee does not recommend the changes in the rule relating to referees given the substantial difference in the state and federal practice under the existing rules.
63	Provides for a substitute judge once a hearing has been commenced, and requires that judge to recall material witnesses who are available to testify again.	State and federal rules are already far from identical. This procedure is also governed by statute, and amendment would create needless litigation.
72	[Relates to Magistrate Judges]	Not applicable to state-court practice.
77	Deletes provision deeming mailing by the clerk as sufficient for all purposes.	This amendment should not be made unless reviewed in conjunction with appellate issues under the Civil Appellate Rules.