STATE OF MINNESOTA

IN SUPREME COURT

C1-84-2137

PROMULGATION OF AMENDMENTS TO THE
MINNESOTA RULES OF CRIMINAL PROCEDURE

ORDER

WHEREAS, in two reports dated September 29, 2003, the Supreme Court Advisory Committee on the Rules of Criminal Procedure recommended certain amendments to the Minnesota Rules of Criminal Procedure relating to public defender eligibility and the recommendations of the Supreme Court Jury Task Force; and

WHEREAS, by order dated October 8, 2003, this Court established a November 12, 2003, deadline for submitting written comments on the proposal; and

WHEREAS, on November 18, 2003, the Supreme Court held a hearing on the proposed amendments; and

WHEREAS, the Supreme Court reviewed the proposals and submitted comments, and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The attached amendments to the Minnesota Rules of Criminal Procedure are prescribed and promulgated for the regulation and procedure in criminal matters in the courts of the State of Minnesota to be effective February 1, 2004.

2. The inclusion of Advisory Committee comments is made for convenience and does not reflect Court approval of the comments made therein.

3. The Advisory Committee on General Rules of Practice shall file recommendations with this Court regarding the recommendations of the Jury Task Force (Recommendation #8) and Advisory Committee on Rules of Criminal Procedure to

amend Minn. Gen. R. Prac. 814 to restrict access to personal information and establish retention standards for juror qualification and voir dire questionnaires.

DATED: December 10, 2003

BY THE COURT:

Kathleen A. Blatz
Chief Justice

AMENDMENTS TO THE
RULES OF CRIMINAL PROCEDURE

1. Rule 5.02. Appointment of Public Defender.

Amend Rule 5.02 as follows:

Rule 5.02. Appointment of Public Defender

Subdivision 1. Notice of Right to Counsel; Appointment of the Public Defender; Waiver of Counsel.

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court shall advise the defendant of the right to counsel and the appointment of the district public defender if the defendant ~~is~~has been determined to be financially unable to afford counsel. The court shall also advise the defendant of the right to request counsel at any stage of the proceedings.

(2) Appointment of the Public Defender. Upon the request of a defendant charged with a felony, gross misdemeanor, ~~or~~ misdemeanor punishable by incarceration, extradition proceeding under section 629, or probation revocation proceeding, who is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint the district public defender for the defendant. The court shall not appoint a district public defender to a defendant who is financially able to retain private counsel, but refuses to do so. ~~In all other cases, the court may appoint an attorney for a defendant financially unable to afford counsel when requested by the defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties.~~

(3) Waiver of Counsel, Misdemeanor. If a defendant appearing without counsel charged with a misdemeanor punishable upon conviction by incarceration does not request counsel and wishes to represent himself or herself, the defendant shall waive counsel in writing or on the record. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

(4) Waiver of Counsel, Felony, Gross Misdemeanor. If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating

circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the district public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

Subd. 2. Appointment of Advisory Counsel. The court may appoint "advisory counsel" to assist the accused who voluntarily and intelligently waives the right to counsel.

(1) If the court appoints advisory counsel because of its concerns about fairness of the process, the court shall so state on the record. The court shall, on the record, then advise the defendant and counsel so appointed that the defendant retains the right to decide when and how the defendant chooses to make use of advisory counsel and that the decision on what type of role advisory counsel is permitted may affect a later request to allow advisory counsel to assume full representation of the accused.

(2) If the court appoints advisory counsel due to its concerns about delays in completing the trial because of the potential disruption by the defendant or because of the complexity or length of the trial, the court shall so state on the record. The court shall on the record then advise the defendant and counsel so appointed that advisory counsel will assume full representation of the accused if (a) the defendant becomes so disruptive during the proceedings that such conduct is determined to constitute a waiver of the right of self representation or (b) the defendant requests advisory counsel to take over representation during the proceeding.

Advisory counsel must be present in the courtroom during all proceedings in the case and must be served with all documents which must be served upon an attorney of record.

Subd. 3. Standards for District Public Defense Eligibility. A defendant is financially unable to obtain counsel if:

(1) The defendant, or any dependent of the defendant who resides in the same household as the defendant, receives means-tested governmental benefits; or

(2) The defendant, through any combination of liquid assets and current income, would be unable to pay the reasonable costs charged by private counsel in that judicial district for a defense of ~~a case of the nature at issue~~ the same matter.~~; or~~

~~(3) The defendant can demonstrate that due to insufficient funds or other assets: two members of a defense attorney referral list maintained by the court have refused to defend the case or, if no referral list is maintained, that two private attorneys in that judicial district have refused to defend the case.~~

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of the district public defender shall be made whenever

possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. In no case shall the district public defender be required to perform this inquiry or investigate the defendant's assets or eligibility. The court has a duty to conduct a financial inquiry. The inquiry must include the following:

(1) the liquidity of real estate assets, including homestead;

(2) any assets that can be readily converted to cash or used to secure a debt;

(3) the value of all property transfers occurring on or after the date of the alleged offense; and

(4) the determination of whether transfer of an asset is voidable as a fraudulent conveyance.

The burden is on the accused to show that he or she is financially unable to afford counsel. Defendants who fail to provide the information necessary to determine eligibility shall be deemed ineligible.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of the public defender for the defendant. The court, if after previously finding that the defendant is eligible for public defender services, determines that the defendant now has the ability to pay part of the costs, may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of the appointed public defender.

2. Comments to Rule 5.

Amend the tenth paragraph of the comments on Rule 5 as follows:

~~*This rule also allows the court to appoint counsel for a defendant charged with an offense which is not punishable by incarceration and who is financially unable to afford counsel upon the request of the defendant or interested counsel or upon the court's initiative when in the interests of justice to the parties. The United States Supreme Court in Argersinger v. Hamlin, 405 U.S. 348 (1972) did not decide that counsel was not required whenever incarceration was not authorized. Considerations other than the possibility of incarceration may make the case sufficiently serious to warrant the appointment of the public defender and this rule provides for that possibility.*~~

Amend the seventeenth paragraph of the comments on Rule 5 as follows:

These general reasons for the appointment of ~~the public defender~~counsel to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the

proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the proceeding were sufficient to allow counsel to take over representation, the court could enter that order. If the circumstances constituted a manifest injustice to continue with the trial, a mistrial could be granted and a date for a new trial, allowing counsel time to prepare, could be set. The court could also deny the request to allow counsel to take over representation if the circumstances would not make this feasible or practical.

Amend the twenty-third paragraph of the comments on Rule 5 as follows:

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is financially eligible for the appointment of the public defender. This standard is based upon the standards adopted by the Minnesota ~~State Board of Public Defense on January 30, 1993~~Legislature effective July 1, 2003 in Minn. Stat. §611.27 (Supp. 2003) except that the statute expressly prohibits the appointment of the public defender as advisory counsel. This rule also recognizes the limited resources of district public defenders.

Amend the twenty-sixth and twenty-seventh paragraphs of the comments on Rule 5 as follows:

~~*Under part (3), the defendant is eligible for public defender representation if they are able to demonstrate that they have attempted to obtain private defense counsel and have been unsuccessful due to their financial circumstances.*~~ *It is strongly recommended that the district court maintain a list of attorneys who wish to have cases referred to them and who are willing to try to make financial arrangements with defendants to permit them to accept representation. A number of organizations, including the Hennepin and Ramsey County Bar Associations and the Minnesota Association of Criminal Defense Lawyers, maintain lists of private attorneys who will accept criminal defense cases at a fee rate which will be determined after consideration of the defendant's ability to pay.* ~~*The defendant may demonstrate eligibility for the public defender by being turned down by two attorneys from the court's referral list due to the defendant's financial circumstances. If no referral list is maintained by the court, the defendant may also prove eligibility by demonstrating that they have contacted two attorneys in the judicial district and that both have refused representation due to the defendant's financial circumstances.*~~ *The existence of such a referral list may not, however, be a basis for failing to appoint counsel for a defendant who is financially eligible for public defender representation under Parts (1) or (2) of this rule.*

To assist the court in deciding whether to appoint the public defender, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. The rule also emphasizes the court's obligation to jealously guard the resources of district public defense and outlines

the extent to which the court must go to determine district public defense eligibility in accordance with In Re Stuart, 646 N.W.2d 520 (Minn. 2002). In order to avoid the creation of conflicts of interest and to focus limited public defender resources on client representation, the public defender shall not be permitted or required to participate in determining whether particular defendants are eligible for public defender representation.

3. Rule 26.02, subd. 2. Juror Information.

Amend Rule 26.02, subd. 2 as follows:

Subd. 2. Juror Information.

(1) List of Prospective Jurors. Upon request the ~~clerk of court~~court administrator shall furnish the parties with a list of the names and addresses of the persons on the jury panel and such other information as the ~~clerk of court~~court administrator has obtained from the prospective jurors, unless otherwise ordered by the trial court after a hearing in accordance with this rule.

(2) Anonymous Jurors. Upon the motion of a party that there is a special need to restrict the parties' access to names, ~~and~~ addresses, telephone numbers, and other identifying information of prospective and selected jurors, the court shall hold a hearing on the motion. The court may order that the parties' and the public's access to this information about the prospective and selected jurors be restricted only if it determines that~~,~~ in the individual case there is a strong reason to believe that the jury needs protection from external threats to its members' safety or impartiality. The court order may restrict access to such information during jury selection, trial and later for so long as such protection is necessary. Jurors and prospective jurors may be identified by number or by other method that protects their identity. If the court restricts access to this information, the court must also take reasonable precautions to minimize any possible prejudicial effect the restriction on access to this information might have on the defendant or on the state.

The court shall make clear and detailed findings of fact in writing or on the record in open court supporting its determination that the restriction on access to information about the prospective and selected jurors is necessary for their ~~the jurors'~~ safety or impartiality.

~~*(2)*~~ *(3) Jury Questionnaire.* As a supplement to oral voir dire, a sworn jury questionnaire designed for use in criminal cases may be used to obtain information helpful to the parties and the court in jury selection before the jurors are called into court for examination. The court may on its own initiative or on request of counsel include in the questionnaire additional questions that may elicit sensitive information. If sensitive questions are included, the prospective jurors shall be advised that instead of answering any particular sensitive questions in writing they may request an opportunity to address the court in camera, with counsel and defendant present, concerning their desire that their answers to any particular sensitive questions not be public. When such a request is made

by a prospective juror, the court shall proceed under Rule 26.02, subd. 4(4) and decide whether the particular sensitive questions may be answered during oral voir dire with the public excluded. Court personnel may hand out the questionnaire to the prospective jurors and collect them when completed. The court shall make the completed questionnaires available to counsel.

4. Rule 26.02, subd. 4(1) Purpose—By Whom Made.

Amend part (1) of rule 26.02, subd. 4 as follows:

(1) Purpose—By Whom Made. A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges, and shall be open to the public except upon order of the court as provided by Rule 26.02, subd. 4(4). The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. The judge shall then put to the prospective juror or jurors any questions which the judge thinks necessary touching their qualifications to serve as jurors in the case on trial and may give such preliminary instructions as are set forth in Rule 26.03, subd. 4. Before exercising challenges, either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case. A verbatim record of the voir dire examination shall be made at the request of either party.

5. Rule 26.02, subd. 4. Voir Dire Examination.

Amend Rule 26.02, subd. 4 by adding a new part (4) at the end as follows:

(4) Exclusion of the Public from Voir Dire. In those rare cases where it is necessary, the following rules shall govern the issuance of any court orders excluding the public from any part of the voir dire or restricting access to such orders or to transcripts of any parts of the voir dire closed to the public.

(a) Advisory. When it appears that prospective jurors during voir dire may be asked sensitive questions that could be embarrassing to them, the court may on its own initiative or on request of the defense or the prosecution, advise the prospective jurors that they may request an opportunity to address the court in camera, with counsel and defendant present, concerning their desire to exclude the public from voir dire when the sensitive questions are asked.

(b) In Camera Hearing. If a prospective juror requests an opportunity to address the court in camera concerning exclusion of the public from voir dire during sensitive questioning, the court shall conduct an in camera hearing on that issue on the record with counsel and the defendant also present. The court shall consider at the hearing whether there are any reasonable alternatives to closing voir dire.

(c) Standards. In considering the request to exclude the public during voir dire, the court shall balance the juror's privacy interests, the defendant's right to a fair and public trial, and the public's interest in access to the courts. The court may order closure of voir dire only if it finds that there is a substantial likelihood that conducting the voir dire in open court would interfere with an overriding interest, including the defendant's interest in a fair trial and the juror's legitimate privacy interests in not disclosing deeply personal matters to the public. Any closure of voir dire shall be no broader than is necessary to protect the overriding interests involved.

(d) Refusal to Close Voir Dire. If the court determines that there is no overriding interest to justify excluding the public from voir dire, the voir dire shall continue in open court on the record and upon request the in camera proceeding shall be transcribed and filed with the court administrator within a reasonable time.

(e) Closure of Voir Dire. If the court determines that overriding interests justify closure of any part of the voir dire, that part of the voir dire shall be conducted in camera on the record with counsel and the defendant present.

(f) Findings of Fact. No order excluding the public from any part of the voir dire shall issue without the court setting forth the reasons therefor either in writing or orally on the record. The findings shall indicate why the defendant's right to a fair trial and the jurors' interests in privacy would be threatened by an open voir dire and shall also include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate.

(g) Record. Whenever under this rule in camera proceedings are held on a juror's request for closure or the public is excluded from any part of the voir dire, a complete record of the proceedings shall be made. Upon request, the record shall be transcribed within a reasonable time and shall be filed with the court administrator. The transcript shall be available to the public, but only if such disclosure can be accomplished while safeguarding the overriding interests involved. The court may order that the transcript or any part of it be sealed, that the name of a juror be withheld, or parts of the transcript be excised if the court finds that it is necessary to do so to protect the overriding interests involved.

6. Rule 26.03, subd. 15. Evidence.

Amend Rule 26.03 subd. 15 as follows:

Subd. 15. Evidence. In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules. Jurors shall not be permitted to submit questions to any witness, directly or through the court or counsel. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

7. Comments to Rule 26.

Amend the twentieth paragraph of the comments on Rule 26 as follows:

In the rare case, where there is a belief that dissemination of this information poses a threat to juror safety or impartiality, ~~the rule~~ Rule 26.02, subd. 2(2) (Anonymous Jurors) provides for a hearing upon a party's motion that the jurors' names, ~~and~~ addresses, telephone numbers, and other identifying information not be distributed. At the hearing, the moving party will have an opportunity to present evidence and argument that there is reason to believe that the jury needs protection from external threats to its members' safety and impartiality. Upon a finding that there is strong reason to believe that this condition exists, the court may enter an order that information regarding identity, including names, telephone numbers, and addresses of prospective jurors be withheld from the public, parties and counsel. See State v. Bowles, 530 N.W.2d 521, 530-1 (Minn. 1995); State v. McKenzie, 532 N.W.2d 210, 219 (Minn. 1995). The restrictions ordered by the court may extend through trial and beyond as necessary to protect the safety and impartiality interests involved. To protect the identity of jurors and prospective jurors the court may order that they be identified by number or other method and may prohibit pictures or sketches in the courtroom. These procedures and protections are in accord with recommendation 22 of the Minnesota Supreme Court Jury Task Force Final Report of December 20, 2001. The trial court's decision will be reviewed under an abuse of discretion standard.

Amend the twenty-third through twenty-eighth paragraphs of the comments to Rule 26 as follows:

Rule 26.02, subd. 2~~(2)~~(3) (Jury Questionnaire).

The use of a written jury questionnaire has proved to be an extremely useful tool in obtaining information from prospective jurors in criminal cases. While its use has been primarily reserved for serious felony cases, experience has established that expanded use of this tool will increase the amount of important information provided by prospective jurors and also make for a more efficient jury selection process. This rule approves of the use of a written questionnaire on a wider scale and provides the procedure for its use. The written questionnaire provided in the Criminal Forms following these rules, includes generally non-sensitive questions relevant to jury selection in any criminal case. See Form 50 for the Jury Questionnaire. Additionally the court on its own initiative or on request of counsel may submit to the prospective jurors as part of the questionnaire other written questions that may elicit sensitive information that might be helpful based on the particular case to be tried.

Once the panel of prospective jurors for a particular case has been determined, the judge or court personnel will instruct the panel on the use of the questionnaire. The preamble at the beginning of the Jury Questionnaire (Form 50) provides the basic information to the prospective jurors including their right to ask the court to permit them to answer any sensitive questions orally and privately. Upon completion of the

questionnaire, the court shall make the questionnaire available to counsel for use in the jury selection process. The questionnaire may be sworn to either when signed or when the prospective juror appears in court at the time of the voir dire examination. Because of the information contained in the questionnaire, counsel will not need to expend court time on this information, but can move directly to follow-up questions on particular information already available in the questionnaire. However, the written questionnaire is intended only to supplement and not to substitute for the oral voir dire examination provided for by Rule 26.02, subd. 4.

The use and retention of jury questionnaires have been subject to a variety of practices. This rule provides that the questionnaire is a part of the jury selection process and part of the record for appeal and reflects current law. As such, the questionnaires should be preserved as part of the court record in the case. See Rule 814 of the General Rules of Practice for the District Courts as to the length of time such records must be retained. Additionally, see Rule 26.02, subd. 2(2) as to restricting public access to the names, addresses, telephone numbers, and other identifying information concerning jurors and prospective jurors when the court determines that an anonymous jury is necessary.

It is recognized that the idea of the privacy of the questionnaire adds to the candor and honesty of the responses of the prospective jurors. However, in light of other applicable laws and the fact that the questionnaire is part of the record in the case, prospective jurors cannot be told that the questionnaire is confidential or will be destroyed at the conclusion of the case. Rather, the jurors can be told, as reflected in the preamble to the Jury Questionnaire (Form 50), that they can ask the court to permit them to answer sensitive questions orally and privately under Rule 26.02, subd. 4(4). This procedure should minimize the sensitive or embarrassing information in the written questionnaires and consequently the need for sealing or destroying them.

In addition to being part of the record in the case, jury selection is a part of the criminal trial which is presumed to be open to the public. Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984) (Press-Enterprise I). The use of a jury questionnaire as part of jury selection is also a part of the open proceeding and therefore the public and the ~~press~~media have a right of access to that information in the usual case. See e.g., Lesher Communications, Inc. v. Superior Court of Contra Costa County, 224 Cal. App. 3d 774 (1990).

Amend the comments on Rule 26 by adding the following new paragraph after the existing twenty-eighth paragraph of the comments:

Rule 26.02, subd. 4(4) (Exclusion of the Public from Voir Dire) provides the procedure and standards for excluding the public from voir dire or restricting access to related orders or transcripts when prospective jurors are questioned on sensitive or embarrassing matters. The Minnesota Supreme Court Jury Task Force in its Final Report of December 20, 2001 in recommendation 20 proposed that the Rules of Criminal Procedure be amended to safeguard the privacy interests of prospective jurors during

voir dire when the interrogation focuses on highly sensitive or personal matters. Rule 26.02, subd. 4(4) does that, but subject to the dictates of Press-Enterprise Co. v. Superior Court of California, 464 U.S. 501 (1984), which requires balancing a prospective juror's privacy interest against the defendant's right to a fair and public trial and the First Amendment right of the public to have access to court proceedings. Under that case only a compelling interest would justify closing voir dire to the public and any restrictions on access must be narrowly tailored to serve that interest. Closure of voir dire must be rare and should be ordered only when the interrogation touches on deeply personal matters that the prospective juror has legitimate reasons for keeping out of the public domain. Under the rule and in accord with Press-Enterprise, the request to close voir dire must be initiated by the prospective juror. However, the court must advise the prospective jurors of the right to make that request when it appears that sensitive questions may be asked during voir dire. Any determination by the court to close any part of the voir dire must be supported by findings either in writing or orally on the record. The court may withhold names, restrict access to orders or transcripts, and excise transcripts as may be necessary to safeguard the overriding privacy interests involved.

Amend the sixty-sixth paragraph of the comments to Rule 26 as follows:

Rule 26.03, subd. 15 (Evidence) leaves to the Minnesota Rules of Evidence the issues of the admissibility of evidence and the competency of witnesses except as otherwise provided in these rules. As to the use of a deposition at a criminal trial, Rule 21.06 controls rather than the Minnesota Rules of Evidence if there is any conflict between them. See Rule 802 and the comments to Rule 804 in the Minnesota Rules of Evidence. The prohibition in Rule 26.03, subd. 15 against jurors submitting questions to witnesses is taken from State v. Costello, 646 N.W.2d 204 (Minn. 2002).

8. Form 50. Jury Questionnaire.

Amend the preamble to Form 50 as follows:

The use of this Questionnaire is to assist lawyers and the court in the selection of a fair, impartial and neutral jury.

Your answers to the questions contained in the Questionnaire, like your answers to questions in open court during jury selection proceedings, are part of the public record in this case.

DO NOT DISCUSS YOUR ANSWERS WITH ANY OF THE OTHER PROSPECTIVE JURORS.

(If additional questions are asked that may elicit sensitive information, the following language should be included: If you object to answering any particular questions in writing because the answers will be sensitive or embarrassing to you, you may request an opportunity to address the court to ask that such answers be given orally and not disclosed to the public.)