A-5

COURT RULES

STATE OF MINNESOTA
IN SUPREME COURT

IN RE PROPOSED AMENDMENTS TO MINNESOTA
RULES OF CRIMINAL PROCEDURE

ORDER
November 18, 1982

IT IS HEREBY ORDERED that a hearing be had before this Court in the courtroom of the Minnesota Supreme Court, State Capitol, on Friday, February 11, 1983, at 9:00 o'clock a.m., before adoption of the Amendments to the Minnesota Rules of Criminal Procedure. At that time, the court will hear proponents or opponents of the proposed Amendments to the Minnesota Rules of Criminal Procedure.

IT IS FURTHER ORDERED that advance notice of the hearing be given by the publication of this order once in the Supreme Court editions of FINANCE AND COMMERCE, ST. PAUL LEDGER, and BENCH AND BAR.

IT IS FURTHER ORDERED that the proposed Amendments be published in the NORTHWESTERN REPORTER advance sheets.

IT IS FURTHER ORDERED that all citizens, including members of bench and bar, desiring to be heard shall file briefs or petitions setting forth their positions and shall notify the Clerk of Supreme Court, in writing, on or before February 1, 1983, of their desire to be heard on the proposed rules. Ten copies of each brief, petition, or letter should be supplied to the Clerk.

Dated: November 18, 1982

BY THE COURT:
DOUGLAS K. AMDAHL
Chief Justice

PROPOSED AMENDMENTS

PROPOSED AMENDMENTS TO THE

MINNESOTA RULES OF CRIMINAL PROCEDURE

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

1. Rule 2.01. Contents; Before Whom Made

Amend the first sentence of the second paragraph to read as follows:

"Except as provided in Rules 11.06 and 15.08, it shall be made upon oath before ~~such~~ a judge~~,~~ or judicial officer~~, or justice of the peace as may be authorized by law to issue criminal process upon the offense charged in the complaint.~~ of the county or district court."

2. Comments on Rule 2.01

To conform to the proposed amendment of Rule 2.01, amend the third and fourth paragraphs of the comments to read as follows:

"Except as provided in Rules 11.06 and 15.08 authorizing the substitution of a new complaint to permit a plea to a misdemeanor or different offense, the complaint shall be made on oath before any judge~~,~~ or judicial officer~~, or justice of the peace~~ of a county or district court. ~~who is authorized to issue criminal process upon the offense charged. (See Minn. Stat. §629.41 (1971).) This will include the judges of the district court (Minn. Stat. Ch. 484 (1971)), the judges of the county courts (Minn. Stat. §§487.01, 487.25 (1971)), judicial officers of the county courts who are given authority to issue criminal process (Minn. Stat. §487.08 (1971)), municipal court judges serving in county court districts on July 1, 1972 who are given that authority (Minn. Stat. §487.09 (1971)), justices of the peace in county court districts who are members of the bar (Minn. Stat. §487.35, subd. 2(b) (1971)), judges of the Municipal Court of Hennepin County (Minn. Stat. §§488A.01, subds. 2, 3; 488A.10, subd. 7 (1971)), the Municipal Court of St. Paul (Minn. Stat. §§488A.18, subds. 2, 3, 5 (1971)), the Municipal Court of Duluth (Minn. Stat. §§488A.35, subds. 1, 5 (1971)) and the municipal courts in Ramsey and St. Louis Counties (Minn. Stat. §488.04, subds. 1, 6 (1971)).~~

~~(As of January 1, 1974 the St. Louis County Municipal Courts are no longer covered by Minn. Stat. Ch. 488, but rather are governed by the County Court Act, Minn. Stat. Ch. 487 (1973). As of January 1, 1975 the Municipal Courts of Ramsey County will be consolidated in a County Municipal Court under Minn. Stat. §§488A.18 to 488A.28 (1973).)~~

Additionally, amend the tenth paragraph of the comments by deleting the last sentence of that paragraph which refers to justices of the peace.

3. Rule 3.01. Issuance

Amend the first sentence of the second paragraph to read as follows:

"The warrant or summons shall be issued by ~~such~~ a judge~~,~~ or judicial officer ~~or justice of the peace as may be authorized by law to issue criminal process upon the offense charged in the complaint~~ of the county or district court."

4. Rule 3.02. Contents of Warrant or Summons

The legislature has eliminated justices of the peace, Minn. Stat. §487.35, subd. 1, as amended by Laws 1977, Ch. 432, §27. To eliminate the now unnecessary references to justices of the peace in Rules 3.02, subd. 2, and 3.02, subd. 3, amend them to read as follows:

"Subd. 2. Directions of Warrant. The warrant shall direct as follows:

"(1) Issuance By County or Municipal Court. When the warrant is issued by a county or municipal court, that the defendant be brought promptly before the court that issued the warrant if it is in session.

~~"(2) Issuance by Justice of Peace. When the warrant is issued by a justice of the peace, that the defendant be brought promptly before a county or municipal court in the county where the alleged offense was committed if such court is in session.~~

"(2) ~~(3)~~ Available Judge or Judicial Officer. If the county or municipal court specified in Rule 3.02, subd. 2(1) ~~and (2)~~ is not in session, that the defendant be brought before a judge or judicial officer of such court, without unnecessary delay, and in any event not later than 36 hours after the arrest exclusive of the day of arrest, or as soon thereafter as such judge or judicial officer is available.

"Subd. 3 Summons. The summons shall summon the defendant to appear at a stated time and place to answer the complaint before the court issuing it and shall be accompanied by a copy of the complaint. ~~If the summons is issued by a justice of the peace it shall summon the defendant to appear before the county court or a municipal court in the county where the alleged offense was committed.~~"

5. Comments on Rule 3.01

To conform to the proposed amendment of Rule 3.01 and because of the repeal of the statutes indicated amend the sixth paragraph to read as follows:

"By Rule 3.01 the warrant shall be issued to any person authorized by law to execute a warrant. (See Rule 3.03, subd. 1 for service of a summons by any officer authorized by law to execute a warrant.) (For authorized persons and officers, see ~~Minn. Stat. §488.11 (1971) (municipal courts not in county court districts); Minn. Stat. §§487.25, 633.035 (1971) (county courts and justices of the peace);~~ Minn. Stat. §488A.06 (1971) (Municipal Court of Hennepin County); Minn. Stat. §488A.27, subd. 13 ~~12~~ (1971) (Municipal Court of Ramsey County ~~St. Paul~~); Minn. Stat. §629.30 (1971) (peace officers); ~~Minn. Stat. §411.27 (1971) (cities of the fourth class);~~ Minn. Stat. §§~~412.161,~~ 412.861 (villages).)"

Comments on Rules 3.01 and 3.02

In the first sentence of the tenth paragraph delete the words "or justice of the peace" and add the word "or" before the words "judicial officer". Also to conform the comments to the proposed deletion of Rule 3.02, subd. 2(2) concerning justices of the peace, amend the thirteenth paragraph of the comments to read as follows:

"The first limitation (Rule 3.02, subd. 2(1) ~~and (2)~~) is that if the county or municipal court which issued the warrant is in session when the defendant is arrested, he shall be brought promptly before that court. The 36-hour time period provided by Rule 3.02, subd. 2~~(3)~~ (2) is not applicable to this first limitation under Rule 3.02, subd. 2(1)~~, (2)~~. Ordinarily the defendant shall be brought directly before the court if it is in session."

PROPOSED AMENDMENTS

7. Comments on Rule 3.02, Subd. 2

To conform to the proposed amendment of Rule 3.02, subd. 2, amend the first sentences of the fourteenth and the fifteenth paragraphs by changing the references to "Rule 3.02, subd. 2(3)" to "Rule 3.02, subd. 2(2)". Also, delete entirely the sixteenth paragraph which refers solely to justices of the peace and in the seventeenth paragraph change the two references to "Rule 3.02, subd. 2(3)" to "Rule 3.02, subd. 2(2)".

8. Rule 4.02, Subd. 5(2) Complaint Filed; Order of Detention; Felonies and Gross Misdemeanors.

To be consistent with the filing requirements of Rule 33.04, amend the second sentence of Rule 4.02, subd. 5(2) to add the words "except as provided by Rule 33.04" after the word "forthwith".

9. Rule 4.02, Subd. 5(3) Complaint or Tab Charge; Misdemeanors.

The use of the word "formal" in the rule to describe a complaint is both confusing and redundant. To eliminate this confusion delete the word "formal" in both the third and fourth sentences of Rule 4.02, subd. 5(3). Additionally amend the second sentence of that rule to read as follows:

> "This brief statement shall be a substitute for the complaint and is referred to as a tab charge in these rules."

10. Comments on Rule 4.02, Subd. 5(1)

To conform to the proposed amendment of Rule 34.02 and to explain recent case law concerning the 36-hour rule, amend the sixth paragraph of the comments to read as follows:

> "Rule 4.02, subd. 5(1) prescribing the time within which a person arrested without a warrant shall be first brought before the court recognizes that additional time is needed to determine whether to continue the prosecution and to draw the complaint. So there is no requirement that the defendant be brought promptly before the appropriate court after his arrest if the court is in session, but it is necessary under Rule 4.02, subd. 5(1) that the defendant be brought before such court without 'unnecessary delay'. (Compare Rule 3.02, subd. 2.) The 36-hour period does not include the day of arrest, Sundays, or legal holidays. Otherwise the intent of Rule 4.02, subd. 5(1) and Rule 3.02, subd. 2 is the same, namely, that the 36-hour period is not an automatic holding period and that the defendant shall be brought before the court at the earliest possible time within the period. ~~In exceptional cases, however, the prosecuting attorney shall not be precluded by this section from seeking relief pursuant to Rule 34.02.~~ The effect of failure to comply with Rules 4.02, subd. 5(1) and 3.02, subd. 2 on the admission of confessions or other evidence or on the jurisdiction of the court is left to case-by-case development. In State v. Wiberg, 296 N.W.2d 388 (Minn. 1980) the Supreme Court held that violation of the time limits set forth in Rule 4.02, subd. 5(1) does not require the automatic exclusion of statements made which have a reasonable relationship to the violation. Rather, the admissibility of the statements depends on such factors as the reliability of the evidence, the length of the delay, whether the delay was intentional, and whether the delay compounded the effects of other police misconduct. In Wiberg the Supreme Court found a violation of Rule 4.02, subd. 5(1) even though 36-hours had not yet elapsed exclusive of the day of arrest. The court noted that such unexplained delays as occurred in Wiberg should weigh heavily in the trial court's determination of whether to exclude any statements. For the application of this same suppression test to identification evidence see Meyer v. State, 316 N.W.2d 545 (Minn. 1982)."

11. Comments on Rule 4.02, Subd. 5(3)

To conform to the proposed amendment of Rule 4.02, subd. 5(3) deleting the word "formal" to describe a complaint, amend the seventh paragraph of the comments as follows:

> "Where the defendant agrees, Rule 4.02, subd. 5(3) provides the procedure for initiating misdemeanor proceedings without the necessity of issuing a ~~formal~~ complaint or obtaining an indictment as is required for felonies and gross misdemeanors. This is provided to avoid the unnecessary delay for a defendant and to aid a prosecutor in those cases where the defendant may not even desire a ~~formal~~ complaint if he is sufficiently informed in some other way of the charges against him. When a defendant makes his first appearance in court following a warrantless misdemeanor arrest, the clerk shall enter on the records a brief statement (tab charge) of the offense charged, including a citation to the statute, ordinance, rule, regulation or provision of law which the defendant is alleged to have violated. This statement shall be a substitute for the complaint and is sufficient to initiate the misdemeanor proceedings under Rule 10.01 unless the defendant, his attorney or the court requests that a ~~formal~~ complaint be filed. This provision for tab charges is substantially consistent with present Minnesota law although under the present statutes the right to a ~~formal~~ complaint varies from court to court. See Minn. Stat. §487.25, subd. 4, and Minn. Stat. §488A.10, subd. 4 (In the county courts and in Hennepin County Municipal Court, a tab charge is sufficient unless the judge orders or the defendant requests a ~~formal~~ complaint); Minn. Stat. §488A.27, subd. 4 (In St. Paul a tab charge is sufficient unless the judge orders a ~~formal~~ complaint); and Minn. Stat. §488.17, subd. 4 (In any other municipal court the tab charge is sufficient where the defendant is in custody when appearing before the court, unless the court orders a ~~formal~~ complaint)."

12. Rule 5.03. Date of Appearance in District Court

When the rules were originally drafted it was assumed the first appearance under Rule 5 would be in the county court and the initial appearance under Rule 8 would be in the district court. Now, following the 1977 amendments which added Rule 5.08 and revised Rule 8, either appearance may be in either court if mutually agreed by the two courts or ordered by the Supreme Court. When both appearances are to be in the same court, requiring a second appearance may serve only to delay the case and waste judicial resources. The various courts should have the option of eliminating this extra appearance if it proves unnecessary and if the defendant agrees.

To accomplish this amend Rule 5.03 to read as follows:

> "Rule 5.03. Date of Appearance in District Court; Consolidation of Appearances Under Rule 5 and Rule 8
>
> "If the defendant is charged with a felony or gross misdemeanor and has not waived his right to a separate appearance under Rule 8 as provided in this rule, the judge or judicial officer shall set a date for and order the appearance of the defendant before the district court having jurisdiction to try the offense charged in accordance with a schedule or other directive established by order of the district court, which appearance date shall not be later than fourteen (14) days after defendant's initial appearance before such judge or judicial officer.
>
> "The defendant shall be informed of the time and place of such appearance. The time for appearance may be extended by the district court for good cause.

"Notwithstanding any rule to the contrary, in felony and gross misdemeanor cases, if it has been mutually agreed between the district court and the county court or if ordered by the Supreme Court, the defendant may be permitted to waive the separate initial appearance otherwise required by this rule and Rule 8. Any such waiver shall be made either in writing or orally on the record in open court. If a separate initial appearance is waived by the defendant, all of the functions and procedures provided for by both Rule 5 and by Rule 8 shall take place at the one consolidated appearance."

13. Comments on Rule 5.02

Amend the comments on Rule 5 by adding the following new paragraphs after the present sixth paragraph:

"Under Rule 5.02, subd. 1, counsel must be appointed for a defendant financially unable to afford counsel in a felony or gross misdemeanor case even if a defendant exercises his constitutional right under Faretta v. California, 422 U.S. 806 (1975), to refuse the assistance of counsel and represent himself. In such a situation the appointed counsel would remain available for assistance and consultation if requested by the defendant.

"As suggested in Von Moltke v. Gillies, 332 U.S. 708 (1948) to ensure a knowing and intelligent waiver of counsel, the court should make a penetrating and comprehensive examination of the defendant as to his comprehension of the

(1) Nature of the charges;

(2) Statutory offenses included within them;

(3) The range of allowable punishments;

(4) The possible defenses;

(5) The possible mitigating circumstances; and

(6) All other facts essential to a broad understanding of the consequences of the waiver.

"Another way for the court to assure itself that the waiver of counsel is voluntary and knowledgeable is to appoint temporary counsel to advise and consult with the defendant as to the waiver. This is in accord with ABA Standards, Providing Defense Services, 5-7.3 (1980)."

14. Comments on Rule 5.03

To explain the amendment of Rule 5.03 which permits consolidation of the appearances under Rule 5 and Rule 8, add the following new paragraph just before the paragraph in the comments concerning Rule 5.04:

"In certain circumstances a separate appearance to fulfill the requirements of Rule 8 may serve very little purpose. This is particularly so if the appearance required by Rule 5 and that required by Rule 8 are to be held in the same court. Originally these rules required the appearance under Rule 5 to be in the county court and the appearance under Rule 8 to be in the district court. Now, if mutually agreed between the district court and the county court or if ordered by the Supreme Court, Rule 5.08 also permits the Rule 5 appearance to be held in the district court and Rule 8 also permits the appearance under that rule to be held in the county court. When these options are used, the additional time and judicial resources invested in a separate appearance under Rule 8 may yield little or no benefit. Therefore, if agreed by the district court and the county court or if ordered by the Supreme Court, Rule 5.03 permits the appearances required by Rule 5 and Rule 8 to be consolidated upon request of the defendant.

"When the appearances are consolidated under Rule 5.03, all of the provisions in Rule 8 are applied to the consolidated hearing. This means that under Rule 8.04 the Omnibus Hearing provided for by Rule 11 must be scheduled for a date not later than 14 days after the consolidated hearing. This requirement is subject however to the power of the court under Rule 8.04(c) to extend the time for good cause upon motion of the defendant or the prosecution or upon the court's own motion. Also, the notice of evidence and identification procedures required by Rule 7.01 must be given at or before the consolidated hearing."

15. Comments on Rule 5

When appearances are consolidated under Rule 5.03 the time table provided in the comments for felonies and gross misdemeanors may be misleading. To correct this, amend the introductory phrase to the time table as follows:

"From the time of the defendant's initial appearance in municipal or county court under Rule 5 until the Omnibus Hearing (Rule 11), the following schedule of events shall take place in felony and gross misdemeanor cases in which the appearances under Rule 5 and Rule 8 have not been consolidated pursuant to Rule 5.03."

16. Comments on Rule 5

In 1977 Rule 10.04, subd. 1 was amended to require that motions in misdemeanor cases must be served no more than 30 days after the arraignment. To conform with this earlier amendment, amend number 7 in the comments under the timetable for misdemeanor cases to read as follows:

"7. Service of pretrial motions (Rules 10; 17.03, subds. 3 and 4; 17.06; 17.06, subd. 3 and motions to suspend criminal proceedings for mental incompetency and motions to disclose medical reports under Rule 20.04) at least 3 days before the pretrial conference or three days before trial if no pretrial conference is held, but no more than 30 days after the arraignment unless the court extends the time for good cause (10.04)."

17. Rule 7.01. Notice of Evidence and Identification Procedures

Because of a typographical error the 1977 amendment changed the reference to "Rule 5.03" in this rule to "Rule 5.02". To correct the error amend the rule by changing the words "Rule 5.02" to "Rule 5.03".

Rule 8. Defendant's Initial Appearance Before the District Court Following the Complaint In Felony and Gross Misdemeanor Cases

To permit county court judges to accept guilty pleas to felonies and gross misdemeanors when presiding at an initial appearance under this rule and to clarify that no plea at all is to be entered unless the defendant wishes to plead guilty, amend Rule 8 to read as follows:

"RULE 8. DEFENDANT'S INITIAL APPEARANCE BEFORE THE DISTRICT OR COUNTY COURT FOLLOWING THE COMPLAINT IN FELONY AND GROSS MISDEMEANOR CASES

"8.01. Place of Appearance and Arraignment

"The defendant's initial appearance under this rule shall be held in the district court of the judicial district where the alleged offense was committed. If it has been mutually agreed between the district court and the county court, or if ordered by the Supreme Court, the appearance may be referred to the county court of the county where the alleged offense was committed. ~~Except as otherwise provided by Rule 8.02, the~~ The procedures upon an initial appearance in county court shall be the same as in district court. ~~At a defendant's initial appearance before the court following the complaint, the procedure shall be as follows:~~

"~~8.01 Arraignment~~

"Unless the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to a grand jury, or the offense is punishable by life imprisonment, the defendant shall be arraigned upon the complaint or the complaint as it may be amended, but may only enter a plea of guilty at that time. If the defendant does not wish to plead guilty, he shall not be called upon to enter any other plea and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 he shall plead to the complaint or complaint as amended or be given additional time within which to plead. ~~and the procedure prescribed by Rules 8.02 to 8.06 shall be followed.~~ If the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to the grand jury, or if the offense is punishable by life imprisonment, the presentation of the case to the grand jury shall commence within 14 days from the date of defendant's appearance in the ~~district~~ court under this rule, and an indictment or report of no indictment shall be returned within a reasonable time. If an indictment is returned, the Omnibus Hearing under Rule 11 shall be held as provided by Rule 19.04, subd. 5.

"8.02. Plea of Guilty

"At an initial appearance, whether in district court or in county court pursuant to Rule 8.01, the defendant may ~~not~~ enter a plea of guilty to a felony, ~~or~~ a gross misdemeanor, ~~but~~ or ~~may enter a plea of guilty to~~ a misdemeanor ~~in lieu of the offenses charged in the complaint unless the prosecuting attorney objects.~~ as permitted under Rule 15. ~~If, at an initial appearance in county court, the defendant requests permission to enter a guilty plea to a felony or gross misdemeanor, the judge or judicial officer shall set a time for the defendant's appearance in district court at the earliest available date, which appearance date, in any event, shall be not later than fourteen (14) days after the initial appearance.~~ If he enters a plea of guilty, the pre-sentencing and sentencing procedures provided by these rules shall be followed.

"8.03. Demand or Waiver of Hearing

"If the defendant does not plead guilty, the defendant and the prosecution shall each either waive or demand a hearing as provided by Rule 11.02 on the admissiblity at trial of any of the evidence specified in the notice given by the prosecuting attorney under Rule 7.01 or the admissibility of any evidence obtained as a result of such evidence.

"8.04. Plea and Time and Place of Omnibus Hearing

"(a) ~~If the hearing on the issues set forth in Rule 8.03 is waived, the defendant may either enter a plea of guilty or be given time within which to plead.~~ If ~~he~~ the defendant does not plead guilty, the Omnibus Hearing on the issues as provided for by Rules 11.03 and 11.04, ~~exclusive of such issues,~~ shall be held within the time hereinafter specified.

"(b) If hearing on either of the issues set forth in Rule 8.03 is demanded, the Omnibus Hearing shall also include the issues provided for by Rules 11.02~~, 11.03 and 11.04, including such issues, shall be held within the time hereinafter specified~~.

"(c) The Omnibus Hearing provided for by Rule 11 shall be scheduled for a date not later than fourteen (14) days after the defendant's initial appearance before the ~~district~~ court. The ~~district~~ court~~, or if the hearing is referred as provided~~

~~by Rule 11.01, the county or municipal court,~~ may extend such time for good cause upon motion of the defendant or the prosecution or upon the court's own motion.

"8.05. Record

"A verbatim record shall be made of the proceedings at the defendant's initial appearance before the ~~district~~ court under this rule.

"8.06. Conditions of Release

"In accordance with the rules governing bail or release, the ~~district~~ court may continue or amend those conditions for defendant's release ~~fixed~~ set by the ~~county or municipal~~ court previously."

19. Comments on Rule 8.01

To conform to the proposed amendments of Rule 8, amend the first paragraph of the comments to read as follows:

"Unless the offense charged in the complaint is a homicide and the prosecuting attorney notifies the court that the case will be presented to a grand jury, or the offense is punishable by life imprisonment, upon the defendant's initial appearance before the ~~district~~ court under this rule following a complaint charging a felony or gross misdemeanor (within 14 days after his first appearance ~~in a county or municipal court~~ under Rule 5), he shall, upon his request, be permitted to plead guilty to ~~be arraigned upon~~ the complaint or amended complaint (See Rules 3.04, subd. 2; 17.05) as provided by Rule 15 ~~13~~. At this stage of the proceeding, the complaint which was filed in the county or municipal court, or that complaint as it may be amended (Rule 17.05) or superseded (Rule 3.04, subd. 2), takes the place of the information under existing Minnesota law (Minn. Stat. §§628.29-628.33 (1971)) and provides the basis for the ~~district~~ court's jurisdiction over the prosecution and the offenses charged in the complaint."

Additionally, delete the word "district" from both the third and the seventh paragraphs of the comments.

20. Comments on Rule 8.06

To conform to the proposed amendments of Rule 8, amend the last sentence of the comments to read as follows:

"Under Rule 8.06 the ~~district~~ court may in accordance with the provisions of Rule 6.02 continue or amend the bail or conditions of release set by the ~~county or municipal~~ court previously."

21. Rule 9.01, Subd. 1(5) Criminal Record of Defendant.

In State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) the Supreme Court held that before a witness with prior felony convictions takes the stand, the trial court should determine whether those prior convictions may be used to impeach the witness. In order to determine whether such an issue exists, the prosecution should be required to notify the defendant of the criminal record of proposed defense witnesses as well as the criminal record of the defendant himself. To accomplish this amend Rule 9.01, subd. 1(5) to read as follows:

"(5) Criminal Record of Defendant and Defense Witnesses. The prosecuting attorney shall inform defense counsel of the records of prior convictions of the defendant and of any defense witnesses disclosed under Rule 9.02, subd. 1(3)(a) that ~~is~~ are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of ~~the~~ any such records ~~of defendant's prior convictions~~ known to the defendant."

22. Rule 9.02, Subd. 1(3)(c) Alibi.

This rule requires defense counsel to disclose to the prosecuting attorney the names of any alibi witnesses. Under Rule 9.03, subd. 2 which requires a continuing duty to disclose, the prosecuting attorney should be required to inform defense counsel of any rebuttal witnesses to the alibi defense. However, to assure that this obligation is understood, amend Rule 9.02, subd. 1(3)(c) by adding the following sentence at the end:

> "As soon as practicable, the prosecuting attorney shall then inform the defendant of the names and addresses of the witnesses the prosecuting attorney intends to call at the trial to rebut the testimony of any of the defendant's alibi witnesses."

23. Rule 9.02, Subd. 1. Information Subject to Discovery Without Order of Court.

Subsequent to the adoption of the rules in 1975 the Supreme Court in State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975) established procedural and substantive standards governing the entrapment defense. To include those procedural standards in the rules, amend Rule 9.01, subd. 1(3) by adding a new provision (e) to read as follows:

> "(e) Entrapment. If the defendant gives notice of intention to rely on the defense of entrapment, he shall include in the notice a statement of the facts forming the basis for the defense, and whether he elects to have the defense submitted to the court or to the jury.
>
> "The entrapment defense may not be submitted to the court unless the defendant waives jury trial upon that issue as provided by Rule 26.01, subd. 1(2).
>
> "When notice of the defense of entrapment is given, the prosecuting attorney shall notify the defendant in writing of any additional offenses or criminal conduct of the defendant upon which the prosecution intends to rely in refuting the defense.
>
> "If the entrapment defense is submitted to the court, the hearing thereon shall be included in the Omnibus Hearing under Rule 11 or in the evidentiary hearing provided for by Rule 12. The court shall make findings of fact and conclusions of law on the record supporting its decision."

24. Comments on Rule 9.01, Subd. 1

To explain recent case law concerning violation of the prosecution's duty to disclose under Rule 9.01, subd. 1, amend the fourth paragraph of the comments by adding the following language at the end of that paragraph:

> "Intentional abuses of the discovery process by the prosecution will not be tolerated and will result in reversal of the judgment of conviction when the facts warrant that. State v. Smith, 313 N.W.2d 429 (Minn. 1981), State v. Zeimet, 310 N.W.2d 552 (Minn. 1981). Additionally even negligent failures by the prosecution to disclose under the rules will require a new trial for a convicted defendant when prejudice is shown even though there is otherwise sufficient evidence on the record to support the conviction. State v. Schwantes, 314 N.W.2d 243 (Minn. 1982), State v. Hall, 315 N.W.2d 223 (Minn. 1982)."

25. Comments on Rule 9.01, Subd. 1(5)

To explain the proposed amendment of Rule 9.01, subd. 1(5) and the case of State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) add the following paragraph after the fourteenth paragraph of the comments:

> "Rule 9.01, subd. 1(5) also provides for the reciprocal discovery of the criminal records of any defense witness disclosed

to the prosecution under Rule 9.02, subd. 1(3)(a). Under Rule 9.03, subd. 2 there is a continuing duty to disclose such information up through the time of trial. If the prosecutor intends to impeach the defendant or any defense witnesses with evidence of prior convictions the prosecutor is required by State v. Wenberg, 289 N.W.2d 503 (Minn. 1980) to request a pretrial hearing on the admissibility of such evidence under the Rules of Evidence. The pretrial hearing may be made a part of the Omnibus Hearing under Rule 11 or the pretrial conference under Rule 12. See Rule 609 of the Minnesota Rules of Evidence for the standards governing the use of criminal convictions to impeach a witness."

26. Comments on Rule 9.02, Subd. 1(3)(e)

To explain the entrapment defense requirements of State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975) and the proposed amendment adding Rule 9.02, subd. 1(3)(e) amend the comments by adding the following paragraphs after the present comment on Rule 9.02, subd. 1(3)(d):

"The procedures set forth in Rule 9.02, subd. 1(3)(e) for asserting the entrapment defense are taken from State v. Grilli, 304 Minn. 80, 230 N.W.2d 445 (1975). That case further requires that upon submission of the defense to court or jury, the defendant has the burden of proving by a fair preponderance of the evidence that he was induced by government agents to commit the crime charged, whereupon the burden rests on the state to prove beyond a reasonable doubt that defendant was predisposed to commit the offense.

"If the defendant asserts the defense of violation of due process with the entrapment defense or separately, the defense shall be heard and determined by the court. The concept of fundamental fairness inherent in the due process requirement will prevent conviction of even a predisposed defendant if the conduct of the government in participating in or inducing the commission of the crime is outrageous. As to this due process defense see Hampton v. United States, 425 U.S. 484 (1976), State v. Ford, 276 N.W.2d 178 (Minn. 1979) and State v. Morris, 272 N.W.2d 35 (Minn. 1978)."

27. Rule 11.04. Other Issues

Rule 404(b) and (c) of the Minnesota Rules of Evidence now set the standards for the admissibility of evidence of other offenses and evidence of a victim's previous sexual conduct in a sexual misconduct case. So that the rules may better complement each other, amend Rule 11.04 by adding the following paragraphs at the end of the rule:

"If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses.

"If the defendant intends to offer evidence of a victim's previous sexual conduct in a prosecution for violation of Minn. Stat. §§609.342 to 609.346, a motion shall be made pursuant to the procedures prescribed by Rule 404(c) of the Minnesota Rules of Evidence."

28. Rule 11.06. Pleas

To permit a county court to accept a plea of guilty to a felony or gross misdemeanor at an Omnibus Hearing referred to that court pursuant to Rule 11.01, amend Rule 11.06 to read as follows:

"11.06. Pleas

"At ~~If~~ the hearing, ~~is held~~ whether in the district court or in the county court pursuant to Rule 11.01, the defendant ~~as provided by Rule 15.07~~ may be permitted to plead to the offense charged in the complaint or to a lesser included offense, or an offense of lesser degree as permitted by Rule 15. ~~If the hearing is held in a county or municipal court, the defendant may be permitted to enter a plea of guilty to a misdemeanor including ordinance violations in lieu of the offense charged in the complaint unless the prosecuting attorney objects. In that event, a new complaint shall be signed by the prosecuting attorney and filed in the county or municipal court. The complaint shall be in the form prescribed by Rule 2.01 and Rule 2.03 except that it need not be made upon oath and the facts establishing probable cause to believe the defendant committed the offense charged need not be provided.~~

29. Rule 11.08, Subd. 1. Recording.

To clarify that a verbatim record of the Omnibus Hearing is necessary, amend the rule to read as follows:

"Subd. 1. Recording. ~~The proceedings shall be on the record.~~ A verbatim record of the proceedings shall be made."

30. Rule 11.09. Review

If the Omnibus Hearing is referred to the county court under Rule 11.01, decisions by that court should be given the same deference as decisions made by a district court in such proceedings. To provide for this, amend Rule 11.09 to read as follows:

"Rule 11.09. Review

"~~Subd. 1. Upon the Record~~. In the event the hearing is held before a county or municipal court, the findings and determinations on the issues presented shall be given the same force and effect as findings and determinations made by the district court. ~~subject to review by the district court before trial upon the record made before the county or municipal court, provided notice specifying the issues to be reviewed is served by the defendant or prosecution upon opposing counsel within five (5) days from the date of the determination of such issues by the county or municipal court and is filed in the office of the clerk of the district court within five (5) days after such service. The district court may at any time before trial on its own motion review the findings and determinations.~~

"~~Subd. 2. Action of District Court. Upon review the district court shall not set aside, amend or modify any of the findings or determinations of the county or municipal court unless it finds them to be clearly erroneous or contrary to law.~~

"~~Subd. 3. Time for Determination. The district court's decision upon review shall be made and entered at least four days before the date of trial.~~

31. Comments on Rule 11.03

Amend the third paragraph of the comments by adding the following sentences at the end of that paragraph:

"In State v. Florence, 239 N.W.2d 892 (Minn. 1976), the Supreme Court discussed the type of evidence that may be presented and considered on a motion to dismiss the complaint for lack of probable cause. Nothing in that case or in the rule prohibits a defendant from calling any witness to testify for the purpose of showing an absence of probable cause. In determining whether to dismiss a complaint under Rule 11.03 for lack of probable cause, the trial court is not simply reassessing whether or not probable cause existed to warrant the arrest. Rather, under Florence the trial court must determine based upon the facts disclosed by the record whether it is fair and reasonable to require the defendant to stand trial."

32. Comments on Rule 11.04

To explain the proposed amendment of Rule 11.04 and the case law concerning various issues to be decided at the Omnibus Hearing, amend the comments by adding the following paragraphs after the present thirteenth paragraph of the comments:

"One of the issues that should be determined at the Omnibus Hearing is the admissibility of the testimony, of any proposed witness who has been subjected to a hypnotic interview concerning the facts of the case. Ordinarily under State v. Mack, 292 N.W.2d 764 (Minn. 1980) the testimony of a previously hypnotized witness concerning the subject matter adduced at a pretrial hypnotic interview may not be admitted in a criminal proceeding. Such testimony may be elicited only to the extent that it covers matters previously and unequivocally disclosed by the witness to the authorities before the hypnosis.

"Under State v. Wenberg, 289 N.W.2d 503 (Minn. 1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. If possible this issue should be heard at the Omnibus Hearing. See Rule 9.01, subd. 1(5) as to the reciprocal duties of the prosecutor and defense counsel to disclose the criminal records of the defendant and any defense witnesses. As to the standards for determining the admissibility of the impeachment evidence see Rule 6.09 of the Minnesota Rules of Evidence and State v. Jones, 271 N.W.2d 534 (Minn. 1978).

"If requested by motion under Rule 10, a hearing on the admissibility of evidence of additional offenses shall be held as part of the Omnibus Hearing. Before such evidence may be considered admissible it must be clear and convincing. Additionally, according to State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) such evidence is admissible only if the prosecution's case is otherwise weak. Because it may not be possible to determine the strength of the prosecution's case until trial, it may be necessary to continue final determination of this issue under Rule 11.07 until that time. The court, however, should determine at the Omnibus Hearing whether the evidence to be presented is clear and convincing. If it does not meet that standard or the other requirements of Rule 404(b) of the Minnesota Rules of Evidence then the court should determine before trial that the evidence is inadmissible. Unless it is not possible to do so, Rule 11.07 requires that all issues presented to the court at the Omnibus Hearing must be decided before trial."

33. Comments on Rule 11.06

To conform to the proposed amendment of Rule 11.06 amend the paragraph of the comments concerning that rule to read as follows:

"Under Rule 11.06 the defendant may plead to the complaint or indictment or to a lesser or different offense as provided by Rules 14 and 15, ~~if~~ whether the Omnibus Hearing is held in the district court or in the county or municipal court pursuant to Rule 11.01. ~~(See Rules 15.05 and 15.06.) If the hearing is held in a municipal or county court the defendant may plead guilty to a misdemeanor, unless the prosecuting attorney objects. In that event a new complaint shall be filed. (Rule 11.06.)~~ See Rules 15.07 and 15.08 as to the standards and procedure for entering a plea to a lesser or a different offense."

34. Comments on Rule 11.08

To clarify that the court has the discretion to determine the method of making a verbatim record of the Omnibus Hearing under Rule 11.08, amend the paragraph of the comments concerning that rule by adding the following sentence at the end of that paragraph:

"The verbatim record required by Rule 11.08, subd. 1, may be

35. Comments on Rule 11.09

To conform to the proposed amendment of Rule 11.09, delete existing paragraphs 18 through 21 of the comments concerning that rule and amend the twenty-second paragraph to read as follows:

"The intent of the Omnibus Hearing rules is that all issues that can be determined before trial shall be heard at the Omnibus Hearing and decided before trial ~~(subject to review when the Omnibus Hearing is held in a municipal or county court)~~. Consequently, when the Omnibus Hearing is held ~~in the district court~~ before a judge other than the trial judge, the trial judge, except in extraordinary circumstances will adhere to the findings and determinations of the Omnibus Hearing judge. See State v. Coe, 298 N.W.2d 770 (Minn. 1980) and State v. Hamling, 314 N.W.2d 224 (Minn. 1982), where this issue was discussed, but not decided."

36. Rule 12.03. Other Issues

Rule 404(b) of the Minnesota Rules of Evidence sets the standards for the admissibility of evidence of other offenses. To refer to this evidentiary rule, amend Rule 12.03 by adding the following paragraph at the end of the rule:

"If the prosecution has given notice under Rule 7.02 of intention to offer evidence of additional offenses, upon motion a hearing shall be held to determine their admissibility under Rule 404(b) of the Minnesota Rules of Evidence and whether there is clear and convincing evidence that defendant committed the offenses."

37. Rule 12.08. Record

Amend subdivision 1 of this rule to read as follows:

"Subd. 1. ~~Reporter~~ Record. Unless waived by counsel, a verbatim record of the proceedings at the evidentiary hearing ~~and at the pretrial conference~~ shall be made. ~~Electronic recording equipment may be used, but upon the request of any party, the court may require the proceedings to be recorded by a court reporter.~~"

38. Comments on Rule 12.03

To explain the proposed amendment of Rule 12.03 and the case law concerning the admissibility of evidence of other crimes and of past convictions for impeachment purposes, amend the comments by adding the following paragraphs after the present third paragraph of the comments:

"Under State v. Wenberg, 289 N.W.2d 503 (Minn. 1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. See Rule 609 of the Minnesota Rules of Evidence and State v. Jones, 271 N.W.2d 534 (Minn. 1978) as to the standards for determining the admissibility of such impeachment evidence.

"If requested by motion under Rule 10, a hearing on the admissibility of evidence of additional offenses shall be held pursuant to Rule 12.03. Before such evidence may be considered admissible it must be clear and convincing. Additionally, according to State v. Billstrom, 276 Minn. 174, 149 N.W.2d 281 (1967) such evidence is admissible only if the prosecution's case is otherwise weak. Because it may not be possible to determine the strength of the prosecution's case until trial, it may be necessary to continue final determination of this issue under Rule 12.07 until that time. The court, however, should determine before trial whether the evidence to be presented is clear and convincing. If it does not meet that standard or the other requirements of Rule 404(b) of the Minnesota Rules of Evidence then the court should determine before trial that the evidence is inadmissible. Unless it is not possible to do so, Rule 12.07 requires that all issues presented to the court under Rule 12 must be decided before trial."

39. Comments on Rule 12.08

Amend the last paragraph of the comments, which concerns Rule 12.08, to read as follows:

"Rule 12.08, subd. 1 requires that a verbatim record of the evidentiary ~~pretrial conference and Raomussen~~ hearing be made ~~either by electronic recording equipment or, in the discretion of the court, by a competent court reporter,~~ by a court reporter, or recording equipment. Rule 12.08, subd. 2 prescribes the circumstances in which a transcript may be furnished to the parties. The record and all papers shall be filed with the clerk of the court in which the proceedings took place (Rule 12.08, subd. 2)."

40. Comments on Rule 13

To conform to the proposed amendments of Rule 8 and Rule 19.04, subd. 4, amend the first paragraph of the comments on Rule 13 to read as follows:

"Arraignment as provided by Rule 13, will take place at the appearance of the defendant in the ~~district~~ court under Rule 8 following a complaint charging a felony or gross misdemeanor or under Rule 19.04, subd. 4 and subd. 5 following an indictment. At that time the defendant may enter only a guilty plea. If the defendant does not wish to plead guilty, no other plea is to be entered then and the arraignment is continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead to the complaint or the complaint as amended or be given additional time within which to plead. In the case of a complaint charging a felony or gross misdemeanor, the arraignment in the ~~district~~ court under Rule 8.01 shall be held within 14 days after the defendant's initial appearance before a ~~county or municipal~~ court (Rule 5.03) under Rule 5, and in the case of an indictment, within 7 days after the defendant's first appearance in the district court (Rule 19.04, subd. 1 and subd. 4)."

41. Comments on Rule 13

To conform to the proposed amendments of Rule 8 and Rule 19.04, subd. 4, amend the sixth and seventh paragraphs of the comments on Rule 13 to read as follows:

"Under Rule 13.04, the defendant shall be called on to plead (see F. R. Crim. P. 10), or shall be given such time as the court determines within which to plead (This follows present Minnesota practice (Minn. Stat. §630.13 (1971)). If the defendant does not plead guilty, Rules 8.04 and 19.04, subd. 5 provide that an Omnibus Hearing under Rule 11 shall be scheduled within ~~10~~ 14 days and 7 days respectively, and he will not be required or permitted to plead earlier than that date.

"By Rule ~~11.07~~ 11.06 he may plead at the Omnibus Hearing ~~if~~ whether the Omnibus Hearing is held in the district court, the county court, or the municipal court."

42. Rule 14.01. Kind of Pleas

Amend the title of this rule to read as follows:

"Rule 14.01. ~~Kind of~~ Pleas Permitted"

43. Comments on Rule 14

Amend the comments by adding the following paragraph after the second paragraph:

"A conditional plea of guilty may not be entered whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or other pretrial order. State v. Lothenbach, 296 N.W.2d 864 (Minn. 1980). One option is to plead not guilty, stipulate the facts, waive jury trial, and, if there is a finding of guilty, appeal the judgment of conviction."

44. Rule 15.01. Acceptance of Plea; Questioning Defendant; Felony and Gross Misdemeanor Cases

Amend number 10 of this rule to read as follows:

"10. Whether his attorney has told him and he understands:

a. That ~~that~~ the maximum penalty that the court could impose for the crime with which he is charged (taking into consideration any prior conviction or convictions is imprisonment for _____ years and that the court could impose that maximum penalty under the Minnesota Sentencing Guidelines.

b. That if a minimum sentence is required by statute the court must impose a sentence of imprisonment of not less than _____ years for the crime with which he is charged."

45. Rule 15.07. Plea to Lesser Offenses

In State v. Carriere, 290 N.W.2d 618 (Minn. 1980), the Supreme Court construed Rule 15.07 as permitting the trial court to accept a plea to a lesser included offense over the objection of the prosecutor only if there is inadequate admissible evidence to support the offense charged. By this construction the court avoided the prosecution's arguments that the rule violated the constitutional restrictions on separation of powers. To conform to this case law restriction, amend the rule to read as follows:

"Rule 15.07. Plea to Lesser Offenses

"With the consent of the prosecuting attorney and the approval of the court, the defendant shall be permitted to enter a plea

of guilty to a lesser included offense or to an offense of lesser degree. Upon motion of the defendant and hearing thereon the court may accept a plea of guilty to a lesser included offense or to an offense of lesser degree, provided the court is satisfied following hearing that the prosecution cannot introduce evidence sufficient to justify the submission of the offense charged to the jury or that it would be a manifest injustice not to accept the plea. In either event, the plea may be entered without amendment of the indictment, complaint or tab charge."

46. Rule 15.09. Record of Proceedings

Amend this rule to read as follows:

"Rule 15.09. Record of Proceedings

"Upon a guilty plea to an offense punishable by incarceration, either a verbatim record of the proceedings shall be made, or in the case of misdemeanors, a petition to enter a plea of guilty, as provided in the Appendix B to Rule 15, shall be filed with the court. ~~Recording equipment may be used, but upon the request of any party, the court in its discretion may require the proceedings to be recorded by a court reporter.~~ In felony and gross misdemeanor cases, any verbatim record made in accordance with this rule shall be transcribed. In misdemeanor cases, any such record need not be transcribed unless requested by the court, the defendant or the prosecuting attorney."

47. Appendix A to Rule 15

Amend number 19b. of the Petition to Enter Plea of Guilty in Appendix A to read as follows:

"b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years and that the court could impose that maximum penalty under the Minnesota Sentencing Guidelines. That if a minimum sentence is required by statute the court must impose a sentence of imprisonment of not less than _____ years for this crime."

48. Appendix B to Rule 15

Number 4 of the form refers to a maximum possible fine of $300. The maximum fine has been raised to $500 so the form is no longer correct. Amend the form by substituting a blank for the $300 figure so that the correct maximum fine for any case can be written on the form.

49. Comments on Rule 15.01

Amend the comments on Rule 15 by adding the following paragraph after the second paragraph of the comments:

"Before entry of a guilty plea, defense counsel should review with the defendant the effect of the Minnesota Sentencing Guidelines on his case. Further, it is almost always desirable for the court to order a pre-plea sentencing guidelines worksheet to be prepared so that the court, the defendant, and both counsel will be aware of the effect of the guidelines at the time the guilty plea is entered."

50. Comments on Rule 15.02

Amend the second sentence of the fifth paragraph of the comments to read as follows:

"Nevertheless, where a defendant is subjected to the possibility of ~~as much as~~ a ~~$300~~ fine and 90 days incarceration, justice re-

quires that the court inform him at least of his fundamental constitutional rights, the elements of the offense charged, and the possible consequences of a guilty plea."

51. Comments on Rule 15.06

Amend the fifth paragraph from the end of the comments, concerning Rule 15.06, by adding the following language at the end of the paragraph:

"Rule 15.06 is consistent with Rule 410 of the Minnesota Rules of Evidence which also governs the admissibility of evidence of a withdrawn plea of guilty. Rule 410 is broader in that it makes inadmissible evidence relating to withdrawn pleas from other jurisdictions including withdrawn pleas of nolo contendere from those jurisdictions which allow such a plea."

52. Comments on Rule 15.07

To conform the comments to the proposed amendment to Rule 15.07 which restricts the power of the court to accept a plea to a lesser offense over the prosecutor's objection, amend the fourth paragraph from the end of the comments to read as follows:

"The rule also authorizes the court on defendant's motion and following a hearing thereon to permit the defendant to plead to a lesser offense without the consent of the prosecuting attorney. In accordance with State v. Carriere, 290 N.W.2d 618 (Minn. 1980), such a plea is permitted only if the court is satisfied, following hearing that the prosecution could not present sufficient admissible evidence to justify submission of the offense charged to the jury. Under State v. Carriere, supra, the showing required of the prosecution in order to withstand the defendant's motion would be in the nature of an offer of proof. Further, the hearing must be in open court and the court's order must include a detailed statement of the reasons for its ruling on the motion. Rule 15.07 also permits a plea to a lesser offense over the prosecutor's objection to prevent a manifest injustice. ~~In either case,~~ Rule 15.07 does not require ~~a record of the reasons for permitting the plea (Compare Minn. Stat. §630.30 (1971).), and the~~ that the indictment or complaint ~~need not~~ be amended. (See State v. Oksanen, 276 Minn. 103, 149 N.W.2d 27 (1967).)"

53. Comments on Rule 15.09

Amend the fifth sentence of the last paragraph of the comments to read as follows:

"The verbatim record may be made by a court reporter or ~~Electronic~~ recording equipment ~~may be used to record the proceedings~~ (see Minn. Stat. §487.11, subd. 2 (1971))."

54. Rule 17.01. Prosecution by Indictment, Complaint or Tab Charge

Rule 8.01 clearly contemplates that a complaint may charge a homicide punishable by life imprisonment, but to avoid any ambiguity amend the first paragraph in Rule 17.01 to read as follows:

"An offense which may be punished by life imprisonment shall be prosecuted by indictment, but the prosecution may proceed by a complaint following an arrest without a warrant or as the basis for the issuance of a warrant of arrest. The procedure thereafter shall be in accordance with the provisions of Rules 8 and 19. Any other offense defined by state law may be prosecuted by indictment or by a complaint as provided by Rule 2. Misdemeanors may also be prosecuted by tab charge."

55. Rule 17.03. Joinder of Offenses and Defendants

State v. Olsen, 258 N.W.2d 898 (Minn. 1977) prescribes the procedure to be followed when two or more defendants jointly charged are repre-

sented by the same counsel. To incorporate those procedures in the rules amend Rule 17.03 by adding a new subdivision 5 to read as follows:

"Subd. 5. Dual Representation. When two or more defendants are jointly charged or will be tried jointly under subdivisions 2 or 4 of this rule, and two or more of them are represented by the same counsel, the procedure hereafter outlined shall be followed before plea and trial.

"(1) The court shall address each defendant personally on the record, advise the defendant of the potential danger of dual representation, and give the defendant an opportunity to question the court on the nature and consequences of dual representation;

"(2) The court shall elicit from each defendant in a narrative statement that the defendant has been advised of his right to effective representation; that the defendant understands the details of his counsel's possible conflict of interest and the potential perils of such a conflict; that the defendant has discussed the matter with his counsel, or if he wishes with outside counsel and that he voluntarily waives his Sixth Amendment protections."

56. Comments on Rule 17.03, Subd. 5

To explain the proposed amendment adding subdivision 5 to Rule 17.03 amend the comments by adding a new paragraph after the eighteenth paragraph in the comments as follows:

"The procedures required by Rule 17.03, subd. 5 concerning representation by the same counsel of two or more defendants jointly charged or tried are taken from State v. Olsen, 258 N.W.2d 898 (Minn. 1977). That case requires that the waiver of Sixth Amendment rights obtained from the defendant must be stated in clear and unequivocal language. If a record is not made as required or if the record fails to show that the procedures were followed in every important respect, State v. Olsen, supra, places the burden on the prosecution to establish beyond a reasonable doubt that a prejudicial conflict of interest did not exist."

57. Comments on Rule 17.05

Amend the paragraph of the comments concerning Rule 17.05 by adding the following sentences at the end of that paragraph:

"Rule 17.05 does not govern the amendment of a complaint after a mistrial and before start of the second trial. Rather, Rule 3.04, subd. 2 which provides for the free amendment of the complaint controls. State v. Alexander, 290 N.W.2d 745 (Minn. 1980)."

58. Comments on Rule 17.06, Subd. 2(1)(a)

The comments to Rule 17.06, subd. 2(1)(a) do not indicate which other rules govern the admissibility and sufficiency of evidence when an indictment is challenged under that rule. Therefore, amend the present twenty-fourth paragraph of the rules by adding the following sentence at the end:

"Upon such a motion the admissibility and sufficiency of evidence pertaining to indictments are governed by Rules 18.06, subd. 1, and 18.06, subd. 2."

59. Rule 18.05. Record of Proceedings

Amend subdivision 1 of this rule to read as follows:

"Subd. 1. Verbatim Record. A verbatim record shall be made by a reporter or recording instrument of the evidence taken before the grand jury and of all statements made and events occurring ~~while a witness is~~ before the grand jury except during deliberations and voting of the grand jury. The record shall not be disclosed except to the court or prosecuting attorney or unless the court, upon motion by the defendant for good cause shown, or upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury, orders disclosure of the record or designated portions thereof to the defendant or his attorneys."

60. Comment on Rule 18.05

To explain the proposed amendment of Rule 18.05, amend the paragraph of the comments concerning that rule to read as follows:

"Rule 18.05, subd. 1, providing for a verbatim record of ~~the evidence taken~~ all statements made and events occurring before the grand jury except during deliberations and voting, supersedes that portion of Minn. Stat. §628.57 (1971) which provides that the minutes of the evidence taken before the grand jury shall not be preserved. (Minn. Stat. §§628.64, 628.65, 628.66 (1971) are not affected.) This rule as amended is similar to the special rule of practice for the First Judicial District which was upheld by the Supreme Court in State v. Hejl, 315 N.W.2d 592 (Minn. 1982) as being consistent with the original language of Rule 18.05. The purpose of Rule 18.05 as amended is to assure that everything said or occurring before the grand jury will be recorded except for during deliberations and voting. This would include any statements made by the prosecuting attorney to the grand jury whether or not any witnesses were present. Of course, under Rule 18.04 during deliberations and voting only grand jury members may be present."

61. Comments on Rule 18.07

Amend the paragraph of the comments concerning Rule 18.07 to read as follows:

"Rule 18.07 adopts the substance of Minn. Stat. §628.08 (1971) except that the indictment shall bear only the signature of the foreman instead of his signed endorsement that it is a 'true bill'. The requirement of Rule 18.07 that an indictment be 'delivered to a judge in open court' is not inconsistent with the general requirement of Rule 18.08 that no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court. Delivery of the indictment does not mean that it must be read or disclosed in court. Also under Rule 33.04 the prosecuting attorney may request the court to delay the filing of the indictment until the arrest of the defendant involved."

62. Rule 19.04, Subd. 4. Date for Arraignment.

To permit the consolidation of the first appearance and the arraignment when the prosecution is by indictment, amend the rule to read as follows:

"Subd. 4. Date for Arraignment. Upon defendant's initial appearance before the district court, he may be arraigned, upon his request and with the consent of the court. If the defendant is not arraigned at the initial appearance, a date shall be ~~fixed~~ set for his arraignment upon the indictment not more than seven (7) days from the date of such initial appearance. The time for appearance may be extended by the district court for good cause. Upon defendant's arraign-

ment, whether at his initial appearance or at some later appearance prior to the Omnibus Hearing, he may only enter a plea of guilty. If he does not wish to plead guilty, he shall not be called upon to enter any other plea and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 he shall plead to the complaint or the complaint as amended or be given additional time within which to plead."

63. Rule 19.04, Subd. 5. Omnibus Hearing Date and Procedure.

The last sentence of this rule provides that for prosecutions by indictment "The (Omnibus) hearing shall not include the issue of probable cause provided by Rule 11.03". Although correct, this sentence is misleading because it is possible to challenge the sufficiency of the evidence heard by the grand jury. Any such challenge, however, proceeds according to Rules 17.06, subd. 2(1)(a) and 18.06, subd. 2 rather than Rule 11.03. To clarify any ambiguity, delete this last sentence of Rule 19.04, subd. 5.

64. Comments on Rule 19.04, Subd. 4

To explain the proposed amendment to Rule 19.04, subd. 4, amend the comments by adding the following sentences at the end of the eleventh paragraph:

"Instead of having a separate arraignment, Rule 19.04, subd. 4, permits the arraignment and initial appearance to be consolidated. This is possible only if requested by the defendant and agreed to by the court. Ordinarily, the Omnibus Hearing would then be held within seven (7) days after the consolidated initial appearance and arraignment under Rule 19.04, subd. 5, but that rule also permits the court to extend that time for good cause."

65. Comments on Rule 19.04, Subd. 5

To explain the proposed amendment of Rule 19.04, subd. 5 amend the second to last paragraph of the comments to read as follows:

"The Omnibus Hearing shall be held in district court, or by reference in a municipal or county court, in accordance with the provisions of Rule 11. (See comments to Rule 11.) If at the Omnibus Hearing the defendant wishes to challenge the sufficiency of the evidence heard by the grand jury to support the indictment that challenge is governed by Rule 17.06, subd. 2(1)(a) and Rule 18.06, subds. 1 and 2. The provision in Rule 11.03 concerning a motion that there is an insufficient showing of probable cause applies only to complaints and not to indictments."

66. Comment on Rule 19.04, Subd. 6(1)

The twelfth paragraph of the comments concerning Rule 19.04, subd. 6(1) is inconsistent with the rules in that it fails to indicate that the Rasmussen notice can be served on the date of the arraignment. To correct this, amend the paragraph to read as follows:

"On or before ~~Before~~ the date of the arraignment the prosecuting attorney shall give the Rasmussen notice required by Rule 19.04, subd. 6(1). (See Rule 7.01 and Comments to Rule 7.01.)"

67. Rule 20.01, Subd. 5. Continuing Supervision by the Court in Felony and Gross Misdemeanor Cases.

Under case law (In the Matter of the Mental Illness of K.B.C, 308 N.W.2d 495 (Minn. 1981)) and the new Minnesota Commitment Act of 1982 (Minn. Stat. Ch. 253B) adequate protection is provided against the unjustified release of a criminal defendant who has been committed as mentally ill and dangerous. There is now little need for the possibly unconstitutional provisions in Rules 20.01, subd. 5 and 20.02, subd. 8(4) granting the criminal trial court continuing super-

vision of the termination of the civil commitment of a criminal defendant. Rule 20.01, subd. 5 should therefore be amended to read as follows:

"Subd. 5. Continuing Supervision by the Court in Felony and Gross Misdemeanor Cases. The head of the institution to which the defendant is committed under civil commitment proceedings, or if the defendant is not committed to an institution, the officer or other person charged with his supervision or to whom he has been committed, shall report periodically to the trial court, at such times as the court shall provide, on the defendant's mental condition with an opinion as to his competency to proceed. The reports shall be made not less than once every six months unless otherwise ordered. Copies of the reports shall be furnished to the prosecuting attorney and to defense counsel.

"When the court on application of the prosecuting attorney, defense counsel, the defendant, or the person having supervision over the defendant, or on the court's own motion, determines, after a hearing with notice to the parties, that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed. Unless the criminal charges against the defendant have been dismissed as provided by Rule 20.01, subd. 6, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial institutionalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment~~, and the court, after notice to the parties, shall hold a hearing thereon. If the court determines that the defendant is mentally ill or deficient and dangerous to the public, the defendant shall not be discharged from civil commitment. Otherwise, the civil commitment proceedings shall be terminated and the defendant discharged therefrom.~~ The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status."

68. Rule 20.02, Subd. 8(4) Continuing Supervision.

Amend this rule to read as follows:

"(4) Continuing Supervision. In felony and gross misdemeanor cases only, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial hospitalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment~~, and the court, after notice to the parties, shall hold a hearing thereon. If the court determines that the defendant is mentally ill or deficient and dangerous to the public, the defendant shall not be discharged from civil commitment. Otherwise, the civil commitment shall be terminated and the defendant discharged therefrom.~~ The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status."

69. Comments on Rule 20.01, Subd. 2(1)

To conform to statutory changes in the civil commitment law, amend the sixth paragraph of the comments to read as follows:

"If the charge is a misdemeanor, the county or municipal court has the options of (1) following the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9; (2) causing civil commitment proceedings to be instituted immediately under Minn. Stat. §~~253.07 (1971)~~253B.07 (1982) or; (3) dismissing the case, unless dismissal would be contrary to the public interest (Rule 20.01, subd. 2(1).)"

70. Comments on Rules 20.01, Subd. 4(2)(a) and (b) and 20.01, Subd. 5

To conform to the statutory changes in the civil commitment law and to the proposed amendment in Rule 20.01, subd. 5 amend the twelfth paragraph of the comments to read as follows:

"If the defendant is under civil commitment under Minn. Stat. Ch. ~~253A (1971)~~ 253B (1982), the civil commitment shall be continued (Rule 20.01, subd. 4(2)(a) and (b).) If he is not under civil commitment, commitment proceedings under Minn. Stat. ~~§253A.07 (1971)~~ 253B.07 (1982) in the county or probate court shall be instituted against him. ~~In either case, the civil commitment shall be subject to the supervision of the trial court and may not be terminated except after notice and hearing before the trial court (Rule 20.01, subd. 5). (At this hearing, the court may also make a determination of the defendant's competency to proceed.)~~"

71. Comments on Rule 20.01, subd. 4(2)(c)

To conform to statutory changes in the civil commitment law, amend the third sentence of the fifteenth paragraph of the comments to read as follows:

"Otherwise, the appeal shall be governed by the appeal provisions of the County Court Act Minn. Stat., Ch. 487 ~~(1971)~~ (1982) applicable to appeals from a county to the district court, and not by the appeal provisions of Minn. Stat. ~~§§253A.21~~ 253B.23 or 525.71-525.75 ~~(1971)~~ (1982) governing appeals from civil commitment proceedings or appeals from a probate court."

72. Comments on Rule 20.02, Subd. 8(4)

To conform to the proposed amendments of Rules 20.01, subd. 5 and 20.02, subd. 8(4) amend the comments by adding the following paragraph after the present paragraph concerning Rule 20.02, subd. 8(4):

"Rules 20.02, subd. 8(4) and 20.01, subd. 5 both require that the trial court and the prosecuting attorney be notified of any proposed institutional transfer or partial hospitalization status (see Minn. Stat. §253B.15, subd. 11) or any proposed discharge, provisional discharge, or other termination of a defendant's civil commitment when that defendant has been found not guilty by reason of mental illness or deficiency or incompetent to proceed. The prosecuting attorney then has the right to participate as a party in any civil proceedings being conducted under the Minnesota Commitment Act of 1982, Minn. Stat., Ch. 253B, concerning those matters. As such, the prosecuting attorney could question and present witnesses and argue for the continued commitment of the defendant in the civil proceedings. A person committed as mentally ill and dangerous can be discharged from that commitment only under the provisions of Minn. Stat. §253B.18. Unlike patients committed as mentally ill only, patients committed as mentally ill and dangerous may not seek a discharge or provisional discharge of their commitment under Minn. Stat. §253B.17 in the probate court which committed them or from the head of the institution under Minn. Stat. §253B.16. Rather, Minn. Stat. §253B.18 permits their discharge or provisional discharge only if ordered by the Commissioner of Public Welfare after receiving a recommendation to that effect from an administrative special review board following a hearing. The Commissioner's decision may be appealed to a three judge probate appeal panel appointed by the Supreme Court. The probate appeal panel then conducts a de novo hearing before deciding on the discharge or provisional discharge of the defendant. Minn. Stat. §253B.19. Beyond that, any party may appeal an adverse decision to the Minnesota Supreme Court and an appeal of a release order stays the effect of that order until the appeal is decided by the Supreme Court. Minn. Stat. §253B.19, subd. 5. This is basically the same procedure as provided by the previous law under Minn. Stat. §253A.15 as interpreted by the court in In the Matter of the Mental Illness of K.B.C., 308 N.W.2d 495 (Minn. 1981)."

73. Comments on Rule 20.03

To explain case law concerning Rule 20.03 amend the fourth paragraph from the end of the comments by adding the following language at the end of that paragraph:

"These rules allow the prosecution to call a defense-retained psychiatrist to testify at the mental illness portion of a bifurcated trial and such a practice does not violate the defendant's attorney-client privilege or his constitutional right to the effective assistance of counsel. State v. Dodis, 314 N.W.2d 233 (Minn. 1982)."

74. Comments on Rule 23.03

Amend the sixth paragraph of the comments by adding the following language at the end of that paragraph:

"See Minn. Stat. §§488A.08, 488A.25, and 487.28 (1981) as to the establishment of violations bureaus in Hennepin County, Ramsey County, and all other counties, respectively."

75. Rule 26.02, Subd. 4. Voir Dire Examination.

The first sentence of subdivision 4(1) of this rule was amended on November 13, 1978, effective January 1, 1979, to require that the voir dire examination "shall be open to the public". At that time the remainder of provision (1) which explained the procedure to be followed on voir dire and authorized the court to give preliminary instructions was mistakenly deleted. To reinsert the deletions mistakenly made in Rule 26.02, subd. 4(1) in 1978 amend subdivision 4(1) of the rule to read 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. 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 he 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."

76. Rule 26.03, Subd. 11. Order of Jury Trial.

Amend parts "h" and "i" of this rule governing the order of final argument to read as follows:

"h. At the conclusion of the evidence, the ~~prosecution~~ defendant may make a closing argument to the jury.

"i. The ~~defendant~~ prosecution may then make a closing argument to the jury. The defendant shall then be permitted time to reply in rebuttal and shall raise in rebuttal no new issues of law or fact which were not presented in one or both of the prior arguments. Only if the court determines that the defendant's rebuttal was clearly improper shall the prosecution be entitled to reply in surrebuttal."

77. Rule 26.03, Subd. 15. Evidence.

Because of the adoption of the Minnesota Rules of Evidence, the provisions in this rule governing the admissibility of evidence and the competency of witnesses are no longer necessary. Therefore, amend the rule to read as follows:

> "Subd. 15. Evidence. In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. ~~All evidence shall be admitted which is admissible under the statutes of this state, or under the rules of evidence applied in the trials of criminal offenses in the courts of this state. 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.~~"

78. Rule 26.03, Subd. 19(6). Impeachment of Verdict.

Rule 606(b) of the Minnesota Rules of Evidence now governs the admissibility of evidence upon an inquiry into the validity of a verdict or indictment. Amend part (6) of this rule as follows to add a reference to that rule of evidence:

> "(6) Impeachment of Verdict. Affidavits of jurors shall not be received in evidence to impeach their verdict. If the defendant has reason to believe that the verdict is subject to impeachment, he shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded. The admissibility of evidence at the hearing shall be governed by Rule 606(b) of the Minnesota Rules of Evidence."

79. Rule 26.03, Subd. 19. Jury Deliberations and Verdict.

A partial verdict is authorized by State v. Olkon, 299 N.W.2d 89 (Minn. 1980). To incorporate that into the rules, amend Rule 26.03, subd. 19 by adding a new provision (7) as follows:

> "(7) Partial Verdict. The court may accept a partial verdict when the jury has agreed on a verdict of conviction on less than all of the charges submitted, but is unable to agree on the remainder."

80. Comments on Rule 26.01, Subd. 1(1)

Amend the third paragraph of the comments by substituting "$500" for "$300" as the possible fine for misdemeanors.

81. Comments on Rule 26.02, Subd. 4(1)

Amend the paragraph of the comments concerning Rule 26.02, subd. 4(1) by adding the following sentences at the end of that paragraph:

> "The court has the right and the duty to assure that the inquiries by the parties during the voir dire examination are 'reasonable'. The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper."

82. Comments on Rule 26.03, Subd. 11

To conform to the proposed amendment of sections (h) and (i) governing the order of final argument in Rule 26.03, subd. 11, amend the paragraph of the comments concerning that rule to read as follows:

> "Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. §546.11 (1971).) The order of closing argument,

under sections 'h' and 'i' of this rule ~~continues to be the same as under existing~~ differs from that provided by Minn. Stat. §631.07 (1971) ~~with~~ under which the prosecution ~~proceeding~~ proceeded first and then the defendant."

83. Comments on Rule 26.03, Subd. 15

Amend the paragraph of the comments concerning this rule to read as follows:

"Rule 26.03, subd. 15 (Evidence) ~~adopts Minn. R. Civ. P. 43.01~~ 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."

84. Comments on Rule 26.03, Subd. 19

To explain the amendment to Rule 26.03, subd. 19 adding provision (7), amend the comments by adding the following paragraph after the paragraph in the comments concerning Rule 26.03, subd. 19(6):

"Rule 26.03, subd. 19(7) (Partial Verdict) is taken from State v. Olkon, 299 N.W.2d 89 (Minn. 1980) which authorized the court to accept a partial verdict."

85. Rule 27.02. Presentence Investigation

Amend Rule 27.02 to read as follows:

"Rule 27.02. Presentence Investigation in Misdemeanor Cases

"~~Subd. 1. When Made. When a defendant has been convicted of a felony, gross misdemeanor, or misdemeanor, and a sentence of life imprisonment is not required by law, the court may, before sentence is imposed, order a presentence investigation and report as provided by law and shall do so when required by law.~~

"~~Subd. 2. Scope of Investigation and Report. The presentence investigation and report shall include the information permitted and required by law.~~ In misdemeanor cases, the report of the presentence investigation may be oral if so directed by the court.

"~~Subd. 3. Disclosure of Report. Subject to the limitations of Minn. Stat. §609.115, subd. 4, a copy of the presentence report, if written, shall be provided to counsel for all parties before sentence. Otherwise, the presentence report shall be subject to disclosure only as provided by law.~~ If the presentence report is given orally, the defendant or his attorney shall be permitted to hear the report.

"~~Subd. 4. Mental or Physical Examination. Upon motion of the defendant or the prosecutor or on its own motion, the court may order the defendant to submit to a mental or physical examination which would be relevant to the sentencing decision. Copies of the report of such examination or any other examination to be considered for the purpose of sentencing shall be disclosed to counsel for the parties. Any evidence derived from the examination may not be used against the defendant in any subsequent proceedings or on retrial except for the review of the sentence.~~"

86. Rule 27.03. Sentencing Proceedings

Because of the substantial changes required by the sentencing guidelines law in Minn. Stat. Ch. 244, many of the sentencing procedures set forth in Rule 27.03 are no longer appropriate. Be-

cause of this, an ad hoc volunteer committee chaired by Chief Justice Amdahl drafted proposed rules for use under the sentencing guidelines. These rules have already been approved by the District Court Judges Association and the Ramsey County District Court judges. To incorporate the procedure recommended by the ad hoc committee into the Rules of Criminal Procedure, amend subdivisions 1, 2, 3, 4, and 5 of Rule 27.03 to read as follows:

"Subd. 1. Hearings. ~~Summary hearings~~ Hearings upon the presentence report and upon the sentence to be imposed upon the defendant shall be held as provided by law. Before the sentencing proceeding, in a misdemeanor or gross misdemeanor case, each party shall notify the opposing party and the court of any part of a written presentence report which he intends to controvert by the production of evidence. Both the prosecutor and the defendant or his attorney shall have an opportunity to controvert any part of an oral presentence report and for such purpose the court may continue the sentencing.

"The procedure for such hearings in felony cases shall be as follows:

"(A) At the time of, or within three days after a plea, finding or verdict of guilt of a felony, the court may order a presentence investigation and shall order that a sentencing worksheet be completed. As part of any presentence investigation and report, the court may order a mental or physical examination of the defendant. Any evidence derived from the examination may not be used against the defendant in any subsequent proceedings or on retrial except for the review of the sentence. The court shall also then:

"(1) Set a date for the return of the report of the presentence investigation.

"(2) Set a date, time and place for the sentencing.

"(3) Order the defendant to return at such date, time and place.

"(4) If the facts ascertained at the time of a plea or through trial cause the judge to consider departure from the sentencing guidelines appropriate, the court shall advise counsel of such consideration.

"(B) The presentence investigation report, if ordered, shall include the information required by Minn. Stat. §609.115, subd. 1, a completed sentencing guidelines worksheet and any supplemental worksheets and such other information as the court may direct. The report shall be submitted to the court in triplicate.

"(C) The court shall cause a copy of the sentencing worksheet and the nonconfidential portion of the presentence investigation report, if any, to be forwarded to the prosecutor and to the defendant or his attorney subject to the limitations of Minn. Stat. §609.115, subd. 4. If the presentence investigation report contains a confidential information section that portion need not be forwarded to counsel or to defendant but counsel should be advised that such information is available for inspection at some designated place.

"If departure from the sentencing guidelines appears appropriate, and the court has not previously notified the parties or counsel for the parties that the court is considering departure, the court shall forward notification of such consideration at the time the sentencing worksheet and any presentence investigation report is forwarded.

"(D) Upon receipt of the sentencing worksheet and any presentence investigation report, any party desiring a sentencing hearing shall, not later than eight days before the date for the sentencing, file with the court and serve on opposing counsel a motion for such hearing, except that when the sentencing worksheet and any presentence investigation report is received within eight days prior to the sentencing date, the motion for a sentencing hearing shall be made within a reasonable time after receipt of the worksheet and any report. If necessary, the court shall continue the sentencing.

"The motion for a sentencing hearing shall specifically set forth the reasons for the motion, including a designation of any portion of the presentence investigation report or sentencing guidelines worksheet challenged, and the grounds for the challenge supported by affidavits or other documentation.

"(E) Opposing counsel shall file and serve any reply not later than three days before the sentencing date.

"(F) At the sentencing hearing, issues raised in the sentencing hearing motion shall be heard. In addition, any remaining factual or legal issues relating to the sentence shall be succinctly stated on the record by counsel. The court shall also permit the record to be supplemented by such testimony as it deems relevant and material to the issues.

"At the conclusion of the sentencing hearing, the court may state into the record findings of fact, conclusions of law and appropriate order on the issues submitted by the parties. Otherwise, the court shall issue written findings of fact, conclusions of law and appropriate order within twenty days of the conclusion of the sentencing hearing.

"If it is determined upon hearing that the sentencing worksheet or supplement submitted as a part of any presentence investigation report contains an error or errors, the court shall cause a corrected worksheet to be prepared, filed and submitted to the sentencing guidelines commission.

"(G) The court may impose sentence immediately following the conclusion of the sentencing hearing.

"Subd. 2. Defendant's Presence at Hearing and Sentencing. Defendant must be personally present at the sentencing hearing and at the time sentence is pronounced except when excused pursuant to Rule 26.03, subd. 1(3). Sentence may be pronounced against a corporation in the absence of counsel if counsel fails to appear on the date of sentence after reasonable notice thereof.

"Subd. 3. Statements at Time of Sentencing. Before pronouncing sentence, the court shall give the prosecutor and defense counsel an opportunity to make a statement with respect to any matter relevant to the question of sentence including a recommendation as to sentence ~~only if requested by the court~~. The court shall also address the defendant personally and ask him if he wishes to make a statement in his own behalf and to present any information before sentence. The court shall not accept any communication relative to sentencing that is not on the record without disclosing the contents to the defense and to the prosecution.

"Subd. 4. Imposition of Sentence. When sentence is imposed the court:

"(A) ~~(a)~~ Shall state the precise terms of the sentence.

"(B) ~~(b)~~ Shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed.~~, which~~

Such time shall be automatically deducted from the sentence and the term of imprisonment except when the time was spent in custody as a condition of probation from a prior stay of imposition or execution of sentence.

"(C) For felony cases if the sentence imposed deviates from the sentencing guidelines applicable to the case, the court shall state into the record findings of fact as to the reasons for departure and shall complete, or cause to be completed, and forwarded to the sentencing guidelines commission a departure form as provided by the commission.

"(D) Prior to imposition of a sentence in a felony case which deviates from the sentencing guidelines, the court shall allow either party to request a sentencing hearing if no sentencing hearing was held and the court did not give prior notice that the sentence imposed might depart from the sentencing guidelines.

"(E) If the court elects to stay imposition or execution of sentence, and:

"(1) Requires a period of confinement as a condition of probation in felony cases, the court shall advise the defendant that such time may not be credited against his sentence in the event that probation is ultimately revoked and sentence executed.

"(2) If noncriminal conduct could result in revocation, the trial court should advise the defendant so that he can be reasonably able to tell what lawful acts are prohibited.

"(3) A written copy of the conditions of probation should be given to the defendant at the time of sentencing or soon thereafter.

"(4) The defendant should be told that in the event of a disagreement between himself and his probation agent as to the terms and conditions of probation, he can return to the court for clarification if necessary.

"Subd. 5. Notice of Right to Appeal. After imposition of sentence or granting of probation ~~in a case which has gone to trial~~ the court shall inform the defendant of his right to appeal the judgment of conviction or sentence or both and the right of a person who is unable to pay the cost of appeal to apply for leave to appeal at state expense by contacting the state public defender."

87. Rule 27.04. Probation Revocation

The rules do not presently include a procedure for the revocation of probation. To provide such a procedure amend Rule 27 by adding a new section, Rule 27.04, to read as follows:

"Rule 27.04. Probation Revocation

"Subd. 1. Commencement of Proceedings.

"(1) Issuance of Revocation Warrant or Summons. Proceedings for the revocation of probation shall be commenced by the issuance of a warrant or a summons by the court based upon a written report showing probable cause to believe that the probationer has violated any conditions of probation. The written report shall include a description of the surrounding facts and circumstances upon which the request for revocation is based. In any case the court may issue a summons instead of a warrant whenever it is satisifed that a warrant is unnecessary to secure the appearance of the probationer. If the probationer fails to appear in response to a summons, a warrant may be issued.

"(2) Contents of Warrant and Summons. Both the warrant and summons shall contain the name of the probationer, a description of the probationary sentence sought to be revoked, the signature of the issuing judge or judicial officer of the county or district court, and shall be accompanied by the written report upon which it was based. The amount of any bail or other conditions of release may be set by the issuing judge or judicial officer and endorsed on the warrant. The warrant shall direct that the probationer be brought promptly before the court that issued the warrant if it is in session. If that court is not in session the warrant shall direct that the probationer be brought before a judge or judicial officer of that court, without unnecessary delay, and in any event not later than 36 hours after the arrest exclusive of the day of arrest, or as soon thereafter as such judge or judicial officer is available. The summons shall summon the probationer to appear at a stated time and place to respond to the revocation charges.

"(3) Execution or Service of Warrant or Summons; Certification. Execution, service, and certification of the warrant or summons shall be as provided in Rule 3.03.

"Subd. 2. First Appearance.

"(1) Advice to Probationer. When a probationer initially appears before the court pursuant to a warrant or summons concerning an alleged probation violation, he shall be advised of the nature of the charge against him. He shall also be given a copy of the written report upon which the warrant or summons was based if he has not previously received such report. The judge, judicial officer, or other duly authorized personnel shall further advise the probationer substantially as follows:

"a. That he is entitled to counsel at all stages of the proceedings, and if he is financially unable to afford counsel, one will be appointed for him at his request;

"b. That unless waived, a revocation hearing will be held to determine whether there is clear and convincing evidence that he has violated any conditions of probation and that probation should therefore be revoked;

"c. That before the revocation hearing the prosecution shall disclose to the probationer all evidence to be used against him, and shall provide him with access to all official records pertinent to the proceeding;

"d. That at the hearing both the prosecution and the probationer shall have the right to offer evidence, present arguments, subpoena witnesses, and call and cross-examine witnesses, provided, however, that the probationer may be denied confrontation by the court when good cause is shown that a substantial risk of serious harm to others would exist if it were allowed. Additionally, the probationer shall have the right at the revocation hearing to present mitigating circumstances or other reasons why the violation, if proved, should not result in revocation;

"e. That the probationer has the right of appeal from the determination of the court following the revocation hearing.

"(2) Appointment of Counsel. The appointment of counsel for a probationer financially unable to afford counsel shall be governed by the standards and procedures set forth in Rule 5.02.

"(3) Conditions of Release. The probationer may be released pending appearance at the revocation hearing. In deciding upon the conditions of release and whether to release the probationer, the court shall take into account the conditions of release and

the factors determining the conditions of release as provided by Rule 6.02, subd. 1 and subd. 2 and whether there is a reason to believe that the probationer will flee or pose a danger to any person in the community. The burden of establishing that the probationer will not flee or will not be a danger to any other person or the community rests with the probationer.

"(4) Time of Revocation Hearing. The court shall set a date for the revocation hearing to be held within a reasonable time before the court which granted probation. If the probationer is in custody as a result of the revocation proceedings, the revocation hearing shall be held within seven days. If the probationer has allegedly violated a condition of probation by commission of a crime, the court may, with the consent of the probationer, postpone the revocation hearing pending disposition of the criminal case whether or not the probationer is in custody.

"(5) Record. A verbatim record shall be made of the proceedings at the probationer's initial appearance before the court under this rule.

"Subd. 3. Revocation Hearing.

"(1) Hearing Procedures. The hearing shall be held in accordance with the provisions of subd. 2(1)(a), (b), (c), and (d) of this rule.

"(2) Finding of No Violation of Conditions of Probation. If the court finds that a violation of the conditions of probation has not been established by clear and convincing evidence, the revocation proceedings shall be dismissed, and the probationer's probation continued under the conditions theretofore ordered by the court.

"(3) Finding of Violation of Conditions of Probation. If the court finds upon clear and convincing evidence that any conditions of probation have been violated, or if the probationer admits the violation, the court may proceed as follows:

"a. Imposition of Sentence Stayed. If imposition of sentence was initially stayed, and probationer placed on probation, the court may again stay imposition of sentence or impose sentence and stay execution thereof, and in either event place the probationer on probation pursuant to Minn. Stat. §609.135, or impose sentence and order the execution thereof.

"b. Execution of Sentence. If execution of sentence initially imposed was stayed and probationer placed on probation, the court may continue the stay and place the probationer on probation in accordance with the provisions of Minn. Stat. §609.135, or order execution of the sentence previously imposed.

"(4) Record of Findings. A verbatim record shall be made of the proceedings at the revocation hearing and in any contested hearing the court shall make written findings of fact on all disputed issues including a summary of the evidence relied upon and a statement of the court's reasons for its determination.

"(5) The probationer or the prosecution may appeal from the court's decision according to the procedure provided for appeal from a sentence by Rule 29.04.

"Subd. 4. Immunity.

"Testimony or information given by a probationer at a revocation hearing, or any information derived from such testimony or information shall not be admissible against the probationer in any judicial proceeding against the probationer other than a prosecution for perjury or impeachment of his testimony under oath."

88. Comments on Rule 27.02

To conform to the proposed amendment of Rule 27.02, delete entirely the fourth, fifth, sixth and seventh paragraphs of the comments and amend the third paragraph to read as follows:

"Rule 27.02 (Presentence Investigation in Misdemeanor Cases.) In misdemeanor cases the presentence investigation report may be oral rather than written and this will often be the case. Where the report is oral, the defendant or his attorney must be allowed to hear the report when given."

89. Comments on Rule 27.03

To conform to the proposed amendments of Rule 27.03 governing sentencing procedures, amend the present comments on Rule 27.03, subd. 1 through subd. 5 to read as follows:

"Rule 27.03, subd. 1 (Hearings) adopts for misdemeanors and gross misdemeanors the provisions for summary hearings upon the presentence report and sentence contained in Minn. Stat. §§609.115, subd. 4, ~~609.155,~~ and 631.20 ~~(1971)~~ (1982). The provision for notice of any part of the presentence report that a party intends to controvert comes from ABA Standards, Sentencing Alternatives and Procedures, ~~4.5(b)~~ 18-5.5 (Approved Draft, 1979 ~~1968~~). Of course, where the report is oral, there would be no opportunity to give such notice and possibly no chance to controvert objectionable information contained in the report. Both parties are entitled to an opportunity to controvert even parts of an oral report and to do this the court may continue the sentencing so evidence can be obtained.

"Sentencing in felony cases for offenses committed on or after May 1, 1980 is governed by Minn. Stat., Ch. 244 and the Minnesota Sentencing Guidelines promulgated pursuant to those statutes. The more complex procedures required by these rules for felony cases are necessary for a proper sentencing decision under the sentencing guidelines. Because of the adoption of the Minnesota Sentencing Guidelines an ad hoc volunteer committee chaired by Chief Justice Douglas Amdahl drafted proposed rules for sentencing under the guidelines. These rules were approved by the District Court Judges Association and the Ramsey County District Court Judges. The proposals of the ad hoc committee have been substantially incorporated into Rules 27.03, subds. 1 through 5 and these comments.

"The Sentencing Guidelines Commission recommends that where the felony involved a sexual offense, that the trial court order a physical or mental examination of the offender as a supplement to the presentence investigation permitted by Minn. Stat. §609.115. Minnesota Sentencing Guidelines and Commentary, Training Material, III. E. (Hereinafter referred to as Training Manual.) Rule 27.03, subd. 1(A) permits the court to order such examinations. This rule is not intended to preclude a post-sentence investigation whenever required by statute (Minn. Stat. §609.115, subd. 2 (sentence of life imprisonment)) or whenever the court considers one necessary. The presentence investigation may include the information obtained on the pretrial release investigation under Rule 6.02, subd. 3.

"The date for the return of the presentence investigation report should be set sufficiently in advance of sentencing to allow counsel sufficient time to make any motion pursuant to Rule 27.03, subd. 1(D).

"The date of the sentencing should be determined after consultation with counsel to determine if unusual problems are anticipated in obtaining the information necessary to

complete the report of the presentence investigation (e.g., securing necessary documentation of out-of-state convictions needed to compute the criminal history index score).

"As to the confidential information section of a presentence investigation report mentioned in Rule 27.03, subd. 1(C), see County of Sherburne v. Schoen, 306 Minn. 171, 236 N.W.2d 592 (1975).

"The ad hoc committee suggested that judges rely on the facts of the conviction offense or offenses considered in the light of factors such as are set forth in the guidelines as a ground for departure and not ask for recommendations for departure from the presentence investigator.

"Rule 27.03, subd. 1(D) essentially continues existing practice and imposes time requirements. Unlike Minn. Stat. §244.10, subd. 1, this rule does require that the motion for a sentencing hearing include grounds.

"Rule 27.03, subd. 1(F) is in accord with Minn. Stat. §244.10, subd. 1, which requires that written findings of fact, conclusions of law and appropriate order on the issues raised at the sentencing hearing be issued at the conclusion of the hearing or within twenty days thereafter.

"In Rule 27.03, subd. 1(G) the term 'sentencing hearing' refers to the hearing required by Minn. Stat. §244.10, subd. 1 on issues of sentencing. In the usual case, actual sentencing should immediately follow.

"Rule 27.03, subd. 2 (Defendant's Presence at Hearing and Sentencing) is adopted from F. R. Crim. P. 43. See also N.Y.C.P.L. 380.40.

"Rule 27.03, subd. 3 (Statements at the Time of Sentencing) is based on ABA Standards, Sentencing Alternatives and Procedures, ~~5.4~~ 18-6.3 and 18-6.4 (Approved Draft, ~~1968~~ 1979). See also N.Y.C.P.L. 380.50.

"Rule 27.04, subd. 4 (Imposition of Sentence) parts (A) and (B) are ~~is~~ based on ABA Standards, Sentencing Alternatives and Procedures, ~~5.6~~ 18-6.6iii, iv (Approved Draft, ~~1968~~ 1979). Existing law relating to probation is continued (Minn. Stat. §§609.135, 609.14). Under the Minnesota Sentencing Guidelines any time spent in custody as a condition of probation need not be credited against a sentence if probation is ultimately revoked. Training Manual, III. C.

"Minn. Stat. §244.10, subd. 2 requires written findings of fact as to the reasons for departure from the sentencing guidelines. The court's statement into the record under Rule 27.03, subd. 4(C) should satisfy this requirement.

"Rule 27.03, subd. 4(D) is designed to eliminate any possible due process notice problems where a defendant does not request a sentencing hearing because of an expectation that he will receive a sentence in conformance with the sentencing guidelines. It is also anticipated that fewer sentencing hearings will be requested by the prosecution and defense so long as there is an opportunity to request such a hearing after notice that the court might depart from the guidelines.

"Rule 27.03, subd. 4(E) is designed to avoid any due process notice problems if probation is revoked and sentence executed. Since a defendant has a right to refuse probation when the conditions of the probation are more onerous than a prison sentence, State v. Randolph, 316 N.W.2d 508 (Minn. 1982), he may well elect not to accept probation if he believes that he may fail to satisfy the conditions of probation, and may not receive credit for time spent in custody as part of probation against his eventual sentence.

"As to part (E)(2) of Rule 27.03, subd. 4, the sentencing guidelines indicate that revocation of a stayed sentence should not be based on merely technical violations, and a court should instead use expanded and more onerous conditions of probation for such technical violations. Training Manual III. B. The Minnesota Supreme Court has stated that a trial court should refer to the following ABA Standard in determining whether to revoke probation:

"Grounds for and alternatives to probation revocation.

"(a) Violation of a condition is both a necessary and a sufficient ground for the revocation of probation. Revocation followed by imprisonment should not be the disposition, however, unless the court finds on the basis of the original defense and the intervening conduct of the offender that:

"(i) confinement is necessary to protect the public from further criminal activity by the offender; or

"(ii) the offender is in need of correctional treatment which can most effectively be provided if he is confined; or

"(iii) it would unduly depreciate the seriousness of the violation if probation were not revoked. ABA Standards for Criminal Justice, Probation §5.1(a) (Approved Draft, 1970) cited in State v. Austin, 295 N.W.2d 246 (Minn. 1980).

"Rule 27.03, subd. 5 (Notice of Right to Appeal) is based on F. R. Crim. P. 32. Failure to notify the defendant of his right to appeal does not extend the time for appeal. Minn. Stat. §244.11 authorizes either the defendant or the state to appeal from a sentence whether imposed or stayed. See Rule 29.04 for the procedure to be followed on such an appeal."

90. Comments on Rule 27.04

To explain the new proposed Rule 27.04 establishing probation revocation procedures, amend the comments to Rule 27 by adding the following language at the end of the present comments:

"Rule 27.04 (Probation Revocation) sets forth the procedure to be followed to assure that a defendant is accorded all of his constitutional rights to due process as set forth in Gagnon v. Scarpelli, 411 U.S. 778 (1973) and Morrissey v. Brewer, 408 U.S. 471 (1972) before his probation is revoked. The rule is based primarily on ABA Standards, Sentencing Alternatives and Procedures, 18-7.5 (Approved Draft, 1979) except that no preliminary hearing to determine probable cause is required. Such a hearing, however, is not constitutionally required if the defendant is not in custody or if the final revocation hearing is held within the time that the preliminary hearing would otherwise be required. Pearson v. State, 308 Minn. 287, 241 N.W.2d 490 (1976). The requirement of Rule 27.04, subd. 2(4) that the final revocation hearing be held within seven days if the defendant is in custody makes a preliminary hearing constitutionally unnecessary. It is, however, necessary under Rule 27.04, subd. 1(2) that the defendant be brought before the court after his arrest within the same time limits as set forth under Rule 3.02, subd. 2 for arrests upon warrant. At that time the court may order the defendant released under Rule 27.04, subd. 2(3) pending the final revocation hearing. At that initial appearance the defendant shall also be given the written report showing probable cause if he has not already received that, have counsel appointed if necessary, be advised as to his rights under the rule, and have a time set for the final revocation hearing.

"The provisions in Rule 27.04, subd. 1(1) as to the contents of the written report and in Rule 27.04, subd. 2(1) as to the defendant's various procedural rights are taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(d) and (e) (Approved Draft, 1979). The provisions in Rule 27.04, subd. 2(3) concerning release of the defendant are similar to those set forth in Rule 27.01 concerning release of a defendant pending sentencing. The standard of proof set forth in Rule 27.04, subd. 3(2) and (3) is taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(e).

"The use immunity provided by Rule 27.04, subd. 4 is similar to that provided in ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(f) and Minn. Stat. §609.09 (1981) except that under the rule the defendant's statements from the revocation hearing may also be used to impeach his testimony under oath later."

91. Rule 29.04. Appeal from Sentence Imposed or Stayed

Although Minn. Stat. §244.11 provides for appeal by the defense or the prosecution of any sentence imposed or stayed under the Minnesota Sentencing Guidelines, the Rules of Criminal Procedure currently provide no procedure for such appeals. The Supreme Court, however, by order dated February 28, 1980 established procedures to be followed on such appeals. To incorporate those procedures into the Criminal Rules of Procedure the following new rule is recommended:

"29.04. Appeal From Sentence Imposed or Stayed

"The following procedures shall apply to the appeal, pursuant to Minn. Stat. §244.11, of any sentence imposed or stayed by the district court according to these rules:

"1. Any party appealing a sentence shall file with the clerk of the district court, within 90 days after entry of judgment, (a) a notice of appeal, (b) 12 copies of an informal letter brief setting forth the arguments concerning the illegality or inappropriateness of the sentence, and (c) an affidavit of service of the notice and a copy of the brief upon opposing counsel and upon the attorney general. A defendant appealing the sentence and the judgment of conviction has the option of combining the two appeals into a single appeal; when this option is selected the procedures established by Rule 29.02 of these rules shall continue to apply.

"2. The clerk of the district court shall not accept a notice of appeal from sentence unless accompanied by the requisite briefs and affidavit of service. Upon the filing of the requisite papers, the clerk shall immediately forward to the clerk of the Supreme Court (a) a certified copy of the notice of appeal along with the briefs and affidavit filed by the appellant, (b) a transcript of the sentencing hearing and any written explanation of sentence by the trial court which is not already included in the transcript, (c) the sentencing guidelines worksheet, and (d) any presentence investigation report.

"3. Within 10 days of service upon it of the copy of the notice of appeal and appellant's brief, respondent, if it wishes to respond, shall serve its brief upon appellant and file with the clerk of the Supreme Court 12 copies of its brief."

92. Comments on Rule 29.03, Subds. 1 and 2

To explain case law concerning appeals by the prosecuting authority under Rule 29.03, amend the comments by adding the following paragraph after the third paragraph from the end of the comments:

"To the extent that an order granting a defendant a new trial also suppresses evidence, it will be viewed as a pretrial order concerning the retrial and the prosecuting authority may appeal the suppression part of the order under Rule 29.01. State v. Brown, 317 N.W.2d 714 (Minn. 1982). A good faith timely motion by the prosecuting authority for clarification or rehearing of an appealable order extends the time to appeal that order until 5 days after entry of the order deciding the motion for clarification or rehearing. State v. Wollan, 303 N.W.2d 253 (Minn. 1981). Generally, absent special circumstances, failure of the prosecuting authority to file its brief within the 15 days as provided by Rule 29.03, subd. 2(5) will result in dismissal of the appeal. State v. Schroeder, 292 N.W.2d 758 (Minn. 1980); State v. Olson, 294 N.W.2d 320 (Minn. 1980); State v. Weber, 313 N.W.2d 387 (Minn. 1981). Although the prosecutor need no longer submit with his notice of appeal the statement formerly required by Minn. Stat. §632.12, he is required by the court's decisions in State v. Webber, 262 N.W.2d 157 (Minn. 1977), State v. Helenbolt, 280 N.W.2d 631 (Minn. 1979) and State v. Fisher, 304 N.W.2d 33 (Minn. 1981) to show on appeal that the trial court clearly and unequivocally erred and that, unless reversed, the error will have a critical impact on the outcome of the trial."

93. Comments on Rule 29.04

To explain the proposed amendment adding Rule 29.04, add the following paragraph at the end of the comments:

"Rule 29.04 (Appeal from Sentence Imposed or Stayed) is taken from the order of the Minnesota Supreme Court dated February 28, 1980. These appeal procedures are necessary because Minn. Stat. §244.11 now authorizes both the defendant and the prosecution to appeal from any sentence imposed or stayed by the court for felony offenses occurring on or after May 1, 1980. Permitting the state to appeal a sentence does not violate the constitutional protection against double jeopardy. United States v. DiFrancesco, 449 U.S. 117 (1980)."

94. Comments on Rule 30.01

To incorporate the holding of the court in State v. Aubol, 244 N.W.2d 636 (Minn. 1976) amend the first paragraph of the comments concerning Rule 30.01 by adding the following sentence at the end of the first paragraph of the comments:

"According to State v. Aubol, 244 N.W.2d 636 (Minn. 1976), leave to dismiss must be granted if the prosecutor has provided a factual basis for the insufficiency of the evidence to support a conviction, and the court is satisfied that the prosecutor has not abused his discretion."

95. Rule 33.04. Filing

To apply the provisions of Rule 33.04 to offenses prosecuted by indictment, amend provisions (c) and (d) of this rule to read as follows:

"(c) A complaint, indictment, application, or affidavit requesting a warrant directing the arrest of a person or authorizing a search and seizure may contain or be accompanied by a request by the prosecuting attorney that the complaint, indictment, application or affidavit, any supporting evidence or information, and any order granting the request, not be filed.

"(d) An order shall be issued granting the request in whole or in part, if the judge finds from affidavits, sworn testimony or evidence that there are reasonable grounds to believe that: (1) in the case of complaint, indictment, or arrest documents, such filing may lead to any person to be arrested fleeing or secreting himself or otherwise preventing the execution of the warrant or (2) in the case of a search warrant application or affidavit, such filing may cause this search or a related search to be unsuccessful or could create a substantial risk of injuring an innocent person or severely hampering an ongoing investigation."

96. Rule 34.01. Computation

To conform to the earlier proposed amendment renumbering Rule 3.02, subd. 2(3) as Rule 3.02, subd. 2(2), the first sentence of this rule should be amended as follows:

"Except as provided by Rules 3.02, subd. 2~~(3)~~(2), 4.02, subd. 5(1), and 4.02, subd. 5(3), time shall be computed as follows:"

97. Rule 34.02. Enlargement

The Advisory Committee was concerned that Rule 34.02 is being improperly used to extend the 36 hour time limits between arrest and appearance in court as provided by Rule 3.02, subd. 2(2) (as renumbered) and Rule 4.02, subd. 5(1). To prevent this, amend the rule to read as follows:

"When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time for taking any action under Rules 3.02, subd. 2(2); 4.02, subd. 5(1); 26.03, subd. 17(3); 26.04, subd. 1(3); or 26.04, subd. 2, or except as provided by Rules 29.02, subd. 5(3), 29.02, subd. 6(4), and 28.05, subd. 1, the time for taking an appeal."

98. Comments on Rule 34.02

Amend the second sentence of the second paragraph as follows to conform to the proposed amendment of Rule 34.02:

"It permits an extension of time except for the time between arrest and initial appearance in court (Rules 3.02, subd. 2(2) and 4.02, subd. 5(1)), for motions for judgment of acquittal (Rule 26.03, subd. 17(3)), for new trial (Rule 26.04, subd. 1(3)), or to vacate judgment (Rule 26.04, subd. 2)."

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