

RULES GOVERNING CRIMINAL MATTERS

Rules of Criminal Procedure

STATE OF MINNESOTA IN SUPREME COURT

C1-84-2137

PROMULGATION OF AMENDMENTS TO THE RULES OF CRIMINAL PROCEDURE

WHEREAS, on December 13, 1989, this Court adopted changes in the Rules of Criminal Procedure, some of which were to become effective on January 1, 1991, and during 1990 a number of comments and objections were received concerning the changes to become effective in 1991, which were referred to the Supreme Court Advisory Committee on Rules of Criminal Procedure for review; and

WHEREAS, the Supreme Court Advisory Committee on Rules of Criminal Procedure has submitted a report and recommended amendments to Rules 8.04 (c), 11.07, 28.04 Subd. 2(2) and 28.04 Subd. 2(8) of the Rules of Criminal Procedure, and

WHEREAS, the Supreme Court has reviewed the recommendations and is fully advised in the premises,

NOW, THEREFORE, IT IS HEREBY ORDERED:

1. The attached amendments to Rules 8.04 (c), 11.07, 28.04 Subd. 2(2) and 28.04 Subd. 2(8) of the Rules of Criminal Procedure be, and the same hereby are, prescribed and promulgated for the regulation of practice and procedure in criminal matters in the courts of the State of Minnesota.

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

3. The Advisory Committee shall continue to serve to monitor said rules and amendments and to hear and accept comments for further changes, to be submitted to the court from time to time.

4. These amendments to the Rules of Criminal Procedure shall govern all criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1991.

Dated: November 29, 1990

BY THE COURT

-s-Peter S. Popovich
Chief Justice

Rules of Criminal Procedure

Effective January 2, 1990 Governing All Criminal Actions Commenced or Arrests Made After 12 o'clock Midnight January 1, 1990*

With amendments received through July 15, 1991

TABLE OF HEADNOTES

Rule 1. Scope, Application, General Purpose and Construction

- 1.01 Scope and Application
- 1.02 Purpose and Construction

Rule 5. Procedure on First Appearance

- 5.01 Statement to the Defendant
- 5.02 Appointment of Counsel
- 5.03 Date of Rule 8 Appearance in District Court;
Consolidation of Appearances Under Rule 5 and Rule 8
- 5.04 Plea in Misdemeanor Cases
- 5.05 Bail or Release
- 5.06 Record
- 5.07 Deleted
- 5.08 Deleted

Rule 7. Notice by Prosecuting Attorney of Evidence and Identification Procedures; Completion of Discovery

- 7.01 Notice of Evidence and Identification Procedures
- 7.02 Notice of Additional Offenses
- 7.03 Completion of Discovery

Rule 8. Defendant's Initial Appearance Before the District Court Following the Complaint or Tab Charge in Felony and Gross Misdemeanor Cases

- 8.01 Place of Appearance and Arraignment
- 8.02 Plea of Guilty
- 8.03 Demand or Waiver of Hearing
- 8.04 Plea and Time and Place of Omnibus Hearing
- 8.05 Record
- 8.06 Conditions of Release

Rule 9. Discovery in Felony and Gross Misdemeanor Cases

- 9.01 Disclosure by Prosecution
- 9.02 Disclosure by Defendant
- 9.03 Regulation of Discovery

Rule 11. Omnibus Hearing in Felony and Gross Misdemeanor Cases

- 11.01 Place of Hearing
- 11.02 Hearing on Evidentiary Issues
- 11.03 Motions
- 11.04 Other Issues
- 11.05 Amendment of Complaint
- 11.06 Pleas
- 11.07 Continuances; Determination of Issues
- 11.08 Record
- 11.09 Deleted
- 11.10 Plea; Trial Date
- 11.11 Exclusion of Witnesses

Rule 13. Arraignment in Felony and Gross Misdemeanor Cases

- 13.01 In Open Court
- 13.02 Right to Counsel
- 13.03 Copy and Reading of Charges
- 13.04 Plea
- 13.05 Record

Rule 28. Appeals to Court of Appeals

- 28.01 Scope of Rule
- 28.02 Appeal by Defendant
- 28.03 Certification of Proceedings
- 28.04 Appeal by Prosecuting Attorney
- 28.05 Appeal from Sentence Imposed or Stayed

*Amendments to Rules 8.04, 11.07, and 19.04, subdivision 5, govern all criminal actions begun or arrests made after 12 o'clock midnight January 1, 1991.

TEXT OF RULES**Rule 1. Scope, Application, General Purpose and Construction****1.01 Scope and Application**

These rules govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the district courts in the State of Minnesota. Except where expressly provided otherwise, misdemeanors as referred to in these rules shall include state statutes, local ordinances, charter provisions, rules or regulations punishable either alone or alternatively by a fine or by imprisonment of not more than 90 days.

See Rule 1.02 for Comment.

1.02 Purpose and Construction

These rules are intended to provide for the just, speedy determination of criminal proceedings. They shall be construed to secure simplicity in procedure, fairness in administration, and the elimination of unjustifiable expense and delay.

Comment

By Rule 1.01, these rules govern the procedure in prosecutions for felonies, gross misdemeanors, misdemeanors, and petty misdemeanors in the district courts in the State of Minnesota. Except where expressly provided otherwise, misdemeanors as referred to in these rules shall include state statutes, local ordinances, charter provisions, rules or regulations punishable either alone or alternatively by a fine or by imprisonment of not more than 90 days.

Rule 1.02 governing the general purpose and construction of the rules is taken from F.R.Crim.P. 2.

In accord with the purpose of these rules to provide for a just and speedy determination of criminal proceedings, the rules specify time limits and consolidate court appearances and hearings whenever possible. Rule 11 provides for an Omnibus Hearing for the determination of all pretrial issues. Under Rules 8.04, 11.04, and 11.07, that hearing must be commenced within 28 days after the appearance under Rule 8 and must be completed and all issues decided within 30 days after the appearance under Rule 8. Extensions of those time limits may be permitted by the trial court, but only for good cause related to the particular case. It would violate the purpose of these rules to bifurcate or further continue Omnibus Hearings on a general basis unrelated to the circumstances of a particular case.

Comment amended effective August 1, 1987; January 2, 1991.

Rule 5. Procedure on First Appearance**5.01 Statement to the Defendant**

A defendant arrested with or without a warrant or served with a summons or citation appearing initially before a judge or judicial officer, shall be advised of the nature of the charge. A defendant who has not previously received a copy of the complaint, if any, and supporting affidavits and the transcription of any supplementary testimony, shall be provided with copies thereof. Upon motion of the prosecuting attorney, the court shall require that the defendant be booked, photographed, and fingerprinted. In cases of felonies and gross misdemeanors, the defendant shall not be called upon to plead.

The judge, judicial officer, or other duly authorized personnel shall advise the defendant substantially as follows:

(a) That the defendant is not required to say anything or submit to interrogation and that anything the defendant says may be used against the defendant in this or in any subsequent proceedings;

(b) That the defendant has a right to counsel in all subsequent proceedings, including police line-ups and interrogations, and if the defendant appears without counsel and is financially unable to afford counsel, that counsel will forthwith be appointed without cost to the defendant charged with an offense punishable upon conviction by incarceration;

(c) That the defendant has a right to communicate with defense counsel and that a continuance will be granted if necessary to enable defendant to obtain or speak to counsel;

(d) That the defendant has a right to a jury trial or a trial to the court;

(e) That if the offense is a misdemeanor, the defendant may either plead guilty or not guilty, or demand a complaint prior to entering a plea.

(f) That if the offense is a gross misdemeanor punishable under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the defendant may demand a complaint prior to entering a plea.

The judge, judicial officer, or other duly authorized personnel may advise a number of defendants at once of these rights, but each defendant shall be asked individually before arraignment whether the defendant heard and understood these rights as explained earlier.

See Rule 5.06 for Comment.

5.02 Appointment of Counsel

Subd. 1. Felonies and Gross Misdemeanors. If the defendant is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint counsel for the defendant.

Subd. 2. Misdemeanors. Unless the defendant charged with a misdemeanor punishable upon conviction by incarceration voluntarily waives counsel in writing or on the record, the court shall appoint counsel for the defendant who appears without counsel and is financially unable to afford counsel. The court shall not accept the waiver unless the court is satisfied that it is voluntary and has been made by the defendant with full knowledge and understanding of the defendant's rights. If the court is not so satisfied, it shall not proceed until the defendant is provided with counsel either of the defendant's choosing or by assignment.

Notwithstanding the waiver, the court may designate counsel to be available to assist and to consult with a defendant who cannot afford counsel at all stages of the proceedings.

A defendant who proceeds at the arraignment without counsel does not waive the future right to counsel and the court must inform the defendant that the defendant continues to have that right at all stages of the proceeding. Provided that for misdemeanor offenses not punishable upon conviction by incarceration, the court may appoint an

attorney for a defendant financially unable to afford counsel when requested by the defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties.

Subd. 3. Standard of Indigency. A defendant is financially unable to obtain counsel if financially unable to obtain adequate representation without substantial hardship for the defendant or the defendant's family.

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of counsel shall be made whenever possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the prerelease investigation provided for in Rule 6.02, subd. 3.

Subd. 5. Partial Eligibility and Reimbursement. The ability to pay part of the cost of adequate representation at any time while the charges are pending against a defendant shall not preclude the appointment of counsel for the defendant. The court may require a defendant, to the extent able, to compensate the governmental unit charged with paying the expense of appointed counsel.

See Rule 5.06 for Comment.

5.03 Date of Rule 8 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 the right to a separate appearance under Rule 8 as provided in this rule, the judge or judicial officer shall set a date for such appearance 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 the defendant's initial appearance before such judge or judicial officer under Rule 5.

The defendant shall be informed of the time and place of such appearance and ordered to appear as scheduled. 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, the defendant may be permitted to waive the separate 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 appearance under Rule 8 is waived by the defendant, all of the functions and procedures provided for by both Rule 5 and Rule 8 shall take place at the one consolidated appearance.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 5.06 for Comment.

5.04 Plea in Misdemeanor Cases

Subd. 1. Entry of Plea. When a valid complaint has been made and filed, or a brief statement entered on the record as authorized under Rule 4.02, subd. 5(3), the defendant shall be called upon to plead or be given time to plead. The arraignment shall be conducted in open court. A defendant may appear by counsel and a corporation shall appear by counsel or by a duly authorized officer.

Subd. 2. Guilty Plea; Offenses From Other Jurisdictions. If the defendant enters a plea of guilty, the presentencing and sentencing procedures provided by these rules shall be followed. Following a plea of guilty, the defendant may request permission to plead guilty to other misdemeanor offenses committed within the jurisdiction of other courts in the state pursuant to Rule 15.10.

Subd. 3. Not Guilty Plea and Jury Trial. If the defendant enters a plea of not guilty to a charge on which entitled to a jury trial, the defendant shall be asked to exercise or waive that right. The defendant may waive jury trial either personally in writing or orally on the record in open court. If the defendant fails to waive or demand a jury trial, a jury trial demand shall be entered in the record.

Subd. 4. Demand or Waiver of Evidentiary Hearing. If the defendant pleads not

guilty and a notice of evidence and identification procedures has been given by the prosecution as required by Rule 7.01, the defendant and the prosecution shall each either waive or demand an evidentiary hearing as provided by Rule 12.04. Such demand or waiver may be made either orally on the record or in writing and shall be made at the first court appearance after the notice has been given by the prosecution.

Subd. 5. Special Appearances Abolished. Special appearances are abolished and any challenge to the personal jurisdiction of the court shall be decided as provided in Rule 10.02.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 5.06 for Comment.

5.05 Bail or Release

The judge or judicial officer shall set and advise the defendant of the conditions under which the defendant may be released under these rules for appearance.

See Rule 5.06 for Comment.

5.06 Record

Minutes of the proceedings shall be kept unless the judge or judicial officer directs that a verbatim record thereof shall be made, and provided that any plea of guilty to an offense punishable by incarceration shall comply with the requirements of Rule 13.05 and Rule 15.09.

5.07 (Deleted August 1, 1987.)

5.08 (Deleted August 1, 1987.)

Comment

Rule 5 prescribes the procedure upon the defendant's initial appearance before a judge or judicial officer following an arrest with or without a warrant under Rules 3 and 4.01 or in response to a summons under Rule 3 or a citation under Rule 4.02, subd. 2. In most misdemeanor cases, the initial appearance will also be the time of arraignment and, often, the time of disposition as well.

Rule 5.01 sets forth the statements and advice to be given to the defendant upon the initial court appearance. Similar provisions appear in ABA Standards, Pretrial Release, 4.3 (Approved Draft, 1968), F.R.Crim.P. 5(c), and ALI Model Code of Pre-Arraignment Procedure, section 310.1(4)(a) (T.D. #5, 1972).

Rule 5.01 requires that the defendant be provided with copies of the complaint and any supporting affidavits and a copy of the transcript of any supplemental testimony. Ordinarily, the facts showing probable cause will be set forth separately in or with the complaint or in supporting affidavits or both, but in the unusual case when supplemental testimony is taken, the defendant shall be provided with a copy of the transcript as soon as it is available. Of course, in misdemeanor cases and in gross misdemeanor cases under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129 where no complaint has been issued and prosecution is pursuant to a tab charge this requirement does not apply.

In misdemeanor cases this statement as to a defendant's rights may be combined with the questioning required under Rule 15.02 prior to acceptance of a guilty plea. In order to save time and avoid repetition, the judge or judicial officer may advise a number of defendants at the same time of these rights, but the statement must be recorded and each defendant upon approaching the court must be asked on the record whether the defendant has heard and understood the rights explained earlier.

The warning as to the defendant's right to counsel continues the requirements of Minnesota Statutes, sections 611.15 and 630.10 (1971). (See St. Paul v. Whidby, 295 Minn. 129, 203 N.W.2d 823 (1972), recognizing that misdemeanors authorizing a sentence of incarceration are criminal offenses and criminal procedures must be followed.)

Rule 5.02 requires the appointment of counsel for indigent defendants (See ABA Standards, Pretrial Release, 4.2 (Approved Draft, 1968).)

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 the constitutional right under *Faretta v. California*, 422 U.S. 806 (1975), to refuse the assistance of counsel and represent herself or 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*, 68 S.Ct. 316, 332 U.S. 708, 92 L.Ed. 309 (1948) to ensure a knowing and intelligent waiver of counsel, the court should make a penetrating and comprehensive examination of the defendant as to the defendant's 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).

The waiver of counsel may be in writing (Minnesota Statutes, section 611.19 (1971); ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968)), or orally on the record.

Even though the defendant waives counsel, Rule 5.02, subd. 2 provides for the designation of counsel to be available for assistance and consultation.

Also, despite a waiver of counsel at arraignment, the defendant continues to have the right to counsel at all further stages of the proceedings, and the court must so inform the defendant. See ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968).

For misdemeanors not punishable by incarceration, the court may, upon request of the defendant or interested counsel or upon the court's initiative when in the interests of justice to the parties, appoint an attorney to represent the defendant. The United States Supreme Court in *Argersinger v. Hamlin*, 405 U.S. 348 (1972) did not decide that counsel was not required whenever incarceration was not authorized. Considerations other than the possibility of incarceration may make the case sufficiently serious to warrant the appointment of counsel and this rule provides for that possibility.

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is sufficiently indigent to require the appointment of counsel. This standard is taken from ABA Standards, Providing Defense Services, 6.1 (Approved Draft, 1968).

In determining whether a defendant is financially unable to afford counsel in a misdemeanor case the Advisory Committee strongly recommends that the following standards be employed as guidelines so that the decision to appoint counsel for indigent defendants can be most efficiently and uniformly reached:

STANDARDS

(1) A defendant will be presumed to be financially unable to afford counsel if:

(a) the defendant's cash assets are less than \$300.00 when entitled to only a court trial; or

(b) the defendant's cash assets are less than \$500.00 when entitled to a jury trial;

and

(c) the defendant's current weekly net income does not exceed 40 times the federal minimum hourly wage as prescribed by federal law in effect at the time, if the defendant is unmarried and without dependents; or,

(d) the defendant's current weekly net income and that of the defendant's spouse do not exceed 60 times the federal minimum hourly wage as prescribed by federal law in effect at the time, if the defendant is married and without dependents. In determining the amounts specified under either section (c) or section (d), for each dependent the amount shall be increased by \$25.00 per week.

(2) A defendant who has cash assets or income exceeding the amounts specified in paragraph (1) shall not be presumed to be financially able to obtain counsel. The determination shall be made by the court as a practical matter, taking into account such other factors as the defendant's length of employment or unemployment, prior income, the value and nature of the defendant's assets, number of children and other family responsibilities, number and nature of debts arising from any source, the amount customarily charged by members of the practicing bar for representation of the type in question, and any other relevant factor.

(3) In determining whether a defendant is financially able to obtain adequate representation without substantial hardship to the defendant or the defendant's family:

(a) cash assets include those assets which may be readily converted to cash by sale or loan without jeopardizing the defendant's ability to maintain a home or employment. A single family automobile shall not be considered a cash asset.

(b) the fact that the defendant has posted or can post bail is irrelevant except insofar as it represents a cash asset belonging to the defendant which could be assigned to retain counsel. The amount of bail which is or can be posted shall not in itself render a defendant financially able to obtain counsel.

(c) the fact that the defendant is employable but unemployed shall not be in itself proof of financial ability to obtain counsel without such substantial hardship.

(d) the fact that parents or other relatives of the defendant have the financial ability to obtain counsel for the defendant is irrelevant except under the following circumstances:

(i) where the defendant is unemancipated, under the age of 21 years, living with parents or other relatives, and such parents or other relatives have the clear ability to obtain counsel; or

(ii) where the parents or other relatives of the defendant have the financial ability to obtain counsel for the defendant but are unwilling to do so only because of the relatively minor nature of the charge.

Under part (1) of the recommended standards a defendant will be presumed to be financially unable to retain defense counsel and counsel shall be appointed when the defendant's income and assets fail to meet the specified minimum levels. The minimum income level referred to in the recommended standards is a weekly "net" figure and is keyed to the federal minimum hourly wage in effect at the time the appointment of counsel is requested. By reference to the minimum wage law, the standard will hopefully provide a realistic gauge of a defendant's ability to hire counsel which will vary with the economy. As made clear by part (2) of the recommended standard, part (1) provides a presumption of indigency and is not to be taken as indicating that a defendant with a higher income and assets must obtain private counsel. A defendant with a higher income or assets should still be appointed counsel if unable under part (2) to obtain adequate representation without substantial hardship to the defendant or the defendant's family. In making this determination the court shall consider the factors listed in parts (2) and (3) of the standard, as well as any other relevant factors.

To assist the court in deciding whether to appoint counsel, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the prerelease investigation provided for in Rule 6.02, subd. 3.

Rule 5.02, subd. 5 provides that the ability of a defendant to pay part of the cost of

adequate representation when charges are pending shall not preclude the court from appointing counsel. This provision is included to make clear that counsel can be appointed for the person of moderate means who would be subject to substantial financial hardship if forced to pay the full cost of adequate representation. In such circumstances the court may require the defendant to the extent able to compensate the governmental unit charged with paying the expense of the appointed counsel.

Rule 5.02, subd. 5 is in accord with ABA Standards, Providing Defense Services, 6.3 (Approved Draft, 1968) and with Minnesota Statutes, section 611.20.

Under Rule 5.03, if the defendant is charged with a felony or gross misdemeanor, a date shall be fixed by the judge or judicial officer for the defendant's appearance in the district court under Rule 8, where the defendant will be arraigned upon the complaint, or, where permitted, the tab charge (Rules 8.01, 12), and if a guilty plea is not then entered, a date will be fixed by the district court (Rule 8.04) for the Omnibus Hearing provided for by Rule 11.

The date fixed by the judge or judicial officer (Rule 5.03) for the defendant's appearance before the district court under Rule 8 shall be not more than 14 days after the defendant's initial appearance (Rule 5), but the district court may extend the time for good cause (Rule 5.03). The judge or judicial officer shall set the date in accordance with a time schedule or other order or directive previously furnished or made by the district court (Rule 5.03).

In certain circumstances a separate appearance to fulfill the requirements of Rule 8 may serve very little purpose. 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, both appearances are held in the district court. The additional time and judicial resources invested in a separate appearance under Rule 8 may yield little or no benefit. Therefore, 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 28 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 related to the particular case upon motion of the defendant or the prosecution or upon the court's initiative. Also, the notice of evidence and identification procedures required by Rule 7.01 must be given at or before the consolidated hearing.

By Rule 5.04, after a complaint has been issued or a tab charge entered on the record as authorized under Rule 4.02, subd. 5(3), the defendant shall be arraigned in open court under Rule 5.04 or may be given time to plead. This is in accord with Minnesota Statutes, section 630.13 (1971). The defendant has an absolute right to appear by counsel to enter a plea of not guilty and set a trial date.

To the extent Minnesota Statutes, section 630.01 (1971) might require the permission of the court to make such an appearance by counsel, it is superseded. See also Rule 14.02, subd. 2 (plea of guilty by counsel); Rule 15.03, subd. 2 (petition to plead guilty); Rule 26.03, subd. 1(3) (defendant's presence at trial and sentencing); and Rule 27.03, subd. 2 (defendant's presence at sentencing). The requirement that the arraignment be conducted in open court is taken from F.R.Crim.P. 10 and follows Minnesota Statutes, section 630.01 (1971). The appearance of a corporation by counsel or an officer continues present Minnesota practice under Minnesota Statutes, section 630.16 (1971).

If the defendant pleads guilty in a misdemeanor case the procedure prescribed by Rule 15 shall be followed and thereafter the presentencing and sentencing procedures provided by these rules shall be followed.

Following a plea of guilty a defendant or defense counsel under Rule 5.04, subd. 2 may request permission for the defendant to enter a plea of guilty to any other misdemeanor committed within the state which is under the jurisdiction of another court. The procedure for entering such pleas is set forth in Rule 15.10. Also see the comments on that

rule. If the defendant has permission to enter the plea from the prosecuting attorney of the governmental unit authorized to prosecute the offense, then the court may accept the plea provided it is otherwise proper. Before accepting the plea, the defendant must be charged with the offense, but that could be done simply by a tab charge pursuant to Rule 4.02, subd. 5(3). By entering a plea under Rule 5.04, subd. 2 the defendant waives any right to object to the venue of the court which is accepting the plea. Following acceptance of the plea, the court has the power to sentence the defendant just as if it originally had jurisdiction over the offense. This rule was originally taken from ABA Standards, Pleas of Guilty, 1.2 (Approved Draft, 1968) and permits a defendant to dispose of a number of charges pending against the defendant throughout the state without the necessity and expense of being taken to each court personally while in custody. If any fines are collected upon entry of a guilty plea to an offense arising in another jurisdiction, the money is to be forwarded to the clerk of the court which originally had jurisdiction over the offense. Disbursement of such fines by the clerk of the court of original jurisdiction shall be as if the plea had actually been entered and the fine collected in the court of original jurisdiction. As to disbursement of such fines see Minnesota Statutes, sections 487.31 and 487.33, subds. 1 and 5 (County Courts); 488A.03, subd. 6(a) and (d) and 488A.03, subd. 11(d) (Hennepin County Municipal Court); and 488A.20, subd. 4 (Ramsey County Municipal Court).

A defendant pleading not guilty who is entitled to a jury trial shall be asked under Rule 5.04, subd. 3 to exercise or waive that right. The defendant with the approval of the court has an absolute right to waive a jury trial under Rules 5.04, subd. 3 and 26.01, subd. 1(2)(a) in a misdemeanor case. A prosecutor who objects to the judge selected to try the case may file a notice to remove the judge. Rule 26.03, subd. 13; *State v. Kraska*, 294 Minn. 540, 201 N.W.2d 742 (1972). See also Rule 26.01, subd. 1(2)(b) as to waiver of jury trial when there is prejudicial publicity and Rule 26.01, subd. 1(3) as to withdrawal of the waiver. Rule 5.04, subd. 3 permits a defendant to waive a jury trial either in writing or orally in open court on the record. This is contrary to Minnesota Statutes, section 631.01 which permitted only a written waiver. See Rule 26.01(1) as to a misdemeanor defendant's right to a jury trial and Rule 6.06 as to the time within which a trial must be held on a misdemeanor charge.

Under Rule 5.04, subd. 4 if the defendant pleads not guilty in a misdemeanor case and the prosecution has given the notice of evidence and identification prescribed by Rule 7.01, then both the defendant and the prosecution shall either waive or demand a Rasmussen (*State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965)) hearing. The waiver or demand is necessary only in cases where a jury trial is to be held since the notice is not required under Rule 7.01 if no jury trial is to be held in a misdemeanor case. Under Rule 7.01 the notice must be given at least 7 days before trial or by the conclusion of the pretrial conference if held. The waiver or demand shall be made at the first court appearance after notice is given and if given during a court appearance the waiver or demand should be made at that appearance. If no court appearance intervenes between the giving of notice and the trial, then waiver or demand shall be made immediately before trial. The waiver or demand of a hearing may be made either in writing or orally on the record. See Rule 12.04, subd. 3 as to the time of any evidentiary hearing demanded.

Rule 5.04, subd. 5 abolishes special appearances in misdemeanor cases. The purpose of such an appearance in the past has been to avoid waiver of a challenge to the personal jurisdiction of the court. Rules 10.02 and 17.06, subd. 4(1), however, reverse prior case law and provide a procedure for challenging the personal jurisdiction of the court after a complaint has been issued and a not guilty plea entered. See the Comments to Rule 10.02 as to this procedure.

By Rule 5.05 the judge or judicial officer shall set the conditions for the defendant's release under Rule 6.02. Under Rule 5.06 minutes of the proceedings at an arraignment or first appearance in court must be kept unless the judge or judicial officer directs that a verbatim record shall be made. The method of taking the minutes is within the discretion of the court. Where a guilty plea is entered to a misdemeanor offense punishable by

incarceration, however, Rules 13.05 and 15.03 require either that a verbatim record be made or a petition to plead guilty be filed. This requirement is prescribed in light of *State v. Casarez*, 295 Minn. 534, 203 N.W.2d 406 (1973) where the court applied the holding of *Boykin v. Alabama*, 395 U.S. 238 (1969) to misdemeanor cases saying, "A guilty plea must appear on the record to have been voluntarily and intelligently made. If not, the plea must be vacated."

From the time of the defendant's initial appearance in 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:

1. Defendant's Initial Appearance before the court under Rule 5.
2. Service of Rasmussen (*State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965)) notice (Rule 7.01) on the defendant on or before the date of the appearance in the district court under Rule 8.
3. Appearance in the district court under Rule 8 (within 14 days after the initial appearance under Rule 5 unless the appearances under Rules 5 and 8 are consolidated pursuant to Rule 5.03).
4. Service of Spreigl (*State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965)), *State v. Billstrom*, 276 Minn. 174, 149 N.W.2d 281 (1967) notice on the defendant (Rule 7.02) on or before the date of the Omnibus Hearing (Rule 11).
5. Completion of discovery required of prosecution and defendant without order of court (Rules 9.01, subd. 1; 9.02, subd. 1) before the Omnibus Hearing (Rule 7.03).
6. Service of pretrial motions (Rules 10, 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 3; 18.02, subd. 2; 17.03, subd. 3 and subd. 4; 17.06; 20.01, subd. 2; 20.03, subd. 1) to be heard at the Omnibus Hearing (3 days before the Omnibus Hearing (Rule 10.04, subd. 1).)
7. Omnibus Hearing under Rule 11 within 28 days after defendant's appearance in the district court under Rule 8 and within 42 days after defendant's initial appearance under Rule 5 when the Rule 5 and Rule 8 appearances are not consolidated.

From the time of the defendant's initial appearance in court until the trial, the following schedule of events shall take place in misdemeanor cases:

1. Defendant's initial appearance (Rule 5).
2. Arraignment (Rule 5).
3. Notice of challenge to jurisdiction of the court following issuance of complaint and entry of not guilty plea. Notice must be given within 7 days after entry of not guilty plea (Rule 10.02).
4. Service of Rasmussen notice (Rule 7.01) on or before the pretrial conference if held under Rule 12.01, or seven days before trial if no such conference is held.
5. Waiver or demand of Rasmussen hearing by prosecution and defendant at first court appearance following service of the Rasmussen notice (Rule 5.04, subd. 6).
6. Service of Spreigl (*State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965), *State v. Billstrom*, 276 Minn. 174, 149 N.W.2d 281 (1967)) notice on the defendant (Rule 7.02) on or before the date of the pretrial conference (Rule 5.04, subd. 6) if held or at least seven days before trial if no such conference is held.
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 three 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 (Rule 10.04).
8. Pretrial conference may be held at such time as the court may order (Rule 12.01).
9. Pretrial motions heard at pretrial conference or just before trial if no such conference is held (Rule 10.04, subd. 2).
10. Discovery may be conducted at any time before trial as permitted by Rule 7.03.
11. Rasmussen hearing held immediately prior to jury trial unless otherwise ordered

by the court for good cause and upon a trial to the court the hearing may be held as part of the trial (Rule 12.04, subd. 3).

12. Trial to be held within 60 days from the date of demand or within 10 days of demand if the defendant is in custody.

Comment amended effective August 1, 1987; January 2, 1991.

Rule 7. Notice by Prosecuting Attorney of Evidence and Identification Procedures; Completion of Discovery

7.01 Notice of Evidence and Identification Procedures

In any case where a jury trial is to be held, when the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping; (2) any confessions, admissions or statements in the nature of confessions made by the defendant; (3) any evidence against the defendant discovered as a result of confessions, admissions or statements in the nature of confessions made by the defendant; or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to line-ups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney shall notify the defendant or defense counsel of such evidence and identification procedures. In felony and gross misdemeanor cases notice shall be given in writing on or before the date set for the defendant's initial appearance in the district court as provided by Rule 5.03. In misdemeanor cases, notice shall be given either in writing or orally on the record in court on or before the date set for the defendant's pretrial conference if one is scheduled or seven (7) days before trial if no pretrial conference is to be held.

Such written notice may be given either personally or by ordinary mail to the defendant's or defense counsel's last known residential or business address or by leaving it at such address with a person of suitable age and discretion then residing or working there.

See Rule 7.03 for Comment.

7.02 Notice of Additional Offenses

The prosecuting attorney shall notify the defendant or defense counsel in writing of any additional offenses, the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. In cases of felonies and gross misdemeanors, the notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offenses become known to the prosecuting attorney. In misdemeanor cases, the notice shall be given at or before the pretrial conference under Rule 12 if held or as soon thereafter as the offense becomes known to the prosecuting attorney. If no pretrial conference is held, then the notice shall be given at least seven (7) days before trial or as soon thereafter as known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which the defendant has been previously prosecuted or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged against defendant arose.

See Rule 7.03 for Comment.

7.03 Completion of Discovery

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

In misdemeanor cases, without order of the court the prosecuting attorney on request of the defendant or defense counsel shall, prior to arraignment or at any time before trial, permit the defendant or defense counsel to inspect the police investigatory reports. Any other discovery shall be by consent of the parties or by motion to the court.

Comment

Under Rule 7.01, the Rasmussen notice (*State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965)) of evidence obtained from the defendant and of identification procedures shall be given on or before the defendant's appearance in the district court under Rule 8 (within 14 days after the first appearance in the court under Rule 5), in order that the defendant may determine at the time of the appearance in the district court under Rule 8 whether to waive or demand a Rasmussen hearing (Rule 8.03). If the defendant then demands a Rasmussen hearing, it will be included in the Omnibus Hearing (Rule 11) no more than 28 days later.

In misdemeanor cases under Rule 7.01, the Rasmussen notice of evidence obtained from the defendant and of identification procedures may be given at arraignment and in such a case the waiver or demand of a hearing takes place at that time (Rule 5.04, subd. 4). However, since misdemeanor arraignments are often within one day or even a few hours of an arrest, a prosecutor may not have sufficient knowledge of the case to issue a Rasmussen notice at that time. Rather than discourage such prompt arraignments, this rule provides that the Rasmussen notice may be served as late as the pretrial conference, if held, or at least seven days before trial if no pretrial conference is held. The Rasmussen notice procedure is required only where a jury trial is to be held. This continues present law under *City of St. Paul v. Page*, 285 Minn. 374, 173 N.W.2d 460 (1969). Even where no notice is required, however, it is anticipated that the discovery permitted by Rule 7.03 will give the defendant and defense counsel notice of any evidentiary or identification issues that would have been the subject of a formal Rasmussen notice.

The notice required by Rule 7.01 must be in writing in felony and gross misdemeanor cases and may be either in writing or oral on the record in misdemeanor cases. Any written notice may be delivered either personally or by ordinary mail to the defendant's or defense counsel's last known residential or business address or by leaving it at such address with a person of suitable age and discretion then residing or working there. If the notice is not actually received, the court may grant a continuance to prevent any prejudice due to surprise.

Rule 7.02 requires that the Spreigl notice (*State v. Spreigl*, 272 Minn. 488, 139 N.W.2d 167 (1965), *State v. Billstrom*, 276 Minn. 174, 149 N.W.2d 281 (1967)) of additional offenses be given on or before the date of the Omnibus Hearing (Rule 11) in order that any issues that may arise as to the admissibility of the evidence of these offenses at trial may be ascertained and determined at the Omnibus Hearing (Rule 11.04). If the prosecuting attorney learns of any such offenses after the Omnibus Hearing, the prosecuting attorney shall immediately give notice thereof to the defendant.

Rule 7.03 requires that the discovery provided by Rules 9.01, subd. 1; 9.02, subd. 1, to be made without order of court shall be completed by the prosecution and defense before the Omnibus Hearing (Rule 11). This will permit the court to resolve at the Omnibus Hearing any issues that may have arisen between the parties with respect to discovery (Rules 9.03, subd. 8; 11.04). It may also result in a plea of guilty at the Omnibus Hearing (Rule 11.07). All notices under Rule 7 shall also be filed with the court (Rule 33.04).

Rule 7.03, in misdemeanor cases, requires the prosecutor upon request of the defendant or defense counsel at any time before trial to permit inspection of the police investigatory reports in the case. Under this rule the prosecutor should reveal not only the reports physically in the prosecutor's possession, but also those concerning the case which are yet in the possession of the police. This disclosure of investigatory reports is already the practice of many prosecutors and in most misdemeanor cases should be sufficient discovery. This type of discovery is particularly important in misdemeanor cases where prosecution can be initiated upon a tab charge (Rule 4.02, subd. 5(3)), without a complaint or indictment. A defendant, of course, may request a complaint under Rule 4.02, subd. 5(3), to be better informed of the charges, but it is expected that complaints will seldom be requested when the investigatory reports are disclosed to the defendant.

In those rare cases where additional discovery is considered necessary by either party, it shall be by consent of the parties or by motion to the court. In such cases it is

expected that the parties and the court will be guided by the extensive discovery provisions of these rules.

Comment amended effective August 1, 1987; January 2, 1991.

Rule 8. Defendant's Initial Appearance Before the District Court Following the Complaint or Tab Charge in Felony and Gross Misdemeanor Cases

8.01 Place of Appearance and Arraignment

The defendant's initial appearance following the complaint or, for a gross misdemeanor under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, a tab charge under this rule shall be held in the district court of the judicial district where the alleged offense was committed.

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 or, for gross misdemeanors under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the tab charge, but may only enter a plea of guilty at that time. If the defendant does not wish to plead guilty, no other plea shall be called for and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead to the complaint or the complaint as amended or such tab charge or be given additional time within which to plead. 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 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.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 8.06 for Comment.

8.02 Plea of Guilty

At an initial appearance under this rule, the defendant may enter a plea of guilty to a felony, a gross misdemeanor, or a misdemeanor as permitted under Rule 15. If the defendant enters a plea of guilty, the presentencing and sentencing procedures provided by these rules shall be followed.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 8.06 for Comment.

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 admissibility 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.

See Rule 8.06 for Comment.

8.04 Plea and Time and Place of Omnibus Hearing

(a) If the defendant does not plead guilty, the Omnibus Hearing on the issues as provided for by Rules 11.03 and 11.04, 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 Rule 11.02.

(c) The Omnibus Hearing provided for by Rule 11 shall be scheduled for a date not later than twenty-eight (28) days after the defendant's appearance before the court under this rule. The court may extend such time for good cause related to the particular

case upon motion of the prosecuting attorney or defendant or upon the court's initiative.

(Amended June 29, 1987, effective August 1, 1987; amended November 29, 1990, effective January 2, 1991.)

See Rule 8.06 for Comment.

8.05 Record

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

See Rule 8.06 for Comment.

8.06 Conditions of Release

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

Comment

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 court under this rule following a complaint charging a felony or gross misdemeanor or a tab charge charging a gross misdemeanor under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129 (within 14 days after the first appearance under Rule 5), the defendant shall, upon request, be permitted to plead guilty to the complaint, tab charge or amended complaint (see Rules 3.04, subd. 2; 17.05) as provided by Rule 15. At this stage of the proceeding, the tab charge or complaint which was filed in the 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 (Minnesota Statutes, sections 628.29-628.33 (1971)) and provides the basis for the court's jurisdiction over the prosecution and the offenses charged in the complaint or the tab charge.

If the defendant pleads guilty the procedures provided by Rule 15 shall be followed.

The defendant is not required to enter a plea upon the appearance in court under Rule 8. The defendant may, however, plead guilty.

Under Rule 8.03, if the defendant does not plead guilty, and if the prosecution has given the notice prescribed by Rule 7.01, both the defendant and the prosecution shall be required to either waive or demand a Rasmussen (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) hearing. (Rule 8.03).

If the Rasmussen hearing is waived by both the prosecution and the defense, the Omnibus Hearing provided by Rule 11 shall be held without a Rasmussen hearing. (See the initial comments to Rule 11 describing the three parts of an Omnibus Hearing.)

If the Rasmussen hearing is demanded, the hearing shall be held as part of the Omnibus Hearing as provided by Rule 11.02.

The Omnibus Hearing shall be commenced not later than 28 days after the defendant's initial appearance in court under Rule 8 unless the time is extended for good cause related to the particular case. (Rule 8.04). If the time is extended, the Omnibus Hearing must still be completed and the issues decided within 30 days after the defendant's initial appearance before the court under Rule 8 unless extended by the Court for good cause related to the particular case. See Rules 11.04 and 11.07 and the comments to Rule 11.

Under Rule 8.01, if the offense charged in the complaint is punishable by life imprisonment, or if it is a homicide and the prosecuting attorney notifies the court the case will be presented to the grand jury, the defendant shall not be arraigned upon the complaint, and the case shall be presented to the grand jury as provided by Rule 8.01. If an indictment is returned, the Omnibus Hearing shall be held as provided by Rule 19.04, subd. 5.

Rule 8.05 provides for a verbatim record of the proceedings under Rule 8.

Under Rule 8.06, the court may in accordance with the provisions of Rule 6.02 continue or amend the bail or conditions of release set by the court previously.

Comment amended November 29, 1990, effective August 1, 1987; January 2, 1991.

Rule 9. Discovery in Felony and Gross Misdemeanor Cases

9.01 Disclosure by Prosecution

Subd. 1. Disclosure by Prosecution Without Order of Court. Without order of court and except as provided in Rule 9.01, subdivision 3, the prosecuting attorney on request of defense counsel shall, before the date set for Omnibus Hearing provided for by Rule 11, allow access at any reasonable time to all matters within the prosecuting attorney's possession or control which relate to the case and make the following disclosures:

(1) Trial Witnesses; Grand Jury Witnesses; Other Persons.

(a) The prosecuting attorney shall disclose to defense counsel the names and addresses of the persons intended to be called as witnesses at the trial together with their prior record of convictions, if any, within the prosecuting attorney's actual knowledge. The prosecuting attorney shall permit defense counsel to inspect and reproduce such witnesses' relevant written or recorded statements and any written summaries within the prosecuting attorney's knowledge of the substance of relevant oral statements made by such witnesses to prosecution agents.

(b) The fact that the prosecution has supplied the name of a trial witness to defense counsel shall not be commented on in the presence of the jury.

(c) If the defendant is charged by indictment, the prosecuting attorney shall disclose to defense counsel the names and addresses of the witnesses who testified before the grand jury in the case against the defendant.

(d) The prosecuting attorney shall disclose to defense counsel the names and the addresses of persons having information relating to the case.

(2) Statements. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any relevant written or recorded statements which relate to the case within the possession or control of the prosecution, the existence of which is known by the prosecuting attorney, and shall provide defense counsel with the substance of any oral statements which relate to the case.

(3) Documents and Tangible Objects. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce books, grand jury minutes or transcripts, law enforcement officer reports, reports on prospective jurors, papers, documents, photographs and tangible objects which relate to the case and the prosecuting attorney shall also permit defense counsel to inspect and photograph buildings or places which relate to the case.

(4) Reports of Examinations and Tests. The prosecuting attorney shall disclose and permit defense counsel to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments or comparisons made in connection with the particular case. The prosecuting attorney shall allow the defendant to have reasonable tests made. If a scientific test or experiment of any matter, except those conducted under Minnesota Statutes, chapter 169, may preclude any further tests or experiments, the prosecuting attorney shall give the defendant reasonable notice and an opportunity to have a qualified expert observe the test or experiment.

(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 are known to the prosecuting attorney provided the defense counsel informs the prosecuting attorney of any such records known to the defendant.

(6) Exculpatory Information. The prosecuting attorney shall disclose to defense counsel any material or information within the prosecuting attorney's possession and control that tends to negate or reduce the guilt of the accused as to the offense charged.

(7) *Scope of Prosecutor's Obligations.* The prosecuting attorney's obligations under this rule extend to material and information in the possession or control of members of the prosecution staff and of any others who have participated in the investigation or evaluation of the case and who either regularly report or with reference to the particular case have reported to the prosecuting attorney's office.

Subd. 2. Discretionary Disclosure Upon Order of Court.

(1) *Matters Possessed by Other Governmental Agencies.*

Upon motion of the defendant, the court for good cause shown shall require the prosecuting attorney, except as provided by Rule 9.01, subdivision 3, to assist the defendant in seeking access to specified matters relating to the case which are within the possession or control of an official or employee of any governmental agency, but which are not within the control of the prosecuting attorney. The prosecuting attorney shall use diligent good faith efforts to cause the official or employee to allow the defendant access at any reasonable time and in any reasonable manner to inspect, photograph, copy, or have reasonable tests made.

(2) *Nontestimonial Evidence from Defendant on Defendant's Motion.*

Upon motion of the defendant who has been arrested, cited or charged under these rules, the court for good cause shown may require the prosecuting attorney to provide for defendant to participate in a line-up, to speak for identification by witnesses or participate in other procedures which would require a court order to accomplish.

(3) *Other Relevant Material.*

Upon motion of the defendant, the trial court at any time before trial may, in its discretion, require the prosecuting attorney to disclose to defense counsel and to permit the inspection, reproduction or testing of any relevant material and information not subject to disclosure without order of court under Rule 9.01, subd. 1, provided, however, a showing is made that the information may relate to the guilt or innocence of the defendant or negate the guilt or reduce the culpability of the defendant as to the offense charged. If the motion is denied, the court upon application of the defendant shall inspect and preserve any such relevant material and information.

Subd. 3. Information Nondiscoverable. The following information shall not be discoverable by the defendant:

(1) *Work Product.*

(a) *Opinions, Theories or Conclusions.* Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent that they contain the opinions, theories or conclusions of the prosecuting attorney or members of the prosecution staff or officials or official agencies participating in the prosecution.

(b) *Reports.* Except as provided in Rules 9.01, subd. 1(1) to (6), reports, memoranda or internal documents made by the prosecuting attorney or members of the prosecution staff or by prosecution agents in connection with the investigation or prosecution of the case against the defendant.

(2) *Prosecution Witnesses Under Prosecuting Attorney's Certificate.* The information relative to the witnesses and persons described in Rules 9.01, subd. 1(1), (2) shall not be subject to disclosure if the prosecuting attorney files a written certificate with the trial court that to do so may endanger the integrity of a continuing investigation or subject such witnesses or persons or others to physical harm or coercion, provided, however, that nondisclosure under this rule shall not extend beyond the time the witnesses or persons are sworn to testify at the trial.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 9.03 for Comment.

9.02 Disclosure by Defendant

Subd. 1. Information Subject to Discovery Without Order of Court. Without order of court, the defendant on request of the prosecuting attorney shall, before the date set for the Omnibus Hearing provided for by Rule 11, make the following disclosures:

(1) *Documents and Tangible Objects.* The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce books, papers, documents, photographs, and tangible objects which the defendant intends to introduce in evidence at the trial or concerning which the defendant intends to offer evidence at the trial, and shall also permit the prosecuting attorney to inspect and reproduce reports on prospective jurors and to inspect and photograph buildings or places concerning which the defendant intends to offer evidence at the trial.

(2) *Reports of Examinations and Tests.* The defendant shall disclose and permit the prosecuting attorney to inspect and reproduce any results or reports of physical or mental examinations, scientific tests, experiments and comparisons made in connection with the particular case within the possession or control of the defendant which the defendant intends to introduce in evidence at the trial or which were prepared by a witness whom the defendant intends to call at the trial when the results or reports relate to testimony of the witness.

(3) *Notice of Defense and Defense Witnesses and Criminal Record.*

(a) *Notice of Defense.* The defendant shall inform the prosecuting attorney in writing of any defense, other than that of not guilty, on which the defendant intends to rely at the trial, including but not limited to the defense of self-defense, entrapment, mental illness or deficiency, duress, alibi, double jeopardy, statute of limitations, collateral estoppel, defense under Minnesota Statutes, section 609.035, or intoxication. The defendant shall supply the prosecuting attorney with the names and addresses of persons whom the defendant intends to call as witnesses at the trial together with their record of convictions, if any, within the defendant's actual knowledge.

A defendant who gives notice of intent to rely on the defense of mental illness or mental deficiency shall also notify the prosecuting attorney of any intent to additionally rely on the defense of not guilty.

(b) *Statements of Defense and Prosecution Witnesses.* The defendant shall permit the prosecuting attorney to inspect and reproduce any relevant written or recorded statements of the persons whom the defendant intends to call as witnesses at the trial and also statements of prosecution witnesses obtained by the defendant, defense counsel, or persons participating in the defense, and which are within the possession or control of the defendant and shall permit the prosecuting attorney to inspect and reproduce any written summaries within the defendant's knowledge of the substance of any oral statements made by such witnesses to defense counsel or obtained by the defendant at the direction of defense counsel.

(c) *Alibi.* If the defendant intends to offer evidence of an alibi, the defendant shall also inform the prosecuting attorney of the specific place or places where the defendant contends to have been when the alleged offense occurred and shall inform the prosecuting attorney of the names and addresses of the witnesses the defendant intends to call at the trial in support of the alibi.

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.

(d) *Criminal Record.* Defense counsel shall inform the prosecuting attorney of any prior convictions of the defendant provided the prosecuting attorney informs defense counsel of the record of prior convictions known to the prosecuting attorneys.

(e) *Entrapment.* A defendant who gives notice of intention to rely on the defense of entrapment, shall include in the notice a statement of the facts forming the basis for the defense, and elect whether 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).

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.

Subd. 2. Discovery Upon Order of Court.

(1) *Disclosures Permitted.* Upon motion of the prosecuting attorney with notice to defense counsel and a showing that one or more of the discovery procedures hereafter described will be of material aid in determining whether the defendant committed the offense charged, the trial court at any time before trial may, subject to constitutional limitations, order a defendant to:

- (a) Appear in a line-up;
- (b) Speak for identification by witnesses to an offense or for the purpose of taking voice prints;
- (c) Be fingerprinted or permit the defendant's palm prints or footprints to be taken;
- (d) Permit measurements of the defendant's body to be taken;
- (e) Pose for photographs not involving re-enactment of a scene;
- (f) Permit the taking of samples of the defendant's blood, hair, saliva, urine, and other materials of the defendant's body which involve no unreasonable intrusion thereof; provided, however, that the court shall not permit a blood test to be taken except upon a showing of probable cause to believe that the test will aid in establishing the guilt of the defendant;
- (g) Provide specimens of the defendant's handwriting; and
- (h) Submit to reasonable physical or medical inspection of the defendant's body.

(2) *Notice of Time and Place of Disclosures.* Whenever the personal appearance of the defendant is required for the foregoing purposes, reasonable notice of the time and place thereof shall be given by the prosecuting attorney to defense counsel.

(3) *Medical Supervision.* Blood tests shall be conducted under medical supervision, and the court may require medical supervision for any other test ordered pursuant to this rule when the court deems such supervision necessary. Upon motion of the defendant, the court may order the defendant's appearance delayed for a reasonable time or may order that it take place at the defendant's residence, or some other convenient place.

(4) *Notice of Results of Disclosure.* Unless otherwise ordered by the court, the prosecuting attorney, within five (5) days from the date the results of the discovery procedures provided by this rule become known, shall make available to defense counsel a report of the results.

(5) *Other Methods Not Excluded.* The discovery procedures provided for by this rule do not exclude other lawful methods available for obtaining the evidence discoverable under the rule.

Subd. 3. Information Not Subject to Disclosure by Defendant; Work Product. Unless otherwise provided by these rules, legal research, records, correspondence, reports or memoranda to the extent they contain the opinions, theories, or conclusions of the defendant or defense counsel or persons participating in the defense are not subject to disclosure.

Subd. 4. Failure to Call Witness. The fact that a witness' name is on a list furnished by defendant to the prosecution under this rule shall not be commented on in the presence of the jury.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 9.03 for Comment.

9.03 Regulation of Discovery

Subd. 1. Investigations Not to be Impeded. Except as otherwise provided as to matters not subject to discovery or covered by protective orders, neither the counsel for

the parties nor other prosecution or defense personnel shall advise persons having relevant material or information (except the accused) to refrain from discussing the case with opposing counsel or from showing opposing counsel any relevant materials, nor shall they otherwise impede opposing counsel's investigation of the case.

Subd. 2. Continuing Duty to Disclose.

(a) If subsequent to compliance with any discovery rule or order, a party discovers additional material, information or witnesses subject to disclosure, that party shall promptly notify the other party of the existence of the additional material or information and the identity of the witnesses.

(b) Each party shall have a continuing duty at all times before and during trial to supply the materials and information required by these rules.

Subd. 3. Time, Place and Manner of Discovery and Inspection. An order of the court granting discovery shall specify the time, place and manner of making the discovery and inspection permitted and may prescribe such terms and conditions as are just.

Subd. 4. Custody of Materials. Any materials furnished to an attorney under discovery rules or orders shall remain in the custody of and be used by the attorney only for the purpose of conducting that attorney's side of the case, and shall be subject to such other terms and conditions as the court may prescribe.

Subd. 5. Protective Orders. Upon a showing of cause, the trial court may at any time order that specified disclosures be restricted or deferred, or make such other order as is appropriate. All material and information to which a party is entitled must be disclosed in time to afford counsel the opportunity to make beneficial use of it.

Subd. 6. In Camera Proceedings. Upon application of any party with notice to the adverse party, the trial court upon a showing of good cause therefor may permit any showing of cause for denial or regulation of discovery, or portion of such showing, to be made in camera. A record shall be made of the proceedings. If the court enters an order granting relief following a showing in camera, the entire record of such showing shall be sealed and preserved in the records of the court, to be made available to the reviewing court in the event of an appeal, habeas corpus proceedings, or postconviction proceedings under Minnesota Statutes, sections 590.01 - 590.06 (1971).

Subd. 7. Excision. When some parts of certain material are discoverable under these rules, and other parts not discoverable, as much of the material shall be disclosed as is consistent with discovery rules. Material excised pursuant to judicial order shall be sealed and preserved in the records of the court to be made available to the reviewing court in the event of an appeal, habeas corpus proceeding, or postconviction proceedings under Minnesota Statutes, sections 590.01 - 590.06 (1971).

Subd. 8. Sanctions. If at any time it is brought to the attention of the trial court that a party has failed to comply with an applicable discovery rule or order, the court may upon motion and notice order such party to permit the discovery or inspection, grant a continuance, or enter such order as it deems just in the circumstances. Any person who willfully disobeys a court order under these discovery rules may be held in contempt.

Subd. 9. Filing. Unless the court orders otherwise for the purpose of a hearing or trial, discovery disclosures made pursuant to Rule 9 shall not be filed under the provisions of Rule 33.04.

The party making the disclosures shall prepare an itemized descriptive list identifying the disclosures without disclosing their contents and shall file the list as provided by Rule 33.04.

Comment

Rule 9, with Rules 7.01, 19.04, subd. 6(1) (Rasmussen notice of evidence obtained from the defendant and of identification procedures), Rules 7.02, 19.04, subd. 6(2); (Spreigl notice of additional offenses to be offered at trial), and Rule 18.05, subs. 1 and 2 (recorded testimony of grand jury witnesses), provide a comprehensive method of dis-

covery by the prosecution (Rule 9.01) and defendant (Rule 9.02). The rules are intended to give the defendant and prosecution as complete discovery as is possible under constitutional limitations.

It is the object of the rules that these discovery procedures shall be completed so far as possible by the time of the Omnibus Hearing under Rule 11, which will be held within 42 days after the defendant's first appearance in court following a complaint under Rule 5, where the Rule 5 and Rule 8 appearances are not consolidated, or within 14 days after the first appearance in district court following an indictment (Rule 19.04) and that all issues arising from the discovery process, including the need for additional discovery, will be resolved at the Omnibus Hearing (Rules 11.04; 9.01, subd. 2; 9.03, subd. 8).

While a pretrial conference originally was not specifically provided for by these rules (Compare ABA Standards, Discovery and Procedure Before Trial, 5.4 (Approved Draft, 1970) containing a specific provision for a pretrial conference.), Rule 11.04 now expressly permits the court in its discretion to hold a pretrial dispositional conference as a part of the Omnibus Hearing if it determines there is a need for it. (See F.R.Crim.P. 17.1.)

Rule 9.01, subd. 1, provides for the disclosures that shall be made before the Omnibus Hearing by the prosecution upon request of the defense without an order of court. As to the prosecution's duty to disclose under the rule see *State v. Smith*, 313 N.W.2d 429 (Minn.1981), *State v. Zeimet*, 310 N.W.2d 552 (Minn.1981), *State v. Schwantes*, 314 N.W.2d 243 (Minn.1982), and *State v. Hall*, 315 N.W.2d 223 (Minn.1982).

Rule 9.01, subd. 1, provides generally for access by defense counsel to unprotected materials in the prosecution file and also for numerous specific disclosures which must be made by the prosecuting attorney upon request of defense counsel. The general "open file" policy established by the rule is based on Unif.R.Crim.P. 421(a) (1987). Of course, this "open file" policy does not require the prosecuting attorney to give defense counsel access to any information that would be deemed nondiscoverable under Rule 9.01, subd. 3.

No specific form of request is required by Rule 9.01, subd. 1. It is anticipated that the discovery provided for by Rule 9.01, subd. 1, as well as the disclosures required of the defense by Rule 9.02 without order of court will be accomplished informally between the prosecuting attorney and defense counsel. (See ABA Standards, Discovery and Procedure Before Trial 1.3(a), 1.4(b) (Approved Draft, 1970).)

Rule 9.01, subd. 1 (1)(a), providing for the discovery of the prosecution's trial witnesses, with their written or recorded statements and written summaries of oral statements, and their criminal records, substantially follows ABA Standards, Discovery and Procedure Before Trial 2.1(a)(i)(ii)(vi) (Approved Draft, 1970) and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(a)(i)(vi) (1970) (48 F.R.D. 553, 587-589). The policy of this rule is to permit discovery of "written and recorded statements in whatever form they may have been preserved." (See Comments ABA Standards, Discovery and Procedure Before Trial, 2.1, p. 62. (Approved Draft, 1970).)

Discovery under Rule 9.01, subd. 1(1)(a), is subject to the provisions of Rule 9.01, subd. 3(2) (prosecutor's certificate for the protection of witnesses), and Rule 9.03, subd. 5 (protective orders).

Rule 9.01, subd. 1(1)(b), forbidding comment to the jury on the fact that a person was named on the list of prosecution witnesses, is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(4) (1970) (48 F.R.D. 553, 590). This rule is not intended to affect any right defense counsel may have by existing law to comment on the fact that the prosecution has failed to call a particular witness, but prevents defense counsel from commenting on the fact that the witness was on the prosecution's list.

Rule 9.01, subd. 1(1)(c), requiring the prosecution to disclose the names and addresses of grand jury witnesses, is in accord with the requirements of existing law (Minnesota Statutes, section 628.08 (1971)). Rule 18.05, subd. 2, provides the method for discovery of their grand jury testimony. (This follows substantially the recommendations of ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iii) (Approved Draft, 1970).)

Rule 9.01, subd. 1(1)(d), requiring the disclosure of the names of all persons having information related to the case is taken from Unif.R.Crim.P. 421(a) (1987). Additionally, the other specific items required to be disclosed by Unif.R.Crim.P. 421(a) (1987) are included in Rule 9.01, subd. 1.

Rule 9.01, subd. 1(2), as originally promulgated followed substantially ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(ii) (Approved Draft, 1970). As revised it is in accord with Unif.R.Crim.P. 421(a) and requires the disclosure of written or recorded statements of all persons (whether or not the statements will be offered in evidence) and also requires disclosure of the substance of any oral statements which relate to the case.

Rule 9.01, subd. 1(2), differs from ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(ii) (Approved Draft, 1970), in that the rule covers the written or recorded statements of accomplices and codefendants whether or not they are to be tried jointly with the defendant.

Rule 9.01, subd. 1(3), providing for discovery of documents and tangible objects, was originally taken from ABA Standards, Discovery and Procedure Before Trial 2.1(a)(v) (Approved Draft, 1970), F.R.Crim.P. 16(6), and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(iv) (1970), 48 F.R.D. 553, 588 to 599. It has been broadened based on Unif.R.Crim.P. 421(a) (1987) to include grand jury minutes or transcripts, law enforcement officer reports, and reports on prospective jurors. Additionally, the items which must be disclosed need only relate to the case, whether or not the prosecuting attorney intends to offer evidence about them at trial. This rule permits the defendant to obtain from the prosecuting attorney grand jury transcripts possessed by the prosecuting attorney. If the defendant wants portions of the grand jury record not yet transcribed or possessed by the prosecuting attorney, it is necessary to request that of the court under Rule 18.05 and to meet the standards under that rule.

Rule 9.01, subd. 1(4), for discovery of reports of examinations and tests follows F.R.Crim.P. 16(a)(2), and ABA Standards, Discovery and Procedure Before Trial, 2.1(a)(iv) (Approved Draft, 1970). The provision in this rule for reasonable tests by the defendant is taken from Unif.R.Crim.P. 421(a) (1987). If a test or experiment done by the prosecution does not destroy the evidence and preclude further tests or experiments, it is not necessary under this rule to notify the defendant or to allow a defense expert to observe the test or experiment.

Rule 9.01, subd. 1(5), and Rule 9.02, subd. 1(3)(d), providing for reciprocal discovery of the defendant's criminal record between prosecution and defendant is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(a)(1)(iii) (1970) 48 F.R.D. 553, 588.

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 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.

Rule 9.01, subd. 1(6), provides for the pretrial disclosure of exculpatory material which is constitutionally required at trial. (See *Brady v. Maryland*, 373 U.S. 83, 87-88 (1963); ABA Standards, Discovery and Procedure Before Trial, 2.1(c) (Approved Draft, 1970).)

The scope of the prosecutor's obligations (Rule 9.01, subd. 1(7)) to make the disclosure required by Rule 9.01, subd. 1, is taken from ABA Standards, Discovery and Procedure Before Trial, 2.1(d) (Approved Draft, 1970).)

Rule 9.01, subd. 2, provides for additional discretionary disclosure upon order of the

court. A motion seeking such an order must be served on the other party as required by Rules 10.04, subd. 1, and 33.01. The first paragraph of Rule 9.01, subd. 2, requires the prosecuting attorney under certain circumstances to assist the defendant in seeking access to materials related to the case which are in the control of other governmental agencies. This provision of the rule does not allow a defendant access to materials possessed by other governmental agencies that are protected by the Minnesota government data practices act in Minnesota Statutes, chapter 13 or by other legislation. This provision is similar to Unif.R.Crim.P. 421(d) (1987) except that under Rule 9.01, subd. 2, a court order is required upon a showing of good cause. The second paragraph of this rule permitting the defendant to request the court to order a line-up, voice identification test or similar procedure requiring a court order is based on Unif.R.Crim.P. 435 (1987) and ALI Model Code of Pre-Arrest Procedure section 170.2(8) (1975). The defendant who is convinced that such nontestimonial evidence would "clear" him or her may desire to proceed under this rule, although most nontestimonial evidence procedures could be conducted by the defendant without using this rule. Reference is made to the defendant being arrested or cited because there may be need to obtain nontestimonial evidence before a complaint is filed. The standard for issuing the order differs slightly from that utilized in Rule 9.02, subd. 2(1), upon a similar motion by the prosecuting attorney. The "good cause" standard used here minimizes the possibility that the defendant will be required to offer potentially incriminating evidence in order to utilize this rule. The third paragraph of Rule 9.01, subd. 2, following ABA Standards, Discovery and Procedure Before Trial, 2.5(a) (Approved Draft, 1970), permits disclosure by order of court of relevant material not covered by Rule 9.01, subd. 1. This rule does not permit the discovery of material nondiscoverable under Rule 9.01, subd. 3, and is not intended as one of the exceptions referred to in Rule 9.01, subd. 3(1)(a).

Requests or motions for discovery under Rule 9.01, subd. 2, should be made before (Rule 10.04) or at the Omnibus Hearing under Rule 11 (Rules 11.03, 11.04).

Rule 9.01, subd. 3, enumerates the material that is not discoverable from the prosecution.

Rule 9.01, subd. 3(1)(a), defining nondiscoverable work product is taken from ABA Standards, Discovery and Procedure Before Trial, 2.6(a) (Approved Draft, 1970), and excludes material containing opinions, theories, or conclusions of the prosecutor and the prosecution staff and official investigators with the exception of the material specifically made discoverable by Rule 9.01, subd. 1. Rule 9.01, subd. 2, providing for discretionary discovery by order of court is not intended as one of the exceptions to the work product rule.

Rule 9.01, subd. 3(1)(b), following substantially F.R.Crim.P. 16(b), excludes from discovery internal prosecution reports with the exception of the material specifically covered by Rule 9.01, subd. 1.

Rule 9.01, subd. 3(2), precluding discovery of the identity and statements of prosecution witnesses and those persons referred to in Rule 9.01, subs. 1(1) and (2), if the prosecutor certifies that they or other persons may be subject to harm, is taken from Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(vi) (1970) 48 F.R.D. 553, 589. ABA Standards, Discovery and Procedure Before Trial, 2.5(b) (Approved Draft, 1970), authorizes the court to deny discretionary disclosure in similar circumstances. The prohibition contained in this rule does not extend beyond the time when the witnesses are sworn to testify at the trial, thus continuing in Minnesota the application of the Jencks rule (353 U.S. 657 (1957)). (See *State v. Thompson*, 273 Minn. 1, 139 N.W.2d 490, 508-512 (1966), *State v. Grunau*, 273 Minn. 315, 141 N.W.2d 815, 823 (1966).) This rule does not prohibit discovery of a defendant's own statement.

Rule 9.02, covering disclosure by the defendant, is based upon ABA Standards, Discovery and Procedure Before Trial, 3.1, 3.2, 3.3 (Approved Draft, 1970). (See also Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16 (b)(1) (1970), 48 F.R.D. 553, 591.) The sanctions and remedies for failure of the prosecution or defense to make discovery are provided for by Rule 9.03, subd. 8.

Rule 9.02, subd. 1, lists the information and material the defendant shall disclose

without order of court before the Omnibus Hearing (Rule 11) on request of the prosecution.

Rule 9.02, subd. 1(1), for disclosure of documents and tangible objects to be introduced at trial follows the language of the parallel rule (Rule 9.01, subd. 1(3)), for prosecution disclosure of similar material. (See F.R.Crim.P. 16(c); Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1)(i) (1970), 48 F.R.D. 553, 591.) The requirement to disclose reports on prospective jurors does not require disclosure of opinions or conclusions concerning jurors given by persons assisting counsel on the case. Such material would be protected as work product under Rule 9.02, subd. 3.

Rule 9.02, subd. 1(2), for disclosure of reports of examinations and tests follows the parallel prosecution disclosure rule (Rule 9.01, subd. 1(4)), except that under Rule 9.02, subd. 1(2), the information subject to defense disclosure is restricted to that to be offered at trial. This restriction on mandatory disclosure by the defendant was considered necessary to avoid the possibility of infringement on the privilege against self-incrimination. (See *Jones v. Superior Court of Nevada County*, 58 Cal.2d 56, 22 Cal.Rptr. 879, 372 P.2d 919 (1962); *Williams v. Florida*, 399 U.S. 78 (1970); ABA Standards, *Discovery and Procedure Before Trial*, 3.2 (Approved Draft, 1970); Preliminary Draft of Proposed Amendments to F.R.Crim.P. 16(b)(1)(ii) (1970), 48 F.R.D. 553, 591.)

Rule 9.02, subd. 1(3)(b), for disclosure of the statements of defense trial witnesses also follows the parallel prosecution disclosure Rule 9.01, subd. 1(1)(a).

Rule 9.02, subd. 1(3)(a), requires written notice of any defense other than not guilty on which the defendant intends to rely at the trial with the names and addresses of the witnesses the defendant intends to call at the trial. This rule is based on ABA Standards, *Discovery and Procedure Before Trial*, 3.3 (Approved Draft, 1970). The defendant is not required to indicate the witnesses intended to be used for each defense except in the case of the defense of alibi (Rule 9.02, subd. 1(3)(c)). Illustrations of the kinds of defenses requiring notice are set forth in Rule 9.02, subd. 1(3)(a). (See *Williams v. Florida*, 90 S.Ct. 1893, 399 U.S. 78, 26, L.Ed.2d 446 (1970), sustaining the constitutionality of the Florida notice-of-alibi statute.) (This rule expands present Minnesota statutory law covering notice of alibi. Minnesota Statutes, section 630.14 (1971).)

Under Rule 9.02, subd. 1(3)(a), a defendant who gives notice of intention to rely on the defense of mental illness or mental deficiency, shall notify the prosecution of any intention to rely also on the defense of not guilty. This notice is necessary for the purposes of Rule 20.02, subd. 6(1) and (2), governing the procedure following a mental examination when the defense is mental illness or mental deficiency.

In addition to Rule 9.02, subd. 1(3)(a), case law may establish notice requirements with which a defendant must comply in order to raise certain defenses. In *State v. Grilli*, 304 Minn. 80, 230 N.W.2d 445 (1975), the court established the requirement that a defendant raising the defense of entrapment must notify the trial court and the prosecutor of the basis for the defense in reasonable detail and whether the defendant elects to have the issue of entrapment tried to the court or to a jury.

Rule 9.02, subd. 1(3)(d), for disclosure of the defendant's criminal record is similar to Rule 9.01, subd. 1(5), for prosecution disclosure of the record.

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 inducement by government agents to commit the crime charged, whereupon the burden rests on the state to prove beyond a reasonable doubt predisposition by defendant 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*, 96 S.Ct. 1646, 425 U.S. 484, 48 L.Ed.2d 113 (1976), *State v. Ford*, 276 N.W.2d 178 (Minn.1979), and *State v. Morris*, 272 N.W.2d 35 (Minn.1978).

Rule 9.02, subd. 2, requiring the defendant upon order of court to personally submit to the nontestimonial identification and other procedures described in the rule, is based upon ABA Standards, *Discovery and Procedure Before Trial*, 3.1 (Approved Draft, 1970), and Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1 (1971), 52 F.R.D. 409, 462-467. (See also, *Schmerber v. California*, 384 U.S. 757 (1966), *Davis v. Mississippi*, 394 U.S. 721, 727-728 (1969).) This rule is intended to be applicable only after an indictment has been returned, or a complaint filed upon which probable cause for the arrest of the defendant has been found or a tab charge has been entered and no complaint demanded for gross misdemeanors under Minnesota Statutes, section 169.121 and Minnesota Statutes, section 169.129.

Following indictment, the order under Rule 9.02, subd. 2, may be obtained from the district court at any time before trial, but preferably it should be sought at or before the Omnibus Hearing under Rule 11.

Following a complaint charging a felony or gross misdemeanor or a tab charge charging a gross misdemeanor under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the order may be obtained at the first appearance of the defendant under Rules 4.02, subs. 5(1) and 5, or at or before the Omnibus Hearing under Rule 11 from the court before which that hearing is held. It may be obtained from the district court at any time before trial, but preferably at or before the Omnibus Hearing.

Rule 9.02, subd. 2(2), requiring notice to defense counsel of the time and place for the personal appearance of the defendant, would include the defendant if the defendant represents herself or himself or is unrepresented. This rule is taken from ABA Standards, *Discovery and Procedure Before Trial*, 3(1)(b) (Approved Draft, 1970).

Rule 9.02, subd. 2(3), providing for medical supervision and for modifications of the order as to time and place is based on Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1(e)(i) (1971), 52 F.R.D. 409, 464-465.

Rule 9.02, subd. 2(4), providing for notice to defense counsel of the results of the examination, is based on Preliminary Draft of Proposed Amendments to F.R.Crim.P. 41.1(j) (1971), 52 F.R.D. 409, 465.

Rule 9.02, subd. 2(5), provides that the method prescribed by Rule 9.02, subd. 2, for obtaining the identification and other evidence from the defendant under order of court is not intended to exclude other lawful measures, such as a lawful search and seizure, by which the evidence may be obtained.

Rule 9.02, subd. 3, paralleling the language of Rule 9.01, subd. 3(1)(a) governing work product of the prosecution, defines the work product that is not subject to disclosure by the defendant, except as provided in Rule 9.02, subs. 1, 2, and 3.

Rule 9.03, governing the regulation of discovery is based on ABA Standards, *Discovery and Procedure Before Trial*, 4.1-4.7 (Approved Draft, 1970), and F.R.Crim.P. 16(e)(g).

Rule 9.03, subd. 1, follows substantially the language of ABA Standards, *Discovery and Procedure Before Trial*, 4.1 (Approved Draft, 1970), protecting interference with discovery.

The first sentence of Rule 9.03, subd. 2, providing for a continuing duty of disclosure is taken from ABA Standards, *Discovery and Procedure Before Trial*, 4.2 (Approved Draft, 1970), and F.R.Crim.P. 16(g). The second sentence is intended to make it clear that each party has a continuing duty before and at trial to make the disclosures required by Rules 9.01, subd. 1, and 9.02, subd. 1, regardless of whether the party has previously made discovery under the rules or on order of court. A party who fails to make discovery when under a duty to do so may be ordered to comply under Rule 9.03, subd. 8.

Rule 9.03, subd. 3, governing court orders for regulation of discovery, is taken from F.R.Crim.P. 16(d).

Rule 9.03, subd. 4, providing for the custody of discovered materials, comes from ABA Standards, *Discovery and Procedure Before Trial*, 4.3 (Approved Draft, 1970).

Rule 9.03, subd. 5, authorizing protective orders, follows ABA Standards, *Discovery and Procedure Before Trial*, 4.4 (Approved Draft, 1970). (See also F.R.Crim.P. 16(e).) In commenting on this standard (See comment ABA Standards, *Discovery and Procedure*

Before Trial, 4.4, p. 101 (Approved Draft, 1970.) The committee stated as follows: "This standard permits application by the party concerned to the court for a protective order which can be tailored to the particular circumstances of the case. It is anticipated that it will ordinarily be needed with respect to those matters for which discovery is mandated, rather than matters where the court in the first instance can exercise discretion upon application of the defense and thus take exceptional circumstances into account at that time."

In making protective orders under Rule 9.03, subd. 5, or in ruling on motions to compel discovery under Rules 9.01, subd. 2, and 9.03, subd. 8, the court may avail itself of Rule 9.03, subs. 6 and 7, authorizing in camera proceedings and excision.

Rule 9.03, subs. 6 and 7, are taken from ABA Standards, Discovery and Procedure Before Trial, 4.5 and 4.6 (Approved Draft, 1970), and F.R.Crim.P. 16(e).

Rule 9.03, subd. 8, providing for sanctions follows ABA Standards, Discovery and Procedure Before Trial, 4.7 (Approved Draft, 1970).

Comment amended effective August 1, 1987; January 2, 1991.

Rule 11. Omnibus Hearing in Felony and Gross Misdemeanor Cases

If the defendant does not plead guilty at the initial appearance before the district court following a complaint or, for a gross misdemeanor under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, following a tab charge, a hearing shall be held as follows:

11.01 Place of Hearing

The hearing shall be held in the district court in the judicial district wherein the alleged offense was committed.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 11.11 for Comment.

11.02 Hearing on Evidentiary Issues

Subd. 1. Evidence. If the defendant or prosecution has demanded a hearing on either of the issues specified by Rule 8.03, the court shall hear and determine them upon such evidence as may be offered by the prosecution or the defense.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses.

See Rule 11.11 for Comment.

11.03 Motions

The court shall hear and determine all motions made by the defendant or prosecution, including a motion that there is an insufficient showing of probable cause to believe that the defendant committed the offense charged in the complaint, and receive such evidence as may be offered in support or opposition. Each party may cross-examine any witnesses produced by the other. A finding by the court of probable cause shall be based upon the entire record including reliable hearsay in whole or in part. Evidence considered on the issue of probable cause shall be subject to the requirements of Rule 18.06, subd. 1.

See Rule 11.11 for Comment.

11.04 Other Issues

The Omnibus Hearing may include a pretrial dispositional conference to determine whether the case can be resolved without scheduling it for trial. The court shall ascertain any other constitutional, evidentiary, procedural or other issues that may be heard or disposed of before trial and such other matters as will promote a fair and expeditious trial, and shall hear and determine them, or continue the hearing for that purpose as permitted by Rule 11.07.

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 Minnesota Statutes, sections 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.

(Amended November 29, 1990, effective January 2, 1991.)

See Rule 11.11 for Comment.

11.05 Amendment of Complaint

The complaint may be amended as prescribed by these rules.

See Rule 11.11 for Comment.

11.06 Pleas

At the hearing the defendant may be permitted to plead to the offense charged in the complaint or, for a gross misdemeanor under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the tab charge or to a lesser included offense, or an offense of lesser degree as permitted by Rule 15.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 11.11 for Comment.

11.07 Continuances; Determination of Issues

Upon motion of the prosecuting attorney or the defendant or upon the court's initiative, the court may continue the hearing or any part thereof from time to time as may be necessary for good cause related to the particular case. All issues presented at the Omnibus Hearing shall be determined within 30 days after the defendant's appearance under Rule 8 unless a later determination is required for good cause related to the particular case. When issues are determined, the court shall make appropriate findings in writing or orally on the record. The issues presented at the Omnibus Hearing shall be consolidated for hearing except as otherwise permitted by these rules.

(Amended November 29, 1990, effective January 2, 1991.)

See Rule 11.11 for Comment.

11.08 Record

Subd. 1. Recording. A verbatim record of the proceedings shall be made.

Subd. 2. Transcript. Upon timely application to the reporter, counsel for the defendant or for the prosecution shall be furnished with a transcript of the proceedings upon the following conditions:

(a) If the transcript is to be furnished to defense counsel, the costs thereof shall be prepaid except when the defendant is represented by the public defender or assigned counsel, or when the defendant makes a sufficient affidavit of inability to pay or secure the costs and the court orders that the defendant be supplied with the transcript at the expense of the appropriate governmental unit.

(b) The prosecution shall be furnished with the transcript without prepayment of costs.

(c) When a transcript is furnished to counsel, a copy shall be filed with the clerk of the court.

Subd. 3. Filing. The record and all papers and exhibits in the proceeding shall be filed or placed in the custody of the clerk of the court. Upon order of the court any exhibit may be returned to the party producing it.

See Rule 11.11 for Comment.

11.09 (Deleted, August 1, 1987.)

11.10 Plea; Trial Date

If the defendant is not discharged the defendant shall plead to the complaint or, for gross misdemeanors under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the tab charge or be given additional time within which to plead. If the defendant pleads not guilty, a trial date shall then be set. A defendant shall be tried as soon as possible after entry of a not guilty plea. On demand made in writing or orally on the record by the prosecuting attorney or the defendant, the trial shall be commenced within sixty (60) days from the date of the demand unless good cause is shown upon the prosecuting attorney's or the defendant's motion or upon the court's initiative why the defendant should not be brought to trial within that period. The time period shall not begin to run earlier than the date of the not guilty plea. If trial is not commenced within 120 days after such demand is made and the not guilty plea is entered, the defendant, except in exigent circumstances, shall be released subject to such nonmonetary release conditions as may be required by the court under Rule 6.02, subd. 1.

See Rule 11.11 for Comment.

11.11 Exclusion of Witnesses

Before or during any Omnibus or other pretrial hearing or proceeding, witnesses may be sequestered or excluded from the courtroom, prior to their appearance, in the discretion of the court.

Comment

If a defendant does not plead guilty at the initial appearance before the district court under Rule 8, the Omnibus Hearing provided by Rule 11 shall be held. The initial appearance may be continued, and if the defendant does not then plead guilty, the Omnibus Hearing shall be held as provided by the rule.

The Omnibus Hearing provided by this rule is divided into three parts: (1) the Rasmussen hearing (Rule 11.02); (2) the hearing of pretrial motions of the defendant and prosecution (Rule 11.04); (3) the hearing on other pretrial issues brought up on the court's initiative (Rule 11.04). The hearings on any of these parts may be combined and heard simultaneously (Rule 11.07).

The current statutory hearing on probable cause has been replaced under these rules by a motion to dismiss the complaint for lack of probable cause which is to be made in accordance with Rule 10 and heard at the Omnibus Hearing pursuant to Rule 11.03. If such a motion is made, the court shall base its probable cause determination upon the evidence set forth in Rule 18.06, subd. 1. In State v. Florence, 306 Minn. 442, 239 N.W.2d 892 (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.

If the defendant does not plead guilty upon the initial appearance in the district court under Rule 8 following a complaint or, where permitted, a tab charge or upon arraignment in the district court under Rule 19.04, subd. 5, following an indictment, the Omnibus Hearing (See ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.1-5.3 (Approved Draft, 1970).), shall be held as provided by Rule 11 not later than twenty-eight (28) days after the initial appearance or arraignment, unless the period is extended for good cause related to the particular case (Rules 8.04; 19.04, subd. 5).

By that time, the prosecution will have given the Rasmussen and Spreigl notices

(Rules 7.01; 7.02; 19.04, subd. 6(1) and (2)); the Rasmussen hearing will have been either waived or demanded (Rule 8.03); the discovery required without order of court will have been completed (Rules 7.03; 19.04, subd. 7; 9.01, subd. 1; 9.02, subd. 1); and pretrial motions will have been served (Rules 10.04, subd. 1; 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 8; 18.02, subd. 2; 18.05, subds. 1 and 2; 17.03, subds. 3 and 4; 17.04; 17.06, subd. 3; 20.01, subd. 2; 20.03, subd. 1). (In the case of an indictment the pretrial motions should include any motion to suppress based on the disclosures contained in the Rasmussen notice under Rule 19.04, subd. 6(1).)

The purpose of the Omnibus Hearing is to avoid a multiplicity of court appearances and hearings upon these issues with a duplication of evidence and to combine all of the issues that can be disposed of without trial into one appearance and hearing. (See ABA Standards, Discovery and Procedure Before Trial, 1.1, 5.3 (Approved Draft, 1970).) Early resolution of motions provides for more efficient handling of criminal cases at subsequent stages. This includes suppression motions, evidentiary motions, and nonevidentiary motions such as motions to disclose the identity of an informant or to consolidate or sever trials or codefendants. Early resolution of these motions also helps to focus the lawyers' attention on a smaller number of witnesses, including law enforcement officers and victims of crimes. When such motions are resolved early, uncertainty with respect to many significant issues in a case are removed. This early resolution of motions also permits timely and meaningful pretrial dispositional conferences at which time the parties can engage in significant plea agreement discussions. Setting a firm trial date and commencing a trial on that date are also important factors in minimizing delays. Firm trial dates are most likely to be found in courts that achieve early resolution of pretrial motions. Achieving early resolution of pretrial motions requires the cooperation of the court, the local bar and law enforcement agencies. When courts take early control of criminal cases with meaningful pretrial events it benefits all people within the criminal justice system and serves the efficient administration of justice.

If a Rasmussen hearing has been demanded under Rule 8.03 or other similar evidentiary issues presented by motion or otherwise (Rules 11.02, subd. 1; 11.03; 11.04), they should be combined for hearing if possible (Rule 11.07).

Rule 11.02 covers the Rasmussen hearing demanded under Rule 8.03 (or required by a motion to suppress in the case of an indictment). Upon the Rasmussen hearing under Rule 11.02, both parties may offer evidence and cross-examine the other's witnesses. The rule leaves to judicial interpretation the consequences of the defendant's testimony at a Rasmussen or similar evidentiary hearing, that is, whether it may be used against the defendant at trial substantively (See *Simmons v. United States*, 88 S.Ct. 967, 390 U.S. 377, 19 L.Ed.2d 1247 (1968).) or by way of impeachment (cf. *Harris v. New York*, 91 S.Ct. 643, 401 U.S. 222, 28 L.Ed.2d 1 (1971)).

By Rule 11.03, the court shall also hear all motions made by the parties under Rule 10 (See also Rules 9.01, subd. 2; 9.02, subd. 2; 9.03, subd. 5; 9.03, subd. 8; 18.02, subd. 2; 18.05, subds. 1 and 2; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subd. 3; 20.01, subd. 2; 20.03, subd. 1.) Motions not made upon grounds then known and available to the parties are waived, except lack of jurisdiction or failure of the complaint or indictment to state an offense, unless the court grants an exception to the waiver (Rule 10.03).

Rule 11.03 specifically permits a motion to dismiss a complaint for lack of probable cause, but does not permit a motion to dismiss an indictment upon this ground. See Rule 19.04, subd. 5.

The court shall also on its initiative under Rule 11.04 ascertain and hear any other issues that can be heard and disposed of before trial and any other matters that would promote a fair and expeditious trial. This would include requests or issues arising respecting discovery (Rule 9), evidentiary issues arising from the Spreigl notice (Rules 7.01, 19.04, subd. 6(2)), or other evidentiary issues, and expressly permits a pretrial dispositional conference if the court considers it necessary. (See F.R.Crim.P. 17.1.) Many judicial districts already make widespread and effective use of pretrial dispositional conferences to resolve cases at the earliest possible time. If such resolution is not possible, the conference may be used to determine the nature of the case so that further hearings

or trial may be scheduled as appropriate. The use of such dispositional conferences, is commendable and highly recommended by the Advisory Committee. To assure that the pretrial dispositional conference portion of the Omnibus Hearing is meaningful, trial courts should insist on timely discovery by the parties before the date of the Omnibus Hearing as required by Rule 9.01, subd. 1. The Advisory Committee also strongly commends the practice, now in effect in some counties, of preparing the Sentencing Guidelines Worksheet prior to the Omnibus Hearing. This may be done in connection with a pre-release investigation under Rule 6.02, subd. 3 and later may be included with any presentence investigation report required under Rule 27.03, subd. 1.

By Rule 11.05 the complaint may be amended at the Omnibus Hearing as provided by Rule 17.05. (See also Rules 3.04, subd. 2; 17.06, subd. 4.)

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 609 of the Minnesota Rules of Evidence, *State v. Jones*, 271 N.W.2d 534 (Minn. 1978), and *State v. Brouillette*, 286 N.W.2d 702 (Minn. 1979).

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 a later determination is justified by good cause related to the particular case, Rule 11.07 requires that all issues presented to the court at the Omnibus Hearing must be decided within 30 days after the defendant's initial appearance before the court under Rule 8.

Under Rule 11.06, the defendant at the Omnibus Hearing may plead to the complaint or indictment or, for gross misdemeanors under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the tab charge or to a lesser or different offense as provided by Rules 14 and 15. See Rules 15.07 and 15.08 as to the standards and procedure for entering a plea to a lesser or a different offense.

By Rule 11.07, the Omnibus Hearing or any part thereof may be continued if necessary to dispose of the issues presented. At any dispositional conference portion of an Omnibus Hearing it is permissible under Rule 11.07 to continue the evidence suppression portion of the Omnibus Hearing until the day of trial if the court determines that resolution of the evidentiary issues would not dispose of the case. Such a continuance would be "for good cause related to the particular case" under Rule 11.07 and under that rule the court could enter an order continuing both the Omnibus Hearing and the court's decision on the evidentiary issues until the day of trial. Other grounds may also support such a continuance and as long as the court finds that the good cause is related to the particular case the continuance is justified under the rule. However, the court should not as a general

rule or practice bifurcate the Omnibus Hearing or delay the hearing or any part of it until the day of trial when that is not justified by the circumstances of the particular case. To do so violates the purpose of these rules. See Rule 1.02 and the comments thereto. All issues presented at the Omnibus Hearing shall be determined within 30 days after the defendant's initial appearance under Rule 8 unless a later determination is required for good cause related to the particular case. (See also Rule 10.04, subd. 2.)

Rule 11.07 requires appropriate findings upon the determinations made on the issues presented at the Omnibus Hearing in order that the basis for the determinations may clearly appear.

Rule 11.08, subd. 1, requires that a record of the Omnibus Hearing shall be made, and Rule 11.08, subd. 2, prescribes the circumstances in which a transcript may be furnished to the parties. The verbatim record required by Rule 11.08, subd. 1, may be made by a court reporter or recording equipment.

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. Consequently, when the Omnibus Hearing is held 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.

A defendant who is not discharged following the Omnibus Hearing, shall plead to the indictment or complaint or, for gross misdemeanors under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the tab charge in the district court or be given additional time within which to plead. If the defendant pleads not guilty, a trial date shall be set. (Rule 11.10.)

Rule 11.10 provides that a defendant shall be brought to trial within 60 days after demand therefor is made by the prosecuting attorney or defendant, unless good cause is shown for a delay, but regardless of a demand the defendant shall be tried as soon as possible. (Rule 11.10 supersedes Minnesota Statutes, section 611.04 (1971), requiring the defendant to be brought to trial at the next term of court.)

For good cause the trial may be postponed beyond the 60-day time limit upon request of the prosecuting attorney or the defendant or upon the court's initiative. Good cause for the delay does not include court calendar congestion unless exceptional circumstances exist. See *McIntosh v. Davis*, 441 N.W.2d 115 (Minn.1989). Even if good cause exists for postponing the trial beyond the 60-day time limit, the defendant, except in exigent circumstances, must be released, subject to such nonmonetary release conditions as may be required by the court under Rule 6.02, subd. 1, if trial has not yet commenced within 120 days after the demand is made and the not guilty plea entered. Other sanctions for violation of these speedy trial provisions are left to case law. See *State v. Kasper*, 411 N.W.2d 182 (Minn.1987), and *State v. Friberg*, 435 N.W.2d 509 (Minn.1989).

Rule 11.10 does not attempt to set arbitrary time limits (other than those resulting from the demand), because they would have to be circumscribed by numerous specific exclusions (See ABA Standards, Speedy Trial, 2.3 (Approved Draft, 1968).), which are covered in any event by the more general terms of the rule. (See ABA Standards, Speedy Trial, 2.3(h) (Approved Draft, 1968)).

Rule 11.10 does not specify the consequences of a failure to bring the defendant to trial within the time limits set by the rule. (This differs from ABA Standards, Speedy Trial, 4.1, Pretrial Release, 5.10 (Approved Drafts, 1968), in which the consequences are set forth.)

The consequences and the time limits beyond which a defendant is considered to have been denied the constitutional right to a speedy trial are left to judicial decision. (See *Barker v. Wingo*, 92 S.Ct. 2182, 407 U.S. 514, 33 L.Ed.2d 101 (1972).) The existence or absence of the demand under Rule 11.10 provides a factor that may be taken into account in determining whether the defendant has been unconstitutionally denied a speedy trial. (See *Barker v. Wingo*, *supra*.)

Under Rule 11.10, the time period following the demand does not begin to run earlier than the date of the not guilty plea. The not guilty plea was selected as the crucial date because the defendant is not required to so plead until at or after the Omnibus Hearing (Rules 8.03; 11.06; 11.10) and by that time all discovery and pretrial proceedings will have been substantially completed. If demand is made before the not guilty plea, the 60-day period starts to run upon entry of the plea. It is contemplated that when the pretrial proceedings have been completed, the court will require the defendant to enter a plea, if the defendant has not already done so, in order that the defendant cannot delay the trial by intentionally delaying the plea. (Rule 11).

Comment amended effective August 1, 1987; January 2, 1991.

Rule 13. Arraignment in Felony and Gross Misdemeanor Cases

The arraignment shall be conducted as follows:

13.01 In Open Court

The arraignment shall be conducted in open court.

See Rule 13.05 for Comment.

13.02 Right to Counsel

If the defendant other than a corporation appears without counsel, the court shall advise the defendant of the right to counsel, and when required, shall appoint counsel pursuant to Rule 5.02.

See Rule 13.05 for Comment.

13.03 Copy and Reading of Charges

The defendant shall be provided with a copy of the complaint or indictment if it has not been previously provided. The complaint or indictment shall be read to the defendant unless the reading is waived. For gross misdemeanors under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, prosecuted by tab charge pursuant to Rule 4.02, subd. 5(3), the tab charge shall be read to the defendant.

See Rule 13.05 for Comment.

13.04 Plea

The defendant shall be called on to plead or may be given time to plead.

See Rule 13.05 for Comment.

13.05 Record

A verbatim record of the arraignment shall be made.

Comment

Arraignment as provided by Rule 13, will take place at the appearance of the defendant in the court under Rule 8 following a complaint charging a felony or gross misdemeanor or following entry of a tab charge for a gross misdemeanor under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, 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 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 court under Rule 8.01 shall be held within 14 days after the defendant's initial appearance before a court (Rule 5.03), under Rule 5, and in the case of an indictment, within seven days after the defendant's first appearance in the district court (Rule 19.04, subds. 1 and 4). In the case of gross misdemeanors under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the arraignment under Rule 13 shall be held within 14 days after the tab charge is entered or within 14 days after the complaint, if any, is filed

(Rules 4.02, subd. 5(3) and 5.03). Of course the appearances under Rule 5 and Rule 8 could be consolidated pursuant to Rule 5.03 and the arraignment on the complaint or tab charge would then be held at that consolidated appearance.

The requirement of Rule 13.01 that the arraignment shall be conducted in open court is taken from F.R.Crim.P. 10 and follows present Minnesota practice (Minnesota Statutes, section 630.01 (1971)).

Rule 13.02 providing that the court shall advise the defendant of the right to counsel continues the requirements of Minnesota Statutes, sections 611.15 and 630.10 (1971).

If the defendant has the right to counsel (See ABA Standards, Providing Defense Services, 4.1 (Approved Draft, 1968); State v. Borst, 278 Minn. 388, 154 N.W.2d 888 (1967)), appears without counsel, and is financially unable to afford counsel, Rule 13.02 requires the court to appoint counsel unless the defendant knowingly and voluntarily waives the right (ABA Standards, Providing Defense Services, 7.1, 7.2 (Approved Draft, 1968)). The waiver shall be in writing (Minnesota Statutes, section 611.19 (1971); ABA Standards, Providing Defense Services, 7.3 (Approved Draft, 1968)) or under Rule 13.02 may be made orally before the court on the record.

Rule 13.03 requiring that the defendant be provided with a copy of the indictment or complaint and that the indictment or complaint be read to the defendant unless waived continues the practice under Minnesota Statutes, section 630.11 (1971).

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 (Minnesota Statutes, section 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 28 days and seven days respectively, and the defendant will not be required or permitted to plead earlier than that date.

By Rule 11.10, if the defendant is not discharged following the Omnibus Hearing, the defendant shall plead to the complaint or, when authorized, the tab charge promptly or may be given additional time.

When the defendant pleads not guilty, a trial date shall be set (see Rule 11.10.)

When the defendant pleads guilty, the procedure prescribed by Rule 15 shall be followed.

Comment amended effective August 1, 1987; January 2, 1991.

Rule 28. Appeals to Court of Appeals

28.01 Scope of Rule

Subd. 1. Appeals from District Court. Rule 28 governs the procedure for appeals in misdemeanor, gross misdemeanor, and felony cases from the district courts to the Court of Appeals except for cases in which the defendant has been convicted of murder in the first degree.

Subd. 2. Applicability of Rules of Civil Appellate Procedure. Except as otherwise provided in these rules, the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern appellate procedures in such cases.

Subd. 3. Suspension of Rules. In the interest of expediting decision, or for other good cause shown, the Court of Appeals may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its initiative and may order proceedings in accordance with its direction, but the Court of Appeals may not alter the time for filing notice of appeal except as provided by these rules.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 28.05 for Comment.

28.02 Appeal by Defendant

Subd. 1. Review by Appeal. Except as provided by law for the issuance of the extraordinary writs and for the Postconviction Remedy, a defendant may obtain review of orders and rulings of the district courts by the Court of Appeals only by appeal as provided by these rules. Writs of error are abolished.

Subd. 2. Appeal as of Right.

(1) *Final Judgment and Postconviction Appeal.* A defendant may appeal as of right from any adverse final judgment or from an order denying in whole or in part a petition for postconviction relief under Minnesota Statutes, chapter 590. A judgment shall be considered final within the meaning of these rules when there is a judgment of conviction upon the verdict of a jury or the finding of the court, and sentence is imposed or the imposition of sentence is stayed.

(2) *Orders.* A defendant may not appeal until final judgment adverse to the defendant has been entered by the trial court except that a defendant may appeal from an order refusing or imposing conditions of release or in felony and gross misdemeanor cases from:

1. an order granting a new trial when the defendant claims that the trial court should have entered a final judgment in the defendant's favor; or
2. an order, not on the defendant's motion, finding the defendant incompetent to stand trial.

(3) *Sentences.* A defendant may appeal as of right from any sentence imposed or stayed in a felony case. All other sentences may be reviewed only pursuant to Rule 28.02, subd. 3.

Subd. 3. Discretionary Appeal. The Court of Appeals in the interests of justice and upon petition of the defendant may allow an appeal from an order not otherwise appealable, except an order made during trial, in the manner provided by the Minnesota Rules of Civil Appellate Procedure, provided that the petition shall be served and filed within thirty (30) days after entry of the order appealed.

Subd. 4. Procedure for Appeals Other than Sentencing Appeals.

(1) *Service and Filing.* An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on the prosecuting attorney, the attorney general for the State of Minnesota, and the clerk of the trial court in which the judgment or order appealed from is entered. A bond shall not be required of a defendant for exercising the right to appeal. Unless otherwise ordered by the appellate court, defendant need not file a certified copy of the judgment or order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure. Failure of the defendant to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) *Contents of Notice of Appeal.* The notice of appeal shall specify the party or parties taking the appeal; shall give the names, addresses, and telephone numbers of all counsel and indicate whom they represent; shall designate the judgment or order from which appeal is taken; and shall state that the appeal is to the Court of Appeals.

(3) *Time for Taking an Appeal.* An appeal by a defendant shall be taken within 90 days after final judgment or entry of the order appealed from in felony and gross misdemeanor cases and within 10 days after final judgment or entry of the order appealed from in misdemeanor cases, except that an appeal from an order denying a petition for postconviction relief shall be taken within 60 days after entry of the order. A notice of appeal filed after the announcement of a decision or order, but before sentencing or entry of judgment or order shall be treated as filed after such entry or sentencing and on the day thereof. If a timely motion to vacate the judgment, for judgment of acquittal, or for a new trial has been made, the time for an appeal from a final judgment does not begin to run until the entry of an order denying the motion, and the order denying the motion may be reviewed upon the appeal from the judgment.

A judgment or order is entered within the meaning of these appellate rules when it is entered upon the record of the clerk of the trial court.

For good cause the trial court or a judge of the Court of Appeals may, before or after the time for appeal has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed herein for appeal.

Subd. 5. Proceedings in Forma Pauperis. Proceedings on appeal or postconviction in forma pauperis shall be as follows:

(1) An indigent defendant wanting to appeal or to obtain postconviction relief shall make application therefor to the office of the Public Defender, addressed as follows:

Minnesota State Public Defender
The Law School, University of Minnesota
Minneapolis, MN 55455

(2) The office of the State Public Defender shall promptly send to such applicant a financial inquiry form, preliminary questionnaire form and such other forms as deemed appropriate.

(3) The applicant shall, if the applicant wants to pursue the application, completely fill out these forms, sign each of these forms, and have his or her signature notarized on each of these forms if indicated.

(4) The applicant shall then return these completed documents to the office of the State Public Defender for further processing.

(5) The State Public Defender's office shall determine if the applicant is financially and otherwise eligible for representation. If the applicant is so eligible then the State Public Defender shall provide representation regarding a judicial review or an evaluation of the merits of a judicial review of the case in a felony case and may so represent the applicant in misdemeanor or gross misdemeanor cases. Upon the administrative determination by the State Public Defender's office that the office will represent an applicant for such a review or evaluation, the State Public Defender is automatically appointed for that purpose without order of the court. The State Public Defender's office shall notify the applicant of its decision on representation and advise the applicant of any problem relative to the applicant's qualifications to obtain the services of the State Public Defender's office. Any applicant who contests a decision of the State Public Defender's office that the applicant is ineligible for representation may apply to the Minnesota Supreme Court for relief.

(6) All requests for transcripts necessary for judicial review or efforts to have cases reviewed in which the defendant is not represented by an attorney shall be referred by the court receiving the same to the office of the State Public Defender for processing as in paragraphs (2) through (5) above.

(7) All clerks of court shall furnish the office of the State Public Defender copies of any documents in their possession, without the prior payment of the fees therefor and shall bill the office of the State Public Defender for these copies after they have been furnished to the State Public Defender's office.

(8) All fees, other than for furnishing copies of documents, including appeal fees, hearing fees or filing fees, ordinarily charged by the clerks of court shall automatically be waived in cases in which the State Public Defender's office, or other public defender's office, represents the defendant in question. Such fees shall also be waived by the court upon a sufficient showing by any other attorney that the defendant is unable to pay the fees required.

(9) Unless otherwise specifically provided by Supreme Court order, the State Public Defender's office shall be appointed to represent all eligible indigent defendants in all appeal or postconviction cases as provided above, regardless of which county in the state is the county in which the defendant was accused.

(10) In appeal cases and postconviction cases, the cost of transcripts and other necessary expenses shall be borne by the State of Minnesota from funds available to the State Public Defender's office, regardless of which county in the state is the county in which the defendant was accused, if approved by the State Public Defender.

(11) When a defendant is represented on appeal by the State Public Defender's office, the provisions of Rule 110.02, subd. 2 of the Minnesota Rules of Civil Appellate Procedure concerning the certificate as to transcript shall not apply. Rather, in such

cases, the State Public Defender upon ordering the transcript shall mail a copy of the written request for transcript to the clerk of the trial court, the clerk of the appellate courts, and the prosecuting attorney. The reporter shall promptly acknowledge receipt of said order and acceptance of it, in writing, with copies to the clerk of the trial court, the clerk of the appellate courts, the State Public Defender, and the prosecuting attorney and in so doing shall state the estimated number of pages of the transcript and the estimated completion date not to exceed 60 days. Upon delivery of the transcript, the reporter shall file with the clerk of the appellate courts a certificate evidencing the date of delivery.

(12) A defendant may proceed *pro se* on appeal only after the State Public Defender has first had the opportunity to file a brief on behalf of the defendant. The State Public Defender at the time of filing and serving the brief shall also provide a copy of the brief to the defendant. If the defendant then chooses to proceed *pro se* on appeal or to file a supplementary brief, the defendant shall so notify the State Public Defender.

(13) Upon receiving notice pursuant to paragraph (12) that the defendant has chosen to proceed *pro se* on appeal or to file a supplementary brief, the State Public Defender's office shall confer with the defendant about the reasons for choosing to do so and advise the defendant concerning the consequences and ramifications of that choice.

(14) In order to proceed *pro se* on appeal following consultation, the defendant shall sign and return to the State Public Defender's office a detailed waiver of counsel as provided by that office for the particular case.

(15) If the State Public Defender's office believes, after consultation, that the defendant may not be competent to waive counsel it shall assist the defendant in seeking an order from the district court determining the competency or incompetency of the defendant.

(16) The brief filed by the State Public Defender on behalf of the defendant shall be considered by the court. A defendant, whether or not choosing to proceed *pro se*, may also file with the court a supplemental brief. The supplemental brief shall be filed within 30 days after the initial brief is filed by the State Public Defender.

(17) If a defendant requests a copy of the transcript, the State Public Defender's office shall confer with the defendant concerning the need for the transcript. If the defendant still requests a copy of the transcript it shall be provided to the defendant temporarily.

(18) Upon receiving the transcript, the defendant must sign a receipt for it including an agreement not to make the transcript available to other persons and to return the transcript to the State Public Defender's office upon expiration of the time to file any supplementary brief.

(19) The transcript remains the property of the State Public Defender's office and must be returned to that office upon expiration of the time to file any supplemental brief. Upon return of the transcript to the State Public Defender's office, that office shall provide the defendant with a copy of a signed receipt for it. The original of the receipt shall be filed promptly with the clerk of the appellate courts and until it is filed the defendant's supplemental brief will not be accepted for filing.

Subd. 6. Stay. When an appeal is taken by the defendant, the execution of judgment or sentence shall not be stayed unless a stay is granted by the trial court judge or a judge of the appellate court.

Subd. 7. Release of Defendant.

(1) *Conditions of Release.* Upon appeal, if the court grants a stay under subd. 6 of this rule, the conditions for defendant's release and the factors determining the conditions of release shall be governed by Rule 6.02, subd. 1 and subd. 2, except as hereinafter provided by this rule. The court shall also take into consideration that the defendant may be compelled to serve the sentence imposed before the appellate court has an opportunity to decide the case.

(2) *Burden of Proof.* Release pending appeal from a judgment of conviction

upon which the defendant was sentenced to incarceration shall not be granted unless the defendant establishes to the satisfaction of the court that there is no substantial risk the defendant will not appear to answer the judgment following the conclusion of the appellate proceedings, that the defendant is not likely to commit a serious crime, intimidate witnesses, or otherwise interfere with the administration of justice, and that the appeal is not frivolous or taken for delay.

(3) *Application for Release Pending Appeal.* Application for release pending appeal shall be made in the first instance to the trial court. If the trial court refuses release pending appeal, or imposes conditions of release, the court shall state on the record the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review, may be made to the appellate court or a judge thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the prosecuting attorney. The appellate court or a judge thereof may order the release of the defendant pending disposition of the motion.

(4) *Credit for Time Spent in Custody.* All time the defendant is in custody pending an appeal shall be automatically deducted from the sentence imposed by the court.

Subd. 8. Record on Appeal. The record on appeal shall consist of the papers filed in the trial court, the offered exhibits, and the transcript of the proceedings, if any. Bills of exception and settled cases are abolished.

In lieu of the record as defined by this rule, the parties may within 60 days after filing of the notice of appeal prepare, sign, and file with the clerk of trial court a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court, stating only the claims and facts essential to a decision. If the statement is accurate, it, together with such additions as the trial court may consider necessary to present the issues raised by the appeal, shall be approved by the trial court and shall be the record on appeal. Any recitation of the essential facts of the case, conclusions of law, and memorandum relating thereto of the trial court shall be included with the record. An appellant who intends to proceed on appeal with a statement of the case under this rule rather than by obtaining a transcript, or without a statement of the case or transcript, shall serve notice of intent to do so on respondent and the clerk of the trial court and file the notice with the clerk of the appellate courts all within the time provided for ordering a transcript.

Subd. 9. Transcript of Proceedings and Transmission of the Transcript and Record. The Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the transcript of the proceedings and the transmission of the transcript and record to the Court of Appeals, except that the transcript shall be ordered within 30 days after filing of the notice of appeal and may be extended by the appellate court for good cause shown. Any videotape or audiotape exhibits admitted at trial or hearing shall, if not previously transcribed, be transcribed at the request of either the appellant or the respondent. The transcript of any such exhibit then shall be included as part of the record. If the entire transcript is not to be included, the appellant, within the 30 days, shall file with the clerk of the appellate courts and serve on the clerk of the trial court and respondent a description of the parts of the transcript which the appellant intends to include in the record and a statement of the issues the appellant intends to present on appeal. If the respondent deems a transcript of other parts of the proceedings to be necessary, the respondent shall order, within 10 days of service of the description or notification of no transcript, those other parts from the reporter deemed necessary, or serve and file a motion in the trial court for an order requiring the appellant to do so.

Subd. 10. Briefs. The appellant shall serve and file the appellant's brief and appendix within 60 days after delivery of the transcript by the reporter or after the filing of the trial court's approval of the statement pursuant to subd. 8 of this rule or Rule 110.03 of the Minnesota Rules of Civil Appellate Procedure. In all other cases, if the transcript is obtained prior to appeal or if the record on appeal does not include a transcript, then

the appellant shall serve and file the appellant's brief and appendix with the clerk of the appellate courts within 60 days after the filing of the notice of appeal. The respondent shall serve and file the respondent's brief and appendix, if any, within 45 days after service of the brief of appellant. The appellant may serve and file a reply brief within 15 days after service of the respondent's brief. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

Subd. 11. Scope of Review. On appeal from a judgment, the court may review any pretrial or trial order or ruling, whether or not a motion for new trial has been made, and may review the denial of a motion for new trial or to vacate judgment or for judgment of acquittal, whether ruled upon before or after judgment. The court may review any other matter as the interests of justice may require.

Subd. 12. Action on Appeal. On appeal from a judgment, if the court affirms the judgment, it shall direct the sentence as pronounced by the trial court or as modified by the appellate court pursuant to Rule 28.05, subd. 2, be executed. If it reverses the judgment, it shall either direct a new trial, or that the defendant be discharged or that the conviction be reduced to a lesser included offense or to an offense of lesser degree, as the case may require. If the conviction is reduced, the case shall be returned to the court which imposed the sentence for resentencing.

Subd. 13. Oral Argument.

(1) Allowance of Oral Argument. There shall be oral argument in every case if either party serves on adverse counsel and files with the clerk of the appellate courts a request for it at the time of serving and filing the party's initial brief, unless:

1. oral argument is forfeited by respondent pursuant to Rule 128.02 of the Minnesota Rules of Civil Appellate Procedure for failure to timely file a brief and appellant has either waived oral argument or not requested it;

2. oral argument is waived pursuant to Rule 134.06; or

3. the appellate court determines in the exercise of its discretion that oral argument is unnecessary because:

a. the dispositive issue or set of issues has been authoritatively settled; or

b. the briefs and record adequately present the facts and legal arguments and the decisional process would not be significantly aided by oral argument.

The clerk of the appellate court shall notify the parties when it has been determined that oral argument shall not be allowed under this provision. Any party so notified may request the court to reconsider its decision by serving on all other parties and filing with the clerk of the appellate courts a written request for reconsideration within 5 days of receipt of the notification that no oral argument shall be allowed. If, under this provision, oral argument is not allowed, the case shall be considered as submitted to the court at the time the clerk of the appellate courts notifies the parties that oral argument has been denied.

The Court of Appeals may direct presentation of oral argument in any case.

(2) Procedure Upon Oral Argument. Except in exigent circumstances, the oral argument shall be heard before the full panel to which the case has been assigned, and in any event shall be considered and decided by the full panel. Except as otherwise provided by this rule, the procedure upon oral argument including waiver and forfeiture of oral argument shall be as set forth in the Minnesota Rules of Civil Appellate Procedure.

(Amended June 29, 1987, effective August 1, 1987.)

See Rule 28.05 for Comment.

28.03 Certification of Proceedings.

If, upon the trial of any person convicted in any court, or if, upon any motion to

dismiss a tab charge, complaint or indictment, or upon any motion relating to the tab charge, complaint, or indictment, any question of law shall arise which in the opinion of the judge is so important or doubtful as to require a decision of the Court of Appeals, the judge shall, if the defendant shall request or consent thereto, report the case, so far as may be necessary to present the question of law, and certify the report to the Court of Appeals, whereupon all proceedings in the case shall be stayed until the decision of the Court of Appeals. The prosecuting attorney shall, upon certification of the report, forthwith furnish a copy to the attorney general at the expense of the county. Other criminal cases in such trial court involving or depending upon the same question, may, if the defendant so requests, or consents thereto, be stayed in like manner until the decision of the case so certified. Unless otherwise provided by order of the appellate court, the filing and serving of briefs upon certification shall be as provided in Rule 28.04, subd. 2(3).

See Rule 28.05 for Comment

28.04 Appeal by Prosecuting Attorney

Subd. 1. Right of Appeal. The prosecuting attorney may appeal as of right to the Court of Appeals:

(1) in any case, from any pretrial order of the trial court except an order dismissing a complaint for lack of probable cause to believe the defendant has committed an offense or an order dismissing a complaint pursuant to Minnesota Statutes, section 631.21;

(2) in felony cases from any sentence imposed or stayed by the trial court; and

(3) in any case, from an order granting postconviction relief under Minnesota Statutes, chapter 590.

Subd. 2. Procedure Upon Appeal of Pretrial Order. The procedure upon appeal of a pretrial order by the prosecuting attorney shall be as follows:

(1) *Stay.* Upon oral notice that the prosecuting attorney intends to appeal a pretrial order, the trial court shall order a stay of proceedings of five (5) days to allow time to perfect the appeal.

(2) *Notice of Appeal.* The prosecuting attorney shall file with the clerk of the appellate courts a notice of appeal, a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appellate Procedure, and a copy of the written request to the court reporter for such transcript of the proceedings as appellant deems necessary. The notice of appeal, the statement of the case, and request for transcript shall have attached at the time of filing, proof of service on the defendant or defense counsel, the State Public Defender, the attorney general for the State of Minnesota, and the clerk of the trial court in which the pretrial order is entered. Failure to serve or file the statement of the case, to request the transcript, to file a copy of such request, or to file proof of service does not deprive the Court of Appeals of jurisdiction over the prosecuting attorney's appeal, but it is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal. The contents of the notice of appeal shall be as set forth in Rule 28.02, subd. 4(2).

(3) *Briefs.* Within fifteen (15) days of delivery of the transcripts, appellant shall file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent. Within 8 days of service of appellant's brief upon respondent the respondent shall file the respondent's brief with said clerk together with proof of service upon the appellant. In all other respects the Minnesota Rules of Civil Appellate Procedure to the extent applicable shall govern the form and filing of briefs and appendices except that the appellant's brief shall contain a statement of the procedural history.

(4) *Dismissal by Attorney General.* In appeals by the prosecuting attorney, the attorney general may, within 20 days after entry of the order staying proceedings, dismiss the appeal and shall within 3 days thereafter give notice thereof to the judge of the lower court and file with the clerk of the appellate courts notice of such dismissal. The lower court shall then proceed as if no appeal had been taken.

(5) *Oral Argument and Consideration.* The provisions of Rule 28.02, subd. 13 concerning oral argument shall apply to appeals by the prosecuting attorney provided that the date of oral argument or submission of the case to the court without oral argument shall not be more than 3 months after all briefs have been filed. The Court of Appeals shall not hear or accept as submitted any such appeals more than 3 months after all briefs have been filed and in such cases the lower court shall then proceed as if no appeal had been taken.

(6) *Attorney's Fees.* Reasonable attorney's fees and costs incurred shall be allowed to the defendant on such appeal which shall be paid by the governmental unit responsible for the prosecution involved.

(7) *Joinder.* The prosecuting attorney may appeal from one or several of the orders under this rule joined in a single appeal.

(8) *Time for Appeal.* The prosecuting attorney may not appeal under this rule until after the Omnibus Hearing has been held under Rule 11, or the evidentiary hearing and pretrial conference, if any, have been held under Rule 12, and all issues raised therein have been determined by the trial court. The appeal then shall be taken within 5 days after the defense, or the clerk of court pursuant to Rule 33.03, subsequently serves notice of entry of the order appealed from upon the prosecuting attorney or within 5 days after the prosecuting attorney is notified in court on the record of such order, whichever occurs first. All pretrial orders entered and noticed to the prosecuting attorney prior to the trial court's final determination of all issues raised in the Omnibus Hearing under Rule 11, or the evidentiary hearing and pretrial conference under Rule 12, may be included in this appeal. An appeal by the prosecuting attorney under this rule bars any further appeal by the prosecuting attorney from any existing orders not included in the appeal. No appeal of a pretrial order by the prosecuting attorney shall be taken after jeopardy has attached.

An appeal under this rule does not deprive the trial court of jurisdiction over pending matters not included in the appeal.

Subd. 3. Cross-Appeal by Defendant. Upon appeal by the prosecuting attorney, the defendant may obtain review of any pretrial or postconviction order which will adversely affect the defendant, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 10 days after service of notice of the appeal by the prosecuting attorney, provided that in postconviction cases the notice of cross-appeal may be filed within 60 days after the entry of the order granting or denying postconviction relief, if that is later. Failure to serve the notice does not deprive the Court of Appeals of jurisdiction over defendant's cross-appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the cross-appeal.

Subd. 4. Conditions of Release. Upon appeal by the prosecuting attorney of a pre-trial order, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subd. 1 and subd. 2. The court shall also consider that the defendant, if not released, may be confined for a longer time pending the appeal than would be possible under the potential sentence for the offense charged.

Subd. 5. Proceedings in Forma Pauperis. An indigent defendant wishing the services of an attorney in an appeal taken by the prosecuting attorney under this rule shall proceed under Rule 28.02, subd. 5.

(Amended June 29, 1987, effective August 1, 1987.)

Subd. 6. Procedure upon Appeal of Postconviction Order.

(1) *Service and Filing.* An appeal shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on the opposing counsel, the clerk of the trial court in which the order appealed from is entered, and, when the appellant is not the attorney general, also the attorney general for the State of Minnesota. No fees or bond for costs shall be required for the appeal. Unless otherwise ordered by the appellate court, a certified copy of the order appealed from or a statement of the case as provided for by Rule 133.03 of the Minnesota Rules of Civil Appel-

late Procedure need not be filed. Failure of the prosecuting attorney to take any other step than timely filing the notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Court of Appeals deems appropriate, including dismissal of the appeal.

(2) *Time for Taking an Appeal.* An appeal by the prosecuting attorney of an order granting postconviction relief shall be taken within 60 days after entry of the order.

(3) *Other Procedures.* The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 8, concerning the record on appeal, Rule 28.02, subd. 9, concerning transcript of the proceedings and transmission of the transcript on record, Rule 28.02, subd. 10, concerning briefs, Rule 28.02, subd. 13, concerning oral argument, Rule 28.04, subd. 2(4), concerning dismissal by the attorney general, and Rule 28.04, subd. 2(6), concerning attorney's fees, shall apply to appeals by the prosecuting attorney of an order granting postconviction relief.

(Amended November 29, 1990, effective January 2, 1991.)

See Rule 28.05 for Comment.

28.05 Appeal from Sentence Imposed or Stayed

Subd. 1. Procedure. The following procedures shall apply to the appeal of a sentence imposed or stayed as permitted by these rules:

(1) *Notice of Appeal and Briefs.* Any party appealing a sentence shall file with the clerk of the appellate courts, within 90 days after judgment and sentencing, (a) a notice of appeal, (b) 9 copies of an informal letter brief setting forth the arguments concerning the illegality or inappropriateness of the sentence, (c) an affidavit of service of the notice upon opposing counsel, the attorney general, and the clerk of the trial court in which the sentence was imposed or stayed, and (d) an affidavit of service 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 28.02 of these rules shall continue to apply. The clerk of the appellate courts shall not accept a notice of appeal from sentence unless accompanied by the requisite briefs and affidavit of service.

(2) *Transmission of Record.* Upon receiving a copy of the notice of appeal, the clerk of the trial court shall immediately forward to the clerk of the appellate courts, (a) a transcript of the sentencing hearing and any written explanation of sentence by the trial court which is not already included in the transcript, (b) the sentencing guidelines worksheet, and (c) any presentence investigation report.

(3) *Respondent's Brief.* Within 10 days of service upon respondent of the copy of the notice of appeal and appellant's brief, a respondent choosing to respond shall serve an informal letter brief upon appellant and file with the clerk of the appellate courts 9 copies of such brief.

(4) *Other Procedures.* The provisions of Rule 28.02, subd. 4(2) concerning the contents of the notice of appeal, Rule 28.02, subd. 5 concerning proceedings in forma pauperis, Rule 28.02, subd. 6 concerning stays, Rule 28.02, subd. 7 concerning the release of the defendant on appeal, and Rule 28.02, subd. 13 concerning oral argument shall apply to sentence appeals under this rule.

Subd. 2. Action on Appeal. On appeal of a sentence, the court may review the sentence imposed or stayed to determine whether the sentence is inconsistent with statutory requirements, unreasonable, inappropriate, excessive, unjustifiably disparate, or not warranted by the findings of fact issued by the sentencing court. This review shall be in addition to all other powers of review presently existing. The court may dismiss or affirm the appeal, vacate or set aside the sentence imposed or stayed and direct entry of an appropriate sentence or order further proceedings to be had as the court may direct.

Comment

Rule 28 governs the procedure for appeals to the Court of Appeals, Minnesota Statutes, chapter 480A (1982), in all petty misdemeanor, misdemeanor, gross misdemeanor, and felony cases except for cases in which the defendant has been convicted of murder in the first degree. Appeals to the Supreme Court in criminal cases are permitted as a matter of right only when a defendant has been convicted of murder in the first degree, Minnesota Statutes, section 632.14 (1982), and the procedure in such cases is governed by Rule 29. Rule 29 also governs the procedure for seeking further discretionary review in the Supreme Court of any decision by the Court of Appeals.

The provision of Rule 28.01, subd. 3 for suspension of the rules is taken from Fed.R.App.P. 2 and Minn.R.Civ.App.P. 102. The court, however, may not extend the time for filing a notice of appeal except as provided by Rule 28.02, subd. 4(3).

Under Rule 28.02, subd. 1 the defendant may obtain review of lower court orders and rulings only by appeal except as may be provided in the case of the extraordinary writ authorized by Minn.Const., art. VI, sec. 2, and the postconviction remedy, Minnesota Statutes, chapter 590. The statutory authorization for the extraordinary writs is contained in Minnesota Statutes, section 480A.06, subd. 5 (1982) and Chapters 586 (Mandamus) 589 (Habeas Corpus), and 606 (Certiorari). The procedure for obtaining writs of mandamus or prohibition is contained in Minn.R.Civ.App.P. 120 and 121.

Under Rule 28.02, subd. 2(1) a defendant may appeal to the Court of Appeals from either a final judgment or an order denying postconviction relief except for cases in which the defendant has been convicted of murder in the first degree. The procedure for the appeal is governed by Rule 28 which supersedes the holding in *Bolstad v. State*, 439 N.W.2d 50 (Minn. Ct. App. 1989) that the procedure in postconviction appeals is governed by the Rules of Civil Appellate Procedure. See Rules 28.04, subd. 1 and 28.04, subd. 6 as to appeal by the prosecuting attorney in postconviction cases. These rules supersede Minnesota Statutes, section 590.06 (1988) concerning the procedure for an appeal from a postconviction order.

The provisions in Rule 28.02, subd. 2(2) concerning a defendant's right to appeal from an order refusing or imposing conditions of release is taken from Fed.R.App.P. 9(a) and 18 U.S.C., section 3147(b). The remaining provisions of Rule 28.02, subd. 2(1) and (2) are taken substantially from ABA Standards, Criminal Appeals, 21-1.3 (Approved Draft, 1979). Rule 28.02, subd. 2(3) giving a defendant the right to appeal any sentence imposed or stayed in a felony case is based on Minnesota Statutes, section 244.11 (1982). Under Rule 28.04, subd. 1(2) the prosecuting attorney also has a right to appeal from a sentence imposed or stayed. Under Rule 27.04, subd. 3(5) either the defendant or the prosecuting attorney may also appeal from the court's decision in a probation revocation proceeding.

Rule 28.02, subd. 3 (Discretionary Appeal) is taken from Minn.R.Civ.App.P. 105 which sets forth the procedure to be followed by a defendant in seeking permission to proceed with an appeal from an order not otherwise appealable. A defendant seeking to appeal from a sentence imposed or stayed in a misdemeanor or gross misdemeanor case would have to proceed under this rule.

Under Rule 28.02, subd. 4 (Procedure for Appeals Other Than Sentencing Appeals) the method for perfecting an appeal to the Court of Appeals is similar to that provided in Minn.R.Civ.App.P. 103.01 except that it is not necessary to file a certified copy of the judgment or order appealed from, a statement of the case, or a bond. Timely filing of the notice with the clerk of the appellate courts is the jurisdictional prerequisite for the appeal. However, failure to take the other actions required by the rule could result in dismissal of the appeal or some lesser sanction as the Court of Appeals deems appropriate.

Under Rule 28.02, subd. 4(3) (Time for Taking an Appeal) a timely motion for a new trial (Rule 26.04, subd. 1(3)), a motion for judgment of acquittal (Rule 26.03, subd. 17(3)), or motion to vacate judgment (Rule 26.04, subd. 2) delays the start of the time period for taking an appeal from the judgment until entry of the order denying the motion. The provisions for extension of time for taking an appeal are based on Fed.R.App.P. 4(b).

Rule 28.02, subd. 5 (*Proceedings in Forma Pauperis*) sets forth the procedures for an indigent defendant to follow to obtain the assistance of the State Public Defender with an appeal or postconviction proceeding. See Minnesota Statutes, section 611.25 (1982) as to the powers and duties of the State Public Defender.

Rule 28.02, subd. 5 also sets forth the method for temporarily making transcripts available to defendants seeking to proceed pro se or to file a supplemental brief on appeal. As to the right of a defendant to proceed pro se on appeal and to obtain a transcript for that purpose see *State v. Seifert*, 423 N.W.2d 368 (Minn. 1988). The procedure established by the rule contains elements of both the majority and dissenting opinions in that case. The rule allows a defendant to proceed pro se on appeal and to obtain a copy of any necessary transcript, but only after the State Public Defender has first had an opportunity to file a brief on behalf of the defendant and provided a copy of that brief to the defendant. This procedure satisfies the right of a defendant to proceed pro se while also assuring that any valid legal arguments will be brought to the attention of the appellate court by competent legal counsel. The State Public Defender's office will confer with the defendant and advise the defendant of the dangers and consequences of proceeding without legal counsel. If the defendant chooses to proceed, the State Public Defender's office will obtain a waiver of counsel from the defendant. If there is doubt as to the defendant's competency to waive counsel, the State Public Defender's office will assist in seeking an order from the district court determining the defendant's competency or incompetency. Upon receiving the transcript, the defendant must sign a receipt acknowledging the obligation to return the transcript to the State Public Defender's office when the time to file the supplementary brief expires. The transcript remains the property of the State Public Defender's office and any supplementary brief will not be accepted by the appellate court until the State Public Defender files a receipt with the appellate court indicating that the transcript has been returned. The recommended forms appended to the rules contain forms for waiver of counsel, request for determination of competency, and receipts of transcript by and from the defendant that satisfy the requirements of these rules. Under part (10) of Rule 28.02, subd. 5, the State Public Defender is not obligated to pay for transcripts or other expenses for a misdemeanor appeal if that office has not agreed under part (5) of that rule to represent the defendant in such a case.

Rule 28.02, subd. 7(1), (2), and (3) (*Release of Defendant, Burden of Proof, and Application for Release Pending Appeal*) are adapted from ABA Standards, *Criminal Appeals*, 21-2.5(a) and (b) (Approved Draft, 1979), Fed.R.App.P. 9(b) and (c), and 18 U.S.C., section 3148.

Rule 28.02, subd. 8 (*Record on Appeal*) is based on Minn.R.Civ.App.P. 110.01 and 110.04.

Under Rule 28.02, subd. 9 (*Transcript of Proceedings and Transmission of the Transcript and Record*) the transcript must be ordered within 30 days after filing of the notice of appeal rather than within ten days as otherwise provided by Minn.R.Civ.App.P. 110.02, subd. 1. The other provisions of Minn.R.Civ.App.P. 110 and 111 concerning the content and transmission of the record and transcripts apply to criminal appeals under Rule 28. It is therefore necessary in a criminal appeal upon ordering the transcript to serve and file a Certificate as to Transcript as required by Minn.R.Civ.App.P. 110.02, subd. 2.

Rule 28.02, subd. 10 (*Briefs*) establishes time limits for serving and filing briefs in criminal cases different from that provided by Minn.R.Civ.App.P. 131.01 for civil cases. Also, the appellant's initial brief in a criminal case, unlike in a civil case, must contain a statement of the procedural history. Otherwise, the provisions of Minn.R.Civ.App.P. 128, 129, 130, 131, and 132 concerning the form and filing of briefs govern in the appeal of a criminal case.

Rule 28.02, subd. 11 (*Scope of Review*) is adapted from Minn.R.Civ.App.P. 103.04 except that on appeal from the final judgment it permits review of pretrial and trial orders or rulings whether or not a motion for new trial has been made, and timely posttrial motions may be reviewed whether ruled upon before or after judgment.

A party appealing to the Court of Appeals does not automatically receive oral argu-

ment. Rather, Rule 28.02, subd. 13(1) (Right to Oral Argument) requires a party desiring oral argument to serve and file with the initial brief a written request for the argument. If oral argument is requested, it shall be granted unless one of the three grounds set forth in the rule exists. The first two grounds of waiver and forfeiture are taken from Minn.R.Civ.App.P. 134.01. The final ground permitting denial of oral argument is based on Minn.R.Civ.App.P. 134.01 and Rule 10(d) of the Eighth Circuit Rules of Appellate Procedure.

Pursuant to Minnesota Statutes, section 480A.08, subd. 3, the Court of Appeals shall decide every case within 90 days after oral argument or final submission of briefs, whichever is later. If oral argument is denied under Rule 28.02, subd. 13(1) the case shall be considered as submitted to the court at the time the clerk so notifies the parties. If oral argument is not held because it was not requested by the parties or was waived or forfeited by them, then the date upon which the case is considered submitted to the court is determined under Minn.R.Civ.App.P. 134.06. Under Minn.R.Civ.App.P. 134.06 waiver of oral argument requires the consent of the court as well as the agreement of the parties.

Rule 28.03 (Certification of Proceedings) is based upon former Minnesota Statutes, section 632.10 which was repealed in 1979.

Rule 28.04 (Appeal by Prosecuting Attorney) sets forth the right and the procedure for the prosecuting attorney to appeal to the Court of Appeals. The right of the prosecuting attorney under Rule 28.04, subd. 1(2) to appeal from a sentence imposed or stayed in a felony is based on Minnesota Statutes, section 244.11 (1982). The procedure for such sentencing appeal is set forth in Rule 28.05.

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 attorney may appeal the suppression part of the order under Rule 28.04, subd. 1(1). *State v. Brown*, 317 N.W.2d 714 (Minn.1982). A good faith timely motion by the prosecuting attorney for clarification or rehearing of an appealable order extends the time to appeal from that order. *State v. Wollan*, 303 N.W.2d 253 (Minn.1981). Originally under Rules 28.04, subd. 2(2) and (8) the prosecuting attorney had 5 days from entry of an appealable pretrial order to perfect the appeal. It was possible for this short time limit to expire before the prosecuting attorney received actual notice of the order sought to be appealed. These rules as revised eliminate this unfairness and assure that notice of the pretrial order will be served on or given to the prosecuting attorney before the 5-day time limit begins to run.

Generally, absent special circumstances, failure of the prosecuting attorney to file the appellant's brief within the 15 days as provided by Rule 28.04, subd. 2(3) 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 not longer submit with the notice of appeal the statement formerly required by Minnesota Statutes, section 632.12, the prosecutor 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.

Rule 28.04, subd. 6, which establishes the procedure for an appeal by the prosecuting attorney from an adverse order in a postconviction case, supersedes the holding in *Bolstad v. State*, 439 N.W.2d 50 (Minn. Ct. App. 1989) that the procedure in such cases is governed by the Rules of Civil Appellate Procedure. The 60 day time limit for taking such an appeal is the same as was provided by Minnesota Statutes, section 590.06 which is now superseded by these rules.

Rule 28.05 (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 Minnesota Statutes, section 244.11 (1982) 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*, 101 S.Ct. 426, 449 U.S. 117, 66 L.Ed.2d 328 (1980).

Under Rule 28.05, subd. 1(1) a defendant may combine an appeal of the sentence with an appeal of the judgment of conviction. If the defendant later determines not to challenge the conviction, the sentence alone may still be challenged on the appeal and the more formal procedural requirements of Rule 28.02 then apply rather than that of Rule 28.05.

Rule 28.05, subd. 2 (Action on Appeal) is taken from Minnesota Statutes, section 244.11 (1982).

Comment amended effective August 1, 1987; January 2, 1991.