

Minnesota Rules of Criminal Procedure

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

[For text of 1.01 to 1.03, see M.S. 1998, Volume 15]

1.04 Definitions

(a) Clerk of Court. References in these rules to clerks or deputy clerks of court shall include court administrators and deputy court administrators.

(b) Designated Gross Misdemeanors. As used in these rules, the term "designated gross misdemeanors" refers to gross misdemeanors or enhanced gross misdemeanors charged or punishable under Minnesota Statutes, section 169.121, Minnesota Statutes, section 169.1211, Minnesota Statutes, section 169.129 or Minnesota Statutes, section 171.24.

(c) Tab charge. As used in these rules, the term "tab charge" is a brief statement of the offense charged including a reference to the statute, rule, regulation, ordinance, or other provision of law which the defendant is alleged to have violated which the clerk shall enter upon the records. A tab charge is not synonymous with "citation" as defined by Rule 6.01.

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

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.

It is further the express purpose of these rules that they be applied without discrimination based upon the factors stated in Rule 1.02. The factors are the same as those set forth in Chapter 363 of the Minnesota Statutes forbidding discriminatory practices in employment and certain other situations except that those handicapped in communication are added to the list of those protected against discrimination. Minnesota Statutes, sections 611.31 to 611.34 (1992). The Minnesota Supreme Court Task Forces on Gender Fairness and Racial

Bias have studied and documented gender and racial bias in the legal system. Their reports issued June 30, 1989, and May 1993 respectively contain recommendations to address these problems. See 15 Wm. Mitchell L. Rev. 827 (1989) (gender fairness report) and 16 Hamline L. Rev. 477 (1993) (racial bias report). Any recommendations in those reports concerning the Rules of Criminal Procedure have been reviewed carefully and appropriate revisions have been made in these rules.

Beyond the procedures required by these rules, prosecutors, courts, and law enforcement agencies should also be aware of the rights of crime victims as provided in chapter 611A of the Minnesota Statutes. This would include, but is not limited to, the prosecutor's duty to provide notice of a prospective plea agreement (Minnesota Statutes, section 611A.03); referral to a pretrial diversion program (Minnesota Statutes, section 611A.031); dismissal of domestic assault or harassment proceedings (Minnesota Statutes, section 611A.0315); the final disposition of the case (Minnesota Statutes, section 611A.039); and the pendency of an appeal of the proceedings (Minnesota Statutes, section 611.0395). Also see Minnesota Statutes, section 629.72, subd. 7 and Minnesota Statutes, section 629.725 as to the duty of the court to provide notice of any hearing on release of the defendant from pretrial detention in domestic abuse, harassment or crimes of violence cases, and Minnesota Statutes, section 629.73 as to the duty of the agency having custody of the defendant in such cases to provide notice of the defendant's impending release.

Rule 1.03 is identical to Rule 83 of the Minnesota Rules of Civil Procedure and is intended to assure uniformity in local rules. The General Rules of Practice for the District Court were adopted by the Supreme Court effective January 1, 1992, to consolidate and make uniform the local rules of practice throughout the state. Only a few of the previously existing local rules were preserved as special rules for particular judicial districts. No local rule is permitted which would conflict with these Rules of Criminal Procedure and to be effective any new local rule must first be approved by the Supreme Court.

Rule 1.04(a) clarifies that any duties, functions or responsibilities set forth in the rules for clerks or deputy clerks also apply to court administrators and deputy court administrators. This is in accord with Minnesota Statutes, section 485.01 (1997). Under Rule 4.02, subd. 5(3) it is possible to commence a prosecution by tab charge for certain designated gross misdemeanors including specified enhanced gross misdemeanors. See Rule 4.02, subd. 5(3) and the comments to that rule for the limitations on such prosecutions. That term is also used in various other places throughout the rules and Rule 1.04(b) specifies the offenses which are considered to be "designated gross misdemeanors". Minnesota Statutes, section 169.121 (1997); Minnesota Statutes, section 169.1211 (1997), and Minnesota Statutes, section 169.129 (1997) relate to driving, operating, or physical control of a motor vehicle while under the influence of alcohol or a controlled or hazardous substance and Minnesota Statutes, section 171.24 (1997) relates to driving after cancellation. Minnesota Statutes, section 609.02, subd. 2a (1997) defines "enhanced gross misdemeanor" as a "crime for which a sentence of not more than two years imprisonment in a correctional facility or a fine of not more than \$3,000, or both, may be imposed."

[For text of 2, to 3.04, see M.S. 1998, Volume 15]

Rule 4. Procedure Upon Arrest Under Warrant Following a Complaint or Without a Warrant

[For text of 4.01, see M.S. 1998, Volume 15]

4.02 Arrest Without a Warrant

Following an arrest without a warrant:

Subd. 1. Release by Arresting Officer. If the arresting officer or the officer's superior determines that further detention is not justified, such officer or the officer's superior shall immediately release the arrested person from custody.

Subd. 2. Citation. The arresting officer or the officer's superior may issue a citation to and release the arrested person as provided by these rules, and must do so if ordered by the

prosecuting attorney or by a judge or judicial officer of the district court of the county where the alleged offense occurred or by any person designated by the court to perform that function.

Subd. 3. Notice to Prosecuting Attorney. As soon as practical after the arrest, the arresting officer or the officer's superior shall notify the prosecuting attorney of the arrest.

Subd. 4. Release by Prosecuting Attorney. The prosecuting attorney may order the arrested person released from custody.

Subd. 5. Appearance Before Judge or Judicial Officer.

(1) Before Whom and When. An arrested person who is not released pursuant to this rule or Rule 6, shall be brought before the nearest available judge of the district court of the county where the alleged offense occurred or judicial officer of such court. The defendant shall be brought before such judge or judicial officer without unnecessary delay, and in any event, not more than 36 hours after the arrest, exclusive of the day of arrest, Sundays, and legal holidays, or as soon thereafter as such judge or judicial officer is available. Provided, however, in misdemeanor cases, a defendant who is not brought before a judge or judicial officer within the 36-hour limit, shall be released upon citation as provided in Rule 6.01, subd. 1.

(2) Complaint Filed; Order of Detention; Felonies and Gross Misdemeanors Not Charged as Designated Gross Misdemeanors Under Rule 1.04(b). At or before the time of the defendant's appearance as required by Rule 4.02, subd. 5(1), a complaint shall be presented to the judge or judicial officer referred to in Rule 4.02, subd. 5(1) or to any judge or judicial officer authorized to issue criminal process upon the offense charged in the complaint. The complaint shall be filed forthwith except as provided by Rule 33.04 and an order for detention of the defendant may be issued, provided (1) the complaint contains the written approval of the prosecuting attorney or the certificate of the judge or judicial officer as provided by Rule 2.02; and (2) the judge or judicial officer determines from the facts set forth separately in writing in or with the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that defendant committed it. Otherwise, the defendant shall be discharged, the complaint and any supporting papers shall not be filed, and no record made of the proceedings.

(3) Complaint or Tab Charge; Misdemeanors; Designated Gross Misdemeanors. If there is no complaint made and filed by the time of the defendant's first appearance in court as required by this rule for a misdemeanor charge or a gross misdemeanor charge for those offenses designated under Rule 1.04(b), the clerk shall enter upon the records a tab charge as defined in Rule 1.04(c) of these rules. However, in a misdemeanor case, if the judge orders, or if requested by the person charged or defense counsel, a complaint shall be made and filed. In a designated gross misdemeanor case commenced by a tab charge, the complaint shall be made, served and filed within 48 hours of the defendant's appearance on the tab charge if the defendant is in custody or within ten days of the defendant's appearance on the tab charge if the defendant is not in custody, provided that in any such case the complaint shall be made, served and filed before the court accepts a guilty plea to any designated gross misdemeanor. Service of such a gross misdemeanor complaint shall be as provided by Rule 33.02 and may include service by U.S. mail. In a misdemeanor case, the complaint shall be made and filed within 48 hours after the demand therefor if the defendant is in custody or within thirty (30) days of such demand if the defendant is not in custody. If no valid complaint has been made and filed within the time required by this rule, the defendant shall be discharged, the proposed complaint, if any, and any supporting papers shall not be filed, and no record shall be made of the proceedings. A complaint is valid when it (1) complies with the requirements of Rule 2, and (2) the judge has determined from the complaint and any supporting affidavits or supplemental sworn testimony that there is probable cause to believe that an offense has been committed and that the defendant committed it. Upon the filing of a valid complaint in a misdemeanor case, the defendant shall be arraigned. When a charge has been dismissed for failure to file a valid complaint and a valid complaint is thereafter filed, a warrant shall not be issued on that complaint unless a summons has been issued first and either could not be served, or, if served, the defendant failed to appear in response thereto.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 4.03 for Comment.

[For text of 4.03, see M.S. 1998, Volume 15]

Comment

By Rule 4.01 a defendant arrested following a complaint shall be dealt with as directed by Rule 3.02, subd. 2.

Rule 4.02, subd. 1 directs an officer who makes an arrest without a warrant or the officer's superior to release the arrested person before the initial appearance in court without proceeding further, if the officer determines that further detention is not justified. This might occur when, for example, further investigation disclosed to the satisfaction of the officer that the defendant did not commit the offense for which arrested. (See similar provisions in ALI Model Code of Pre-Arrestment Procedure, section 120.9(2) (Proposed Official Draft #1, 1972), Wis.Stat., sec. 968.08)).

Rule 4.02, subd. 4 similarly authorizes the prosecuting attorney to order the release of a person arrested without a warrant without proceeding further. This would occur, for example, if the prosecuting attorney decides not to file a complaint.

Rule 4.02, subd. 3 provides that the prosecuting attorney shall be notified of an arrest without a warrant as soon as practical in order to determine whether to continue the prosecution and, if so, to draw a complaint.

Rule 4.02, subd. 2 provides that the officer arresting without a warrant or the officer's superior may issue a citation as provided by Rule 6.01 and must do so if ordered by the prosecuting attorney or by a judge or judicial officer described in the rule.

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

Where the defendant agrees, Rule 4.02, subd. 5(3) provides the procedure for initiating misdemeanor proceedings or designated gross misdemeanor proceedings as defined in Rule 104(b) without the necessity of issuing a complaint or obtaining an indictment as is required for felonies and other gross misdemeanors. This is provided to avoid the unnecessary delay

for a defendant and to aid a prosecutor in those cases where the defendant may not even desire a complaint if sufficiently informed in some other way of the charges. When a defendant first appears in court following a warrantless arrest in such cases, the clerk shall enter on the records a brief statement (tab charge) of the offense charged, including a citation to the statute, ordinance, rule, regulation or provision of law which the defendant is alleged to have violated. This statement shall be a substitute for the complaint and is sufficient to initiate the proceedings in such cases under Rule 10.01 unless the defendant, defense counsel or the court requests, in misdemeanor cases, that a complaint be filed and provided that in gross misdemeanor proceedings under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the complaint must be made, served and filed within the time limits as specified unless the defendant has entered a guilty plea before then. This provision for tab charges is substantially consistent with present Minnesota law for misdemeanors although under the present statutes the right to a complaint varies from court to court. See Minnesota Statutes, section 487.25, subd. 4, and Minnesota Statutes, section 488A.10, subd. 4 (In the county courts and in Hennepin County Municipal Court, a tab charge is sufficient unless the judge orders or the defendant requests a complaint); Minnesota Statutes, section 488A.27, subd. 4 (In St. Paul a tab charge is sufficient unless the judge orders a complaint); and Minnesota Statutes, section 488.17, subd. 4 (In any other municipal court the tab charge is sufficient where the defendant is in custody when appearing before the court, unless the court orders a complaint).

Rule 4.02, subd. 5(3) permits the use of a tab charge to initiate a prosecution for a designated gross misdemeanor charged under Minnesota Statutes, section 171.24, Minnesota Statutes, section 169.121, Minnesota Statutes, section 169.1211 or Minnesota Statutes, section 169.129. Rule 1.04(b) defines designated gross misdemeanor. The provisions concerning tab charges were extended to gross misdemeanor and enhanced gross misdemeanor driving while intoxicated proceedings because of concern that such proceedings will not otherwise be prosecuted and completed promptly. When the rules were originally promulgated, there were few gross misdemeanor prosecutions. Due primarily to Minnesota Statutes, sections 169.121 and 169.129, the number of gross misdemeanor prosecutions has increased tremendously. Unfortunately, prosecutorial resources have not increased proportionately and in some jurisdictions prosecutions for gross misdemeanor driving while intoxicated have been delayed substantially pending issuance of complaints. The use of the tab charges should get such cases into court promptly. However, the complaint must be made, served and filed within the time limits as specified in the rule. The rule further requires that prior to acceptance of a guilty plea to a designated gross misdemeanor, a complaint must be made, served and filed. This requirement is included because of concern that a case should be reviewed by a prosecutor before acceptance of a guilty plea to an offense for which a defendant, particularly a pro se defendant, could receive a sentence of imprisonment of up to one or two years. All other non-designated gross misdemeanors must be charged initially by complaint or indictment as required by Rules 4.02, subd. 5(2) and 17.01. Except for the use of the tab charge, the procedure for designated gross misdemeanor prosecutions is the same as for gross misdemeanor prosecutions under any other statute. Under the rule the defendant need not be required to personally appear in court to receive the complaint when it is later issued. Service could be made by mail on the defendant or defense counsel as appropriate. The defendant could be arraigned on the complaint at the next court appearance after the filing and service of the complaint. That next court appearance could be under Rule 8 or at the omnibus hearing under Rule 11 if the Rule 5 and 8 appearances were consolidated under Rule 5.03 with the consent of the defendant. If no valid complaint is filed as required by the rules, the proceedings are dismissed. See Rule 17.06, subd. 4(3) as to any restrictions or bars on further prosecution after such a dismissal.

Under Rule 5.01 a defendant must be advised of the right to demand a complaint. It is anticipated that complaints will be requested by defendants in only a small percentage of misdemeanor cases because discovery is permitted under Rule 7.03, and most defendants will not wish to make an additional appearance to receive the complaint.

If a complaint is required under this rule in a misdemeanor case, the prosecutor must file a valid complaint within 48 hours if the defendant is in custody or within 30 days if the defendant is not in custody or the tab charge must be dismissed. A longer time limit than 48

hours for those defendants in custody would encourage defendants who are in jail pending issuance of a complaint to waive that right in order to speed up the disposition of the charges. Time limits, of course, can be waived by a defendant. A defendant who is not in custody, may wish to request a later time to receive the complaint, for the defendant's convenience and that of the defense counsel and the prosecutor.

A complaint to be valid must comply with the requirements of Rule 2 and the issuing officer must have made a determination of probable cause.

Where a charge has been dismissed by the court for failure of the prosecutor to file a valid, timely complaint (Rule 4.02, subd. 5(3)) as required and the prosecutor subsequently files a valid complaint, a summons must be issued instead of a warrant. If it is impossible to locate the defendant to serve the summons or if the defendant fails to respond to the summons, a warrant may be issued. (See also Rule 3.01.) This restriction is considered justified since it is unfair to subject a defendant to a possibly unnecessary arrest when the defendant has appeared in court once to answer the minor charge, and, through no fault of the defendant, a complaint was not issued at that time.

Where the tab charge has been dismissed for failure to file a valid, timely complaint as required, the prosecutor must file a valid complaint within the time specified by Rule 17.06, subd. 4(3) or any further prosecution is barred if so ordered by the court.

When a valid complaint has been filed or waived, defendant will be arraigned pursuant to Rule 5.

Rule 4.02, subd. 5(2) provides that on or before the first appearance of a person arrested without a warrant a complaint shall be filed provided it has the written approval of the prosecuting attorney or the certificate of the court as provided in Rule 2.02 and the judge or judicial officer has made a finding of probable cause. Otherwise the defendant shall be discharged. The rule is not intended to cover the effect of the discharge on subsequent prosecution for the same offense or conduct. (See *State v. Uglum*, 175 Minn. 607, 222 N.W. 280 (1928).)

Rule 4.02, subd. 5(2) permits the complaint to be presented either to the judge or judicial officer before whom the defendant will appear or to any judge or judicial officer authorized to issue a warrant of arrest upon the complaint. If the judge or judicial officer to whom the complaint is presented determines that there is probable cause to believe that defendant committed the offense charged, the complaint shall be filed, and in lieu of a warrant of arrest (which is the present practice), an order for detention of the defendant pending further proceedings shall be issued.

Rule 4.03 is based upon the constitutional requirement as set forth in *County of Riverside v. McLaughlin*, __ U.S. __, 111 S. Ct. 1661 (1991) for a prompt judicial determination of probable cause following a warrantless arrest. Pursuant to that case and Rule 4.03, subd. 1, the determination must occur without unreasonable delay and in no event later than 48 hours after the arrest. There are no exclusions in computing the 48-hour time limit; Rule 34.01 does not apply. Even a probable cause determination within 48 hours will be too late if there has been unreasonable delay in obtaining the determination. "Examples of unreasonable delay are delays for the purpose of gathering additional evidence to justify the arrest, a delay motivated by ill will against the arrested individual, or delay for delay's sake." *County of Riverside v. McLaughlin*, __ U.S. __, 111 S. Ct. 1661, 1670 (1991). The requirements of Rule 4.03 are in addition to the requirements of Rule 4.02 that a person arrested without a warrant be brought before a judge or judicial officer within 36 hours after the arrest exclusive of the day of arrest, Sundays and legal holidays. Because of the exclusions permitted in computing time under the "36-hour rule," compliance with that rule will not assure compliance with the "48-hour rule." However, if a defendant does appear in court within the time limits of the "48-hour rule" as well as the "36-hour rule" and a valid complaint is then issued, Rule 4.03 is satisfied and no further determination of probable cause is necessary.

The "48-hour rule" also applies to all misdemeanor cases. For gross misdemeanors prosecuted under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129 and for misdemeanors, Rule 4.02, subd. 5(3) requires only that a tab charge be entered on the records at the time of a defendant's appearance in Court within the "36-hour rule." A complaint may be issued at that time but is not then required and Rule 4.02, subd.

5(3) governs when and if a complaint is subsequently required. However, the requirements of Rule 4.03 still apply and, even if not requested by a defendant, there must be a judicial determination of probable cause within 48 hours of an arrest and detention or the arrested person must be released whether the offense involved is a felony, gross misdemeanor, or misdemeanor. Rule 6.01 provides for the mandatory and permissive issuance of citations and an arrested person released on citation prior to the 48-hour time limit need not receive a probable cause determination pursuant to Rule 4.03.

Release of an arrested person pursuant to Rule 4.03, subd. 1 because of a determination that probable cause does not exist, or because no determination is made within the specified time limit, does not prevent later prosecution for the offense involved or arrest for a different incident. However, it is not permissible to attempt to extend the time limit of the rule by releasing and then rearresting an individual without a warrant without additional facts to establish probable cause. As it is for the "36-hour rule" these rules do not provide sanctions for violation of the "48-hour rule." That is left to case law development. See *State v. Wiberg*, 296 N.W.2d 388 (Minn. 1980) as to the possible suppression of evidence for violation of the "36-hour rule."

Under Rule 4.03, subd. 2 the facts submitted to the court to establish probable cause may be either by written affidavit or sworn oral testimony. See Form 44, Application for Judicial Determination of Probable Cause to Detain, following these rules. If oral testimony is submitted, the oath shall be administered by the judge or judicial officer, but may be done by telephone, facsimile transmission, video equipment or similar device in the discretion of the reviewing judge or judicial officer. As of May, 1992, the only judicial officer in Minnesota serves in St. Louis county pursuant to Minnesota Statutes, section 487.08. See Rule 33.05 as to use of facsimile transmission generally. Any written affidavits submitted may be sworn to before a clerk or deputy clerk of court or notary public as well as before the reviewing judge or judicial officer. The procedure for obtaining the probable cause determination is similar to that for obtaining a complaint under Rule 2 and no appearance by the arrested person is required.

Under Rule 4.03, subd. 3 the prosecuting attorney's written or oral approval is necessary in the probable cause proceedings. However, as for complaints under Rule 2.02, the court may proceed without such approval upon certifying in writing that the prosecuting attorney is unavailable and the determination of probable cause should not be delayed. Instead of obtaining a probable cause determination under Rule 4.03, the prosecuting attorney has the option of obtaining a complaint complying with Rule 2 within the time limit provided by Rule 4.03. If that is done, the time for the defendant's appearance before the judge or judicial officer is still governed by the "36-hour" provision of Rule 4.02.

Rule 4.03, subd. 4 sets forth the elements to be included in the court's written determination of probable cause. See Form 45, Judicial Determination of Probable Cause to Detain, following these rules. It need not contain a recitation of the facts upon which the court's determination was based. The court may set bail or other conditions of release. If the court sets conditions other than money bail on which the defendant may be released, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain release. See Rule 6.01, subd. 1 and the comments to that rule. The arrested person must be provided with a written notice of the court's determination forthwith. See Form 46, Notice of Judicial Determination of Probable Cause to Detain, following the rules. It is not necessary that the actual determination or a copy of it be provided to the arrested person forthwith. That may be difficult or impossible in some cases, particularly if the telephone or other electronic means were used in obtaining the determination. The written notice containing the elements of the determination may be prepared by someone other than the reviewing judge or judicial officer. See Minnesota Statutes, section 611.32, subd. 2 and *State v. Mitjans*, 408 N.W.2d 824 (Minn. 1987) as to the obligation of a law enforcement officer, with the assistance of an interpreter, to explain to an arrested person handicapped in communication all charges filed against the person and all procedure relating to the person's detainment and release. It is not necessary to forthwith provide the arrested person with any affidavits, transcribed testimony, or other materials submitted to the court upon the application for a probable cause determination. If prosecution is commenced, those materials may be obtained by the defendant later through discovery under Rule 9.01, subd. 1 for felonies and gross misde-

meanors and under Rule 7.03 for misdemeanors. Otherwise, access to any such materials is governed by Minnesota Statutes, section 13.82 of the Minnesota government data practices act.

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. The court shall first determine whether the defendant is handicapped in communication. A defendant is handicapped in communication if, (a) because of either a hearing, speech or other communications disorder, or (b), because of difficulty in speaking or comprehending the English language, the defendant cannot fully understand the proceedings or any charges made against the defendant or is incapable of presenting or assisting in the presentation of a defense. If a defendant is handicapped in communication, the judge or judicial officer shall appoint a qualified interpreter to assist the defendant throughout the proceedings. The proceedings at which a qualified interpreter is required are all those covered by these rules which are attended by the defendant. 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 designated gross misdemeanor as defined in Rule 1.04(b) and a complaint has not yet been made and filed, a complaint must be issued within 10 days if the defendant is not in custody or within 48 hours if the defendant is in custody.

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.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 5.06 for Comment.

5.02 Appointment of Public Defender

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

(1) Notice of Right to Counsel. If a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration appears without counsel, the court

shall advise the defendant of the right to counsel and the appointment of the public defender if the defendant is financially unable to afford counsel. The court shall also advise the defendant of the right to request counsel at any stage of the proceedings.

(2) **Appointment of the Public Defender.** Upon the request of a defendant charged with a felony, gross misdemeanor, or misdemeanor punishable by incarceration, who is not represented by counsel and is financially unable to afford counsel, the judge or judicial officer shall appoint the public defender for the defendant. In all other cases, the court may appoint an attorney for a defendant financially unable to afford counsel when requested by the defendant or interested counsel or when such appointment appears advisable to the court in the interests of justice to the parties.

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

(4) **Waiver of Counsel, Felony, Gross Misdemeanor.** If a defendant appearing without counsel charged with a felony or gross misdemeanor does not request counsel and wishes to represent himself or herself, the court shall ensure that a voluntary and intelligent written waiver of the right to counsel is entered in the record. If the defendant refuses to sign the written waiver form, the waiver shall be made orally on the record. Prior to accepting any waiver, the trial court shall advise the defendant of the following: the nature of the charges, the statutory offenses included within the charges, the range of allowable punishments, that there may be defenses, that there may be mitigating circumstances, and all other facts essential to a broad understanding of the consequences of the waiver of the right to counsel, including the advantages and disadvantages of the decision to waive counsel. The court may appoint the public defender for the limited purpose of advising and consulting with the defendant as to the waiver.

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

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

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

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

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

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

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

(3) The defendant can demonstrate that due to insufficient funds or other assets: two members of a defense attorney referral list maintained by the court have refused to de-

fend the case or, if no referral list is maintained, that two private attorneys in that judicial district have refused to defend the case.

Subd. 4. Financial Inquiry. An inquiry to determine financial eligibility of a defendant for the appointment of the public defender shall be made whenever possible prior to the court appearance and by such persons as the court may direct. This inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. In no case shall the public defender perform this inquiry.

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

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 5.06 for Comment.

[For text of 5.03 to 5.06, see M.S. 1998, Volume 15]

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 the appointment of a qualified interpreter for a defendant handicapped in communication. The rule requires that a qualified interpreter assist such a defendant in all procedures contemplated by these rules. This appointment is mandated by Minnesota Statutes, section 611.32, subdivision 1 (1992). A person handicapped in communication is someone who due to a hearing, speech or other communications disorder, or lack of skill in English, is not able to fully understand the judicial proceedings or charges, or is incapable of presenting or assisting in the presentation of a defense. The definition contained in the rule is the same as that contained in Minnesota Statutes, section 611.31 (1992). Minnesota Statutes, section 611.33 (1992) should be referred to for the definition of qualified interpreter.

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 designated gross misdemeanor cases as defined in Rule 1.04(b) 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 governs the appointment of the public defender for indigent defendants (See ABA Standards, Pretrial Release, 4.2 (Approved Draft, 1968).)

The prior rule reflected a policy decision that all indigent defendants charged with felony or gross misdemeanor offenses would have counsel appointed for them. While the prior rule did not reflect the right of the defendant to waive counsel in felony and gross misdemeanor cases, the comments to the rule did acknowledge the right of defendants to represent themselves. *Faretta v. California*, 422 U.S. 806 (1975). The current rule includes language which makes this right clear. The decision in *Faretta v. California* found that it was permissible for the state to appoint counsel over the defendant's objection, to assist and consult if requested to do so by the defendant. The revised rule also sets forth standards for appointing "advisory counsel" in cases where the defendant waives counsel and the court believes it is appropriate to appoint "advisory counsel".

This rule contains the requirement that the court advise defendants appearing without counsel of their right to counsel, Minnesota Statutes, section 611.15, and the right "at any time" to request the appointment of the public defender. Minnesota Statutes, section 611.16.

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

Faretta v. California recognized the constitutional right of the accused in a criminal proceeding to voluntarily and intelligently waive the right to counsel and represent himself or herself. In ensuring a voluntary and intelligent waiver, the court must warn the defendant of the "dangers and disadvantages of self-representation." The rule provides that when a defendant wishes to waive the right to counsel, the court must ensure that the defendant makes a voluntary and intelligent waiver of counsel by conducting a penetrating and comprehensive examination of the defendant's understanding of the factors involved in this decision. The provision sets forth a minimum list of the factors to be considered. See *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

Another way for the court to assure itself that the waiver of counsel is voluntary and intelligent 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).

Minnesota law requires that a waiver of counsel be in writing unless the defendant refuses to sign the written waiver form. In that case a record of the waiver is permitted. Minnesota Statutes, section 611.19. In practice, a Petition to Proceed As Pro Se Counsel may fulfill the dual requirements of providing the defendant with the information necessary to make a voluntary and intelligent waiver of the right to counsel as well as providing a written waiver. See Form 11. Also see Appendix C to Rule 15 for the Petition to Enter Plea of Guilty by Pro Se Defendant.

Faretta v. California also recognized that a state may, over the objection of the accused, appoint what has been called "standby counsel" to aid the accused if and when the accused requests help and to be available to represent the accused in the event termination of the defendant's self-representation is necessary because the defendant "deliberately engages in serious and obstructionist misconduct."

In most cases, the primary role of counsel appointed over the objection of the accused is fundamentally advisory. In fewer cases, the role of appointed counsel may be to take over representation of the defendant during trial either because of a request of the defendant because of the length or complexity of the trial, or because the defendant's disruptive behavior constituted a waiver of the right of self-representation. While *Faretta* refers to counsel taking representation upon termination of the right of self-representation, in most cases this is not the primary role of such counsel and may not be either feasible or desirable. The absolute control over the defense placed in the hands of the accused by *Faretta* may prevent appointed advisory counsel from being able to be ready to step in and continue the trial if the defendant

is unable or unwilling to continue to represent himself or herself. The accused, not appointed counsel, controls the plan—or lack of plan—for the presentation of the defense. The term “standby counsel” is too broad a term to cover the role of appointed counsel in every case or even most cases where counsel is appointed over the objection of the defendant. Because the primary purpose of counsel appointed over the objection of the defendant is to help the accused understand and negotiate through the basic procedures of the trial and “to relieve the trial judge of the need to explain and enforce basic rules of [the] courtroom,” counsel appointed over the objection of the accused may be more properly called “advisory counsel”.

There appear to be two main reasons for appointing advisory counsel for defendants who wish to represent themselves: (1) the many concerns surrounding the fairness of a criminal process where lay people choose to represent themselves—to aid the court in fulfilling its responsibility for insuring a fair trial, to further the public interest in an orderly, rational trial, or if the court appoints advisory counsel to assist the pro se defendant—and (2) the concerns over the disruption of the criminal process prior to its completion caused by the removal of an unruly defendant or a request for counsel during a long or complicated trial.

These general reasons for the appointment of the public defender to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the court proceeding were sufficient to allow counsel to take over representation, the court could enter that order. If the circumstances constituted a manifest injustice to continue with the trial, a mistrial could be granted and a date for a new trial, allowing counsel time to prepare, could be set. The court could also deny the request to allow counsel to take over representation if the circumstances would not make this feasible or practical.

If the court appoints advisory counsel because of the complexity of the case or the length of the trial or the possibility that the defendant may be removed from the trial because of disruptive behavior, advisory counsel must be expected to be prepared to take over as counsel in the middle of the trial so long as the interests of justice are served.

Whenever counsel is appointed over the defendant's objection, counsel's participation must not be allowed to destroy the jury's perception that the accused is representing himself or herself. In all proceedings, especially those before the jury, advisory counsel must respect the defendant's right to control the case and not interfere with it. The accused must authorize appointed counsel before the counsel can be involved, render impromptu advice, or ever appear before the court. If the accused does not wish appointed counsel to participate, counsel must simply attend the trial.

Even where appointed counsel is not expected to be ready to take over representation in the middle of the proceedings, it is appropriate and necessary that all advisory counsel be served with the same disclosure and discovery items as counsel of record so that counsel can at least be familiar with this information in acting in an advisory role. All counsel appointed for the pro se defendant must be served with the pleadings, motions, and discovery.

It is essential that at the outset of the trial court explain to the accused and counsel appointed in these situations what choices the accused has and what the consequences of those choices may be later in the proceedings. In *State v. Richards*, 552 N.W.2d 197, 206 (Minn. 1996), the Supreme Court repeated the rule it set in *State v. Richards*, 463 N.W.2d 499 (Minn. 1990): the defendant's request for the “substitution of standby counsel (shall not be granted) unless, in the trial court's discretion, his request is timely and reasonable and reflects extraordinary circumstances.” Trial courts should consider the progress of the trial, the readiness of standby counsel, and the possible disruption of the proceedings. Statement of the expectations of advisory counsel at the outset should make it clear to all concerned about what will happen should there be a change in the representation of the defendant during the proceeding.

A defendant appearing pro se with advisory counsel should be informed that the duties and costs of investigation, legal research, and other matters associated with litigating a criminal matter are the responsibility of the defendant and not advisory counsel. It should be

made clear to the pro se defendant that advisory counsel is not a functionary of the defendant who can be directed to perform tasks by the defendant. A motion pursuant to Minnesota Statutes, section 611.21 is available to seek funds for hiring investigators and expert witnesses.

Rule 5.02, subd. 3 prescribes the standard to be applied by the court in determining whether a defendant is financially eligible for the appointment of the public defender. This standard is based upon the standards adopted by the Minnesota State Board of Public Defense on January 30, 1993.

Under part (1), the defendant is eligible for public defender representation if they receive a means-tested government benefit or if they have a dependent who resides in their household and who receives such benefits. A means-tested benefit is one based upon an income and/or assets test.

Under part (2), the defendant is eligible for public defender representation if their income and/or assets are insufficient for them to pay the reasonable costs of private representation in that judicial district for a case of the nature at issue.

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

To assist the court in deciding whether to appoint the public defender, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. In order to avoid the creation of conflicts of interest and to focus limited public defender resources on client representation, the public defender shall not be permitted or required to participate in determining whether particular defendants are eligible for public defender representation.

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 the public defender. This provision is included to make clear that the public defender 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 public defender.

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.

Rule 6. Pretrial Release

[For text of 6.01, see M.S. 1998, Volume 15]

6.02 Release by Judge, Judicial Officer or Court

Subd. 1. Conditions of Release. Any person charged with an offense shall be released without bail pending the first court appearance when ordered by the prosecuting attorney, the judge of a district court, or by any person designated by the court to perform that function. Upon appearance before a judge, judicial officer, or court, a person so charged shall be ordered released pending trial or hearing on personal recognizance or on order to appear or upon the execution of an unsecured appearance bond in a specified amount, unless the court, judge or judicial officer determines, in the exercise of discretion, that such a release will be inimical of public safety or will not reasonably assure the appearance of the person as required. When such a determination is made, the court, judge or judicial officer shall, either in lieu of or in addition to the above methods of release, impose the first of the following conditions of release which will reasonably assure the appearance of the person for trial or hearing, or when otherwise required, or, if no single condition gives that assurance, any combination of the following conditions:

- (a) Place the person in the care and supervision of a designated person or organization agreeing to supervise the person;
- (b) Place restrictions on the travel, association or place of abode during the period of release;

(c) Require the execution of an appearance bond in an amount set by the court with sufficient solvent sureties, or the deposit of cash or other sufficient security in lieu thereof; or

(d) Impose any other condition deemed reasonably necessary to assure appearance as required, including a condition requiring that the person return to custody after specified hours.

If such conditions of release, aside from an appearance bond, are imposed by the court, the court shall issue a written order containing those conditions of release. A copy of any such order shall be provided to the defendant and immediately to the law enforcement agency that has or had custody of the defendant. Such law enforcement agency shall also be provided by the court with any available information on the location of the named victim.

In any event, the court shall also fix the amount of money bail without other conditions upon which the defendant may obtain release.

The defendant's release shall be conditioned on appearance at trial or hearing, including the Omnibus Hearing, evidentiary hearing and the pretrial conference prescribed by these rules, or at the taking of any deposition that may be ordered by the court.

Subd. 2. Determining Factors. In determining which conditions of release will reasonably assure such appearance, the judge, judicial officer or court shall on the basis of available information, take into account the nature and circumstances of the offense charged, the weight of the evidence against the accused, the accused's family ties, employment, financial resources, character and mental condition, length of residence in the community, record of convictions, record of appearance at court proceedings or flight to avoid prosecution, and the safety of any other person or of the community.

Subd. 3. Prerelease Investigation. In order to acquire the information required for determining the conditions of release, an investigation into the accused's background may be made prior to or contemporaneously with the defendant's appearance before the court, judge or judicial officer. The court's probation service or other qualified facility available to the court may be directed to conduct the investigation. Any information obtained from the defendant in response to an inquiry during the course of the investigation and any evidence derived from such information, shall not be used against the defendant at trial. This shall not preclude the use of evidence obtained by other independent investigation.

Subd. 4. Review of Conditions of Release. Upon motion, the court before which the case is pending shall review the conditions of release.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 6.06 for Comment.

[For text of 6.03 to 6.06, see M.S. 1998, Volume 15]

Comment

In misdemeanor cases a citation ordinarily must be issued if the misdemeanor charged is not punishable by incarceration. It is the opinion of the Advisory Committee that where possible, a person should not be taken into custody for an offense for which the person could not be incarcerated even if found guilty.

Rule 6.01 adopts the policy expressed in ABA Standards, Pretrial Release, 2.1 (Approved Draft, 1968) favoring the issuance of citations in lieu of arrest or of continued custody after an arrest by an officer acting without a warrant.

Rule 6.01, subd. 1(1)(a) and (b) make it mandatory upon the arresting or detaining officer and officer-in-charge of the stationhouse to issue a citation to any person who is subject to lawful arrest without a warrant for misdemeanors, including ordinance violations, or who has been arrested without a warrant for those offenses, unless it reasonably appears to the officer that arrest or detention is necessary to prevent bodily harm to the accused or another or to prevent further criminal conduct, or that there is a substantial likelihood that the accused will fail to respond to a citation. The uniform traffic ticket may be used for this purpose Minnesota Statutes, section 169.99 (1971).

The initial determination of whether to issue a citation is to be made by the arresting or detaining officer in the field from the information available on the spot. If that officer decides not to issue a citation, the officer-in-charge of the stationhouse will then make a determination from all the information that may then be available, including any additional information disclosed by further interrogation and investigation.

In making their determination of whether to issue a citation, the officers may take into account the defendant's place and length of residence, family relationships, references, present and past employment, criminal record, past history of response to criminal process, and such facts as have a bearing on the likelihood of harmful or criminal conduct. (See ABA Standards, Pretrial Release, 2.2, 2.3 (Approved Draft, 1968).)

By Rule 6.01, subd. 1(1), if a citation is not issued and an arrest is made, the officer shall report to the court the reasons for not issuing it, but the failure to issue a citation is not jurisdictional. The reasons for failing to issue a citation should be specified particularly for the defendant involved. It is not sufficient to simply use a checklist or only the words of the rule to justify the failure to issue a citation. Under these rules an arrest for a misdemeanor should be considered the exception rather than the normal practice.

Under present Minnesota statutory law (Minnesota Statutes, sections 492.01 to 492.06, 487.28 (1971)), citations may be issued for traffic and specified ordinance violations for which a traffic and ordinance violations bureau has been established. Traffic tickets for traffic violations may be issued under Minnesota Statutes, section 169.91 (1971). Rule 6.01, subd. 1 extends the authority to issue citations for all misdemeanors and ordinance violations and makes it mandatory unless it reasonably appears to the arresting or detaining officer or officer-in-charge of the stationhouse that detention is necessary to prevent harmful or criminal conduct or that there is substantial likelihood that the defendant will not appear in response to a citation.

Rule 6.01, subd. 1(2) requires that a citation be issued for any offense whenever ordered by the prosecuting attorney or by a district court judge.

Rule 6.01, subd. 2 gives the officer-in-charge of the stationhouse permissive authority to issue citations for gross misdemeanors and felonies unless it reasonably appears that detention is necessary to prevent harmful or criminal conduct or that the defendant may not appear in response to a citation. (This follows in substance the recommendation of ABA Standards, Pretrial Release, 2.3(a) (Approved Draft, 1968).)

The form of citation prescribed by Rule 6.01, subd. 3 follows ABA Standards, Pretrial Release, 1.4(a) (Approved Draft, 1968), except that the provision for a written promise to appear has been eliminated. It is the belief of the Advisory Committee that requiring a written promise to appear will add very little additional assurance that the defendant will appear and may cause an unnecessary confrontation between the defendant and the law enforcement officer. If it reasonably appears to the law enforcement officer that there is a substantial likelihood that the accused will fail to respond to the citation, an arrest may be made. If the defendant does not respond to the citation as directed and a summons or warrant is necessary, the facts establishing probable cause need not be set forth separately in the complaint as is otherwise required by Rule 2.01. Rather, the citation may be attached to the complaint which is then sworn to by the complainant. This is in accord with the current practice in many courts. If such a complaint is issued the defendant still retains the right under Rule 4.02, subd. 5(3) to demand a complaint that complies with the requirements of Rule 2.01.

Rule 6.01, subd. 4 that the issuance of a citation does not prevent or affect an otherwise lawful search adopts ABA Standards, Pretrial Release, 2.4 (Approved Draft, 1968).

Rule 6.01, subd. 5 authorizing an officer who issues a citation to take the accused to a medical facility adopts ABA Standards, Pretrial Release, 2.5 (Approved Draft, 1968). Rule 6.01, subd. 5 is intended merely to stress that the issuance of a citation in lieu of a custodial arrest or continued detention does not affect the statutory rights of a law enforcement officer to transport a person in need of care to an appropriate medical facility. The extent of a law enforcement officer's powers to transport a person for such purposes will still be governed by statute and is neither expanded nor contracted by Rule 6.01, subd. 5. See, e.g., Minnesota Statutes, section 609.06(8) regarding the right to use reasonable force, in certain situations, toward mentally ill or mentally defective persons and Minnesota Statutes, section 253A.04,

subd. 2 governing the right of a health or peace officer to transport mentally ill or intoxicated persons to various places for care.

These rules do not prescribe the consequences of a failure to obey a citation. The remedy available is the issuance of a warrant or summons upon a complaint.

These rules do not require the adoption of a bail schedule. The purpose of these rules is to assure that whenever reasonably possible defendant will be released without bail. Any bail schedule adopted pursuant to Minnesota Statutes, section 629.71 (1971) should be applied only in those cases where the defendant would not otherwise be released without bail or upon issuance of a citation under these rules. The maximum cash bail which can be required for misdemeanors will continue to be twice the highest possible cash fine upon conviction as prescribed by Minnesota Statutes, section 629.47 (1971).

Rule 6.02, subd. 1 specifying the conditions of release that may be imposed upon a defendant at the first appearance before a judge, judicial officer, or court (Rule 5.05. See also Rules 6.02, subd. 4, 19.05) is taken from the Bail Reform Act of 1966, 18 U.S.C., secs. 3141–3152, and in general follows ABA Standards, Pretrial Release 5.1, 5.3 (Approved Draft, 1968). If conditions of release are endorsed on the warrant (Rule 3.02, subd. 1), the defendant should be released on meeting those conditions.

Rule 6.02, subd. 1 substantially follows the language of section 3146(a). The rule directs that the defendant shall be released on personal recognizance, or on order to appear, or on the execution of an unsecured appearance bond unless the judge or judicial officer determines, in the exercise of discretion, that release by one of those methods will not reasonably assure the defendant's appearance.

Release on "personal recognizance" is a release without bail upon defendant's written promise to appear at appropriate times. (See ABA Standards, Pretrial Release, 1.4(d) (Approved Draft, 1968).) An "Order to Appear" is an order issued by the court releasing the defendant from custody to continuing the defendant at large pending disposition of the case, but requiring the defendant to appear in court or in some other place at all appropriate times. (See ABA Standards, Pretrial Release, 1.4(c) (Approved Draft, 1968).)

If the court determines that release on personal recognizance, order to appear, or on an unsecured appearance bond will be inimical of public safety or will not reasonably secure the defendant's appearance, the court shall in lieu of or in addition to those methods of release impose the first or any combination of the four conditions specified in Rule 6.02, subd. 1 that will assure appearance.

Basically these conditions are taken from 18 U.S.C., section 3146 and ABA Standards, Pretrial Release, 5.2, 5.3 (Approved Draft, 1968). They emphasize that the conditions of release should proceed from the least restrictive to the ultimate imposition of cash bail depending on the circumstances in each case. Release on monetary conditions should be reduced to minimal proportions. It should be required only in cases in which no other conditions will reasonably insure the defendant's appearance. When monetary conditions are imposed, bail should be set at the lowest level necessary to ensure the defendant's reappearance.

Rule 341(g)(2) of the Uniform Rules of Criminal Procedure (1987) and Standard 10–5.3(d) of the American Bar Association Standards for Criminal Justice (1985) provide for release upon posting of ten percent of the face value of an unsecured bond and upon posting of a secured bond by an uncompensated surety. Although Rule 6.02 does not expressly authorize these options, the rule is broad enough to permit the court to set such conditions of release in an unusual case. If the ten percent cash option is authorized by the trial court, it should be in lieu of, not in addition to, an unsecured bond, because there is generally no reasonable expectation of collecting on the unsecured bond and the public should not be deluded into thinking it will be collected. The judge should consider the availability of a reliable person, to help assure the appearance of the defendant. If cash bail is deposited with the court it is deemed to be the property of the defendant pursuant to Minnesota Statutes, section 629.53 (1993) and according to that statute the court may apply the deposit to any fine or restitution imposed.

For certain driving while intoxicated prosecutions under Minnesota Statutes, section 169.121 where the defendant has prior convictions under that or related statutes, the court may impose the conditions of release set forth in Minnesota Statutes, section 169.121, subd.

1c (1997). Those conditions could include alcohol testing and impoundment of license plates. However, Rule 6.02, subd. 1 requires that even though the court sets conditions other than money bail upon which the defendant may be released, or even though the court prescribes other conditions in addition to money bail, the court shall also fix the amount of money bail (secured by cash, property, or qualified sureties) without any other conditions upon which the defendant may obtain release. The Advisory Committee was of the opinion that this is required by the defendant's constitutional right to bail. Minnesota Constitution, Article 1, section 5, makes all persons bailable by sufficient sureties for all offenses.

If the court sets conditions of release, aside from an appearance bond, then the court must issue a written order stating those conditions. Any such written order should be issued promptly and the defendant's release should not be unnecessarily delayed. In addition to providing a copy of any such order to the defendant, the court must immediately provide it to the law enforcement agency that has or had custody of the defendant along with information about the named victim's whereabouts. This provision for a written order is in accord with Minnesota Statutes, section 629.715 (1997) which concerns conditions of release for defendants charged with crimes against persons. Such written orders are required because it is important that the defendant, as well as other concerned persons and law enforcement officers, know precisely what conditions govern the defendant's release.

In connection with the setting of bail or other conditions of release, see Minnesota Statutes, section 629.72, subd. 7 and Minnesota Statutes, section 629.725 as to the duty of the court to provide notice of a hearing on the release of the defendant from pretrial detention in domestic abuse, harassment or crimes of violence cases. Also see Minnesota Statutes, section 629.72, subd. 6 and Minnesota Statutes, section 629.73 as to the duty of the law enforcement agency having custody of the defendant in such cases to provide notice of the defendant's impending release.

Under Rule 6.02, subd. 1, defendant's release, in whatever form, shall be conditioned on appearance at trial or hearing, including the Omnibus Hearing under Rule 11, and at the taking of depositions under Rule 21.01.

Rule 6.02, subd. 2 enumerates the factors that a court shall take into account in determining the conditions of release (including personal recognizance, order to appear, or unsecured bond) that will reasonably assure the defendant's appearance. This rule follows the language of 18 U.S.C. sec. 3146(b) and ABA Standards, Pretrial Release, 5.1 (Approved Draft, 1968). It also permits the court to consider the safety of any other person or the community in determining the conditions of release to be imposed.

Recommendation 5, concerning sexual assault, in the Final Report of the Minnesota Supreme Court Task Force on Gender Fairness in the Courts, 15 Wm. Mitchell L. Rev. 827 (1989), states that "Minnesota judges should not distinguish in setting bail, conditions of release, or sentencing in nonfamilial criminal sexual conduct cases on the basis of whether the victim and defendant were acquainted." This prohibition should be applied in setting bail in other cases as well.

Rule 6.02, subd. 3 authorizing a prerelease investigation to obtain the necessary information for making the release decision is in accord with ABA Standards, Pretrial Release, 4.5 (Approved Draft, 1968).

Under Rule 6.02, subd. 4 the court which initially set conditions of release may on motion reexamine them if the case is still pending before that court, and may continue or revise the conditions in accordance with Rule 6.02, subds. 1 and 2. If the case is not pending before that court, the conditions of release may on motion be reviewed and continued or revised under the provisions of Rule 6.02, subds. 1 and 2 by the court before which the case is then pending. This is generally in accord with 18 U.S.C., section 3147(a) and ABA Standards, Pretrial Release, 5.9(b) (Approved Draft, 1968).

NOTE: The rule does not cover appeal of the release decision nor does it include release following a conviction. Appeal of the release decision is permitted under Rules 28 and 29. These rules also set standards and procedures for the release of a defendant following conviction.

Rule 6.03 prescribes the procedures to be followed upon violation of conditions of release. The rule is substantially in accord with the ABA Standards, Pretrial Release, 5.6, 5.7,

5.8 (Approved Draft, 1968), except that by Rule 6.03, subd. 3, the court is not authorized to revoke the defendant's release without setting bail because such action is not permitted under Minnesota Constitution, Article 1, section 5. The court must continue or revise the release conditions, governed by the considerations set forth in Rule 6.02, subds. 1 and 2. Under those rules, the court may increase the defendant's bail. If the defendant is unable to post the increased bail or to meet alternative conditions of release, the defendant may be kept in custody. Also, Rule 6.03 requires the issuance of a summons rather than a warrant and the issuance of a citation rather than an arrest under the same circumstances upon which they would be required under Rules 3.01 and 6.01, respectively. Rule 6.03, subd. 3 requires only an informal hearing and does not require a showing of willful default, but leaves it to the discretion of the court to determine under all of the circumstances whether to continue or revise the conditions of possible release.

There are no provisions similar to Rule 6.03 in existing Minnesota statutory law except Minnesota Statutes, section 629.58 (1971) which provides that if a defendant fails to perform the conditions of a recognizance, process shall be issued against the persons bound thereby. Rule 6.03, subds. 1 and 2 take the place of that statute.

Minnesota Statutes, section 629.63 (1971) providing for surrender of the defendant by the surety on the defendant's bond is not affected by Rule 6.03. To the extent that it is inconsistent with Rule 6.03 and Rule 6.02, subds. 1 and 2, however, Minnesota Statutes, section 629.64, requiring that in the event a defendant is surrendered by such surety money bail shall be set, is superseded.

Rule 6.03, subd. 4 follows in substance ABA Standards, Pretrial Release, 5.8 (Approved Draft, 1968). The rule provides for a review of release conditions when the defendant has been subsequently charged by complaint or indictment with a crime (other than that upon which initially released). The rule provides that the court with jurisdiction over the prior charge shall review the release conditions upon that charge and may continue or revise them (governed by the considerations set forth in Rule 6.02, subds. 1 and 2).

Rule 6.04 continues the existing procedures for forfeiture of an appearance bond (Minnesota Statutes, sections 629.48, 629.58–60 (1971)).

Rule 6.05 providing for the trial court's supervision and review—on the court's own motion—of the detention of defendants under the court's jurisdiction, is in accord with ABA Standards, Pretrial Release, 5.9(c) (Approved Draft, 1968).

Rule 6.06 provides that in misdemeanor cases 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. The trial may be postponed 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. As to sanctions for violation of these speedy trial provisions see *State v. Kasper*, 411 N.W.2d 182 (Minn. 1987) and *State v. Friberg*, 435 N.W.2d 509 (Minn. 1989). In misdemeanor cases Rule 6.06 supersedes Minnesota Statutes, section 611.04 (1971) which required the defendant to be brought to trial at the next term of court. As to the right to a speedy trial generally, see the comments to Rule 11.10.

[For text of 7., see M.S. 1998, Volume 15]

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 designated gross misdemeanor as defined by Rule 1.04(b), 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 designated gross misdemeanors, 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 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.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 8.06 for Comment.

[For text of 8.02 to 8.06, see M.S. 1998, Volume 15]

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 designated gross misdemeanor as defined by Rule 1.04(b) (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 Rule 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. Under Rule 4.02, subd. 5(3) a prosecution for a designated gross misdemeanor may be commenced by tab charge, but a complaint must be served and filed within 48 hours of the defendant's appearance on the tab charge if the defendant is in custody or within 10 days of the defendant's appearance on the tab charge if the defendant is not in custody. Therefore, if the separate Rule 8 appearance occurs later than those time limits, as will usually be the case, a complaint must have been served and filed for such a gross misdemeanor prosecution to continue. However, if the Rule 5 and Rule 8 appearances were consolidated under Rule 5.03, it would be possible for the tab charge to still be effective at the time of the Rule 8 appearance.

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. See Minnesota Statutes, section 611A.033 regarding the prosecutor's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of any change in the schedule of court proceedings. This would include the Omnibus Hearing as well as trial or any other hearing.

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.

Rule 9. Discovery in Felony and Gross Misdemeanor Cases

[For text of 9.01 to 9.03, see M.S. 1998, Volume 15]

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, subds. 1 and 2 (recorded testimony of grand jury witnesses), provide a comprehensive method of discovery 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.

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, the order may be obtained at the first appearance of the defendant under Rules 4.02, subds. 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, subds. 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, subds. 6 and 7, authorizing in camera proceedings and excision.

Rule 9.03, subds. 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).

[For text of 10., see M.S. 1998, Volume 15]

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 designated gross misdemeanor as defined by Rule 1.04(b), following a tab charge, a hearing shall be held as follows:

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

[For text of 11.01, see M.S. 1998, Volume 15]

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. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

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

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 11.11 for Comment.

[For text of 11.03 to 11.08, see M.S. 1998, Volume 15]

11.10 Plea; Trial Date

If the defendant is not discharged the defendant shall plead to the complaint or be given additional time within which to plead. If the defendant so requests, the court shall allow the defendant at the Omnibus Hearing to enter a plea, including a not guilty plea, even if the Omnibus Hearing is continued or Omnibus Hearing issues are still pending for decision by the court. The entry of a plea other than guilty in that situation does not waive any pending juris-

dictional or other issues that the defendant may have raised for determination by the court at the Omnibus Hearing. If the defendant enters a plea other than guilty, a trial date shall then be set. A defendant shall be tried as soon as possible after entry of a plea other than guilty. 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 plea other than guilty. If trial is not commenced within 120 days after such demand is made and such a 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 6.01, subd. 1.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 11.11 for Comment.

[For text of 11.11, see M.S. 1998, Volume 15]

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)).

Rule 11.02, subd. 1 permits any party offering a videotape or audiotape exhibit to also provide to the court a transcript of the tape. This rule does not govern whether any such transcript is admissible as evidence in the case. That issue is governed by Article 10 of the Minnesota Rules of Evidence. However, upon an appeal of the proceedings, the transcript of the exhibit will be part of the record if the other party stipulates to the accuracy of the tape transcript as provided in Rule 28.02, subd. 9.

In *State v. Scales*, 518 N.W.2d 587 (Minn. 1994), the court held that all custodial interrogation including any information about rights, any waiver of those rights, and all questioning must be electronically recorded in a place of detention and, if feasible, in any other place. Any "substantial" violation of this recording requirement requires suppression of any statements thereby obtained.

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 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 Om-

nibus 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.) See Minnesota Statutes, section 611A.033 regarding the prosecutor's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of any change in the schedule of court proceedings. This would include the Omnibus Hearing as well as trial or any other hearing.

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 in the district court or be given additional time within which to plead. If the defendant pleads not guilty, not guilty by reason of mental illness or mental deficiency, or double jeopardy or that prosecution is barred by Minnesota Statutes, section 609.035, a trial date shall be set. (Rule 11.10.) If the Omnibus Hearing or any part of it is continued pursuant to Rule 11.07, Rule 11.10 further provides that the defendant may enter a plea including a not guilty plea at the first Omnibus Hearing appearance. This assures that if a defendant wishes to demand a speedy trial under Rule 11.10, the running of the time limit for that will not be delayed by continuing the plea until the continued Omnibus Hearing. If the trial date is continued, see Minnesota Statutes, section 611A.033 regarding the prosecuting attorney's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of the continuance.

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.) See Minnesota Statutes, section 611A.033 regarding the prosecutor's duties under the Victim's Rights Act in relation to speedy trial demands.

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*, 407 U.S. 514 (1972).) The constitutional right to a speedy trial is triggered not when the plea is entered but when a charge is issued or an arrest is made. *State v. Jones*, 391 N.W.2d 224 (Minn. 1986). 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 plea of not guilty, not guilty by reason of mental illness or mental deficiency, or double jeopardy or that prosecution is barred by Minnesota Statutes, section 609.035. However, under Rule 11.10, the defendant may insist on the right to enter such a plea at the first Omnibus Hearing appearance even if the hearing is continued. This will assure that a defendant can get the speedy trial time limit running even if some Omnibus Hearing issues are continued for later decision by the court. The plea other than guilty 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 pre-trial proceedings will have been substantially completed. If demand is made before such plea, the 60-day period starts to run upon entry of the plea. It is contemplated that when the pre-trial 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).

Rule 12. Pretrial Conference and Evidentiary Hearing in Misdemeanor Cases

[For text of 12.01 to 12.03, see M.S. 1998, Volume 15]

12.04 Hearing on Evidentiary Issues

Subd. 1. Evidence. If the defendant or the prosecution has demanded a hearing on the issue specified by Rule 7.01, the court shall hear and determine the issue upon such evidence as may be offered by the prosecutor or the defense. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

Subd. 2. Cross-Examination. Upon such hearing, the defendant and the prosecution may cross-examine the other's witnesses as to the evidentiary and identification issues raised as specified in Rule 7.01.

Subd. 3. Time. Any evidentiary hearing shall be held separately from the trial when the trial is to be before a jury and in the discretion of the court may be held either separately or as part of the trial when the trial is to the court. Any separate hearing shall be held immediately prior to trial unless the court for good cause otherwise orders.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 12.08 for Comment.

[For text of 12.05 to 12.08, see M.S. 1998, Volume 15]

Comment

There will be no Omnibus Hearing required for misdemeanors (see Rule 11). There is no necessity for a probable cause determination for misdemeanors. A Rasmussen hearing usually can be conducted on the same day as the trial.

The multiplicity of court appearances and hearings which prompted the establishment of an Omnibus Hearing for felonies and gross misdemeanors (see the comments to Rule 11) is

not a problem in misdemeanor cases. Thus, no Omnibus Hearing is necessary. Rather, this rule prescribes that a pretrial conference may be held in such cases and at such times as the court may order and any Rasmussen hearing will ordinarily be conducted immediately prior to trial.

Trial courts are encouraged to hold pretrial conferences, especially in jury cases. Since a jury trial would normally last a day or longer, requiring the investment of time and expense, a pretrial conference which may settle the case without a trial, appears justified. If a pretrial conference is scheduled, it should be held at such times as the court orders and ordinarily the courts should order it held before the day of trial so that witnesses and jurors will be spared the inconvenience of appearing for trial in a case that is settled. At the conference the court will consider the same matters upon which an Omnibus Hearing must be held in felony and gross misdemeanor cases (see Rule 11). Under Rule 12.02, the court shall hear and determine all motions made under Rule 10 (see also Rules 7.03; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subds. 3 and 17), by the prosecutor or the defendant and receive any evidence subject to cross-examination by the other party, unless the court grants an exception to the waiver (Rule 10.03). Motions that are not made upon grounds then known and available to the parties are waived, with the exception of those for lack of jurisdiction over the offense or failure of the complaint to state an offense. At the conference the court on its initiative under Rule 12.03 shall also ascertain and hear any other issues that can be heard and disposed of before trial. This would include requests or issues arising from the Spreigl notice (Rule 7.02), and any other matters which would promote a fair and expeditious trial. If no pretrial conference is held, any motions and issues under Rules 12.02 and 12.03 which arise should be heard (Rule 12.01) and determined (Rule 12.07) immediately prior to trial.

Under *State v. Wenberg*, 289 N.W.2d 503 (Minn. 1980), if the prosecutor intends to impeach the defendant or any defense witness with evidence of prior convictions, the prosecutor must request a pretrial hearing on the admissibility of such evidence. See Rule 609 of the Minnesota Rules of Evidence, *State v. Jones*, 271 N.W.2d 534 (Minn. 1978), and *State v. Brouillette*, 286 N.W.2d 702 (Minn. 1979), as to the standards for determining the admissibility of such impeachment evidence.

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

Either at or before a pretrial conference, or at least seven days before trial if no conference is held, the prosecutor must serve the Rasmussen and Spreigl notice (Rules 7.01 and 7.02). Any other pretrial motions should be served at least three days before the conference or at least three days before trial if no conference is held (Rules 7.03; 10.04, subd. 1; 17.03, subds. 3 and 4; 17.04; 17.06; 17.06, subds. 3 and 17).

Rule 12.04 covers the Rasmussen hearing demanded under Rule 5.04, subd. 4. Under Rule 12.04, subd. 3, any Rasmussen hearing would be held separately from any jury trial, but may be held either separately or as part of the trial when trial is to the court. Any separate hearing should be held immediately prior to trial unless the court for good cause orders that it be held at a different time. This procedure continues substantially the present practice under *City of St. Paul v. Page*, 285 Minn. 374, 173 N.W.2d 460 (1969).

At the Rasmussen hearing, both parties may offer evidence (Rule 12.04, subd. 2) and cross-examine the other's witnesses (Rule 12.04, subd. 3). The rule leaves to judicial interpretation the consequences of the defendant's testimony at a Rasmussen or similar evidentiary hearing as to whether it can be used against the defendant at trial substantively (see *Sim-*

mons 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*, 401 U.S. 222 (1971)).

Rule 12.04, subd. 1 permits any party offering a videotape or audiotape exhibit to also provide to the court a transcript of the tape. This rule does not govern whether any such transcript is admissible as evidence in the case. That issue is governed by Article 10 of the Minnesota Rules of Evidence. However, upon an appeal of the proceedings, the transcript of the exhibit will be part of the record if the other party stipulates to the accuracy of the tape transcript as provided in Rule 28.02, subd. 9.

By Rule 12.05, the complaint may be amended at the pretrial conference as provided by Rule 17.05 (see also Rules 3.04, subd. 2, and 17.06, subd. 4).

By Rule 12.06, the defendant at the pretrial conference may plead to the complaint or tab charge or to such other different offense as is permitted by Rule 15.08.

Rule 12.07 provides for the continuation of the pretrial conference if necessary to dispose of the issues presented. For the purpose of taking testimony or other good cause the court may continue the determination of issues or motions until the day of trial. Such a continuance, where testimony is required, will save witnesses an additional court appearance where those witnesses would be testifying at trial. Where no pretrial conference is held, any motions raised by the parties shall be heard on the day of the trial (Rule 10.04, subd. 2). All motions and issues including those raised at a separate evidentiary hearing shall be determined before trial begins unless otherwise agreed to by the prosecution and the defense. Findings may be made either in writing or orally on the record.

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

Rule 13. Arraignment in Felony and Gross Misdemeanor Cases

The arraignment shall be conducted as follows:

[For text of 13.01 and 13.02, see M.S. 1998, Volume 15]

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 designated gross misdemeanors as defined by Rule 1.04(b) prosecuted by tab charge pursuant to Rule 4.02, subd. 5(3), the tab charge shall be read to the defendant.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 13.05 for Comment.

[For text of 13.04 and 13.05, see M.S. 1998, Volume 15]

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 designated gross misdemeanor as defined by Rule 1.04(b) 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 appear-

ance 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). 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.

Rule 14. Pleas

[For text of 14.01, see M.S. 1998, Volume 15]

14.02 Who May Plead

Subd. 1. By an individual in felony and gross misdemeanor cases. A plea to an indictment or complaint or, for a designated gross misdemeanor as defined by Rule 1.04(b), a tab charge by an individual defendant shall be made orally on the record by the defendant in person.

Subd. 2. By an individual in misdemeanor cases. A plea to a complaint or tab charge by an individual defendant shall be made orally on the record or by the petition to plead guilty provided for in Rule 15.03, subd. 2. If the court is satisfied that the defendant has knowingly and voluntarily waived the right to be present, the plea may be entered by counsel.

Subd. 3. By a corporation. A plea by a corporate defendant shall be made by counsel or a corporate officer, and shall be made orally on the record or in writing.

Subd. 4. Defendant's Refusal to Plead. If the defendant stands mute or refuses to plead, or if the court refuses to accept a plea of guilty, the court shall proceed as if the defendant had entered a plea of not guilty.

If a defendant corporation fails to appear, the court upon proof of the commission of the offense charged may enter judgment of conviction and impose such sentence as may be appropriate.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 14.03 for Comment.

[For text of 14.03, see M.S. 1998, Volume 15]

Comment

Rule 14 adopts the pleas provided by Minnesota Statutes, section 630.28 (1971), and adds the plea of not guilty by reason of mental illness or mental deficiency as defined by Minnesota Statutes, section 611.026 (1971), with its judicial interpretations, and the plea of the bar provided by Minnesota Statutes, section 609.035 (1971). Notice of a defense or defenses under Rule 9.02, subd. 1(3)(a), does not obviate the necessity for a plea under Rule 14.

Rule 20.02, subd. 6(2) and (5), governing the procedure upon the defense of mental illness or mental deficiency, contemplate that a defendant shall plead both not guilty and not guilty by reason of mental illness or mental deficiency when intending to put in issue both guilt of the elements of the offense charged and mental responsibility by reason of mental illness or mental deficiency.

A conditional plea of guilty may not be entered whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or any other pretrial order. *State v. Lothenbach*, 296 N.W.2d 865 (Minn. 1980). One option, as authorized by Rule 26.01, subd. 3, is to plead not guilty, stipulate the facts, waive the jury trial, and, if there is a find of guilty, appeal the judgment of conviction. *Id.* A guilty plea also waives any appellate challenge to an order certifying the defendant as an adult. *Waynewood v. State*, 552 N.W.2d 718 (Minn. 1996).

Rule 14.02, subd. 1, continues the requirement of Minnesota Statutes, section 630.28 (1971), that the plea shall be made orally on the record.

Rule 14.04, subd. 2, unlike Minnesota Statutes, section 630.29, permits a plea of guilty or not guilty to a misdemeanor to be made by counsel, with the permission of the court. Otherwise, the plea shall be made in person except in the case of a corporation. In misdemeanor cases, by Rule 14.02, subd. 2, before accepting such a plea through counsel, the court should determine whether counsel has advised the defendant of the rights and information contained in Rule 15.02, and whether the plea would be acceptable under Rule 15 if the defendant were present personally in court. The petition to plead guilty provided for in Rule 15.03, subd. 2, and in the Appendix B to Rule 15, if properly completed and filed with the court, constitutes a proper plea. The defendant need not be present when it is filed and accepted. See also Rule 26.03, subd. 1(3), (defendant's presence at trial and sentencing), and Rule 27.03, subd. 2 (defendant's presence at sentencing). If the court is satisfied that the defendant has knowingly and voluntarily decided to enter the plea and to waive the right to be present in court, then the court must allow the plea to be entered in the defendant's absence.

By Rule 14.02, subd. 3, a plea by a corporation may be made orally or in writing by counsel or a corporate officer. (See Minnesota Statutes, section 630.16 (1971).)

Rule 14.02, subd. 3, provides for the procedure when a corporation fails to appear in response to a summons or an order of court or otherwise. (This changes Minnesota Statutes, section 630.16 (1971).)

Rule 14.02, subd. 4, governing the procedure when a defendant refuses to plead or when the court refuses to accept a plea of guilty follows the substance of Minnesota Statutes, section 630.34 (1971). The court should not refuse to accept a plea merely because the defendant is not present. The procedure upon a plea of guilty is set forth in Rule 15.

Rule 15. Procedure Upon Plea of Guilty; Plea Agreements; Plea Withdrawal; Plea to Lesser Offense

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

Before the court accepts a plea of guilty, the defendant shall be sworn and questioned by the court with the assistance of counsel as to the following:

1. Name, age and date and place of birth and whether the defendant is handicapped in communication and, if so, whether a qualified interpreter has been provided for the defendant.

2. Whether the defendant understands the crime charged.

3. Specifically, whether the defendant understands that the crime charged is (name of offense) committed on or about (month) (day) (year) in _____ County, Minnesota (and that the defendant is tendering a plea of guilty to the crime of (name of offense) which is a lesser degree or lesser included offense of the crime charged).

4. a. Whether the defendant has had sufficient time to discuss the case with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts of the case, and that defense counsel has represented the defendant's interests and fully advised the defendant.

5. Whether the defendant has been told by defense counsel and understands that upon a plea of not guilty, there is a right to a trial by a jury and that a finding of guilty is not possible unless all jurors agree.

6. a. Whether the defendant has been told by defense counsel and understands that there will not be a trial by either a jury or by a judge without a jury if the defendant pleads guilty.

b. Whether the defendant waives the right to a trial.

7. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial by jury or by a judge, the defendant will be presumed to be innocent until guilt is proved beyond a reasonable doubt.

8. a. Whether the defendant has been told by defense counsel, and understands that if the defendant wishes to plead not guilty and have a trial, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and that the defendant will have the right, through defense counsel, to question these witnesses.

b. Whether the defendant waives the right to have these witnesses testify in the defendant's presence in court and be questioned by defense counsel.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to plead not guilty and have a trial, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

10. Whether defense counsel has told the defendant and the defendant understands:

a. That the maximum penalty that the court could impose for the crime charged (taking into consideration any prior conviction or convictions) is imprisonment for _____ years.

b. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than _____ months for the crime charged.

c. That if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

11. Whether defense counsel has told the defendant that the defendant discussed the case with one of the prosecuting attorneys, and that the respective attorneys agreed that if the defendant entered a plea of guilty the prosecutor will do the following: (state the substance of the plea agreement.)

12. Whether defense counsel has told the defendant and the defendant understands that if the court does not approve the plea agreement, the defendant has an absolute right to withdraw the plea of guilty and have a trial.

13. Whether, except for the plea agreement, any policeman, prosecutor, judge, defense counsel, or any other person, made any promises or threats to the defendant or any member of the defendant's family, or any of the defendant's friends, or other persons in order to obtain a plea of guilty.

14. Whether defense counsel has told the defendant and the defendant understands that if the plea of guilty is for any reason not accepted by the court, or is withdrawn by the defendant with the court's approval, or is withdrawn by court order on appeal or other review, that the defendant will stand trial on the original charge (charges) namely, (state the offense) (which would include any charges that were dismissed as a result of the plea agreement) and that the prosecution could proceed just as if there had never been any agreement.

15. a. Whether the defendant has been told by defense counsel and understands, that if the defendant wishes to plead not guilty and have a jury trial, the defendant can testify if the defendant wishes, but that if the defendant decided not to testify, neither the prosecutor nor the judge could comment to the jury about the failure to testify.

b. Whether the defendant waives this right, and agrees to tell the court about the facts of the crime.

16. Whether with knowledge and understanding of these rights the defendant still wishes to enter a plea of guilty or instead wishes to plead not guilty.

17. Whether the defendant makes any claim of innocence.

18. Whether the defendant is under the influence of intoxicating liquor or drugs or under mental disability or under medical or psychiatric treatment.

19. Whether the defendant has any questions to ask or anything to say before stating the facts of the crime.

20. What is the factual basis for the plea.

(NOTE: It is desirable that the defendant also be asked to acknowledge signing the Petition to Plead Guilty, suggested form of which is contained in the Appendix A to these rules; that the defendant has read the questions set forth in the petition or that they have been read to the defendant, and that the defendant understands them; that the defendant gave the answers set forth in the petition; and that they are true.)

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 15.11 for Comment and Appends. A and B.

15.02 Acceptance of Plea; Questioning Defendant; Misdemeanor Cases

Before the court accepts a plea of guilty to any offense punishable upon conviction by incarceration, any plea agreement shall be explained in open court. The defendant shall then be questioned by the court or counsel in substance as follows:

1. Specifically whether the defendant understands that the crime charged is (name the offense) committed on or about (Month) (Day) (Year) in _____ County, Minnesota (and that the defendant is pleading guilty to the crime of (name of offense)).

2. Whether the defendant realizes that the maximum possible sentence is 90 days imprisonment and a fine in the amount allowed by applicable law. (Under the applicable law, if the maximum sentence is less, it should be so stated.) Further, whether the defendant realizes that, if the defendant is not a citizen of the United States, a plea of guilty to the crime charged may result in deportation, exclusion from admission to the United States, or denial of naturalization as a United States citizen.

3. Whether the defendant knows there is a right to the assistance of counsel at every stage of the proceedings and that counsel will be appointed for a defendant unable to afford counsel.

4. Whether the defendant knows of the right:

(a) to trial by the court a jury and that a finding of guilty is not possible in a jury trial unless all jurors agree;

(b) to confront and cross-examine all prosecution witnesses;

(c) to subpoena and present defense witnesses;

(d) to testify or remain silent at trial or at any other time;

(e) to be presumed innocent and that the State must prove its case beyond a reasonable doubt; and

(f) to a pretrial hearing to contest the admissibility at trial of any confessions or admissions or of any evidence obtained from a search and seizure.

5. Whether the defendant waives these rights.

6. Whether the defendant understands the nature of the offense charged.

7. Whether the defendant believes that what the defendant did constitutes the offense to which the defendant is pleading guilty.

The court with the assistance of counsel, if any, shall then elicit sufficient facts from the defendant to determine whether there is a factual basis for all elements of the offense to which the defendant is pleading guilty.

Where the guilty plea is being entered at the defendant's first appearance in court, the statement as to the defendant's rights required by Rule 5.01 may be combined with the questioning required above prior to entry of a guilty plea.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 15.11 for Comment and Appens. A and B.

[For text of 15.03 to 15.07, see M.S. 1998, Volume 15]

15.08 Plea To Different Offense

With the consent of the prosecuting attorney and the defendant, the defendant may enter a plea of guilty to a different offense than that charged in the original tab charge, indictment, or complaint. If the different offense is a felony or gross misdemeanor, a new complaint shall be signed by the prosecuting attorney and filed in the district court. The complaint shall be in the form prescribed by Rule 2.01 and Rule 2.03 except that it need not be made upon oath and the facts establishing probable cause to believe the defendant committed the offense charged need not be provided. If the different offense is a misdemeanor, the defendant may be charged by complaint or tab charge as provided in Rule 4.02, subd. 5(3) with the new offense and the original charge shall be dismissed.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 15.11 for Comment and Appens. A and B.

[For text of 15.09 to 15.11, see M.S. 1998, Volume 15]

APPENDIX A TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
JUDICIAL DISTRICT _____

State of Minnesota,
vs. _____

PETITION TO ENTER
PLEA OF GUILTY

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above entitled action do respectfully represent and state as follows:

1. My full name is _____. I am _____ years old, my date of birth is _____. The last grade that I went through in school is _____.

2. If filed in my case, I have received, read and discussed a copy of the (Indictment)(Complaint).

3. I understand the charge made against me in this case.

4. Specifically, I understand that I have been charged with the crime of _____ committed on or about (month) (day) (year) in _____ County, Minnesota, (and that the crime I am talking about is _____ which is a lesser degree or lesser included offense of the crime charged).

5. I am represented by an attorney whose name is _____ and:

- a. I feel that I have had sufficient time to discuss my case with my attorney.
- b. I am satisfied that my attorney is fully informed as to facts of this case.
- c. My attorney has discussed possible defenses to the crime that I might have.
- d. I am satisfied that my attorney has represented my interests and has fully

advised me.

6. I (have)(have never) been a patient in a mental hospital.

7. I (have)(have not) talked with or been treated by a psychiatrist or other person for a nervous or mental condition.

8. I (have)(have not) been ill recently.

9. I (have)(have not) recently been taking pills or other medicines.

10. I (do)(do not) make the claim that I was so drunk or so under the influence of drugs or medicine that I did not know what I was doing at the time of the crime.

11. I (do)(do not) make the claim that I was acting in self-defense or merely protecting myself or others at the time of the crime.

12. I (do)(do not) make the claim that the fact that I have been held in jail since my arrest and could not post bail caused me to decide to plead guilty in order to get the thing over with rather than waiting for my turn at trial.

13. I (was)(was not) represented by an attorney when I (had a probable cause hearing). (If I have not had a probable cause hearing:)

a. I know that I could now move that the complaint against me be dismissed for lack of probable cause and I know that if I do not make such a motion and go ahead with entering my plea of guilty, I waive all right to successfully object to the absence of a probable cause hearing.

b. I also know that I waive all right to successfully object to any errors in the probable cause hearing when I enter my plea of guilty.

14. My attorney has told me and I understand:

a. That the prosecutor for the case against me, has:

i. physical evidence obtained as a result of searching for and seizing the evidence;

ii. evidence in the form of statements, oral or written that I made to police or others regarding this crime;

iii. evidence discovered as a result of my statements or as a result of the evidence seized in a search;

iv. identification evidence from a line-up or photographic identification;

v. evidence the prosecution believes indicates that I committed one or more other crimes.

b. That I have a right to a pretrial hearing before a judge to determine whether or not the evidence the prosecution has could be used against me if I went to trial in this case.

c. That if I requested such a pretrial hearing I could testify at the hearing if I wanted to, but my testimony could not be used as substantive evidence against me if I went to trial and could only be used against me if I was charged with the crime of perjury. (Perjury means testifying falsely).

d. That I (do)(do not) now request such a pretrial hearing and I specifically (do)(do not) now waive my right to have such a pretrial hearing.

e. That whether or not I have had such a hearing I will not be able to object tomorrow or any other time to the evidence that the prosecutor has.

15. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury and all jurors would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial I now waive my right to a trial.

16. I have been told by my attorney and I understand that if I wish to plead not guilty and have a trial by jury or trial by a judge I would be presumed innocent until my guilt is proved beyond a reasonable doubt.

17. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty and have a trial the prosecutor would be required to have the witnesses testify against me in open court in my presence and that I would have the right, through my attorney, to question these witnesses.

b. That with knowledge of my right to have the prosecution's witnesses testify in open court in my presence and questioned by my attorney, I now waive this right.

18. I have been told by my attorney and I understand:

a. That if I wish to plead not guilty and have a trial I would be entitled to require any witnesses that I think are favorable to me to appear and testify at trial.

b. That with knowledge of my right to require favorable witnesses to appear and testify at trial I now waive this right.

19. I have been told by my attorney and I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

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

c. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

d. That my present probation or parole could be revoked because of the plea of guilty to this crime.

e. That if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

20. I have been told by my attorney and I understand:

a. That my attorney discussed this case with one of the prosecuting attorneys and that my attorney and the prosecuting attorney agreed that if I entered a plea of guilty, the prosecutor will do the following:

(Give the substance of the agreement)

b. That if the court does not approve this agreement:

i. I have an absolute right to then withdraw my plea of guilty and have a trial.

ii. Any testimony that I have given concerning the guilty plea could not be used against me unless I am charged with the crime of perjury based on this testimony.

21. That except for the agreement between my attorney and the prosecuting attorney:

a. No one – including my attorney, any policeman, prosecutor, judge, or any other person – has made any promises to me, to any member of my family, to any of my friends or other persons, in order to obtain a plea of guilty from me.

b. No one – including my attorney, any policeman, prosecutor or judge, or any other person – has threatened me or any member of my family or my friends or other persons, in order to obtain a plea of guilty from me.

22. My attorney has told me and I understand that if my plea of guilty is for any reason not accepted by the court, or if I withdraw the plea, with the court's approval, or if the plea is withdrawn by court order on appeal or other review:

a. I would then stand trial on the original charge (charges) against me, namely _____ (which would include any charges that were dismissed as a result of the plea agreement entered into by my attorney and the prosecuting attorney).

b. The prosecution could proceed against me just as if there had been no plea of guilty and no plea agreement.

23. My attorney has told me and I understand that if my plea of guilty is accepted by the judge I have the right to appeal, but that any appeal or other court action I may take claiming error in the proceedings probably would be useless and a waste of my time and the court's.

24. My attorney has told me and I understand that a judge will not accept a plea of guilty for anyone who claims to be innocent.

25. I now make no claim that I am innocent.

26. I have been told by my attorney and I understand that if I wish to plead not guilty and have a jury trial:

a. That I could testify at trial if I wanted to but I could not be forced to testify.

b. That if I decided not to testify neither the prosecutor nor the judge could comment on my failure to testify.

c. That with knowledge of my right not to testify and that neither the judge nor the prosecutor could comment on my failure to testify at trial I now waive this right and I will tell the judge about the facts of the crime.

27. That in view of all above facts and considerations I wish to enter a plea of guilty.

Dated this ____ day of _____, 19__

DEFENDANT

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

APPENDIX B TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
JUDICIAL DISTRICT _____

Plaintiff,
vs.

MISDEMEANOR PETITION TO
ENTER PLEA OF GUILTY

Defendant

District Court File No. _____

TO: THE ABOVE NAMED COURT

I wish to enter a plea of guilty in the above-entitled case and I hereby state to the Court the following:

1. I am the Defendant in this case, my full name is _____ and my date of birth is ____.

2. I am charged with (name of offense) in violation of (statute or ordinance).

3. I hereby plead guilty to the offense of (name of offense) in violation of (statute or ordinance).

4. I am pleading guilty because on (date) in the City of _____, County of _____, and State of Minnesota I committed the following acts: (state sufficient facts to establish a factual basis for all elements of the offense to which the defendant is pleading guilty).

5. I understand that the maximum possible sentence for the misdemeanor offense to which I am pleading guilty is 90 days imprisonment or a fine of (amount) or both. Further, I understand that if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

6. RIGHT TO AN ATTORNEY. I understand that I have the right to be represented by an attorney and that an attorney will be appointed to represent me without cost to me if I cannot afford to pay for an attorney.

7. I have fully discussed the charge(s), my constitutional rights, and this petition with my attorney, (name of attorney).

[OR]

7a. WAIVER OF ATTORNEY. I give up my right to be represented by an attorney and any right I might have to request that an attorney be appointed to represent me.

8. I understand that I also have the following constitutional rights which I knowingly and voluntarily give up:

a. The right to a trial to the court or to a jury in which I am presumed innocent until proven guilty beyond a reasonable doubt and in which all jurors in a jury trial must agree I am guilty before the jury could find me guilty.

b. The right to confront and cross-examine all witnesses against me.

c. The right to remain silent or to testify for myself.

d. The right to subpoena and present witnesses to testify for me in my defense.

e. The right to a pretrial hearing to contest the admissibility at trial of any confessions or admissions or of any evidence obtained from a search and seizure.

9. I am entering my plea of guilty freely and voluntarily and without any promises except as indicated in number 10 below.

10. I am entering my plea of guilty based on the following plea agreement with the prosecutor: (if none so state).

11. I understand that if the court does not approve this agreement I have the right to withdraw my plea of guilty and have a trial.

12. I understand that if this plea of guilty is accepted I have the right to be present at the time of sentencing and to speak and to present evidence on my behalf.

13. I hereby request to be present at the time of sentencing.

[OR]

13a. I hereby knowingly and voluntarily give up my right to be present upon (entry of my plea and) sentencing and request that the court sentence me in my absence, but according to any plea agreement that might be contained in this petition.

Dated this ____ day of _____, 19__.

Signature of Defendant

Printed name of Defendant

I, (name of attorney) state that I am the attorney for the defendant in the above-entitled criminal action; that I personally explained the contents of the above petition to the defendant; and that I personally observed the defendant date and sign the above petition.

Dated this ____ day of _____, 19__.

Attorney for Defendant

PETITION AND PLEA OF GUILTY ACCEPTED BY

Judge of District Court

Date

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

APPENDIX C TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
JUDICIAL DISTRICT _____

State of Minnesota,
Plaintiff,
vs.

PETITION TO ENTER
PLEA OF GUILTY BY
PRO SE DEFENDANT

Defendant,

TO: THE ABOVE NAMED COURT

I, _____, defendant in the above-entitled action do respectfully represent and state as follows:

1. My full name is _____. I am _____ years old. My date of birth is _____. The last grade that I went through in school is _____.

2. If filed in my case, I have received and read a copy of the (Indictment)(Complaint).

3. I understand the charge made against me in this case.

4. Specifically, I understand that I have been charged with the crime of _____ committed on or about _____ (month) _____ (day) _____ (year) in _____ County, Minnesota, (and that the crime I am talking about is _____ which is a lesser degree or lesser included offense of the crime charged).

5a. I understand that I have an absolute right to have an attorney represent me at any stage of these proceedings, including a guilty plea.

b. I have read over and completed a Petition to Proceed as Pro Se Counsel (Form 11) and provided that Petition to the Court on _____.

c. I have been advised of the nature of the charges and statutory offenses included in the charges against me, the maximum sentence permitted, the possible defenses, mitigating circumstances, and other relevant facts so that I understand the advantages and disadvantages of waiving my right to an attorney.

d. Knowing the consequences of giving up my right to counsel, I waive my right to be represented by an attorney during the entry of my guilty plea.

6. I (have) (have not) been a patient in a mental hospital.

7. I (have) (have not) talked with or been treated by a psychiatrist or other person for a nervous or mental condition.

8. I (have) (have not) been ill recently.

9. I (have) (have not) recently been taking pills or other medicines.

10. I (do) (do not) make the claim that I was so drunk or so under the influence of drugs or medicine that I did not know what I was doing at the time of the crime.

11. I (do) (do not) make the claim that I was acting in self-defense or merely protecting myself or others at the time of the crime.

12. I (do) (do not) make the claim that the fact that I have been held in jail since my arrest and could not post bail caused me to decide to plead guilty in order to get the thing over with rather than waiting for my turn at trial.

13. I (was) (was not) represented by an attorney when I (had a probable cause hearing.) (If I have not had a probable cause hearing.)

a. I know that I could now move that the complaint against me be dismissed for lack of probable cause and I know that if I do not make such a motion and go ahead with entering my plea of guilty, I waive all right to successfully object to the absence of a probable cause hearing.

b. I also know that I waive all right to successfully object to any errors in the probable cause hearing when I enter my plea of guilty.

14. I understand:

a. That the prosecutor for the case against me, has:

- i. physical evidence obtained as a result of searching for and seizing the evidence;
- ii. evidence in the form of statements, oral or written that I made to police or others regarding this crime;
- iii. evidence discovered as a result of my statements or as a result of the evidence seized in a search;
- iv. identification evidence from a lineup or photographic identification;
- v. evidence the prosecution believes indicates that I committed one or more other crimes.

b. That I have a right to a pre-trial hearing before a judge to determine whether or not the evidence the prosecution has could be used against me if I went to trial in this case.

c. That if I requested such a pre-trial hearing I could testify at the hearing if I wanted to, but my testimony could not be used as substantive evidence against me if I went to trial and could only be used against me if I was charged with the crime of perjury. (Perjury means testifying falsely.)

d. That I (do) (do not) now request such a pre-trial hearing and I specifically (do) (do not) now waive my right to have such a pre-trial hearing.

e. That whether or not I have had such a hearing I will not be able to object tomorrow or any other time to the evidence that the prosecutor has.

15. I understand:

a. That if I wish to plead not guilty I am entitled to a trial by a jury and all jurors would have to agree I was guilty before the jury could find me guilty.

b. That if I plead guilty I will not have a trial by either a jury or by a judge without a jury.

c. That with knowledge of my right to a trial I now waive my right to a trial.

16. I understand that if I wish to plead not guilty and have a trial by jury or trial by a judge I would be presumed innocent until my guilt is proved beyond a reasonable doubt.

17. I understand:

a. That if I wish to plead not guilty and have a trial the prosecutor would be required to have the witnesses testify against me in open court in my presence and that I would have the right to question these witnesses.

b. That with knowledge of my right to have the prosecution's witnesses testify in open court in my presence and questioned by me, I now waive this right.

18. I understand:

a. That if I wish to plead not guilty and have a trial I would be entitled to require any witnesses that I think are favorable to me to appear and testify at trial.

b. That with the knowledge of my right to require favorable witnesses to appear and testify at trial I now waive this right.

19. I understand:

a. That a person who has prior convictions or a prior conviction can be given a longer prison term because of this.

b. That the maximum penalty that the court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for ____ years. That if a minimum sentence is required by statute the court may impose a sentence of imprisonment of not less than ____ months for this crime.

c. That a person who participates in a crime by intentionally aiding, advising, counseling and conspiring with another person or persons to commit a crime is just as guilty of that crime as the person or persons who are present and participating in the crime when it is actually committed.

d. That my present probation or parole could be revoked because of the plea of guilty to this crime.

e. That if I am not a citizen of the United States, my plea of guilty to this crime may result in deportation, exclusion from admission to the United States or denial of naturalization as a United States citizen.

20. I understand:

a. That I have discussed this case with one of the prosecuting attorneys and that the prosecuting attorney and I agreed that if I entered a plea of guilty, the prosecutor will do the following:

(Give the substance of the agreement)

b. That if the court does not approve this agreement:

i. I have an absolute right to then withdraw my plea of guilty and have a trial.

ii. Any testimony that I have given concerning the guilty plea could not be used against me unless I am charged with the crime of perjury based on this testimony.

21. That except for the agreement between the prosecuting attorney and me:

a. No one – including any police officer, prosecutor, judge, or any other person – has made any promises to me, to any member of my family, to any of my friends or other persons, in order to obtain a plea of guilty from me.

b. No one – including any police officer, prosecutor or judge, or any other person – has threatened me or any member of my family or my friends or other persons, in order to obtain a plea of guilty from me.

22. I understand that if my plea of guilty is for any reason not accepted by the court, or if I withdraw the plea, with the court's approval, or if the plea is withdrawn by court order on appeal or other review:

a. I would then stand trial on the original charge (charges) against me, namely _____ (which would include any charges that were dismissed as a result of the plea agreement entered into by the prosecuting attorney and me.)

b. The prosecution could proceed against me just as if there had been no plea of guilty and no plea agreement.

23. I understand that if my plea of guilty is accepted by the judge I have the right to appeal, but that any appeal or other court action I may take claiming error in the proceedings probably would be useless and a waste of my time and the court's time.

24. I understand that a judge will not accept a plea of guilty for anyone who claims to be innocent.

25. I now make no claim that I am innocent.

26. I understand that if I wish to plead not guilty and have a jury trial:

a. That I could testify at trial if I wanted to, but I could not be forced to testify.

b. That if I decided not to testify neither the prosecutor nor the judge could comment on my failure to testify.

c. That with knowledge of my right not to testify and that neither the judge nor the prosecutor could comment on my failure to testify at trial I now waive this right and I will tell the judge about the facts of the crime.

27. That in view of all the above facts and considerations I wish to enter a plea of guilty.

Dated this ____ day of _____, ____

DEFENDANT

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

(Rule 15)**Comment**

Rule 15.01 adopts in principle ABA Standards, *Pleas of Guilty*, 1.4–1.6 (Approved Draft, 1968) as to the advice which shall be given to and the inquiry that shall be made of a defendant before acceptance of a plea of guilty to provide assurance that the defendant understands the nature of the charge and the consequences of the plea, including the relinquishment of constitutional rights (*Boykin v. Alabama*, 395 U.S. 238 (1969)); that the plea is voluntary; and that it has a factual basis. See also *State v. Johnson*, 279 Minn. 209, 156 N.W.2d 218 (1968).

Rule 15.01 differs from the ABA Standards and from F.R.Crim.P. 11 in that the Rule sets forth a detailed inquiry, following substantially that suggested in Jones, *Minnesota Criminal Procedure*, 3rd Edition, section 31, p. 80. (See also Preliminary Draft of Proposed Amendments to the F.R.Crim.P. 11 (1971), 52 F.R.D. 409, 415.) Although a failure to include all of the interrogation set forth in Rule 15.01 will not in and of itself invalidate a plea of guilty, a complete inquiry as provided for by the rule will in most cases assure and provide a record for a valid plea. Rule 15.01 also differs in its requirement that the court make certain that a defendant handicapped in communication has a qualified interpreter. This comports with the general requirement for interpreter services established in Rule 5.01 and Minnesota Statutes, sections 611.31 to 611.34 (1992) and emphasizes the critical importance of this service in the guilty plea process.

The inquiry required by paragraph 10.c. of Rule 15.01 and by paragraph 2 of Rule 15.02 concerning deportation and related consequences is similar to that required in a number of other states. See, e.g., California, Cal. Penal Code, section 1016.5; Connecticut, Conn. Gen. Stat. Ann., section 54–1j; Massachusetts, Mass. Gen. Laws Ann. ch. 278, section 29D; New York, N.Y. Crim. Proc. Law, section 220.50 (7); Ohio, Ohio Rev. Code Ann., section 2943.031; Oregon, Or. Rev. Stat., section 135.385; Texas, Tex. Code Cim. Proc. Ann. art. 2613; and Washington, Wash. Rev. Code Ann., section 10.40.200. In the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104–132, 110 Stat. 1214 (1996) and the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104–208, 110 Stat. 3009 (1996), Congress extensively amended the Immigration and Nationality Act and greatly expanded the grounds for deportation of non-citizens convicted of crimes. Consequently, many non-citizens pleading guilty to felony charges and even to a number of non-felony charges will subject themselves to deportation proceedings. The consequences of such proceedings will often be more severe and more important to the non-citizen defendant than the consequences of the criminal proceedings. It is therefore appropriate that defense counsel advise non-citizen defendants of those consequences and that the court inquire to be sure that has been done. As to the obligation of defense counsel in such situations, see ABA Standards for Criminal Justice, *Pleas of Guilty*, 14–3.2 (2d ed. 1982). The requirement of inquiring into deportation and immigration consequences does not mean that other unanticipated non-criminal consequences of a guilty plea will justify later withdrawal of that plea. See *Kim v. State*, 434 N.W.2d 263 (Minn. 1989) (unanticipated employment consequences).

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

Rule 15.01 requires that the inquiry be made by the court with the assistance of the prosecuting attorney and defense counsel.

It is suggested by the Advisory Committee that it is desirable to have the defendant sign a Petition to Plead Guilty in the form of the petition appearing in the Appendices to these rules (which contain in even more detailed form the information showing the defendant's understanding of defense rights and the consequences of pleading), and that the defendant be asked upon the inquiry under Rule 15.01 to acknowledge signing the petition, that the defendant has read the questions set forth in the petition or that they have been read to the defendant and that the defendant understands them, that the defendant gave the answers set

forth in the petition, and that they are true. This petition is presently in use in some counties in Minnesota.

Such extensive questioning in a misdemeanor case, Rule 15.02, would not be possible considering the large number of such cases. Nevertheless, where a defendant is subjected to the possibility of a fine and 90 days incarceration, justice requires that the court inform the defendant at least of fundamental constitutional rights, the elements of the offense charged, and the possible consequences of a guilty plea. The court in *State v. Casarez*, 295 Minn. 534, 203 N.W.2d 406 (1973) applied the Boykin standard to misdemeanors, holding that a misdemeanor guilty plea must be vacated where the record does not show a knowing and voluntary waiver of the defendant's constitutional rights. It is clear then that at least some limited inquiry is necessary on the record before a misdemeanor guilty plea is accepted, and Rule 15.02 prescribes the minimal standards for this questioning.

Care must be taken in accepting a misdemeanor guilty plea or the use of that conviction to aggravate a later misdemeanor to a gross misdemeanor may be endangered. A prior uncounseled guilty plea cannot be used to aggravate a later charge absent a valid waiver of counsel on the record for the earlier plea. *State v. Nordstrom*, 331 N.W.2d 901 (Minn. 1983). Also, a prior guilty plea which lacks a factual basis on the record cannot be used to aggravate a later charge. *State v. Stewart*, 360 N.W.2d 463 (Minn. Ct. App. 1985). Careful use of the Misdemeanor Petition to Enter Plea of Guilty set forth in Appendix B should avoid these problems.

Under Rule 15.03, subd. 1, the inquiry upon entry of a guilty plea may be conducted by the court, defense counsel or the prosecutor as the court may direct. The questioning shall cover in substance the defendant's knowledge of the offense charged; the potential sentence; and the waiver of the defendant's rights to counsel, to a jury trial, to confront witnesses, to subpoena witnesses, to remain silent, to the presumption of innocence, and to require proof of guilt beyond a reasonable doubt. The court shall also ask the defendant whether the defendant understands the nature of the offense charged and whether the defendant believes that what the defendant did constitutes the offense to which the defendant is pleading guilty. The court shall determine whether there is a factual basis for the plea. Since even this minimal inquiry, if conducted for each defendant, would cause much delay and repetition, alternative methods are provided by Rule 15.03, subd. 2. Where a number of defendants are to be arraigned consecutively and are all present in the courtroom, Rule 15.03, subd. 1 provides that the court may advise them as a group of the possible consequences of a guilty plea and of their constitutional rights. The court must first determine whether any of the defendants are handicapped in communication, as that term is defined in Rule 5.01 and Minnesota Statutes, section 611.31 (1992). If any are, the court must provide a qualified interpreter for each such defendant and both the need for this service and the provision of it for each defendant who requires it must be noted on the record. Rule 5.01; Minnesota Statutes, sections 611.31 to 611.34 (1992). The court must provide any such defendant with the information contained in the warning individually. If this procedure is followed, each defendant who has received a group warning, when appearing individually before the court must be asked whether the defendant heard and understood the earlier statement by the court. The defendant must then be individually questioned as to waiver of the constitutional rights previously explained; as to understanding the nature of the offense charged; as to believing that what the defendant did constitutes the offense to which the defendant is pleading guilty; and as to the factual basis for the plea. To further save time, the statement of rights required by Rule 5.01 upon a defendant's first appearance in court may be combined with the questioning required by this rule.

Rule 15.03, subd. 2(2) provides the second alternative method of entering a plea of guilty. Under this rule a "Petition to Enter Plea of Guilty" as provided for in the Appendix B to Rule 15, may be completed and filed with the court. This petition in written form contains in substance the information and questions required by Rule 15.03, subd. 1. When properly completed the petition may be filed by either the defendant or defense counsel and it is not necessary for the defendant to personally appear in court when the petition is presented to the court. (See Rule 15.03, subd. 2). See *Mills v. Municipal Court*, 110 Cal.Rptr. 329 (1973) where the California court approved the use of a similar petition. If the court is satisfied that the plea is being knowingly and voluntarily entered according to the standards of Rule 15.01,

subd. 1 it shall dispose of the tendered plea in the same manner as if the defendant were entering the plea orally and in person.

The defendant's right to counsel at the proceedings under Rule 15 is covered by Rule 13.03 (Arraignment In Felony and Gross Misdemeanor Cases).

Rule 15.01, parts 10, 11, 12, following ABA Standards, Pleas of Guilty, 1.5 (Approved Draft, 1968), requires the court to ascertain whether there has been a plea agreement, what it is, whether the defendant understands it and also understands that if the court disapproves the agreement, the defendant has the absolute right to withdraw the plea. Under Rule 15.04, subd. 3(1), the court shall advise the defendant if the plea agreement is rejected (unless the court decides to postpone approval or rejection until the presentence report is received), and shall give the defendant an opportunity to withdraw the plea, if one has been entered.

Rule 15.04, subd. 1 regarding the propriety of plea discussions and agreements follows the language of ABA Standards, Pleas of Guilty, 3.1(a) (Approved Draft, 1968). Instead of specifying what the subject matter of a plea agreement shall be. (See ABA Standards, Pleas of Guilty, 3.1(b) (Approved Draft, 1968)) Rule 15.04, subd. 1 refers to the more general considerations which under Rule 15.04, subd. 3(2) shall govern the prosecuting attorney in determining whether to enter into a plea agreement. See Minnesota Statutes, section 611A.03 regarding the prosecutor's duties under the Victim's Rights Act to make a reasonable and good faith effort to inform of proposed plea agreements and to notify of the right to be present at sentencing to make any objection to the plea agreement or to the proposed disposition.

Rule 15.04, subd. 2, which refers to the relationship between defense counsel and the defendant in connection with a plea agreement, follows ABA Standards, Pleas of Guilty, 3.2(a) (Approved Draft, 1968).

Rule 15.04, subd. 3(1) is adapted from ABA Standards, Pleas of Guilty, 3.3(b) (Approved Draft, 1968) and authorizes the trial court to permit disclosure of a plea agreement in advance of the tender of the plea of guilty. When the defendant is questioned under Rule 15.01, the court shall inform the defendant if the plea agreement is rejected unless the court decides to postpone a decision on acceptance or rejection until the presentence report is received, and shall give the defendant an opportunity to withdraw a plea of guilty, if entered. Whenever the court rejects the plea agreement, whether on tender of plea or after receipt of the presentence report, or after plea, the court shall so inform the defendant and give the defendant an opportunity to affirm or withdraw the plea, if entered, and if the defendant has made factual disclosures tending to disclose guilt of the offense charged, the judge should disqualify himself or herself from the trial of the case.

Rule 15.04, subd. 3(2) sets forth the considerations that shall guide the prosecuting attorney in determining whether to enter into a plea agreement and what the plea agreement shall be, and it also contains the considerations that shall govern the court in deciding whether to accept the agreement. This rule is taken from ABA Standards, Pleas of Guilty, 1.8 (Approved Draft, 1968). Rule 15.04, subd. 3(2)(d) is intended to cover the situations in which innocent witnesses or victims, such as young children involved in sexual offenses, may be protected from unnecessary publicity.

Rule 15.05, subd. 1 authorizing the withdrawal of a plea of guilty to correct manifest injustice follows the principles set by ABA Standards, Pleas of Guilty, 2.1(a) (Approved Draft, 1968), but does not provide guidelines for determining whether a motion for withdrawal of the plea is timely or whether withdrawal is necessary to correct manifest injustice. (In this respect the rule differs from ABA Standards, Pleas of Guilty, 2.1(a)(i),(ii) (Approved Draft, 1968). This is left by the rule to judicial decision. (See e.g., *Chapman v. State*, 282 Minn. 13, 162 N.W.2d 698 (1968).)

Whenever a plea agreement has been rejected, the defendant shall be afforded the opportunity to withdraw a plea of guilty, if entered (Rules 15.04, subd. 3(1); 15.01).

The court shall permit withdrawal of a plea of guilty to correct manifest injustice whether the motion is made before or after sentence. (Rule 15.05, subd. 1).

Rule 15.05, subd. 2 permits the court in its discretion to allow the defendant to withdraw a guilty plea before sentence under the conditions specified in the rule. (Compare Minnesota Statutes, section 630.29 (1971) which does not prescribe guidelines.)

Rule 15.05, subd. 3 permitting a motion to withdraw a plea of guilty without asserting innocence is taken from ABA Standards, Pleas of Guilty, 2.1(a)(iii) (Approved Draft, 1968).

Rule 15.06 making plea discussions and plea agreements inadmissible in evidence follows ABA Standards, Pleas of Guilty, 3.4 (Approved Draft, 1968). Rule 15.06 is consistent with Rule 410 of the Minnesota Rules of Evidence which also governs the admissibility of evidence of a withdrawn plea of guilty. Rule 410 is broader in that it makes inadmissible evidence relating to withdrawn pleas from other jurisdictions including withdrawn pleas of *nolo contendere* from those jurisdictions which allow such a plea.

Rule 15.07 permits a defendant to plead to a lesser offense with the approval of the court if the prosecuting attorney consents. (This is substantially the same as Minnesota Statutes, section 630.30 (1971) which requires the approval of the court.)

The rule also authorizes the court on defendant's motion and following a hearing thereon to permit the defendant to plead to a lesser offense without the consent of the prosecuting attorney. In accordance with *State v. Carriere*, 290 N.W.2d 618 (Minn. 1980), such a plea is permitted only if the court is satisfied, following a hearing, that the prosecution could not present sufficient admissible evidence to justify submission of the offense charged to the jury. Under *State v. Carriere*, *supra*, the showing required of the prosecution in order to withstand the defendant's motion would be in the nature of an offer of proof. Further, the hearing must be in open court and the court's order must include a detailed statement of the reasons for its ruling on the motion. Rule 15.07 also permits a plea to a lesser offense over the prosecutor's objection to prevent a manifest injustice. Rule 15.07 does not require that the indictment or complaint be amended. (See *State v. Oksanen*, 276 Minn. 103, 149 N.W.2d 27 (1967).) However, if the indictment or complaint is not amended the rule requires that for felonies the reduction of the charge must be done in writing or on the record. If it is done only on record the proceedings must be transcribed and filed to assure that the court file will always reflect the disposition of all felony charges.

Rule 15.08 permits a plea of guilty to a different offense than that charged in the original complaint, tab charge or indictment with the consent of the defendant and prosecuting attorney. In that event for felonies and gross misdemeanors, other than those under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, a new complaint shall be filed, but need not be made on oath and need not provide evidence establishing probable cause. (See also Rule 11.06). In misdemeanor cases and gross misdemeanor cases under Minnesota Statutes, section 169.121 or Minnesota Statutes, section 169.129, the procedure is also permitted, but the defendant will be tab charged with the new offense as provided by Rule 4.02, subd. 5(3), and the original charge or charges will be dismissed upon entry of the guilty plea to the new charge.

Rule 15.09, requiring a record of the proceedings on a plea of guilty is in accord with ABA Standards, Pleas of Guilty, 1.7 (Approved Draft, 1968). In misdemeanor cases, the rule provides the alternative, however, of filing a petition to enter a guilty plea as provided for in Rule 15.03, subd. 2 and in the Appendix B to Rule 15. This provision for either a verbatim record or a petition is included to satisfy the constitutional requirement that a plea to a misdemeanor offense punishable by incarceration must be shown on the record to be knowingly and voluntarily entered. See *State v. Casarez*, 295 Minn. 534, 203 N.W.2d 406 (1973); *Boykin v. Alabama*, 89 S.Ct. 1709, 395 U.S. 238, 23 L.Ed.2d 274 (1969); and *Mills v. Municipal Court*, 110 Cal.Rptr. 329, 515 P.2d 273, 10 C.3d 288 (1973). The verbatim record may be made by a court reporter or recording equipment (see Minnesota Statutes, section 487.11, subd. 2 (1971)). In felony and gross misdemeanor cases, any verbatim record made pursuant to this rule shall be transcribed. In misdemeanor cases, any such record need not be transcribed unless requested by the court, the defendant or the prosecuting attorney.

Rule 15.10, which permits a defendant to plead guilty to misdemeanor, gross misdemeanor, or felony offenses from other jurisdictions in certain circumstances, is based on Unif.R.Crim.P 444(e) (1987). It is similar to Rule 5.04, subd. 2, which previously authorized such pleas in misdemeanor cases, but is broader in that such pleas are permitted after a verdict or finding of guilty as well as after a guilty plea. Before proceeding under this rule, it is necessary for the prosecuting attorney having authority to charge the offense to charge the defendant in the jurisdiction having venue. This may be done by complaint or indictment or,

for misdemeanors by tab charge. The charging document may be transmitted to the jurisdiction where the plea is to be entered by facsimile transmission under Rule 33.05.

If the defendant is handicapped in communication due to difficulty in speaking or comprehending English, the court may not accept a guilty plea petition until the defendant has been able to review it with the assistance of a qualified interpreter; and the court establishes on the record that this has occurred. See Final Report of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System, Chapter 2, recommendation 11. It is strongly recommended that when the defendant is handicapped in communication due to difficulty in speaking or comprehending English, a multilingual guilty plea petition be used which would be both in English and a language in which the defendant is able to communicate. The use of a multilingual petition would help assure that the translation is accurate and is preferable to the use of a petition which contains only the language other than English.

[For text of 16., see M.S. 1998, Volume 15]

Rule 17. Indictment, Complaint and Tab Charge

17.01 Prosecution by Indictment, Complaint or Tab Charge

An offense which may be punished by life imprisonment shall be prosecuted by indictment, but the prosecution may proceed by a complaint following an arrest without a warrant or as the basis for the issuance of a warrant of arrest. The procedure thereafter shall be in accordance with the provisions of Rules 8 and 19. Any other offense defined by state law may be prosecuted by indictment or by a complaint as provided by Rule 2. Misdemeanors and designated gross misdemeanors as defined by Rule 1.04(b) may be prosecuted by tab charge, provided that for any such designated gross misdemeanors, a complaint shall be subsequently made, served and filed as required by Rule 4.02, subd. 5(3).

The arrest of a person under a warrant of arrest issued upon a complaint under Rule 3 or the filing of a complaint under Rule 4.02, subd. 5(2) against a person arrested without a warrant shall not preclude an indictment for the offense charged in the complaint or for an offense arising from the conduct upon which the charge in the complaint was based.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 17.06 for Comment.

[For text of 17.02 to 17.05, see M.S. 1998, Volume 15]

17.06 Motions Attacking Indictment, Complaint or Tab Charge

Subd. 1. Defects in Form. No indictment, complaint or tab charge shall be dismissed nor shall the trial, judgment or other proceedings thereon be affected by reason of a defect or imperfection in matters of form which does not tend to prejudice the substantial rights of the defendant.

Subd. 2. Motion to Dismiss or For Appropriate Relief. All objections to an indictment, complaint or tab charge shall be made by motion as provided by Rule 10.01 and may be based on the following grounds without limitation:

(1) Indictment.

(a) The evidence admissible before the grand jury was not sufficient as required by these rules to establish the offense charged or any lesser or other included offense or any offense of a lesser degree;

(b) The grand jury was illegally constituted;

(c) The grand jury proceeding was conducted before fewer than 16 grand jurors;

(d) Fewer than 12 grand jurors concurred in the finding of the indictment;

(e) The indictment was not found or returned as required by law;

(f) An unauthorized person was in the grand jury room during the presentation of evidence upon the charge contained in the indictment or during the deliberations or voting of the grand jury upon the charge.

(2) *Indictment, Complaint or Tab Charge.* In the case of an indictment, complaint or tab charge:

(a) The indictment, complaint or tab charge does not substantially comply with the requirements prescribed by law to the prejudice of the substantial rights of the defendant;

(b) The court lacks jurisdiction of the offense charged;

(c) The law defining the offense charged is unconstitutional or otherwise invalid;

(d) In the case of an indictment or complaint, that the facts stated do not constitute an offense;

(e) The prosecution is barred by the statute of limitations;

(f) The defendant has been denied a speedy trial;

(g) There exists some other jurisdictional or legal impediment to prosecution or conviction of the defendant for the offense charged, except as provided by Rule 10.02;

(h) Double jeopardy, collateral estoppel, or that prosecution is barred by Minnesota Statutes, section 609.035.

Subd. 3. Time for Motion. A motion to dismiss the indictment, complaint or tab charge shall be made within the time prescribed by Rule 10.04, subd. 1 except that an objection to the jurisdiction of the court over the offense or that the indictment, complaint or tab charge fails to charge an offense may be made at any time during the pendency of the proceeding.

Subd. 4. Effect of Determination of Motion to Dismiss.

(1) *Motion Denied.* If a motion to dismiss the indictment, complaint or tab charge is determined adversely to the defendant, the defendant shall be permitted to plead if the defendant has not previously pleaded. A plea previously entered shall stand. The defendant in a misdemeanor case may continue to raise the issues on appeal if convicted following a trial.

(2) *Grounds for Dismissal.* When a motion to dismiss an indictment, complaint or tab charge is granted for a defect in the institution of prosecution or in the indictment, complaint or tab charge, the court shall specify the grounds upon which the motion is granted.

(3) *Dismissal for Curable Defect.* If the dismissal is for failure to file a timely complaint as required by Rule 4.02, subd. 5(3), or for a defect that could be cured or avoided by an amended or new indictment, or complaint, further prosecution for the same offense shall not be barred, and the court shall on motion of the prosecuting attorney, made within seven (7) days after notice of the entry of the order granting the motion to dismiss, order that defendant's bail or the other conditions of release be continued or modified for a specified reasonable time pending an amended or new indictment or complaint.

In misdemeanor cases, if the defendant is unable to post any bail that might be required under Rule 6.02, subd. 1, then the defendant must be released subject to such nonmonetary conditions as the court deems appropriate under that rule. The specified time for such amended or new indictment or complaint shall not exceed sixty (60) days for filing a new indictment or seven (7) days for amending an indictment or complaint or for filing a new complaint. During the seven-day period for making the motion and during the time specified by the order, if such motion is made, dismissal of the indictment or complaint shall be stayed. If the prosecution does not make the motion within the seven-day period or if the indictment or complaint is not amended or if a new indictment or complaint is not filed within the time specified by the order, the defendant shall be discharged and further prosecution for the same offense shall be barred unless the prosecution has appealed as provided by law, or unless the defendant is charged with murder and the court has granted a motion to dismiss on the ground of the insufficiency of the evidence before the grand jury. In misdemeanor cases and also in designated gross misdemeanor cases as defined in Rule 1.04(b) dismissed for failure to file a timely complaint within the time limits as provided by Rule 4.02, subd. 5(3), further prosecu-

tion shall not be barred unless additionally a judge or judicial officer of the court has so ordered.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

Comment

The first sentence of Rule 17.01 that an offense punishable by life imprisonment shall be prosecuted by indictment retains existing Minnesota law, which does not permit an information to be filed for that offense. (Minnesota Statutes, sections 628.29, 628.32(6) (1971).) All other offenses may be prosecuted by indictment or complaint. The complaint takes the place of the information as an accusatory instrument. (See Comment, Rules 2, 8.)

Under Rule 17.01 the fact that a complaint has been filed initially does not preclude an indictment while the complaint is pending or after it has been dismissed (except as provided in Rule 17.06, subd. 4).

Under Rule 17.01, a misdemeanor and also a designated gross misdemeanor as defined in Rule 1.04(b) may be prosecuted by complaint or by tab charge (See Rule 4.02, subd. 5(3)) under these rules. However for any such designated gross misdemeanor prosecution the complaint must be subsequently made, served and filed within the time limits as provided by Rule 4.02, subd. 5(3). These offenses may also be prosecuted by indictment and, in such cases, rules applicable to indictments shall apply.

The complaint by Rule 2.01 and the indictment by Rule 17.02, subd. 2 shall contain a written statement of the essential facts constituting the offense charged. (See F.R.Crim.P. 3, 7(c)(1).) The statement of the evidence, or the supporting affidavits, or sworn testimony, showing probable cause required by Rule 2.01 are not a part of the indictment.

Except to the extent that existing statutes (Minnesota Statutes, sections 628.10–628.13, 628.15–628.18, 628.20–628.24, 628.27 (1971)), governing the contents of an indictment or information are inconsistent with Rule 17.02, they are not intended to be abrogated by these rules. So, to the extent they are consistent with the provisions of Rule 17.02, they may be followed in drawing complaints and indictments under these rules.

The requirement of Rule 17.02, subd. 3 for the citation of the statute violated but that error in the citation or in its omission is harmless unless the defendant was prejudiced comes from F.R.Crim.P. 7(e)(1)(2). (See also Minnesota Statutes, section 628.19 (1971).)

Rule 17.02, subd. 3 permits counts to be used but prohibits duplicity by charging more than one offense in a single count.

Allegations by reference is taken from F.R.Crim.P. 7(c)(1).

Rule 17.02, subd. 3, following Minnesota Statutes, section 628.14 (1971), also permits—but does not require—counts for lesser offenses, and permits allegations in the alternative of the means of committing an offense. (The last sentence of section 628.14 permitting several counts describing the different “classes” to which an offense might belong was not included in the rule because of its ambiguity.)

Rule 17.02, subd. 4 abolishes the bill of particulars. The information supplied by a bill of particulars may be obtained by discovery under Rules 9 or 7.03. If the indictment or complaint is deficient a motion may be made under Rule 17.06, subd. 2(2) and if granted, the indictment or complaint may be amended in accordance with Rule 17.06, subd. 4(3).

If the defect is one that can be cured by an amendment or new indictment or complaint, dismissal is automatically stayed for seven days during which the prosecuting attorney may move that the stay be continued and the defendant's bail or other conditions of release be continued or modified pending amendment or a new indictment or complaint. (Rule 17.06, subd. 4(3)).

If the motion is made, the further stay for that purpose shall be granted but not for more than 60 days for a new indictment. (See Rules 18.01, subd. 1; 18.09) or more than seven days for an amendment or new complaint. The 60-day period permitted for a new indictment allows for the additional time needed to draw and summon the grand jurors and witnesses and to present the case to the grand jury.

If the motion is not made within the seven-day time period for making the motion, or if no new indictment is returned within the 60-day period or amendment or new complaint filed within the seven-day period, the case shall be dismissed, the defendant discharged, and further prosecution is barred, unless the prosecution appeals as provided by law (See Minnesota Statutes, sections 632.11–632.13 (1971).), or unless the defendant is charged with murder and the court has granted the motion to dismiss on the ground that the evidence before the grand jury was insufficient to establish probable cause. (See Rules 17.06, subd. 2(1)(a); 18.06). It was the opinion of the Advisory Committee that an exception should be made in the case of murder in view of the seriousness of the offense and the absence of a statute of limitations.

Rule 17.03, subd. 1, governing joinder of offenses, adopts the provisions of Minnesota Statutes, section 609.035 (1971) leaving its judicial interpretations to judicial decision.

Rule 17.03, subd. 2(2), governing the joinder of defendants in misdemeanor cases, adopts the provisions of Minnesota Statutes, section 631.03 (repealed, 1979 chapter 233, section 42) which permitted the joinder of two or more defendants when they are jointly charged with the commission of an offense. Severance of offenses or defendants already joined is governed by Rule 17.03, subd. 3.

Rule 17.03, subd. 3, providing that improper joinder of offenses or defendants is not a ground for dismissal but only for mandatory severance, abrogates Minnesota Statutes, section 630.23(3) which lists misjoinder of offenses as a ground for demurrer. When defendants are properly already joined, severance is governed by Rule 17.03, subd. 2 and Rule 17.03, subd. 3. Part (1) of Rule 17.03, subd. 3, concerning severance of offenses is taken from Unif.R.Crim.P. 472(a) (1987) which is based on ABA Standards for Criminal Justice 13–3.1(a) and (b) (1985). Part (2) of the rule, concerning severance of defendants because of out-of-court statements by a codefendant, is taken from Unif.R.Crim.P. 472(b)(1) (1987) which is based on ABA Standards for Criminal Justice 13–3.2(a) (1985). Part (3) of the rule, concerning severance of defendants during trial is taken from Unif.R.Crim.P. 472(b)(2)(ii) (1987) which is based on ABA Standards for Criminal Justice 13–3.2(b)(ii) (1985).

Rule 17.03, subd. 4, permitting consolidation of indictments, complaints and tab charges follows F.R.Crim.P. 13.

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

The provision of Rule 17.04 for striking surplusage is taken from F.R.Crim.P. 7(d).

Rule 17.05 permitting an amendment of an indictment, complaint or tab charge at any time before verdict or finding unless the defendant will be substantially prejudiced follows F.R.Crim.P. 7(e) and takes the place of the second sentence of Minnesota Statutes, section 628.19 (1971). The rule leaves to the trial court the determination of whether the defendant will be substantially prejudiced by an amendment and what steps, if any, including a continuance, may be taken to remove any prejudice that might otherwise result from an amendment. Rule 17.05 does not govern the amendment of a complaint after a mistrial and before start of the second trial. Rather, Rule 3.04, subd. 2 which provides for the free amendment of the complaint controls. *State v. Alexander*, 290 N.W.2d 745 (Minn. 1980).

Rule 17.06, subd. 1, precluding dismissal for defects in form follows the language of the first sentence of Minnesota Statutes, section 628.19 (1971).

In addition to the motion to dismiss an indictment for disqualification of individual jurors or the jury panel (See Rule 18.02, subd. 2), Rule 17.06, subd. 2 provides that all objections to an indictment, complaint or tab charge shall be by motion to dismiss or for appropriate relief (Rule 10.01), thus abolishing the demurrer (Minnesota Statutes, section 630.23 (1971)) and motion to quash or set aside (Minn.Stat., sec. 630.18) provided by existing law, and superseding those statutes to the extent they are inconsistent with the rule.

Grounds for a motion for dismissal of an indictment only and for a motion for dismissal of an indictment or complaint are set forth in Rule 17.06, subd. 2(1) and (2). These grounds are not intended to be exclusive.

Rule 17.06, subd. 2(1)(a) providing for a motion for dismissal of an indictment for lack of admissible evidence showing probable cause is available because of the requirement of Rule 18.05, subd. 1 that a record be made of the evidence taken before the grand jury. (See also the provisions of Rule 18.05, subd. 1 for the conditions in which the record may be disclosed to the defendant. And see also Rule 18.06, subd. 2.) Upon such a motion the admissibility and sufficiency of evidence pertaining to indictments are governed by Rules 18.06, subd. 1, and 18.06, subd. 2.

Rule 17.06, subd. 2(2)(f) listing denial of a speedy trial as a ground for dismissal leaves to judicial decision the constitutional or other requirements of a speedy trial as well as the effect of a denial of defendant's demand for trial under Rule 11.10 and Rule 6.06.

By Rule 10.04, subd. 1, a motion to dismiss an indictment or complaint shall be served not later than three days before the Omnibus Hearing under Rule 11 unless the time is extended for good cause. In misdemeanor cases, by Rule 17.06, subd. 3, a motion to dismiss a complaint or tab charge shall be served at least three days before the pretrial conference or, at least three days before the trial if no pretrial conference is held, unless this time is extended for good cause. Rule 17.06, subd. 4(1) provides that if a defendant's motion to dismiss is denied in a misdemeanor case the defendant may continue to raise the issue involved in the motion on direct appeal if convicted following a trial. The denial of a motion to dismiss based upon a challenge to the personal jurisdiction of the court could therefore be raised on direct appeal of a misdemeanor judgment of conviction. This reverses prior Minnesota case law, which permitted review in such cases only by writ of prohibition. See *State v. Stark*, 288 Minn. 286, 179 N.W.2d 597 (1970). Permitting the issue of personal jurisdiction to be raised on direct appeal avoids the inconvenience and delay which would often result from continuing the trial to allow the defendant to seek a writ of prohibition.

The first sentence of Rule 17.06, subd. 4, that if a motion to dismiss is decided adversely to the defendant, the defendant shall be permitted to plead if the defendant has not already done so and that a plea previously entered shall stand, is taken from F.R.Crim.P. 12(b)(5) and takes the place of similar provisions in Minnesota Statutes, sections 630.19, 630.26 (1971). (See also Rule 11.10.) This rule contemplates that a defendant may plead not guilty and also make a motion to dismiss if the defendant wishes.

The balance of Rule 17.06, subd. 4 relating to the effect of a determination to dismiss the indictment, tab charge, or complaint supersedes Minnesota Statutes, sections 630.19–630.21, 630.25 (1971) and provides uniformity for that purpose. The rule is based on F.R.Crim.P. 12(h)(b). (See also Rule 3.04, subd. 2.)

In order that the basis of a dismissal for a defect in the institution of the prosecution or in the indictment or complaint may be apparent, Rule 17.06, subd. 4 requires the court to specify the grounds for granting the motion. Under Rule 17.06, subd. 4(3) if the dismissal is for failure to file a timely complaint as required by Rule 4.02, subd. 5(3) for misdemeanor cases and also for designated gross misdemeanor cases as defined in Rule 1.04(b) or for a defect which could be cured by a new complaint, the prosecutor may within 7 days after notice of entry of the order dismissing the case move to continue the case for the purpose of filing a new complaint. Upon such a motion the court shall continue the case for no more than seven days pending the filing of a new complaint, or amending of the complaint or indictment or for 60 days pending the filing of a new indictment.

During the time for such a motion and during any continuance, dismissal of the charge is stayed, but in a misdemeanor case, the defendant may not be kept in custody based on that charge. A defendant who cannot post bail in a misdemeanor case must be released subject to such nonmonetary conditions as the court deems appropriate under Rule 6.02, subd. 1. If no motion is made or if no new or amended complaint or indictment is filed within the times allowed, the defendant must be discharged and any further prosecution is barred unless the prosecution has appealed or unless the murder case exception applies. However, in misdemeanor cases and also in designated gross misdemeanor cases as defined in Rule 1.04(b) dismissed for failure to file a timely complaint within the time limits as provided by Rule 4.02,

subd. 5(3), further prosecution is not automatically barred, but is barred only if so ordered by the court. If such a case is dismissed for failure to issue a complaint, but the 30-day time limit established by Rule 4.02, subd. 5(3), has not yet run, the prosecutor may still issue the complaint within that 30-day time limit even without bringing a motion under Rule 17.06, subd. 4(3). The court is not authorized under Rule 17.06, subd. 4(3), to bar further prosecution before the 30-day time limit has run. Before this time limit has run, however, the court may order that further prosecution shall be barred if a valid complaint is not issued within the 30-day time limit. If no complaint is then issued within the 30 days, prosecution is barred without the necessity of further motions, court appearances, or orders. Rule 17.06, subd. 4(3), does not govern dismissals for defects that could not be cured at the time of dismissal by a new or amended complaint or indictment. Therefore, when a complaint or indictment has been dismissed because of insufficient evidence to establish probable cause, the prosecutor may re prosecute if further evidence is later discovered to establish probable cause. The prosecutor may not reinstitute the charge by a tab charge under Rule 4.02, subd. 5(3) even for a misdemeanor. Also under Rule 4.02, subd. 5(3), even if prosecution is reinstituted within the specified period after having been dismissed for failure to file a timely complaint, a summons rather than a warrant must be issued to secure the appearance of the defendant in court.

Rule 18. Grand Jury

[For text of 18.01 to 18.03, see M.S. 1998, Volume 15]

18.04 Who May Be Present

Attorneys for the State, the witness under examination, qualified interpreters for witnesses handicapped in communication or for jurors with a sensory disability, and for the purpose of recording the evidence, a reporter or operator of a recording instrument may be present while the grand jury is in session, but no person other than the jurors and any qualified interpreters for any jurors with a sensory disability may be present while the grand jury is deliberating or voting. Upon order of court and a showing of necessity for the purpose of security, a designated peace officer may be present while a specified witness is testifying. If a witness before the grand jury so requests and has effectively waived immunity from self-incrimination or has been granted use immunity, the attorney for the witness may be present while the witness is testifying, provided the attorney is then and there available for that purpose or the attorney's presence can be secured without unreasonable delay in the grand jury proceedings. The attorney shall not be permitted to participate in the grand jury proceedings except to advise and consult with the witness while the witness is testifying.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 18.09 for Comment.

[For text of 18.05 to 18.07, see M.S. 1998, Volume 15]

18.08 Secrecy of Proceedings

Every grand juror and every qualified interpreter for a grand juror with a sensory disability present during deliberations or voting shall keep secret whatever that juror or any other juror has said during deliberations and how that juror or any other juror has voted. Disclosure of matters occurring before the grand jury, other than its deliberations and the vote of any juror, may be made to the prosecuting attorney for use in the performance of the prosecuting attorney's duties, and to the defendant or defense counsel pursuant to Rule 18.05 of this rule governing the record of the grand jury proceedings. Otherwise, no juror, attorney, interpreter, stenographer, reporter, operator of a recording device, typist who transcribes recorded testimony, clerk of court, law enforcement officer, or court attache may disclose matters occur-

ring before the grand jury except when directed by the court preliminarily to or in connection with a judicial proceeding. Unless the court directs otherwise, no person shall disclose the finding of an indictment until the defendant is in custody or appears before the court except when necessary for the issuance and execution of a summons or warrant, provided, however, disclosure may be made by the prosecuting attorney by notice to the defendant or defense counsel of the indictment and the time of defendant's appearance in the district court, if in the discretion of the prosecuting attorney such notice is sufficient to insure defendant's appearance.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 18.09 for Comment.

[For text of 18.09, see M.S. 1998, Volume 15]

Comment

Rule 18.01, subd. 1 follows substantially the first sentence of F.R.Crim.P. 6 except that it requires that a grand jury shall be summoned not only whenever required by the public interest but also when requested by the county attorney. In this respect, it also changes Minnesota Statutes, section 628.42 (1971). Rule 18.01, subd. 1, permits more than one grand jury to be drawn or to serve at one time.

Under Rules 18.01, subd. 1 and 18.09 the grand jury shall be drawn and summoned and shall serve without regard to terms of court. This changes Minnesota Statutes, section 628.42, providing that the grand jury shall be drawn and summoned for a general term of court and requiring the order therefor to be entered 15 days before the term, and also changes Minnesota Statutes, section 628.46 (1971) which requires the venue for the grand jury panel to be issued 12 days before the first day of the term and summons to be served on the grand jurors ten days before the beginning of the term. It also changes Minnesota Statutes, section 484.30 (1971) providing for a grand jury to be ordered for a special term of court.

Rule 18.01, subd. 2 continues statutory law (See Minnesota Statutes, sections 593.13, 593.14 (1971).) For the selection of persons for the grand jury list from which the grand jury is to be drawn and summoned, except that, adopting the policy expressed in the Federal Jury Selection Act, 28 U.S.C., section 1861, and to meet constitutional requirements, Rule 18.01, subd. 2 requires that the persons on the grand jury list shall be selected at random from a fair cross section of the qualified residents of the county. The method by which this shall be done is left to the determination of the jury commission or judges making the selection of persons for the list. This changes the "key-man" selection process now followed in Ramsey, St. Louis and Hennepin Counties.

Rule 18.01, subd. 2 continues special provisions governing St. Louis County. Rule 18.01, subd. 2 continues existing practice provided by law (Minnesota Statutes, sections 628.42, 628.45, 628.46 (1971)) for drawing the jurors from the grand jury list. The time and manner of summoning grand jurors shall be prescribed by rule or order of court.

Rule 18.02, subd. 1 abolishes the challenges to the grand jury panel and to individual jurors provided by Minnesota Statutes, section 628.52 (1971) and provides that objections to the panel and individual jurors shall be made solely by motion to dismiss the indictment. (See also Rule 17.06, subd. 2(1)).

The grounds for objections to the panel or to individual jurors enumerated in Minnesota Statutes, sections 628.53, 628.54 (1971) are intended to be preserved by Rule 18.02, subd. 2 together with any other objections based on the grounds specified in Rule 18.02, subd. 2.

The effect of a dismissal of an indictment under Rule 18.02, subd. 2 is covered by Rule 17.06, subd. 4.

The second sentence of Rule 18.02, subd. 2 adopts F.R.Crim.P. 6(b)(2) that the indictment shall not be dismissed for disqualification of individual jurors if 12 or more other jurors concurred in the indictment.

Rule 18.03, subd. 1 continues present statutory law (Minnesota Statutes, section 628.41) as to the number of grand jury members and the quorum needed to conduct business.

Rule 18.03, subd. 2 continues present statutory law (Minnesota Statutes, section 628.56, 628.57 (1971)) for the organization and conduct of the proceedings of a grand jury except as otherwise provided by these rules. (See Rules 18.03, subd. 3 (charge), 18.04 (who may be present), 18.05, subd. 1 (record), 18.06 (kind and character of evidence).)

Rule 18.03, subd. 3 permits the court to instruct the jury under applicable rules and statutes without reading any particular statutes or rules.

Rule 18.04, specifying the persons who may be present before the grand jury, except when the jurors are deliberating or voting, is intended to take the place of those portions of Minnesota Statutes, sections 628.63 and 630.18(3) (1971) which permit only the county attorney to be present at the request of the grand jury to examine the witnesses. The prosecuting attorney is entitled under the rule to be present whether the jury requests it or not.

Rule 18.04 also permits the presence of the following: qualified interpreters for those handicapped in communication as defined in Rule 5 and Minnesota Statutes, sections 611.31 to 611.34 (1992); reporters or operators of a recording instrument to make the record required by Rule 18.05, subd. 1 (see F.R. Crim.P. 6(d)); a designated peace officer; and the attorney for a witness who has either effectively waived immunity from self-incrimination or been granted use immunity by the court.

Rule 18.04 also allows qualified interpreters for jurors with sensory disabilities to be present during grand jury proceedings including deliberations or voting. This is in accord with Minnesota Statutes, section 593.32 and Rule 809 of the Jury Management Rules in the General Rules of Practice for District Courts which prohibit exclusion from jury service for certain reasons including sensory disability. Further, this provision allows the court to make reasonable accommodation for such jurors under the Americans with Disabilities Act. 42 U.S.C. section 12101 et seq.

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

Under Rule 18.05, subd. 1, the record may be disclosed to the court or to the prosecuting attorney, and to the defendant for good cause (This would include a "particularized need." *Dennis v. United States*, 384 U.S. 855, 869-870 (1966).) or on a showing that grounds exist for a motion to dismiss the indictment because of occurrences before the grand jury. In addition, the defendant, under Rule 9.01, subd. 1, may obtain from the prosecuting attorney any portions of the grand jury proceedings already transcribed and possessed by the prosecuting attorney.

Rule 18.05, subd. 2, supplementing the discovery rules (Rule 9.01, subd. 1), permits the defendant to obtain a transcript of the testimony of grand jury witnesses, subject to protective orders under Rule 9.03, subd. 5. (See ABA Standards, *Discovery and Procedure Before Trial*, 2.1(a)(iii) (Approved Draft, 1970).) This rule does not preclude the court from ordering that the defendant be supplied with such a transcript during the trial, upon a showing of good cause.

Rule 18.06, subd. 1 supersedes Minnesota Statutes, section 628.59 (1971).

Rule 18.06, subd. 2, providing that an indictment may be found upon probable cause changes Minnesota Statutes, section 628.03 (1971) and that part of section 628.02 which is inconsistent with the rule.

Rule 18.06, subd. 3 abolishes the presentment provided by Minnesota Statutes, sections 628.03, 628.04 (1971).

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

The provision that if an indictment is not voted, the foreperson shall so report to the court forthwith in writing (See F.R.Crim.P. 6(f).) was not contained in Minnesota Statutes, section 628.08 (Repealed, 1979 chapter 233, section 42).

The provisions of the first sentence of Rule 18.08 for secrecy on the part of the grand jurors is taken from Minnesota Statutes, section 628.64 (1971). Additionally it provides that any interpreters for grand jurors with a sensory disability shall have that same obligation of secrecy. As to the confidentiality obligation of interpreters generally see Canon 5 of the Code of Professional Responsibility for Interpreters in the Minnesota State Court System.

That part of the second sentence of Rule 18.08 providing for disclosures to the prosecuting attorney for use in the performance of the prosecuting attorney's duties comes from F.R.Crim.P. 6(e). The provision in the second sentence for disclosure to the defendant is in accord with Rule 18.05. The third sentence of Rule 18.08 imposing secrecy on the persons named—except as permitted by Rules 18.08 and 18.05—or except when ordered by the court in connection with a judicial proceeding, is taken from F.R.Crim.P. 6(e).

The first part of the last sentence of Rule 18.08 forbidding disclosure of an indictment until the defendant is in custody or appears in court except when necessary for the issuance of a warrant or summons (See Rule 19.01) is taken from F.R.Crim.P. 6(e); and the following proviso adopts the substance of the last sentence of Minnesota Statutes, section 628.68 (1971). The rule, however, leaves it to the discretion of the prosecuting attorney to determine whether to notify the defendant or defense counsel of the indictment without the issuance of a warrant or summons.

Rule 18.09 making the grand jury session independent of the terms of court adopts the substance of F.R.Crim.P. 6(g) and takes the place of Minnesota Statutes, section 628.58 (1971). (See also Rule 18.01, subd. 1.)

The object of Rules 18.09 and 18.01, subd. 1 is that a grand jury shall always be available, without regard to terms of court, to be summoned into session and convened when required under Rule 18.01 or otherwise.

That portion of Rule 18.09 authorizing the court to excuse a grand juror for good cause is taken from F.R.Crim.P. 6(g), and enlarges the power of the court under Minnesota Statutes, section 628.49 (1971). The court may excuse grand jurors for the reasons specified in section 628.49 and upon other grounds showing good cause.

[For text of 19. to 24., see M.S. 1998, Volume 15]

Rule 25. Special Rules Governing Prejudicial Publicity

[For text of 25.01 to 25.03, see M.S. 1998, Volume 15]

Comment

This rule prescribes special rules to be applied in the case of potentially prejudicial publicity. Other applicable rules when this question arises are Rules 26.01, subd. 1(2)(b) (Waiver of Jury Trial); 26.02, subd. 4(2)(b) (Sequestration of Jurors on Voir Dire); 26.03, subd. 3 (Use of Courtroom); 26.03, subd. 5(1) (Sequestration of Jury); 26.03, subd. 6 (Exclusion of Public from Hearings or Arguments Outside Presence of the Jury); 26.03, subd. 7 (Cautioning Parties, Witnesses, Jurors, and Judicial Employees; Sequestration of Witnesses); 26.03, subd. 8 (Admonitions to Jurors); and 26.03, subd. 9 (Questioning Jurors about Exposure to Prejudicial Material). See also Comment to Rule 26.04 (Postverdict Motions).

The Rules of Public Access to Records of the Judicial Branch, effective July 1, 1988, generally govern access to case records of all judicial courts. However, Rule 4, subd. 1(d) and Rule 4, subd. 2 of those rules provide that the Rules of Criminal Procedure shall govern what criminal case records are inaccessible to the public and the procedure for restraining access to those records. As to those restrictions see Rule 25.01 (pretrial hearing closure); Rule 25.03 (restricting access to public records relating to a criminal proceeding); Rule 26.03, subd. 6 (exclusion from proceedings outside the hearing of the jury); and Rule 33.04 (delay in filing of complaint, indictment, application, or affidavit requesting a warrant).

Rule 25.01 (Pretrial Hearings—Motion to Exclude Public) setting forth the procedure and standard for excluding the public from pretrial hearings is based on Minneapolis Star and Tribune Company v. Kammeyer, 341 N.W.2d 550 (Minn. 1983). The motion to exclude the public from pretrial hearings under this rule shall not be granted unless the court determines that there is a substantial likelihood of interference with an overriding interest. For a defendant that would include interference with the defendant's right to a fair trial by reason of the dissemination of evidence or argument adduced at the hearing. As to the sufficiency of the alleged overriding interest to justify closure of the hearing see Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984) (Closure of suppression hearing over the defendant's objection), Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984) (Closure of voir dire proceedings), and Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 102 S.Ct. 2613, 73 L.Ed.2d 248 (1982) (Closure of courtroom when the minor victim of a sex offense testifies). This determination would include the situation in which the news media agreed not to disseminate these matters until completion of the trial. The provision for appellate review is intended to give the defendant, as well as any person aggrieved, standing to seek immediate review of the court's ruling on exclusion.

Whenever the public is excluded a record of the proceedings shall be kept and made available to the public following the completion of the trial or disposition of the case without trial. For the protection of innocent persons, the court may order that names be deleted or substitutions be made.

This rule does not interfere with the power of the court in any pretrial hearing to caution those present that dissemination of certain information by means of public communication may jeopardize the right to a fair trial by an impartial jury.

Rule 25.02. Motion for Continuance or Change of Venue.

Rule 25.02, subd. 1 and subd. 2 (At Whose Instance; Methods of Proof) are taken from ABA Standards, Fair Trial and Free Press, 3.2(a)(b) (Approved Draft, 1968). Rule 25.02, subd. 3 (Standards for Granting the Motion) is based upon ABA Standards, Fair Trial and Free Press 3.2(c) (Approved Draft, 1968). The determination that there is a reasonable likelihood a fair trial cannot be had may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the prejudicial material involved. Rule 25.02, subd. 4 (Time of Disposition of Motion) is based on ABA Standards, Fair Trial and Free Press, 3.2(d) (Approved Draft, 1968). A motion for continuance or change of venue should, if possible, be made at the time prescribed by Rule 10 for pretrial motions and heard at the Omnibus Hearing under Rule 11. Under Rule 25.02, subd. 4, the motion may be made before the jury is sworn and in that event should be determined before the jury is sworn. If a motion is made or reconsideration of a prior denial is sought, however, it may be granted after the jury is sworn. Since the Fifth Amendment's double jeopardy provisions are applicable to the states [Benton v. Maryland, 89 S.Ct. 2056, 395 U.S. 784, 23 L.Ed.2d 707 (1969)], jeopardy attaches in a jury case when the jury is sworn and in a court trial when the first evidence is presented to the court. See Minnesota Statutes, section 611A.033 regarding the prosecutor's duties under the Victim's Rights Act to make reasonable efforts to provide advance notice of any continuance of the proceedings.

Rule 25.02, subd. 5 (Limitations; Waiver) is taken from ABA Standards, Fair Trial and Free Press, 3.2(e) (Approved Draft, 1968) and expressly permits more than one change of venue. (This changes Minnesota Statutes, section 627.01 which allows the defendant only one change of venue.)

It is anticipated that Rule 25.03 will be utilized only "in exceptional cases" involving serious crimes. See Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254, 257, and Note 7 (Minn. 1977). The procedure required by this rule is based upon Minneapolis Star and Tribune Company v. Kammeyer, 341 N.W.2d 550 (Minn. 1983) as well as Northwest Publications, Inc. v. Anderson, 259 N.W.2d 254 (Minn. 1977). A restrictive order may be issued under Rule 25.03 only if the Court finds that access to the records will present a substantial likelihood of interfering with the fair and impartial administration of justice. This standard is similar to that provided by Rule 25.01 governing closure of pretrial hearings and Rule 26.03, subd. 6 governing closure of trial proceedings. A more restrictive standard governing access to such records would be anomalous in light of Rule 25.01 and Rule 26.03, subd. 6. Rule 25.03 governs only the restriction of access to public records concerning a criminal case. It does not authorize the court under any circumstances to prohibit the news media from broadcasting or publishing any information in their possession relating to a criminal case. This is in accord with ABA Standards, Fair Trial and Free Press, 8-3.1 (Approved Draft, 1982) which recommends that no rule of court be promulgated authorizing any such restrictions. The requirement in Rule 25.03, subd. 3 that any restrictive order be no broader than necessary is taken from Waller v. Georgia, 467 U.S. 39, 104 S.Ct. 2210, 81 L.Ed.2d 31 (1984).

Possible alternatives to a restrictive order indicated in Rule 25.03, subd. 3(b) are the following:

A continuance or change of venue under Rule 25.02; sequestration of jurors on voir dire under Rule 26.02, subd. 4(2)(b); regulation of use of the courtroom under Rule 26.03, subd. 3; sequestration of jury under Rule 26.03, subd. 5(1); exclusion of the public from hearings or arguments outside the presence of the jury under Rule 26.03, subd. 6; cautioning or ordering parties, witnesses, jurors, and judicial employees and sequestration of witnesses under Rule 26.03, subd. 7; admonitions to jurors about exposure to prejudicial material under Rule 26.03, subd. 9.

Rule 26. Trial

26.01 Trial by Jury or by the Court

Subd. 1. Trial by Jury.

(1) Right to Jury Trial.

(a) Offenses Punishable by Incarceration. A defendant shall be entitled to a jury trial in any prosecution for an offense punishable by incarceration. All trials shall be in the district court.

(b) Misdemeanors Not Punishable by Incarceration. In any prosecution for the violation of a misdemeanor not punishable by incarceration, trial shall be to the court.

(2) Waiver of Trial by Jury.

(a) Waiver Generally. The defendant, with the approval of the court may waive jury trial provided the defendant does so personally in writing or orally upon the record in open court, after being advised by the court of the right to trial by jury and after having had an opportunity to consult with counsel.

(b) Waiver When Prejudicial Publicity. The defendant shall be permitted to waive jury trial whenever it is determined that (a) the waiver has been knowingly and voluntarily made, and (b) there is reason to believe that, as the result of the dissemination of potentially prejudicial material, the waiver is required to assure the likelihood of a fair trial.

(3) *Withdrawal of Waiver of Jury Trial.* Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial.

(4) *Waiver of Number of Jurors Required by Law.* At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of a lesser number than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

(5) *Number Required for Verdict.* A unanimous verdict shall be required in all cases.

(6) *Waiver of Unanimous Verdict.* At any time before verdict, the parties, with the approval of the court, may stipulate that the jury may render a verdict on the concurrence of a specified number of jurors less than that required by law or these rules. The court shall not approve such a stipulation unless the defendant, after being advised by the court of the right to a verdict on the concurrence of the number of jurors specified by law, personally in writing or orally on the record waives the right to such a verdict.

Subd. 2. Trial Without a Jury. In a case tried without a jury, the court, within 7 days after the completion of the trial, shall make a general finding of guilty, not guilty, or if such pleas have been made, a general finding of not guilty by reason of mental illness or mental deficiency, double jeopardy, or that prosecution is barred by Minnesota Statutes, section 609.035 (1971), if appropriate. The court, within 7 days after the general finding in felony and gross misdemeanor cases, shall in addition specifically find the essential facts in writing on the record. In misdemeanor and petty misdemeanor cases, such findings shall be made within 7 days after the filing of the notice of appeal. If an opinion or memorandum of decision is filed, it is sufficient if the findings of fact appear therein. If the court omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding.

Subd. 3. Trial on Stipulated Facts. By agreement of the defendant and the prosecuting attorney, a case may be submitted to and tried by the court based on stipulated facts. Before proceeding in this manner, the defendant shall acknowledge and waive the rights to testify at trial, to have the prosecution witnesses testify in open court in the defendant's presence, to question those prosecution witnesses, and to require any favorable witnesses to testify for the defense in court. The agreement and the waiver shall be in writing or orally on the record. Upon submission of the case on stipulated facts, the court shall proceed as on any other trial to the court. If the defendant is found guilty based on the stipulated facts, the defendant may appeal from the judgment of conviction and raise issues on appeal the same as from any trial to the court.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 26.04 for Comment.

26.02 Selection of Jury

Subd. 1. Selection and Qualifications. The jury list shall be composed of the names of persons selected at random from a fair cross-section of the residents of the county who are qualified by law to serve as jurors and shall otherwise be selected as provided by law. The jury shall be drawn from the jury list and summoned, as prescribed by law.

Subd. 2. Juror Information.

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

Upon the motion of a party that there is a special need to restrict the parties access to names and addresses of prospective jurors, the court shall hold a hearing on the motion. The court may order that the parties' access to this information about the prospective jurors be restricted only if it determines that, in the individual case there is a strong reason to believe that the jury needs protection from external threats to its members' safety or impartiality. If the court restricts access to this information, the court must also take reasonable precautions to minimize any possible prejudicial effect the restriction on access to this information might have on the defendant or the state.

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

(2) *Jury Questionnaire.* As a supplement to oral voir dire, a sworn jury questionnaire designed for use in criminal cases may be used to obtain information helpful to the parties and the court in jury selection before the jurors are called into court for examination.

Court personnel may hand out the questionnaire to the prospective jurors and collect them when completed. The court shall make the completed questionnaires available to counsel.

Subd. 3. Challenge to Panel. Either party may challenge the jury panel on the ground that there has been a material departure from the requirements of law governing the selection, drawing or summoning of the jurors. The challenge shall be in writing, specifying the facts constituting the grounds of the challenge and shall be made before a jury is sworn. If the opposing party objects to either the sufficiency of the challenge or the facts on which it is based, the court shall hear and determine the challenge.

Subd. 4. Voir Dire Examination.

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

(2) *Séquestration of Jurors.*

(a) Courts' Discretion. In the discretion of the court the examination of each juror may take place outside of the presence of other chosen and prospective jurors.

(b) Prejudicial Publicity. Whenever there is a significant possibility that individual jurors will be ineligible to serve because of exposure to prejudicial material, the examination of each juror with respect to the juror's exposure shall take place outside the presence of other chosen and prospective jurors.

(3) *Order of Drawing, Examination and Challenge.*

(a) Uniform Rule. Except as provided by Rule 26.02, subd. 4(3)(c) 8 with respect to cases of first degree murder, unless the court orders that the jurors shall be drawn, examined and challenged as provided either by Rule 26.02, subd. 4(3)(b) or (c), they shall be drawn, examined and challenged as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of peremptory challenges available to all the parties and the number of any alternate jurors.

2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.

4. A challenge for cause may be made at any time during voir dire by any party. At the close of voir dire any additional challenges for cause shall be made, first by the defense and then by the prosecution.

5. If any prospective juror is challenged and excused for cause another shall be drawn from the jury panel so that the number in the jury box will remain equal to the number initially called.

6. After both parties have had an opportunity to challenge for cause, each, commencing with the defendant, may exercise alternately the peremptory challenges permitted by these rules.

7. When the peremptory challenges have been exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called until the number selected equals the number of which the jury shall be composed for trial of the case plus the alternate jurors, if any.

(b) By Order of Court. The court may order that the jurors be drawn, examined and challenged as provided by Rule 26.02, subd. 4(3)(b) or (c) as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of any alternate jurors.

2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.

4. Upon completion of defendant's examination of a prospective juror, the defendant shall be permitted to exercise a challenge for cause or a peremptory challenge as permitted by these rules as to that juror. A juror who is excused shall be replaced by another member of the panel. The replacement juror shall be examined and challenged after all previously drawn jurors have been examined and challenged.

5. Upon completion of the examination and any challenge of each prospective juror by the defendant, the state may examine such prospective juror and may challenge the juror for cause or peremptorily. A juror who is excused shall be replaced by another member of the panel who shall be subject to examination and challenge in accordance with this rule.

6. This process of jury selection shall continue until the number of persons of which the jury shall be composed for trial of the case plus any alternate jurors is selected and sworn as the trial jury.

(c) By Order of Court.

1. The court shall direct that one prospective juror at a time be drawn from the jury panel for examination.

2. The prospective juror so drawn shall be sworn to answer truthfully questions asked relative to the prospective juror's qualifications to serve as a juror in the case.

3. The prospective juror shall be examined by the court and then by the parties, commencing with the defendant.

4. Upon completion of defendant's examination, the defendant may challenge the juror for cause or peremptorily as permitted by these rules.

5. If the juror is excused, another prospective juror shall be drawn from the panel and shall be examined and subject to challenge in the same manner.

6. A prospective juror who is not excused after examination by the defendant may be examined by the state and may be challenged for cause or peremptorily by the state.

7. This process of selection shall continue until the number of persons of which the jury shall be composed for trial of the case is selected and sworn as the trial jury plus the number of any alternate jurors.

8. In cases of first degree murder, the method provided by Rule 26.02, subd. 4(3)(c) shall be preferred unless otherwise ordered by the court.

Subd. 5. Challenge for Cause.

(1) *Grounds.* A juror may be challenged for cause by either party upon the following grounds:

1. The existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.

2. A felony conviction unless the juror's civil rights have been restored.

3. The lack of any of the qualifications prescribed by law to render a person a competent juror.

4. A physical or mental defect which renders the juror incapable of performing the duties of a juror.

5. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case.

6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted.

7. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by the defendant, in a criminal prosecution.

8. Having served on the grand jury which found the indictment, or an indictment on a related offense.

9. Having served on a trial jury which has tried another person for the same or a related offense to that charged in the indictment, complaint, tab charge or a related indictment, complaint or tab charge.

10. Having been a member of a jury formerly sworn to try the same indictment, complaint, tab charge or a related indictment, complaint or tab charge.

11. Having served as a juror in any case involving the defendant.

(2) *How and When Exercised.* A challenge for cause may be oral and shall state the grounds on which it is based. The challenge shall be made before the juror is sworn to try the case, but the court for good cause shown may permit it to be made after the juror is sworn but before all the jurors constituting the jury are sworn. If a challenge for cause is made and the court sustains the challenge, the juror shall be excused.

(3) *By Whom Tried.* If the opposing party objects to the sufficiency of a challenge for cause or the facts on which it is based, all issues of law or fact arising upon the challenge shall be tried and determined by the court.

Subd. 6. Peremptory Challenges. If the offense charged is punishable by life imprisonment the defendant shall be entitled to 15 and the state to 9 peremptory challenges. For any other offense, the defendant shall be entitled to 5 and the state to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants' additional peremptory challenges and permit them to be exercised separately or jointly, and in that event the state's peremptory challenges shall be correspondingly increased. All peremptory challenges shall be exercised out of the hearing of the jury panel.

Subd. 6a. Objections to Peremptory Challenges.

(1) *Rule.* No party may engage in purposeful discrimination on the basis of either race or gender in the exercise of peremptory challenges.

(2) *Procedure.* Any party, or the court, may object to the exercise of a peremptory challenge on the ground of purposeful racial or gender discrimination at any time before the jury is sworn to try the case. The objection and all arguments thereon shall be heard out of the hearing of the jury panel and the individual jury panel member involved. A record shall be made of all proceedings upon the objection. All issues of law or fact arising upon the objection shall be tried and determined by the court as promptly as possible, but in all events it shall be done before the jury is sworn to try the case.

(3) *Determination.* The trial court shall use a three-step process for evaluating a claim that any party has engaged in purposeful racial or gender discrimination in the exercise of its peremptory challenges:

(a) First, the party making the objection must make a prima facie showing that the responding party has exercised its peremptory challenges on the basis of race or gender. If the objection was raised by the court on its own initiative then the court must initially determine, after such hearing as it deems appropriate, that there is a prima facie showing that the responding party has exercised its peremptory challenges on the basis of race or gender. If no prima facie showing is found, the objection shall be overruled.

(b) Second, if the court determines that a prima facie showing has been made, the responding party must articulate a race-neutral or gender-neutral explanation, as applicable, for exercising the peremptory challenge(s) in question. If no race-neutral or gender-neutral explanation is articulated, the objection shall be sustained.

(c) Third, if the court determines that a race-neutral or gender-neutral explanation has been articulated, the objecting party must prove that the proffered explanation is pretextual. If the objection was initially raised by the court, it shall determine, after such hearing as it deems appropriate, whether the peremptory challenge was exercised in a purposeful discriminatory manner on the basis of race or gender. If purposeful discrimination is proved the objection shall be sustained. If no purposeful discrimination is proved the objection shall be overruled.

(4) *Remedies.* If the objection is overruled the jury panel member against whom the peremptory challenge was exercised shall be excused. If the objection is sustained, the court shall do either of the following based upon its determination of what the interests of justice and a fair trial to all parties in the case require:

(a) Disallow the discriminatory peremptory challenge and resume jury selection with the challenged jury panel member reinstated on the panel; or

(b) Discharge the entire jury panel and select a new jury from a jury panel not previously associated with the case.

Subd. 7. Order of Challenges to the Panel and to Individual Jurors. Challenges to the panel and to individual jurors shall be made in the following order:

a. To the panel.

b. To an individual juror for cause.

c. Peremptory challenge to an individual juror.

Subd. 8. Alternate Jurors. A trial judge may impanel alternate or additional jurors whenever in the judge's discretion, the judge believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. Alternate jurors, in the order in which they are called, shall replace jurors who prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, and be subject to the same examination and challenges for cause as the regular jurors. No additional peremptory challenges shall be allowed for alternate jurors except that unused peremptory challenges for the regular jury may be exercised against alternate jurors. If a juror becomes unable or disqualified to perform a juror's duties after the jury has retired to consider its verdict, a mistrial shall be declared unless the parties agree pursuant to Rule 26.01, subd. 1(4) that the jury shall consist of a lesser number than that selected for the trial.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 26.04 for Comment.

26.03 Procedures During Trial

Subd. 1. Presence of Defendant.

(1) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. If the defendant is handicapped in communication, a qualified interpreter for that defendant shall also be present at each of these proceedings.

(2) *Continued Presence Not Required.* The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive the right to be present whenever:

1. a defendant voluntarily and without justification absents himself after trial has commenced; or

2. a defendant after warning engages in conduct which is such as to justify being excluded from the courtroom because it tends to interrupt the orderly procedure of the court and the due course of the trial. As an alternative to exclusion, the court may use all such

methods of restraint as will ensure the orderly procedure of the court and the due course of the trial.

(3) *Presence Not Required.* A defendant need not be present in the following situations:

1. a corporation may appear by counsel for all purposes;
2. in the case of felonies and gross misdemeanors, on defendant's motion, the court may excuse the defendant from attendance at any proceeding except arraignment, plea, trial, and imposition of sentence; and
3. in prosecutions for misdemeanors, the court shall permit arraignment and plea in the defendant's absence if the court is satisfied that the defendant has knowingly and voluntarily waived the right to be present. The court with the written consent of the defendant, or the defendant's oral consent in open court, may permit trial, and imposition of sentence in the defendant's absence.
4. the court in its discretion and upon agreement of the defendant may allow the participation by telephone of one or more parties, counsel, or the judge in any proceedings in which the defendant would otherwise be permitted to waive personal appearance under these rules.

Subd. 2. Custody and Restraint of Defendants and Witnesses.

a. During the trial the defendant shall be seated so as to effectively consult with defense counsel and to see and hear the proceedings.

b. An incarcerated defendant or witness shall not appear in court in the distinctive attire of a prisoner.

c. Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order or security. A trial judge who orders such restraint shall state the reasons on the record outside the presence of the jury. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall on request of the defendant instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt.

Subd. 3. Use of Courtroom. Whenever appropriate in view of the notoriety of the case or the number or conduct of news media representatives present at any judicial proceeding, the court shall ensure the preservation of decorum by instructing those representatives and others as to the permissible use of the courtroom and other facilities of the court, the assignment of seats to news media representatives on an equitable basis, and other matters that may affect the conduct of the proceeding.

Subd. 4. Preliminary Instructions. After the jury has been impaneled and sworn, and before the opening statements of counsel, the court may instruct the jury as to the respective claims of the parties and as to such other matters as will aid the jury in comprehending the trial procedure and sequence to be followed. Preliminary instructions may also include such matters as burden of proof, presumption of innocence, the necessity of proof of guilt beyond a reasonable doubt, the elements which the jury may consider in weighing testimony or determining credibility of witnesses, rules applicable to opinion evidence, and such other rules of law, including the essential elements of the offense, as the court may deem essential to the proper understanding of the evidence. Such preliminary instructions shall be disclosed to the parties before they are given and either party may object to any specific instruction or propose other instructions to be given prior to trial.

Subd. 5. Sequestration of the Jury.

(1) *In the Discretion of the Court.* During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. With the consent of the defendant the court, in its discretion, may allow the jurors to separate over night during deliberation. The officers shall not speak to or communicate with any juror concerning any subject connected with the trial nor permit any other person to do so, and shall return the jury to the courtroom at the next designated trial session.

(2) *On Motion.* Either party may move for sequestration of the jury at the beginning of trial or at any time during the course of the trial. Sequestration shall be ordered if it is

determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

Subd. 6. Exclusion of the Public From Hearings or Arguments Outside the Presence of the Jury. The following rules shall govern the issuance of any court order excluding the public from any portion of the trial that takes place outside the presence of the jury and restricting access to any transcripts or orders developed from such closed portions of the trial.

(1) *Grounds for Exclusion of Public.* If the jury is not sequestered, the court on its initiative or on motion of the defendant or the prosecuting attorney may order that the public be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing may interfere with an overriding interest including that it is likely to interfere with a fair trial by an impartial jury. The motion shall not be granted unless it is determined that there is a substantial likelihood of such interference. In determining the motion the court shall consider reasonable alternatives to closing such portion of the trial and the closure shall be no broader than is necessary to protect the overriding interest involved.

(2) *Notice to Adverse Counsel.* If, during trial, counsel for either the prosecution or the defense has evidence that counsel believes may be the subject of an exclusionary order, counsel has a duty first to advise opposing counsel of that fact and suggest that both counsel meet privately with the presiding judge in closed court and disclose to the court the problem. If counsel for either side refuses to meet with the court, the court may order counsel to be present in closed court.

(3) *Meeting in Closed Court and Notice of Hearing.* In closed court the court shall review the evidence outlined by counsel that may be the subject of a restrictive order. If the court feels that any of the proffered evidence may properly be the subject for a restrictive order, the court shall immediately docket a notice of hearing on the court's initiative or on a motion for a restrictive order made by either counsel. Such notice shall be docketed at least 24 hours before the hearing and shall be reasonably calculated to afford the public and the news media with an opportunity to be heard on whether the overriding interest claimed justifies closing the hearing to the public and the news media.

(4) *Hearing.* At the hearing held pursuant to such notice, the trial court shall advise all present that evidence has been disclosed to it that may be the subject of a closure order and shall give the public and the news media an opportunity to suggest any alternatives to a restrictive order.

(5) *Findings of Fact.* No exclusion order shall issue without the court setting forth the reasons therefor in written findings of fact. Such findings must include a review of alternatives to closure and a statement of why the court believes such alternatives are inadequate. Any matter to be decided which does not present the risk of revealing inadmissible, prejudicial information shall be decided openly and on the record.

(6) *Records.* Whenever under this rule part of the proceedings are closed to the public, a complete record of those proceedings shall be made and upon request shall be transcribed at public expense and filed and shall be available to the public following the completion of the trial. For the protection of innocent persons, the court may order that names be deleted or substitutions therefor be made in the record.

(7) *Appellate Review.* Anyone represented at the hearing or aggrieved by an order granting or denying an exclusion or restrictive order under this rule may petition the Court of Appeals for review, which shall be the exclusive method for obtaining review.

The Court of Appeals shall determine upon the hearing record whether the moving party sustained the burden of justifying the order under the conditions specified in this rule, and may reverse, affirm, or modify the order issued.

Subd. 7. Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses. Whenever appropriate, the court shall order attorneys, parties, witnesses, jurors, and employees and officers of the court not to make extrajudicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial.

Witnesses may be sequestered or excluded from the courtroom, prior to their appearance, in the discretion of the court.

Subd. 8. Admonitions to Jurors. Appropriate admonitions shall be given to the jury during the trial not to read, listen to, or watch reports about the case appearing in the news media.

Subd. 9. Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial. If it is determined that material disseminated outside the trial proceedings raises serious questions of possible prejudice, the court may on its initiative and shall on motion of either party question each juror, out of the presence of the others, about the juror's exposure to that material. The examination shall take place in the presence of counsel, and a verbatim record of the examination shall be kept.

Subd. 10. View by Jury.

a. When the court is of the opinion that a viewing by the jury of the place where the offense being tried was committed, or any other place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its discretion, at any time before the closing arguments, order that the jury be conducted to such place.

b. The jury must be kept together during the viewing under the supervision of a proper officer appointed by the court. The judge and a court reporter must be present, and with the judge's permission any other person may be present. The prosecuting attorney, the defendant and defense counsel may as a matter of right be present, but the right may be waived.

c. The purpose of the viewing shall be solely to permit visual observation by the jury of the place in question, and neither the parties, counsel, nor the jurors while viewing the place may engage in discussion concerning the significance or implications of anything under observation or concerning any issue in the case.

Subd. 11. Order of Jury Trial. The order of a jury trial shall be substantially as follows:

a. The jury shall be selected and sworn.

b. The court may deliver preliminary instructions to the jury.

c. The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts the prosecuting attorney expects to prove.

d. The defendant may make an opening statement to the jury, or may make it immediately before offering evidence in defense. The statement shall be confined to a statement of the defense and the facts the defendant expects to prove in support thereof.

e. The prosecution shall offer evidence in support of the indictment, complaint or tab charge.

f. The defendant may offer evidence in defense.

g. The prosecution may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal of the prosecution's rebuttal evidence. In the interests of justice, the court may permit either party to offer evidence upon the party's original case.

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

i. *The defendant may then make a closing argument to the jury.*

j. On the motion of the prosecution, the court may permit the prosecution to reply in rebuttal if the court determines that the defense has made in its closing argument a misstatement of law or fact or a statement that is inflammatory or prejudicial. The rebuttal must be limited to a direct response to the misstatement of law or fact or the inflammatory or prejudicial statement.

k. The court shall charge the jury.

l. The jury shall retire for deliberation and, if possible, render a verdict.

Subd. 12. Note Taking. Jurors may take notes of the evidence presented at the trial and may keep these notes with them when they retire for deliberation.

Subd. 13. Substitution of Judge.

(1) *Before or During Trial.* If by reason of death, sickness or other disability, the judge before whom pretrial proceedings or a jury trial has commenced is unable to proceed, any other judge sitting in or assigned to the court, upon certification of familiarity with the record of the proceedings or trial, may proceed with and finish the proceedings or trial.

(2) *After Verdict or Finding of Guilt.* If by reason of absence, death, sickness or other disability, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that those duties cannot be performed because of not presiding at the trial, such judge may grant a new trial.

(3) *Interest or Bias of Judge.* No judge shall preside over a trial or other proceeding if that judge is disqualified under the Code of Judicial Conduct. A request to disqualify a judge for cause shall be heard and determined by the chief judge of the judicial district or the assistant chief judge if the chief judge is the subject of the request.

(4) *Notice to Remove.* The defendant or the prosecuting attorney may serve on the other party and file with the court administrator a notice to remove the judge assigned to a trial or hearing. The notice shall be served and filed within seven (7) days after the party receives notice of which judge is to preside at the trial or hearing, but not later than the commencement of the trial or hearing. No notice to remove shall be effective against a judge who has already presided at the trial, Omnibus Hearing, or other evidentiary hearing of which the party had notice, except upon an affirmative showing of cause on the part of the judge. After a party has once disqualified a presiding judge as a matter of right, that party may disqualify the substitute judge only upon an affirmative showing of cause.

(5) *Recusal.* A judge without a motion may recuse himself or herself from presiding over a trial or other proceeding.

(6) *Assignment of New Judge.* Upon the removal, disqualification, disability, recusal or unavailability of a judge under this rule, the chief judge of the judicial district shall assign any other judge within the district to hear the matter. If there is no other judge of the district who is qualified to hear the matter, the chief judge of the district shall notify the chief justice. The chief justice shall then assign a judge of another district to preside over the matter.

Subd. 14. Exceptions.

(1) *Exceptions Abolished.* Exceptions to rulings or orders of the court or to the actions of a party are abolished. It is sufficient that a party, at the time the ruling or order of court is made or sought or the action of a party taken, makes known to the court the action which the party desires the court to take or the party's objections to the action of the court or of a party and the grounds therefor; and, if a party has no opportunity to object to a ruling or order or action at the time it is made or taken the absence of an objection does not thereafter prejudice the party.

(2) *Bills of Exception and Settled Cases Abolished.* The bill of exceptions and settled case shall not be required. The record of the case for the purposes for which a bill of exceptions or settled case was heretofore required shall consist of the papers filed in the trial court, the offered exhibits, and the minutes of the court, and the transcript of the proceedings, if any.

Subd. 15. Evidence. In all trials the testimony of witnesses shall be taken in open court, unless otherwise provided by these rules. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

Subd. 16. Interpreters. The court may appoint an interpreter of its own selection and may fix reasonable compensation for the interpreter. The compensation shall be paid out of funds provided by law. Qualified interpreters appointed by the court for any juror with a sensory disability may be present in the jury room to interpret while the jury is deliberating and voting.

Subd. 17. Motion for Judgment of Acquittal.

(1) *Motions Before Submission to Jury.* Motions for directed verdict are abolished and motions for judgment of acquittal shall be used in their place. After the evidence on either side is closed, the court on motion of a defendant or on its initiative shall order the entry of a judgment of acquittal of one or more offenses charged in the tab charge, indictment or complaint if the evidence is insufficient to sustain a conviction of such offense or offenses.

(2) *Reservation of Decision on Motion.* If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision on the motion. If the defendant's motion is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict. If the defendant's motion is granted after the jury returns a verdict of guilty, the court shall make written findings specifying its reasons for entering a judgment of acquittal.

(3) *Motion After Discharge of Jury.* If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 15 days after the jury is discharged or within such further time as the court may fix during the 15-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal, in which case the court shall make written findings specifying its reasons for entering a judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

Subd. 18. Instructions.

(1) *Requests for Instructions.* At the close of the evidence or at such earlier time during the trial as the court reasonably directs, any party may file written requests that the court instruct the jury on the law as set forth in the requests. At the same time copies of such requests shall be furnished to all parties. The court shall inform counsel of its proposed action upon the requests prior to the arguments to the jury, and such action shall be made a part of the record.

(2) *Proposed Instructions.* The court may, and upon request of any party shall, before the arguments to the jury, inform counsel what instructions will be given and all such instructions may be stated to the jury by either party as a part of the party's argument.

(3) *Objections to Instructions.* No party may assign as error any portion of the charge or omission therefrom unless the party objects thereto before the jury retires to consider its verdict. The matter to which objection is made and the grounds of the objection shall be specifically stated. Opportunity shall be given to make the objection out of the hearing of the jury and, on request of any party, out of the presence of the jury. All objections to instructions and the rulings thereon shall be included in the record. All instructions, whether given or refused, shall be made a part of the record. An error in the instructions with respect to fundamental law or controlling principle may be assigned in a motion for a new trial though it was not otherwise called to the attention of the court.

(4) *Giving of Instructions.* The court in its discretion shall instruct the jury either before or after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. The instructions may be in writing and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

(5) *Contents of Instructions.* In charging the jury the court shall state all matters of law which are necessary for the jury's information in rendering a verdict and shall inform the jury that it is the exclusive judge of all questions of fact. The court shall not comment on the evidence or the credibility of the witnesses, but may state the respective claims of the parties.

Subd. 19. Jury Deliberations and Verdict.

(1) *Materials to Jury Room.* The court shall permit the jury, upon retiring for deliberation, to take to the jury room exhibits which have been received in evidence, or copies thereof, except depositions and may permit a copy of the instructions to be taken to the jury room.

(2) *Jury Requests to Review Evidence.*

1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after no-

tice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to reexamine the requested materials admitted into evidence.

2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury, but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

(3) Additional Instructions After Jury Retires.

1. If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless:

(a) the jury may be adequately informed by directing their attention to some portion of the original instructions;

(b) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or

(c) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.

2. The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.

3. The court after notice to the prosecutor and defense counsel may recall the jury after it has retired and give any additional instructions as the court deems appropriate.

(4) Deadlocked Jury. The jury may be discharged without having agreed upon a verdict if it appears that there is no reasonable probability of agreement.

(5) Polling the Jury. When a verdict is rendered and before the jury has been discharged, the jury shall be polled at the request of any party or upon the court's initiative. The poll shall be conducted by the court or clerk of court who shall ask each juror individually whether the verdict announced is the juror's verdict. If the poll does not conform to the verdict, the jury may be directed to retire for further deliberation or may be discharged.

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

(7) Partial Verdict. The court may accept a partial verdict when the jury has agreed on a verdict on less than all of the charges submitted, but is unable to agree on the remainder. (Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

Revisor's Note: Subdivision 11 is superseded to the extent it conflicts with Minnesota Statutes, section 631.07. See Laws 1999, chapter 72.

See Rule 26.04 for Comment.

[For text of 26.04, see M.S. 1998, Volume 15]

Comment

Rule 26.01, subd. 1(1). Right to Jury Trial.

In cases of felonies (Minnesota Statutes, section 609.02, subd. 2 (1971)) and gross misdemeanors, (Minnesota Statutes, sections 609.02, subd. 4, 609.03(2) (1971)) the defendant is entitled to jury trial under Minnesota Constitution, Article 1, section 6, which guarantees the right to jury trial in "all criminal prosecutions." The term "criminal prosecution" includes prosecutions for all crimes defined by Minnesota Statutes, section 609.02 (1971). (Peterson v. Peterson, 278 Minn. 275, 153 N.W.2d 825 (1967); State v. Ketterer, 248 Minn.

173, 79 N.W.2d 136 (1956).) The defendant's right to jury trial for offenses punishable by more than six months imprisonment is also guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution. (*Duncan v. Louisiana*, 88 S.Ct. 1444, 391 U.S. 145, 194, 20 L.Ed.2d 491, 522 (1968); *Baldwin v. New York*, 399 U.S. 66 (1970).)

Since misdemeanors in Minnesota are punishable by no more than 90 days of incarceration or a fine or both (Minnesota Statutes, section 609.03, subd. 3) there would usually be no federal constitutional right to a jury trial on a misdemeanor.

There is, however, a state constitutional right to a jury trial in any prosecution for the violation of a misdemeanor statute punishable by incarceration. See *Minnesota Constitution*, Article 1, section 6, as interpreted in *State v. Hoben*, 256 Minn. 436, 98 N.W.2d 813 (1959); *State v. Ketterer*, 248 Minn. 173, 79 N.W.2d 136 (1956); *State ex rel. Erickson v. West*, 42 Minn. 147, 43 N.W. 845 (1889); and *City of Mankato v. Arnold*, 36 Minn. 62, 30 N.W. 305 (1886).

Beyond these constitutional requirements, present statutory law provides for the right to a jury trial at some stage in the proceedings in all prosecutions for the violation of misdemeanors punishable by incarceration. The defendant, however, might not be able to exercise this right to a jury trial until appeal to district court for a trial *de novo*. As to the right to a jury trial in Hennepin or Ramsey County, either initially or upon a trial *de novo* in district court, see *Minnesota Statutes*, sections 484.63 (appeals to district court); 488A.10, subd. 6 (appeals from Hennepin County Municipal Court); and 488A.27, subd. 6 (appeals from Ramsey County Municipal Court after January 1, 1975); and *State v. Hoben*, 256 Minn. 436, 98 N.W.2d 813 (1959) (jury trial in municipal court for traffic ordinance violations).

In county courts governed by Minnesota Statutes, chapter 487 (which includes all but Hennepin and Ramsey County) a defendant has a right to a jury trial in any prosecution for the violation of a statutory misdemeanor punishable by incarceration. (see *Minnesota Constitution*, Article 1, section 6), or of any nonstatutory misdemeanor whether or not punishable by incarceration (see *Minnesota Statutes*, section 487.25, subd. 6). There is no right to a jury trial in a prosecution for the violation of a statutory misdemeanor not punishable by incarceration (see *Minnesota Statutes*, sections 169.89, subd. 2 and 633.02).

Under Rule 26.01, subd. 1(1)(a) defendants prosecuted for misdemeanors will have the right to a jury trial if and only if the misdemeanor charged is punishable by incarceration. This will be so whether the misdemeanor is proscribed by statute, ordinance or otherwise, and whether it is a traffic or nontraffic offense. *Minnesota Statutes*, sections 488A.10, subd. 6 (Hennepin County) and 488A.27, subd. 6 (Ramsey County after January 1, 1975) to the extent they provide otherwise are superseded. Also, *Minnesota Statutes*, section 487.24, subd. 6, to the extent it might be interpreted to permit a jury trial in a prosecution for the violation of a misdemeanor not punishable by incarceration is superseded. It is the opinion of the Advisory Committee that there should be no difference in the right to a jury trial in the different areas of the state. The committee anticipated that the power of the prosecutor under Rule 23.04 to treat many minor misdemeanors now punishable by incarceration as petty misdemeanors with the consent of the defendant should prevent any large backlog of jury cases from developing. Under Rule 23.05, subd. 1 a defendant is not entitled to a jury trial if the offense is to be treated (see *Minnesota Statutes*, chapter 487) as a petty misdemeanor under Rule 23.04. Also, the broadened use of violations bureaus permitted under Rule 23.03 if implemented by the courts should result in fewer jury and court trial demands.

Rule 26.01, subd. 1(1)(b) providing that there shall be no jury trial at any stage in the prosecution of a misdemeanor not punishable by incarceration is largely consistent with present statutory law. See *Minnesota Statutes*, sections 484.63 and 488.20 (appeals to district court); *Minnesota Statutes*, sections 169.89, subd. 2 and 633.02 (statutory petty misdemeanors); *Minnesota Statutes*, section 488A.10, subd. 6 (Ramsey County Municipal Court after January 1, 1975). To the extent *Minnesota Statutes*, section 487.25, subd. 6 is inconsistent with Rule 26.01, subd. 1(1)(b) it is superseded.

Rule 26.01, subd. 1(2)(a) (Waiver of Trial by Jury Generally) is based upon F.R.Crim.P. 23(a), ABA Standards, Trial by Jury, 1.2(b) (Approved Draft, 1968) and continues substantially present Minnesota law (*Minnesota Statutes*, section 631.01 (1971)) except that waiver of jury trial by the defendant requires the approval of the court.

Rule 26.01, subd. 1(2)(b) (Waiver When Prejudicial Publicity.)

Under Rule 26.01, subd. 1(2)(b) the defendant shall be permitted to waive jury trial if required to assure the likelihood of a fair trial when there has been a dissemination of potentially prejudicial material. (See ABA Standards, *Fair Trial and Free Press*, 3.3 (Approved Draft, 1968).)

Rule 26.01, subd. 1(3) (Withdrawal of Waiver of Jury Trial) continues present Minnesota law (Minnesota Statutes, section 631.01 (1971)) and provides that waiver of jury trial may be withdrawn before commencement of trial. Trial is commenced when jeopardy attaches. See Comment to Rule 25.02.

Rule 26.01, subd. 1(4) (Waiver of Number of Jurors Required by Law) is drawn from F.R.Crim.P. 23(b) and ABA Standards, Trial by Jury, 1.3 (Approved Draft, 1968). (See also *State v. Sackett*, 39 Minn. 69, 38 N.W. 773 (1888).) The number of jurors required by law for felonies is 12 and for gross misdemeanors and misdemeanors is 6. (Minnesota Statutes, section 593.01 (1989).) (A jury of 6 would not contravene the United States Constitution. *Williams v. Florida*, 90 S.Ct. 1893, 399 U.S. 78, 26 L.Ed.2d 446 (1970).) The Minnesota Supreme Court held in *State v. Hamm*, 423 N.W.2d 379 (Minn. 1988) that the provision in Minnesota Statutes, section 593.01 for 6-member juries in misdemeanor and gross misdemeanor cases violated the state constitution. After that decision Article I, section 6 of the Minnesota Constitution was amended in 1988 to permit the legislature to provide for 6-member juries in nonfelony criminal cases. The legislature reenacted Minnesota Statutes, section 593.01, subd. 1, effective February 9, 1989.

Rule 26.01, subd. 1(5) (Number Required for Verdict) requires a unanimous verdict for felonies, gross misdemeanors, and misdemeanors and so continues existing law in those cases. (Minnesota Statutes, section 593.01 (1971).) (See also *State v. Everett*, 14 Minn. 439 (Gil 330) (1869).)

Rule 26.01, subd. 1(6) (Waiver of Unanimous Verdict) continues present Minnesota law. (*State v. Zubrocki*, 194 Minn. 346, 260 N.W. 507 (1935).) It is based on ABA Standards, Trial by Jury, 1.1(3) (Approved Draft, 1968) except that the defendant's consent is necessary for a less than unanimous verdict.

Rule 26.01, subd. 2 (Trial Without a Jury) requiring special findings in a case tried to the court is taken from F.R.Crim.P. 23(c), and in addition prescribes time limits for general findings and for special findings. Rule 14.01 prescribes the pleas referred to in the rule. The consequences of an omission of a finding on an essential fact comes from Minn.R.Civ.P. 49(a). The provision in Rule 26.01, subd. 3 (Trial on Stipulated Facts) for submitting the case to the court for decision on stipulated facts is in accord with ABA Standards for Criminal Justice 21-1.3(c) (1985). The rules do not permit conditional pleas of guilty whereby the defendant reserves the right to appeal the denial of a motion to suppress evidence or other pretrial order. *State v. Lothenbach*, 296 N.W.2d 854 (Minn. 1980). However, by agreement of the parties, the issues may be preserved by submitting the case on stipulated facts as authorized by Rule 26.01, subd. 3.

Rule 26.02 (Selection of Jury.)

Rule 26.02, subd. 1 (Selection and Qualifications (of Jury)) continues present statutory law for the selection, drawing, and summoning of the trial jury (See Minnesota Statutes, sections 593.02, 593.04, 593.13, 593.14, 593.17, 628.43, 628.44, 628.54 (1971) for the qualifications of jurors. See sections 593.03, 593.05-593.07, 593.09-593.13, 593.135, 593.14 for the selection, drawing, and summoning of jurors.) except that to satisfy constitutional requirements, it provides that the persons on the jury list from which the jury panel is drawn shall be selected at random from a fair cross-section of the residents of the county who are qualified to serve as jurors. (See a similar provision in Rule 18.01, subd. 2 governing the selection of the grand jury list.) (See also ABA Standards, Trial by Jury, 2.1(a) (Approved Draft, 1968).)

Rule 26.02, subd. 2(1) (List of Prospective Jurors) which provides that information about prospective jurors which is obtained by the jury clerk, including names and addresses, shall in the usual case be made available to the parties and counsel upon request is taken from ABA Standards, Trial by Jury, 2.2 (Approved Draft, 1978) and also provides that in

addition to the jury list, the parties shall have access to such other information concerning the jurors as may be available at the clerk's office.

In the rare case, where there is a belief that dissemination of this information poses a threat to juror safety or impartiality, the rule provides for a hearing upon a party's motion that the jurors' names and addresses not be distributed. At the hearing, the moving party will have an opportunity to present evidence and argument that there is reason to believe that the jury needs protection from external threats to its members' safety and impartiality. Upon a finding that there is strong reason to believe that this condition exists, the court may enter an order that information regarding identity and addresses of prospective jurors be withheld from the parties and counsel. See *State v. Bowles*, 530 N.W.2d 521, 530-1 (Minn. 1995); *State v. McKenzie*, 532 N.W.2d 210, 219 (Minn. 1995). The trial court's decision will be reviewed under an abuse of discretion standard.

The trial court must recognize that not every trial where there is a threat to jurors' impartiality will require restriction on access to information about jurors. The decision to restrict access to information on jurors must be made in the light of reason, principle, and common sense.

In ensuring that restriction on the parties' access to information about the jurors does not have a prejudicial effect on the defendant, the trial court must take reasonable precautions to minimize the potential for prejudice. The court must allow voir dire on the effect that restricting access to juror identification may have on the impartiality of the jurors. The court should also instruct the jurors that the jury selection procedures do not in any way suggest the defendant's guilt.

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

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

Once the panel of prospective jurors for a particular case has been determined, the judge or court personnel will instruct the panel on the use of the questionnaire. The preamble at the beginning of the Jury Questionnaire (Form 50) provides the basic information to the prospective jurors. Upon completion of the questionnaire, the court shall make the questionnaire available to counsel for use in the jury selection process. The questionnaire may be sworn to either when signed or when the prospective juror appears in court at the time of the voir dire examination. Because of the information contained in the questionnaire, counsel will not need to expend court time on this information, but can move directly to follow-up questions on particular information already available in the questionnaire. However, the written questionnaire is intended only to supplement and not to substitute for the oral voir dire examination provided for by rule 26.02, subd. 4.

The use and retention of jury questionnaires have been subject to a variety of practices. This rule provides that the questionnaire is a part of the jury selection process and part of the record for appeal and reflects current law. As such, the questionnaires should be preserved as part of the court record of the case.

It is recognized that the idea of the privacy of the questionnaire adds to the candor and honesty of the responses of the prospective jurors. However, in light of other applicable laws and the fact that the questionnaire is part of the record in the case, prospective jurors cannot be told that the questionnaire is confidential or will be destroyed at the conclusion of the case.

In addition to being part of the record in the case, jury selection is a part of the criminal trial which is presumed to be open to the public. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (*Press-Enterprise I*). The use of a jury questionnaire as part of jury selection is also a part of the open proceeding and therefore the public and the press

have a right of access to that information in the usual case. See e.g., *Leshner Communications, Inc. v. Superior Court of Contra Costa County*, 224 Cal. App. 3d 774 (1990).

Rule 26.02, subd. 3 (Challenge to Panel) is based on ABA Standards, Trial by Jury, 2.3 (Approved Draft, 1968) and Minnesota Statutes, sections 631.23, 631.24, 631.25 (1971) except that it substitutes an "objection" for the "exception" to the sufficiency of the challenge (Minnesota Statutes, section 631.24) and for the "denial" of the facts on which the challenge is based. (Minnesota Statutes, section 631.25 (1971).) If such an objection is made, the challenge is tried by the court.

Rule 26.02, subd. 4(1) (Purpose of Voir Dire Examination—By Whom Made). The provision of this rule governing the purpose for which voir dire examination shall be conducted and the provision for initiation of the examination by the judge is taken from ABA Standards, Trial by Jury, 2.4 (Approved Draft, 1968). The last sentence of the rule permitting the parties to interrogate the jurors before exercising challenges continues the similar provision of Minnesota Statutes, section 631.26 (1971) with the limitation that the inquiry shall be "reasonable." The court has the right and the duty to assure that the inquiries by the parties during the voir dire examination are "reasonable." The court may therefore restrict or prohibit questions that are repetitious, irrelevant, or otherwise improper. However, the Minnesota Supreme Court's Task Force on Racial Bias in the Judicial System recommends in its Final Report, dated May 1993, that during voir dire lawyers should be given ample opportunity to inquire of jurors as to racial bias.

Rule 26.02, subd. 4(2)(a) (Sequestration of Jurors at Court's Discretion) gives the court the discretion to sequester jurors during the voir dire.

Rule 26.02, subd. 4(2)(b) (Prejudicial Publicity), following ABA Standards, Fair Trial and Free Press, 3.4(a) (Approved Draft, 1968), directs sequestration of the jurors during voir dire when there is a significant possibility that exposure to prejudicial publicity may result in disqualification of individual jurors. The standard (3.4(a)) recommends that the questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how that exposure has affected the prospective juror's attitude toward the trial, not to convince the prospective juror that it would be a dereliction of duty not to cast aside any preconceptions that might exist.

Rule 26.02, subd. 4(3) (Order of Drawing, Examination and Challenge of Jurors.) The purpose of this rule is to achieve uniformity in the order of drawing, examination, and challenge of jurors, but also to provide a limited number of alternatives that may be followed, in the discretion of the trial court. Hence, a uniform rule (26.02, subd. 4(3)(a)) is prescribed which is to be followed unless the court orders that one of the two alternatives, 26.02, subd. 4(3)(b) or (c), shall be adopted in a particular case. An exception is that in cases of first degree murder, Rule 26.02, subd. 4(3)(c) is to be preferred unless otherwise ordered by the court. (See Rule 26.02, subd. 4(3)(c) (8).)

Rule 26.02, subd. 4(3)(a) (Uniform Rule) is the uniform rule which is to be followed unless the court orders otherwise and substantially adopts the method used in civil cases, so that in a criminal case 20 members of the jury panel are first drawn for a 12-person jury. (See Minnesota Statutes, sections 546.09, 546.10 (1971); Rule 27, PT I, Code of Rules for the District Courts.) After each party has exercised his challenges for cause, commencing with the defendant, they exercise their peremptory challenges alternately, commencing with the defendant. If all peremptory challenges are not exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called.

Rule 26.02, subd. 4(3)(b) (By Order of Court) is the first alternative to Rule 26.02, subd. 4(3)(a). With a 12-person jury to be selected, 12 members of the jury panel are first drawn, and as a juror is excused for cause or peremptorily, a replacement is drawn so that there are always 12 persons in the jury box. The order of examination and challenge prescribed by the rule, first by defendant and then by the state, retains existing law. (Minnesota Statutes, section 631.39 (1971).)

Rule 26.02, subd. 4(3)(c) (By Order of Court) is the second alternative to Rule 26.02, subd. 4(3)(a) and provides that the prospective jurors shall be drawn one at a time. Otherwise this rule is substantially the same as Rule 26.02, subd. 4(3)(b). In cases of first degree murder this alternative shall be preferred unless the court in its discretion orders otherwise.

Rule 26.02, subd. 5(1) (Grounds of Challenge for Cause) with some changes of language, substantially adopts the grounds for challenge for cause under existing law (See Minnesota Statutes, sections 631.28—631.31 (1971)), but abolishes the classifications of the grounds into general causes (sections 631.28, 631.29), particular causes (section 631.30), implied bias (sections 631.30, 631.31), and actual bias (sections 631.30, 631.32). For the definition of a felony conviction which would disqualify a person from service on the jury, see Minnesota Statutes, section 609.13 (1971). The term "related offense" in the rule is intended to be more comprehensive than the conduct or behavioral incident covered by Minnesota Statutes, section 609.035 (1971).

Rule 26.02, subd. 5(2) (How and When Challenge for Cause is Exercised) providing that a challenge for cause may be oral, stating the grounds upon which it is based, continues substantially the similar provisions of Minnesota Statutes, section 631.34 (1971). The requirement that a challenge for cause to an individual juror shall be made before the juror is sworn but for good cause may be made before all the jurors are sworn adopts substantially the provisions of Minnesota Statutes, section 631.26 (1971). As to when jeopardy attaches, see Comment to Rule 25.02.

Rule 26.02, subd. 5(3) (By Whom Challenges for Cause are Tried) provides that if a party objects to a challenge for cause, it shall be tried by the court. The rule abolishes exceptions to and denials of the challenge (Minnesota Statutes, section 631.34 (1971)) by the triers of fact (Minnesota Statutes, section 631.34 (1971)) (Minnesota Statutes, section 631.35 (1971)).

Rule 26.02, subd. 6 (Peremptory Challenges) changes the number of peremptory challenges allowed by Minnesota Statutes, section 631.27 (1971) when the offense is punishable by life imprisonment from 20 for the defendant and ten for the state to 15 and nine. The provision of section 631.27 giving the defendant five and the prosecution three peremptory challenges in the trial of other offenses is continued. The provision for additional peremptory challenges when there is more than one defendant comes from F.R.Crim.P. 24.

Rule 26.02, subd. 6a (Objections to Peremptory Challenges) is intended to adopt and implement the equal protection prohibition against purposeful racial and gender discrimination in the exercise of peremptory challenges established in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712 (1986) and subsequent cases, including *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 114 S.Ct. 1419 (1994) (extending the rule to gender-based discrimination). In applying this rule, the bench and bar should thoroughly familiarize themselves with the case law which has developed, particularly with respect to meanings of the terms "prima facie showing" "race-neutral explanation," "pretextual reasons," and "purposeful discrimination" used in the rule. See *Batson*, supra; *Purkett v. Elem*, 514 U.S., 115 S.Ct. 1769 (1995); *Ford v. Georgia*, 498 U.S. 411, 111 S.Ct. 850 (1991); *Powers v. Ohio*, 499 U.S. 400, 111 S.Ct. 1364 (1991); *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859 (1991); *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 111 S.Ct. 2077 (1991); *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348 (1992); *State v. Moore*, 438 N.W.2d 101 (Minn. 1989); *State v. Everett*, 472 N.W.2d 864 (Minn. 1991); *State v. Bowers*, 482 N.W.2d 774 (Minn. 1992); *State v. Scott*, 493 N.W.2d 546 (Minn. 1992); and *State v. McRae*, 494 N.W.2d 252 (Minn. 1992). Although the rule expressly applies only to racial and gender discrimination, counsel and the court should be aware of the possibility that the *Batson* protections and procedures could be extended by caselaw to other protected classes, especially where that class is subject to heightened or strict scrutiny such as for religion. See *State v. Davis*, 504 N.W.2d 767 (Minn. 1993) cert. Denied *Davis v. Minnesota*, 511 U.S. 1115, 114 S.Ct. 2120 (1994). In the second step of the process under Rule 26.02, subd. 6a(3)(b), the responding party need only "articulate" a race or gender-neutral explanation for exercising the peremptory challenge. If that is done, the court proceeds to the third step in the process. During the second step of the process the court is not to weigh or judge the explanation presented so long as it articulates a race or gender-neutral basis for the challenge. *Purkett v. Elem*, 514 U.S., 115 S.Ct. 1769 (1995).

Rule 26.02, subd. 7 (Order of Challenges) prescribes the order in which challenges shall be made: first, to the panel; second, to an individual juror for cause; and third, peremptorily to an individual juror. It supersedes the requirement of Minnesota Statutes, section 631.39 (1971) that challenges for cause be made for (1) general disqualification, (2) implied bias, and (3) actual bias, in that order.

Rule 26.02, subd. 8 (Alternate Jurors) is based on F.R.Crim.P. 24(c) and ABA Standards, Trial by Jury, 2.7 (Approved Draft, 1968) and displaces Minnesota Statutes, section 546.095 (1971). It places no limitations on the number of alternate jurors and permits no additional peremptory challenges and differs in those respects from the federal rule and section 546.095.

Rule 26.03, subd. 1(1) (Presence Required) is taken from F.R.Crim.P. 43. See also Rules 14.02 and 27.03, subd. 2. The interpreter requirement is based upon Rule 5.01 and Minnesota Statutes, sections 611.31 to 611.34 (1992).

Rule 26.03, subd. 1(2) (Continued Presence Not Required) is based upon Proposed F.R.Crim.P. 43(b) (1971) 52 F.R.D. 472, *Allen v. Illinois*, 397 U.S. 337, 90 S.Ct. 1057 (1970) and Minnesota Statutes, section 631.015 (1971). If a defendant fails to be present at the trial, the court may proceed with the trial unless it appears that the defendant's absence was involuntary. The defendant may move for a new trial on the ground any absence was involuntary.

Rule 26.03, subd. 1(3) (Presence Not Required), permitting the defendant's absence from proceedings in the case of misdemeanors, is drawn from proposed F.R.Crim.P. 43(c) (1971) 52 F.R.D. 472 (See also Rules 14.02 and 27.03, subd. 2.) In addition, in the case of felonies and gross misdemeanors, it permits the court to excuse defendant's presence from any proceeding except arraignment, plea, trial, and imposition of sentence.

Rule 26.03, subd. 1(3)4 is based upon the recommendation of the Minnesota Supreme Court Criminal Courts Study Commission. The purpose of the rule is to facilitate the hearings in nondispositive, uncontested, and ministerial hearings whenever counsel, court, and defendant agree.

Rule 26.03, subd. 2 (Custody and Restraint of Defendants and Witnesses) is taken from ABA Standards, Trial by Jury, 4.1(a), (b), (c) (Approved Draft, 1968). Refusal of a defendant to put on or wear nondistinctive attire of a prisoner that has been made available shall constitute a waiver of this provision and shall not be grounds for delaying the trial.

Rule 26.03, subd. 3 (Use of Courtroom) comes from ABA Standards, Fair Trial and Free Press 3.5(a) (Approved Draft, 1968).

Rule 26.03, subd. 4 (Preliminary Instructions) is adapted from ABA Standards, Trial by Jury 4.6(a) (Approved Draft, 1968) and Minn.R.Civ.P. 39.03.

Rule 26.03, subd. 5(1) (Sequestration of Jury in Discretion of Court) permits sequestration of the jury in the discretion of the court.

Rule 26.03, subd. 5(2) (Sequestration on Motion) directing sequestration on motion of either party when prejudicial publicity may come to the attention of the jurors, comes from ABA Standards, Fair Trial and Free Press 3.5(b) (Approved Draft, 1968).

Rule 26.03, subd. 6 (Exclusion of Public From Hearing or Arguments Outside the Presence of the Jury) is based on *Minneapolis Star and Tribune Company v. Kammeyer*, 341 N.W.2d 550 (Minn. 1983) which established similar procedures for excluding the public from pretrial hearings. See the Comments to Rule 25.01 concerning those procedures. When the record of proceeding from which the public is excluded is made available, the court may order that names be deleted or substitutions therefor made for the protection of innocent persons. This rule for exclusion of the public is not intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize right to a fair trial by an impartial jury. (See ABA Standards, Fair Trial and Free Press 3.5(d) (Approved Draft, 1968).) An agreement by the news media not to publicize matters heard until after completion of the trial could afford the basis for a determination by the court that there is no substantial likelihood of interfering with an overriding interest, including the right to a fair trial, by permitting the news media or the public to be present. Re provision for appellate review, see Comment to Rule 25.01.

Rule 26.03, subd. 7 (Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses) comes from ABA Standards, Fair Trial and Free Press, 3.5(c) (Approved Draft, 1968).

Rule 26.03, subd. 8 (Admonitions to Jurors) adopts the substance of ABA Standards for Criminal Justice 8-3.6(a) (1985). In any case that appears likely to be of significant public

interest, an admonition in substantially the following form, suggested by ABA Standards for Criminal Justice 8-3.6(e) (1985), may be given before the end of the first day if the jury is not sequestered:

"During the time you serve on this jury, there may appear in the newspapers or on radio or television reports concerning this case, and you may be tempted to read, listen to, or watch them. Please do not do so. Due process of law requires that the evidence to be considered by you in reaching your verdict meet certain standards; for example, a witness may testify about events personally seen or heard but not about matters told to them by others. Also, witnesses must be sworn to tell the truth and must be subject to cross-examination. News reports about the case are not subject to these standards, and if you read, listen to, or watch these reports, you may be exposed to information which unduly favors one side and to which the other side is unable to respond. In fairness to both sides, therefore, it is essential that you comply with this instruction."

If the process of selecting a jury is a lengthy one, such an admonition may also be given to each juror as selected. At the end of each subsequent day of the trial, and at other recess periods if the court deems necessary, an admonition in substantially the following form suggested by Standard 3.5(e) may be given:

"For the reasons stated earlier in the trial, I must remind you not to read, listen to, or watch any news reports concerning this case while you are serving on this jury."

Rule 26.03, subd. 9 (Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial) adopts ABA Standards, *Fair Trial and Free Press*, 3.5(f) (Approved Draft, 1968).

Rule 26.03, subd. 10 (View by Jury) adapted from N.Y.C.P.L. 270.50, replaces Minnesota Statutes, section 546.12 (1971).

Rule 26.03, subd. 11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minnesota Statutes, section 546.11 (1971).) The order of closing argument, under sections "h," "i," and "j" of this rule reflects a change. The prosecution argues first, then the defense. The court may then permit the prosecution limited rebuttal, if the defense in its argument made a misstatement of law or fact or a statement that is inflammatory or prejudicial.

Rule 26.03, subd. 12 (Note Taking) is adapted from Minnesota Statutes, section 631.10 (1971) and ABA Standards, Trial by Jury 4.2 (Approved Draft, 1968).

Rule 26.03, subd. 13 (Substitution of Judge) supersedes Minnesota Statutes, section 542.16 (1988) concerning notice to remove a judge in criminal proceedings. Parts (1) and (2) of the rule are taken from F.R.Crim.P. 25(a)(b) and ABA Standards, Trial by Jury 4.3 (Approved Draft, 1968) and take the place of Minnesota Statutes, section 484.29 (1971). Part (3) of the rule is based on Unif.R.Crim.P. 741(c) (1987). Unlike Minn. R. Civ. P. 63.02, the criminal rule defers to the Code of Judicial Conduct as to the grounds for disqualification and provides expressly that the judge sought to be removed may not hear and determine the issue. See Rule 3C of the Code of Judicial Conduct as to the grounds for disqualification. Part (4) of the rule is based on Minn.R.Civ.P. 63.03 except that the time limit specified for the notice differs from that provided by the civil rule and Minnesota Statutes, section 542.16 (1988). The rule follows existing law and permits either the defendant or the prosecuting attorney to serve and file a notice to remove a judge as a matter of right without cause. *State v. Kraska*, 294 Minn. 540, 201 N.W.2d 742 (1972). Only one such removal as a matter of right is permitted to a party. Any other removals must be for cause. A request to remove a judge for cause may be made either before or after exercising the right to remove a judge without showing cause. A judge who has previously presided at the trial, the Omnibus Hearing, or other evidentiary hearing in the case, of which a party had notice, may not later be removed from the case by that party without a showing of cause. However, a party is not foreclosed from later serving and filing a notice to remove a judge who simply presided at an appearance under Rule 5 or Rule 8 in the case. Part (5) of the rule concerning recusal is based on Unif.R.Crim.P. 741(b) (1987). Under that rule a judge should disqualify himself or herself "whenever the judge has any doubt as to his or her ability to preside impartially in a criminal case or whenever the judge believes his or her impartiality can reasonably be questioned."

ABA Standards for Criminal Justice 6-1.7 (1985). Part (6) of the rule is based in part on Minn.R.Civ.P. 63.03 and 63.04 and Minnesota Statutes, section 542.16 (1988).

Rule 26.03, subd. 14(1) (Exceptions Abolished) is taken from Minn. R. Civ. P. 46 and supersedes Minnesota Statutes, section 547.03 (1971).

Rule 26.03, subd. 14(2) (Bills of Exception and Settled Cases Abolished) abolishes the bill of exceptions and settled case provided by Minnesota Statutes, sections 547.02-547.06, 632.05 (1971) and adopts Minn. R. Civ. P. 59.02 and Minn.R.Civ.App.P. 110.01 providing for the record on a hearing upon a motion for new trial and on appeal. See also F.R.Crim.P. 26.

Rule 26.03, subd. 15 (Evidence) leaves to the Minnesota Rules of Evidence the issues of the admissibility of evidence and the competency of witnesses except as otherwise provided in these rules. As to the use of a deposition at a criminal trial, Rule 21.06 controls rather than the Minnesota Rules of Evidence if there is any conflict between them. See Rule 802 and the Comments to Rule 804 in the Minnesota Rules of Evidence.

Rule 26.03, subd. 15 provides that any party offering a videotape or audiotape exhibit may also provide to the court a transcript of the tape. This rule does not govern whether any such transcript is admissible as evidence. That issue is governed by Article 10 of the Minnesota Rules of Evidence. However, upon an appeal of the proceedings, the transcript of the exhibit will be part of the record if the other party stipulates to the accuracy of the tape transcript as provided in Rule 28.02, subd. 9.

The provisions in Rule 26.03, subd. 16 (Interpreters) concerning the appointment of and compensation for interpreters comes from F.R.Crim.P. 28(b). The provision in the rule allowing qualified interpreters for any juror with a sensory disability to be present in the jury room during deliberations and voting was added to the rule to conform with Minnesota Statutes, section 593.32 and Rule 809 of the Jury Management Rules in the General Rules of Practice for District Courts which prohibit exclusion from jury service for certain reasons including sensory disability. Further, this provision allows the court to make reasonable accommodation for such jurors under the Americans with Disabilities Act, 42 U.S.C., section 12101 et seq. Caselaw holding that the presence of an alternate juror during deliberations is considered to be presumptively prejudicial, *State v. Crandall*, 452 N.W.2d 708 (Minn. App. 1990) would not apply to such qualified interpreters present during deliberations. As to an interpreter's duties of confidentiality and to refrain from public comment see respectively Canons 5 and 6 of the Code of Professional Responsibility for Interpreters in the Minnesota State Court System.

Rule 26.03, subd. 17 (Motion for Judgment of Acquittal), abolishing motions for directed verdict, and providing for motions for judgment of acquittal is taken from F.R.Crim.P. 29(a)(b)(c) and ABA Standards, Trial by Jury, 4.5(a)(b)(c) (Approved Draft, 1968). Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence. (See F.R.Crim.P. 29(a), ABA Standards, Trial by Jury, 4.5(a) (Approved Draft, 1968).)

Rule 26.03, subd. 18(1) (Requests for Instructions) follows Minn.R.Civ.P.51. See also F.R.Crim.P. 30 and ABA Standards, Trial by Jury 4.6(b) (Approved Draft, 1968).

Rule 26.03, subd. 18(2) (Proposed Instructions) substantially adopts similar provisions in Minnesota Statutes, section 546.14 (1971).

Rule 26.03, subd. 18(3) (Objections to Instructions) is adapted from F.R.Crim.P. 30 and ABA Standards, Trial by Jury 4.6(c)(e) (Approved Draft, 1968). The last sentence relating to errors in fundamental law comes from Minn. R. Civ. P. 51.

Rule 26.03, subd. 18(4) (Giving of Instructions) comes from Minn.R.Civ.P. 51 except that the provisions permitting the giving of instructions before closing arguments and the jury to take written instructions to the jury room are new.

Rule 26.03, subd. 18(5) (Contents of Instructions) provides that the court shall instruct the jury on the law and may summarize the claims of the parties, but does not permit comment on the evidence or on the credibility of the witnesses. Compare Minnesota Statutes, section 631.08 (1971) which provides that the judge may "present the facts of the case."

Rule 26.03, subd. 19 (Jury Deliberations and Verdict.)

Rule 26.03, subd. 19(1) (Materials to Jury Room) adopts the substance of Minnesota Statutes, section 631.10. [See also ABA Standards, Trial by Jury, 5.1(a) (Approved Draft,

1968).] It also permits the jury to take to the jury room a copy of the instructions, in the discretion of the court. For the notes of the jury see Rule 26.03, subd. 12.

Rule 26.03, subd. 19(2) (*Jury Requests to Review Evidence*) comes from ABA Standards, Trial by Jury, 5.2(a)(b) (Approved Draft, 1968) and takes the place of a similar provision of Minnesota Statutes, section 631.11 (1971).

Rule 26.03, subd. 19(3) (*Additional Instructions After Jury Retires*) is based on ABA Standards, Trial by Jury, 5.3(a)(b)(c) and takes the place of a similar provision of Minnesota Statutes, section 631.11 (1971).

Rule 26.03, subd. 19(4) (*Deadlocked Jury*.)

The kind of instructions that may be given to a deadlocked jury is left to judicial decision or to formulation of a pattern instruction. In *State v. Martin*, 297 Minn. 359, 211 N.W.2d 765 (1973), the Minnesota Supreme Court disapproved an Allen instruction (*Allen v. United States*, 17 S.Ct. 154, 164 U.S. 492, 41 L.Ed. 528 (1896)) and adopted ABA Standards, Trial by Jury, 5.4 (Approved Draft, 1968).

Rule 26.03, subd. 19(5) (*Polling the Jury*) is drawn from ABA Standards, Trial by Jury, 5.5 (Approved Draft, 1968) and Minnesota Statutes, section 631.16 (1971).

Rule 26.03, subd. 19(6) (*Impeachment of Verdict*) adopts the procedure outlined in *Swartz v. Minneapolis Suburban Bus Co.*, 258 Minn. 325, 328, 104 N.W.2d 301, 303 (1960).

Rule 26.03, subd. 19(7) (*Partial Verdict*) is taken from Unif.R.Crim.P. 535(e) (1987) and from *State v. Olkon*, 299 N.W.2d 89 (Minn. 1980) which authorized the court to accept a partial verdict. Under the rule a partial verdict of either guilty or not guilty may be accepted by the court.

Rule 26.04 (*Postverdict Motions*.)

Rule 26.04, subd. 1(1) (*Grounds of New Trial*) substantially adopts the grounds for a new trial set forth in Minnesota Statutes, section 547.01 (1971) and adds the ground that a new trial may be granted in the interests of justice. (See F.R.Crim.P. 33.) ABA Standards, Fair Trial and Free Press, 3.6 (Approved Draft, 1968) recommends that a verdict of guilty should be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more of the jurors was influenced by exposure to an extrajudicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Under existing Minnesota law, a motion for a new trial should not be granted on that ground if the defendant, having knowledge during the trial that one or more jurors has been exposed to an extrajudicial communication, fails promptly to move for a mistrial. (See *State v. O'Donnell*, 280 Minn. 213, 158 N.W.2d 699 (1968) outlining the steps to be taken by defense counsel in the event of prejudicial publicity during trial.)

Rule 26.04, subd. 1(2) (*Basis of Motion for New Trial*) is taken from Minn.R.Civ.P. 59.02 and supersedes Minnesota Statutes, sections 547.02, 547.023 (1971).

Rule 26.04, subd. 1(3) (*Time for Motion*) is based upon Minn.R.Civ.P. 59.03 and F.R.Crim.P. 35 and supersedes Minnesota Statutes, sections 547.02, 547.023 (1971). The postconviction remedy, Minnesota Statutes, sections 590.01–590.06 (1971) provides a means for relief on the ground of newly discovered evidence after the time for making a motion for new trial.

Rule 26.04, subd. 1(4) (*Time for Serving Affidavits*) is taken from Minn.R.Civ.P. 59.04.

Rule 26.04, subd. 2 (*Motion to Vacate Judgment*) is based on F.R.Crim.P. 34 except that it is treated as a motion to vacate judgment instead of a motion in arrest of judgment and permits the court to vacate a judgment of acquittal and to dismiss the case on the grounds stated or to dismiss the case if a judgment has not been entered.

Rule 26.04, subd. 3 (*Joinder of Motions*) provides for joinder of motions for new trial (Rule 26.04, subd. 1) and motions to vacate judgment (Rule 26.04, subd. 2).

Rule 26.04, subd. 4 (*New Trial on Court's Initiative*) permits the court to grant a new trial on its initiative with the consent of the defendant.

Rule 27. Sentence and Judgment

[For text of 27.01 and 27.02, see M.S. 1998, Volume 15]

27.03 Sentencing Proceedings

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

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

(A) At the time of, or within three days after a plea, finding or verdict of guilt of a felony, the court may order a presentence investigation and shall order that a sentencing worksheet be completed. As part of any presentence investigation and report, the court may order a mental or physical examination of the defendant. The court shall also then:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Subd. 3. Statements at Time of Sentencing. Before pronouncing sentence, the court shall give the prosecutor, the victim, and defense counsel an opportunity to make a statement with respect to any matter relevant to the question of sentence including a recommendation as to sentence. The court shall also address the defendant personally and ask if the defendant wishes to make a statement in the defendant's own behalf and to present any information before sentence including, in the discretion of the court, oral statements from other persons on behalf of the defendant. The court shall not accept any communication relative to sentencing that is not on the record without disclosing the contents to the defense and to the prosecution.

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

(A) Shall state the precise terms of the sentence.

(B) Shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed. Such time shall be automatically deducted from the sentence and the term of imprisonment including time spent in custody as a condition of probation from a prior stay of imposition or execution of sentence.

(C) For felony cases if the sentence imposed departs from the sentencing guidelines applicable to the case, the court shall state, on the record, findings of fact as to the reasons for departure and shall forward, or cause to be forwarded, to the sentencing guidelines commission a copy of the transcript of that portion of the record or a completed departure form as provided by the commission. Such departure report shall be filed with the commission and the clerk of court for the trial court within 15 days after the date of sentencing.

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

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

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

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

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

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

Subd. 5. Notice of Right to Appeal. After imposition of sentence or granting of probation the court shall inform the defendant of the right to appeal the judgment of conviction or

sentence or both and the right of a person who is unable to pay the cost of appeal to apply for leave to appeal at state expense by contacting the state public defender.

Subd. 6. Record. A verbatim record of the sentencing proceedings shall be made. In felony and gross misdemeanor cases any verbatim record made in accordance with this rule shall be transcribed and filed with the clerk of court for the trial court within 30 days after the date of sentencing. In misdemeanor cases any such record need not be transcribed unless requested by the court, the defendant or the prosecuting attorney.

Subd. 7. Judgment. The clerk's record of a judgment of conviction shall contain the plea, the verdict of findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The sentence or stay of imposition of sentence is an adjudication of guilt.

Subd. 8. Clerical Mistakes. Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

Subd. 9. Correction or Reduction of Sentence. The court at any time may correct a sentence not authorized by law. The court may at any time modify a sentence during either a stay of imposition or stay of execution of sentence except that the court may not increase the period of confinement.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 27.05 for Comment.

27.04 Probation Revocation

Subd. 1. Commencement of Proceedings.

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

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

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

Subd. 2. First Appearance.

(1) Advice to Probationer. A probationer who initially appears before the court pursuant to a warrant or summons concerning an alleged probation violation, shall be advised of the nature of the violation charged. Prior to doing this, the judge, judicial officer, or other duly authorized personnel shall determine whether the probationer is handicapped in communication and, if so, appoint a qualified interpreter to assist the probationer throughout

the probation violation proceedings. The probationer shall also be given a copy of the written report upon which the warrant or summons was based if the probationer has not previously received such report. The judge, judicial officer, or other duly authorized personnel shall further advise the probationer substantially as follows:

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

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

c. That before the revocation hearing all evidence to be used against the probationer shall be disclosed to the probationer and the probationer shall be provided access to all official records pertinent to the proceedings;

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

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

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

(3) Conditions of Release. The probationer may be released pending appearance at the revocation hearing. In deciding upon the conditions of release and whether to release the probationer, the court shall take into account the conditions of release and the factors determining the conditions of release as provided by Rule 6.02, subd. 1 and subd. 2 and whether there is a reason to believe that the probationer will flee or pose a danger to any person in the community. The burden of establishing that the probationer will not flee or will not be a danger to any other person or the community rests with the probationer.

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

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

Subd. 3. Revocation Hearing.

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

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

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

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

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

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

(5) The probationer or the prosecution may appeal from the court's decision according to the procedure provided for appeal from a sentence by Rule 28.05.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 27.05 for Comment.

[For text of 27.05, see M.S. 1998, Volume 15]

Comment

Rule 27.01 (Conditions of Release) is based on F.R.Crim.P. 32, 46(c) and 28 U.S.C., section 3148. Pending sentence the conditions for defendant's release or whether the defendant should be confined are to be determined under Rules 6.02, subd. 1 and subd. 2, governing pretrial release, but the defendant has the burden of establishing the defendant will not flee or pose a danger to any other person or to the community.

Minnesota Constitution, Article I, section 7, provides that all persons shall before conviction be bailable by sufficient sureties. The defendant is not entitled to bail as a matter of right after conviction.

Rule 27.02 (Presentence Investigation in Misdemeanor Cases.) In misdemeanor cases the presentence investigation report may be oral rather than written and this will often be the case. Where the report is oral, the defendant or defense counsel must be allowed to hear the report when given. If a presentence report is prepared, the officer conducting the investigation is required by Minnesota Statutes, section 609.115, subd. 1 and Minnesota Statutes, section 611A.037 to advise the victim of the crime concerning the victim's rights under those statutes and under Minnesota Statutes, section 611A.038. Those rights include the rights to request restitution and to submit an impact statement to the court at sentencing.

Rule 27.03 (Sentencing Proceedings.)

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

The sentencing hearings "as provided by law" under Rule 27.03, subd. 1 would include restitution proceedings under Minnesota Statutes, sections 611A.04 and 611A.045 (1988). The authorization and procedure to obtain restitution as set forth in the Minnesota rules and statutes substantially conforms to the "Guidelines Governing Restitution to Victims of Criminal Conduct" approved by the American Bar Association on August 9-10, 1988.

Sentencing in felony cases for offenses committed on or after May 1, 1980, is governed by Minnesota Statutes, Minnesota Statutes, chapter 244 and the Minnesota Sentencing Guidelines promulgated pursuant to those statutes. The more complex procedures required by these rules for felony cases are necessary for a proper sentencing decision under the sentencing guidelines. Because of the adoption of the Minnesota Sentencing Guidelines an ad

hoc volunteer committee chaired by Chief Justice Douglas Amdahl drafted proposed rules for sentencing under the guidelines. These rules were approved by the District Court Judges Association and the Ramsey County District Court Judges. The proposals of the *ad hoc* committee have been substantially incorporated into Rules 27.03, subds. 1 through 5 and these Comments.

The Sentencing Guidelines Commission recommends that where the felony involved a sexual offense, that the trial court order a physical or mental examination of the offender as a supplement to the presentence investigation permitted by Minnesota Statutes, section 609.115. Minnesota Sentencing Guidelines and Commentary, Training Material, III. E. (Hereinafter referred to as Training Manual.) Rule 27.03, subd. 1(A) permits the court to order such examinations. This rule is not intended to preclude a postsentence investigation whenever required by statute (Minnesota Statutes, section 609.115, subd. 2 (sentence of life imprisonment)) or whenever the court considers one unnecessary. The presentence investigation may include the information obtained on the pretrial release investigation under Rule 6.02, subd. 3. If a defendant is convicted of a domestic abuse offense as defined by Minnesota Statutes, section 609.2244, subd. 1, a presentence domestic abuse investigation must be conducted. A report must then be submitted to the court which meets the requirements set forth in Minnesota Statutes, section 609.2244, subd. 2.

The Advisory Committee 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 prerelease investigation under Rule 6.02, subd. 3 and may later be included with any presentence investigation report required under Rule 27.03, subd. 1.

The date for the return of the presentence investigation report should be set sufficiently in advance of sentencing to allow counsel sufficient time to make any motion pursuant to Rule 27.03, subd. 1(D). The officer conducting the presentence investigation is required by Minnesota Statutes, section 609.115 and Minnesota Statutes, section 611A.037 to advise any victim of the crime concerning the victim's rights under those statutes and under Minnesota Statutes, section 611A.038. Those rights include the rights to request restitution and to submit an impact statement to the court at sentencing.

The date of the sentencing should be determined after consultation with counsel to determine if unusual problems are anticipated in obtaining the information necessary to complete the report of the presentence investigation (e.g., securing necessary documentation of out-of-state convictions needed to compute the criminal history index score).

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

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

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

Rule 27.03, subd. 1(F) is in accord with Minnesota Statutes, section 244.10, subd. 1, which requires that written findings of fact, conclusions of law and appropriate order on the issues raised at the sentencing hearing be issued at the conclusion of the hearing or within 20 days thereafter.

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

Rule 27.03, subd. 2 (Defendant's Presence at Hearing and Sentencing) is adopted from F.R.Crim.P.43. See also N.Y.C.L. 380.40. The interpreter requirement is based upon Rule 5 and Minnesota Statutes, sections 611.31 to 611.34 (1992).

Rule 27.03, subd. 3 (Statements at the Time of Sentencing) is based on ABA Standards, Sentencing Alternatives and Procedures, 18-6.3 and 18-6.4 (Approved Draft, 1979). See

also *N.Y.C.P.L. 380.50*. The right of the victim of the crime to make a statement at sentencing is in accord with *Minnesota Statutes, section 611A.038*.

Rule 27.03, subd. 4 (Imposition of Sentence) parts (A) and (B) are based on *ABA Standards, Sentencing Alternatives and Procedures, 18-6.6iii, iv* (Approved Draft, 1979). Existing law relating to probation is continued (*Minnesota Statutes, sections 609.135, 609.14*).

Minnesota Statutes, section 611A.06 requires the Commissioner of Corrections or other custodial authority to notify the victim of the crime when an offender is to be released from imprisonment. *Minnesota Statutes, section 611A.0385* further requires that the court or its designee shall at the time of the sentencing make reasonable good faith efforts to inform any identifiable victims of their right to such notice under *Minnesota Statutes, section 611A.06*.

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

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

Rule 27.03, subd. 4(E) is designed to avoid any due process notice problems if probation is revoked and sentence executed. A defendant has a right to refuse probation when the conditions of the probation are more onerous than a prison sentence, *State v. Randolph, 316 N.W.2d 508* (Minn. 1982).

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

Grounds for and alternatives to probation revocation.

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

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

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

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

Rule 27.03, subd. 5 (Notice of Right to Appeal) is based on *F.R.Crim.P. 32*. Failure to notify the defendant of the right to appeal does not extend the time for appeal. *Minnesota Statutes, section 244.11* authorizes either the defendant or the state to appeal from a sentence whether imposed or stayed. See Rule 28.05 for the procedure to be followed on such an appeal.

Rule 27.03, subd. 6 (Record), requiring a verbatim record of the sentencing proceedings, is in accord with *ABA Standards, Sentencing Alternatives and Procedures, 5.7* (Approved Draft, 1968). It does not affect the provisions of *Minnesota Statutes, section 243.49* (1971) relative to the transcription of trial court proceedings.

Rule 27.03, subd. 7 (Judgment), stating what the record of the judgment shall contain, is adapted from *F.R.Crim.P. 32(b)*. The sentence or stay of imposition of sentence constitutes an adjudication of guilt if the court does not sooner make such an adjudication.

Rule 27.03, subd. 8 (Clerical Mistakes) for correction of clerical mistakes is taken from *F.R.Crim.P. 36*.

Rule 27.03, subd. 9 (Correction or Reduction of Sentence), adopted from F.R.Crim.P. 35, permits the court to correct an unauthorized sentence at any time. This would include a failure to follow proper procedures in connection with the imposition of sentence. The rule also permits the court at any time to modify a sentence during either a stay of imposition or stay of execution of sentence except to increase the period of confinement. The powers of the court under this rule are not limited by the duration or expiration of a term of court. Other remedies available in connection with the sentence are provided for the postconviction remedy (Minnesota Statutes, chapter 590 (1971)).

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

At that time the court may order the defendant released under Rule 27.04, subd. 2(3) pending the final revocation hearing. At that initial appearance the defendant shall also be given the written report showing probable cause if not already provided, have counsel appointed if necessary, be advised as to the rights under the rule, and have a time set for the final revocation hearing.

The provisions in Rule 27.04, subd. 1(1) as to the contents of the written report and in Rule 27.04, subd. 2(1) as to the defendant's various procedural rights are taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(d) and (e) (Approved Draft, 1979). The interpreter requirement is based upon Rule 5 and Minnesota Statutes, sections 611.31 to 611.34 (1992). The provisions in Rule 27.04, subd. 2(3) concerning release of the defendant are similar to those set forth in Rule 27.01 concerning release of a defendant pending sentencing. The standard of proof set forth in Rule 27.04, subd. 3(2) and (3) is taken from ABA Standards, Sentencing Alternatives and Procedures, 18-7.5(e).

Rule 27.05 (Pretrial Diversion) is based on Unif.R.Crim.P. 442 (1987) and ABA Standards for Criminal Justice 10-6.1 through 10-6.3 (1985) except that court approval is required for all pretrial diversion when charges are pending during the period of diversion. This rule does not preclude the prosecuting attorney and defendant from agreeing to diversion of a case without court approval if charges are not pending before the court. The requirement in subd. 1(1) that the prosecuting attorney give "due consideration of the victim's views" is in accord with the requirement in Minnesota Statutes, section 611A.031 that the prosecuting attorney "make every reasonable effort to notify and seek input from the victim" before employing pretrial diversion for certain specified offenses. With the approval of the court, the conditions specified in Rule 27.05, subd. 1(2), including restitution, may be included in the pretrial diversion agreement. See Minnesota Statutes, sections 611A.04 and 611A.045 as to requiring restitution as part of a sentence. Under Rule 27.05, subd. 1(3), no condition may be included in the pretrial diversion agreement that could not be imposed upon probation after conviction of the crime charged. See Minnesota Statutes, section 609.135 as to the permissible conditions of probation. See Minnesota Statutes, section 611A.031 regarding the prosecutor's duties under the Victim's Rights Act, for certain designated offenses, to make every reasonable effort to notify and seek input prior to placing a person into a pretrial diversion program.

Rule 28. Appeals to Court of Appeals

[For text of 28.01, see M.S. 1998, Volume 15]

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 State Public Defender.

(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.

(5) If a defendant convicted of a crime against person is released pending appeal pursuant to this rule, the prosecution shall make reasonable good faith efforts to advise the victim as soon as possible of the defendant's release.

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 unless the parties have already stipulated to the accuracy of a transcript of such exhibit previously made a part of the record in the trial court. The transcript of any such exhibit then shall be included as part of the record. It shall not be necessary for the court reporter to certify the correctness of any such videotape or audiotape transcript. 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 pre-trial 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.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 28.05 for Comment.

[For text of 28.03, see M.S. 1998, Volume 15]

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, including probable cause dismissal orders based on questions of law. However, an order is not appealable (a) if it is based solely on a factual determination dismissing a complaint for lack of probable cause to believe the defendant has committed an offense or (b) if it is an order dismissing a complaint pursuant to Minnesota Statutes, section 631.21; and

(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; and

(4) in any case, from a judgment of acquittal by the trial court entered after the jury returns a verdict of guilty under Rule 26.03, subd. 17(2) or (3); and

(5) in any case, from an order of the trial court vacating judgment and dismissing the case made after the jury returns a verdict of guilty under Rule 26.04, subd. 2.

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 which shall also include a statement for the record as to how the trial court's alleged error, unless reversed, will have a critical impact on the outcome of the trial, the trial court shall order a stay of proceeding 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 which shall also include a summary statement by the prosecutor as to how the trial court's alleged error, unless reversed, will have a critical impact on the outcome of the trial, 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 en-

tered 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 pretrial 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 Appellate 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.

Subd. 7. Procedure Upon Appeal from Judgment of Acquittal or Vacation of Judgment After a Jury Verdict of Guilty.

(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 judgment or 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 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 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 from either a judgment of acquittal after a jury verdict of guilty, or an order vacating judgment and dismissing the case after a jury verdict of guilty, shall be taken within ten days after entry of the judgment or order.

(3) Stay and Conditions of Release. Upon oral notice that the prosecuting attorney intends to appeal from a judgment of acquittal after a jury verdict of guilty or from an order vacating judgment and dismissing the case after a jury verdict of guilty, the trial court shall order a stay of execution of the judgment or order of ten (10) days to allow time to perfect the appeal. The trial court shall also determine the conditions for defendant's release pending the appeal, which conditions shall be governed by Rule 6.02, subds. 1 and 2.

(4) 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 and 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 from either a judgment of acquittal after a jury verdict of guilty or an order vacating judgment and dismissing the case after a jury verdict of guilty.

(5) Cross-Appeals. Upon appeal by the prosecuting attorney under this subdivision, the defendant may obtain review of any pretrial and trial orders and issues, by filing a notice of cross-appeal with the clerk of the appellate courts, together with proof of service on the prosecuting attorney, within 30 days of the prosecutor filing notice of appeal or within ten days after delivery of the transcript by the reporter, whichever is later. If this election is made and the jury's verdict is ultimately reinstated, the defendant may not file a second appeal from the entry of judgment of conviction unless it is limited to issues, such as sentencing, that could not have been raised in the cross-appeal. The defendant may also elect to respond to the issues raised in the prosecutor's appeal and reserve appeal of any other issues until such time as the jury's verdict of guilty is reinstated. If reinstatement occurs, the defendant may appeal from the judgment using the procedures set forth in Rule 28.02, subd. 2.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1991; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

See Rule 28.05 for Comment.

[For text of 28.05, see M.S. 1998, Volume 15]

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. Minnesota Statutes, section 611A.0395 requires the prosecuting attorney to make a reasonable and good faith effort to notify a victim of any pending appeal, of any hearings or arguments on the appeal, and of the final decision.

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 autho-

rized by Minnesota Constitution, Article VI, section 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. If the parties have stipulated to the accuracy of a transcript of videotape or audiotape exhibits and made it part of the trial court record, that becomes part of the record on appeal and it is not necessary for the court reporter to transcribe the exhibits. If no such transcript exists, a transcript need not be prepared unless expressly requested by the appellant or the respondent. The exhibit then must be transcribed, but the court reporter need not certify the correctness of the exhibit transcript as is otherwise required for the remainder of the transcript under Rule 110.02, subd. 4 of the Rules of Civil Appellate Procedure. This exception is made because of the difficulties often encountered in preparing such a transcript. If either of the parties questions the accuracy of the court reporter's transcript of a videotape or audiotape exhibit that party may seek to correct the transcript either by stipulation with the other party or by motion to the trial court under Rule 110.05 of the Rules of Civil Appellate Procedure.

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 argument. 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 consid-

ered 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. Rule 28.04, subd. 1(1) makes it clear that under case law decided since the original adoption of the rules prosecutors may appeal from dismissals for lack of probable cause if such orders are based on questions of law. See, e.g., *State v. Aarsvold*, 376 N.W.2d 518 (Minn. App. 1985), rev. denied (Minn. Dec. 30, 1985); *State v. Kiminski*, 474 N.W.2d 385, 388–89 (Minn. App. 1991), rev. denied (Minn. Oct. 11, 1991); and *State v. Lores*, 512 N.W.2d 618, 620 (Minn. App. 1994), rev. denied (Minn. April 28, 1994). 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. The prosecutor's right to appeal from a trial court's judgment of acquittal after a jury returns a verdict of guilty, or from a trial court's order vacating judgment and dismissing the case after a jury returns a verdict of guilty, does not offend the constitutional protection against double jeopardy because a reversal of the trial court's order on appeal would merely reinstate the jury's verdict and would not subject the defendant to another trial, *United States v. Wilson*, 420 U.S. 332, 344–45, 95 S.Ct. 1013, 1022–23 (1975). The defendant may elect to appeal any orders or issues arising in the course of the criminal process by filing a cross-appeal.

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). **CRITICAL IMPACT REQUIREMENT.** Although the prosecutor need no 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. The rule requires prosecutors to articulate their position on critical impact both in the oral notice to the trial court of intent to appeal (under Rule 28.04, subd. 2(1)), and in the statement of the case to the Court of Appeals (under Rule 28.04, subd. 2(2)).

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).

[For text of 29. to 36., see M.S. 1998, Volume 15]

CRIMINAL FORMS

TABLE OF FORMS

Introductory Statement

Form

- 11 Petition to Proceed as Pro Se Counsel
- 49 Criminal Judgment and Warrant of Commitment
- 50 Jury Questionnaire

INTRODUCTORY STATEMENT

The following forms are limited in number. No attempt is made to furnish a complete manual of forms. For all complaints charging a misdemeanor offense the prosecuting attorney, judge, judicial officer or clerk of court authorized to issue process shall use the appropriate form as set forth in the following criminal forms or a form substantially in compliance with these forms. The other forms provided herein are not mandatory, but shall be accepted by the court if offered by any party or counsel for their designated purpose.

Comment

The Final Report of the Minnesota Supreme Court Task Force on Racial Bias in the Judicial System (1993) recommends that all judicial forms and documents be drafted in easily translatable English, and be translated by approved legal translators into such additional languages as the State Court Administrator approves. It is recommended that any criminal forms that are translated consist of both English and the additional language.

[For text of Forms 1. to 10., see M.S. 1998, Volume 15]

FORM 11 – PETITION TO PROCEED PRO SE COUNSEL

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF _____

JUDICIAL DISTRICT _____

State of Minnesota,

Plaintiff,

PETITION TO PROCEED
AS PRO SE COUNSEL

vs.

District Court File No. _____

Defendant.

TO: THE ABOVE-NAMED COURT

I, _____ defendant in the above-entitled action, request the Court to allow me to represent myself, and do respectfully represent and state as follows:

1. My full name is _____. I am _____ years old. My date of birth is _____. The last grade that I went through in _____ school is _____.

2. I have received and read the (complaint)(indictment).

3. I understand the charge(s) made against me.

b. That the maximum statutory penalty that the Court could impose for this crime (taking into consideration any prior conviction or convictions) is imprisonment for _____ years, and/or a fine of \$_____. That if a minimum sentence is required by statute the Court may impose a sentence of imprisonment of not less than _____ months for this crime.

17. I understand that if I am eligible for the services of the public defender, the Court will appoint the Office of the _____ Public Defender. However, I am under no obligation to seek advice from advisory counsel. I understand that the role of advisory counsel is limited. I understand that:

a. Advisory counsel will be physically present in the courtroom during all proceedings in my case.

b. Advisory counsel will respond to request for advice from me. Advisory counsel will not initiate such discussions.

c. The support staff of the public defender – investigators, secretaries, law clerks, and legal service advisors will not be available to me.

d. If need investigative services, expert services, waivers of fees, research, secretarial services, or any other assistance, I must petition the Court for whatever relief or assistance I deem appropriate. Such request is pursuant to Minnesota Statutes, section 611.21.

e. If I am out of custody and desire to conduct legal research, I will be expected to do it myself at the library.

f. Advisory counsel will not be prepared to try my case on the trial date unless ordered to be prepared to do so by the court.

g. Advisory counsel will be present for all Court appearances to consult with me if I request. Advisory counsel will be seated either at the back of the courtroom or at counsel table, based on my wishes and the Court's wishes. In an effort to vindicate my constitutional right to self-representation, advisory counsel will not initiate motions, objections, arguments to the Court, or any other aspect of representation unless I have given prior approval to the specific aspect of representation.

h. If I wish to give up my right to represent myself, I know that the Court will not automatically grant my request. The Court will consider the following in either granting or denying that request: the stage of the proceedings, whether advisory counsel is prepared to take over, the length of the continuance necessary for the advisory counsel to assume representation, the prejudice to either party, whether the jury has been sworn, and any other relevant considerations.

i. If the Court grants my request to give up the right to represent myself and substitute advisory counsel, the trial date may be continued if requested by the advisory counsel. The trial date will then be reset at a date mutually agreeable between counsel for the prosecution and counsel for the defendant.

j. In the unlikely event that the Court orders advisory counsel to represent me after the trial has started and jeopardy has attached, the Court may grant a mistrial if requested by my new attorney and reset the trial date at a date mutually agreeable between counsel.

18. That in view of the above, I wish to waive my right to be represented by an attorney and represent myself.

Dated this _____ day of _____, _____.

Petitioner

(Added effective January 1, 1999.)

[For text of Forms 12. to 48., see M.S. 1998, Volume 15]

FORM 49 – CRIMINAL JUDGEMENT AND WARRANT OF COMMITMENT

FORM 49 – CRIMINAL JUDGMENT AND WARRANT OF COMMITMENT

State of Minnesota		District Court
County 	Judicial District 	Case Number
State of Minnesota vs.		CRIMINAL JUDGMENT AND WARRANT OF COMMITMENT
Name: _____ A/K/A: _____		
Address: _____		
Phone: _____ Sex: ____ Race: _____ DOB: ____/____/____		
Custody Status: _____		
SJIS Complaint #: _____ Controlling Agency: _____ Control Number: _____		
JUDGMENT AND CONDITIONS		
Offense Date: ____/____/____		
Date of: ☐ Sentence ☐ Violation/Revocation ☐ Resentence ☐ Correction ____/____/____		
Level of Conviction: ☐ Felony ☐ Gross Misdemeanor ☐ Misdemeanor Count(s) _____		
Count #: _____ M.S. § _____ M.O.C. _____ G.O.C. _____		
☐ amended ☐ reduced		
On ____/____/____ the defendant:		
☐ entered a plea of guilty ☐ probation before conviction (M.S. § 152.18) ☐ was found guilty by the Court ☐ stay of adjudication ☐ was found guilty by a jury ☐ other		
Non-Conviction Dispositions Count Number(s): _____ ☐ Dismissed ☐ Acquitted		
☐ FELONY LEVEL SENTENCE		
☐ Committed to Commissioner of Corrections for _____ years, _____ months and _____ days (M.S. §244.101: When the court sentences an offender to an executed sentence for an offense occurring on or after Aug. 1, 1993, the sentence consists of two parts: a specified minimum term of imprisonment equal to two-thirds of the total executed sentence; and a specified maximum supervised release term equal to one-third of the total executed sentence.)		
☐ Sex Offender Conditional Release pursuant to M.S. § 609.346: ☐ 5 years ☐ 10 years(2nd/Subsequent)		
☐ Stay of execution for _____ years, _____ months		
OR		
☐ Stay of imposition for _____ years, _____ months		
☐ MISDEMEANOR/GROSS MISDEMEANOR LEVEL SENTENCE		
☐ Sentence to ☐ jail ☐ work house for _____ months, _____ days of which _____ months, _____ days are stayed for _____ years, _____ months		
OR		
☐ Stay of imposition for _____ years, _____ months		
Sentence is ☐ concurrent or ☐ consecutive to: Case #: _____ Count #(s): _____		
☐ Departure Report should be forwarded to the Minnesota Sentencing Guidelines Commission		

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999.)

FORM 50 – JURY QUESTIONNAIRE

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

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

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

1. Name _____
 2. Place of residence (City, Village, or Township): _____
Zip Code _____
 3. How long have you lived in this location? _____
 4. Where did you grow up? _____
How long have you lived in this County? _____
 5. Your age _____
 6. Are you currently (check one) single (never married) _____
separated _____ divorced _____ married _____
widowed _____?
 7. How many years of school have you completed? _____
 8. What high school(s) did you attend and the last calendar year you attended? _____
 9. If you attended college or vocational school after high school, list: 1. the name of the school, 2. major type of training, 3. dates attended, 4. degrees or certificates.

 10. Are you currently: (check one)
employed full time _____ employed at more than one job _____
employed part time _____ temporarily laid off _____
unemployed _____ retired _____ homemaker _____ disabled _____
student _____
 11. If employed or temporarily laid off, list occupation, name of employer and duties:

 12. How long have you worked for this employer? _____
What previous jobs have you held? _____
 13. Please describe the occupation and education of: other adults in your household or, if divorced, your ex-spouse
your mother _____
your father _____
 14. If you have any children, please list their age, sex, occupation if employed:

 15. Have you ever served in the military? Yes _____ No _____
If yes, list the branch, place and date of service, rank at discharge and the type of discharge: _____

- Are you now serving in a reserve unit? Yes _____ No _____

16. Please list the organizations to which you belong, in which you participate, or in which you have ever held any office. For example, service clubs, governmental bodies, unions or professional organizations, volunteer activities, educational or political groups, etc.: _____
- _____
- _____

Answer this question for other adults in your household:

17. Have you ever served on a jury? Yes ____ No ____
If yes, please list the year or years in which you served
and whether the case was civil or criminal:
- | | |
|-------|-------------------|
| year | civil or criminal |
| _____ | _____ |
| _____ | _____ |
| _____ | _____ |

If you served on a criminal jury was a verdict reached?
Yes ____ No ____ What was the charge? _____

18. Have you ever served on a grand jury? Yes ____ No ____
If yes, how many cases were presented to the grand jury
on which you served?

If yes, did the grand jury return an indictment(s)?
Yes ____ No ____

19. Have you ever been called as a witness in court or given
a statement in any legal proceeding? Yes ____ No ____
If yes, please describe the circumstances:
- _____
- _____
- _____

20. Do you have any close relatives or friends who are
lawyers, judges, or are employed in any other job within
the legal profession? Yes ____ No ____
If yes, list the name(s), relationship(s) and occupation(s):
- _____
- _____
- _____

21. Have you or any close relatives or friends ever been sued
or sued someone else? Yes ____ No ____
If yes, please explain: _____
- _____
- _____

22. Have you ever had any legal or medical training?
Yes ____ No ____
If yes, please describe: _____
- _____
- _____

23. Have you or any close relatives or friends ever been the
victim of a crime? Yes ____ No ____

If yes, please explain: _____

24. Have you ever been a witness to a crime, or ever been questioned by a law enforcement officer about a crime?

Yes ____ No ____

If yes, please explain: _____

25. Have you ever filed a complaint against someone with law enforcement? Yes ____ No ____

If yes, please explain: _____

26. Have you or any close relatives or friends ever been charged with or accused of a crime? Yes ____ No ____

If yes, please explain the circumstances and the results: _____

27. Have you or any close relatives or friends ever worked in law enforcement, such as for a police department, highway patrol, state crime bureau or sheriff? Yes ____ No ____

If yes, please list their name(s), occupation(s), and employer(s): _____

28. Have you or any close relatives or friends ever worked for a fire department or rescue squad? Yes ____ No ____

29. Do you have any close relatives or friends who have ever worked as a probation officer or in the prison system?

Yes ____ No ____

30. Do you have any religious or philosophical beliefs that would make it difficult for you to be a juror? Yes ____

No ____ If yes, please explain: _____

31. Do you have any disabilities, physical, mental, or other problems which would make it difficult for you to sit as a juror? Yes ____ No ____

If yes, please explain: _____

Do you have any limitations on your vision or hearing?

Yes ____ No ____

If yes, would a special seating assignment help you follow the trial and enable you to serve on the jury? Yes ____

No ____

32. Have you or any close relatives or friends ever been addicted to anything, such as alcohol or drugs of any kind?

Yes ____ No ____

33. Are there any pressing matters that would distract you or prevent you from giving jury service your complete and undivided attention? Yes ____ No ____

If yes, please explain: _____

I have given complete and honest answers to all of the questions above.

Dated: _____

Signature

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight
January 1, 1999.)