

CRIMINAL PROCEDURE

Minnesota Rules of Criminal Procedure

Revised effective January 1, 1990
With amendments received through August 1, 2007

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TEXT OF RULES

Rule 1. Scope, Application, General Purpose and Construction

[For text of 1.01 to 1.03, see M.S. 2006, 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 charged or punishable under Minnesota Statutes, section 169A.20, Minnesota Statutes, section 169A.25, Minnesota Statutes, section 169A.26 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.

(d) Aggravated Sentence. As used in these rules, the term “aggravated sentence” refers to a sentence that is an upward durational or dispositional departure from the presumptive sentence provided for in the Minnesota Sentencing Guidelines based upon aggravating circumstances or a statutory sentencing enhancement.

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

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. 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 169A.20 relates to driving, operating, or physical control of a motor vehicle while under the influence of alcohol or a controlled or hazardous substance or refusing to submit to a chemical test and Minnesota Statutes, section 171.24 (1997) relates to driving after cancellation. Minnesota Statutes, section 169A.25 (second-degree driving while impaired) and Minnesota Statutes, section 169A.26 (third-degree driving while impaired) establish the circumstances under which violations of Minnesota Statutes, section 169A.20 constitute a gross misdemeanor.

Rule 1.04 (d) defines "aggravated sentence" for the purpose of the provisions in these rules governing the procedure that a sentencing court must follow to impose an upward sentencing departure in compliance with *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). On June 24, 2004, the United States Supreme Court decided in *Blakely* that an upward departure in sentencing under the State of Washington's determinate sentencing system violated the defendant's Sixth Amendment rights where the additional findings required to justify the departure were not made beyond a reasonable doubt by a jury. The definition is in accord with existing Minnesota case law holding that *Blakely* applies to upward departures under the Minnesota Sentencing Guidelines and under various sentencing enhancement statutes requiring additional factual findings. See, e.g., *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005) (durational departures); *State v. Allen*, 706 N.W.2d 40 (Minn. 2005) (dispositional departures); *State v. Leake*, 699 N.W.2d 312 (Minn. 2005) (life sentence without release under Minnesota Statutes, section 609.106); *State v. Barker*, 705 N.W.2d 768 (Minn. 2005) (firearm sentence enhancements under Minnesota Statutes, section 609.11); and *State v. Henderson*, 706 N.W.2d 758 (Minn. 2005) (career offender sentence enhancements under Minnesota Statutes, section 609.1095, subd. 4). However, these *Blakely*-related protections and procedures do not apply retroactively to sentences that were imposed and were no longer subject to direct appeal by the time that *Blakely* was decided on June 24, 2004. *State v. Houston*, 702 N.W.2d 268 (Minn. 2005). Also, the protections and procedures do not apply to sentencing departures and enhancements that are based solely on a defendant's criminal conviction history such as the assessment of a custody status point under the Minnesota Sentencing

Guidelines. State v. Allen, 706 N.W.2d 40 (Minn. 2005). For aggravated sentence procedures related to Blakely, see Rule 7.03 (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by complaint); Rule 9.01, subd. 1(7) (discovery of evidence relating to an aggravated sentence); Rule 11.04 (Omnibus Hearing decisions on aggravated sentence issues); Rule 15.01, subd. 2 and Appendices E and F (required questioning and written petition provisions concerning defendant's admission of facts supporting an aggravated sentence and accompanying waiver of rights); Rule 19.04, subd. 6(3) (notice of prosecutor's intent to seek an aggravated sentence in proceedings prosecuted by indictment); Rule 26.01, subd. 1(2)(b) (waiver of right to a jury trial determination of facts supporting an aggravated sentence); Rule 26.01, subd. 3 (stipulation of facts to support an aggravated sentence and accompanying waiver of rights); Rules 26.03, subd. 17(1) and (3) (motion that evidence submitted to jury was insufficient to support an aggravated sentence); Rule 26.03, subd. 18(6) (verdict forms); Rule 26.03, subd. 19(5) (polling the jury); and Rule 26.04, subd. 1 (new trial on aggravated sentence issue). The procedures provided in these rules for the determination of aggravated sentence issues supersede the procedures concerning those issues in Minnesota Statutes, section 244.10 (see 2005 Minnesota Laws, chapter 136, article 16, sections 3 to 6) or other statutes.

(Amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Rule 2 to 4.03, see M.S. 2006, Volume 15]

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 felony cases, 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.

(g) That if the offense is a gross misdemeanor and the defendant has had an opportunity to consult with an attorney, the defendant may enter a plea of guilty in accordance with Rule 15.01.

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; amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

See Rule 5.06 for Comment.

[For text of 5.02 to 5.08, see M.S. 2006, 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.)

Pursuant to Rule 5.01(g), a defendant may plead guilty to a gross misdemeanor at the first appearance under Rule 5 in accordance with the guilty plea provisions of Rule 15.01. If that is done, the defendant must first have the opportunity to consult with an attorney. If the guilty plea is to a designated gross misdemeanor prosecuted by tab charge, it is necessary that a complaint be made, served, and filed before the court accepts the guilty plea. See Rule 4.02, subd. 5(3), and the comments to that rule. See also Rule 5.02, subd. 1(4), concerning waiver of the right to counsel. Rule 5.01(g) does not permit a defendant to enter a plea of not guilty to a gross misdemeanor at the first appearance under Rule 5. Rather, in accordance with Rules 8.01 and 11.10, a not guilty plea in felony and gross misdemeanor cases is not entered until the Omnibus Hearing or later.

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.

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 counsel to the pro se defendant suggest a natural expectation of the level of readiness of advisory counsel. If the court appoints advisory counsel as a safeguard to the fairness of the proceeding, it would not be expected that counsel would be asked to take over the representation of the defendant during the trial and counsel should not be expected and need not be prepared to take over representation should this be requested or become necessary. If this unexpected event occurred and a short recess of the 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 Legislature effective July 1, 2003 in Minnesota Statutes, section 611.27 (Supp. 2003) except that the statute expressly prohibits the appointment of the public defender as advisory counsel. This rule also recognizes the limited resources of district public defenders.

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.

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 existence of such a referral list may not, however, be a basis for failing to appoint counsel for a defendant who is financially eligible for public defender representation under Parts (1) or (2) of this rule.

To assist the court in deciding whether to appoint the public defender, Rule 5.02, subd. 4 provides that whenever possible a financial inquiry should be conducted before the defendant's appearance in court. Such an inquiry may be combined with the pre-release investigation provided for in Rule 6.02, subd. 3. The rule also emphasizes the court's obligation to jealously guard the resources of district public defense and outlines the extent to which the court must go to determine district public defense eligibility in accordance with *In Re Stuart*, 646 N.W.2d 520 (Minn. 2002). In order to avoid the creation of conflicts of interest and to focus limited public defender resources on client representation, the public defender shall not be permitted or required to participate in determining whether particular defendants are eligible for public defender representation.

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.

(Amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

[For text of Rule 6, see M.S. 2006, Volume 15]

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

[For text of 7.01 and 7.02, see M.S. 2006, Volume 15]

Rule 7.03. Notice of Prosecutor's Intent to Seek an Aggravated Sentence

At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence. (Added effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

7.04 Completion of Discovery

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

In misdemeanor cases, without order of the court the prosecuting attorney on request of the defendant or defense counsel shall, prior to arraignment or at any time before trial, permit the defendant or defense counsel to inspect the police investigatory reports. Upon request, the defendant or defense counsel also shall be entitled to receive a reproduction of the police investigatory reports after the arraignment. This obligation to provide a reproduction of the police investigatory reports may be satisfied by any method that provides to the defendant or defense counsel an exact reproduction of such reports, including E-mail, facsimile transmission, or similar method if that method is available to both parties. A reasonable charge may be made to cover the actual costs of reproduction unless the defendant is represented by the public defender or an attorney working for a public defense corporation under Minnesota Statutes, section 611.216 or is determined by the court to be financially unable to obtain counsel pursuant to Rule 5.02. Any other discovery shall be by consent of the parties or by motion to the court.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003.)

Comment

Under Rule 7.01, the Rasmussen notice (State ex rel. Rasmussen v. Tahash, 272 Minn. 539, 141 N.W.2d 3 (1965)) of evidence obtained from the defendant and of identification procedures shall be given on or before the defendant's appearance in the district court under Rule 8 (within 14 days after the first appearance in the court under Rule 5), in order that the defendant may determine at the time of the appearance in the district court under Rule 8 whether to waive or demand a Rasmussen hearing (Rule 8.03). If the defendant then demands a Rasmussen hearing, it will be included in the Omnibus Hearing (Rule 11) no more than 28 days later. It is permissible for the prosecuting attorney to attach to a complaint for service a notice under Rule 7.01 or a discovery request under Rule 9.02.

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

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

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

any such offenses after the Omnibus Hearing, the prosecuting attorney shall immediately give notice thereof to the defendant.

Rule 7.03 establishes the notice requirements for a prosecutor to initiate proceedings seeking an aggravated sentence in compliance with *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). See Rule 1.04(d) as to the definition of "aggravated sentence." Also, see the comments to that rule. The written notice required by Rule 7.03 must include not only the grounds or statute relied upon, but also a summary statement of the supporting factual basis. However, there is no requirement that the factual basis be given under oath. In developing this rule, the Advisory Committee was concerned that if prosecutors were required to provide notice too early in the proceedings, they may not yet have sufficient information to make that decision and therefore may be inclined to overcharge. On the other hand it is important that defendants and defense counsel have adequate advance notice of the aggravated sentence allegations so that they can defend against them. Further, the earlier that accurate, complete aggravated sentence notices are given, the more likely it is that cases can be settled, and at an earlier point in the proceedings. The requirement of the rule that notice be given at least seven days before the Omnibus Hearing balances these important, sometimes competing, policy considerations. However, the rule recognizes that it may not always be possible to give notice by that time and the court may permit a later notice for good cause shown so long as the later notice will not unfairly prejudice the defendant. In making that decision the court can consider whether a continuance of the proceedings or other conditions would cure any unfair prejudice to the defendant. Pretrial issues concerning a requested aggravated sentence will be considered and decided under the Omnibus Hearing provisions of Rule 11.04.

Rule 7.04 requires that the discovery provided by Rules 9.01, subd. 1; 9.02, subd. 1, to be made without order of court shall be completed by the prosecution and defense before the Omnibus Hearing (Rule 11). This will permit the court to resolve at the Omnibus Hearing any issues that may have arisen between the parties with respect to discovery (Rules 9.03, subd. 8; 11.04). It may also result in a plea of guilty at the Omnibus Hearing (Rule 11.07). All notices under Rule 7 shall also be filed with the court (Rule 33.04).

Rule 7.04, in misdemeanor cases, requires the prosecutor upon request of the defendant or defense counsel at any time before trial to permit inspection of the police investigatory reports in the case. Additionally, upon request of the defendant or defense counsel, the prosecutor is obligated to provide a reproduction of the police investigatory reports to the defendant or defense counsel after the arraignment. This obligation of the prosecutor to provide a reproduction of such reports may be satisfied not just by photocopying, but by other existing or future methods that permit transmission of an exact reproduction to the defendant or defense counsel. This would include E-mail or facsimile transmission if the defendant or defense counsel has the equipment necessary to receive such transmissions. The provision of the rule permitting free copies to public defenders and attorneys working for public defense corporation under Minnesota Statutes, section 611.216 is in accord with Minnesota Statutes, section 611.271. Under this rule the prosecutor should reveal not only the reports physically in the prosecutor's possession, but also those concerning the case which are yet in the possession of the police. This disclosure of investigatory reports is already the practice of many prosecutors and in most misdemeanor cases should be sufficient discovery. This type of discovery is particularly important in misdemeanor cases where prosecution can be initiated upon a tab charge (Rule 4.02, subd. 5(3)), without a complaint or indictment. A defendant, of course, may request a complaint under Rule 4.02, subd. 5(3), to be better informed of the charges, but it is expected that complaints will seldom be requested when the investigatory reports are disclosed to the defendant.

In those rare cases where additional discovery is considered necessary by either party, it shall be by consent of the parties or by motion to the court. In such cases it is expected that the parties and the court will be guided by the extensive discovery provisions of these rules. Rule 9 provides guidelines for deciding any such motions, but they are not mandatory and the decision is within the discretion of the trial judge. *State v. Davis*, 592 N.W.2d 457 (Minn. 1999).

(Amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Rule 8, see M.S. 2006, Volume 15]

Rule 9. Discovery in Felony and Gross Misdemeanor Cases

9.01 Disclosure by Prosecution

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

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

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

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

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

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

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

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

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

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

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

(7) Evidence Relating to Aggravated Sentence. The prosecuting attorney shall disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecutor intends to rely in seeking an aggravated sentence.

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

Subd. 2. Discretionary Disclosure Upon Order of Court.

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

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

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

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

(3) *Other Relevant Material.*

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

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

(1) *Work Product.*

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

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

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

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 9.03 for Comment.

[For text of 9.02 and 9.03, see M.S. 2006, 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 no-

tice 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.W2d 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).)

Rule 9.01, subd. 1(7) requires the prosecuting attorney to disclose to the defendant or defense counsel all evidence not otherwise disclosed upon which the prosecuting attorney intends to rely in seeking an aggravated sentence under *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004). The prosecuting attorney also has a continuing duty to disclose such evidence under Rule 9.03, subd. 2. See Rule 1.04(d) for the definition of "aggravated sentence" and also see the comments to that rule.

The scope of the prosecutor's obligations (Rule 9.01, subd. 1(8)) 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, subds. 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 Amend-

ments 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)(b), which requires the defense to disclose statements of defense and prosecution witnesses, does not require the disclosure of a defendant's statements made to defense counsel or agents of defense counsel where such information is protected by state and federal constitutional guarantees or the attorney-client privilege. See *Minnesota Statutes*, section 595.02, subd. 1(b).

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).

Under Rule 9.03, subd. 10, the obligation of the defendant or the prosecutor to permit reproduction of items discoverable under Rule 9 may be satisfied not just by photocopying, but also by any other existing or future technology that permits transmission of an exact reproduction of the item. This would include E-mail or facsimile transmission if the other party has the equipment necessary to receive such transmissions. The provision in this rule permitting free copies to public defenders and attorneys working for public defense corporations under Minnesota Statutes, section 611.216 is in accord with Minnesota Statutes, section 611.271.

(Amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Rule 10, see M.S. 2006, Volume 15]

Rule 11. Omnibus Hearing in Felony and Gross Misdemeanor Cases

If the defendant does not plead guilty in a felony case at the initial appearance under Rule 8 or, in a gross misdemeanor case at the first appearance under Rule 5 or at the initial appearance under Rule 8, 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; amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

[For text of 11.01 to 11.03, see M.S. 2006, Volume 15]

11.04 Other Issues

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

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

If the prosecutor has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, a hearing shall be held to determine whether the law and proffered evidence support an aggravated sentence. If so, the court shall determine whether the issues will be presented to the jury in a unitary or bifurcated trial.

In deciding whether to bifurcate the trial, the court shall consider whether the evidence in support of an aggravated sentence is otherwise admissible in the guilt phase of the trial and whether unfair prejudice would result to the defendant in a unitary trial. A bifurcated trial shall be ordered where evidence in support of an aggravated sentence includes evidence that is inadmissible during the guilt phase of the trial or would result in unfair prejudice to the defendant. If the court orders a unitary trial the court may still order separate final arguments on the issues of guilt and the aggravated sentence.

If the defendant intends to offer evidence of a victim's previous sexual conduct in a prosecution for violation of Minnesota Statutes, sections 609.342 to 609.346, a motion shall be made pursuant to the procedures prescribed by Rule 412 of the Minnesota Rules of Evidence.

(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 all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 11.11 for Comment.

[For text of 11.05 to 11.11, see M.S. 2006, 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 7.04; 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 num-*

ber 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.

If the prosecuting attorney has given notice under Rule 7.03 or 19.04, subd. 6(3) of intent to seek an aggravated sentence, Rule 11.04 requires the court to have a hearing to determine any pretrial issues that need to be resolved in connection with that request. This could include issues as to the timelines of the notice under Rule 7.03 or 19.04, subd. 6(3). The court must determine whether the proposed grounds legally support an aggravated sentence and whether or not the proffered evidence is sufficient to proceed to trial. The rule does not provide a standard for determining insufficiency of the evidence claims and that is left to case law development. If the aggravated sentence claim will be presented to a jury, the court must also decide whether the evidence will be presented in a unitary or a bifurcated trial and the rule provides the standards for making that determination. Even if a unitary trial is ordered for the presentation of evidence, the rule recognizes that presentation of argument on an aggravated sentence during the guilt phase of the proceedings may unduly prejudice a defendant. The rule therefore allows the court to order separate final arguments on the aggravated sentence issue, if necessary, after the jury renders its verdict on the issue of guilt.

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 Omnibus Hearing or delay the hearing or any part of it until the day of trial when that is not justified by the circumstances of the particular case. To do so violates the purpose of these rules. See Rule 1.02 and the comments thereto. All issues presented at the Omnibus Hearing shall be determined within 30 days after the defendant's initial appearance under Rule 8 unless a later determination is required for good cause related to the particular case. (See also Rule 10.04, subd. 2.) 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.W2d 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).

(Amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Rules 12 to 14, see M.S. 2006, Volume 15]

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

15.01 Acceptance of Plea; Questioning Defendant on Plea or Aggravated Sentence; Felony and Gross Misdemeanor Cases

Subdivision 1. Guilty Plea. 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 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 by a jury or a judge on the issue of guilt.

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 for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will be imposed to follow any executed prison sentence, and violating the terms of that conditional release may increase the time the defendant serves in prison.

d. 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.

e. That the prosecutor is seeking an aggravated sentence.

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. If an aggravated sentence is sought, refer to subdivision 2 of this rule.)

Subd. 2. Aggravated Sentence.

Before the court accepts an admission of facts in support of an aggravated sentence, the defendant shall be sworn and questioned by the court with the assistance of counsel, in addition to and separately from the inquiry that may be required by subdivision 1, as to the following:

1. Whether the defendant understands that the prosecution is seeking a sentence greater than the presumptive sentence called for in the sentencing guidelines.

2. a. Whether the defendant understands that the presumptive sentence for the crime to which the defendant has pled guilty or otherwise has been found guilty is _____, and that the defendant could not be given an aggravated sentence greater than the presumptive sentence unless the prosecutor proves facts in support of such aggravated sentence.

b. Whether the defendant understands that the sentence in this case will be an aggravated sentence of _____, or will be left to the judge to decide.

3. a. Whether the defendant has had sufficient time to discuss this aggravated sentence with defense counsel.

b. Whether the defendant is satisfied that defense counsel is fully informed as to the facts supporting an aggravated sentence and has represented defendant's interests and fully advised the defendant.

4. Whether the defendant has been told by defense counsel and understands that even though the defendant has pled guilty to or has otherwise been found guilty of the crime of _____, defendant may nonetheless deny the facts alleged by the prosecution which would support an aggravated sentence.

5. a. Whether the defendant has been told by defense counsel and understands that if defendant chooses to deny the facts alleged in support of an aggravated sentence, the defendant has a right to a trial by either a jury or a judge to determine whether those facts have been proven, and that a finding that the facts are proven is not possible unless all jurors agree.

b. Whether the defendant waives the right to a trial by a jury or a judge of the facts in support of an aggravated sentence.

6. Whether the defendant has been told by defense counsel and understands that at such trial before a jury or a judge, the defendant would be presumed not to be subject to an aggravated sentence and the court could not impose an aggravated sentence unless the facts in support of the aggravated sentence are proven beyond a reasonable doubt.

7. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial by a jury or a judge, the prosecutor will be required to have the prosecution witnesses testify in open court in the defendant's presence, and 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 and be questioned by defense counsel.

8. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts alleged in support of an aggravated sentence and have a trial by a jury or a judge, the defendant will be entitled to require any defense witnesses to appear and testify.

b. Whether the defendant waives this right.

9. a. Whether the defendant has been told by defense counsel and understands that if the defendant wishes to deny the facts in support of an aggravated sentence and have a trial by a jury or a judge, the defendant can testify if the defendant wishes, but that if the defendant decides 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 in support of an aggravated sentence.

10. Whether, with knowledge and understanding of these rights, the defendant still wishes to admit the facts in support of an aggravated sentence or instead wishes to deny these facts and have a trial by a jury or a judge.

11. What is the factual basis for an aggravated sentence.

(Note: Where a represented defendant is pleading guilty without an aggravated sentence, use the plea petition form in Appendix A to these rules. Where a represented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix A and Appendix E.

Where an unrepresented defendant is pleading guilty without an aggravated sentence, use Appendix C to these rules. Where an unrepresented defendant's plea agreement includes an admission to facts to support an aggravated sentence, use both Appendix C and Appendix F.) (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; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 15.11 for Comment and Appens. A, B, C, and D.

[For text of 15.02 to 15.11, see M.S. 2006, 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.

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 on the issue of guilt, 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 on the issue of guilt, 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 for felony driving while impaired offenses and most sex offenses, a mandatory period of conditional release will follow any executed prison sentence that is imposed. Violating the terms of this conditional release may increase the time I serve in prison. In this case, the period of conditional release is ____ years.

d. 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.

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

f. That the prosecutor is seeking an aggravated sentence of ____.

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 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 my attorney, 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. 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).

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. My attorney has told me and I understand that if I am not a citizen of the United States this plea of guilty may result in deportation, exclusion from admission to the United States of America or denial of citizenship.

28. 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; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Appendix B, see M.S. 2006, Volume 15]

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 on the issue of guilt, 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 on the issue of guilt, 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.

f. That the prosecutor is seeking an aggravated sentence of _____.

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; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Appendix D, see M.S. 2006, Volume 15]

APPENDIX E TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
_____ JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
vs.

PETITION REGARDING
AGGRAVATED SENTENCE

Defendant.

TO: THE ABOVE NAMED COURT

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

1. I have pled guilty to or have otherwise been found guilty of the crime of _____.

2. I understand the presumptive guideline sentence for this offense is _____, and I could not be given an aggravated sentence greater than the presumptive sentence unless the prosecution proves facts in support of such an aggravated sentence.

3. I understand the prosecution is seeking a sentence greater than that called for in the sentencing guidelines. Specifically, I understand the sentence in this case will be _____ or will be left to the judge to decide.

4. I am represented by attorney _____ and:

a. I feel I have had sufficient time to discuss the issue of an aggravated sentence with my attorney.

b. I am satisfied my attorney is fully informed as to the facts related to an aggravated sentence and that my attorney has discussed possible defenses I have to an aggravated sentence.

c. I am satisfied that my attorney has represented my interests and has fully advised me about an aggravated sentence.

5. My attorney has told me and I understand that even though I have pled guilty to or been otherwise found guilty of the crime of _____, I have the right to deny the facts alleged by the prosecution in support of an aggravated sentence.

6. My attorney has told me and I understand that I am entitled to a trial by either a jury or a judge to determine whether an aggravated sentence may be imposed upon me.

7. My attorney has told me and I understand that at such trial I have the following rights:

a. I am presumed not to be subject to an aggravated sentence.

b. The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge beyond a reasonable doubt.

c. That before a jury could find facts supporting an aggravated sentence, all jurors would have to agree. That means the jury's decision must be unanimous.

d. That at a trial before either a jury or a judge, the prosecution will be required to call witnesses in open court and in my presence, and I, through my attorney, will have the right to question the witnesses.

e. That I may require any witnesses I think are favorable to me to appear and testify on my behalf.

f. That I may testify at such a trial if I wish to, but that if I choose not to testify, neither the prosecution nor the judge could comment to the jury about the failure to testify.

g. That if I admit the facts in support of an aggravated sentence, I will not have a trial by either a jury or a judge.

8. That with knowledge of my right to a trial on the facts in support of an aggravated sentence, I now waive my right to a trial.

9. I now waive my right not to testify and I will tell the judge about the facts which support an aggravated sentence.

Dated: _____

Signature of Defendant

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

APPENDIX F TO RULE 15

STATE OF MINNESOTA
COUNTY OF _____

IN DISTRICT COURT
JUDICIAL DISTRICT

State of Minnesota,
Plaintiff,
vs.

PETITION REGARDING
AGGRAVATED SENTENCE
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. I have pled guilty to or have otherwise been found guilty of the crime of _____.
2. I understand the presumptive guideline sentence for this offense is _____, and I could not be given an aggravated sentence greater than the presumptive sentence unless the prosecution proves facts in support of such an aggravated sentence.
3. I understand the prosecution is seeking a sentence greater than that called for in the sentencing guidelines. Specifically, I understand the sentence in this case will be _____ or will be left to the judge to decide.
4. I understand that although I have pled guilty to or have otherwise been found guilty of the crime of _____, I have the right to deny the facts alleged by the prosecution in support of an aggravated sentence.
5. I understand that I am entitled to a trial by either a jury or a judge to determine whether an aggravated sentence may be imposed upon me.
6. I understand that I have an absolute right to have an attorney represent me at such trial and knowing the consequences of giving up my right to counsel, I waive my right to be represented by an attorney.
7. I understand that at a trial by a jury or a judge to determine if an aggravated sentence may be imposed upon me, I have the following rights:
 - a. I am presumed not to be subject to an aggravated sentence.
 - b. The prosecution must prove facts supporting an aggravated sentence to either a jury or a judge beyond a reasonable doubt.
 - c. That before a jury could find facts supporting an aggravated sentence, all jurors would have to agree. That means the jury's decision would have to be unanimous.
 - d. That at a trial before either a jury or a judge, the prosecution will be required to call witnesses in open court and in my presence, and that I would have the right to question the witnesses.
 - e. That I may require any witnesses I think are favorable to me to appear and testify on my behalf.
 - f. That I may testify at such a trial if I wish to, but that if I choose not to testify, neither the prosecution nor the judge could comment to the jury about the failure to testify.
 - g. That if I admit the facts in support of an aggravated sentence, I will not have a trial by either a jury or a judge.
8. That with knowledge of my right to a trial on the facts in support of an aggravated sentence, I now waive my right to a trial.
9. I now waive my right not to testify and I will tell the judge about the facts which support an aggravated sentence.

Dated: _____

Signature of Defendant

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1999; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

[For text of Rules 16 to 18.09, see M.S. 2006, Volume 15]

Rule 19. Warrant or Summons Upon Indictment; Appearance Before District Court

[For text of 19.01 to 19.03, see M.S. 2006, Volume 15]

19.04 Appearance of Defendant Before Court

Subd. 1. Appearance. The defendant shall be taken promptly before the district court which issued the warrant.

Subd. 2. Statement to Defendant. A defendant appearing initially before the district court under a warrant of arrest or in response to a summons, shall be advised of the charges. If the defendant has not received a copy of the indictment, the defendant shall be provided with a copy.

The court shall also advise the defendant substantially as required by Rule 5.01.

Subd. 3. Appointment of Counsel. If the defendant is not represented by counsel and is financially unable to afford counsel, the court shall appoint counsel for the defendant.

Subd. 4. Date for Arraignment. Upon defendant's initial appearance before the district court, the defendant may be arraigned, upon the defendant's request and with the consent of the court. If the defendant is not arraigned at the initial appearance, a date shall be set for the arraignment upon the indictment not more than seven (7) days from the date of such initial appearance. The time for appearance may be extended by the district court for good cause. Upon defendant's arraignment, whether at the initial appearance or at some later appearance prior to the Omnibus Hearing, the defendant may only enter a plea of guilty. A defendant who does not wish to plead guilty shall not be called upon to enter any other plea and the arraignment shall be continued until the Omnibus Hearing when pursuant to Rule 11.10 the defendant shall plead to the indictment or be given additional time within which to plead.

Subd. 5. Omnibus Hearing Date and Procedure. If upon arraignment, the defendant does not plead guilty, a date shall be fixed, not more than seven (7) days from the date of the arraignment, unless the court for good cause related to the particular case, upon motion of the prosecuting attorney or the defendant or upon the court's initiative, extends the time, when an Omnibus Hearing shall be held in accordance with Rule 11.

Subd. 6. Notice by Prosecuting Attorney.

(1) *Notice of Evidence and Identification Procedures.* When the prosecution has (1) any evidence against the defendant obtained as a result of a search, search and seizure, wiretapping, or any form of electronic or mechanical eavesdropping, (2) any confessions, admissions or statements in the nature of confessions made by the defendant, (3) any evidence against the defendant discovered as the result of confessions, admissions or statements in the nature of confessions made by the defendant, or (4) when in the investigation of the case against the defendant, any identification procedures were followed, including but not limited to line-ups or other observations of the defendant and the exhibition of photographs of the defendant or of any other persons, the prosecuting attorney, on or before the date set for defendant's arraignment, shall notify the defendant or defense counsel in writing of such evidence and identification procedures.

(2) *Notice of Additional Offenses.* The prosecuting attorneys shall notify the defendant or defense counsel in writing of any additional offenses the evidence of which may be offered at the trial under any exceptions to the general exclusionary rule. The notice shall be given at the Omnibus Hearing under Rule 11 or as soon thereafter as the offense becomes known to the prosecuting attorney. Such additional offenses shall be described with sufficient particularity to enable the defendant to prepare for trial. The notice need not include offenses for which the defendant has been previously prosecuted, or those that may be offered in rebuttal of the defendant's character witnesses or as a part of the occurrence or episode out of which the offense charged in the indictment arose.

(3) *Notice of Intent to Seek Aggravated Sentence.* At least seven days prior to the Omnibus Hearing, or at such later time if permitted by the court upon good cause shown and upon such conditions as will not unfairly prejudice the defendant, the prosecuting attorney shall notify the defendant or defense counsel in writing of intent to seek an aggravated sentence. The notice shall include the grounds or statutes relied upon and a summary statement of the factual basis supporting the aggravated sentence.

Subd. 7. Discovery. Before the date set for the Omnibus Hearing the prosecution and defendant shall complete the discovery that is required by Rules 9.01, subd. 1 and 9.02, subd. 1 to be made without the necessity of an order of court.

(Effective for criminal actions commenced or arrests made after 12 o'clock midnight January 1, 1990; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 19.06 for Comment.

[For text of 19.05 and 19.06, see M.S. 2006, Volume 15]

Comment

Rule 19 relating to the warrant or summons on an indictment and the subsequent procedures parallels for the most part Rules 3, 4, 5, 7, 8, 11 governing the warrant or summons on a complaint and the procedures thereafter followed, all of which lead up to the Omnibus Hearing under Rule 11. The necessary differences between the two procedures under an indictment and a complaint are reflected in Rule 19.

Rule 19.01 provides for the issuance of a warrant of arrest or summons upon an indictment when requested by the prosecuting attorney, and a summons shall be issued when directed by the court. (See F.R.Crim.P. 9(a).) (Rule 19.01 takes the place of Minnesota Statutes, sections 630.02, 630.03 (1971) providing for bench warrants.) (See also Rule 18.08 providing for notice to the defendant or defense counsel at the discretion of the prosecuting attorney.)

That part of Rule 19.01 providing for the issuance of a summons for a corporation takes the place of Minnesota Statutes, section 630.15 (1971).

The provision of Rule 19.01 that a defendant in custody may be ordered by the court to be brought before the court at a specified time and place is taken from Minnesota Statutes, section 630.01 (1971).

Rule 19.01 permits more than one warrant or summons to be issued upon the same indictment as for example, for codefendants. (See F.R.Crim.P. 9(a).)

If a defendant other than a corporation does not respond to a summons a warrant shall issue. (See F.R.Crim.P. 9(a).) If a corporation does not respond to a summons, the court may proceed as provided in Rule 14.02, subd. 4.

Rule 19.02, subd. 1 provides that the warrant shall be signed by a judge of the district court. The form of the warrant follows substantially that prescribed for a warrant upon a complaint by Rule 3.02, subd. 1 except that the indictment warrant directs the defendant to be brought before the district court, and Rule 19.04, subd. 1 requires that this be done promptly.

The amount of bail and other conditions of release may be set by the district court (See Rule 6.02) and endorsed on the warrant. (See F.R.Crim.P. 9(b)(1) and Minnesota Statutes, section 630.05 (1971).) (See also Rule 19.05).

The form of summons prescribed by Rule 19.02, subd. 2 is substantially the same as that prescribed by Rule 3.02, subd. 3 for a summons on a complaint.

Rule 19.03 governing execution or service of a warrant or summons upon an indictment and proof of execution or service follows substantially Rule 3.03 governing the similar procedures relating to a warrant or summons on a complaint.

Upon the defendant's first appearance before the district court under Rule 19.04, the defendant shall be advised of the charges; provided with a copy of the indictment; given the advice required by Rule 5.01; counsel shall be appointed for a defendant who is unrepresented and unable to afford counsel (Rule 19.04, subd. 3); the bail or conditions of release set, continued, or modified in accordance with the provisions of Rule 6.02 (Rule 19.05); and a date shall be fixed for arraignment (Rule 13), which shall be held not more than seven days after the appearance in district court, unless the time is extended for good cause. (Rule 19.04, subd. 5). Instead of having a separate arraignment, Rule 19.04, subd. 4, permits the arraignment and initial appearance to be consolidated. This is possible only if requested by the defendant and agreed to by the court. Ordinarily, the Omnibus Hearing would then be held within seven (7) days after the consolidated initial appearance and arraignment under Rule 19.04, subd. 5, but that rule also permits the court to extend that time for good cause.

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

Rule 19.04, subd. 6(3), which establishes the notice requirements for a prosecuting attorney seeking an aggravated sentence in proceedings prosecuted by indictment, parallels Rule 7.03, which establishes those requirements for proceedings prosecuted by complaint.

See the comments to that other rule. Also see Rule 1.04(d), which defines “aggravated sentence,” and the comments to that rule.

Upon the date fixed for arraignment, the defendant shall be arraigned as provided by Rule 13. If the defendant does not plead guilty, a date shall be fixed for the Omnibus Hearing under Rule 11, which shall be held not more than seven days from the date of the arraignment unless extended for good cause. (Rule 19.04, subd. 4 and subd. 5).

Between defendant’s first appearance in the district court and the Omnibus Hearing, the prosecution and defendant shall complete the discovery procedures required by Rules 9.01, subd. 1; 9.02, subd. 1 (Rule 19.04, subd. 7).

The parties shall serve their motions under Rule 10 at least three days before the Omnibus Hearing (Rule 10.04) (including motions to suppress based on the Rasmussen notice given under Rule 19.04, subd. 6(1)). (See also Comments to Rule 11.03.)

At or before the Omnibus Hearing the prosecution shall give the Spreigl notice required by Rule 19.04, subd. 6(4). (See Rule 7.02 and Comments to Rule 7.02.)

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

By Rule 19.06 a verbatim record shall be made of the defendant’s first appearance before the district court, the arraignment, and the Omnibus Hearing.

(Amended effective for all criminal actions commenced or arrests made after 12 o’clock midnight October 1, 2006.)

Rule 20. Proceedings for Mentally Ill or Mentally Deficient

20.01 Competency to Proceed

Subd. 1. Competency to Proceed Defined. A defendant shall not be permitted to waive counsel who lacks sufficient ability to knowingly, voluntarily, and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case. The court may not proceed under this rule before a lawyer consults with the defendant and the lawyer has an opportunity to be heard by the court. A defendant shall not be permitted to enter a plea or be tried or sentenced for any offense if the defendant:

(1) lacks sufficient ability to consult with a reasonable degree of rational understanding with defense counsel; or

(2) is mentally ill or mentally deficient so as to be incapable of understanding the proceedings or participating in the defense.

Subd. 2. Proceedings. If during the pending proceedings, the prosecuting attorney, defense counsel or the court has reason to doubt the competency of the defendant, then the prosecuting attorney or defense counsel by motion or the court on its initiative shall raise that issue. Any such motion may be brought over the objection of the defendant. The motion shall set forth the facts constituting the basis for the motion, but defense counsel shall not divulge communications in violation of the attorney–client privilege. The bringing of the motion by defense counsel does not waive the attorney–client privilege. If the court in which a criminal case is pending determines upon motion of the prosecuting attorney or defense counsel or upon initiative of the court that there is reason to doubt the defendant’s competency as defined by this rule, the court shall suspend the criminal proceedings and shall proceed as follows:

(1) *Misdemeanors.* If the charge is a misdemeanor, the court having trial jurisdiction shall either proceed according to this rule, or cause civil commitment proceedings to be instituted against the defendant, or unless contrary to the public interest, dismiss the case.

(2) *Probable Cause – Felony or Gross Misdemeanor.* In the case of a felony or gross misdemeanor, unless the issue of probable cause has previously been determined, the

district court, upon motion, before proceeding further shall determine whether there is sufficient probable cause stated on the face of the complaint. If the court determines that the complaint does not state sufficient probable cause to believe the defendant committed the offense charged, the charges against the defendant shall be dismissed.

(3) *Medical Examination.* The court shall appoint at least one examiner as defined in the Minnesota Commitment Act of 1982, Minnesota Statutes, chapter 253B, or successor statute to examine the defendant and to report to the court on the defendant's mental condition.

If the defendant is otherwise entitled to release, confinement for the examination may not be ordered if the examination can be done adequately on an outpatient basis. The court may make appearance for the outpatient examination a condition of the defendant's release. If the examination cannot be adequately done on an outpatient basis or if the defendant is not otherwise entitled to be released, the court may order the defendant confined in a state mental hospital or other suitable hospital or facility for the purpose of such examination for a specified period not to exceed 60 days. If the defendant or prosecution has retained a qualified psychiatrist or clinical psychologist or physician experienced in the field of mental illness, the court on request of the defendant or prosecuting attorney shall direct that such psychiatrist or psychologist or physician be permitted to observe the examination and to also examine the defendant. Both the examiner appointed by the court and any examiner retained by the defense or prosecuting attorney may obtain and review the report of any prior examination conducted under this rule. The court shall further direct that if any of the mental-health professionals appointed to examine the defendant concludes that the defendant presents an imminent risk of serious danger to another person, is imminently suicidal, or otherwise needs emergency intervention, the mental-health professional shall promptly notify the prosecuting attorney, defense counsel, and the court.

(4) *Report of Examination.* At the conclusion of the examination, a written report of the examination shall be forwarded to the judge who ordered the examination, and the judge shall cause copies of the report to be delivered forthwith to the prosecuting attorney and to defense counsel. The contents of the report shall not be otherwise disclosed until the hearing on the defendant's competency. The report of the examination shall include without limitation:

(1) A diagnosis of the mental condition of the defendant.

(2) If the defendant is mentally ill or mentally deficient, an opinion as to:

(a) the defendant's capacity to understand the criminal proceedings and to participate in the defense;

(b) whether the defendant presents an imminent risk of serious danger to another person, is imminently suicidal, or otherwise needs emergency intervention;

(c) the treatment required, if any, for the defendant to attain or maintain competence with an explanation of the appropriate treatment alternatives by order of choice, including the extent to which the defendant can be treated without being committed to an institution and the reasons for rejecting such treatment if institutionalization is recommended; and

(d) whether there is a substantial probability that with treatment or otherwise the defendant will ever attain the competency to proceed, and if so, in approximately what period of time, and the availability of the various types of acceptable treatment in the local geographical area, specifying the agencies or settings in which the treatment might be obtained and whether it would be available to an outpatient.

(3) A statement of the factual basis upon which the diagnosis and opinion are based.

(4) If the examination could not be conducted by reason of the defendant's unwillingness to participate therein, a statement to that effect with an opinion, if possible, as to whether the defendant's unwillingness was the result of mental illness or deficiency.

Subd. 3. Hearing and Determination of Competency.

(1) *Request for Hearing.* If either party files written objections to the report within ten (10) days after the receipt of a copy thereof, the court, upon notice to the parties, shall hold a hearing on the issue of the defendant's competency to proceed.

(2) *Going Forward With Evidence.* If the defense moved for the examination, the defense shall go forward first with evidence at the hearing. If the examination was on motion of the prosecuting attorney or on the initiative of the court, the prosecuting attorney shall go forward first with evidence unless the court otherwise directs.

(3) *Report and Evidence.* At the hearing, evidence as to the defendant's mental condition may be admitted, including the report of the person who examined the defendant at the direction of the court. The person who prepared the report or any individual designated by that person as a source of information for preparation of the report, other than the defendant or defense counsel, is considered the court's witness and may be called and cross-examined as such by either party.

(4) *Defense Counsel as Witness.* To the extent that doing so does not divulge communications in violation of the attorney-client privilege, defense counsel may relate to the court, subject to examination by the prosecuting attorney, personal observations of and conversations with the defendant. Those disclosures do not automatically disqualify defense counsel from continuing to represent the defendant. The court may inquire of defense counsel concerning the attorney-client relationship and the defendant's ability to communicate effectively with defense counsel. However, the court may not require defense counsel to divulge communications in violation of the attorney-client privilege. The prosecuting attorney may not cross-examine defense counsel responding to the court's inquiry.

(5) *Determination Without Hearing.* If neither the prosecution nor the defense files written objections to the report within the ten-day period, the court without a hearing may determine the defendant's competency to proceed upon the basis of the report.

(6) *Decision and Sufficiency of Evidence.* If upon consideration of the report and the evidence received at any hearing, the court finds by the greater weight of the evidence that the defendant is competent, the court shall enter an order finding that the defendant is competent. Otherwise, the court shall enter an order finding that the defendant is incompetent.

Subd. 4. Effect of Finding on Issue of Competency to Proceed.

(1) *Finding of Competency.* If the court determines that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed.

(2) *Finding of Incompetency.* If the charge against the defendant is a misdemeanor and the court determines that the defendant is incompetent to proceed, the charge shall be dismissed. If the charge against the defendant is a gross misdemeanor or felony and the court determines that the defendant is incompetent to proceed, the criminal proceedings against the defendant shall be further suspended except as provided by Rule 20.01, subd. 6.

(a) *Finding of Mental Illness.* If the court determines that the defendant is mentally ill so as to be incapable of understanding the criminal proceedings or participating in the defense, and the defendant is under civil commitment as mentally ill, the court shall order that the commitment be continued, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against the defendant. The commitment or continuing commitment shall be subject to the supervision of the trial court as provided by Rule 20.01, subd. 5.

(b) *Finding of Mental Deficiency.* If the court finds the defendant to be mentally deficient so as to be incapable of understanding the criminal proceedings or participating in the defense, and the defendant is under commitment as mentally deficient to the guardianship of the commissioner of public welfare, the court shall order the defendant remanded to the care and custody of the commissioner, and if not under commitment, the court shall cause civil commitment proceedings to be instituted against the defendant. The commitment or continuing commitment shall be subject to the supervision of the trial court as provided by Rule 20.01, subd. 5.

(c) *Appeal.* Either party shall have the right of appeal to the Court of Appeals from a determination of the probate court upon the civil commitment proceedings. The appeal shall be on the record only pursuant to Rule 28. In all civil commitment proceedings instituted under this rule, a verbatim record of the proceedings shall be made.

Subd. 5. Continuing Supervision by the Court in Felony and Gross Misdemeanor Cases. The head of the institution to which the defendant is committed under civil commitment proceedings, or if the defendant is not committed to an institution, the officer or other

person charged with the defendant's supervision or to whom the defendant has been committed, shall report periodically to the trial court, at such times as the court shall provide, on the defendant's mental condition with an opinion as to the defendant's competency to proceed. The reports shall be made not less than once every six months unless otherwise ordered. Copies of the reports shall be furnished to the prosecuting attorney and to defense counsel.

When the court on application of the prosecuting attorney, defense counsel, the defendant, or the person having supervision over the defendant, or on the court's initiative, determines, after a hearing with notice to the parties, that the defendant is competent to proceed, the criminal proceedings against the defendant shall be resumed. Unless the criminal charges against the defendant have been dismissed as provided by Rule 20.01, subd. 6, the trial court and the prosecuting attorney shall be notified of any proposed institutional transfer, partial institutionalization status, and any proposed termination, discharge, or provisional discharge of the civil commitment. The prosecuting attorney shall have the right to participate as a party in any proceedings concerning such proposed changes in the defendant's civil commitment or status.

Subd. 6. Dismissal of Criminal Proceedings.

(1) *Felonies.* Except when the defendant is charged with murder, the criminal proceedings shall be dismissed upon the expiration of three years from the date of the finding of the defendant's incompetency to proceed unless the prosecuting attorney, before the expiration of the three-year period, files a written notice of intention to prosecute the defendant when the defendant has been restored to competency.

(2) *Gross Misdemeanors.* The criminal proceedings shall be dismissed 30 days after the date of the finding of the defendant's incompetency to proceed unless by that date the prosecuting attorney files a written notice of intention to prosecute the defendant when the defendant has been restored to competency. If such a notice has been filed, the criminal proceedings shall be dismissed when the defendant would be entitled under these rules to custody credit of at least one year if convicted in the criminal proceedings.

Subd. 7. Determination of Legal Issues Not Requiring Defendant's Participation.

The fact that the defendant is incompetent to proceed shall not preclude defense counsel from making any legal objection or defense which is susceptible of fair determination before trial without the personal participation of the defendant.

Subd. 8. Admissibility of Defendant's Statements. When a defendant is examined under this rule, any statement made by the defendant for the purpose of the examination and any evidence derived from the examination shall be admissible in evidence at the proceedings to determine whether the defendant is competent to proceed.

Subd. 9. Credit for Time Spent in Confinement. If the court orders criminal proceedings resumed on a finding that defendant is competent to proceed, and the defendant is convicted of the charge, the time the defendant has spent confined to a hospital or other facility under this rule shall be credited upon any jail or prison sentence imposed.

(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 March 1, 2006; amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

See Rule 20.03 for Comment.

[For text of 20.02 and 20.03, see M.S. 2006, Volume 15]

Comment

Rule 20 prescribes the detailed procedures to be followed when it appears that a defendant may be mentally incompetent to stand trial or when the defendant interposes a defense of mental irresponsibility. The rule fills in the omissions in existing procedures (Minnesota Statutes, sections 611.026, 631.18, 631.19 (1971)) and attempts to meet the constitutional equal protection and due process requirements established by Jackson v. Indiana, 406 U.S. 715 (1972), McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972), Humphrey v. Cady, 405 U.S. 504 (1972), and Pate v. Robinson, 383 U.S. 375 (1966), which are not fully

met by the present statutes. To the extent the statutes are inconsistent with Rule 20, they are superseded by the rule.

Rule 20 in authorizing a compulsory medical examination of the defendant (Rules 20.01, subd. 2(3) and 20.02, subd. 1) also provides procedures for avoiding infringement of the defendant's privilege against self-incrimination (Rule 20.02, subd. 6).

Rule 20.01 details the procedures relating to competency to proceed.

Rule 20.01, subd. 1 with some changes of language adopts the provisions of Minnesota Statutes, section 611.026 (1971) defining competency to proceed and also includes the additional elements as set forth in Unif.R.Crim.P. 463(b) (1987) and ABA Standards for Criminal Justice 7-4.1(b) (1985). The test for competency to proceed set forth in part (1) of the rule is as required by *Dusky v. United States*, 362 U.S. 402 (1960). The requirement for counsel consulting with the defendant before proceeding under the rule is from Unif.R.Crim.P. 464(c) (1987) and ABA Standards for Criminal Justice 7-4.4(a)(ii) (1985). The standard set forth in the rule for competency to waive counsel is from Unif.R.Crim.P. 711(a) and (d) (1987) and ABA Standards for Criminal Justice 7-5.3(b) (1985). See Rule 5.02 and the Comments to that rule concerning the appointment of counsel generally.

If the court before which the case is pending determines there is reason to doubt the defendant's competency and the charge is a felony or gross misdemeanor, the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9 shall be followed.

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

Under Rule 20.01, subd. 2, the prosecuting attorney, defense counsel, and the court all have a duty to raise the issue of the defendant's competency if a reasonable doubt of that exists. This is in accord with Unif.R.Crim.P. 464(a) (1987) and ABA Standards for Criminal Justice 7-4.2(a), (b), and (c) (1985). The prohibition in the rule against defense counsel divulging communications in violation of the attorney-client privilege is from Unif.R.Crim.P. 464(b) (1987) and ABA Standards for Criminal Justice 7-4.2(f) (1985).

Rule 20.01, subd. 2(2) provides that upon motion, before proceeding further, the district court shall determine whether the complaint sufficiently states probable cause on its face. If the court determines that probable cause is not sufficiently stated, the case shall be dismissed. If it determines that probable cause is sufficiently stated, the criminal proceedings are suspended and the procedures prescribed by Rules 20.01, subd. 2(2) to 20.01, subd. 9 shall be followed.

The first steps in that procedure under Rule 20.01, subs. 2(3) and (4), are the medical examination of the defendant and a determination of the defendant's competency upon the medical report, or after hearing if objection is made to the report (Rule 20.01, subd. 3). (These rules were originally derived from ALI Model Penal Code, secs. 4.04-4.06 and Wis. Stat. sec. 971.14). As revised, the rules are in substantial compliance with the Uniform Rules of Criminal Procedure (1987) and the American Bar Association Standards for Criminal Justice (1985). The preference in the rule for an outpatient examination, if that can be adequately done, is derived from Unif.R.Crim.P. 464(f) (1987) and ABA Standards for Criminal Justice 7-4.3 (1985). If the court determines that a defendant who is otherwise entitled to release will not appear for an outpatient examination, that would be sufficient cause to find that an outpatient examination cannot be adequately done and to order the defendant confined for the examination. See Rule 6 as to whether the defendant would otherwise be entitled to release from custody during the proceedings. In conducting the examination, the rule provides that the examiners may obtain and review any reports of prior examinations conducted under the rule. This includes prior reports conducted under both Rule 20.01 and Rule 20.02. This express authorization, which was adopted in 2005, is intended merely to clarify the rule and not to change it. The provision in Rule 20.01, subd. 2(3), for the mental-health professionals conducting the examination to promptly contact the court and counsel upon concluding the defendant poses any of the serious imminent risks specified is taken from Unif.R.Crim.P. 464 (e)(6) (1987) and ABA Standards for Criminal Justice 7-3.2(b) (1985).

The requirements for the examination report as set forth in Rule 20.01, subd. 2(4), are in substantial compliance with Unif.R.Crim.P. 464(f) (1987) and ABA Standards for Criminal Justice 7-4.5 (1985). The examiners appointed by the court to examine a defendant for the purpose of determining competency to proceed or for the purpose of a mental illness or mental deficiency defense must have the same qualifications as examiners appointed for civil commitment proceedings. Under Minnesota Statutes, section 253B.02, subd. 7 (1988), that means the examiner must be "a licensed physician or a licensed consulting psychologist, knowledgeable, trained and practicing in the diagnosis and treatment of the alleged impairment." If simultaneous examinations are ordered pursuant to Rule 20.02, subd. 7, the examiner appointed should then be qualified to provide a report for all the necessary purposes.

Rule 20.01, subd. 3 sets forth the procedure to be followed for determining competency based upon the report alone or together with a hearing if objection is made to the report. The provisions for going forward with the evidence as set forth in Rule 20.01, subd. 3(2) are taken from Unif.R.Crim.P. 466(f) (1987) and ABA Standards for Criminal Justice 7-4.8(c)(i) (1985). Rule 20.01, subd. 3(3) providing for either party to cross-examine the person who prepared the report or that person's sources is taken from Unif.R.Crim.P. 466(d) (1987) and ABA Standards for Criminal Justice 7-4.8(a)(i) and 7-4.8(b) (1985). The provisions in Rule 20.01, subd. 3(4) concerning defense counsel as a witness on competency are taken from Unif.R.Crim.P. 464(e)(1) and (2) (1987) and ABA Standards for Criminal Justice 7-4.8(b)(i) and (ii) (1985). The evidentiary standard set forth in Rule 20.01, subd. 3(6) is taken from Unif.R.Crim.P. 464(g) (1987) and ABA Standards for Criminal Justice 7-4.8(c)(ii) (1985).

If the defendant is found to be competent, the criminal proceedings shall be resumed (Rule 20.01, subd. 4(1)).

If the defendant is found to be incompetent and the charge is a misdemeanor, the case shall be dismissed (Rule 20.01, subd. 4(2)).

If the charge is a felony or gross misdemeanor and the defendant is found to be incompetent, the criminal proceedings shall continue to be suspended (Rule 20.01, subd. 4(2)), and the court shall follow the procedure established by Rules 20.01, subd. 4(2) to 20.01, subd. 6. For gross misdemeanors, the criminal proceedings must be dismissed by the court 30 days after the finding of incompetency unless the prosecuting attorney has filed with the court by that time a written notice of intention to prosecute the defendant on the gross misdemeanor when the defendant is restored to competency. Additionally, even if such a notice is filed, the proceedings must be dismissed later if the defendant becomes entitled to at least one year of custody credit if the defendant were to be convicted of the gross misdemeanor offense. This would include custody credit for time confined in a jail or correctional facility and also for time confined in a hospital or other facility under this rule (see subdivision 9 of this rule).

If the defendant is under civil commitment under Minnesota Statutes, chapter 253B (1982), the civil commitment shall be continued (Rule 20.01, subd. 4(2)(a) and (b)). If the defendant is not under civil commitment, commitment proceedings under Minnesota Statutes, section 253B.07 (1982) in the probate court shall be instituted against the defendant.

At any time, on motion of the interested parties or on the court's initiative, a hearing shall be held to determine the defendant's competency, and if the defendant is found to be competent, the criminal proceedings shall be resumed. (There is no limitation on the time or number of these hearings.) (Rule 20.01, subd. 5).

The provisions for institution of civil commitment proceedings, for notice and for hearing before the trial court upon the termination of civil commitment and upon the issue of defendant's competency (Rules 20.01, subd. 4(2)(a); 20.01, subd. 4(2)(b); 20.01, subd. 5), and the provision for automatic dismissal of the criminal charges after three years (Rule 20.01, subd. 6) are intended to meet the constitutional equal protection and due process requirements established by *Jackson v. Indiana*, 406 U.S. 715 (1972).

Rule 20.01, subd. 4(2)(c) gives either party the right to appeal to the Court of Appeals from the determination of the court upon the civil commitment proceedings instituted under Rule 20.01, subd. 4(2)(a) and (b). The appeal shall be determined only upon the record made in the court, which shall be a verbatim record.

During the period of the defendant's incompetency, Rule 20.01, subd. 7 permits the defense attorney to make any legal objection or defense to the prosecution which can be deter-

mined without the presence of the defendant. (This could include motions to dismiss the indictment or complaint under Rules 18.02, subd. 2; 17.06) (See Wisconsin Statutes, section 971.14(6)).

By Rule 20.01, subd. 8 statements made by the defendant to the court-appointed examiner for the purpose of the examination under Rule 20.01, subd. 2(3) and evidence derived therefrom are admissible at the proceedings to determine the defendant's competency (Rule 20.01, subd. 3). (See ALI Penal Code, section 4.09, Wisconsin Statutes, section 971.18.) (For the admissibility of these statements at trial, see Rule 20.02, subd. 6.)

Rule 20.01, subd. 9 provides for credit for any confinement to a hospital or other facility under Rule 20.01, subd. 2(3).

Rule 20.02 details the procedures to be followed when the defense is not guilty by reason of mental illness or mental deficiency (Rules 14.01; 9.02, subd. 1(3)(a)).

The definition of mental illness and mental deficiency contained in Minnesota Statutes, section 611.026 (1971) with its judicial interpretations is not affected by these rules. (See *State v. Rawland*, 294 Minn. 17, 199 N.W.2d 774 (1972)).

Rule 20.02 is intended, first, to provide a procedure for compulsory mental examination of the defendant without infringing upon the defendant's constitutional privilege against self-incrimination as to statements made by the defendant for the purpose of the examination, (Rule 20.02, subd. 1 to subd. 7) and, second, to provide procedures following an acquittal by reason of mental illness or mental deficiency that will meet constitutional requirements of equal protection and due process (Rule 20.02, subd. 8). (See *Jackson v. Indiana*, 406 U.S. 715 (1972), *McNeil v. Director, Patuxent Institution*, 407 U.S. 245 (1972).)

By Rule 20.02, subd. 1 an order for compulsory mental examination is triggered by a defense notice under Rule 9.02, subd. 1(3)(a) of an intention to rely on the defense of mental illness or mental deficiency, by the defendant in a misdemeanor case pleading not guilty by reason of mental illness or mental deficiency, or when the defendant offers evidence of mental illness or mental deficiency at trial. Under Rule 9.02, subd. 1(3)(a), in felony and gross misdemeanor cases, a defendant who also intends to rely on the defense of not guilty of the elements of the offense charged must at the same time so notify the prosecution. (See Rule 20.02, subd. 6(2) providing for the trial procedure in the event the defendant gives notice of intention to rely on both the defenses of mental illness or mental deficiency and not guilty.)

Rule 20.02, subd. 1 authorizing compulsory mental examination of the defendant changes existing Minnesota law. (*State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966)) (For similar provisions and cases upholding their constitutionality, see Wisconsin Statutes, section 971.16; *Roberts v. State*, 41 Wis.2d 537, 164 N.W.2d 525 (1969); *State ex rel. LaFollette v. Raskin*, 35 Wis.2d 607, 150 N.W.2d 318 (1967).)

Rule 20.02, subd. 2 providing for the examination is the same as Rule 20.01, subd. 2(3) governing the examination for competency to proceed. See the comments on Rule 20.01, subd. 2(3) as to the qualifications of the examiners appointed to examine the defendant. Under Rule 20.02, subd. 7 the two examinations as well as any examination under the civil commitment statutes in Minnesota Statutes, chapter 253B may by court order be conducted simultaneously. In the order for the examination under Rule 20.02, subd. 2, the court shall direct what the examination and report shall cover. (See Rule 20.02, subd. 4(1), (2), (3).)

Rule 20.02, subd. 3 leaves the imposition of sanctions for failure of the defendant to participate in the examination to the discretion of the trial court to be determined under all of the circumstances. See Rule 20.02, subd. 4 providing that the examiner's report shall if possible contain an opinion as to whether the defendant's failure to participate was the result of the defendant's mental condition.

Rule 20.02, subd. 4 provides what the report of the examination shall contain. Rule 20.02, subd. 4(2) is worded in the language of Minnesota Statutes, section 611.026, but is intended to include the judicial interpretations given to that statute. (See *State v. Rawland*, 294 Minn. 17, 199 N.W.2d 774 (1972).)

Rule 20.02, subd. 5 provides that evidence derived from the examination is inadmissible except when the defendant has raised the issue of his or her mental condition.

Rule 20.02, subd. 6 is intended to provide a procedure for obviating objections on the grounds of self-incrimination to the admissibility at trial of statements made by the defen-

dant for the purpose of the compulsory mental examination under Rules 20.02, subd. 2 and 20.01, subd. 2(3).

If the defendant intends to rely solely on the defense of mental irresponsibility (Rules 9.02, subd. 1(3)(a); 14.01), statements made by the defendant for the purpose of the mental examination and evidence derived from the statements shall be admissible on the trial of that issue, if otherwise admissible under the rules of evidence. (Compare Wis.Stat., sec. 971.18).

If, however, the defendant intends to rely on the defense of mental illness or mental deficiency and the defense of not guilty of the elements of the offense charged (Rules 9.02, subd. 1(3)(a); 14.01), there must be a separation of the two defenses for trial (Rules 20.02, subd. 6(2); 20.02, subd. 6(4)). (See also Wisconsin Statutes, section 971.175; *State ex rel. LaFollette v. Raskin*, 34 Wis.2d 607, 150 N.W.2d 318 (1967).) The mandatory separation of the two defenses for trial under this rule makes it unnecessary to use the procedures outlined in *State v. Hoffman*, 328 N.W.2d 709 (Minn. 1982).

If the two defenses are separated for trial, the statements and evidence derived therefrom will be admissible only upon the trial of the defense of mental illness or mental deficiency, if otherwise admissible under the rules of evidence. (Rule 20.02, subd. 6(3).)

The trial procedure when there is a separation of the two defenses under Rule 20.02, subd. 6(2) is set forth in Rule 20.02, subd. 6(4). (See also Wis.Stat., sec. 971.175.) The trial shall be continuous before the same jury or judge, with the defense of not guilty of the elements of the offense tried first, and then if necessary, the defense of not guilty by reason of mental illness or mental deficiency.

The jury shall be informed before commencement of the trial that the two defenses have been interposed and of the trial procedures that will be followed in trying them. (Rule 20.02, subd. 6(4)(a).)

Upon the trial of the defense of not guilty, the jury or court shall determine whether the elements of the offense have been proved beyond a reasonable doubt (Rule 20.02, subd. 6(4)(b)).

The form of the determination shall be as follows: (1) "We, the jury, find that the elements of the offense of (name of offense) have been proved beyond a reasonable doubt.", or (2) "We, the jury, find that the elements of the offense of (name of offense) have not been proved beyond a reasonable doubt."

If it is determined that the elements of the offense have been proved, the trial of the defense of mental illness or mental deficiency shall follow immediately before the same jury or court.

Upon the trial of the defense of mental irresponsibility, the jury or court shall render a verdict or make a finding of (1) not guilty by reason of mental illness (See Rule 20.02, subd. 8(1) and (4) for the effect and consequences.); or (2) not guilty by reason of mental deficiency (See Rule 20.02, subd. 8(2) and (4) for the effect and consequences.); or (3) a verdict or finding of guilty (resulting in a judgment of conviction and sentence).

The provisions of Minnesota Statutes, section 611.026 (1971) placing the burden on the defendant of proving lack of mental responsibility by a preponderance of the evidence are continued by Rule 20.02, subd. 6(4)(b).

The provisions of Rule 20.02, subd. 8 for civil commitment (Rule 20.02, subd. 8(1)(2)) following an acquittal by reason of mental illness or mental deficiency, for appeal from the determination in the civil commitment proceedings (Rule 20.02, subd. 8(3)), and for continuing supervision by the trial court while the defendant is under commitment (Rule 20.02, subd. 8(4)) are similar to those contained in Rule 20.01, subd. 4 and subd. 5 governing civil commitment of a defendant found incompetent to stand trial. Like those rules, Rule 20.02, subd. 8 is intended to meet constitutional requirements of equal protection and due process. There is not continuing supervision by the criminal trial court in misdemeanor cases.

Rules 20.02, subd. 8(4) and 20.01, subd. 5 both require that the trial court and the prosecuting attorney be notified of any proposed institutional transfer or partial hospitalization status (see Minnesota Statutes, section 253B.15, subd. 11) or any proposed discharge, provisional discharge, or other termination of a defendant's civil commitment when that defendant has been found not guilty by reason of mental illness or deficiency or incompetent to proceed. The prosecuting attorney then has the right to participate as a party in any civil pro-

ceedings being conducted under the Minnesota Commitment Act of 1982, Minnesota Statutes, chapter 253B, concerning those matters. As such, the prosecuting attorney could question and present witnesses and argue for the continued commitment of the defendant in the civil proceedings. A person committed as mentally ill and dangerous can be discharged from that commitment only under the provisions of Minnesota Statutes, section 253B.18. Unlike patients committed as mentally ill only, patients committed as mentally ill and dangerous may not seek a discharge or provisional discharge of their commitment under Minnesota Statutes, section 253B.17 in the probate court which committed them or from the head of the institution under Minnesota Statutes, section 253B.16. Rather, Minnesota Statutes, section 253B.18 permits their discharge or provisional discharge only if ordered by the commissioner of public welfare after receiving a recommendation to that effect from an administrative special review board following a hearing. The commissioner's decision may be appealed to a three judge probate appeal panel appointed by the Supreme Court. The probate appeal panel then conducts a *de novo* hearing before deciding on the discharge or provisional discharge of the defendant. Minnesota Statutes, section 253B.19. Beyond that, any party may appeal an adverse decision to the Court of Appeals and an appeal of a release order stays the effect of that order until the appeal is decided by the Court of Appeals. Minnesota Statutes, section 253B.19, subd. 5. This is basically the same procedure as provided by the previous law under Minnesota Statutes, section 253A.15 as interpreted by the court in *In the Matter of the Mental Illness of K.B.C.*, 308 N.W.2d 495 (Minn. 1981).

Rule 20.03 (which is comparable to Minn. R. Civ. R. 35.03 and 35.04) permits the disclosure to use and by the prosecution of medical reports and hospital and medical records that are relevant to the defense of mental illness or mental deficiency. It includes reports and records that are made both before and after the defense of mental illness or mental deficiency is asserted. These rules allow the prosecution to call a defense-retained psychiatrist to testify at the mental illness portion of a bifurcated trial and such a practice does not violate the defendant's attorney-client privilege or the constitutional right to the effective assistance of counsel. *State v. Dodis*, 314 N.W.2d 233 (Minn. 1982).

The defendant may turn over the copies of the reports and records to the court instead of to the prosecuting attorney. If the defendant does so, the court shall examine them to determine their relevancy. If the court determines they are relevant, they shall be given to the prosecuting attorney. Otherwise they shall be returned to the defendant.

If the defendant is unable to comply with the order of the court for disclosure, either because the defendant does not have access to the reports or records, or for any other reason, a subpoena duces tecum may be issued under Rule 22 for their production. (See Rule 22.02).

By Rule 20.03, subd. 2 the reports and records disclosed to the prosecution under Rule 20.03, subd. 1 and evidence obtained therefrom are admissible only when the defense of mental illness or mental deficiency is the sole defense or when that defense is separated for trial under Rule 20.02, subd. 6(4).

(Amended effective for criminal actions commenced or arrests made after 12 o'clock midnight March 1, 2006; amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

[For text of Rules 21 to 25, see M.S. 2006, Volume 15]

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 on the Issue of Guilt.* The defendant, with the approval of the court may waive jury trial on the issue of guilt 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 on the Issue of an Aggravated Sentence.* Where an aggravated sentence is sought by the prosecution, the defendant, with the approval of the court, may waive jury trial on the facts in support of an aggravated sentence 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 a trial by jury and after having had an opportunity to consult with counsel.

(c) *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 determination of defendant's guilt, or the existence of facts to support an aggravated sentence, or both, 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. If this procedure is utilized for determination of defendant's guilt and the existence of facts to support an aggravated sentence, there shall be a separate waiver as to each issue. 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; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 26.04 for Comment.

[For text of 26.02, see M.S. 2006, Volume 15]

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 and the prosecution, 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. The prosecution may then make a rebuttal argument to the defense closing argument. The rebuttal must be limited to a direct response to those matters raised in the defendant's closing argument.

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

l. At the conclusion of the arguments the court shall allow the parties an opportunity, outside the presence of the jury and on the record, to make any objections they may have to the content or manner of the other party's argument based upon existing law and to request curative instructions. This rule does not limit the right of any party under existing law to make appropriate objections and to seek curative instructions at any other time during the closing argument process.

m. The court shall charge the jury.

n. 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. Jurors shall not be permitted to submit questions to any witness, directly or through the court or counsel. If either party offers into evidence a videotape or audiotape exhibit, that party may also provide to the court a transcript of the proposed exhibit which will be made a part of the record.

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 or Insufficiency of Evidence to Support an Aggravated Sentence.

(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. The court shall also, on motion of the defendant or on its initiative, order that any grounds for an aggravated sentence be withdrawn from consideration by the jury if the evidence is insufficient.

(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 or insufficiency of evidence to support an aggravated sentence 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.

(6) *Verdict Forms.* The court shall submit appropriate forms of verdict to the jury for its consideration. Where an aggravated sentence is sought, the court shall submit the issue(s) to the jury by special interrogatory.

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 notice 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 on the issue of guilt 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. When the jury has answered special interrogatories relating to an aggravated sentence, the jury shall be polled at the request of any party or upon court's initiative as to their answers. The poll(s) 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 either 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; amended effective for all trials commencing on or after March 14, 2000; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003; amended effective February 1, 2004; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 26.04 for Comment.

26.04 Postverdict Motions

Subd. 1. New Trial.

(1) *Grounds*. The court on written motion of the defendant may grant a new trial on the issue of guilt or the existence of facts to support an aggravated sentence, or both, on any of the following grounds:

1. If required in the interests of justice;
2. Irregularity in the proceedings of the court, jury, or on the part of the prosecution, or any order or abuse of discretion, whereby the defendant was deprived of a fair trial;
3. Misconduct of the jury or prosecution;
4. Accident or surprise which could not have been prevented by ordinary prudence;
5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;
6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;
7. The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

(2) *Basis of Motion*. A motion for new trial shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may

be shown by affidavit except as otherwise provided by these rules. A full or partial transcript of the court reporter's notes of the testimony taken at the trial or other verbatim recording thereof may be used on the hearing of the motion.

(3) *Time for Motion.* Notice of a motion for a new trial shall be served within 15 days after verdict or finding of guilty. The motion shall be heard within 30 days after the verdict or finding of guilty, unless the time for hearing be extended by the court within the 30-day period for good cause shown.

(4) *Time for Serving Affidavits.* When a motion for new trial is based on affidavits, they shall be served with the notice of motion. The opposing party shall have 10 days after such service in which to serve opposing affidavits, which period may be extended by the court upon an order extending the time for hearing under this rule. The court may permit reply affidavits.

Subd. 2. Motion to Vacate Judgment. The court on motion of a defendant shall vacate judgment, if entered, and dismiss the case if the indictment, complaint or tab charge does not charge an offense or if the court was without jurisdiction of the offense charged. The motion shall be made within 15 days after verdict or finding of guilty or after plea of guilty, or within such time as the court may fix during the 15-day period. If the motion is granted, the court shall make written findings specifying its reasons for vacating the judgment and dismissing the case.

Subd. 3. Joinder of Motions. Any motions for judgment of acquittal or to vacate judgment shall be joined with a motion for a new trial.

Subd. 4. New Trial on Court's Initiative. The court, within 15 days after verdict or finding of guilty, with the consent of the defendant, may order a new trial upon any of the grounds specified in Rule 26.04, subd. 1(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 all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

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 on the Issue of Guilt) 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) establishes the procedure for waiver of a jury on the issue of an aggravated sentence. See *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004) and *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005) as to the constitutional limitations on imposing aggravated sentences based on findings of fact beyond the elements of the offense and the conviction history. Also, see Rules 1.04 (d), 7.03, and 11.04 and the comments to those rules. Whether a defendant has waived or demanded a jury trial on the issue of guilt, that defendant is still entitled to a jury trial on the issue of an aggravated sentence and a valid waiver under Rule 26.01, subd. 1(2)(b) is necessary before an aggravated sentence may be imposed based on findings not made by jury trial.

Rule 26.01, subd. 1(2)(c) (Waiver When Prejudicial Publicity.) Under Rule 26.01, subd. 1(2)(c), 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 1, 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, Rule 26.02, subd. 2(2) (Anonymous Jurors) provides for a hearing upon a party's motion that the jurors' names, addresses, telephone numbers, and other identifying information not be distributed. At the hearing, the moving party will have an opportunity to present evidence and argument that there is reason to believe that the jury needs protection from external threats to its members' safety and impartiality. Upon a finding that there is strong reason to believe that this condition exists, the court may enter an order that information regarding identity, including names, telephone numbers, and ad-

*dress*es of prospective jurors be withheld from the public, parties and counsel. See *State v. Bowles*, 530 N.W.2d 521, 530–1 (Minn. 1995); *State v. McKenzie*, 532 N.W.2d 210, 219 (Minn. 1995). The restrictions ordered by the court may extend through trial and beyond as necessary to protect the safety and impartiality interests involved. To protect the identity of jurors and prospective jurors the court may order that they be identified by number or other method and may prohibit pictures or sketches in the courtroom. These procedures and protections are in accord with recommendation 22 of the Minnesota Supreme Court Jury Task Force Final Report of December 20, 2001. The trial court's decision will be reviewed under an abuse of discretion standard.

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(3) (Jury Questionnaire).

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

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

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

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

(Form 50), that they can ask the court to permit them to answer sensitive questions orally and privately under Rule 26.02, subd. 4(4). This procedure should minimize the sensitive or embarrassing information in the written questionnaires and consequently the need for sealing or destroying them.

In addition to being part of the record in the case, jury selection is a part of the criminal trial which is presumed to be open to the public. *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984) (*Press-Enterprise I*). The use of a jury questionnaire as part of jury selection is also a part of the open proceeding and therefore the public and the media 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. 4(4) (Exclusion of the Public from Voir Dire) provides the procedure and standards for excluding the public from voir dire or restricting access to related orders or transcripts when prospective jurors are questioned on sensitive or embarrassing matters. The Minnesota Supreme Court Jury Task Force in its Final Report of December 20, 2001 in recommendation 20 proposed that the Rules of Criminal Procedure be amended to safeguard the privacy interests of prospective jurors during voir dire when the interrogation focuses on highly sensitive or personal matters. Rule 26.02, subd. 4(4) does that, but subject to the dictates of *Press-Enterprise Co. v. Superior Court of California*, 464 U.S. 501 (1984), which requires balancing a prospective juror's privacy interest against the defendant's right to a fair and public trial and the First Amendment right of the public to have access to court proceedings. Under that case only a compelling interest would justify closing voir dire to the public and any restrictions on access must be narrowly tailored to serve that interest. Closure of voir dire must be rare and should be ordered only when the interrogation touches on deeply personal matters that the prospective juror has legitimate reasons for keeping out of the public domain. Under the rule and in accord with *Press-Enterprise*, the request to close voir dire must be initiated by the prospective juror. However, the court must advise the prospective jurors of the right to make that request when it appears that sensitive questions may be asked during voir dire. Any determination by the court to close any part of the voir dire must be supported by findings either in writing or orally on the record. The court may withhold names, restrict access to orders or transcripts, and excise transcripts as may be necessary to safeguard the overriding privacy interests involved.

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. See *State v. Bauer*, 189 Minn. 280, 249 N.W. 40 (1933) and *State v. Greer*, 635 N.W.2d 82 (Minn. 2001) (holding no error in district court's restrictions on voir dire). 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 chal-

lenges 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 from the time the jury is sworn until deliberation begins.

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," "j," "k," and "l" of this rule reflects a change. The prosecution argues first, then the defense. The prosecution is then automatically entitled to rebuttal argument. However, this argument must be true rebuttal and is limited to directly responding to matters raised in the defendant's closing argument. Allowance of the rebuttal argument to the prosecution should result in a more efficient and less confusing presentation to the jury. The prosecution will only need to address those defenses actually raised by the defendant rather than guessing, perhaps wrongly, about those defenses. In the event that the prosecution engages in improper rebuttal, paragraph "k" of the rule provides upon motion, for a limited right of rebuttal to the defendant to address misstatements of law or fact and any inflammatory or prejudicial statements. The court has the inherent power and duty to assure that any rebuttal or surrebuttal arguments stay within the limits of the rule and do not simply repeat matters from the earlier arguments or address matters not raised in the earlier arguments. It is the responsibility of the court to ensure that final argument to the jury is kept within proper bounds. ABA Standards for Criminal Justice, The Prosecution Function 3–5.8 and The Defense Function 4–7.8 (1985). If the argument is sufficiently improper, the trial judge should intervene even without objection from opposing counsel. See *State v. Salitros*, 499 N.W.2d 815 (Minn. 1993); *State v. White*, 295 Minn. 217, 203 N.W.2d 852 (1973).

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. The prohibition in Rule 26.03, subd. 15 against jurors submitting questions to witnesses is taken from *State v. Costello*, 646 N.W.2d 204 (Minn. 2002).

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 or Insufficiency of Evidence to Support an Aggravated Sentence) 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).) A defendant is also entitled to a jury determination of any facts beyond the elements of the offense or conviction history that might be used to aggravate the sentence. *Blakely v. Washington*, 542 U.S. 296, 124 S.Ct. 2531 (2004); *State v. Shattuck*, 704 N.W.2d 131 (Minn. 2005). If such a trial is held, the rule also provides that the defendant may challenge the sufficiency of the evidence presented.

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. 18(6) (Verdict Forms) requires that where aggravated sentence issues are presented to a jury, the court shall submit the issues to the jury by special interrogatory. For a sample form for that purpose see CRIMJIG 8.01 of the Minnesota Criminal Jury Instruction Guide. When that is done, Rule 26.03, subd. 19(5) permits any of the parties to request that the jury be polled as to their answers.

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.

(Amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

Rule 27. Sentence and Judgment

[For text of 27.01 and 27.02, see M.S. 2006, 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 a mitigated 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. In addition, the reasons for departure shall either be: (a) stated in a sentencing order; or (b) recorded in the departure report as provided by the sentencing guidelines commission and attached to the sentencing form provided for in subdivision 6. The sentencing order or sentencing form with attached departure report shall be filed with the commission 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:

(1) The court shall state the precise term during which imposition or execution will be stayed.

(2) 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.

(3) 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.

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

(5) 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) A verbatim record of the sentencing proceedings shall be made. The defendant, prosecution, or any person may, at their expense, order a transcript of the verbatim record made in accordance with this rule. When requested, the transcript must be completed within 30 days of the date the transcript was requested in writing and satisfactory financial arrangements were made for the transcription.

(B) Information from the sentencing proceeding shall also be recorded in a sentencing form or order that, at a minimum, contains:

- (1) the defendant's name;
- (2) case number;
- (3) for each count:
 - a. if the defendant pled guilty to or was found guilty of the offense:
 - i. the offense date;
 - ii. a citation to the offense statute and level of offense;
 - iii. the information specified in subdivision 4 (precise terms of sentence including the amount of any fine, time spent in custody, whether the sentence is a departure and if so, the reasons therefor, and terms and conditions of probation);
 - iv. the level of sentence; and
 - v. restitution, if appropriate, and whether it shall be joint and several with other persons; or
 - b. if the defendant did not plead guilty to or was not found guilty of the offense, that the defendant was acquitted or the count was dismissed;

(4) other financial obligations such as surcharges, law library fees, court costs, and treatment evaluation costs; and

(5) the signatures of the sentencing judge and defendant.

The sentencing form or order shall be provided in place of the transcript required in Minnesota Statutes, sections 243.49 and 631.41.

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; amended effective November 5, 2003; amended effective for criminal actions commenced or arrests made after 12 o'clock midnight March 1, 2006; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight October 1, 2006.)

See Rule 27.05 for Comment.

[For text of 27.04 and 27.05, see M.S. 2006, Volume 15]

Rule 28. Appeals to Court of Appeals

[For text of 28.01 to 28.03, see M.S. 2006, 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 an order staying adjudication of an offense for which the defendant pleaded guilty or was found guilty at a trial. An order for a stay of adjudication to which the prosecuting attorney did not object is not appealable; and

(5) 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

(6) 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; and

(7) in any case, from an order for a new trial granted under Rule 26.04, subd. 1, after a verdict or judgment of guilty, if the trial court expressly states therein, or in a memorandum attached thereto, that the order is based exclusively upon a question of law which in the opinion of the trial court is so important or doubtful as to require a decision by the appellate courts. However, an order for a new trial is not appealable if it is based on the interests of justice.

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 court administrator 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, or within fifteen (15) days of the filing of the notice of appeal if the transcript was delivered prior to the filing of the notice of appeal or if the appellant has not requested any transcript under Rule 28.04, subd. 2(2), 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 Appel-

late 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 court administrator pursuant to Rule 33.03, subsequently serves notice of entry of the order appealed from upon the prosecuting attorney or within 5 days after the prosecuting attorney is notified in court on the record of such order, whichever occurs first. All pretrial orders entered and noticed to the prosecuting attorney prior to the trial court's final determination of all issues raised in the Omnibus Hearing under Rule 11, or the evidentiary hearing and pretrial conference under Rule 12, may be included in this appeal. An appeal by the prosecuting attorney under this rule bars any further appeal by the prosecuting attorney from any existing orders not included in the appeal. No appeal of a pretrial order by the prosecuting attorney shall be taken after jeopardy has attached.

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

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

Subd. 4. Conditions of Release. Upon appeal by the prosecuting attorney of a pretrial order, the conditions for defendant's release pending the appeal shall be governed by Rule 6.02, subsd. 1 and 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.

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 court administrator 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 Order Staying Adjudication.

(1) *Service and Filing.* An appeal from an order staying adjudication shall be taken by filing a notice of appeal with the clerk of the appellate courts together with proof of service on opposing counsel, the court administrator of the trial court in which the order is entered, the State Public Defender, and when the appellant is not the attorney general, the attorney general of the State of Minnesota. The notice shall be accompanied by a copy of a written request to the court reporter for such transcript of the proceedings as appellant deems necessary. 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 from an order staying adjudication shall be taken within 10 days after entry of the order.

(3) *Briefs.* Within 15 days after delivery of the transcript, or within 15 days after the filing of the notice of appeal if the transcript was delivered prior to filing of the notice of appeal or if the appellant has not requested a transcript, the appellant shall file the appellant's brief with the clerk of the appellate courts together with proof of service upon the respondent. The brief shall be identified as a stay of adjudication brief. Within eight days after service of the appellant's brief, the respondent shall file the respondent's brief with the 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) *Other Procedures.* The provisions of Rule 28.02, subd. 4(2), concerning the contents of the notice of appeal, Rule 28.02, subd. 5, concerning proceedings in forma pauperis, Rule 28.02, subd. 7, concerning release of the defendant pending appeal, Rule 28.02, subd. 8, concerning the record on appeal, and Rule 28.02, subd. 13, concerning oral argument, shall apply to appeals by the prosecuting attorney from an order staying adjudication.

Subd. 8. Procedure Upon Appeal from Judgment of Acquittal or Vacation of Judgment After a Jury Verdict of Guilty, or From an Order Granting a New Trial.

(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 court administrator 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, or an order granting a new trial, 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, or from an order granting a new trial, 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, or an order granting a new trial.

(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.

(Amended June 29, 1987, effective August 1, 1987; 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; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003; amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

See Rule 28.05 for Comment.

[For text of 28.05, see M.S. 2006, 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 authorized 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). Subd. 2(2) 3 provides defendants with the ability to appeal an order denying a double jeopardy based motion for dismissal after a first trial has ended by mistrial. This provision avoids forcing a defendant to stand trial for a second time for the same offense, one of the principle concerns of double jeopardy protection, *State v. McDonald*, 298 Minn. 449, 452, 215 N.W.2d 607, 609 (1974), without first permitting appellate review of the double jeopardy issue. 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. A defendant cannot as a matter of right appeal from a stay of adjudication entered pursuant to Minnesota Statutes, section 152.18, subdivision 1, which statute requires the consent of the defendant. However, a defendant may seek discretionary appeal from such a stay under Rule 28.02, subd. 3. *State v. Vershelde*, 595 N.W.2d 192 (Minn. 1999).

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. 4(4) establishes a procedure by which a defendant who has initiated a direct appeal may nonetheless pursue postconviction relief. Certain types of claims are better suited to the taking of testimony and fact-finding possible in the district court, and defendants are encouraged to bring such claims, such as ineffective assistance of counsel where explanation of the attorney's decision is necessary, through postconviction proceedings rather than through direct appeal. See *Black v. State*, 560 N.W.2d 83, 85 n.1 (Minn. 1997).

The order staying the appeal may provide for a time limit within which to file the postconviction proceeding.

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. Part (7) sets forth the procedure through which an indigent person represented on appeal by private counsel obtains a transcript at public expense. It reflects the ruling and procedure set out in *State v. Pederson*, 600 N.W.2d 451 (Minn. 1999). Part (7)(c) addresses the method of resolving disputes between the State Public Defender and the private attorney about what parts of the transcript should be ordered. The "appropriate" court for resolving disputes is the appellate court in which the appeal is filed. In the event an evidentiary hearing or extensive fact finding is required to resolve the dispute, the appellate court may order the issue be resolved by the district court in which the case was originally filed. In any case in which the entire transcript is not ordered, the procedure set forth in Rule 28.02, subd. 9, must be followed to permit the respondent to order additional parts of the transcript. Part (8), which requires court administrators to furnish to the State Public Defender copies of any documents in their possession without charge, is in accord with Minnesota Statutes, section 611.271. 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)3 the case shall be considered as submitted to the court at the time the clerk so notifies the parties. If oral argument is not held because it was not requested by the parties or was waived or forfeited by them, then the date upon which the case is considered submitted to the court is determined under Minn.R.Civ.App.P. 134.06. Under Minn.R.Civ.App.P. 134.06 waiver of oral argument requires the consent of the court as well as the agreement of the parties.

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

Rule 28.04 (Appeal by Prosecuting Attorney) sets forth the right and the procedure for the prosecuting attorney to appeal to the Court of Appeals. 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). In response to *State v. Lee*, 706 N.W.2d 491 (Minn. 2005), Rule 28.04, subd. 1(4), was revised to expressly permit a prosecuting attorney to appeal a stay of adjudication ordered by the district court over the objection of the prosecuting attorney. Prior to that revision, such appeals were permitted by construing the appeal in misdemeanor and gross misdemeanor cases as an appeal from a pretrial order under part (1) and in felony cases as an appeal from a sentence under part (2). See *State v. Hoelzel*, 639 N.W.2d 605 (Minn. 2002); *State v. Verschelde*, 595 N.W.2d 192 (Minn. 1999); *State v. Thoma*, 571 N.W.2d 773 (Minn. 1997), aff'g 569 N.W.2d 205 (Minn. App. 1997); and *State v. Wright*, 699 N.W.2d 782 (Minn. App. 2005). 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. In *State v. Hugger*, 640 N.W.2d 619 (Minn. 2002) the court held that in computing the 5-day time period within which an appeal must be taken under Rule 28.04, subd. 2(8), intermediate Saturdays, Sundays, and legal holidays shall be excluded pursuant to Rule 34.01 before the additional 3 days for service by mail is added pursuant to Rule 34.04.

Rule 28.04, subd. 2(2), requires that the prosecuting attorney serve the notice of appeal, the statement of the case, and the request for transcript on the defendant or defense counsel, the State Public Defender, the attorney general for the State of Minnesota, and the court administrator. Failure to timely serve the notice of appeal on the State Public Defender is a jurisdictional defect requiring dismissal of the appeal. *State v. Barrett*, 694 N.W.2d 783 (Minn. 2005).

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).

(Amended effective for criminal actions commenced or arrests made after 12 o'clock midnight March 1, 2006; amended effective for all criminal actions commenced or arrests made on or after April 1, 2007.)

Rule 29. Appeals to Supreme Court

[For text of 29.01 to 29.05, see M.S. 2006, Volume 15]

29.06 Procedure for Appeals by the Prosecuting Attorney from a Judgment of Acquittal or Vacation of Judgment after a Jury Verdict of Guilty, or from an Order Granting a New Trial

Upon an appeal to the Supreme Court 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, or from an order granting a new trial, in a first degree murder case, the provisions of Rule 28.04, subd. 8 shall apply.

(Added effective for criminal actions commenced or arrests made after 12 o'clock midnight July 1, 1994; amended effective for all criminal actions commenced or arrests made after 12 o'clock midnight February 1, 2003; amended effective April 1, 2007.)

[For text of Rule 30 to Table of Superseded Statutes, see M.S. 2006, Volume 15]