NO. ADM 04-8001

State of Minnesota
In Supreme Court

In re: Proposed Amendments to the
Minnesota Rules of Civil Procedure

PETITION AND APPENDIX OF MINNESOTA STATE BAR ASSOCIATION

Mark R. Bradford (#335940)
Christine E. Hinrichs (#389963)
BASSFORD REMELE, P.A.
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
612-333-3000

Attorneys for Petitioner
Minnesota State Bar Association

Petitioner, Minnesota State Bar Association ("MSBA"), respectfully asks this Court to amend the Minnesota Rules of Civil Procedure to: (1) substantially conform certain rules to the Federal Rules of Civil Procedure; and (2) require that at least 50 percent of unclaimed, undistributed funds in state class-action lawsuits (*cy pres*) be donated to the Minnesota Legal Aid Foundation Fund.

In support of its Petition, MSBA states:

1. MSBA is a not-for-profit professional association comprised of attorneys admitted to practice before this Court and the lower courts throughout the State of Minnesota.

2. The Supreme Court has the exclusive authority to amend the Minnesota Rules of Civil Procedure.

3. For many years, MSBA has worked to improve Minnesota's courts and from time to time has petitioned this Court to amend the Minnesota Rules of Civil Procedure.

4. On September 24, 2015, the MSBA formed a subcommittee, called the Federal Conformity Working Group, to evaluate further potential changes to the Minnesota Rules of Civil Procedure. The Working Group was comprised of: two members of the MSBA Judiciary Committee; the current Chair of the MSBA Judiciary Committee (Daniel J. Cragg); and two members of the MSBA Court Rules and Administration Committee.

5. After completing its evaluation, the Working Group proposed various amendments to the full MSBA Court Rules and Administration Committee. That

committee met twice to consider the proposed amendments, and in turn made recommendations to the MSBA Judiciary Committee. The Judiciary Committee voted to adopt the recommendations, and presented to the MSBA General Assembly:

(1) a Report and Recommendation to the MSBA Regarding Proposing Amendments to the Minnesota Rules of Civil Procedure;[1] and

(2) a Report and Recommendation to the MSBA Regarding Amendment to the Minnesota Rules of Civil Procedure to Require that at Least 50 percent of Unclaimed, Undistributed Residual Funds in Class Actions be donated to the Minnesota Legal Aid Foundation.[2]

6. MSBA's General Assembly adopted each Report and Recommendation at MSBA's annual meeting on June 24, 2016. The General Assembly also authorized the filing of this Petition and attachments to request that the Supreme Court implement the recommended changes.

SUBSTANTIALLY CONFORM CERTAIN RULES TO THE FEDERAL RULES OF CIVIL PROCEDURE

7. As its first Petition, MSBA respectfully requests that this Court amend Rules 4, 5, 6, 12, 14, 15, 27, 32, 53, 56, 59, 63, and 68 to conform to the time-period structure contained in the Federal Rules of Civil Procedure and to read as discussed below.

8. In particular, MSBA requests that this Court change five-day periods to seven-day periods, 10-day periods to 14-day periods, and 20-day periods to 21-day periods. These changes would prevent filing due dates from frequently falling on

[1] This Report and Recommendation is attached as App.1-61.

[2] This Report and Recommendation is attached as App.62-79.

Saturdays and Sundays, and provide litigants a clearer and more logical time computation.

9. MSBA also requests that this Court amend Rule 16 to make scheduling orders mandatory and to require counsel's attendance at pre-trial conferences, amend Rule 26 to clarify the timeframe for initial disclosures and the commencement or discovery, amend Rules 30 and 31 to conform to their federal counterparts, and correct a typographical error in Rule 30.05.

10. With respect to Rule 4, MSBA requests that Rule 4.05 be replaced by language similar to Federal Rule of Civil Procedure ("FRCP") 4(d). FRCP 4(d) is a clearer rule that illustrates the ability to waive service in order to reduce costs, and provides a defendant with additional time to answer as an incentive to waive service. These changes would additionally require a slight change to Rule 3. MSBA therefore proposes that Rules 3 and 4 be amended as follows:

* * *

3.01. Commencement of the Action

A civil action is commenced against each defendant: (a) when the summons is served upon that defendant, or (b) at the date of waiver of service pursuant to Rule 4.05 ~~acknowledgement of service if service is made by mail~~ or other means of service consented to by the defendant either in writing or electronically; or (c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Filing requirements are set forth in Rule 5.04, which requires filing with the court within one year after commencement for non-family cases.

* * *

4.042. Service of the Complaint

If the defendant shall appear within ~~ten~~ 14 days after the completion of service by publication, the plaintiff, within ~~five~~ seven days after such appearance, shall serve the complaint, by copy, on the defendant or the defendant's attorney. The defendant shall then have at least ~~ten~~ 14 days in which to answer the same.

* * *

~~**4.05. Service by Mail**~~

~~In any action service may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgment of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt of summons within the time allowed by these rules.~~

4.05. Waiving Service of Summons

(a) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4.03 has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may request that the defendant waive service of a summons. The notice and request must:

(1) be in writing and be addressed:

(A) to the individual defendant; or

(B) for a defendant subject to service under Rule 4.03(b)-(e) to the agent authorized by appointment or by law to receive service of process;

(2) be accompanied by a copy of the complaint, 2 copies of Form 22 or a substantially similar form, and a prepaid means for returning a signed copy of the form;

(3) inform the defendant, using Form 22 or a substantially similar form of the consequences of waiving and not waiving service;

(4) state the date when the request is sent;

(5) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside the United States—to return the waiver; and

(6) be sent by first-class mail or other reliable means.

(b) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(1) the expenses later incurred in making service; and

(2) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(c) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside the United States.

(d) Results of Filing of a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of execution of the waiver.

(e) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

* * *

11. With respect to Rule 5, the current Rule 5.05 requires that parties filing by facsimile must follow up the filing with a transmission fee, larger exhibits and

attachments, and filing fees within five days. This time period should be changed to seven days in accordance with the federal rules seven day increment structure. MSBA therefore proposes that Rule 5.05 be amended as follows:

* * *

5.05. Filing; Facsimile Transmission

Except where filing is required by electronic means by rule of court, any document may be filed with the court by facsimile transmission. Filing shall be deemed complete at the time that the facsimile transmission is received by the court and the filed facsimile shall have the same force and effect as the original. Only facsimile transmission equipment that satisfies the published criteria of the Supreme Court shall be used for filing in accordance with this rule. Within ~~five~~ seven days after the court has received the transmission, the party filing the document shall forward the following to the court:

(a) a $25 transmission fee for each 50 pages, or part thereof, of the filing;

(b) any bulky exhibits or attachments; and

(c) the applicable filing fee or fees, if any.

If a document is filed by facsimile, the sender's original must not be filed but must be maintained in the files of the party transmitting it for filing and made available to the court or any party to the action upon request. Upon failure to comply with the requirements of this rule, the court in which the action is pending may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, staying further proceedings until compliance is complete, or dismissing the action, proceeding, or any part thereof.

* * *

12. With respect to Rule 6, the time allowed in Rule 6.04 to serve a motion before a hearing should be changed from five days to seven days to conform to the federal rules seven-day increment structure. Further, a definition of "next day" should be

added both to conform to the federal rules and also to end a recurring issue that arises with motion response deadlines. Because Minn. R. Gen. Prac. 115 requires that dispositive motion responses be served nine days before a hearing, response deadlines often fall on weekends, which means the deadline would run to the next business day. However, an ambiguity arises because "next day" would naturally mean one counts forward, but in context could also be construed to mean that one continues to count backward from the hearing date. The proposed amendment makes it clear that the "next day" has the latter meaning. In practice, this will mean that reply briefs for Tuesday hearings will be filed and served on a Friday, rather than a Monday, allowing the district court sufficient time to review the reply brief. Finally, the last sentence of Rule 6.05, which allows an extra day for service if service is made by a means other than United States Mail and after 5:00 p.m., should be removed. Mandatory e-filing has effectively eliminated the need for this rule. MSBA therefore proposes that Rules 6.04 and 6.05 be amended as follows:

* * *

6.01. Computation

(a) Computation of Time Periods. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a: Saturday; Sunday; legal holiday; or when the act to be done is the filing of a document in court, a day on which weather or other conditions result in the closing of the office of the court administrator of the court where the action is pending; or where filing or service is either permitted or required to be made electronically, a day on which unavailability of the computer system used by the court for electronic filing and service makes it impossible to accomplish service or filing, in which event the

period runs until the end of the next day that is not one of the aforementioned days. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

6.04. For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served no later than ~~five~~ seven days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59.04, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

* * *

6.05. Additional Time After Service by Mail or Service Late in Day

Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party, and the notice or document is served upon the party by United States Mail, three days shall be added to the prescribed period. ~~If service is made by any means other than United States Mail and accomplished after 5:00 p.m. local Minnesota time on the day of service, one additional day shall be added to the prescribed period.~~

* * *

13. With respect to Rule 12, the current Rule 12 imposes numerous 20-day time limits that should be changed to 21-day limits in accordance with the federal rules seven-day increment structure. In addition, parties subject to orders for a more definite statement should be given 14 days to comply rather than 10 days, again in accordance with the federal rules seven-day increment structure. MSBA therefore proposes that Rule 12 be amended as follows:

* * *

13.01. When Presented

Defendant shall serve an answer within ~~20~~ 21 days after service of the summons upon that defendant unless the court directs otherwise pursuant to Rule 4.043. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within ~~20~~ 21 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within ~~20~~ 21 days after service of the answer or, if a reply is ordered by the court, within ~~20~~ 21 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after service of notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ~~ten~~ 14 days after the service of the more definite statement.

* * *

12.05. Motion for More Definite Statement, for Paragraphing and for Separate Statement

If a pleading to which a responsive pleading is permitted violates the provisions of Rule 10.02, or is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a compliance with Rule 10.02 or for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ~~ten~~ 14 days after service of notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

* * *

12.06. Motion to Strike

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within ~~20~~ 21 days after the service of the pleading upon the party, or upon its own initiative at any time, the court may order any pleading not in compliance with Rule 11 stricken as sham and false, or may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

* * *

14. With respect to Rule 14, the current Rule 14.01 requires that copies of third-party pleadings be furnished to any requesting party in the action within five days. The requirement to request third-party pleadings seems antiquated in the era of e-filing. Third-party pleadings should be served in accordance with Rule 5.01. MSBA therefore proposes that Rule 14 be amended as follows:

* * *

14.01. When Defendant May Bring in Third Party

Within 90 days after service of the summons upon a defendant, and thereafter either by written consent of all parties to the action or by leave of court granted on motion upon notice to all parties to the action, a defendant as a third-party plaintiff may serve a summons and complaint, together with a copy of plaintiff's complaint upon a person, whether or not the person is a party to the action, who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff and after such service shall forthwith serve notice thereof upon all other parties to the action. ~~Copies of third-party pleadings shall be furnished by the pleader to any other party to the action within five days after request therefor.~~ The person so served, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the

third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed in accordance with this rule against any person who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

* * *

15. With respect to Rule 15, the current Rule 15.01 allows a party to amend a pleading as a matter of course within 20 days after it has been served, and requires a response to the amended pleading within ten days of service. These time periods should be changed to conform to the federal rule, which allows 21 days to amend a pleading, and 14 days to respond to that amended pleading. This amendment would be consistent with the federal rules seven-day structure. The MSBA therefore proposes that Rule 15.01 be amended as follows:

* * *

15.01. Amendments

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within ~~20~~ 21 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ~~ten~~ 14 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

* * *

16. With respect to Rule 16, MSBA suggests that the rule should make scheduling orders mandatory rather than optional. This conforms the rule to the federal system and improves efficiency and clarity with regard to schedules. MSBA also suggests adding a section mandating preparation and attendance at pretrial conferences, as in the federal rules. Adding this section would increase the usefulness of such conferences. MSBA therefore proposes that Rule 16 be amended as follows:

* * *

16.02. Scheduling and Planning

The court ~~may, and upon written request of any party with notice to all parties,~~ shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:

(a) to join other parties and to amend the pleadings;

(b) to file and hear motions; and

(c) to complete discovery.

The scheduling order also may include

(d) provisions for disclosure or discovery of electronically stored information;

(e) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation materials after production;

(f) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(g) any other matters appropriate in the circumstances of the case. A schedule shall not be modified except by leave of court upon a showing of good cause.

16.03. Attendance and Subjects for Consideration at a Pretrial Conference

(a) **Attendance**: A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider settlement.

(b) At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Minnesota Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters pursuant to Rule 53;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42.02 with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50.01 or an involuntary dismissal under Rule 41.02(b);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

* * *

17. With respect to Rule 26, MSBA suggests that the rule should be amended to provide more clarity on the timing for initial disclosures and the commencement of discovery. The time allowed for initial disclosures, both in general and for parties served or joined later, should be based on the Rule 26.06 conference rather than the required date for an answer. This would also prioritize the Rule 26.06 conference. The time

allotted to make initial disclosures after the Rule 26.06 conference should be 14 days to reduce delay in the early stages.

18. MSBA also suggests that Minn. R. Civ. P. 26.02(b)—which the federal advisory committee relied upon in making its 2015 amendments—should add the "relative ease of access" as a consideration to bring it into substantial conformity with its federal counterpart. Rule 26.03 should include a clause allowing the shifting of expenses in order to conform to the federal rule.

19. Finally, MSBA suggests that the initial clause of Rule 26.04 be removed and discovery be allowed to commence after the conference, rather than the framing of the discovery plan, in conformity with FRCP 26(d). Doing so would prioritize the Rule 26.06 conference along with the other proposed changes to this rule. This would also necessitate removal of the related clauses in Rules 26.02, 30.01, 31.01(a), 33.01(a), 34.02, 36.01, and 45. A new clause on "early Rule 34 requests" should be added to conform with the 2015 amendments to the federal rules. MSBA therefore proposes that Rule 26 be amended as follows:

26.01. Required Disclosures

(a) Initial Disclosure.

* * *

(3) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within ~~60 days after the original due date when an answer is required~~ 14 days after the parties' Rule 26.06 conference, unless a different time is set by stipulation or court order, or unless an objection is made in a proposed discovery plan submitted as part of a civil cover sheet required under Rule 104 of the General Rules of Practice for the District

Courts. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(4) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the ~~initial disclosures are due under Rule 26.01(a)(3)~~ Rule 26.06 conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

* * *

26.02. Discovery Methods, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the methods and scope of discovery are as follows:

(a) Methods. Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission.

(b) Scope and Limits. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the parties' relative access to relevant information, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Subject to these limitations, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Upon a showing of good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(1) Authority to Limit Frequency and Extent. The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(2) Limits on Electronically Stored Evidence for Undue Burden or Cost. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause and proportionality, considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(3) Limits Required When Cumulative; Duplicative; More Convenient Alternative; and Ample Prior Opportunity. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court <u>on motion or on its own initiative</u> if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; <u>or</u>

<u>**(iii)** the burden of proposed discovery is outside the scope permitted by Rule 26.02(b).</u>

* * *

26.03. Protective Orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance,

embarrassment, oppression, or undue burden or expense, including one or more of the following:

(a) that the discovery not be had;

(b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or providing for the allocation of expenses;

(c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) that discovery be conducted with no one present except persons designated by the court;

(f) that a deposition, after being sealed, be opened only by order of the court;

(g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37.01(d) applies to the award of expenses incurred in connection with the motion.

26.04. Timing and Sequence of Discovery

(a) Timing. ~~Notwithstanding the provisions of Rules 26.02, 30.01, 31.01(a), 33.01(a), 34.02, 36.01, and 45,~~ Parties may not seek discovery from any source before the parties have conferred ~~and prepared a discovery plan~~ as required by Rule 26.06(c) except: ~~in a proceeding exempt from initial disclosure under Rule 26.01(a)(2),~~

~~(i)~~ ~~or~~ when allowed by stipulation or court order, or

(ii) when proceedings are exempt from disclosure under Rule 26.01(a)(2), in which case the parties may seek discovery from any source no sooner than the expiration of 14 days after the initial deadline to answer, or

(iii) for an early Rule 34 request. An early Rule 34 request may be delivered more than 21 days after the summons and complaint are served on a party. An early Rule 34 request is considered to have been served at the Rule 26.06 conference.

(b) Sequence. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(c) Expedited Litigation Track. Expedited timing and modified content of certain disclosure and discovery obligations may be required by order of the supreme court adopting special rules for the pilot expedited civil litigation track.

* * *

20. With respect to Rule 27, the current Rule 27.01(b) requires 20 days' notice before the date of a hearing. This should be changed to 21 days to reflect the federal rules seven-day increment structure. MSBA therefore proposes that Rule 27 be amended as follows:

* * *

27.01. Before Action

* * *

(b) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least ~~20~~ 21 days before the date of hearing, the notice

shall be served either within or outside the state in the manner provided in Rule 4.03 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4.03, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, the provisions of Rule 17.02 apply.

* * *

21. With respect to Rules 30 and 31, MSBA suggests that Rule 30.01 be amended to conform to the changes proposed in Rule 26 in relation to Rule 26.04. The language in Rule 30.02(b) should also be updated to improve clarity and conform to its federal counterpart.

22. Rule 30.05 appears to have a typo. It states: "The officer shall indicate in the certificate prescribed by Rule 30.06(1). . . ." It should reference Rule 30.06(a) instead. MSBA therefore proposes that Rules 30 and 31 be amended as follows:

* * *

30.05. Review by Witness; Changes; Signing

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The officer shall indicate in the certificate prescribed by ~~Rule 30.06(1)~~ 30.06(a)) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

* * *

31.01 Serving Questions; Notice

(a) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (b). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(b) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26.02(a), if the person to be examined is confined in prison, or ~~if, without the written stipulation of the parties, the party to be examined has already been deposed in the case~~ the parties have not stipulated to the deposition and (1) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants, (2) the person to be examined has already been deposed in the case, or (3) if the party seeks to take a deposition before the time specified in Rule 26.04.

(c) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30.02(f).

(d) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may, for cause shown, enlarge or shorten the time.

* * *

23. With respect to Rule 32, the current Rule 32.05(c) requires that objections to written deposition questions be served within five days. MSBA suggests that this be changed to seven days. MSBA therefore proposes that Rule 32 be amended as follows:

* * *

32.04. Effect of Errors and Irregularities in Depositions

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions submitted pursuant to Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within ~~five~~ seven days after service of the last questions authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed, preserved or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer pursuant to Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

* * *

24. With respect to Rule 33, MSBA suggests that Rule 33.01(a) be amended to conform to the time period changes in Rule 26.04, as discussed above. MSBA therefore proposes that Rule 33 be amended as follows:

* * *

33.01. Availability

(a) Any party may serve written interrogatories upon any other party~~. Interrogatories may, without leave of court, be served upon any party after service of the summons and complaint.~~ No party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.

(b) The party upon whom the interrogatories have been served shall serve separate written answers or objections to each interrogatory within 30 days after service of the interrogatories, ~~except that a defendant may serve answers or objections within 45 days after service of summons and complaint upon that defendant.~~ The court, on motion and notice and for good cause shown, may enlarge or shorten the time.

* * *

25. With respect to Rule 34, MSBA suggests that Rule 34.02 be amended to accommodate the changes to Rule 26.04, as discussed above. Rule 34.02 should also be brought into conformity with its federal counterpart. MSBA therefore proposes that Rule 34 be amended as follows:

* * *

34.02. Procedure

The request may, without leave of court, be served upon any party with or after service of the summons and complaint. The request shall set

forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, ~~except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant~~ or, if the request was delivered under Rule 26.04, within 30 days after the parties' first Rule 26.06 conference. ~~The court may allow a shorter or longer time.~~ A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, ~~stating the reasons for objection~~ stating with specificity the reasons for objection. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, that part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order pursuant to Rule 37 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(a) A party who produces documents for inspection shall produce them as they are kept in the usual course of business at the time of the request or, at the option of the producing party, shall organize them to correspond with the categories in the request;

(b) If a request does not specify the form or forms for producing electronically stored information, a responding party must

produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(c) A party need not produce the same electronically stored information in more than one form.

* * *

26. With respect to Rule 36, MSBA suggests that Rule 36.01 be changed only to accommodate the changes to Rule 26.04. MSBA therefore proposes that Rule 36 be amended as follows:

* * *

36.01. Request for Admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements, opinions of fact, or the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request, unless they have been or are otherwise furnished or made available for inspection and copying. The request may be served without leave of court unless the party seeks to serve the request before the time specified in Rule 26.04 ~~be served after service of the summons and complaint~~.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within 30 days after service of the request, or within such shorter or longer time as the court may allow or the parties stipulate to under Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney.~~; but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant.~~ If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and, when good faith requires that a party qualify an answer or deny only a part of

the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that a reasonable inquiry has been made and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37.03, deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request is to be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37.01(d) apply to the award of expenses incurred in connection with the motion.

* * *

27. With respect to Rule 37, MSBA notes that Rule 37.01(b) and Rule 37.05 were in conformity (or substantial conformity in the case of 37.01(b)) with their federal counterpart until the 2015 amendments to the federal rules. MSBA suggests bringing them into (substantial) conformity again. MSBA therefore proposes that Rule 37 be amended as follows:

* * *

37.01. Motion for Order Compelling Disclosure or Discovery

(a) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

(b) Specific Motions.

(1) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26.01, any other party may move to compel disclosure and for appropriate sanctions.

(2) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection.

This motion may be made if:

(A) a deponent fails to answer a question propounded or submitted under Rules 30 or 31;

(B) a corporation or other entity fails to make a designation under Rule 30.02(f) or 31.01(c);

(C) a party fails to answer an interrogatory submitted under Rule 33; or

~~(D) if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested.~~

(D) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) Evasive or Incomplete Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(d) Expenses and Sanctions.

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an

opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

~~**37.05. Electronically Stored Information**~~

~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

37.05. Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(a) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(b) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(1) presume that the lost information was unfavorable to the party;

(2) instruct the jury that it may or must presume the information was unfavorable to the party; or

(3) dismiss the action or enter a default judgment.

* * *

28. With respect to Rule 53, the current Rule 53.07(b) includes a 20-day limit for filing objections to a master's order, report, or recommendation, which should be changed to 21 days. MSBA therefore proposes that Rule 53 be amended as follows:

* * *

53.07. Action on Master's Order, Report, or Recommendations

(a) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.

(b) Time To Object or Move. A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than ~~20~~ 21 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.

* * *

29. With respect to Rule 56, many aspects of the current Rule 56 are antiquated. Significant changes were made in 2010 to Rule 56 of the Federal Rules of Civil Procedure to bring it into conformity with the modern practice of summary

judgment. MSBA suggests that the Minnesota rule be brought into conformity with its federal counterpart. MSBA therefore proposes that Rule 56 be amended as follows:

~~**56.01. For Claimant**~~

~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the service of the summons, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~

56.01. Motion for Summary Judgment or Partial Summary Judgment.

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

~~**56.02. For Defending Party**~~

~~A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

56.02. Time to File a Motion.

Service and filing of the motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than 14 days before the time fixed for the hearing. Unless the court orders otherwise, a party may not file a motion for summary judgment more than 30 days after the close of all discovery.

~~**56.03. Motion and Proceedings Thereon**~~

~~Service and filing of the motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than 10 days~~

~~before the time fixed for the hearing. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

56.03. Procedures.

(a) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(1) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations pursuant to Minn. Stat. § 358.116, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(b) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(d) Affidavits or Declarations. An affidavit or declaration pursuant to Minn. Stat. § 358.116 used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

~~**56.04. Case not Fully Adjudicated on Motion**~~

~~If, on motion pursuant to this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not~~

~~in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~

56.04. When Facts Are Unavailable to the Nonmovant.

If a nonmovant shows by affidavit or declaration pursuant to Minn. Stat. § 358.116 that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(a) defer considering the motion or deny it;

(b) allow time to obtain affidavits or declarations or to take discovery; or

(c) issue any other appropriate order.

~~**56.05. Form of Affidavits; Further Testimony; Defense Required**~~

~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or parts thereof referred to in an affidavit shall be attached thereto or served therewith. A "sworn copy" includes documents that are authenticated by a signature under penalty of perjury, pursuant to Minn. Stat. § 358.116. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

56.05. Failing to Properly Support or Address a Fact.

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56.03, the court may:

(a) give an opportunity to properly support or address the fact;

(b) consider the fact undisputed for purposes of the motion;

(c) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(d) issue any other appropriate order.

~~**56.06. When Affidavits are Unavailable**~~

~~Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.~~

56.06. Judgment Independent of the Motion.

After giving notice and a reasonable time to respond, the court may:

(a) grant summary judgment for a nonmovant;

(b) grant the motion on grounds not raised by a party; or

(c) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

~~**56.07. Affidavits Made in Bad Faith**~~

~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party submitting them to pay to the other party the amount of the reasonable expenses which the filing of the affidavits causes the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.~~

56.07. Failing to Grant All the Requested Relief.

If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

56.08. Affidavit or Declaration Submitted in Bad Faith.

If satisfied that an affidavit or declaration pursuant to Minn. Stat. § 358.116 under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

* * *

30. With respect to Rule 59, the current Rule 59.04 imposes a 10-day time limit on parties opposing a new trial to serve affidavits. This should be extended to 14 days. MSBA therefore proposes that Rule 59 be amended as follows:

* * *

59.04 Time for Serving Affidavits

When a motion for a new trial is based upon affidavits, they shall be served with the notice of motion. The opposing party shall have ~~10~~ 14 days after such service in which to serve opposing affidavits, which period may be extended by the court pursuant to Rule 59.03. The court may permit reply affidavits.

* * *

31. With respect to Rule 63, the current Rule 63.03 requires 10 days' notice to remove a judge after the party receives notice of a judicial assignment. This time limit should be changed to 14 days. MSBA therefore proposes that Rule 63 be amended as follows:

* * *

63.03 Notice to Remove

Any party or attorney may make and serve on the opposing party and file with the administrator a notice to remove. The notice shall be served and filed within ~~10~~ 14 days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing.

* * *

32. With respect to Rule 68, the current Rule 68.01(a) requires more than 10 days of notice before trial to submit an offer of settlement. This should be changed to 14

days. Rules 68.01(e), 68.02(a), and 68.02(d) should be adjusted similarly. MSBA therefore proposes that Rule 68 be amended as follows:

* * *

68.01 Offer

(a) Time of Offer. At any time more than ~~10~~ 14 days before the trial begins, any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.

(b) Applicability of Rule. An offer does not have the consequences provided in Rules 68.02 and 68.03 unless it expressly refers to Rule 68.

(c) Damages-only Offers. An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which shall be added to the amount states as provided in Rule 68.02(b)(2) and (c).

(d) Total-obligation Offers. The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees.

(e) Offer Following Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ~~10~~ 14 days before the commencement of a hearing or trial to determine the amount or extent of liability.

(f) Filing. Notwithstanding the provisions of Rule 5.04, no offer under this rule need be filed with the court unless the offer is accepted.

68.02 Acceptance or Rejection of Offer

(a) Time for Acceptance. Acceptance of the offer shall be made by service of written notice of acceptance within ~~ten~~ fourteen days after

service of the offer. During the ~~ten-day~~ fourteen day period the offer is irrevocable.

(b) Effect of Acceptance of Offer of Judgment. If the offer accepted is an offer of judgment, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and the court shall order entry of judgment as follows:

(1) If the offer is a total-obligation offer as provided in Rule 68.01(d), judgment shall be for the amount of the offer.

(2) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment.

(c) Effect of Acceptance of Offer of Settlement. If the offer accepted is an offer of settlement, the settled claim(s) shall be dismissed upon:

(1) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied; or

(2) order of the court implementing the terms of the agreement.

(d) Offer Deemed Withdrawn. If the offer is not accepted within the ~~ten-day~~ fourteen day period, it shall be deemed withdrawn.

(e) Subsequent Offers. The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

* * *

REQUIRE THAT AT LEAST 50 PERCENT OF UNCLAIMED, UNDISTRIBUTED RESIDUAL FUNDS IN CLASS ACTIONS BE DONATED TO THE MINNESOTA LEGAL AID FOUNDATION FUND

33. As its second Petition, MSBA respectfully requests that this Court amend Rule 23.05 and add new Rule 23.11 to require that at least 50 percent of unclaimed,

undistributed residual funds in class actions (*i.e.*, *cy pres* funds) be donated to the Minnesota Legal Aid Foundation Fund.

34. As detailed in the attached Report and Recommendation (App.62-79), *cy pres* is a method of distributing remaining funds from a class-action settlement. Funds sometimes remain undistributed because not all plaintiffs claim their share, all class members cannot be located, individual claims are smaller than the cost of processing them, or the settlement amount agreed to turns out to be larger than necessary. Trial judges currently have discretion to decide the fate of such residual funds.

35. In 1995, recognizing the severe shortage of resources to support legal services for the poor in Minnesota, this Court established a Joint Legal Services Access and Funding Committee.[3] That committee issued a report (the Penn-Stageberg Report), recommending (among other things) that "trial judges in all courts in Minnesota should be educated about the need for funding for legal services for the disadvantaged . . . and in appropriate cases, of designating local legal services or volunteer programs or the Supreme Court's Legal Services Advisory Committee as recipients of *cy pres* funds."

36. In 1998, the six regional legal-services programs that comprised the Minnesota Legal Services Coalition created the Minnesota Legal Aid Foundation Fund ("MLAFF"), an endowment whose proceeds benefit virtually all the State's legal-services providers. The Supreme Court Legal Services Advisory Committee distributes the income the MLAFF generates (approximately $150,000-$170,000 per year) as part of a two-year funding cycle that supports 30 leave services and pro bono programs. The

[3] *See* http://mncourts.gov/Documents/0/Public/administration/penn-stageberg.pdf, p. 19.

MLAFF was created with the express intention of being a vehicle for *cy pres* awards for Minnesota's legal-services programs.

37. Minnesota has not adopted a formal rule either creating a presumption that legal-organizations are appropriate recipients of *cy pres* funds, or mandating that such organizations receive a certain percentage of class-action residuals. As a result, the MLAFF has received only three *cy pres* awards, though one—from the Microsoft anti-trust settlement—was not technically a *cy pres* award but a provision of the parties' settlement agreement.

38. Upon the competition of an update to the Cy Pres Manual in 2011, the MSBA Legal Assistance to the Disadvantaged ("LAD") Committee and the Minnesota Legal Services Coalition undertook an educational campaign regarding *cy pres* awards. Nevertheless, courts often still award class-action residuals to organizations other than legal-services providers.

39. Based on a summary prepared by the ABA Resource Center of Access to Justice, 21 states have adopted court rules or legislation regarding *cy pres* funds.[4] Illinois, Washington, Indiana, and North Carolina mandate that a certain percentage of *cy pres* funds be directed to civil legal services. North Carolina requires that 100 percent of *cy pres* funds be directed to civil legal services. Illinois has a 50-percent requirement, while Washington and Indiana each have a 25-percent requirement.

40. Legal-services providers in these states appear to have reaped substantial benefits following implementation of these requirements. For example, legal-services

[4] The summary is attached to the MSBA's Report & Recommendation. (App.66-75.)

providers in Illinois received $1.5 million in 2010, and legal-service providers in Washington received more than $1.0 million in 2011. This compares with negligible award amounts before codification.

41. MSBA strongly believes that Minnesota legal-service providers would experience similar benefits if the rules were amended to require that at least 50 percent of residual class-action funds be donated to the Minnesota Legal Aid Foundation Fund. The distributed funds would then become part of the MLAFF fund endowment, the income from which is distributed by the Supreme Court Legal Services Advisory Committee to legal aid and pro bono programs throughout Minnesota. The remaining residuals would continue to be distributed according to current law in ways that directly or indirectly benefit class members or similarly situated people.

42. To address this important issue, MSBA proposes that the Court amend Rule 23.05 and add Rule 23.11 as follows:

* * *

23.05. Settlement, Voluntary Dismissal, or Compromise

(a) Court Approval.

* * *

(3) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. Any order entering a judgment, or approving a proposed compromise, voluntary dismissal, or settlement, of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.

* * *

23.11. *Cy Pres* Distributions.

> In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Minnesota Legal Aid Foundation Fund to support "qualified legal services programs" consistent with Minn. Stat. § 480.24 *et seq.* The court may disburse the balance of any residual funds beyond the minimum 50% to any other non-profit entity that has a direct or indirect relationship to the objectives of the underlying litigation or otherwise promotes the substantive or procedural interests of members of the certified class.

* * *

43. Contemporaneous with this filing, a copy of this Petition has been submitted for the purpose of information to the Honorable Eric L. Hylden, Judge of St. Louis County District Court, Minnesota.

Accordingly, Petitioner, Minnesota State Bar Association respectfully requests that this Court grant this Petition and amend the Minnesota Rules of Civil Procedure consistent with Paragraphs 1-43 above.

Dated: September 2, 2016

Respectfully submitted,

MINNESOTA STATE BAR ASSOCIATION

By: s/ Robin Wolpert
Robin Wolpert (#310219)
Its President

and

BASSFORD REMELE
A Professional Association

By: s/ Mark R. Bradford
Mark R. Bradford (#335940)
Christine E. Hinrichs (#389963)
33 South Sixth Street, Suite 3800
Minneapolis, MN 55402-3707
Phone: 612-333-3000
mbradford@bassford.com
chinrichs@bassford.com

Attorneys for the Minnesota State Bar Association

INDEX TO APPENDIX

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA Regarding Proposing Amendments to the Minnesota Rules of Civil Procedure

MSBA Court Rules and Administration Committee and Judiciary Committee
June 8, 2016

RESOLVED: That the MSBA file a petition with the court proposing amendments to the Minnesota Rules of Civil Procedure that would bring them into substantial conformity with the Federal Rules of Civil Procedure as outlined below.

REPORT

In keeping with MSBA President Mike Unger's goal of increased MSBA participation in the Supreme Court's rulemaking process, the Federal Conformity Working Group was formed to evaluate and make recommendations to bring the Minnesota Rules of Civil Procedure into substantial conformity with the Federal Rules of Civil Procedure, with special attention paid to more recent amendments to the federal rules that occurred while the Supreme Court's Advisory Committees were dormant.

The Working Group consisted of two members of the Judiciary Committee, two members of the Court Rules and Administration Committee, and Daniel J. Cragg, Chair of the Judiciary Committee. Daniel is also a member of the Court Rules and Administration Committee.

The Working Group did not attempt to bring the style of the federal rules to the Minnesota rules, but instead focused on the substance of the nonconformity, and where changes are proposed, the style of the Minnesota rule was maintained. The Court Rules and Administration Committee met twice to consider the proposed changes. A few of the changes recommended by the Working Group were not adopted by the Court Rules and Administration Committee but the vast majority were passed by the Committee, although a few members dissented on particular items. The Judiciary Committee reviewed the recommendations of the Court Rules and Administration Committee (including the objections of those who dissented on particular changes), and the original recommendations of the Federal Conformity Working Group. The Judiciary Committee voted to adopt the recommendations of the Court Rules Committee, which are contained in this report.

Section One provides an overview of the proposed changes. Section Two reproduces the rule in its entirety and uses the familiar ~~strikethrough~~ for deletions and underlining for new language. These changes are also highlighted.

Section One

As a general matter, we recommend that **Rules 4, 5, 6, 12, 14, 15, 27, 32, 53, 56, 59, 63, and 68** all conform to the new federal time period structure. Changing the time period structure to the federal system would change required five day periods to seven day periods, 10 day periods to 14 day periods, and 20 day periods to 21 day periods. This change would prevent filing due dates from frequently falling on Saturdays and Sundays as well as providing for a more logical computation of time. The location of each proposed time change is highlighted in the respective rule in Section Two.

Rule 4: We recommend that Rule 4.05 should be replaced by a similar rule to Federal Rule of Civil Procedure ("FRCP") 4(d). FRCP 4(d) is a clearer rule that illustrates the ability to waive service to reduce costs, and also provides a defendant with additional time to answer as an incentive to waive service. This change also requires a slight change to the language of Rule 3.

Rule 5: Rule 5.05 requires that parties filing by facsimile must follow up the filing with a transmission fee, larger exhibits and attachments, and filing fees within five days. This time period should be changed to seven days in accordance with the federal rules seven day increment structure.

Rule 6: Rule 6 needs only two minor changes. First, the time allowed to serve a motion before a hearing should be changed from five days to seven days to conform to the federal rules seven day increment structure. Second, the final sentence of Rule 6.05, which allows an extra day for service if service is made by a means other than United States Mail and after 5:00 p.m., should be removed. Mandatory e-filing has effectively eliminated the need for this rule.

Rule 12: Rule 12 imposes numerous 20 day time limits that should be changed to 21 day limits in accordance with the federal rules seven day increment structure. Parties subject to motions for a more definite statement should be granted 14 days to comply rather than 10 days, again in accordance with the federal rules seven day increment structure.

Rule 14: Rule 14.01 requires that copies of third-party pleadings be furnished to any requesting party in the action within five days. The requirement to request third-party pleadings seems antiquated in the era of e-filing. Third-party pleadings should be served in accordance with Rule 5.01.

Rule 16: Rule 16 should make scheduling orders mandatory rather than optional. This conforms the rule to the federal system and improves efficiency and clarity with regard to schedules. We also suggest adding a section mandating preparation and attendance at pretrial conferences, as in the federal rules. Adding this section would increase the usefulness of such conferences.

Rule 26: Rule 26 should be altered to provide greater clarity on the timing for initial disclosures and the commencement of discovery. The time allowed for initial disclosures, both in general and for parties served or joined later, should be based on the 26.06 conference rather than the required date for an answer. This would also prioritize the Rule 26.06 conference, which will be discussed further in the amendments to this rule. The time allotted to make the initial disclosures after the Rule 26.06 conference should be 14 days to reduce delay in the early stages.

Minn. R. Civ. P. 26.02(b), which the federal advisory committee relied upon in making the 2015 amendments, should add the "relative ease of access" as a consideration to bring it into substantial conformity with its federal counterpart. Rule 26.03 should include a clause allowing the shifting of expenses in order to conform to the federal rule.

The initial clause of Rule 26.04 should be removed and discovery should be allowed to commence after the conference, rather than the framing of the discovery plan, in conformity with FRCP 26(d). Doing so would further prioritize the Rule 26.06 conference along with the other proposed changes to this rule. This would also necessitate removal of the related clauses in Rules 26.02, 30.01, 31.01(a), 33.01(a), 34.02, 36.01, and 45. A new clause on "early Rule 34 requests" should be added to conform with the 2015 amendments to the federal rules.

Rule 27: Rule 27.01(b) requires 20 days of notice before the date of a hearing. This should be changed to 21 days to reflect the federal rules seven day increment structure.

Rules 30 & 31: Rule 30.01 should be adjusted to conform to the changes proposed in Rule 26 in relation to the Rule 26.04. Rule 30.02(b)'s language should be updated to improve clarity and conform to its federal counterpart. Finally, Rule 30.05 appears to have a typo. It states that "The officer shall indicate in the certificate prescribed by Rule 30.06(1). . ." while it should reference Rule 30.06(a).

Rule 32: Rule 32.04(c) requires that objections to written deposition questions be served within five days. This should be changed to seven days.

Rule 33: Rule 33.01(a) should be adjusted to conform to the time period changes in Rule 26.04, as discussed above.

Rule 34: Rule 34.02 should be adjusted to accommodate the changes to Rule 26.04, as discussed above. Rule 34.02 should also be brought into conformity with its federal counterpart.

Rule 36: Rule 36.01 should be changed only to accommodate the changes to Rule 26.04.

Rule 37: Rule 37.01(b) & 37.05 were in conformity (or substantial conformity in the case of 37.01(b)) with their federal counterpart until the 2015 amendments to the federal rules. We propose bringing them into (substantial) conformity again.

Rule 53: Rule 53.07(b) includes a 20 day limit for filing objections to a master's order, report, or recommendation, which should be changed to 21 days.

Rule 56: Many aspects of present Rule 56 are antiquated. Significant changes were made in 2010 to Rule 56 of the Federal Rules of Civil Procedure to bring it into conformity with the modern practice of summary judgment. We recommend that the Minnesota rule be brought into conformity with its federal counterpart.

Rule 59: Rule 59.04 imposes a 10 day time limit on parties opposing a new trial to serve affidavits. This should be extended to 14 days.

Rule 63: Rule 63.03 requires 10 days-notice to remove a judge after the party receives notice of a judicial assignment. This time limit should be changed to 14 days.

Rule 68: Rule 68.01(a) requires more than 10 days of notice before trial to submit an offer of settlement. This should be changed to 14 days. Rules 68.01(e), 68.02(a), and 68.02(d) should be adjusted similarly.

Section Two

3.01. Commencement of the Action

A civil action is commenced against each defendant: (a) when the summons is served upon that defendant, or (b) at the date of waiver of service pursuant to Rule 4.05 ~~acknowledgement of service if service is made by mail~~ or other means of service consented to by the defendant either in writing or electronically; or (c) when the summons is delivered to the sheriff in the county where the defendant resides for service; but such delivery shall be ineffectual unless within 60 days thereafter the summons is actually served on that defendant or the first publication thereof is made.

Filing requirements are set forth in Rule 5.04, which requires filing with the court within one year after commencement for non-family cases.

Rule 4. Service

4.01. Summons; Form

The summons shall state the name of the court and the names of the parties, be subscribed by the plaintiff or by the plaintiff's attorney, give an address within the state where the subscriber may be served in person and by mail, state the time within which these rules require the defendant to serve an answer, and notify the defendant that if the defendant fails to do so judgment by default will be rendered against the defendant or the relief demanded in the complaint.

4.02. By Whom Served

Unless otherwise ordered by the court, the sheriff or any other person not less than 18 years of age and not a party to the action, may make service of a summons or other process.

4.03. Personal Service

Service of summons within the state shall be as follows:

(a) Upon an Individual. Upon an individual by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein.

If the individual has, pursuant to statute, consented to any other method of service or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be made in the manner provided by such statute.

If the individual is confined to a state institution, by serving also the chief executive officer at the institution.

If the individual is an infant under the age of 14 years, by serving also the individual's father or mother, and if neither is within the state, then a resident guardian if the infant has one known to the plaintiff, and if the infant has none, then the person having control of such defendant, or with whom the infant resides, or by whom the infant is employed.

(b) Upon Partnerships and Associations. Upon a partnership or association which is subject to suit under a common name, by delivering a copy to a member or the managing agent of the partnership or association. If the partnership or association has, pursuant to statute, consented to any other method of service or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be made in the manner provided by such statute.

(c) Upon a Corporation. Upon a domestic or foreign corporation, by delivering a copy to an officer or managing agent, or to any other agent authorized expressly or impliedly or designated by statute to receive service of summons, and if the agent is one authorized or designated under statute to receive service any statutory provision for the manner of such service shall be complied with. In the case of a transportation or express corporation, the summons may be served by delivering a copy to any ticket, freight, or soliciting agent found in the county in which the action is brought, and if such corporation is a foreign corporation and has no such agent in the county in which the plaintiff elects to bring the action, then upon any such agent of the corporation within the state.

(d) Upon the State. Upon the state by delivering a copy to the attorney general, a deputy attorney general or an assistant attorney general.

(e) Upon Public Corporation. Upon a municipal or other public corporation by delivering a copy

(1) To the chair of the county board or to the county auditor of a defendant county;

(2) To the chief executive officer or to the clerk of a defendant city, village or borough;

(3) To the chair of the town board or to the clerk of a defendant town;

(4) To any member of the board or other governing body of a defendant school district; or

(5) To any member of the board or other governing body of a defendant public board or public body not hereinabove enumerated.

If service cannot be made as provided in this Rule 4.03(e), the court may direct the manner of such service.

4.04. Service by Publications; Personal Service Out of State

(a) Service by Publications. Service by publication shall be sufficient to confer jurisdiction:

(1) When the defendant is a resident individual domiciliary having departed from the state with intent to defraud creditors, or to avoid service, or remains concealed therein with the like intent;

(2) When the plaintiff has acquired a lien upon property or credits within the state by attachment or garnishment, and

(A) The defendant is a resident individual who has departed from the

state, or cannot be found therein, or

(B) The defendant is a nonresident individual or a foreign corporation,

partnership or association;

When quasi in rem jurisdiction has been obtained, a party defending the action thereby submits personally to the jurisdiction of the court. An appearance solely to contest the validity of quasi in rem jurisdiction is not such a submission.

(3) When the action is for marriage dissolution or separate maintenance and the court has ordered service by published notice;

(4) When the subject of the action is real or personal property within the state in or upon which the defendant has or claims a lien or interest, or the relief demanded consists wholly or partly in excluding the defendant from any such interest or lien;

(5) When the action is to foreclose a mortgage or to enforce a lien on real estate within the state.

The summons may be served by three weeks' published notice in any of the cases enumerated herein when the complaint and an affidavit of the plaintiff or the plaintiff's attorney have been filed with the court. The affidavit shall state the existence of one of the enumerated cases, and that the affiant believes the defendant is not a resident of the state or cannot be found therein, and either that the affiant has mailed a copy of the summons to the defendant at the defendant's place of residence or that such residence is not known to the affiant. The service of the summons shall be deemed complete 21 days after the first publication.

(b) Personal Service Outside State. Personal service of such summons outside the state, proved by the affidavit of the person making the same sworn to before a person authorized to administer an oath, shall have the same effect as the published notice provided for herein.

(c) Service Outside United States. Unless otherwise provided by law, service upon an individual, other than an infant or an incompetent person, may be effected in a place not within the state:

(1) by any internationally agreed means reasonably calculated to give notice, such as those means authorized by the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents; or

(2) if there is no internationally agreed means of service or the applicable international agreement allows other means of service, provided that service is reasonably calculated to give notice;

(A) in the manner prescribed by the law of the foreign country for service in that country in an action in any of its courts of general jurisdiction; or

(B) as directed by the foreign authority in response to a letter rogatory or letter of request; or

(C) unless prohibited by the law of the foreign country, by

(i) delivery to the individual personally of a copy of the

summons and the complaint; or

(ii) any form of mail requiring a signed receipt, to be addressed and dispatched by the court administrator to the party to be served; or

(3) by other means not prohibited by international agreement as may be directed by the court.

4.041. Additional Information to be Published

In all cases where publication of summons is made in an action in which the title to, or any interest in or lien upon, real property is involved or affected or is brought in question, the publication shall also contain a description of the real property involved, affected or brought in question thereby, and a statement of the object of the action. No other notice of the pendency of the action need be published.

4.042. Service of the Complaint

If the defendant shall appear within ~~ten~~ 14 days after the completion of service by publication, the plaintiff, within ~~five~~ seven days after such appearance, shall serve the complaint, by copy, on the defendant or the defendant's attorney. The defendant shall then have at least ~~ten~~ 14 days in which to answer the same.

4.043. Service by Publication; Defendant May Defend; Restitution

If the summons is served by publication, and the defendant receives no actual notification of the action, the defendant shall be permitted to defend upon application to the court before judgment and for sufficient cause; and, except in an action for marriage dissolution, the defendant, in like manner, may be permitted to defend at any time within one year after judgment, on such terms as may be just. If the defense is sustained, and any part of the judgment has been enforced, such restitution shall be made as the court may direct.

4.044. Nonresident Owner of Land Appointing an Agent

If a nonresident person or corporation owning or claiming any interest or lien in or upon lands in the state appoints an agent pursuant to Minnesota Statutes, section 557.01, service of summons in an action involving such real estate shall be made upon the agent or the principal in accordance with Rule 4.03, and service by publication shall not be made upon the principal.

~~**4.05. Service by Mail** In any action service may be made by mailing a copy of the summons and of the complaint (by first-class mail, postage prepaid) to the person to be served, together with two copies of a notice and acknowledgment conforming substantially to Form 22 and a return envelope, postage prepaid, addressed to the sender. If acknowledgment of service under this rule is not received by the sender within the time defendant is required by these rules to serve an answer, service shall be ineffectual. Unless good cause is shown for not doing so, the court shall order the payment of the costs of personal service by the person served if such person does not complete and return the notice and acknowledgment of receipt of summons within the time allowed by these rules.~~

4.05. Waiving Service of Summons

(a) Requesting a Waiver. An individual, corporation, or association that is subject to service under Rule 4.03 has a duty to avoid unnecessary expenses of serving the summons. The plaintiff may request that the defendant waive service of a summons. The notice and request must:

(1) be in writing and be addressed:

(A) to the individual defendant; or

(B) for a defendant subject to service under Rule 4.03(b)-(e) to the agent authorized by appointment or by law to receive service of process;

(2) be accompanied by a copy of the complaint, 2 copies of Form 22 or a substantially similar form, and a prepaid means for returning a signed copy of the form;

(3) inform the defendant, using Form 22 or a substantially similar form of the consequences of waiving and not waiving service;

(4) state the date when the request is sent;

(5) give the defendant a reasonable time of at least 30 days after the request was sent—or at least 60 days if sent to the defendant outside the United States—to return the waiver; and

(6) be sent by first-class mail or other reliable means.

(b) Failure to Waive. If a defendant located within the United States fails, without good cause, to sign and return a waiver requested by a plaintiff located within the United States, the court must impose on the defendant:

(1) the expenses later incurred in making service; and

(2) the reasonable expenses, including attorney's fees, of any motion required to collect those service expenses.

(c) Time to Answer After a Waiver. A defendant who, before being served with process, timely returns a waiver need not serve an answer to the complaint until 60 days after the request was sent—or until 90 days after it was sent to the defendant outside the United States.

(d) Results of Filing of a Waiver. When the plaintiff files a waiver, proof of service is not required and these rules apply as if a summons and complaint had been served at the time of execution of the waiver.

(e) Jurisdiction and Venue Not Waived. Waiving service of a summons does not waive any objection to personal jurisdiction or to venue.

4.06. Return

Service of summons and other process shall be proved by the certificate of the sheriff or other peace officer making it, by the affidavit of any other person making it, by the written admission or acknowledgment of the party served, or if served by publication, by the affidavit of the printer or the printer's designee. The proof of service in all cases other than by published notice shall state the time, place, and manner of service. Failure to make proof of service shall not affect the validity of the service.

4.07. Amendments

The court in its discretion and on such terms as it deems just may at any time allow any summons or other process or proof of service thereof to be amended, unless it clearly appears that substantial rights of the person against whom the process issued would be prejudiced thereby.

Rule 5. Service and Filing of Pleadings and Other Papers

5.01. Service; When Required.

Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar document shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4. A party appears when that party serves or files any document in the proceeding.

5.02. Service; How Made

(a) Methods of Service. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service shall be made upon the attorney unless service upon the party is ordered by the court. Written admission of service by the party or the party's attorney shall be sufficient proof of service. If Rule 14 of the General Rules of Practice for the District Courts or an order of the Minnesota Supreme Court authorizes or requires that service be made by electronic means, service shall be made by compliance with subdivision (b)

of this rule. Otherwise, service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party; by mailing a copy to the attorney or party at the attorney's or party's last known address; or, if no address is known, by leaving it with the court administrator. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at the attorney's or party's office with a clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at the attorney's or party's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein.

(b) E-Service. Service of all documents after the original complaint may, and where required by these rules shall, be made by electronic means as authorized by Rule 14 of the General Rules of Practice for the District Courts.

(c) Effective Date of Service. Service by mail is complete upon mailing. Service by facsimile is complete upon completion of the facsimile transmission. Service by authorized electronic means using the court's E-Filing System as defined in Rule 14 of the General Rules of Practice for the District Courts is complete upon completion of the electronic transmission of the document(s) to the E-Filing System.

(d) Technical Errors; Relief. Upon satisfactory proof that electronic filing or electronic service of a document was not completed, any party may obtain relief in accordance with Rule 14.01(c) of the General Rules of Practice for the District Courts.

5.03. Service: Numerous Defendants

If the defendants are numerous, the court, upon motion or upon its own initiative, may order that service of the pleadings of the defendants and replies thereto need not be made as between the defendants and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading with the court and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

5.04. Filing; Certificate of Service

(a) Deadline for Filing Action. Any action that is not filed with the court within one year of commencement against any party is deemed dismissed with prejudice against all parties unless the parties within that year sign a stipulation to extend the filing period. This paragraph does not apply to family cases governed by rules 301 to 378 of the General Rules of Practice for the District Courts.

(b) Filing of Documents After the Complaint; Certificate of Service. All documents after the complaint required to be served upon a party, together with a certificate of service, shall be filed with the court within a reasonable time after service, except disclosures under Rule 26, expert disclosures and reports, depositions upon oral examination and interrogatories, requests for documents, requests for admission, and answers and responses thereto shall not be filed unless authorized by court order or rule.

(c) Rejection of Filing. The administrator shall not refuse to accept for filing any documents presented for that purpose solely because it is not presented in proper form as required by these rules or any local rules or practices. Documents may be rejected for filing if:

(1) tendered without a required filing fee or a correct assigned file number;

(2) tendered to an administrator other than for the court where the action is pending; or

(3) the document constitutes a discovery request or response submitted without the express permission of the court.

5.05. Filing; Facsimile Transmission

Except where filing is required by electronic means by rule of court, any document may be filed with the court by facsimile transmission. Filing shall be deemed complete at the time that the facsimile transmission is received by the court and the filed facsimile shall have the same force and effect as the original. Only facsimile transmission equipment that satisfies the published criteria of the Supreme Court shall be used for filing in accordance with this rule. Within five seven days after the court has received the transmission, the party filing the document shall forward the following to the court:

(a) a $25 transmission fee for each 50 pages, or part thereof, of the filing;

(b) any bulky exhibits or attachments; and

(c) the applicable filing fee or fees, if any.

If a document is filed by facsimile, the sender's original must not be filed but must be maintained in the files of the party transmitting it for filing and made available to the court or any party to the action upon request. Upon failure to comply with the requirements of this rule, the court in which the action is pending may make such orders as are just, including but not limited to, an order striking pleadings or parts thereof, staying further proceedings until compliance is complete, or dismissing the action, proceeding, or any part thereof.

5.06. Filing Electronically

Where authorized or required by order of the Minnesota Supreme Court or Rule 14 of the General Rules of Practice for the District Courts, documents may, or where required shall, be filed electronically by following the procedures of such order or rule and will be deemed filed in accordance with the provisions of this rule.

A document that is electronically filed is deemed to have been filed by the court administrator on the date and time of its transmittal to the court through the E-Filing System as defined by Rule 14 of the General Rules of Practice for the District Courts, and except for proposed orders, the filing shall be stamped with this date and time if it is subsequently accepted by the court administrator. If the filing is not subsequently accepted by the court administrator for reasons authorized by Rule 5.04, no date stamp shall be applied and the E-Filing System shall notify the filer that the filing was not accepted.

6.01. Computation

(a) Computation of Time Periods. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run shall not be included. The last day of the period so computed shall be included, unless it is a: Saturday; Sunday; legal holiday; or when the act to be done is the filing of a document in court, a day on which weather or other conditions result in the closing of the office of the court administrator of the court where the action is pending; or where filing or service is either permitted or required to be made electronically, a day on which unavailability of the computer system used by the court for electronic filing and service makes it impossible to accomplish service or filing, in which event the period runs until the end of the next day that is not one of the aforementioned days. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(b) Periods Shorter than 7 Days. When the period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation.

(c) Definition of Legal Holiday. As used in this rule and in Rule 77(c), "legal holiday" includes any holiday designated in Minn. Stat. § 645.44, subd. 5, as a 26 holiday for the state or any state-wide branch of government and any day that the United States Mail does not operate.

6.02. Enlargement

When by statute, by these rules, by a notice given thereunder, or by order of court an act is required or allowed to be done at or within a specified time, the court for cause shown may, at any time in its discretion,

(1) with or without motion or notice order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or

(2) upon motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 4.043, 59.03, 59.05, and 60.02 except to the extent and under the conditions stated in them.

6.03. Unaffected by Expiration of Term

The continued existence or the expiration of a term of court does not affect or limit the period of time provided for the taking of any action or proceeding, or affect the power of the court to act or take any proceeding in any action which has been pending before it.

6.04. For Motions; Affidavits

A written motion, other than one which may be heard ex parte, and notice of the hearing thereof shall be served no later than ~~five~~ seven days before the time specified for the hearing, unless a different period is fixed by these rules or by order of the court. Such an order may for cause shown be made on ex parte application. When a motion is supported by affidavit, the affidavit shall be served with the motion; and, except as otherwise provided in Rule 59.04, opposing affidavits may be served not later than one day before the hearing, unless the court permits them to be served at some other time.

6.05. Additional Time After Service by Mail or Service Late in Day Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other document upon the party, and the notice or document is served upon the party by United States Mail, three days shall be added to the prescribed period. ~~If service is made by any means other than United States Mail and accomplished after 5:00 p.m. local Minnesota time on the day of service, one additional day shall be added to the prescribed period.~~

Rule 12. Defenses and Objections; When and How Presented; By Pleading or Motion; Motion for Judgment on Pleadings

12.01. When Presented

Defendant shall serve an answer within ~~20~~ 21 days after service of the summons upon that defendant unless the court directs otherwise pursuant to Rule 4.043. A party served with a pleading stating a cross-claim against that party shall serve an answer thereto within ~~20~~ 21 days after the service upon that party. The plaintiff shall serve a reply to a counterclaim in the answer within ~~20~~ 21 days after service of the answer or, if a reply is ordered by the court, within ~~20~~ 21 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters these periods of time as follows unless a different time is fixed by order of the court:

(1) If the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading shall be served within ten days after service of notice of the court's action;

(2) if the court grants a motion for a more definite statement, the responsive pleading shall be served within ~~ten~~ 14 days after the service of the more definite statement.

12.02. How Presented

Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(a) lack of jurisdiction over the subject matter;

(b) lack of jurisdiction over the person;

(c) insufficiency of process;

(d) insufficiency of service of process;

(e) failure to state a claim upon which relief can be granted; and

(f) failure to join a party pursuant to Rule 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense

that the pleading fails to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

12.03. Motion for Judgment on the Pleadings

After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on such motion, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided for in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

12.04. Preliminary Hearing

The defenses and relief enumerated in Rules 12.02 and 12.03, whether made in a pleading or by motion, shall be heard and determined before trial on application of any party unless the court orders that the hearing and determination thereof be deferred until the trial.

12.05. Motion for More Definite Statement, for Paragraphing and for Separate Statement

If a pleading to which a responsive pleading is permitted violates the provisions of Rule 10.02, or is so vague and ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a compliance with Rule 10.02 or for a more definite statement before interposing a responsive pleading. The motion shall point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ~~ten~~ 14 days after service of notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it deems just.

12.06. Motion to Strike

Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within ~~20~~ 21 days after the service of the pleading upon the party, or upon its own initiative at any time, the court may order any pleading not in compliance with Rule 11 stricken as sham and false, or may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent or scandalous matter.

12.07. Consolidation of Defenses in Motion

A party who makes a motion pursuant to this rule may join with it other motions then available to the party. If a party makes a motion under this rule but omits therefrom any then available defense or objection which this rule permits to be raised by motion, that party shall not thereafter

make a motion based on the defense or objection so omitted, except a motion as provided in Rule 12.08(b) hereof on any of the grounds there stated.

12.08. Waiver or Preservation of Certain Defenses

(a) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived **(1)** if omitted from a motion in the circumstances described in Rule 12.07, or **(2)** if it is neither made by motion pursuant to this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15.01 to be made as a matter of course.

(b) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered pursuant to Rule 7.01, or by motion for judgment on the pleadings, or at the trial on the merits.

(c) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

Rule 14. Third-Party Practice

14.01. When Defendant May Bring in Third Party

Within 90 days after service of the summons upon a defendant, and thereafter either by written consent of all parties to the action or by leave of court granted on motion upon notice to all parties to the action, a defendant as a third-party plaintiff may serve a summons and complaint, together with a copy of plaintiff's complaint upon a person, whether or not the person is a party to the action, who is or may be liable to the third-party plaintiff for all or part of the plaintiff's claim against the third-party plaintiff and after such service shall forthwith serve notice thereof upon all other parties to the action. ~~Copies of third-party pleadings shall be furnished by the pleader to any other party to the action within five~~ seven days ~~after request therefor.~~ The person so served, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff's claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff's claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff's claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. A third-party defendant may proceed in accordance with this rule against any person who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant.

14.02. When Plaintiff May Bring in Third Party

When a counterclaim is asserted against a plaintiff, the plaintiff may cause a third party to be brought in under circumstances which, pursuant to Rule 14.01, would entitle defendant to do so.

14.03. Orders for Protection of Parties and Prevention of Delay

The court may make such orders to prevent a party from being embarrassed or put to undue expense, or to prevent delay of the trial or other proceeding by the assertion of a third-party claim, and may dismiss the third-party claim, order separate trials, or make other orders to prevent delay or prejudice. Unless otherwise specified in the order, a dismissal pursuant to this rule is without prejudice.

Rule 15. Amended and Supplemental Pleadings

15.01. Amendments

A party may amend a pleading once as a matter of course at any time before a responsive pleading is served or, if the pleading is one to which no responsive pleading is permitted and the action has not been placed upon the trial calendar, the party may so amend it at any time within ~~20~~ 21 days after it is served. Otherwise a party may amend a pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires. A party shall plead in response to an amended pleading within the time remaining for response to the original pleading or within ~~ten~~ 14 days after service of the amended pleading, whichever period may be longer, unless the court otherwise orders.

15.02. Amendments to Conform to the Evidence

When issues not raised by the pleadings are tried by express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings. Such amendment of the pleadings as may be necessary to cause them to conform to the evidence and to raise these issues may be made upon motion of any party at any time, even after judgment; but failure so to amend does not affect the result of a trial of these issues. If evidence is objected to at the trial on the ground that it is not within the issues raised by the pleadings, the court may allow the pleadings to be amended and shall do so freely when the presentation of the merits of the action will be subserved thereby and the objecting party fails to satisfy the court that admission of such evidence would prejudice maintenance of the action or defense upon the merits. The court may grant a continuance to enable the objecting party to meet such evidence.

15.03. Relation Back of Amendments

Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against the party, the party to be brought in by amendment (1) has received such notice of the institution of the action that the party will not be prejudiced in maintaining a defense on the merits, and (2) knew or should have known

that, but for a mistake concerning the identity of the proper party, the action would have been brought against that party.

15.04. Supplemental Pleadings

Upon motion of a party the court may, upon reasonable notice and upon such terms as are just, permit the party to serve a supplemental pleading setting forth transactions, occurrences, or events which have happened since the date of the pleading sought to be supplemented, whether or not the original pleading is defective in its statement of a claim for relief or of a defense. If the court deems it advisable that the adverse party plead thereto, it shall so order, specifying the time therefor.

Rule 16. Pretrial Conferences; Scheduling; Management

16.01. Pretrial Conferences; Objectives

In any action, the court may in its discretion direct the attorneys for the parties and any self-represented litigants to appear before it for a conference or conferences before trial for such purposes as:

(a) expediting the disposition of the action;

(b) establishing early and continuing control so that the case will not be protracted because of lack of management;

(c) discouraging wasteful pretrial activities;

(d) improving the quality of the trial through more thorough preparation; and

(e) facilitating the settlement of the case.

16.02. Scheduling and Planning

The court ~~may, and upon written request of any party with notice to all parties,~~ shall, after consulting with the attorneys for the parties and any unrepresented parties, by a scheduling conference, telephone, mail, or other suitable means, enter a scheduling order that limits the time:

(a) to join other parties and to amend the pleadings;

(b) to file and hear motions; and

(c) to complete discovery.

The scheduling order also may include

(d) provisions for disclosure or discovery of electronically stored information;

(e) any agreements the parties reach for asserting claims of privilege or of protection as trial-preparation materials after production;

(f) the date or dates for conferences before trial, a final pretrial conference, and trial; and

(g) any other matters appropriate in the circumstances of the case. A schedule shall not be modified except by leave of court upon a showing of good cause

16.03. Attendance and Subjects for Consideration at a Pretrial Conference

(a) **Attendance**: A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by other means to consider settlement.

(b) At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the Minnesota Rules of Evidence;

(5) the appropriateness and timing of summary adjudication under Rule 56;

(6) the control and scheduling of discovery, including orders affecting discovery pursuant to Rule 26 and Rules 29 through 37;

(7) the identification of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

(8) the advisability of referring matters pursuant to Rule 53;

(9) settlement and the use of special procedures to assist in resolving the dispute when authorized by statute or rule;

(10) the form and substance of the pretrial order;

(11) the disposition of pending motions;

(12) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(13) an order for a separate trial pursuant to Rule 42.02 with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

(14) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50.01 or an involuntary dismissal under Rule 41.02(b);

(15) an order establishing a reasonable limit on the time allowed for presenting evidence; and

(16) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action. At least one of the attorneys for each party participating in any conference before trial shall have authority to enter into stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

16.04. Final Pretrial Conference

Any final pretrial conference may be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference shall be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any self-represented litigants.

16.05. Pretrial Orders

After any conference held pursuant to this rule, an order shall be entered reciting the action taken. This order shall control the subsequent course of the action and shall be modified only to prevent manifest injustice.

16.06. Sanctions

If a party or party's attorney fails to obey a scheduling or pretrial order, or if no appearance is made on behalf of a party at a scheduling or pretrial conference, or if a party or party's attorney is substantially unprepared to participate in the conference, or if a party or party's attorney fails to participate in good faith, the court, upon motion or upon its own initiative, may make such orders with regard thereto as are just, including any of the orders provided in Rule 37.02(b)(2), (3), (4). In lieu of or in addition to any other sanction, the court shall require the party or the attorney representing the party or both to pay the reasonable expenses incurred because of any noncompliance with this rule, including attorney fees, unless 45 the court finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

Rule 26. Duty to Disclose; General Provisions Governing Discovery

26.01. Required Disclosures

(a) Initial Disclosure.

(1) In General. Except as exempted by Rule 26.01(a)(2) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(B) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(C) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(2) Proceedings Exempt from Disclosure. Unless otherwise ordered by the court in an action, the following proceedings are exempt from disclosures under Rule 26.01(a), (b), and (c):

(A) an action for review on an administrative record;

(B) a forfeiture action in rem arising from a state statute;

(C) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(D) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(E) an action to enforce or quash an administrative summons or subpoena;

(F) a proceeding ancillary to a proceeding in another court;

(G) an action to enforce an arbitration award;

(H) family court actions under Gen. R. Prac. 301 - 378;

(I) Torrens actions;

(J) conciliation court appeals;

(K) forfeitures;

(L) removals from housing court to district court;

(M) harassment proceedings;

(N) name change proceedings;

(O) default judgments;

(P) actions to either docket a foreign judgment or re-docket a judgment within the district;

(Q) appointment of trustee;

(R) condemnation appeal;

(S) confession of judgment;

(T) implied consent;

(U) restitution judgment; and

(V) tax court filings.

(3) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within ~~60 days after the original due date when an answer is required~~ 14 days after the parties' Rule 26.06 conference, unless a different time is set by stipulation or court order, or unless an objection is made in a proposed discovery plan submitted as part of a civil cover sheet required under Rule 104 of the General Rules of Practice for the District Courts. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(4) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the ~~initial disclosures are due under Rule 26.01(a)(3)~~ Rule 26.06 conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(5) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(b) Disclosure of Expert Testimony.

(1) In General. In addition to the disclosures required by Rule 26.01(a), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Minnesota Rule of Evidence 702, 703, or 705.

(2) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared

and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

(A) a complete statement of all opinions the witness will express and the basis and reasons for them;

(B) the facts or data considered by the witness in forming them;

(C) any exhibits that will be used to summarize or support them;

(D) the witness's qualifications, including a list of all publications authored in the previous 10 years;

(E) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and

(F) a statement of the compensation to be paid for the study and testimony in the case.

(3) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

(A) the subject matter on which the witness is expected to present evidence under Minnesota Rule of Evidence 702, 703, or 705; and

(B) a summary of the facts and opinions to which the witness is expected to testify.

(4) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

(A) at least 90 days before the date set for trial or for the case to be ready for trial; or

(B) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26.01(b)(2) or (3), within 30 days after the other party's disclosure.

(5) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26.05.

(c) Pretrial Disclosures.

(1) In General. In addition to the disclosures required by Rule 26.01(a) and (b), a party must provide to the other parties the following information about the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(B) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(C) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(2) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32.01 of a deposition designated by another party under Rule 26.01(c)(1)(B); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26.01(c)(1)(C). An objection not so made—except for one under Minnesota Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(d) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26.01 must be in writing, signed, and served.

26.02. Discovery Methods, Scope and Limits

Unless otherwise limited by order of the court in accordance with these rules, the methods and scope of discovery are as follows:

(a) Methods. Parties may obtain discovery by one or more of the following methods: depositions by oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property; for inspection and other purposes; physical (including blood) and mental examinations; and requests for admission.

(b) Scope and Limits. Discovery must be limited to matters that would enable a party to prove or disprove a claim or defense or to impeach a witness and must comport with the factors of proportionality, including without limitation, the burden or expense of the proposed discovery weighed against its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the parties' relative access to relevant information, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues. Subject to these limitations, parties may obtain discovery regarding any matter, not privileged, that is relevant to a claim or defense of any party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. Upon a showing of good cause and proportionality, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information sought need not be admissible at the trial if discovery appears reasonably calculated to lead to the discovery of admissible evidence.

(1) Authority to Limit Frequency and Extent. The court may establish or alter the limits on the number of depositions and interrogatories and may also limit the length of depositions under Rule 30 and the number of requests under Rule 36. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26.03.

(2) Limits on Electronically Stored Evidence for Undue Burden or Cost. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause and proportionality, considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(3) Limits Required When Cumulative; Duplicative; More Convenient Alternative; and Ample Prior Opportunity. The frequency or extent of use of the discovery methods otherwise permitted under these rules shall be limited by the court on motion or on its own initiative if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; or

(ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or

(iii) the burden of proposed discovery is outside the scope permitted by Rule 26.02(b).

(c) Insurance Agreements. In any action in which there is an insurance policy that may afford coverage, any party may require any other party to disclose the coverage and limits of such insurance and the amounts paid and payable thereunder and, pursuant to Rule 34, may obtain production of the insurance 62 policy; provided, however, that this provision will not permit such disclosed information to be introduced into evidence unless admissible on other grounds.

(d) Trial Preparation: Materials. Subject to the provisions of Rule 26.02(e) a party may obtain discovery of documents and tangible things otherwise discoverable pursuant to Rule 26.02(b) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation. A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a party or other person may obtain without the required showing a statement concerning the action or its subject matter previously made by that person who is not a party. If the request is refused, the person may move for a court order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is **(1)** a written statement signed or otherwise adopted or approved by the person making it, or **(2)** a stenographic, mechanical, electrical, or other recording, or a transcription

thereof, that is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(e) Trial Preparation: Experts. Discovery of facts known and opinions held by experts, otherwise discoverable pursuant to Rule 26.02(b) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(1) (A) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(B) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to Rule 26.02(e)(3), concerning fees and expenses, as the court may deem appropriate.

(2) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35.02 or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(3) Unless manifest injustice would result, **(A)** the court shall require the party seeking discovery to pay the expert a reasonable fee for time spent in responding to discovery pursuant to Rules 26.02(e)(1)(B) and 26.02(e)(2); and **(B)** with respect to discovery obtained pursuant to Rule 26.02(e)(1)(B), the court may require, and with respect to discovery obtained pursuant to Rule 26.02(e)(2) the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(f) Claims of Privilege or Protection of Trial Preparation Materials.

(1) When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

(2) If information is produced in discovery that is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must

take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

26.03. Protective Orders

Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(a) that the discovery not be had;

(b) that the discovery may be had only on specified terms and conditions, including a designation of the time or place or providing for the allocation of expenses;

(c) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(d) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(e) that discovery be conducted with no one present except persons designated by the court;

(f) that a deposition, after being sealed, be opened only by order of the court;

(g) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(h) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. Rule 37.01(d) applies to the award of expenses incurred in connection with the motion.

26.04. Timing and Sequence of Discovery

(a) Timing. ~~Notwithstanding the provisions of Rules 26.02, 30.01, 31.01(a), 33.01(a), 34.02, 36.01, and 45,~~ Parties may not seek discovery from any source before the parties have conferred ~~and prepared a discovery plan~~ as required by Rule 26.06(c) except: ~~in a proceeding exempt from initial disclosure under Rule 26.01(a)(2),~~

(i) ~~or~~ when allowed by stipulation or court order, or

(ii) when proceedings are exempt from disclosure under Rule 26.01(a)(2), in which case the parties may seek discovery from any source no sooner than the expiration of 14 days after the initial deadline to answer, or

(iii) for an early Rule 34 request. An early Rule 34 request may be delivered more than 21 days after the summons and complaint are served on a party. An early Rule 34 request is considered to have been served at the Rule 26.06 conference.

(b) Sequence. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(c) Expedited Litigation Track. Expedited timing and modified content of certain disclosure and discovery obligations may be required by order of the supreme court adopting special rules for the pilot expedited civil litigation track.

26.05. Supplementation of Responses A party who has responded to a request for discovery is under a duty to supplement or correct the response to include information thereafter acquired if ordered by the court or in the following circumstances:

A party is under a duty seasonably to amend a prior response to an interrogatory, request for production, or request for admission if the party learns that the response is in some material respect incomplete or incorrect and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing. With respect to testimony of an expert, the duty extends to information contained in interrogatory responses, in any report of the expert, and to information provided through a deposition of the expert.

26.06. Discovery Conference

(a) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26.01(a)(2) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event within 30 days from the initial due date for an answer.

(b) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26.01(a), (b); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all self-represented litigants that have appeared in the case are jointly responsible for arranging the conference, and for attempting in good faith to agree on the proposed discovery plan. A written report outlining the discovery plan must be filed with the court within 14 days after the conference or at the time the action is filed, whichever is later. The court may order the parties or attorneys to attend the conference in person.

(c) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(1) what changes should be made in the timing, form, or requirement for disclosures under Rule 26.01, including a statement of when initial disclosures were made or will be made;

(2) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(3) any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order;

(5) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(6) any other orders that the court should issue under Rule 26.03 or under Rule 16.02 and .03.

(d) Conference with the Court. At any time after service of the summons, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

(4) Any issues relating to claims of privilege or of protection as trial-preparation material, including—if the parties agree on a procedure to assert such claims after production—whether to ask the court to include their agreement in an order.

(5) Any limitations proposed to be placed on discovery;

(6) Any other proposed orders with respect to discovery; and

(7) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matter set forth in the motion. All parties and attorneys are under a duty to participate in good faith in the framing of any proposed discovery plan.

Notice of the motion shall be served on all parties. Objections or additions to matters set forth in the motion shall be served not later than ten days after the service of the motion. Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

26.07. Signing of Discovery Requests, Responses and Objections

In addition to the requirements of Rule 33.01(d), every request for discovery or response or objection thereto made by a party represented by an attorney shall be signed by at least one attorney of record in the attorney's individual name, whose address and e-mail address shall be stated. A self-represented litigant shall sign the request, response, or objection and state the party's address and e-mail address. The signature constitutes a certification that the attorney or party has read the request, response, or objection, and that to the best of the signer's knowledge, information and belief formed after a reasonable inquiry it is:

(1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and

(3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed. If a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.

Rule 27. Deposition Before Action or Pending Appeal

27.01. Before Action

(a) Petition. A person who desires to perpetuate testimony regarding any matter may file a verified petition in the district court of the county of the residence of an expected adverse party. The petition shall be entitled in the name of the petitioner and shall show

(1) that the petitioner expects to be a party to an action but is presently unable to bring it or cause it to be brought;

(2) the subject matter of the expected action and the petitioner's interest therein;

(3) the facts which the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it;

(4) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known; and

(5) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each.

The petition shall ask for an order authorizing the petitioner to take the deposition of those persons to be examined as named in the petition, for the purpose of perpetuating their testimony.

(b) Notice and Service. The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 21 days before the date of hearing, the notice shall be served either within or outside the state in the manner provided in Rule 4.03 for service of summons; but if such service cannot with due diligence be made upon any expected adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4.03, an attorney who shall represent them, and, in case they are not otherwise represented, shall cross-examine the deponent. If any expected adverse party is a minor or incompetent, the provisions of Rule 17.02 apply.

(c) Order and Examination. If the court is satisfied that the perpetuation of testimony may prevent a failure or delay of justice, it shall make an order designating and describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The deposition may then be taken in accordance with these rules and the court may make orders authorized by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition for such deposition was filed.

(d) Use of Deposition. If a deposition to perpetuate testimony is taken pursuant to these rules or if, although not so taken, it would be admissible in evidence in the courts of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in this state, in accordance with the provisions of Rule 32.01.

27.02. Pending Appeal

If an appeal has been taken from a judgment or order, or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment or order was rendered may allow the taking of the deposition of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In such case, the party who desires to perpetuate the testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion shall show the names, addresses, the substance of the testimony expected to be elicited from each person to be examined, and the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders authorized by Rules 34 and 35, and thereupon the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

27.03. Perpetuation by Action

This rule does not limit the power of the court to entertain an action to perpetuate testimony.

Rule 30. Depositions by Oral Examination

30.01. When Depositions May Be Taken

~~After service of the summons, any party may take the testimony of any person, including a party, by deposition upon oral examination. Leave of court, granted with or without notice, must be obtained only if the plaintiff seeks to take a deposition prior to the expiration of 30 days after service of the summons and complaint and upon any defendant or service made pursuant to Rule 4.04, except that leave is not required if a defendant has served a notice of taking deposition or otherwise sought discovery. The attendance of witnesses may be compelled by subpoena as provided in Rule 45.~~

(a) A party may take the testimony of any person, including a party, by deposition upon oral examination without leave of court except as provided in paragraph (b). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(b) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26.02(a), if the person to be examined is confined in prison, or the parties have not stipulated to the deposition and (1) the deposition would result in more than 10 depositions being taken under this rule or Rule 31 by the plaintiffs, or by the defendants, or by the third-party defendants, (2) the person to be examined has already been deposed in the case, or (3) if the party seeks to take a deposition before the time specified in Rule 26.04.

30.02. Notice of Examination: General Requirements: Special Notice; Non-Stenographic Method of Recording; Production of Documents and Things; Deposition of Organization; Depositions by Telephone

(a) Notice. A party desiring to take the deposition of any person upon oral examination shall give reasonable notice in writing to every other party to the action. The notice shall state the name and place for taking the deposition and the name and address of each person to be examined, if known, and, if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs. If a subpoena duces tecum is to be served on the person to be examined, the designation of the materials to be produced as set forth in the subpoena shall be attached to or included in the notice.

(b) Notice of Method of Recording. The party taking the deposition shall state in the notice the method by which the testimony shall be recorded. Unless the court orders otherwise, it may be recorded ~~by sound, sound-and-visual, or stenographic~~ by audio, audiovisual, or stenographic means, the party taking the deposition shall bear the cost of the recording. Any party may arrange for a transcription to be made from the recording of a deposition taken by non-stenographic means.

(c) Additional Recording Method. With prior notice to the deponent and other parties, any party may designate another method to record the deponent's testimony in addition to the

method specified by the person taking the deposition. The additional record or transcript shall be made at that party's expense unless the court otherwise orders. Any deposition pursuant to these rules may be taken by means of simultaneous audio and visual electronic recording without leave of court or stipulation of the parties if the deposition is taken in accordance with the provisions of this rule. In addition to the specific provisions of this rule, the taking of video depositions is governed by all other rules governing the taking of depositions unless the nature of the video deposition makes compliance impossible or unnecessary.

(d) Role of Officer. Unless otherwise agreed by the parties, a deposition shall be conducted before an officer appointed or designated under Rule 28 and shall begin with a statement on the record by the officer that includes **(A)** the officer's name and business address; **(B)** the date, time, and place of the deposition; **(C)** the name of the deponent; **(D)** the administration of the oath or affirmation to the deponent; and **(E)** an identification of all persons present. If the deposition is recorded other than stenographically, the officer shall repeat items (A) through (C) at the beginning of each unit of recorded tape or other recording medium. The appearance or demeanor of deponents or attorneys shall not be distorted through camera or sound-recording techniques. At the end of the deposition, the officer shall state on the record that the deposition is complete and shall set forth any stipulations made by counsel concerning the custody of the transcript or recording and the exhibits, or concerning other pertinent matters.

(e) Production of Documents. The notice to a party deponent may be accompanied by a request made in compliance with Rule 34 for the production of documents and tangible things at the taking of the deposition. The procedure of Rule 34 shall apply to the request.

(f) Deposition of Organization. A party may in the party's notice and in a subpoena name as the deponent a public or private corporation or a partnership, association, or governmental agency and describe with reasonable particularity the matters on which examination is requested. In that event, the organization so named shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. A subpoena shall advise a non-party organization of its duty to make such a designation. The persons so designated shall testify as to matters known or reasonably available to the organization. This provision does not preclude taking a deposition by any other procedure authorized in these rules.

(g) Telephonic Depositions. The parties may stipulate in writing or the court may upon motion order that a deposition be taken by telephone or other remote electronic means. For the purposes of this rule and Rules 28.01, 37.01(a), 37.02(a) and 45.03, a deposition taken by such means is taken in the district and at the place where the deponent is to answer questions.

30.03. Examination and Cross-Examination; Record of Examination; Oath; Objections

Examination and cross-examination of witnesses may proceed as permitted at the trial under the provisions of the Minnesota Rules of Evidence except Rules 103 and 615. The officer before whom the deposition is to be taken shall put the witness on oath or affirmation and shall personally, or by someone acting under the officer's direction and in the officer's presence,

record the testimony of the witness. The testimony shall be taken stenographically or recorded by any other means ordered in accordance with Rule 30.02(d). If requested by one of the parties, the testimony shall be transcribed. All objections made at the time of the examination to the qualifications of the officer taking the deposition, to the manner of taking it, to the evidence presented, to the conduct of any party, or to any other aspect of the proceedings shall be noted by the officer upon the deposition; but the examination shall proceed, with the testimony being taken subject to the objections. In lieu of participating in the oral examination, a party may serve written questions in a sealed envelope on the party taking the deposition and the party taking the deposition shall transmit them to the officer, who shall propound them to the witness and record the answers verbatim.

30.04. Schedule and Duration; Motion to Terminate or Limit Examination

(a) Objections. Any objection to evidence during a deposition shall be stated concisely and in a non-argumentative and non-suggestive manner. A person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation on evidence directed by the court, or to present a motion under paragraph (d).

(b) Duration. Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours. The court must allow additional time consistent with Rule 26.02(a) if needed for a fair examination of the deponent or if the deponent or another person, or other circumstance, impedes or delays the examination.

(c) Sanctions. If the court finds such an impediment, delay, or other conduct that has frustrated the fair examination of the deponent, it may impose upon the persons responsible an appropriate sanction, including the reasonable costs and attorney's fees incurred by any parties as a result thereof.

(d) Suspension of Examination. At any time during a deposition, on motion of a party or of the deponent and upon a showing that the examination is being conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party, the court in which the action is pending or the court in the district where the deposition is being taken may order the officer conducting the examination to cease forthwith from taking the deposition, or may limit the scope and manner of the taking of the deposition as provided in Rule 26.03. If the order made terminates the examination, it shall be resumed thereafter only upon the order of the court in which the action is pending. Upon demand of the objecting party or deponent, the taking of the deposition shall be suspended for the time necessary to make a motion for an order. The provisions of Rule 37.01(d) apply to the award of expenses incurred in relation to the motion.

30.05. Review by Witness; Changes; Signing

If requested by the deponent or a party before completion of the deposition, the deponent shall have 30 days after being notified by the officer that the transcript or recording is available in which to review the transcript or recording and, if there are changes in form or substance, to sign a statement reciting such changes and the reasons given by the deponent for making them. The

officer shall indicate in the certificate prescribed by ~~Rule 30.06(1)~~ 30.06(a)) whether any review was requested and, if so, shall append any changes made by the deponent during the period allowed.

30.06. Certification and Filing by Officer; Exhibits; Copies; Notices of Filing

(a) Certification by Officer; Exhibits. The officer shall certify that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness, and shall certify that the deposition has been transcribed, that the cost of the original has been charged to the party who noticed the deposition, and that all parties who ordered copies have been charged at the same rate for such copies. This certificate shall be in writing and accompany the record of the deposition. Unless otherwise ordered by the court or agreed to by the parties the officer shall securely seal the deposition in an envelope or package endorsed with the title of the action and marked "Deposition of (herein insert the name of witness)," and shall promptly send it to the attorney or party who arranged for the transcript or recording, who shall store it under conditions that will protect it against loss, destruction, tampering, or deterioration. Documents and things produced for inspection during the examination of the witness shall, upon the request of a party, be marked for identification and annexed to the deposition and may be inspected and copied by any party, except that if the person producing the materials desires to retain them, the person may (1) offer copies to be marked for identification and annexed to the deposition and to serve thereafter as originals if the person affords to all parties fair opportunity to verify the copies by comparison with the originals, or (2) offer the originals to be marked for identification after giving each party an opportunity to inspect and copy them, in which event the materials may then be used in the same manner as if annexed to the deposition. Any party may move for an order that the original be annexed to and returned with the deposition pending final disposition of the case.

(b) Duties of Officer. Unless otherwise ordered by the court or agreed by the parties, the officer shall retain stenographic notes of any deposition taken stenographically or a copy of the recording of any deposition taken by another method. Upon payment of reasonable charges therefor, the officer shall furnish a copy of the transcript or other recording of the deposition to any party or to the deponent.

(c) Notice of Receipt of Transcript. The party taking the deposition shall give prompt notice of its receipt from the officer to all other parties.

30.07. Failure to Attend or to Serve Subpoena; Expenses

(a) Failure of Party Noticing Deposition to Attend. If the party giving the notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to such other party the amount of the reasonable expenses incurred by the other party and the other party's attorney in so attending, including reasonable attorney fees.

(b) Failure to Serve Subpoena on Non-Party Witness. If the party giving the notice of the taking of a deposition of a witness fails to serve a subpoena upon that witness, and the

witness because of such failure does not attend, and if another party attends in person or by attorney on the expectation that the deposition of that witness is to be taken, the court may order the party giving notice to pay to such other party the amount of the reasonable expenses incurred by those individuals in so attending, including reasonable attorney fees.

Rule 31. Depositions of Witnesses Upon Written Questions

31.01 Serving Questions; Notice

(a) A party may take the testimony of any person, including a party, by deposition upon written questions without leave of court except as provided in paragraph (b). The attendance of witnesses may be compelled by the use of subpoena as provided in Rule 45.

(b) A party must obtain leave of court, which shall be granted to the extent consistent with the principles stated in Rule 26.02(a), if the person to be examined is confined in prison, or ~~if, without the written stipulation of the parties, the party to be examined has already been deposed in the case~~ the parties have not stipulated to the deposition and (1) the deposition would result in more than 10 depositions being taken under this rule or Rule 30 by the plaintiffs, or by the defendants, or by the third-party defendants, (2) the person to be examined has already been deposed in the case, or (3) if the party seeks to take a deposition before the time specified in Rule 26.04.

(c) A party desiring to take a deposition upon written questions shall serve them upon every other party with a notice stating (1) the name and address of the person who is to answer them, if known, and if the name is not known, a general description sufficient to identify the person or the particular class or group to which the person belongs, and (2) the name or descriptive title and address of the officer before whom the deposition is to be taken. A deposition upon written questions may be taken of a public or private corporation or a partnership or association or governmental agency in accordance with the provisions of Rule 30.02(f).

(d) Within 14 days after the notice and written questions are served, a party may serve cross questions upon all other parties. Within 7 days after being served with cross questions, a party may serve redirect questions upon all other parties. Within 7 days after being served with redirect questions, a party may serve recross questions upon all other parties. The court may, for cause shown, enlarge or shorten the time.

31.02 Officer to Take Responses and Prepare Record

A copy of the notice and copies of all questions served shall be delivered by the party taking the deposition to the officer designated in the notice, who shall proceed promptly, in the manner provided by Rules 30.03, 30.05, and 30.06, to take the testimony of the witness in response to the questions and to prepare, certify, and file or mail the deposition, attaching thereto the copy of the notice and the questions received by the officer.

31.03. Notice of Filing

When the deposition is received from the officer, the party taking it shall promptly give notice thereof to all other parties.

Rule 32. Use of Depositions in Court Proceedings

32.01. Use of Depositions

At the trial or upon the hearing of a motion or an interlocutory proceeding, any part or all of a deposition, so far as admissible under the Minnesota Rules of Evidence applied as though the witness were then present and testifying, and subject to the provisions of Rule 32.02, may be used against any party who was present or represented at the taking of the deposition or who had reasonable notice thereof in accordance with any one of the following provisions:

(a) Any deposition may be used by any party for the purpose of contradicting or impeaching the testimony of deponent as a witness or for any purpose permitted by the Minnesota Rules of Evidence.

(b) The deposition of a party or of any one who at the time of taking the deposition was an officer, director, employee, or managing agent or a person designated pursuant to Rules 30.02(f) or 31.01 to testify on behalf of a public or private corporation, partnership, association, or governmental agency which is a party may be used by an adverse party for any purpose.

(c) The deposition of a witness, whether or not a party, may be used by any party for any purpose if the court finds:

(1) that the witness is dead; or

(2) that the witness is at a greater distance than 100 miles from the place of trial or hearing, or is out of the state, unless it appears that the absence of the witness was procured by the party offering the deposition; or

(3) that the witness is unable to attend or testify because of age, sickness, infirmity, or imprisonment; or

(4) that the party offering the deposition has been unable to procure the attendance of the witness by subpoena; or

(5) upon application and notice, that such exceptional circumstances exist as to make it desirable, in the interest of justice and with due regard to the importance of presenting the testimony of witness orally in open court, to allow the deposition to be used.

(d) If only part of a deposition is offered in evidence by a party, an adverse party may require the offering party to introduce any other part which ought in fairness to be considered with the part introduced and any party may introduce any other parts.

Substitution of parties pursuant to Rule 25 does not affect the right to use depositions previously taken; and, when an action has been brought in any court of the United States or any state and another action involving the same subject matter is afterward brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in

the former action may be used in the latter as if originally taken therefor. A deposition previously taken may also be used as permitted by the Minnesota Rules of Evidence.

32.02. Objections to Admissibility

Subject to the provisions of Rules 28.02 and 32.04(c), objection may be made at the trial or hearing to receiving in evidence any deposition or part thereof for any reason which would require the exclusion of evidence if the witness were then present and testifying.

32.03. Form of Presentation

Except as otherwise directed by the court, a party offering deposition testimony pursuant to this rule may offer it in stenographic or nonstenographic form, but, if in nonstenographic form, the party shall also provide the court with a transcript of the portions so offered. On request of any party in a case tried before a jury, deposition testimony offered other than for impeachment purposes shall be presented in nonstenographic form, if available, unless the court for good cause orders otherwise.

32.04. Effect of Errors and Irregularities in Depositions

(a) As to Notice. All errors and irregularities in the notice for taking a deposition are waived unless written objection is promptly served upon the party giving the notice.

(b) As to Disqualification of Officer. Objection to taking a deposition because of disqualification of the officer before whom it is to be taken is waived unless made before the taking of the deposition begins or as soon thereafter as the disqualification becomes known or could be discovered with reasonable diligence.

(c) As to Taking of Deposition.

(1) Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, unless the ground of the objection is one which might have been obviated or removed if presented at that time.

(2) Errors and irregularities occurring at the oral examination in the manner of taking the deposition, in the form of the questions or answers, in the oath or affirmation, or in the conduct of parties, and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition.

(3) Objections to the form of written questions submitted pursuant to Rule 31 are waived unless served in writing upon the party propounding them within the time allowed for serving the succeeding cross or other questions and within ~~five~~ seven days after service of the last questions authorized.

(d) As to Completion and Return of Deposition. Errors and irregularities in the manner in which the testimony is transcribed, preserved or the deposition is prepared, signed, certified, sealed, endorsed, transmitted, filed, or otherwise dealt with by the officer pursuant to Rules 30 and 31 are waived unless a motion to suppress the deposition or some part thereof is made with reasonable promptness after such defect is, or with due diligence might have been, ascertained.

32.05. Use of Video Depositions

Video depositions may be used in court proceedings to the same extent as stenographically recorded depositions.

Rule 33. Interrogatories to Parties

33.01. Availability

(a) Any party may serve written interrogatories upon any other party. ~~Interrogatories may, without leave of court, be served upon any party~~ after service of the summons and complaint. No party may serve more than a total of 50 interrogatories upon any other party unless permitted to do so by the court upon motion, notice and a showing of good cause. In computing the total number of interrogatories each subdivision of separate questions shall be counted as an interrogatory.

(b) The party upon whom the interrogatories have been served shall serve separate written answers or objections to each interrogatory within 30 days after service of the interrogatories, ~~except that a defendant may serve answers or objections within 45 days after service of summons and complaint upon that defendant.~~ The court, on motion and notice and for good cause shown, may enlarge or shorten the time.

(c) Objections shall state with particularity the grounds for the objection and may be served either as a part of the document containing the answers or separately. The party submitting the interrogatories may move for an order under Rule 37.01 with respect to any objection to or other failure to answer an interrogatory. Answers to interrogatories to which objection has been made shall be deferred until the objections are determined.

(d) Answers to interrogatories shall be stated fully in writing and shall be signed under oath or penalty of perjury by the party served or, if the party served is the state, a corporation, a partnership, or an association, by any officer or managing agent, who shall furnish such information as is available. A party shall restate the interrogatory being answered immediately preceding the answer to that interrogatory.

All answers signed under penalty of perjury must have the signature affixed immediately below a declaration using substantially the following language: "I declare under penalty of perjury that everything I have stated in this document is true and correct." In addition to the signature, the date of signing and the county and state where the document was signed shall be noted on the document.

Without leave of court or written stipulation, any party may serve upon any other party written interrogatories, not exceeding 50 in number including all discrete subparts, to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Leave to serve additional interrogatories shall be granted to the extent consistent with the principles of Rule 26.02(a).

33.02. Scope; Use at Trial

Interrogatories may relate to any matters which can be inquired into pursuant to Rule 26.02, and the answers may be used to the extent permitted by the Minnesota Rules of Evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because its answer involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed, a pretrial conference has been held, or at another later time.

33.03. Option to Produce Business Records

Where the answer to an interrogatory may be derived or ascertained from the business records, including electronically stored information, of the party upon whom the interrogatory has been served or from an examination, audit, or inspection of such business records, including a compilation, abstract, or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit, or inspect such records and to make copies, compilations, abstracts, or summaries. A specification shall be in sufficient detail as to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

Rule 34. Production of Documents, Electronically Stored Information, and Things, or Entry Upon Land for Inspection and Other Purposes

34.01. Scope

Any party may serve on any other party a request **(1)** to produce and permit the party making the request, or someone acting on the requesting party's behalf, to inspect and copy, test, or sample any designated documents or electronically stored information—including writings, drawings, graphs, charts, photographs, sound recordings, images, phono-records, and other data or data compilations stored in any medium from which information can be obtained—translated, if necessary, by the respondent through detection devices into reasonably usable form, or to inspect and copy, test, or sample any designated tangible things that constitute or contain matters within the scope of Rule 26.02 and that are in the possession, custody or control of the party upon whom the request is served, or **(2)** to permit entry upon designated land or other property in the

possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26.02.

34.02. Procedure

The request may, without leave of court, be served upon any party with or after service of the summons and complaint. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the form or forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, ~~except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant or, if the request was delivered under Rule 26.04, within 30 days after the parties' first Rule 26.06 conference. The court may allow a shorter or longer time.~~ A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for producing electronically stored information, ~~stating the reasons for objection~~ stating with specificity the reasons for objection. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection. The production must then be completed no later than the time for inspection specified in the request or another reasonable time specified in the response. An objection must state whether any responsive materials are being withheld on the basis of that objection. If objection is made to part of an item or category, that part shall be specified and inspection permitted of the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order pursuant to Rule 37 with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(a) A party who produces documents for inspection shall produce them as they are kept in the usual course of business at the time of the request or, at the option of the producing party, shall organize them to correspond with the categories in the request;

(b) If a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable; and

(c) A party need not produce the same electronically stored information in more than one form.

34.03. Persons Not Parties

This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

Rule 36. Requests for Admission

36.01. Request for Admission

A party may serve upon any other party a written request for the admission, for purposes of the pending action only, of the truth of any matters within the scope of Rule 26.02 set forth in the request that relate to statements, opinions of fact, or the application of law to fact, including the genuineness of any documents described in the request. Copies of documents shall be served with the request, unless they have been or are otherwise furnished or made available for inspection and copying. The request may be served without leave of court unless the party seeks to serve the request before the time specified in Rule 26.04 ~~be served after service of the summons and complaint~~.

Each matter of which an admission is requested shall be separately set forth. The matter is admitted unless within 30 days after service of the request, or within such shorter or longer time as the court may allow or the parties stipulate to under Rule 29, the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party or by the party's attorney; ~~but, unless the court shortens the time, a defendant shall not be required to serve answers or objections before the expiration of 45 days after service of the summons and complaint upon that defendant.~~ If objection is made, the reasons therefor shall be stated. The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter. A denial shall fairly meet the substance of the requested admission, and, when good faith requires that a party qualify an answer or deny only a part of the matter of which an admission is requested, the party shall specify so much of it as is true and qualify or deny the remainder. An answering party may not give lack of information or knowledge as a reason for failure to admit or deny unless the party states that a reasonable inquiry has been made and that the information known or readily obtainable by the party is insufficient to enable the party to admit or deny. A party who considers that a matter of which an admission has been requested presents a genuine issue for trial may not, on that ground alone, object to the request; the party may, subject to the provisions of Rule 37.03, deny the matter or set forth reasons why the party cannot admit or deny it.

The party who has requested the admissions may move to determine the sufficiency of the answers or objections. Unless the court determines that an objection is justified, it shall order that an answer be served. If the court determines that an answer does not comply with the requirements of this rule, it may order either that the matter is admitted or that an amended answer be served. The court may, in lieu of these orders, determine that final disposition of the request is to be made at a pretrial conference or at a designated time prior to trial. The provisions of Rule 37.01(d) apply to the award of expenses incurred in connection with the motion.

36.02. Effect of Admission

Any matter admitted pursuant to this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission. Subject to Rule 16 governing amendment of a pretrial order, the court may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits. Any admission made by a party hereunder is for the purpose of the pending action only and is not an admission by that party for any other purpose nor may it be used against that party in any other proceeding.

37.01. Motion for Order Compelling Disclosure or Discovery

(a) Appropriate Court. An application for an order to a party shall be made to the court in which the action is pending. An application for an order to a person who is not a party shall be made to the court in the county where the discovery is being, or is to be, taken.

(b) Specific Motions.

(1) To Compel Disclosure. If a party fails to make a disclosure required by Rule 26.01, any other party may move to compel disclosure and for appropriate sanctions.

(2) To Compel a Discovery Response. A party seeking discovery may move for an order compelling an answer, designation, production, or inspection.

This motion may be made if:

(A) a deponent fails to answer a question propounded or submitted under Rules 30 or 31;

(B) a corporation or other entity fails to make a designation under Rule 30.02(f) or 31.01(c);

(C) a party fails to answer an interrogatory submitted under Rule 33; or

~~(D) if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested.~~

(D) a party fails to produce documents or fails to respond that inspection will be permitted—or fails to permit inspection—as requested under Rule 34.

The motion must include a certification that the movant has in good faith conferred or attempted to confer with the person or party failing to make the discovery in an effort to secure the information or material without court action. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(c) Evasive or Incomplete Answer, or Response. For purposes of this subdivision an evasive or incomplete disclosure, answer, or response is to be treated as a failure to disclose, answer, or respond.

(d) Expenses and Sanctions.

(1) If the motion is granted, or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in making the motion, including attorney fees, unless the court finds that the motion was filed without the movant's first making a

good faith effort to obtain the discovery without court action, or that the opposing party's nondisclosure, response, or objection was substantially justified or that other circumstances make an award of expenses unjust.

(2) If the motion is denied, the court may enter any protective order authorized under Rule 26.03 and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(3) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26.03 and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

37.02. Failure to Comply with Order

(a) Sanctions by Court in County Where Deposition is Taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county in which the deposition is being taken, the failure may be considered a contempt of that court.

(b) Sanctions by Court in Which Action is Pending. If a party or an officer, director, employee, or managing agent of a party or a person designated in Rule 30.02(f) or 31.01 to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made pursuant to Rule 35 or 37.01, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(1) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(2) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(3) An order striking pleadings or parts thereof, staying further proceedings until the order is obeyed, dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(4) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(5) Where a party has failed to comply with an order pursuant to Rule 35.01 requiring that party to produce another for examination, such orders as are listed herein in paragraphs (1), (2), and (3), unless the party failing to comply shows that that party is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable

expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

37.03. Failure to Disclose, to Supplement an Earlier Response or to Admit

(a) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26.01 or .05, the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:

(1) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;

(2) may inform the jury of the party's failure; and

(3) may impose other appropriate sanctions, including any of the orders listed in Rule 37.02.

(b) Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matter as requested pursuant to Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of any such matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36.01, or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or (4) there was other good reason for the failure to admit.

37.04. Failure of a Party to Attend at Own Deposition or Serve Answers

If a party or an officer, director, employee, or managing agent of a party or a person designated in Rule 30.02(f) or 31.01 to testify on behalf of a party fails (1) to appear before the officer who is to take the deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted pursuant to Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted pursuant to Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, including any action authorized in Rule 37.02(b)(1), (2), and (3). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust. The failure to act described herein may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26.03.

~~**37.05. Electronically Stored Information**~~

~~Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.~~

37.05. Failure to Preserve Electronically Stored Information.

If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

(a) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or

(b) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

(1) presume that the lost information was unfavorable to the party;

(2) instruct the jury that it may or must presume the information was unfavorable to the party; or

(3) dismiss the action or enter a default judgment.

37.06. Failure to Participate in Framing a Discovery Plan

If a party or its attorney fails to participate in good faith in developing and submitting a proposed discovery plan as required by Rule 26.06, the court may, after giving an opportunity to be heard, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

Rule 45 – Subpoena

45.01. For Attendance of Witnesses; Form; Issuance

(a) Form. Every subpoena shall

(1) state the name of the court from which it is issued; and

(2) state the title of the action, the name of the court in which it is pending, and its court file number, if one has been assigned; and

(3) command each person to whom it is directed to attend and give testimony or to produce and permit inspection, copying, testing, or sampling of designated books, documents, electronically stored information, or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(4) contain a notice to the person to whom it is directed advising that person of the right to reimbursement for certain expenses pursuant to Rule 45.03(d), and the right to have the amount of those expenses determined prior to compliance with the subpoena.

A command to produce evidence or to permit inspection, copying, testing, or sampling may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(b) Subpoenas Issued in Name of Court. A subpoena commanding attendance at a trial or hearing, for attendance at a deposition, or for production, or inspection, copying, testing, or sampling shall be issued in the name of the court where the action is pending.

(c) Issuance by Court or by Attorney. The court administrator shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney

as officer of the court may also issue and sign a subpoena on behalf of the court where the action is pending.
(d) Subpoena for Taking Deposition, Action Pending in Foreign Jurisdiction. A subpoena for attendance at a deposition to be taken in Minnesota for an action pending in a foreign jurisdiction may be issued by the court administrator or by an attorney admitted to practice in Minnesota in the name of the court for the county in which the deposition will be taken, provided that the deposition is allowed and has been properly noticed under the law of the jurisdiction in which the action is pending. The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things that constitute or contain matters within the scope of the examination permitted by the law of the jurisdiction in which the action is pending, but in that event, the subpoena will be subject to the provisions of Rules 26.03 and 45.03(b)(2).
(e) Notice to Parties. Any use of a subpoena, other than to compel attendance at a trial, without prior notice to all parties to the action, is improper and may subject the party or attorney issuing it, or on whose behalf it was issued, to sanctions.

45.02. Service
(a) Who May Serve and Method of Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person or by leaving a copy at the person's usual place of abode with some person of suitable age and discretion then residing therein and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the state of Minnesota or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises, copying, testing, or sampling before trial shall be served on each party in the manner prescribed by Rule 5.02.
(b) Statewide Service. Subject to Rule 45.03(c)(1)(B), a subpoena may be served at any place within the state of Minnesota.
(c) Proof of Service. Proof of service when necessary shall be made by filing with the court administrator of the court on behalf of which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.
(d) Compensation of Subpoenaed Person. The party serving the subpoena shall make arrangements for reasonable compensation as required under Rule 45.03(d) prior to the time of commanded production or the taking of such testimony. If such reasonable arrangements are not made, the person subpoenaed may proceed under Rule 45.03(c) or 45.03(b)(2). The party serving the subpoena may, if objection has been made, move upon notice to the deponent and all parties for an order directing the amount of such compensation at any time before the taking of the deposition. Any amounts paid shall be subject to the provisions of Rule 54.04.

45.03. Protection of Persons Subject to Subpoenas
(a) Requirement to Avoid Undue Burden. A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall

enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(b) Subpoena for Document Production Without Deposition.

(1) A person commanded to produce and permit inspection, copying, testing, or sampling of designated electronically stored information, books, papers, documents, or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing, or trial.

(2) Subject to Rule 45.04(b), a person commanded to produce and permit inspection, copying, testing, or sampling may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to producing any or all of the designated materials or inspection of the premises—or to producing electronically stored information in the form or forms requested. If objection is made, the party serving the subpoena shall not be entitled to inspect, and copy, test, or sample the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production, inspection, copying, testing, or sampling. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection, copying, testing, or sampling commanded.

(c) Motion to Quash or Modify Subpoena.

(1) On timely motion, the court on behalf of which a subpoena was issued shall quash or modify the subpoena if it

(A) fails to allow reasonable time for compliance;

(B) requires a person who is not a party or an officer of a party to travel to a place outside the county where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of Rule 45.03(c)(2)(C), such a person may in order to attend trial be commanded to travel from any such place within the state of Minnesota, or

(C) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(D) subjects a person to undue burden.

(2) If a subpoena

(A) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(B) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(C) requires a person who is not a party or an officer of a party to incur substantial expense to travel outside the county where that person resides, is employed or regularly transacts business in person to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Compensation of Certain Non-Party Witnesses. Subject to the provisions of Rules 26.02 and 26.03, a witness who is not a party to the action or an employee of a party [except a person appointed pursuant to Rule 30.02(f)] and who is required to give testimony or produce documents relating to a profession, business, or trade, or relating to knowledge, information, or facts obtained as a result of activities in such profession, business, or trade, is entitled to reasonable compensation for the time and expense involved in preparing for and giving such testimony or producing such documents.

45.04. Duties in Responding to Subpoena

(a) Form of Production.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(3) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

(4) A person responding to a subpoena need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26.02(b)(3). The court may specify conditions for the discovery.

(b) Claims of Privilege.

(1) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial-preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(2) If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for a determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The person who produced the information must preserve the information until the claim is resolved.

45.05. Contempt

Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court on behalf of which the subpoena was issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by Rule 45.03(c)(1)(B).

45.06 Interstate Depositions and Discovery

(a) Definitions. In Rule 45.06:

(1) "Foreign jurisdiction" means a state other than this state.

(2) "Foreign subpoena" means a subpoena issued under authority of a court of record of a foreign jurisdiction.

(3) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government, or governmental subdivision, agency or instrumentality, or any other legal or commercial entity.

(4) "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, or any territory or insular possession subject to the jurisdiction of the United States.

(5) "Subpoena" means a document, however denominated, issued under authority of a court of record requiring a person to:

(A) attend and give testimony at a deposition;

(B) produce and permit inspection and copying of designated books, documents, records, electronically stored information, or tangible things in the possession, custody, or control of the person; or

(C) permit inspection of premises under the control of the person.

(b) Issuance of Subpoena.

(1) To request issuance of a subpoena under this section, a party must submit a foreign subpoena to the district court administrator of the court in the county in which discovery is sought to be conducted in this state. A request for the issuance of a subpoena under this act does not constitute an appearance in a proceeding pursuant to Rule 5.01 of these rules, but does subject the filer to the jurisdiction of the court and to Minnesota law and rules, including the Minnesota Rules of Professional Conduct.

(2) A district court administrator in this state, upon submission of a foreign subpoena, shall, in accordance with that court's procedure, promptly issue a subpoena for service upon the person to which the foreign subpoena is directed.

(3) A subpoena under subsection (2) must:

(A) incorporate the terms used in the foreign subpoena; and

(B) contain or be accompanied by the names, addresses, and telephone numbers of all counsel of record in the proceeding to which the subpoena relates and of any party not represented by counsel.

(c) Service of Subpoena. A subpoena issued by a district court administrator under Section (b) must be served in compliance with Rule 45.02 of these rules.

(d) Deposition, Production, and Inspection. All Minnesota rules and statutes applicable to compliance with subpoenas to attend and give testimony, produce designated books, documents, records, electronically stored information, or tangible things, or permit inspection of premises apply to subpoenas issued under Paragraph (b).

(e) Application To Court. An application to the court for a protective order or to enforce, quash, or modify a subpoena issued by a district court administrator under Paragraph (b) must comply with the rules and statutes of this state and be submitted to the district court in the county in which discovery is to be conducted.

Rule 53. Masters

53.01. Appointment

(a) Authority for Appointment. Unless a statute provides otherwise, a court may appoint a master only to:

(1) perform duties consented to by the parties;

(2) hold trial proceedings and make or recommend findings of fact on issues to be decided by the court without a jury if appointment is warranted by

(A) some exceptional condition, or

(B) the need to perform an accounting or resolve a difficult computation of damages; or

(3) address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge.

(b) Disqualification. A master must not have a relationship to the parties, counsel, action, or court that would require disqualification of a judge, unless the parties consent with the court's approval to appointment of a particular person after disclosure of any potential grounds for disqualification.

(c) Expense. In appointing a master, the court must consider the fairness of imposing the likely expenses on the parties and must protect against unreasonable expense or delay.

53.02. Order Appointing Master

(a) Notice. The court must give the parties notice and an opportunity to be heard before appointing a master. A party may suggest candidates for appointment.

(b) Contents. The order appointing a master must direct the master to proceed with all reasonable diligence and must state:

(1) the master's duties, including any investigation or enforcement duties, and any limits on the master's authority under Rule 53.03;

(2) the circumstances—if any—in which the master may communicate ex parte with the court or a party;

(3) the nature of the materials to be preserved and filed as the record of the master's activities;

(4) the time limits, method of filing the record, other procedures, and standards for reviewing the master's orders, findings, and recommendations;

(5) the basis, terms, and procedure for fixing the master's compensation under Rule 53.08; and

(6) the extent to which, if at all, the parties and the master must use the court's E-filing System in the proceedings before the master.

(c) Entry of Order. The court may enter the order appointing a master only after the master has filed an affidavit disclosing whether there is any ground for disqualification and, if a ground for disqualification is disclosed, after the parties have consented with the court's approval to waive the disqualification.

(d) Amendment. The order appointing a master may be amended at any time after notice to the parties and an opportunity to be heard.

53.03. Master's Authority

Unless the appointing order expressly directs otherwise, a master has authority to regulate all proceedings and take all appropriate measures to perform fairly and efficiently the assigned duties. The master may by order impose upon a party any noncontempt sanction provided by

Rule 37 or 45, and may recommend a contempt sanction against a party and sanctions against a nonparty.

53.04. Evidentiary Hearings
Unless the appointing order expressly directs otherwise, a master conducting an evidentiary hearing may exercise the power of the appointing court to compel, take, and record evidence.

53.05. Master's Orders
A master who makes an order must file the order and promptly serve a copy on each party. The court administrator must enter the order on the docket.

53.06. Master's Reports
A master must report to the court as required by the order of appointment. The master must file the report and promptly serve a copy of the report on each party unless the court directs otherwise.

53.07. Action on Master's Order, Report, or Recommendations
(a) Action. In acting on a master's order, report, or recommendations, the court must afford an opportunity to be heard and may receive evidence, and may: adopt or affirm; modify; wholly or partly reject or reverse; or resubmit to the master with instructions.
(b) Time To Object or Move. A party may file objections to—or a motion to adopt or modify—the master's order, report, or recommendations no later than ~~20~~ 21 days from the time the master's order, report, or recommendations are served, unless the court sets a different time.
(c) Fact Findings. The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:
(1) the master's findings will be reviewed for clear error, or
(2) the findings of a master appointed under Rule 53.01(a)(1) or (3) will be final.
(d) Legal Conclusions. The court must decide de novo all objections to conclusions of law made or recommended by a master.
(e) Procedural Matters. Unless the order of appointment establishes a different standard of review, the court may set aside a master's ruling on a procedural matter only for an abuse of discretion.

Rule 53.08. Compensation
(a) Fixing Compensation. The court must fix the master's compensation before or after judgment on the basis and terms stated in the order of appointment, but the court may set a new basis and terms after notice and an opportunity to be heard.
(b) Payment. The compensation fixed under Rule 53.08(a) must be paid either:
(1) by a party or parties; or
(2) from a fund or subject matter of the action within the court's control.
(c) Allocation. The court must allocate payment of the master's compensation among the parties after considering the nature and amount of the controversy, the means of the parties, and the extent to which any party is more responsible than other parties for the reference to a master. An interim allocation may be amended to reflect a decision on the merits.

53.09. Appointment of Statutory Referee

A statutory referee employed in the judicial branch is subject to this rule only when the order referring a matter to the statutory referee expressly provides that the reference is made under this rule.

Rule 56. Summary Judgment

~~**56.01. For Claimant**~~

~~A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the expiration of 20 days from the service of the summons, or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.~~

56.01. Motion for Summary Judgment or Partial Summary Judgment.

A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

~~**56.02. For Defending Party**~~

~~A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.~~

56.02. Time to File a Motion.

Service and filing of the motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than 14 days before the time fixed for the hearing. Unless the court orders otherwise, a party may not file a motion for summary judgment more than 30 days after the close of all discovery.

~~**56.03. Motion and Proceedings Thereon**~~

~~Service and filing of the motion shall comply with the requirements of Rule 115.03 of the General Rules of Practice for the District Courts, provided that in no event shall the motion be served less than 10 days before the time fixed for the hearing. Judgment shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that either party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.~~

56.03. Procedures.

(a) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(1) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations pursuant to Minn. Stat. § 358.116, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(2) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(b) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(c) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(d) Affidavits or Declarations. An affidavit or declaration pursuant to Minn. Stat. § 358.116 used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

~~**56.04. Case not Fully Adjudicated on Motion**~~

~~If, on motion pursuant to this rule, judgment is not rendered upon the whole case or for all the relief asked and a trial is necessary, the court at the hearing on the motion, by examining the pleadings and the evidence before it and by interrogating counsel, shall, if practicable, ascertain what material facts exist without substantial controversy and what material facts are actually and in good faith controverted. It shall thereupon make an order specifying the facts that appear without substantial controversy, including the extent to which the amount of damages or other relief is not in controversy, and directing such further proceedings in the action as are just. Upon the trial of the action the facts so specified shall be deemed established, and the trial shall be conducted accordingly.~~

56.04. When Facts Are Unavailable to the Nonmovant.

If a nonmovant shows by affidavit or declaration pursuant to Minn. Stat. § 358.116 that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(a) defer considering the motion or deny it;

(b) allow time to obtain affidavits or declarations or to take discovery; or

(c) issue any other appropriate order.

~~**56.05. Form of Affidavits; Further Testimony; Defense Required**~~

~~Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all documents or~~

~~parts thereof referred to in an affidavit shall be attached thereto or served therewith. A "sworn copy" includes documents that are authenticated by a signature under penalty of perjury, pursuant to Minn. Stat. § 358.116. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in Rule 56, an adverse party may not rest upon the mere averments or denials of the adverse party's pleading but must present specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.~~

56.05. Failing to Properly Support or Address a Fact.

If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56.03, the court may:

(a) give an opportunity to properly support or address the fact;

(b) consider the fact undisputed for purposes of the motion;

(c) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(d) issue any other appropriate order.

~~**56.06. When Affidavits are Unavailable**~~
~~Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present, by affidavit, facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.~~

56.06. Judgment Independent of the Motion.

After giving notice and a reasonable time to respond, the court may:

(a) grant summary judgment for a nonmovant;

(b) grant the motion on grounds not raised by a party;or

(c) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

~~**56.07. Affidavits Made in Bad Faith**~~
~~Should it appear to the satisfaction of the court at any time that any of the affidavits presented pursuant to this rule are presented in bad faith or solely for the purpose of delay, the court shall forthwith order the party submitting them to pay to the other party the amount of the reasonable~~

~~expenses which the filing of the affidavits causes the other party to incur, including reasonable attorney fees, and any offending party or attorney may be adjudged guilty of contempt.~~

56.07. Failing to Grant All the Requested Relief.

If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

56.08. Affidavit or Declaration Submitted in Bad Faith.

If satisfied that an affidavit or declaration pursuant to Minn. Stat. § 358.116 under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Rule 59. New Trials

59.01 Grounds

A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes:
(a) Irregularity in the proceedings of the court, referee, jury, or prevailing party, or any order or abuse of discretion, whereby the moving party was deprived of a fair trial;
(b) Misconduct of the jury or prevailing party;
(c) Accident or surprise which could not have been prevented by ordinary prudence;
(d) Material evidence newly discovered, which with reasonable diligence could not have been found and produced at the trial;
(e) Excessive or insufficient damages, appearing to have been given under the influence of passion or prejudice;
(f) Errors of law occurring at the trial, and objected to at the time or, if no objection need have been made pursuant to Rules 46 and 51, plainly assigned in the notice of motion;
(g) The verdict, decision, or report is not justified by the evidence, or is contrary to law; but, unless it be so expressly stated in the order granting a new trial, it shall not be presumed, on appeal, to have been made on the ground that the verdict, decision, or report was not justified by the evidence.
On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct entry of a new judgment.

59.02 Basis of Motion

A motion made pursuant to Rule 59.01 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. A full or partial transcript of the court reporter's notes may be used on the hearing of the motion.

59.03 Time for Motion
A notice of motion for a new trial shall be served within 30 days after a general verdict or service of notice by a party of the filing of the decision or order; and the motion shall be heard within 60 days after such general verdict or notice of filing, unless the time for hearing be extended by the court within the 60-day period for good cause shown.

59.04 Time for Serving Affidavits
When a motion for a new trial is based upon affidavits, they shall be served with the notice of motion. The opposing party shall have ~~10~~ 14 days after such service in which to serve opposing affidavits, which period may be extended by the court pursuant to Rule 59.03. The court may permit reply affidavits.

59.05 On Initiative of Court
Not later than 15 days after a general verdict or the filing of the decision or order, the court upon its own initiative may order a new trial for any reason for which it might have granted a new trial on motion of a party. After giving the parties notice and an opportunity to be heard on the matter, the court may grant a motion for a new trial, timely served, for a reason not stated in the motion. In either case, the court shall specify in the order the grounds therefor.

59.06 Stay of Entry of Judgment
A stay of entry of judgment pursuant to Rule 58 shall not be construed to extend the time within which a party may serve a motion hereunder.

Rule 63. Disability or Disqualification of a Judge; Notice to Remove; Assignment of a Judge

63.01 Disability of Judge
If by reason of death, sickness, or other disability a judge before whom an action has been tried is unable to perform judicial duties after a verdict is returned or findings of fact and conclusions of law are filed, any other judge regularly sitting in or assigned to the court in which the action was tried may perform those duties; but if such other judge is satisfied that the duties cannot be performed because that judge did not preside at the trial or for any other reason, that judge may exercise discretion to grant a new trial.

63.02 Interest or Bias
No judge shall sit in any case if that judge is interested in its determination or if that judge might be excluded for bias from acting therein as a juror. If there is no other judge of the district who is qualified, or if there is only one judge of the district, such judge shall forthwith notify the Chief Justice of the Minnesota Supreme Court of that judge's disqualification.

63.03 Notice to Remove
Any party or attorney may make and serve on the opposing party and file with the administrator a notice to remove. The notice shall be served and filed within ~~10~~ 14 days after the party receives notice of which judge or judicial officer is to preside at the trial or hearing, but not later than the commencement of the trial or hearing.

No such notice may be filed by a party or party's attorney against a judge or judicial officer who has presided at a motion or any other proceeding of which the party had notice, or who is assigned by the Chief Justice of the Minnesota Supreme Court. A judge or judicial officer who has presided at a motion or other proceeding or who is assigned by the Chief Justice of the Minnesota Supreme Court may not be removed except upon an affirmative showing of prejudice on the part of the judge or judicial officer.
After a party has once disqualified a presiding judge or judicial officer as a matter of right, that party may disqualify the substitute judge or judicial officer, but only by making an affirmative showing of prejudice. A showing that the judge or judicial officer might be excluded for bias from acting as a juror in the matter constitutes an affirmative showing of prejudice.
Upon the filing of a notice to remove or if a litigant makes an affirmative showing of prejudice against a substitute judge or judicial officer, the chief judge of the judicial district shall assign any other judge of any court within the district, or a judicial officer in the case of a substitute judicial officer, to hear the cause.

63.04 Assignment of Judge
Upon receiving notice as provided in Rules 63.02 and 63.03, the chief justice shall assign a judge of another district, accepting such assignment, to preside at the trial or hearing, and the trial or hearing shall be postponed until the judge so assigned can be present.

Rule 68.Offer of Judgment or Settlement
68.01 Offer
(a)Time of Offer. At any time more than ~~10~~ 14 days before the trial begins, any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.
(b)Applicability of Rule. An offer does not have the consequences provided in Rules 68.02 and 68.03 unless it expressly refers to Rule 68.
(c)Damages-only Offers. An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which shall be added to the amount states as provided in Rule 68.02(b)(2) and (c).
(d)Total-obligation Offers. The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees.
(e)Offer Following Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ~~10~~ 14 days before the commencement of a hearing or trial to determine the amount or extent of liability.
(f)Filing. Notwithstanding the provisions of Rule 5.04, no offer under this rule need be filed with the court unless the offer is accepted.

68.02 Acceptance or Rejection of Offer

(a) Time for Acceptance. Acceptance of the offer shall be made by service of written notice of acceptance within ~~ten~~ fourteen days after service of the offer. During the ~~ten-day~~ fourteen day period the offer is irrevocable.

(b) Effect of Acceptance of Offer of Judgment. If the offer accepted is an offer of judgment, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and the court shall order entry of judgment as follows:

(1) If the offer is a total-obligation offer as provided in Rule 68.01(d), judgment shall be for the amount of the offer.

(2) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment.

(c) Effect of Acceptance of Offer of Settlement. If the offer accepted is an offer of settlement, the settled claim(s) shall be dismissed upon:

(1) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied; or

(2) order of the court implementing the terms of the agreement.

(d)Offer Deemed Withdrawn. If the offer is not accepted within the ~~ten-day~~ fourteen day period, it shall be deemed withdrawn.

(e)Subsequent Offers. The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

68.03 Effect of Unaccepted Offer

(a)Unaccepted Offer Not Admissible. Evidence of an unaccepted offer is not admissible, except in a proceeding to determine costs and disbursements.

(b)Effect of Offer on Recovery of Costs. An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(1) If the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer, and the plaintiff-offeree shall not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the plaintiff-offeree shall not be affected by this provision.

(2) If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

(3) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

(c) Measuring Result Compared to Offer. To determine for purposes of this rule if the relief awarded is less favorable to the offeree than the offer:

(1) a damages-only offer is compared with the amount of damages awarded to the plaintiff; and

(2) a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer.

68.04 Applicable Attorney Fees and Prejudgment Interest
(a)"Applicable Attorney Fees" Defined." Applicable attorney fees" for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to attorney fees not provided for under the applicable substantive law.
(b)"Applicable Prejudgment Interest" Defined." Applicable prejudgment interest" for the purposes of Rule 68 means any prejudgment interest to which a party is entitled by statute, rule, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to prejudgment interest not provided for under the applicable substantive law.

FORM 22 – WAIVER OF THE SERVICE OF SUMMONS

TO: (insert the name and address of the person to be served.)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from _____, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent

_____
Signature

_____
Date of Signature

ACKNOWLEDGMENT OF RECEIPT OF SUMMONS AND COMPLAINT

I declare, under penalty of perjury, that I received a copy of the the complaint in the above-captioned matter at (insert address).

_____
Signature

_____
Relationship to Entity/Authority to
Receive Service of Process

_____
Date of Signature

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4.05 of the Minnesota Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does not include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.

No resolution presented herein reflects the policy of the Minnesota State Bar Association until approved by the Assembly. Informational reports, comments, and supporting data are not approved by their acceptance for filing and do not become part of the policy of the Minnesota State Bar Association unless specifically approved by the Assembly.

Report and Recommendation to the MSBA

Regarding Amendment of the Minnesota Rules of Civil Procedure to Require that at Least 50% of Unclaimed, Undistributed Residual Funds in Class Actions be donated to the Minnesota Legal Aid Foundation Fund

MSBA Legal Assistance to the Disadvantaged Committee
September 11, 2012, reaffirmed on February 12, 2016

RECOMMENDATION

Resolved, that the Minnesota State Bar Association petition the Minnesota Supreme Court to amend the Minnesota Rules of Civil Procedure by amending Rule 23.05 and adding Rule 23.11, as follows:

1) Minnesota Rules of Civil Procedure Rule 23.05

23.05 Settlement, Voluntary Dismissal, or Compromise

(a) Court Approval.

***

(3) The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate. Any order entering a judgment, or approving a proposed compromise, voluntary dismissal, or settlement, of a class action that establishes a process for the identification and compensation of members of the class shall provide for the disbursement of residual funds.

***

2) Minnesota Rules of Civil Procedure Rule 23.11

23.11. *Cy Pres* Distributions. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Minnesota Legal Aid Foundation Fund to support "qualified legal services programs" consistent with Minn. Stat. § 480.24 *et seq.* The court may disburse the balance of any residual funds beyond the minimum 50% to any other non-profit entity that has a direct or indirect relationship to the objectives of the underlying litigation or otherwise promotes the substantive or procedural interests of members of the certified class.

REPORT

Background

Cy pres is a method for distributing remaining funds from a class action settlement. The funds could be undistributed because not all plaintiffs claim their share, all class members cannot be located, individual claims are smaller than the cost of processing those claims, or because the settlement amount agreed to by the parties turns out to be larger than necessary. Judges overseeing these actions have the authority to decide the fate of such residual funds. For more information about the use of the *cy pres* doctrine in class actions, see *Equal Access to Justice: A Cy Pres Manual*, created by the MSBA and the Minnesota Legal Services Coalition.[1]

The courts have found legal services programs to be appropriate recipients of *cy pres* funds either because the programs address issues directly relevant to the litigation (*e.g.*, consumer or discrimination issues), or because legal services programs for the poor serve the courts' overall mission of access to justice.[2] Minnesota legal services programs have benefited directly from *cy pres* in several cases.

In recognition of the severe shortage of resources to support legal services for the poor in Minnesota, the Minnesota Supreme Court established a Joint Legal Services Access and Funding Committee in 1995 (the Penn-Stageberg Report).[3] Among the report's recommendations was that "trial judges in all courts in Minnesota should be educated about the need for funding for legal services for the disadvantaged .... and in appropriate cases, of designating local legal services or volunteer programs, or the Supreme Court's Legal Services Advisory Committee as the recipients of *cy pres* funds."

In 1998, the six regional legal services programs that comprised the Minnesota Legal Services Coalition created the Minnesota Legal Aid Foundation Fund, an endowment whose proceeds benefit virtually all of the state's legal services providers. The Supreme Court Legal Services Advisory Committee distributes the income generated by the MLAFF (currently $150,000-$170,000 per year), as part of a two-year funding cycle which supports about 30 legal services and pro bono programs. The MLAFF was created with the express intention of being a vehicle for *cy pres* awards for Minnesota's legal services programs.

Minnesota has not adopted a formal rule either creating a presumption that legal services organizations are appropriate recipients of *cy pres* funds, or mandating that legal services organizations receive a certain percentage of class action residuals. Because Minnesota has no centralized tracking mechanism for *cy pres* awards, we cannot establish with any certainty how many *cy pres* awards are made each year and to whom. According to the anecdotal information available to LAD, *cy pres* awards are most likely going to other organizations, both legal and non-legal. The MLAFF has only received three *cy pres* awards, although one - from the Microsoft anti-trust settlement – was significant.[4]

An educational campaign regarding *cy pres* awards was undertaken by the MSBA Legal Assistance to the Disadvantaged Committee and the Minnesota Legal Services Coalition upon completion of the update to the Cy Pres Manual in 2010 - 2011.[5] Nevertheless, it appears that class action residuals are awarded to legal services providers on an, at best, hit or miss basis.

---

[1] http://www.mnbar.org/docs/default-source/atj/cypresmanualA8F4E22DD8B1.pdf?sfvrsn=2

[2] *Id.*, pp. 2 - 5.

[3] http://mncourts.gov/Documents/0/Public/administration/penn-stageberg.pdf, p. 19.

[4] The Microsoft award was not technically a *cy pres* award, but a provision of the settlement agreement.

[5] http://www.mnbar.org/docs/default-source/atj/cypresmanualA8F4E22DD8B1.pdf?sfvrsn=2

Cy Pres Residual Rules in Other States

As funding pressures on civil legal services have grown, a movement to codify the practice of awarding unclaimed class action residuals to civil legal services has gained steam nationally, with 21 states having adopted court rules or legislation allowing for *cy pres* distributions. A more consistent approach to directing residual awards to legal services could result in substantial funding increases.

Codification has taken various forms - as court rules or as legislation - in different states. California, Hawaii, Massachusetts, and Tennessee have adopted permissive rules, which, while codifying the presumption that residual awards can be directed to civil legal services, do not mandate that any particular percentage be so directed. Other states, such as Illinois, Washington State, Indiana, and North Carolina, mandate that a certain percentage of class action residuals be directed to civil legal services. The Illinois Code of Civil Procedure requires that at least 50 percent of the residual funds in class actions go toward organizations that "improve access to justice for low-income Illinois residents." Indiana and Washington have a 25 percent requirement, and North Carolina has a 100 percent requirement. A summary of *cy pres* rules in other states, prepared by the ABA Resource center of Access to Justice, is attached as Addendum 1.[6]

States also differ in how "class action residuals" are defined. For example, the Washington rule does not apply to all class action settlements, while Tennessee has attempted to cover even residuals resulting from class actions in federal court.

In addition, states differ in how the residuals that are directed to civil legal services are distributed. The Washington rule requires that that the residual funds be disbursed to the Legal Foundation of Washington for distribution, while the Illinois rule is much less restrictive, requiring only that the distribution be made to "one or more eligible organizations having...as its principal purpose promoting or providing services that would be eligible for funding under the Illinois Equal Justice Act."

In some states, civil legal services providers appear to have reaped substantial funds following codification of a *cy pres* residual requirement. For example, civil legal services in Illinois was awarded $1.5 million in fiscal year 2010, and Washington programs received more than $1 million in 2011. This compares with negligible award amounts pre-codification.

Proposed Rule

As explained above, some states have adopted a statute directing *cy pres* funds to go to state legal aid funding, whereas others have adopted a rule of civil procedure (usually by adding a new provision to the class action rules). LAD believes the most practical course for Minnesota would be an amendment to Rule 23 of the Rules of Civil Procedure. LAD has proposed the following language:

> Rule 23.11. *Cy Pres* Distributions. In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to the Minnesota Legal Aid Foundation Fund to support qualified legal services programs, as defined by Minn. Stat. § 480.24, subd. (3). The

[6] South Carolina and Wisconsin passed cy pres rules after the Addendum # 1 was last updated. South Carolina's amendment is available at: http://www.judicial.state.sc.us/courtreg/displayRule.cfm?ruleID=23.0&subRuleID=&ruleType=CIV (last accessed May 23, 2016). Wisconsin's rule is in the process of being formalized by the Wisconsin Supreme Court. A news article about the change is available at: http://wisatj.org/court-acts-cypres-probono?doing_wp_cron=1464032175.4369690418243408203125 (last accessed May 23, 2016).

court may disburse the balance of any residual funds beyond the minimum 50% to any other non-profit entity that has a direct or indirect relationship to the objectives of the underlying litigation or otherwise promotes the substantive or procedural interests of members of the certified class.

This proposed rule requires at least half of residual funds be directed to the MLAFF. These funds would then become part of the fund endowment, the income from which is distributed by the Supreme Court Legal Services Advisory Committee to legal aid and pro bono programs throughout Minnesota. The other half of the residuals would continue to be directed according to current law, in ways that directly or indirectly benefit the class members, or similarly situated people.

Conclusion

Nineteen years ago, the Penn-Stageberg report identified *cy pres* funds as a potential source of increased legal services funding. Providers of civil legal services to the poor in Minnesota experienced sharp funding cuts during the recession while the need for their services increased dramatically. Despite an improving economy, civil legal aid funding has not returned to pre-recession levels. Other states have seen significant financial returns from instituting a *cy pres* distribution rule. Civil legal aid providers would greatly benefit from a *cy pres* distribution rule in Minnesota. If a rule is adopted in Minnesota, the LAD committee will work to make sure the bench and bar are aware of the new rule. LAD believes the time is right to create this rule, and requests the Assembly to approve this recommendation.

/S/ Janine Laird
Janine Laird, LAD Committee Co-chair

/S/ Julian Zebot
Julian Zebot, LAD Committee Co-chair

Legislation and Court Rules Providing for Legal Aid to Receive Class Action Residuals*

First draft prepared 10/29/07; Most recent update 3-19-16

California

Legislature amended Section 384 of the California Code of Civil Procedure to permit payment of class action residuals "to nonprofit organizations or foundations to support projects that will benefit the class or similarly situated persons, or that promote the law consistent with the objectives and purposes of the underlying cause of action, to child advocacy programs, or to nonprofit organizations providing civil legal services to the indigent.

Effective date: January 1, 1994.

Amount received to date: It is unknown how much is generated specifically because of the statute. California legal aid programs received at least $8,662,000 in 2013.

Implementation work and analysis: Cy Pres Manual prepared in 2014. Many legal aid providers in California actively solicit cy pres contributions.

For more information, please contact: Stephanie Choy, Managing Director, Legal Services Trust Fund Program, State Bar of California, stephanie.choy@calbar.ca.gov, 415/538-2249.

Colorado

The Colorado Supreme Court amended Sec. 23(g) of the Colorado Rule of Civil Procedure in 2016 to state that "**.....In matters where the claims process has been exhausted and residual funds remain, not less than 50 percent of the residual funds shall be disbursed to the Colorado Lawyer Trust Account Foundation (COLTAF) to support activities and programs that promote access to the civil justice system for low income residents of Colorado. The court may disburse the balance of any residual funds beyond the minimum percentage to COLTAF or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective Date: July 1, 2016

Amount received to date: None. (See effective date.)

Implementation work and analysis:

For more information, please contact: Diana Poole, Executive Director, Colorado Lawyer Trust Account Foundation, diana@legalaidfoundation.org, 303/863-9544

Connecticut

The Connecticut Supreme Court amended Sec. 9-9 of the Connecticut Superior Court Rules in 2014 to state that " .....Any order, judgment or approved settlement in a class action that establishes a process for identifying and compensating members of the class may designate the recipient or recipients of any such residual funds that may remain after the claims payment process has been completed. In the absence of such designation, the residual funds shall be disbursed to the organization administering the program for the use of interest on lawyers' client funds pursuant to General Statutes 51-81c for the purpose of funding those organizations that provide legal services for the poor in Connecticut."

Effective Date: January 1, 2015

Amount received to date: None

Implementation work and analysis:

For more information, please contact: Steve Eppler-Epstein, Executive Director, Connecticut Legal Services, seppler-epstein@connlegalservices.org, 860/344-0447, ext. 109

Hawaii

The Hawaii Supreme Court amended Rule 23 of Hawaii's Rules of Civil Procedure, in January, 2011, to state that "....it shall be within the discretion of the court to approve the timing and method of distribution of residual funds and to approve the recipient(s) of residual funds, as agreed to by the parties, including nonprofit tax exempt organizations eligible to receive assistance from the indigent legal assistance fund under HRS section 607-5.7 (or any successor provision) or the Hawaii Justice Foundation, for distribution to one or more of such organizations. Judges may approve the distribution of residual funds to legal aid organizations or to the Hawaii Justice Foundation to disburse to one or more of such organizations."

Effective date: July 1, 2011

Amount received to date: In 2013, legal aid providers received $130,000 of $450,000 total cy pres funds awarded in state pursuant to rule. $124,000 received in 2014 through 6/30/14.

Implementation work and analysis: In 2011, the Hawaii Access to Justice Commission prepared a Toolkit.

For more information, please contact: Bob LeClair, Executive Director, Hawaii Justice Foundation, hjf@hawaii.rr.com, 808/537-3886

Illinois

Legislature amended Section 5 of the Code of Civil Procedure to add new Section 2-807 (735 ILCS 5/2-807), to establish a presumption that residual funds in class actions will go towards organizations that improve access to justice for low-income Illinois residents. Courts have the discretion to award up to 50% of the funds to other organizations that serve the public good as part of a settlement if the court finds good cause to do so, but at least 50% of these funds must go to support legal aid.

Effective date: July 1, 2008

Amount received to date: Approximately $5,300,000 in FY2013; $502,000 in FY2014. This includes awards made pursuant to the legislation and others.

Implementation work and analysis: The Chicago Bar Foundation has developed educational materials and sample language that they distribute to area judges, class action lawyers and other relevant parties (e.g., claims administrators). CBF website provides detailed information.

For more information, please contact: Bob Glaves, Executive Director, Chicago Bar Foundation, bglaves@chicagobar.org,

Indiana

New language in Rule 23 of the Indiana Rules of Civil Procedure, adopted by the Indiana Supreme Court, reads, in part: "In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Indiana Bar Foundation to support the activities and programs of the Indiana Pro Bono Commission and its pro bono districts. The court may disburse the balance of any residual funds beyond the minimum percentage to the Indiana Bar Foundation or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2011

Amount received to date: $2,069.59

Implementation work and analysis: Completed education campaign. Discussed federal courts local rule. Rule is seen as influencing local federal courts.

For more information, please contact: Andrew Homan, Indiana Pro Bono Commission, ahoman@inbf.org, 317/269-7863.

Kentucky

The Kentucky Supreme Court amended Civil Rule 23 to direct at least 25% of residual funds of any class action award to civil legal aid. Funds are to be maintained by the Kentucky IOLTA

Board of Trustees and distributed to legal aid programs in accordance with a formula based on poverty population.

Effective date: January 1, 2014

Amount received to date: None; see implementation date.

Implementation work and analysis: The new rule has been published in the state bar magazine and judges will be advised of the new rule at their annual colleges.

For more information, please contact: Judge Roger Crittenden (ret.), Chair, Kentucky Access to Justice Commission, rlcrittenden@fewpb.net

Louisiana

The Louisiana Supreme Court enacted Rule XLIII, which states in part: "In matters where the claims process has been exhausted and Cy Pres Funds remain, such funds may be disbursed by the trial court to one or more non-profit or governmental entities which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, including the Louisiana Bar Foundation for use in its mission to support activities and programs that promote direct access to the justice system."

Effective date: September 24, 2012

Amount received to date: Amount attributable to rule is unknown. Total received by legal aid in 2013 was $511,000.

Plans for implementation:

For more information, please contact:

Maine

The Maine Supreme Judicial Court has amended Civil Rule 23(f)(2) as follows: "The parties may agree that residual funds be paid to an entity whose interests reasonably approximate those being pursued by the class. When it is not clear that there is such a recipient, unless otherwise required by governing law, the settlement agreement should provide that residual fees, if any, be paid to the Maine Bar Foundation to be distributed in the same manner as funds received from interest on lawyers trust accounts....."

Effective date: March 1, 2013

Amount received to date: Neither the MBF nor any legal aid provider has received an award since the rule's effective date. MBF received $58,708 in 2012.

Plans for implementation: MBF and providers to talk about heightening awareness of the new rule.

For more information, please contact: Diane Scully, Executive Director, Maine Bar Foundation, dscullly@mbf.org, 207/622-3477.

Massachusetts

New language in Rule 23 of the Massachusetts Rules of Civil Procedure, adopted by the Supreme Judicial Court of Massachusetts, reads, in part: "In matters where the claims process has been exhausted and residual funds remain, the residual funds shall be disbursed to one or more nonprofit organizations or foundations (which may include nonprofit organizations that provide legal services to low income persons) which support projects that will benefit the class or similarly situated persons consistent with the objectives and purposes of the underlying causes of action on which relief was based, or to the Massachusetts IOLTA Committee to support activities and programs that promote access to the civil justice system for low income residents of the Commonwealth of Massachusetts." The rule was revised in 2015 to require in cases with residual funds that the plaintiff provide notice to IOLTA for the purpose of allowing IOLTA to be heard on whether it ought to be a recipient of any or all residual funds.

Effective date: January 1, 2009; revised July 1, 2015

Amount received to date: Legal aid programs reported receiving $448,000 in 2013.

Implementation work and analysis: IOLTA staff have provided judges and court clerks throughout the state with a brochure and other materials regarding the rule change.

For more information, please contact: Jayne Tyrrell, Executive Director, Massachusetts IOLTA Committee, jtyrrell@maiolta.org, 617/723-9093.

Montana

The Montana Supreme Court amended Rule 23 of the Montana Rules of Civil Procedure to state that "In matters where the claims process has been exhausted and residual funds remain, not less than fifty percent (50%) of the residual funds shall be disbursed to an Access to Justice Organization to support activities and programs that promote access to the Montana civil justice system. The court may disburse the balance of any residual funds beyond the minimum percentage to an Access to Justice Organization or to another non-profit entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 1, 2015

Amount received to date: None (see effective date)

Implementation work and analysis:

For more information, please contact: Niki Zupanic, Executive Director, Montana Justice Foundation, nzupanic@mtjustice.org, 406/523-3920.

Nebraska

The Nebraska Legislature amended section 30-3839 of Revised Statutes Cumulative supplement, 2012, to provide that: "Prior to the entry of any judgment or order approving settlement in a class action described in section 25-319, the court shall determine the total amount that will be payable to all class members if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise to further the purposes of the underlying cause of action, shall direct the defendant to pay the sum of the unpaid residue to the Legal Aid and Services Fund".

Effective date: April, 2014

Amount received to date: None

Implementation work and analysis:

For more information, please contact:

New Mexico

The New Mexico Supreme Court adopted new language in Rule 23 of the New Mexico Rules of Civil Procedure: The new language provides that residual class action funds may be distributed to non-profit organizations that provide legal services to low income persons, the IOLTA program, the entity administering the pro hac vice rule and/or educational entities that provide training, teaching and legal services that further the goals of the underlying causes of action on which relief was based. Funds also may go to other non-profit organizations that support projects that benefit the class or similarly situated persons consistent with the goals of the underlying causes of action on which relief was based.

Effective date: May 11, 2011

Amount received to date: $10,000 to Equal Access to Justice (a combined private bar campaign for 5 NM legal aid programs) through the Access to Justice Commission. May have been awards to individual programs as well.

Implementation work and analysis: Held a CLE on cy pres at the 2013 annual bench & bar conference - panelists include judges and private attorneys.

For more information, please contact:

North Carolina

Legislature amended Subchapter VIII of Chapter 1 of the General Statutes to add new Article 26B, which reads, in part: "Prior to the entry of any judgment or order approving settlement in a class action established pursuant to Rule 23 of the Rules of Civil Procedure, the court shall determine the total amount that will be payable to all class members, if all class members are paid the amount to which they are entitled pursuant to the judgment or settlement. The court shall also set a date when the parties shall report to the court the total amount that was actually paid to the class members. After the report is received, the court, unless it orders otherwise consistent with its obligations under Rule 23 of the Rules of Civil Procedure, shall direct the defendant to pay the sum of the unpaid residue, to be divided and credited equally, to the Indigent Person's Attorney Fund and to the North Carolina State Bar for the provision of civil legal services for indigents."

Effective date: October 1, 2005

Amount received to date: Awards received by IOLTA and disbursed to legal aid programs pursuant to division described in rule: 2007=$18,000; 2010=$2,200; 2011=$33,000; 2013=$528,000 (plus an additional direct award of $130,000 for a total of $658,000 for 2013). Individual legal aid programs also have received awards.

Implementation work and analysis: In 2012, the North Carolina Access to Justice Commission prepared a toolkit.

For more information, please contact: Evelyn Pursley, Executive Director, North Carolina IOLTA, epursley@ncbar.gov, 919/828-0477.

Oregon

The legislature amended section 32 of the Oregon Code of Civil Procedure to add a new section O, which provides that, in class action cases where residual funds exist, at least 50 percent of the amount not paid to class members be paid to the Oregon State Bar for the funding of legal services. The remainder will be paid to any entity for purposes that the court determines are directly related to the class action or directly beneficial to the interests of class members

Effective date: March 4, 2015

Amount received to date: None (see effective date)

Implementation work and analysis:

For more information, please contact: Judith Baker, Director of Legal Services Program, Oregon State Bar, jbaker@osbar.org, 503/431-6323

Pennsylvania

The Supreme Court of Pennsylvania has revised Chapter 1700 of the Rules of Civil Procedure, directing that at least 50% of residual funds in a given class action shall be disbursed to the Pennsylvania IOLTA Board to support activities and programs which promote the delivery of civil legal assistance. The balance may go to IOLTA, or to another entity for purposes that have a direct or indirect relationship to the objectives of the underlying class action, or which otherwise promote the substantive or procedural interests of the members of the class.

Effective date: July 1, 2012

Amount received to date: In fiscal year ended June 30, 2013, cy pres revenue to IOLTA totaled $78,010. In fiscal year ended June 30, 2014, revenue totaled $2,282,191. Individual legal aid programs also have received awards.

Implementation work and analysis: IOLTA developed a toolkit that has been distributed to Pennsylvania trial judges. They also are working on an educational plan for the class action bar and the federal and state trial bench.

For more information, please contact: Stephanie Libhart, Executive Director, Lawyer Trust Account Board, stephanie.libhart@pacourts.us, 717/238-2001.

South Dakota

Legislature approved Section 16-2-57 of its codified laws on the settlement of class action lawsuits to provide that "Any order settling a class action lawsuit that results in the creation of a common fund for the benefit of the class shall provide for the distribution of any residual funds to the Commission on Equal Access to Our Courts. However, up to fifty percent of the residual funds may be distributed to one or more other nonprofit charitable organizations that serve the public good if the court finds there is good cause to approve such a distribution as part of the settlement."

Effective date: 2008

Amount received to date: There have been 3 payments to date; paid to the Commission on Equal Access to Our Courts, which disbursed the funds to legal aid providers.

Implementation work and analysis: There are relatively few class action cases in South Dakota.

For more information, please contact: Thomas Barnett, Executive Director and Secretary Treasurer, State Bar of South Dakota, thomas.barnett@sdbar.net, 605/224-7554.

Tennessee

Legislature amended the Tennessee Code Annotated, Title 16, Chapter 3, Part 8, to create the Tennessee Voluntary Fund for Indigent Civil Representation and authorize it to receive contributions from several sources, including: "The unpaid residuals from settlements or awards in class action litigation in both state and federal courts, provided any such action has been

certified as a class action under Rule 23 of the Tennessee Rules of Civil Procedure or Rule 23 of the Federal Rules of Civil Procedure;" In 2009, Rule 23.08 was amended to clarify that judges and parties to class actions may enter into settlement decrees providing for unclaimed class action funds to be paid to the Tennessee Voluntary Fund for Indigent Civil Representation.

Effective date: September 1, 2006

Amount received to date: None

Implementation work and analysis:

For more information, please contact: Ann Pruitt, Executive Director, Tennessee Alliance for Legal Services, apruitt@tals.org, 615/627-0956

Washington

New language in Rule 23, adopted by the Washington Supreme Court, reads, in part: "Any order entering a judgment or approving a proposed compromise of a class action certified under this rule that establishes a process for identifying and compensating members of the class shall provide for the disbursement of any residual funds. In matters where the claims process has been exhausted and residual funds remain, not less than twenty-five percent (25%) of the residual funds shall be disbursed to the Legal Foundation of Washington to support activities and programs that promote access to the civil justice system for low income residents of Washington State. The court may disburse the balance of any residual funds beyond the minimum percentage to the Legal Foundation of Washington or to any other entity for purposes that have a direct or indirect relationship to the objectives of the underlying litigation or otherwise promote the substantive or procedural interests of members of the certified class."

Effective date: January 3, 2006

Amount received: In 2013, received $6,196,718 due to Rule 23, out of total cy pres receipts of $15,935,503.

Implementation work and analysis: Staff and volunteers of the Legal Foundation of Washington and LAW Fund continually educate judges and lawyers about the rule and about the value of using cy pres to benefit access to justice through gifts to the Legal Foundation of Washington.

For more information, please contact: Caitlin Davis Carlson, Executive Director, Legal Foundation of Washington, caitlindc@legalfoundation.org, 206/624-2536, ext 288.

*Prepared by Meredith McBurney, Resource Development Consultant for the American Bar Association's Resource Center for Access to Justice Initiatives, a project of the Standing

Committee on Legal Aid and Indigent Defendants. Contact Meredith at meredithmcburney@msn.com or 303/329-8091.

Memorandum in Support of the Legal Assistance to the Disadvantaged Committee's Cy Pres Proposal

The MSBA's Legal Assistance to the Disadvantaged (LAD) Committee urges the MSBA Judiciary Committee to approve its proposal to amend the Minnesota Rules of Civil Procedure to require that at least 50% of unclaimed class action residual funds be disbursed to the Minnesota Legal Aid Foundation Fund to support qualified legal services programs in Minnesota through a process known as "*cy pres* awards."

This bar year, the LAD Committee has obtained approval for the proposal from the MSBA Civil Litigation Section, the MSBA Court Rules and Administration Committee, the Minnesota State Bar Foundation, and the Hennepin County Bar Foundation. The Committee attempted to obtain approval from the Consumer Litigation Section and the Ramsey County Bar Foundation, but they did not receive a response.

The Basics of Cy Pres Awards and the LAD Committee Proposal

Cy pres awards are court-ordered distributions of the residual funds from class action settlements or judgments that are unclaimed or cannot be distributed to class members. Residual funds may be unclaimed for a variety of reasons, such as inability to locate class members, class members declining to file claims or cash settlement checks, or when it is economically or administratively unfeasible to distribute funds to class members. Boies, Willber H. and Timothy M. Kennedy, *Comment to the Advisory Committee on Civil Rules and the Rule 23 Subcommittee Concerning Cy Pres Awards in Class Action Settlements Under Rule 23*, September 8, 2015, p. 5.

The LAD Committee's proposed rule requires that when the class representative and the defendant are drafting their settlement agreement for approval by the Court, the parties must specify what happens with funds that remain unclaimed. Of those unclaimed funds, not less than 50% must be disbursed for centralized distribution to civil legal aid programs operating in Minnesota. The settling

parties would be free to direct the remaining 50% of unclaimed funds to whatever organizations on which they agree, subject to the judge's approval, so long as the organizations have some connection to the purpose of the lawsuit.

While class action settlements occur in federal and state courts, the LAD Committee's proposal only extends to state court class actions in Minnesota; federal class actions would not be affected by this proposal. There are no Minnesota state cases that specify how *cy pres* funds should be used in a class action context.

Cy Pres Awards to Civil Legal Aid Programs are an Appropriate Way to Distribute Unclaimed Residual Class Action Funds

Legal services programs serve an essential role in helping the state's most vulnerable residents preserve basic needs such as food, shelter, safety, and access to health care. *Cy pres* awards are an effective way to provide funding for these programs.

For several decades, federal[1] and state courts throughout the country have recognized that legal services organizations are an appropriate recipient of *cy pres* awards, either because the issues involved in the class action are issues that legal services programs often tackle (such as mortgage foreclosure) or

[1] Federal courts require a nexus for *cy pres* distribution—meaning that *cy pres* awards direct money to a charitable purpose related to the underlying purpose of the litigation. In the twenty-one states that have passed rules similar to this one, the state court has made a policy decision that support of civil legal aid programs statewide is important enough to include in their class action court rule. The proposed rule at hand, extending only to state court cases, is separate from and not affected by federal law. As an aside, the Eighth Circuit has had a mixed view of *cy pres* awards to legal aid programs in the last 18 years, depending on the case. See *Fogie v. Thorn Americas, Inc.*, 190 F.3d 889 (8th Cir. 1999) and 2001 WL 1617964 (D. Minn. 2001); *Stewart v. CenterPoint Energy Resources Corp.*, No. 05-CV-1502 (2004); *Bokusky v. Edina Realty*, No. 3-92 CIV 223 (1996); *Chutich v. Green Tree Acceptance, Inc.*, No. 3-88 CIV 869 (1997); *In re Airline Ticket Comm'n Antitrust Litig.*, 307 F.3d 679 (8th Cir., 2002); and *Oetting v. Green Jacobson, P.C. (In re Bankamerica Corp. Sec. Litig.), 775 F.3d 1060 (8th Cir., 2015).* To the extent a nexus is required to support such a rule, a sufficient nexus exists because the *cy pres* funds to be distributed to legal services providers will all be used to increase access to justice. Moreover, the proposed rule requires that the remaining 50% is required to be directed to an organization "that has a direct or indirect relationship to the objectives of the underlying litigation or otherwise promotes the substantive or procedural interests of members of the certified class."

because the underlying premise for all class actions is to make access to justice a reality for people who otherwise would not obtain the protections of the justice system, which is precisely the mission of civil legal aid programs. *Id.* at p. 7. According to the American Bar Association, 21 states have amended court rules or statutes to mandate that at least some portion (usually ranging from 25-100%) of unclaimed residual class action funds be distributed to civil legal aid organizations through *cy pres* awards (See addendum 1). [2]

Funding From Cy Pres Awards Would Greatly Benefit Civil Legal Aid Programs in Minnesota

Since the 2008 recession, funding for civil legal aid programs has decreased due to government funding and interest rate cuts. According to the Legal Services Advisory Committee, while many income sources have improved since the recession, overall civil legal aid funding and staffing levels in Minnesota have not yet returned to pre-recession levels. According to a 2012 Minnesota Legal Services Turndown Study, civil legal aid programs in Minnesota must turn away two out of every three eligible clients who seek their services.

Every source of income is important to ensure that low income Minnesotans get the legal help they need for to ensure their safety and meet their basic needs. The proposed *cy pres* rule would create a new dedicated funding source for these important programs. Other states have seen significant gains from implementing a *cy pres* rule. The ABA Resource Center for Access to Justice Initiatives reports that states with *cy pres* rules collected a total of $7-$20million per year in the last 10 years.

For the foregoing reasons we respectfully request that the MSBA Judiciary Subcommittee approve the LAD Committee's proposed changes to the Minnesota Rules of Civil Procedure.

---

[2] South Carolina and Wisconsin passed *cy pres* rules after Addendum # 1 was last updated. South Carolina's amendment is available at: http://www.judicial.state.sc.us/courtreg/displayRule.cfm?ruleID=23.0&subRuleID=&ruleType=CIV (last accessed May 23, 2016). Wisconsin's rule is in the process of being formalized by the Wisconsin Supreme Court. A news article about the change is available at: http://wisatj.org/court-acts-cypres-probono?doing_wp_cron=1464032175.4369690418243408203125 (last accessed May 23, 2016).

Date: ___June 3, 2016___

Respectfully submitted,

___/S/ Janine Laird_____

Janine Laird
LAD Committee Co-Chair

__/S/ Julian Zebot_____

Julian Zebot
LAD Committee Co-Chair