

**MINNESOTA  
PROPOSED RULES  
OF  
CRIMINAL PROCEDURE  
AND  
COMMENTS**

**Rules 21-31**

SUPREME COURT ADVISORY COMMITTEE  
RULES OF CRIMINAL PROCEDURE

1500 FIRST NATIONAL BANK BUILDING  
SAINT PAUL, MINNESOTA 55101  
TELEPHONE (612) 227-7621

FRANK CLAYBOURNE, ST. PAUL  
CHAIRMAN  
JUDGE CHARLES E. CASHMAN, OWATONNA  
HENRY H. FEIKEMA, MPLS.  
PROF. DAVID GRAVEN, MPLS.  
CHARLES C. JOHNSON, MANKATO  
C. PAUL JONES, MPLS.  
JOHN E. MACGIBBON, ELK RIVER  
HENRY W. MCCARR, JR., MPLS.  
RONALD I. MESHESHER, MPLS.  
JUDGE DONALD C. ODDEN, DULUTH  
JUDGE CHESTER G. ROSENGREN, FERGUS FALLS  
JUDGE BRUCE C. STONE, MPLS.  
PROF. WILLIAM B. DANFORTH, MPLS.  
REPORTER  
PROF. MAYNARD E. PIRSIG, MPLS.  
CONSULTANT

January 18, 1974

TO: The Judges and Lawyers of Minnesota.


Last July the Supreme Court Advisory Committee on Rules of Criminal Procedure mailed you a copy of the first 20 proposed rules of criminal procedure covering pre-trial practice. At the direction of the Supreme Court, we now enclose herewith a copy of proposed rules 21 through 31 which completes the rules pertaining to felonies and gross misdemeanors.

The Court has requested that any suggestions or comments thereon be mailed to the undersigned as Chairman of the Advisory Committee at the address shown above in time to be received prior to February 15, 1974. All suggestions will be given careful consideration by the Advisory Committee and the Court.

The Court will hold a hearing on all of the proposed rules on Friday, February 22, 1974 at 9:30 a.m. in Room 584 of the Federal Building and U. S. Court House, 316 N. Robert St., St. Paul. The Court has directed that anyone who wishes to be heard at the hearing shall make such request in advance, in writing, addressed to Chief Justice Robert J. Sheran in Room 760 at the same address.

The enclosed rules, as well as those that were sent you in July, were mailed through the courtesy of the Minnesota State Bar Association.

Yours very truly,

  
Frank Claybourne, Chairman  
Supreme Court Advisory Committee  
Rules of Criminal Procedure

FC:eha  
Enclosure

## TABLE OF CONTENTS

	<u>Page</u>
<u>RULE 21 SPECIAL RULES GOVERNING PREJUDICIAL PUBLICITY</u>	
21.1	Pretrial Hearings - Motion to Exclude Public 1
21.2	Continuance or Change of Venue 1
21.21	At Whose Instance 1
21.22	Methods of Proof 1
21.23	Standards for Granting the Motion 2
21.24	Time of Disposition 2
21.25	Limitations; Waiver 2
<u>RULE 22 VENUE</u>	
22.1	Place of Trial 5
22.2	Venue in Special Cases 5
22.21	Offense Committed on Public or Private Conveyance 5
22.22	Offenses Committed on County Lines 5
22.23	Injury or Death in One County from an Act Committed in Another County 5
22.24	Prosecution in County Where Injury or Death Occurs 5
22.25	Prosecution When Death Occurs Outside State 6
22.26	Kidnapping 6
22.27	Libel 6
22.28	Bringing Stolen Goods into State 6
22.29	Obscene or Harassing Telephone Calls 6
22.2.10	Fair Campaign Practices 6
22.2.11	Series of Offenses Aggregated 7
22.2.12	Non-Support of Wife or Child 7
22.3	Change of Venue 7
22.31	Grounds 7
22.32	County to Which Transferred 7
22.33	Time for Motion for Change of Venue 7
22.34	Proceedings on Transfer 8
<u>RULE 23 TRIAL</u>	
23.1	Trial by Jury or by the Court 12
23.11	Trial by Jury 12
23.111	Right to Jury Trial 12
23.112	Waiver of Trial by Jury 12
23.1121	Waiver Generally 12
23.1122	Waiver When Prejudicial Publicity 12
23.113	Withdrawal of Waiver of Jury Trial 12
23.114	Waiver of Number of Jurors Required by Law 12
23.115	Waiver of Unanimous Verdict 13
23.116	Number Required for Verdict 13
23.12	Trial Without a Jury 13
23.2	Selection of Jury 14
23.21	Selection and Qualifications 14
23.22	List of Prospective Jurors 14
23.23	Challenge to Panel 14

	<u>Page</u>
23.24	Voir Dire Examination 15
23.241	Purpose - By Whom Made 15
23.242	Sequestration of Jurors 15
23.2421	Court's Discretion 15
23.2422	Prejudicial Publicity 15
23.243	Order of Drawing, Examination and Challenge 16
23.2431	Uniform Rule 16
23.2432	By Order of Court 17
23.2433	By Order of Court 18
23.25	Challenge for Cause 20
23.251	Grounds 20
23.252	How and When Exercised 21
23.253	By Whom Tried 21
23.26	Peremptory Challenges 21
23.27	Order of Challenges to the Panel and to Individual Jurors 22
23.28	Alternate Jurors 22
23.3	Procedures During Trial 23
23.31	Presence of Defendant 23
23.311	Presence Required 23
23.312	Continued Presence Not Required 23
23.313	Presence Not Required 23
23.32	Custody and Restraint of Defendants and Witnesses 24
23.33	Use of Courtroom 24
23.34	Preliminary Instructions 25
23.35	Sequestration of the Jury 25
23.351	In the Discretion of the Court 25
23.352	On Motion 26
23.36	Exclusion of the Public From Hearings or Arguments Outside the Presence of the Jury 26
23.37	Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses 27
23.38	Admonitions to Jurors 27
23.39	Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial 27
23.3.10	View by Jury 27
23.3.11	Order of Jury Trial 28
23.3.12	Note Taking 29
23.3.13	Substitution of Judge 29
23.3.131	Before or During Trial 29
23.3.132	After Verdict or Finding of Guilt 30
23.3.14	Exceptions 30
23.3.141	Exceptions Abolished 30
23.3.142	Bills of Exception and Settled Cases Abolished 30
23.3.15	Evidence 31
23.3.16	Interpreters 31
23.3.17	Motion for Judgment of Acquittal 31
23.3.171	Motion Before Submission to Jury 31
23.3.172	Reservation of Decision on Motion 31
23.3.173	Motion After Discharge of Jury 32
23.3.18	Instructions 32
23.3.181	Requests for Instructions 32
23.3.182	Proposed Instructions 33
23.3.183	Objections to Instructions 33

	<u>Page</u>
23.3.184 Giving of Instructions	33
23.3.185 Contents of Instructions	34
23.3.19 Jury Deliberations and Verdict	34
23.3.191 Materials to Jury Room	34
23.3.192 Jury Requests to Review Evidence	34
23.3.193 Additional Instructions After Jury Retires	35
23.3.194 Deadlocked Jury	36
23.3.195 Polling the Jury	36
23.3.196 Impeachment of Verdict	36
23.4 Post-Verdict Motions	36
23.41 New Trial	36
23.411 Grounds	36
23.412 Basis of Motion	37
23.413 Time for Motion	37
23.414 Time for Serving Affidavits	38
23.42 Motion to Vacate Judgment	38
23.43 Joinder of Motions	38
23.44 New Trial on Court's Own Motion	38

#### RULE 24 SENTENCE AND JUDGMENT

24.1 Conditions of Release	51
24.2 Presentence Investigation	51
24.21 When Made	51
24.22 Scope of Investigation and Report	51
24.23 Disclosure of Report	51
24.24 Mental or Physical Examination	52
24.3 Sentencing Proceedings	52
24.31 Hearings	52
24.32 Defendant's Presence at Sentencing	52
24.33 Statements at Time of Sentence	52
24.34 Imposition of Sentence	53
24.35 Notice of Right to Appeal	53
24.36 Record	53
24.37 Judgment	53
24.38 Clerical Mistakes	54
24.39 Correction or Reduction of Sentence	54

#### RULE 25 APPEAL

25.1 Scope of Rules Governing Appeal	58
25.11 Appeals from District Court	58
25.12 Applicability of Rules of Civil Procedure	58
25.13 Suspension of Rules	58
25.2 Appeal by Defendant	58
25.21 Review by Appeal	58
25.22 Appeal as of Right	58
25.221 Final Judgment	58
25.222 Orders	59
25.23 Discretionary Appeal	59
25.24 Certification of Proceedings	59

	<u>Page</u>
25.25	How Appeal is Taken 60
25.251	Notice of Appeal 60
25.252	Contents of Notice of Appeal 60
25.253	Time for Taking an Appeal 61
25.254	Proceedings in Forma Pauperis 62
25.26	Stay 65
25.27	Release of Defendant 65
25.271	Conditions of Release 65
25.272	Burden of Proof 65
25.273	Application for Release Pending Appeal 65
25.28	Record on Appeal 66
25.29	Transcript of Proceedings and Transmission of the Transcript and Record 66
25.2.10	Scope of Review 67
25.2.11	Action of Appellate Court 67
25.3	Appeal by State 67
25.31	Appealable Orders 67
25.32	Procedure 67
25.321	Stay 67
25.322	Notice of Appeal 68
25.323	Transcript 68
25.324	Briefs 68
25.325	Dismissal by Attorney General 68
25.326	Hearing 69
25.327	Attorneys' Fees 69
25.328	Joinder 69
25.329	Time for Appeal 69
25.33	Cross-Appeal by Defendant 69
25.34	Conditions of Release 70
<u>RULE 26 DISMISSAL</u>	
26.1	By Prosecuting Attorney 77
26.2	By Court 77
<u>RULE 27 HARMLESS ERROR AND PLAIN ERROR</u>	
27.1	Harmless Error 79
27.2	Plain Error 79
<u>RULE 28 MOTIONS</u>	
28	Motions 81
<u>RULE 29 SERVICE AND FILING OF PAPERS</u>	
29.1	Service: Where Required 83
29.2	Service: How Made 83
29.3	Notice of Orders 83
29.4	Filing 83

RULE 30 TIME

30.1	Computation	85
30.2	Enlargement	85
30.3	For Motions; Affidavits	86
30.4	Additional Time After Service by Mail	86
30.5	Unaffected by Expiration	86

RULE 31 COURTS AND CLERKS

31	Courts and Clerks	88
----	-------------------	----





RULE 21 SPECIAL RULES GOVERNING PREJUDICIAL PUBLICITY

The following rules shall govern when any question of potentially prejudicial publicity is raised:

21.1 Pretrial Hearings - Motion to Exclude Public.

In any pretrial hearing, the defendant may move that all or part of the hearing be held in chambers or otherwise closed to the public, including representatives of the news media, on the ground that dissemination of evidence or argument adduced at the hearing may disclose matters that may be inadmissible in evidence at the trial and likely to interfere with his right to a fair trial by an impartial jury. The motion shall be granted unless the court determines that there is no substantial likelihood of such interference. With the consent of the defendant, the court may make such an exclusion order on its own motion or at the suggestion of the prosecution. Whenever under this rule all or part of any pretrial hearing is held in chambers or otherwise closed to the public, a complete record of the proceedings shall be kept and unless otherwise ordered by the court shall be available to the public following the completion of the trial or disposition of the case without trial.

21.2 Continuance or Change of Venue.

A motion for continuance or change of venue because of prejudicial publicity shall be governed by the following rules:

21.21 At Whose Instance.

A continuance or change of venue may be granted on motion of either the prosecution or the defense or on the court's own motion.

21.22 Methods of Proof.

In addition to the testimony or affidavits of individuals in the community, which shall not be required as a condition of the granting

of a motion for continuance or change of venue, qualified public opinion surveys shall be admissible as well as other materials having probative value.

21.23 Standards for Granting the Motion.

A motion for continuance or change of venue shall be granted whenever it is determined that the dissemination of potentially prejudicial material creates a reasonable likelihood that in the absence of such relief, a fair trial cannot be had. A showing of actual prejudice shall not be required.

21.24 Time of Disposition.

If a motion for continuance or change of venue is made before the jury is sworn, the motion shall be determined before the jury is sworn. If a motion is made or if reconsideration of a prior denial is sought, it may be granted notwithstanding the fact that a jury has been sworn to try the case.

21.25 Limitations; Waiver.

It shall not be ground for denial of a change of venue that one such change has already been granted. The waiver of the right to trial by jury or the failure to exercise all available peremptory challenges shall not constitute a waiver of the right to a continuance or change of venue if a motion has been timely made.

COMMENT

RULE 21 SPECIAL RULES GOVERNING PREJUDICIAL PUBLICITY

This rule prescribes special rules to be applied in the case of potentially prejudicial publicity. Other applicable rules when this question arises are Rules 23.1122 (waiver of jury trial); 23.2422 (Sequestration of Jurors on Voir Dire); 23.33 (Use of Courtroom); 23.351 (Sequestration of Jury); 23.36 (Exclusion of Public from Hearings or Arguments Outside Presence of the Jury); 23.37 (Cautioning Parties, Witnesses, Jurors, and Judicial Employees; Sequestration of Witnesses); 23.38 (Admonitions to Jurors); and 23.39 (Questioning Jurors about Exposure to Prejudicial Material). See also Comment to Rule 23.4 (Post-Trial Motions).

Rule 21.1 (Pretrial Hearings - Motion to Exclude Public) comes from ABA Standards, Fair Trial and Free Press, 3.1 (Approved Draft, 1968). The motion to exclude the public from pretrial hearings under this rule shall be granted unless the court determines that there is no substantial likelihood of interference with defendant's right to a fair trial by reason of the dissemination of evidence or argument adduced at the hearing. This determination would include the situation in which the news media agreed not to disseminate these matters until completion of the trial.

Whenever the public is excluded, a record of the proceedings shall be kept and made available to the public, unless the court orders otherwise, following the completion of the trial. For the protection of innocent persons, the court may order that names be deleted or substitutions therefor made.

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

Rule 21.2 Motion for Continuance or Change of Venue.

Rules 21.21, 21.22 (At Whose Instance, Methods of Proof) are taken from ABA Standards, Fair Trial and Free Press, 3.2 (a) (b) (Approved Draft, 1968). Rule 21.23 (Standards for Granting the Motion) is based upon ABA Standards, Fair Trial and Free Press 3.2 (c) (Approved Draft, 1968). The determination that there is a reasonable likelihood a fair trial cannot be had may be based on such evidence as qualified public opinion surveys or opinion testimony offered by individuals, or on the court's own evaluation of the nature, frequency, and timing of the prejudicial material involved. Rule 21.24 (Time of Disposition of Motion) is based on ABA Standards, Fair Trial and Free Press, 3.2 (d) (Approved Draft, 1968). A motion for continuance or change of venue should, if possible, be made at the time prescribed by Rule 10 for pretrial motions and heard at the Omnibus Hearing under Rule 11. Under Rule 21.24, the motion may be made before the jury is sworn and in that event should be determined before the jury is sworn. If a motion is made or reconsideration of a prior denial is sought, however, it may be granted after the jury is sworn. Since the Fifth Amendment's double jeopardy provisions are applicable to the states (Benton v. Maryland, 395 U.S. 784 (1969), it is the opinion of the Advisory Committee that jeopardy attaches in a jury case when the jury is sworn and in a court trial when the first witness is sworn.

Rule 21.25 (Limitations; Waiver) is taken from ABA Standards, Fair Trial and Free Press, 3.2 (e) (Approved Draft, 1968) and expressly permits more than one change of venue. (This changes Minn. Stat. S627.01 which allows the defendant only one change of venue.)

RULE 22   VENUE

22.1   Place of Trial.

The case shall be tried in the county where the offense was committed except as otherwise provided by these rules.

22.2   Venue in Special Cases.

22.21   Offense Committed on Public or Private Conveyance.

When any offense is committed within the state on a public or private conveyance, and it is doubtful in which county the offense occurred, the case may be prosecuted and tried in any county through which the conveyance traveled in the course of the trip during which the offense was committed, or in the county where such trip began or terminated.

22.22   Offenses Committed on County Lines.

Offenses committed on or within 1,500 feet of the boundary line between two counties may be alleged in the complaint or indictment to have been committed in either of them and may be prosecuted and tried in either county.

22.23   Injury or Death in One County from an Act Committed in Another County.

If an act is committed in one county resulting in injury or death in another county, the offense may be prosecuted and tried in either county. If it is doubtful in which one of two or more counties the act was committed or injury or death occurred, the offense may be prosecuted and tried in any one of such counties.

22.24   Prosecution in County Where Injury or Death Occurs.

If an act is committed either within or without the limits of the state and injury or death results in any county of the state, the offense may be prosecuted and tried in the county where the injury or death occurs.

22.25 Prosecution When Death Occurs Outside State.

If an assault is committed in this state resulting in death outside the state, the homicide may be prosecuted and tried in the county where the assault was committed.

22.26 Kidnapping.

The offense of kidnapping may be prosecuted and tried either in the county where the offense was committed or in any county through or in which the person kidnapped was taken or kept while under confinement or restraint.

22.27 Libel.

The offense of publication of a libel contained in a newspaper published in the state may be prosecuted and tried in any county where the paper was published or circulated; but a person shall not be prosecuted for publication of the same libel against the same person in more than one county.

22.28 Bringing Stolen Goods Into State.

Whoever brings stolen property into the state in violation of Minn. Stat. S609.525 (1971) may be prosecuted and tried in any county, but not more than one county, into or through which the property was brought.

22.29 Obscene or Harassing Telephone Calls.

Violations of Minn. Stat. S609.79 (1971) may be prosecuted and tried either at the place where the telephone call is made or where it is received.

22.2.10 Fair Campaign Practices.

Violations of section 211.27 Minn. Stat. (1971) prohibiting corporate contributions to political campaigns may be prosecuted and tried in

the county where such payment or contribution is made or services rendered or in any county wherein such money has been paid or distributed.

22.2.11 Series of Offenses Aggregated.

When a series of offenses are aggregated pursuant to Minn. Stat. S609.52, Subd. 3(5) (1971) and the offenses have been committed in more than one county, the case may be prosecuted and tried in any one of the counties in which one or more of the offenses was committed.

22.2.12 Non-Support of Wife or Child.

Violations of Minn. Stat. S609.375 (1971) for non-support of wife or child may be prosecuted and tried in the county where the wife or child or both reside.

22.3 Change of Venue.

22.31 Grounds.

The case may be transferred to another county:

- a. If the court is satisfied that a fair and impartial trial cannot be had in the county in which the case is pending;
- b. For the convenience of parties and witnesses;
- c. In the interests of justice;
- d. As provided by Rule 21.2 governing prejudicial publicity.

22.32 County to which Transferred.

For the purposes of change of venue under this rule the district referred to in Minn. Const. art. I S6 shall be all that area within the geographical boundaries of the State of Minnesota.

22.33 Time for Motion for Change of Venue.

A motion for change of venue, except as permitted by Rule 21.2, shall be made at the time prescribed by Rule 10 for making pretrial motions.

22.34 Proceedings on Transfer.

If the case is transferred under these rules, all records in the case or certified copies thereof shall be transmitted to the court to which the case is transferred. If the defendant is in custody, the court may order that he be transported to the sheriff of the county to which the case is transferred. Unless the Supreme Court orders otherwise, the case shall be tried before the judge who ordered the change of venue. If the defendant has been released upon conditions of release under these rules those conditions shall be continued upon the further condition that the defendant shall appear as ordered by the court for trial and other proceedings in the county to which the case has been transferred.



COMMENT

RULE 22   VENUE

Rule 22.1   Place of Trial.

Except as provided in Rule 22.2 governing special cases, and Rule 22.3 governing change of venue, criminal cases shall be tried in the county where the offense was committed. This adopts the general rule provided by Minn. Stat. S627.01 (1971). By Rule 11.1 Omnibus Hearings may be held in any county in the district court's judicial district in which the offense was committed. The place of filing a complaint is provided for by Rule 2.1; the defendant's first appearance in county or municipal court (a) following an arrest upon a complaint by Rules 3.22 and 4.1 or (b) following an arrest without a warrant by Rule 4.25; the defendant's initial appearance in the district court following a complaint (Rule 8) by Rule 5.3.

Rule 22.2   Venue in Special Cases.

This rule is adapted from the provisions of existing law as follows:

Rule 22.21   (Offense Committed on Public or Private Conveyances) from Minn. Stat. S627.05, 627.06 (1971) (This would include offenses committed on water craft, aircraft, or vehicles.);

Rule 22.22   (Offenses Committed on County Lines) from Minn. Stat. S627.07 (1971);

Rule 22.23   (Injury or Death in One County from an Act Committed in Another County) from Minn. Stat. S627.08 (1971);

Rule 22.24   (Prosecution in County Where Injury or Death Occurs) from Minn. Stat. S627.09 (1971);

Rule 22.25   (Prosecution When Death Occurs Outside State)   from Minn. Stat. S627.10 (1971);

Rule 22.26   (Kidnapping) from Minn. Stat. S627.13 (1971);

Rule 22.27   (Libel) from Minn. Stat. S627.14 (1971);

Rule 22.28 (Bringing Stolen Goods Into State) from Minn. Stat. S609.525);

Rule 22.29 (Obscene or Harassing Telephone Calls) from Minn. Stat. S609.79 (1971);

Rule 22.2.10 (Fair Campaign Practices) from Minn. Stat. SS 211.27, 211.31 (1971);

Rule 22.2.11 (Series of Offenses Aggregated) from Minn. Stat. S609.52 subd. 3(5) (1971), as amended;

Rule 22.2.12 (Non-Support of Wife or Child) from Minn. Stat. S609.375 (1971).

Rule 22.3 Change of Venue.

Rule 22.31 (Grounds of Change of Venue) permits a change of venue upon motion of the defendant or prosecution or on the court's own motion upon any of the ground specified in the rule. Change of venue (a) for a fair and impartial trial (Rule 22.31 a. is taken from Minn. Stat. S627.01 (1971); (b) for the convenience of parties and witnesses (Rule 22.31 b. from F. R. Crim. P. 21(b); (c) in the interests of justice (Rule 22.31 c.) from F. R. Crim. P. 21(b) and Minn. Stat. S627.04 (1971); and (d) to avoid prejudicial publicity (Rule 21.2) from ABA Standards, Fair Trial and Free Press, 3.2(c) (Approved Draft, 1968).

Rule 22.32 (County to Which Transferred). Under this rule change of venue may be ordered upon any of the specified grounds to any county of the state. Minn. Const. art. I, S6 provides that the defendant shall have the right to a trial by an impartial jury of the county or district wherein the crime shall have been committed, which county or district shall have been previously ascertained by law. Minn. Stat. S627.01 (1971) (and Rule 22.1) provides that a criminal case shall be tried in the county where the offense was committed thus establishing the district referred to in the constitution. For the purpose of change of venue under Rule 22.32, however, the county or district of trial may be any county in the state.

Rule 22.33 (Time for Motion for Change of Venue). Except as provided by Rule 21.2 (Special Rules Governing Prejudicial Publicity) a motion for change of venue shall be made at the time prescribed by Rule 10.31 for making pretrial motions (3 days

before the Omnibus Hearing (Rule 11)) and shall be heard at that hearing unless the court for good cause orders otherwise. As to when jeopardy attaches, see comment to Rule 21.2.

Rule 22.34 (Proceedings on Transfer) is taken from F. R. Crim. P. 21(c) and Minn. Stat. S627.03 (1971). It further provides that unless the supreme court orders otherwise it shall be tried before the judge who ordered the change of venue. The rule does not change Minn. Stat. S627.02 (1971) governing the payment of costs. If the defendant has been released upon conditions of release, those conditions shall be continued, conditioned upon his appearance for trial in the county to which venue has been transferred as ordered by the court. This provision takes the place of Minn. Stat. S627.03 (1971).

RULE 23 TRIAL

23.1 Trial by Jury or by the Court.

23.11 Trial by Jury.

23.111 Right to Jury Trial.

A defendant shall be entitled to a jury trial.

23.112 Waiver of Trial by Jury.

23.1121 Waiver Generally.

The defendant, with the approval of the court and the concurrence of the prosecuting attorney, may waive jury trial provided he does so personally in writing or orally upon the record in open court, after being advised by the court of his right to trial by jury and after having had an opportunity to consult with counsel.

23.1122 Waiver When Prejudicial Publicity.

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

23.113 Withdrawal of Waiver of Jury Trial.

Waiver of jury trial may be withdrawn by the defendant at any time before the commencement of trial.

23.114 Waiver of Number of Jurors Required by Law.

At any time before verdict, the parties, with the approval of the court, may stipulate that the jury shall consist of a

lesser number than that provided by law. The court shall not approve such a stipulation unless the defendant, after being advised by the court of his right to trial by a jury consisting of the number of jurors provided by law, personally in writing or orally on the record in open court agrees to trial by such reduced jury.

23.115 Waiver of Unanimous Verdict.

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

23.116 Number Required for Verdict.

In the case of felonies and misdemeanors a unanimous verdict is required. In the case of gross misdemeanors, a verdict may be rendered on the concurrence of eleven-twelfths of the jurors after 12 hours of deliberation.

23.12 Trial Without a Jury.

In a case tried without a jury, the court, within 7 days after the completion of the trial, shall make a general finding of guilty, not guilty, or if such pleas have been made, a general finding of not guilty by reason of mental illness or mental deficiency, double jeopardy, or that prosecution is barred by Minn. Stat. S609.035 (1971),

if appropriate. The court, within 7 days after the general finding, shall in addition specifically find the essential facts in writing or on the record. If an opinion or memorandum of decision is filed, it is sufficient if the findings of fact appear therein. If the court omits a finding on any issue of fact essential to sustain the general finding, it shall be deemed to have made a finding consistent with the general finding.

## 23.2 Selection of Jury.

### 23.21 Selection and Qualifications.

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

### 23.22 List of Prospective Jurors.

Upon request the clerk of court shall furnish the parties with a list of the names and addresses of the persons on the jury panel. The parties shall also have access to such other information as the clerk has obtained from prospective jurors.

### 23.23 Challenge to Panel.

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

23.24 Voir Dire Examination.

23.241 Purpose - By Whom Made.

A voir dire examination shall be conducted for the purpose of discovering bases for challenge for cause and for the purpose of gaining knowledge to enable an informed exercise of peremptory challenges. The judge shall initiate the voir dire examination by identifying the parties and their respective counsel and by briefly outlining the nature of the case. the judge shall then put to the prospective juror or jurors any questions which he thinks necessary touching their qualifications to serve as jurors in the cause on trial. Before exercising challenges, either party may make a reasonable inquiry of a prospective juror or jurors in reference to their qualifications to sit as jurors in the case. A verbatim record of the voir dire examination shall be made at the request of either party.

23.242 Sequestration of Jurors.

23.2421 Court's Discretion.

In the discretion of the court the examination of each juror may take place outside of the presence of other chosen and prospective jurors.

23.2422 Prejudicial Publicity.

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

23.243 Order of Drawing, Examination and Challenge.

23.2431 Uniform Rule.

Except as provided by Rule 23.2433(8) with respect to cases of first degree murder, unless the court orders that the jurors shall be drawn, examined and challenged as provided either by Rule 23.2432 or 23.2433, they shall be drawn, examined and challenged as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of peremptory challenges available to all the parties and the number of any alternate jurors.
2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.
3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.
4. If any prospective juror is challenged and excused for cause another shall be drawn from the jury panel so that the number in the jury box will remain equal to the number initially called.



5. After the defendant has completed his challenges for cause, the state may exercise its challenges for cause.
6. After both parties have had an opportunity to challenge for cause, each, commencing with the defendant, may exercise alternately the peremptory challenges permitted by these rules.
7. When the peremptory challenges have been exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called until the number selected equals the number of which the jury shall be composed for trial of the case plus the alternate jurors, if any.

23.2432 By Order of Court.

The court may order that the jurors be drawn, examined and challenged as provided by Rule 23.2432 or 23.2433 as follows:

1. The court shall first direct that such a number of the members of the jury panel be drawn and called as will equal the number of which the jury shall be composed for trial of the case plus the number of any alternate jurors.
2. The prospective jurors so drawn and called shall take their place in the jury box and be sworn to answer truthfully questions asked them relative to their qualifications to serve as jurors in the case.

3. The prospective jurors shall be examined as to their qualifications, first by the court, then by the parties, commencing with the defendant.
4. Upon completion of defendant's examination of a prospective juror, the defendant shall be permitted to exercise a challenge for cause or a peremptory challenge as permitted by these rules as to that juror. If the juror is excused, he shall be replaced by another member of the panel. the replacement juror shall be examined and challenged after all previously drawn jurors have been examined and challenged.
5. Upon completion of the examination and any challenge of each prospective juror by the defendant, the state may examine such prospective juror and may challenge the juror for cause or peremptorily. If the juror is excused, he shall be replaced by another member of the panel who shall be subject to examination and challenge in accordance with this rule.
6. This process of jury selection shall continue until the number of persons of which the jury shall be composed for trial of the case plus any alternate jurors is selected and sworn as the trial jury.

23.2433 By Order of Court.

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

2. The prospective juror so drawn shall be sworn to answer truthfully questions asked him relative to his qualifications to serve as a juror in the case.
3. The prospective juror shall be examined by the court and then by the parties, commencing with the defendant.
4. Upon completion of defendant's examination, the defendant may challenge the juror for cause or peremptorily as permitted by these rules.
5. If the juror is excused, another prospective juror shall be drawn from the panel and shall be examined and subject to challenge in the same manner.
6. If a prospective juror is not excused after examination by the defendant, he may be examined by the state and may be challenged for cause or peremptorily by the state.
7. This process of selection shall continue until the number of persons of which the jury shall be composed for trial of the case is selected and sworn as the trial jury plus the number of any alternate jurors.
8. In cases of first degree murder, the method provided by Rule 23.2433 shall be preferred unless otherwise ordered by the court.

23.25 Challenge for Cause.

23.251 Grounds.

A juror may be challenged for cause by either party upon the following grounds:

1. The existence of a state of mind on the part of the juror, in reference to the case or to either party, which satisfies the court that the juror cannot try the case impartially and without prejudice to the substantial rights of the party challenging.
2. A felony conviction unless his civil rights have been restored.
3. The lack of any of the qualifications prescribed by law to render a person a competent juror.
4. A physical or mental defect which renders him incapable of performing the duties of a juror.
5. The consanguinity or affinity, within the ninth degree, to the person alleged to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, or to any of the attorneys in the case.
6. Standing in relation of guardian and ward, attorney and client, employer and employee, landlord and tenant, or being a member of the family of the defendant, or of the person alleged to be injured by the offense, or on whose complaint the prosecution was instituted.
7. Being a party adverse to the defendant in a civil action, or having complained against, or been accused by him, in a criminal prosecution.

8. Having served on the grand jury which found the indictment, or an indictment on a related offense.
9. Having served on a trial jury which has tried another person for the same or a related offense to that charged in the indictment or complaint.
10. Having been a member of a jury formerly sworn to try the same indictment or complaint or a related indictment or complaint.
11. Having served as a juror in any case involving the defendant.

23.252 How and When Exercised.

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

23.253 By Whom Tried.

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

23.26 Peremptory Challenges.

If the offense charged is punishable by life imprisonment the defendant shall be entitled to 15 and the state to 9 peremptory challenges. For any other offense, the defendant shall be entitled to 5 and the state to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges

and permit them to be exercised separately or jointly, and in that event the state's peremptory challenges shall be correspondingly increased.

23.27 Order of Challenges to the Panel and to Individual Jurors.

Challenges to the panel and to individual jurors shall be made in the following order:

- a. To the panel.
- b. To an individual juror for cause.
- c. Peremptory challenge to an individual juror.

23.28 Alternate Jurors.

A trial judge may impanel alternate or additional jurors whenever in his discretion, he believes it advisable to have such jurors available to replace jurors who, prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. An alternate juror who does not replace a principal juror shall be discharged after the jury retires to consider its verdict. Alternate jurors, in the order in which they are called, shall replace jurors who prior to the time the jury retires to consider its verdict, become unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, have the same qualifications, and be subject to the same examination and challenges for cause as the regular jurors. No additional peremptory challenges shall be allowed for alternate jurors except that unused peremptory challenges for the regular jury may be exercised against alternate jurors. If a juror becomes unable or disqualified to perform his duties after the jury has retired to consider its verdict, a mistrial shall be declared unless the parties agree pursuant to Rule 23.114 that the jury shall consist of a lesser number than that selected for the trial.

### 23.3 Procedures During Trial.

#### 23.31 Presence of Defendant.

##### 23.311 Presence Required.

The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules.

##### 23.312 Continued Presence Not Required.

The further progress of a trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to waive his right to be present whenever:

1. a defendant voluntarily and without justification absents himself after trial has commenced; or
2. a defendant after warning engages in conduct which is such as to justify his being excluded from the courtroom because it tends to interrupt the orderly procedure of the court and the due course of the trial.

As an alternative to exclusion, the court may use all such methods of restraint as will ensure the orderly procedure of the court and the due course of the trial.

##### 23.313 Presence Not Required.

A defendant need not be present in the following situations:

1. a corporation may appear by counsel for all purposes;
2. in the case of felonies or gross misdemeanors, on defendant's motion, the court may excuse the defendant from attendance at any proceeding except arraignment, plea, trial, and imposition of sentence.

3. in prosecutions for misdemeanors, excluding gross misdemeanors, the court with the written consent of the defendant, or his oral consent in open court, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.

23.32 Custody and Restraint of Defendants and Witnesses.

- a. During the trial the defendant shall be seated where he can effectively consult with his counsel and can see and hear the proceedings.
- b. An incarcerated defendant or witness shall not appear in court in the distinctive attire of a prisoner.
- c. Defendants and witnesses shall not be subjected to physical restraint while in court unless the trial judge has found such restraint reasonably necessary to maintain order or security. If the trial judge orders such restraint, he shall state his reasons on the record outside the presence of the jury. Whenever physical restraint of a defendant or witness occurs in the presence of jurors trying the case, the judge shall on request of the defendant instruct those jurors that such restraint is not to be considered in assessing the proof and determining guilt.

23.33 Use of Courtroom.

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



basis, and other matters that may affect the conduct of the proceeding.

23.34 Preliminary Instructions.

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

23.35 Sequestration of the Jury.

23.351 In the Discretion of the Court.

During the period from the time the jurors are sworn until they retire for deliberation upon their verdict, the court, in its discretion, may either permit them and any alternate jurors to separate during recesses and adjournments or direct that they be continuously kept together during such period under the supervision of proper officers. The officers shall not speak to or communicate with any juror concerning any subject connected with the trial nor permit any other person

to do so, and shall return the jury to the courtroom at the next designated trial session.

23.352 On Motion.

Either party may move for sequestration of the jury at the beginning of trial or at any time during the course of the trial. Sequestration shall be ordered if it is determined that the case is of such notoriety or the issues are of such a nature that, in the absence of sequestration, highly prejudicial matters are likely to come to the attention of the jurors. Whenever sequestration is ordered, the court in advising the jury of the decision shall not disclose which party requested sequestration.

23.36 Exclusion of the Public From Hearings or Arguments Outside the Presence of the Jury.

If the jury is not sequestered, the defendant may move that the public, including representatives of the news media, be excluded from any portion of the trial that takes place outside the presence of the jury on the ground that dissemination of evidence or argument adduced at the hearing is likely to interfere with the defendant's right to a fair trial by an impartial jury. The motion shall be granted unless it is determined that there is no substantial likelihood of such interference. With the consent of the defendant, the court may take such action on its own motion or at the suggestion of the prosecution. Whenever such action is taken, a complete record of the proceedings from which the public has been excluded shall be kept and unless otherwise ordered by the court shall be available to the public following the completion of the trial.

23.37 Cautioning Parties, Witnesses, Jurors and Judicial Employees;  
Insulating Witnesses.

Whenever appropriate, the court shall order attorneys, parties, witnesses, jurors, and employees and officers of the court not to make extra-judicial statements relating to the case or the issues in the case for dissemination by any means of public communication during the course of the trial.

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

23.38 Admonitions to Jurors.

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

23.39 Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial.

If it is determined that material disseminated outside the trial proceedings raises serious questions of possible prejudice, the court may on its own motion and shall on motion of either party question each juror, out of the presence of the others, about his exposure to that material. The examination shall take place in the presence of counsel, and a verbatim record of the examination shall be kept.

23.3.10 View by Jury.

- a. When the court is of the opinion that a viewing by the jury of the place where the offense being tried was committed, or any other place involved in the case, will be helpful to the jury in determining any material factual issue, it may in its

discretion, at any time before the closing arguments, order that the jury be conducted to such place.

- b. The jury must be kept together during the viewing under the supervision of a proper officer appointed by the court. The judge and a court reporter must be present, and with the judge's permission any other person may be present. The prosecuting attorney, the defendant and defense counsel may as a matter of right be present, but the right may be waived.
- c. The purpose of the viewing shall be solely to permit visual observation by the jury of the place in question, and neither the parties, counsel, nor the jurors while viewing the place may engage in discussion concerning the significance or implications of anything under observation or concerning any issue in the case.

#### 23.3.11 Order of Jury Trial.

The order of a jury trial shall be substantially as follows:

- a. The jury shall be selected and sworn.
- b. The court may deliver preliminary instructions to the jury.
- c. The prosecuting attorney may make an opening statement to the jury, confining the statement to the facts he expects to prove.
- d. The defendant may make an opening statement to the jury, or he may make it immediately before he offers evidence in his defense. The statement shall be confined to a statement of the defense and the facts he expects to prove in support thereof.
- e. The prosecution shall offer evidence in support of the indictment or complaint.
- f. The defendant may offer evidence in his defense.
- g. The prosecution may offer evidence in rebuttal of the defense evidence, and the defendant may then offer evidence in rebuttal

of the prosecution's rebuttal evidence. In the interests of justice, the court may permit either party to offer evidence upon his original case.

- h. At the conclusion of the evidence, the defendant may make a closing argument to the jury.
- i. The prosecution may make a closing argument to the jury. The defendant shall then be permitted to reply in rebuttal and shall raise in rebuttal no new issues of law or fact which were not presented in one or both of the prior arguments. In the discretion of the court the prosecution may be permitted to reply in rebuttal to the rebuttal argument of the defendant, provided the defendant's rebuttal was improper.
- j. The court shall charge the jury.
- k. The jury shall retire for deliberation and, if possible, render a verdict.

23.3.12 Note Taking.

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

23.3.13 Substitution of Judge.

23.3.131 Before or During Trial.

If by reason of death, sickness or other disability of the judge before whom pretrial proceedings or a jury trial has commenced is unable to proceed, any other judge sitting in or assigned to the court, upon certification that he has familiarized himself with the record of the proceedings or trial, may proceed with and finish the proceedings or trial.

23.3.132 After Verdict or Finding of Guilt.

If by reason of absence, death, sickness or other disability, the judge before whom the defendant has been tried is unable to perform the duties to be performed by the court after a verdict or finding of guilt, any other judge sitting in or assigned to the court may perform those duties; but if such other judge is satisfied that he cannot perform those duties because he did not preside at the trial, he may in his discretion grant a new trial.

23.3.14 Exceptions.

23.3.141 Exceptions Abolished.

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

23.3.142 Bills of Exception and Settled Cases Abolished.

The bill of exceptions and settled case shall not be required. The record of the case for the purposes for which a bill of exceptions or settled case was heretofore required shall consist of the papers filed in the trial court, the offered exhibits, and the minutes of the court, and the transcript of the proceedings, if any.

23.3.15 Evidence.

In all trials the testimony of witnesses shall be taken orally in open court, unless otherwise provided by these rules. All evidence shall be admitted which is admissible under the statutes of this state, or under the rules of evidence applied in the trials of criminal offenses in the courts of this state. In any case, the statute or rule which favors the reception of the evidence governs, and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.

23.3.16 Interpreters.

The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law.

23.3.17 Motion for Judgment of Acquittal.

23.3.171 Motion Before Submission to Jury.

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

23.3.172 Reservation of Decision on Motion.

If the defendant's motion is made at the close of the evidence offered by the prosecution, the court may not reserve decision on the motion. If the defendant's motion

is made at the close of all the evidence, the court may reserve decision on the motion, submit the case to the jury and decide the motion either before the jury returns a verdict or after it returns a verdict or is discharged without having returned a verdict.

23.3.173 Motion After Discharge of Jury.

If the jury returns a verdict of guilty or is discharged without having returned a verdict, a motion for judgment of acquittal may be made or renewed within 15 days after the jury is discharged or within such further time as the court may fix during the 15-day period. If a verdict of guilty is returned the court may on such motion set aside the verdict and enter judgment of acquittal. If no verdict is returned, the court may enter judgment of acquittal. Such a motion is not barred by defendant's failure to make a similar motion prior to the submission of the case to the jury.

23.3.18 Instructions.

23.3.181 Requests for Instructions.

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



23.3.182 Proposed Instructions.

The court may, and upon request of any party shall, before the arguments to the jury, inform counsel what instructions will be given and all such instructions may be stated to the jury by either party as a part of his argument.

23.3.183 Objections to Instructions.

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

23.3.184 Giving of Instructions.

The court shall instruct the jury after the arguments are completed except, at the discretion of the court, preliminary instructions need not be repeated. In the discretion of the court, the instructions may be given before the closing arguments. The instructions may be in writing

and in the discretion of the court a copy may be taken to the jury room when the jury retires for deliberation.

23.3.185 Contents of Instructions.

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

23.3.19 Jury Deliberations and Verdict.

23.3.191 Materials to Jury Room.

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

23.3.192 Jury Requests to Review Evidence.

1. If the jury, after retiring for deliberation, requests a review of certain testimony or other evidence, the jurors shall be conducted to the courtroom. The court, after notice to the prosecutor and defense counsel, may have the requested parts of the testimony read to the jury and permit the jury to re-examine the requested materials admitted into evidence.
2. The court need not submit evidence to the jury for review beyond that specifically requested by the jury,

but in its discretion the court may also have the jury review other evidence relating to the same factual issue so as not to give undue prominence to the evidence requested.

23.3.193 Additional Instructions After Jury Retires.

1. If the jury, after retiring for deliberation, desires to be informed on any point of law, the jurors, after notice to the prosecutor and defense counsel, shall be conducted to the courtroom. The court shall give appropriate additional instructions in response to the jury's request unless: (a) the jury may be adequately informed by directing their attention to some portion of the original instructions; (b) the request concerns matters not in evidence or questions which do not pertain to the law of the case; or (c) the request would call upon the judge to express an opinion upon factual matters that the jury should determine.
2. The court need not give additional instructions beyond those specifically requested by the jury, but in its discretion the court may also give or repeat other instructions to avoid giving undue prominence to the requested instructions.
3. The court after notice to the prosecutor and defense counsel may recall the jury after it has retired and give any additional instructions as the court deems appropriate.

23.3.194 Deadlocked Jury.

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

23.3.195 Polling the Jury.

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

23.3.196 Impeachment of Verdict.

Affidavits of jurors shall not be received in evidence to impeach their verdict. If the defendant has reason to believe that the verdict is subject to impeachment, he shall move the court for a summary hearing. If the motion is granted the jurors shall be interrogated under oath and their testimony recorded.

23.4 Post-Verdict Motions.

23.41 New Trial.

23.411 Grounds.

The court on written motion of the defendant may grant a new trial on any of the following grounds:

1. If required in the interests of justice;
2. Irregularity in the proceedings of the court, jury, or

on the part of the prosecution, or any order or abuse of discretion, whereby the defendant was deprived of a fair trial;

3. Misconduct of the jury or prosecution;
4. Accident or surprise which could not have been prevented by ordinary prudence;
5. Material evidence, newly discovered, which with reasonable diligence could not have been found and produced at the trial;
6. Errors of law occurring at the trial, and objected to at the time or, if no objection is required by these rules, assigned in the motion;
7. The verdict or finding of guilty is not justified by the evidence, or is contrary to law.

23.412 Basis of Motion.

A motion for new trial shall be made and heard on the files, exhibits and minutes of the court. Pertinent facts that would not be a part of the minutes may be shown by affidavit except as otherwise provided by these rules. A full or partial transcript of the court reporter's notes of the testimony taken at the trial or other verbatim recording thereof may be used on the hearing of the motion.

23.413 Time for Motion.

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

23.414 Time for Serving Affidavits.

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

23.42 Motion to Vacate Judgment.

The court on motion of a defendant shall vacate judgment, if entered, and dismiss the case if the indictment or complaint does not charge an offense or if the court was without jurisdiction of the offense charged. The motion shall be made within 15 days after verdict or finding of guilty or after plea of guilty, or within such time as the court may fix during the 15-day period.

23.43 Joinder of Motions.

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

23.44 New Trial on Court's Own Motion.

The court, within 15 days after verdict or finding of guilty, with the consent of the defendant, may order a new trial upon any of the grounds specified in Rule 23.411.

COMMENT

RULE 23 TRIAL

Rule 23.111 Right to Jury Trial.

In cases of felonies (Minn. Stat. S609.02, subd. 2 (1971)) gross misdemeanors, (Minn. Stats. SS 609.02, subd. 4, 609.03 (2) (1971)) the defendant is entitled to jury trial under Minn. Const. art. 1, sec. 6 which guarantees the right to jury trial in "all criminal prosecutions." The term "criminal prosecutions" includes prosecutions for all crimes defined by Minn. Stat. S609.02 (1971). (Peterson v. Peterson, 278 Minn. 275, 153 N.W. 2d 825 (1967); State v. Ketterer, 248 Minn. 173, 79 N.W. 2d 136 (1956).) The defendant's right to jury trial for offenses punishable by more than six months imprisonment is also guaranteed by the Fourteenth and Sixth Amendments to the United States Constitution. (Duncan v. Louisiana, 391 U.S. 145 (1968); Baldwin v. New York, 399 U.S. 66 (1970).)

Rule 23.1121 (Waiver of Trial by Jury Generally) is based upon Fed. R. Cr. P. 23 (a), ABA Standards, Trial by Jury, 1.2 (b) (Approved Draft, 1968) and continues substantially present Minnesota law (Minn. Stat. S631.01 (1971)) except that waiver of jury trial by the defendant requires the approval of the court and the concurrence of the prosecuting attorney.

Rule 23.1122 Waiver When Prejudicial Publicity.

Under Rule 23.1122 the defendant shall be permitted to waive jury trial if required to assure the likelihood of a fair trial when there has been a dissemination of potentially prejudicial material. (See ABA Standards, Fair Trial and Free Press, 3.3 (Approved Draft, 1968).)

Rule 23.113 (Withdrawal of Waiver of Jury Trial) continues present Minnesota law (Minn. Stat. S631.01 (1971)).

Rule 23.114 (Waiver of Number of Jurors Required by Law) is drawn from F. R. Cr. P. 23 (b) and ABA Standards, Trial by Jury, 1.3 (Approved Draft, 1968). (See also

State v. Sackett, 39 Minn. 69, 38 N.W. 773 (1888).) The number of jurors required by law for felonies and gross misdemeanors is 12. (Minn. Stat. S593.01 (1971).) (A jury of 6 would not contravene the United States Constitution. Williams v. Florida 399 U.S. 78 (1970).)

Rule 23.115 (Waiver of Unanimous Verdict) continues present Minnesota law. (State v. Zubrocki, 194 Minn. 346, 260 N.W. 507 (1935).) It is based on ABA Standards, Trial by Jury, 1.1 (3) (Approved Draft, 1968) except that the defendant's consent is necessary for a less than unanimous verdict when one is required.

Rule 23.116 (Number Required for Verdict) requires a unanimous verdict for felonies and misdemeanors and so continues existing law in those cases. (Minn. Stat. S593.01 (1971) (See also State v. Everett, 14 Minn. 439 (1869) (Gil 330).) The United States Constitution (Sixth and Fourteenth Amendments), however, permits a less than unanimous verdict (Johnson v. Louisiana, 92 S. Ct. 1620 (1972) (9/12); Apodaca v. Oregon, 92 S. Ct. 1628 (1972) (10/12)). The Advisory Committee, therefore, decided to permit a 11/12 verdict after 12 hours but to limit this provision to gross misdemeanors. This less than unanimous rule was not extended to misdemeanors because the jury in such cases consists of only 6 members. (Minn. Stat. S593.01 (1971).)

Rule 23.12 (Trial Without a Jury) requiring special findings in a case tried to the court is taken from F. R. Cr. P. 23 (c), and in addition prescribes time limits for general findings and for special findings. Rule 13.1 prescribes the pleas referred to in the rule. The consequences of an omission of a finding on an essential fact comes from Minn. R. Civ. P. 49 (a).

#### Rule 23.2 Selection of Jury.

Rule 23.21 (Selection and Qualifications (of Jury)) continues present statutory law for the selection, drawing, and summoning of the trial jury (See Minn. Stats. SS 593.02 593.04, 593.13, 593.14, 593.17, 628.43, 628.44, 628.54, (1971) for the qualifications of jurors. See SS 593.03, 593.05-593.07, 593.09-593.13, 593.135, 593.14 for the



selection, drawing, and summoning of jurors.) except that to satisfy constitutional requirements, it provides that the persons on the jury list from which the jury panel is drawn shall be selected at random from a fair cross-section of the residents of the county who are qualified to serve as jurors. (See a similar provision in Rule 15.12 governing the selection of the grand jury list.) (See also ABA Standards, Trial by Jury, 2.1 (a) (Approved Draft, 1968).)

Rule 23.22 (List of Prospective Jurors) is taken from ABA Standards, Trial by Jury, 2.2 (Approved Draft, 1968) and also provides that in addition to the jury list, the parties shall have access to such other information concerning the jurors as may be available at the clerk's office.

Rule 23.23 (Challenge to Panel) is based on ABA Standards, Trial by Jury, 2.3 (Approved Draft, 1968) and Minn. Stats. SS 631.23, 631.24, 631.25 (1971) except that it substitutes an "objection" for the "exception" to the sufficiency of the challenge (Minn. Stat. S631.24) and for the "denial" of the facts on which the challenge is based. (Minn. Stat. S631.25 (1971).) If such an objection is made, the challenge is tried by the court.

Rule 23.241 (Purpose of Voir Dire Examination--By Whom Made). The provision of this rule governing the purpose for which voir dire examination shall be conducted and the provision for initiation of the examination by the judge is taken from ABA Standards, Trial by Jury, 2.4 (Approved Draft, 1968). The last sentence of the rule permitting the parties to interrogate the jurors before exercising challenges continues the similar provision of Minn. Stat. S631.26 (1971) with the limitation that the inquiry shall be "reasonable".

Rule 23.2421 (Sequestration of Jurors at Court's Discretion) gives the court the discretion to sequester jurors during the voir dire.

Rule 23.2422 (Prejudicial Publicity), following ABA Standards, Fair Trial and Free Press, 3.4 (a) (Approved Draft, 1968), directs sequestration of the jurors during

voir dire when there is a significant possibility that exposure to prejudicial publicity may result in disqualification of individual jurors. The standard (3.4(a)) recommends that the questioning should be conducted for the purpose of determining what the prospective juror has read and heard about the case and how his exposure has affected his attitude towards the trial, not to convince him that he would be derelict in his duty if he could not cast aside any preconceptions he might have.

Rule 23.243 Order of Drawing, Examination and Challenge of Jurors.

The purpose of this rule is to achieve uniformity in the order of drawing, examination, and challenge of jurors, but also to provide a limited number of alternatives that may be followed, in the discretion of the trial court. Hence, a uniform rule (23.2431) is prescribed which is to be followed unless the court orders that one of the two alternatives, 23.2432 or 23.2433, shall be adopted in a particular case. An exception is that in cases of first degree murder Rule 23.2433 is to be preferred unless otherwise ordered by the court. (See Rule 23.2433 (8).)

Rule 23.2431 (Uniform Rule) is the uniform rule which is to be followed unless the court orders otherwise and substantially adopts the method used in civil cases so that in a criminal case 20 members of the jury panel are first drawn for a 12-person jury. (See Minn. Stat. SS 546.09, 546.10 (1971); Rule 27, PT. I, Code of Rules for the District Courts.) After each party has exercised his challenges for cause, commencing with the defendant, they exercise their peremptory challenges alternately, commencing with the defendant. If all peremptory challenges are not exercised, the jury shall be selected from the remaining prospective jurors in the order in which they were called.

Rule 23.2432 (By Order of Court) is the first alternative to Rule 23.2431. With a 12-person jury to be selected, 12 members of the jury panel are first drawn, and as a juror is excused for cause or peremptorily, a replacement is drawn so that there are always 12 persons in the jury box. The order of examination and challenge

prescribed by the rule, first by defendant and then by the state, retains existing law. (Minn. Stat. S631.39 (1971).)

Rule 23.2433 (By Order of Court) is the second alternative to Rule 23.2431 and provides that the prospective jurors shall be drawn one at a time. Otherwise this rule is substantially the same as Rule 23.2432. In cases of first degree murder this alternative shall be preferred unless the court in its discretion orders otherwise.

Rule 23.251 (Grounds of Challenge for Cause) with some changes of language, substantially adopts the grounds for challenge for cause under existing law (See Minn. Stats. SS 631.28-631.31 (1971)), but abolishes the classifications of the grounds into general causes (631.28, 631.29), particular causes (631.30), implied bias (631.30, 631.31), and actual bias (631.30, 631.32). For the definition of a felony conviction which would disqualify a person from service on the jury, see Minn. Stat. S609.13 (1971). The term "related offense" in the rule is intended to be more comprehensive than the conduct or behavioral incident covered by Minn. Stat. S609.035 (1971).

Rule 23.252 (How and When Challenge for Cause is Exercised) providing that a challenge for cause may be oral, stating the grounds upon which it is based, continues substantially the similar provisions of Minn. Stat. S631.34 (1971). The requirement that a challenge for cause to an individual juror shall be made before he is sworn but for good cause may be made before all the jurors are sworn adopts substantially the provisions of Minn. Stat. S631.26 (1971). As to when jeopardy attaches, see comment to Rule 21.2.

Rule 23.253 (By Whom Challenges for Cause are Tried) provides that if a party objects to a challenge for cause, it shall be tried by the court. The rule abolishes exceptions to and denials of the challenge (Minn. Stat. S631.34 (1971)) and the triers of fact (Minn. Stat. S631.35 (1971)).

Rule 23.26 (Peremptory Challenges) changes the number of peremptory challenges allowed by Minn. Stat. S631.27 (1971) when the offense is punishable by life imprisonment from 20 for the defendant and 10 for the state to 15 and 9. The provision of S631.27 giving the defendant 5 and the prosecution 3 peremptory challenges in the trial of other offenses is continued. The provision for additional peremptory challenges when there is more than one defendant comes from F. R. Cr. P. 24.

Rule 23.27 (Order of Challenges) prescribes the order in which challenges shall be made: first, to the panel; second, to an individual juror for cause; and third, peremptorily to an individual juror. It supersedes the requirement of Minn. Stat. S631.39 (1971) that challenges for cause be made for (1) general disqualification, (2) implied bias, and (3) actual bias, in that order.

Rule 23.28 (Alternate Jurors) is based on F. R. Cr. P. 24 (c) and ABA Standards, Trial by Jury, 2.7 (Approved Draft, 1968) and displaces Minn. Stat. S546.095 (1971). It places no limitations on the number of alternate jurors and permits no additional peremptory challenges and differs in those respects from the federal rule and S546.095.

Rule 23.311 (Presence Required) is taken from F. R. Cr. P. 43. See also Rules 12.2, 13.2, and 24.32.

Rule 23.312 (Continued Presence Not Required) is based upon Proposed F. R. Cr. P. 43 (b) (1971) 52 F.R.D. 472, Allen v. Illinois, 397 U.S. 337, 90 Sup. Ct. 1057 (1970) and Minn. Stat. S631.015 (1971). If a defendant fails to be present at the trial, the court may proceed with the trial unless it appears that the defendant's absence was involuntary. The defendant may move for a new trial on the ground his absence was involuntary.

Rule 23.313 (Presence Not Required), permitting the defendant's absence from proceedings in the case of misdemeanors, is drawn from Proposed F. R. Cr. P. 43 (c) (1971), 52 F.R.D. 472 (See also Rules 12.2, 13.2 and 24.32.). In addition, in the case of felonies and gross misdemeanors, it permits the court to excuse the defendant's presence from any proceeding except arraignment, plea, trial, and imposition of sentence.

Rule 23.32 (Custody and Restraint of Defendants and Witnesses) is taken from ABA Standards, Trial by Jury, 4.1 (a) (b) (c) (Approved Draft, 1968).

Rule 23.33 (Use of Courtroom) comes from ABA Standards, Fair Trial and Free Press 3.5 (a) (Approved Draft, 1968).

Rule 23.34 (Preliminary Instructions) is adapted from ABA Standards, Trial by Jury 4.6 (a) (Approved Draft, 1968) and Minn. R. Civ. P. 39.03.

Rule 23.351 (Sequestration of Jury in Discretion of Court) permits sequestration of the jury in the discretion of the court.

Rule 23.352 (Sequestration on Motion) directing sequestration on motion of either party when prejudicial publicity may come to the attention of the jurors, comes from ABA Standards, Fair Trial and Free Press 3.5 (b) (Approved Draft, 1968).

Rule 23.36 (Exclusion of Public From Hearing or Arguments Outside the Presence of the Jury) is adapted from ABA Standards, Fair Trial and Free Press 3.5 (d) (Approved Draft, 1968). When the record of proceedings from which the public is excluded is made available, the court may order that names be deleted or substitutions therefor made for the protection of innocent persons. This rule for exclusion of the public is not intended to interfere with the power of the court, in connection with any hearing held outside the presence of the jury, to caution those present that dissemination of specified information by any means of public communication, prior to the rendering of the verdict, may jeopardize the right to a fair trial by an impartial jury. (See ABA Standards, Fair Trial and Free Press 3.5 (d) (Approved Draft, 1968).) An agreement by the news media not to publicize matters heard until after completion of the trial could afford the basis for a determination by the court that there is no substantial likelihood of interfering with defendant's right to a fair trial by permitting the news media or the public to be present.

Rule 23.37 (Cautioning Parties, Witnesses, Jurors and Judicial Employees; Insulating Witnesses) comes from ABA Standards, Fair Trial and Free Press, 3.5 (c) (Approved Draft, 1968).

Rule 23.38 (Admonitions to Jurors) adopts the substance of ABA Standards, Fair Trial and Free Press 3.5 (a) (Approved Draft, 1968). In any case that appears likely to be of significant public interest, an admonition in substantially the following form, suggested by ABA Standards, 3.5 (e), Fair Trial and Free Press (Approved Draft, 1968), may be given before the end of the first day if the jury is not sequestered:

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

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

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

Rule 23.39 (Questioning Jurors About Exposure to Potentially Prejudicial Material in the Course of a Trial) adopts ABA Standards, Fair Trial and Free Press, 3.5 (f) (Approved Draft, 1968).

Rule 23.3.10 (View by Jury) adapted from N.Y.C.P.L. 270.50, replaces Minn. Stat. S546.12 (1971).

Rule 23.3.11 (Order of Jury Trial) substantially continues the order of trial under existing practice. (See Minn. Stat. S546.11 (1971).) The order of closing argument, (Minn. Stat. S631.07 (1971)) however, is changed to provide that the defendant shall argue first with the right of rebuttal after the prosecution's argument. In the discretion of the court, the prosecution may present a rebuttal if the defendant's rebuttal has raised new issues or is otherwise improper.

Rule 23.3.12 (Note Taking) is adapted from Minn. Stat. S631.10 (1971) and ABA Standards, Trial by Jury 4.2 (Approved Draft, 1968).

Rule 23.3.13 (Substitution of Judge) is taken from F. R. Cr. P. 25 (a) (b) and ABA Standards, Trial by Jury 4.3 (Approved Draft, 1968) and takes the place of Minn. Stat. S484.29 (1971).

Rule 23.3.141 (Exceptions Abolished) is taken from Minn. R. Civ. P. 46 and supersedes Minn. Stat. S547.03 (1971).

Rule 23.3.142 (Bills of Exception and Settled Cases Abolished) abolishes the bill of exceptions and settled case provided by Minn. Stats. SS 547.02-06, 632.05 (1971) and adopts Minn. R. Civ. P. 59.02 and Minn. R. Civ. App. P. 110.01 providing for the record on a hearing upon a motion for new trial and on appeal.

Rule 23.3.15 (Evidence) adopts the provisions of Minn. R. Civ. P. 43.01. See also F. R. Cr. P. 26.

Rule 23.3.16 (Interpreters) comes from F. R. Cr. P. 28 (b).

Rule 23.3.17 (Motion for Judgment of Acquittal), abolishing motions for directed verdict, and providing for motions for judgment of acquittal is taken from F. R. Cr. P. 29 (a) (b) (c) and ABA Standards, Trial by Jury, 4.5 (a) (b) (c) (Approved Draft, 1968). Such a motion by the defendant, if not granted, should not be deemed to withdraw the case from the jury or to bar the defendant from offering evidence. (See F. R. Cr. P. 29 (a), ABA Standards, Trial by Jury, 4.5 (a) (Approved Draft, 1968).)

Rule 23.3.181 (Requests for Instructions) follows Minn. R. Civ. P. 51. See also F. R. Cr. P. 30 and ABA Standards, Trial by Jury 4.6 (b) (Approved Draft, 1968).

Rule 23.3.182 (Proposed Instructions) substantially adopts similar provisions in Minn. Stat. S546.14 (1971).

Rule 23.3.183 (Objections to Instructions) is adapted from F. R. Cr. P. 30 and ABA Standards, Trial by Jury 4.6 (c) (e) (Approved Draft, 1968). The last sentence relating to errors in fundamental law comes from Minn. R. Civ. P. 51.

Rule 23.3.184 (Giving of Instructions) comes from Minn. R. Civ. P. 51 except that the provisions permitting the giving of instructions before closing arguments and the jury to take written instructions to the jury room are new.

Rule 23.3.185 (Contents of Instructions) provides that the court shall instruct the jury on the law and may summarize the claims of the parties, but does not permit comment on the evidence or on the credibility of the witnesses. Compare Minn. Stat. S631.08 (1971) which provides that the judge may "present the facts of the case."

Rule 23.3.19 Jury Deliberations and Verdict.

Rule 23.3.191 (Materials to Jury Room) adopts the substance of Minn. Stat. S631.10. (See also ABA Standards, Trial by Jury, 5.1 (a) (Approved Draft, 1968).) It also permits the jury to take to the jury room a copy of the instructions, in the discretion of the court. For the notes of the jury see Rule 23.3.12.

Rule 23.3.192 (Jury Requests to Review Evidence) comes from ABA Standards, Trial by Jury, 5.2 (a) (b) (Approved Draft, 1968) and takes the place of a similar provision of Minn. Stat. S631.11 (1971).

Rule 23.3.193 (Additional Instructions After Jury Retires) is based on ABA Standards, Trial by Jury, 5.3 (a) (b) (c) and takes the place of a similar provision of Minn. Stat. 631.11 (1971).

Rule 23.3.194 (Deadlocked Jury.)

The kind of instructions that may be given to a deadlocked jury is left to judicial



decision or to formulation of a pattern instruction. In State v. Martin \_\_\_\_\_ Minn. \_\_\_\_\_, \_\_\_\_\_ N.W. 2d \_\_\_\_\_ (1973), the Minnesota Supreme Court disapproved an Allen instruction (Allen v. United States, 164 U.S. 492 (1896)) and adopted ABA Standards, Trial by Jury, 5.4 (Approved Draft, 1968).

Rule 23.3.195 (Polling the Jury) is drawn from ABA Standards, Trial by Jury, 5.5 (Approved Draft, 1968) and Minn. Stat. S631.16 (1971).

Rule 23.3.196 (Impeachment of Verdict) adopts the procedure outlined in Swartz v. Minneapolis Suburban Bus Co. 258 Minn. 325, 328, 104 N.W. 2d 301, 303 (1960).

Rule 23.4 Post-Verdict Motions.

Rule 23.411 (Grounds of New Trial) substantially adopts the grounds for a new trial set forth in Minn. Stat. S547.01 (1971) and adds the ground that a new trial may be granted in the interests of justice. (See F. R. Cr. P. 33.) ABA Standards, Fair Trial and Free Press 36 (Approved Draft, 1968) recommends that a verdict of guilty should be set aside and a new trial granted whenever, on the basis of competent evidence, the court finds a substantial likelihood that the vote of one or more of the jurors was influenced by exposure to an extra-judicial communication of any matter relating to the defendant or to the case itself that was not part of the trial record on which the case was submitted to the jury. Under existing Minnesota law, a motion for a new trial should not be granted on that ground if the defendant, having knowledge during the trial that one or more jurors has been exposed to an extra-judicial communication, fails promptly to move for a mistrial. (See State v. O'Donnell, 280 Minn. 213, 158 N.W. 2d 699 (1968) outlining the steps to be taken by defense counsel in the event of prejudicial publicity during trial.)

Rule 23.412 (Basis of Motion for New Trial) is taken from Minn. R. Civ. P. 59.02 and supersedes Minn. Stats. SS 547.02, 547.023 (1971).

Rule 23.413 (Time for Motion) is based upon Minn. R. Civ. P. 59.03 and F. R. Cr. P. 35 and supersedes Minn. Stats. SS 547.02, 547.023 (1971). The post-conviction

remedy Minn. Stats. SS 590.01-590.06 (1971) provides a means for relief on the ground of newly discovered evidence after the time for making a motion for new trial.

Rule 23.414 (Time for Serving Affidavits) is taken from Minn. R. Civ. P. 59.04.

Rule 23.42 (Motion to Vacate Judgment) is based on F. R. Cr. P. 34 except that it is treated as a motion to vacate judgment instead of a motion in arrest of judgment and permits the court to vacate a judgment of acquittal and to dismiss the case on the grounds stated or to dismiss the case if a judgment has not been entered.

Rule 23.43 (Joinder of Motions) provides for joinder of motions for new trial (Rule 23.41) and motions to vacate judgment (Rule 23.42).

Rule 23.44 (New Trial on Court's Own Motion) permits the court to grant a new trial on its own motion with the consent of the defendant.

RULE 24 SENTENCE AND JUDGMENT

24.1 Conditions of Release.

When a defendant has been convicted and is awaiting sentence, the court may continue or alter the conditions for defendant's release, or may order confinement of the defendant, taking into account the conditions of release and the factors determining the conditions of release as provided by Rules 6.21 and 6.22 and whether there is reason to believe that the defendant will flee or pose a danger to any person or to the community. The burden of establishing that the defendant will not flee or will not be a danger to any other person or to the community rests with the defendant.

24.2 Presentence Investigation.

24.21 When Made.

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

24.22 Scope of Investigation and Report.

The presentence investigation and report shall include the information permitted and required by law.

24.23 Disclosure of Report.

Subject to the limitations of Minn. Stat. S609.115, subd. 4 a copy of the presentence report shall be provided to counsel for all parties before sentence. Otherwise, the presentence report shall be subject to disclosure only as provided by law.

24.24 Mental or Physical Examination.

Upon motion of the defendant or the prosecutor or on its own motion, the court may order the defendant to submit to a mental or physical examination which would be relevant to the sentencing decision.

Copies of the report of such examination or any other examination to be considered for the purpose of sentencing shall be disclosed to counsel for the parties. Any evidence derived from the examination may not be used against the defendant in any subsequent proceedings or on retrial except for the review of the sentence.

24.3 Sentencing Proceedings.

24.31 Hearings.

Summary hearings upon the presentence report and upon the sentence to be imposed upon the defendant shall be held as provided by law. Before the sentencing proceeding, each party shall notify the opposing party and the court of any part of the presentence report which he intends to controvert by the production of evidence.

24.32 Defendant's Presence at Sentencing.

The defendant must be personally present at the time sentence is pronounced except that when sentence is pronounced for a misdemeanor the court may, on motion of the defendant, dispense with this requirement. Sentence may be pronounced against a corporation in the absence of counsel if counsel fails to appear on the date of sentence after reasonable notice thereof.

24.33 Statements at Time of Sentence.

Before pronouncing sentence, the court shall give the prosecutor and defense counsel an opportunity to make a statement with respect to any matter relevant to the question of the sentence. The court shall also address the defendant personally and ask him if he

wishes to make a statement in his own behalf and to present any information before sentence. The court shall not accept any communication relative to sentencing that is not on the record without disclosing the contents to the defense and to the prosecution.

24.34 Imposition of Sentence.

When sentence is imposed the court:

- a. Shall state the precise terms of the sentence.
- b. Shall assure that the record accurately reflects all time spent in custody in connection with the offense or behavioral incident for which sentence is imposed, which time shall be automatically deducted from the sentence.

24.35 Notice of Right to Appeal.

After imposition of sentence or granting of probation in a case which has gone to trial the court shall inform the defendant of his right to appeal and the right of a person who is unable to pay the cost of appeal to apply for leave to appeal at state expense.

24.36 Record.

A verbatim record of the sentencing proceedings shall be made and transcribed.

24.37 Judgment.

The clerk's record of a judgment of conviction shall contain the plea, the verdict of findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The sentence or stay of imposition of sentence is an adjudication of guilt.

24.38 Clerical Mistakes.

Clerical mistakes in judgments, orders, or other parts of the record or errors in the record arising from oversight or omission may be corrected by the court at any time and after such notice, if any, as the court orders.

24.39 Correction or Reduction of Sentence.

The court at any time may correct a sentence not authorized by law. The court may at any time modify a sentence during a stay of imposition or execution of sentence except that the court may not increase the period of confinement.

## COMMENT

### RULE 24 SENTENCE AND JUDGMENT

Rule 24.1 (Conditions of Release) is based on F. R. Crim. P. 32, 46 (c) and 28 U.S.C.S. 3148. Pending sentence the conditions for defendant's release or whether he should be confined are to be determined under Rules 6.21 and 6.22, governing pre-trial release, but the defendant has the burden of establishing he will not flee or pose a danger to any other person or to the community.

Minn. Const. art. I, S7, provides that all persons shall before conviction be bailable by sufficient sureties. The defendant is not entitled to bail as a matter of right after conviction.

#### Rule 24.2 Presentence Investigation.

Rule 24.21 (When Made) adopts the provisions of Minn. Stats. SS 609.115, 601.116, 601.155 and 242.13 (1971) but in addition to felonies permits presentence investigations in the case of gross misdemeanors and misdemeanors. SS 609.116 (sex offenders), 609.155 (habitual offenders), and 242.13 (probation under YCC) require presentence investigations. This rule is not intended to preclude a post-sentence investigation whenever required by statute (Minn. Stat. S609.115 subd. 2 (sentence of life imprisonment) or whenever the court considers one necessary. The presentence investigation may include the information obtained in the pretrial release investigation under Rule 6.23.

Rule 24.22 (Scope of Investigation and Report) The scope of the investigation and report is determined under the rule by existing statutory law (Minn. Stats. SS 609.115, 609.116 (1971)).

Rule 24.23 (Disclosure)(Presentence Report) adopts Minn. Stat. S 609.115, subd. 4 (1971) except that the rule provides that a copy of the presentence report shall be provided to counsel for all parties before sentence.

Rule 24.24 (Mental or Physical Examination) is based on ABA Standards, Sentencing Alternatives and Procedures, 4.6 (Approved Draft, 1968). See also N.Y.C.P.L. 390.30(2).

Rule 24.3 Sentencing Proceedings.

Rule 24.31 (Hearings) adopts the provisions for summary hearings upon the presentence report and sentence contained in Minn. Stats. SS 609.115, subd. 4, 609.155, 631.20 (1971). The provision for notice of any part of the presentence report that a party intends to controvert comes from ABA Standards, Sentencing Alternatives and Procedures, 4.5(b) (Approved Draft, 1968).

Rule 24.32 (Defendant's Presence at Sentencing) is adopted from F. R. Crim. P. 43. See also N.Y.C.R.L. 380.40.

Rule 24.33 (Statements at the Time of Sentencing) is based on ABA Standards, Sentencing Alternatives and Procedures, 5.4 (Approved Draft, 1968). See also N.Y.C.P.L. 380.50.

Rule 24.34 (Imposition of Sentence) is based on ABA Standards, Sentencing Alternatives and Procedures, 5.6 iii, iv (Approved Draft, 1968). Existing law relating to probation is continued (Minn. Stats. SS 609.135, 609.14).

Rule 24.35 (Notice of Right to Appeal) is based on F. R. Crim. P. 32. Failure to notify the defendant of his right to appeal does not extend the time for appeal.

Rule 24.36 (Record), requiring a verbatim record of the sentencing proceedings, is in accord with ABA Standards, Sentencing Alternatives and Procedures, 5.7 (Approved Draft, 1968). It does not affect the provisions of Minn. Stat. S243.49 (1971) relative to the transcription of trial court proceedings.

Rule 24.37 (Judgment); stating what the record of the judgment shall contain, is adapted from F. R. Crim. P. 32(b). The sentence or stay of imposition of sentence constitutes an adjudication of guilt if the court does not sooner make such an adjudication.



Rule 24.38 (Clerical Mistakes) for correction of clerical mistakes is taken from F. R. Crim. P. 36.

Rule 24.39 (Correction or Reduction of Sentence), adopted from F. R. Crim. P. 35, permits the court to correct an unauthorized sentence at any time. This would include a failure to follow proper procedures in connection with the imposition of sentence. The rule also permits the court at any time to modify a sentence during a stay of imposition or reduction of sentence except to increase the period of confinement. The powers of the court under this rule are not limited by the duration or expiration of a term of court. Other remedies available in connection with the sentence are provided for the post-conviction remedy (Minn. Stat. Ch. 590 (1971).)

RULE 25 APPEAL

25.1 Scope of Rules Governing Appeal.

25.11 Appeals from District Court.

These rules govern the procedure for appeals in criminal cases from the district courts to the Minnesota Supreme Court.

25.12 Applicability of Rules of Civil Procedure.

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

25.13 Suspension of Rules.

In the interest of expediting decision, or for other good cause shown, the Supreme Court may suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction, but the Supreme Court may not extend or shorten the time for filing notice of appeal except as provided by these rules.

25.2 Appeal by Defendant.

25.21 Review by Appeal.

Except as provided by law for the issuance of the extraordinary writs and for the Post-Conviction Remedy, a defendant may obtain review of orders and rulings of the district courts by the Supreme Court only by appeal as provided by these rules. Writs of error are abolished.

25.22 Appeal as of Right.

25.221 Final Judgment.

A defendant may appeal as of right from any final judgment adverse to him. A judgment shall be considered final within the meaning of these rules when there is a judgment of

conviction upon the verdict of a jury or the finding of the court and sentence is imposed or the imposition of sentence is stayed.

25.222 Orders.

A defendant may not appeal until final judgment adverse to him has been entered by the district court except a defendant may appeal from:

1. An order granting a new trial when the defendant claims that the trial court should have entered a final judgment in his favor; or
2. An order, not on his motion, finding him incompetent to stand trial; or
3. An order refusing or imposing conditions of release.

25.23 Discretionary Appeal.

The Supreme Court in the interests of justice and upon petition of the defendant may allow an appeal from an order not otherwise appealable, except an order made during trial, in the manner provided by the Minnesota Rules of Civil Appellate Procedure.

25.24 Certification of Proceedings.

If, upon the trial of any person convicted in any district court, or if, upon any motion to dismiss a complaint or indictment, or upon any motion relating to the indictment or complaint, any question of law shall arise which in the opinion of the judge is so important or doubtful as to require a decision of the Supreme Court, he shall, if the defendant shall request or consent thereto, report the case, so far as may be necessary to present the question of law, and certify the report to the Supreme Court, whereupon all proceedings in the

case shall be stayed until the decision of the Supreme Court. The county attorney shall, upon the certification of the report, forthwith furnish a copy to the attorney general at the expense of the county. Other criminal cases in such district court involving or depending upon the same question may, if the defendants so request, or consent thereto, be stayed in like manner until the decision of the case so certified.

25.25 How Appeal is Taken.

25.251 Notice of Appeal.

An appeal from a judgment or order shall be taken by the defendant by filing a notice of appeal with the clerk of the district court. Failure of the defendant to take any other step than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the Supreme Court deems appropriate, including a dismissal of the appeal. Within 5 days from the filing of the notice of appeal, a copy of the notice shall be served on or mailed to the attorney general and the prosecuting attorney. Upon the filing of the notice of appeal, the clerk shall promptly transmit a certified copy of the notice to the clerk of the Supreme Court.

25.252 Contents of Notice of Appeal.

The notice of appeal shall specify the party or parties taking the appeal; shall designate the judgment or order from which the appeal is taken; and shall state that the appeal is to the Supreme Court.

25.253 Time for Taking an Appeal.

The notice of appeal by a defendant shall be filed in the district court within 90 days after the entry of the judgment or order appealed from. A notice of appeal filed after the announcement of a decision, sentence, or order but before the entry of judgment or order shall be treated as filed after such entry and on the day thereof. If a timely motion to vacate the judgment or for judgment of acquittal, or for a new trial on any ground other than newly discovered evidence has been made, an appeal from a final judgment may be taken within 90 days after the entry of an order denying the motion, and the order denying the motion may be reviewed upon the appeal from the judgment.

A motion for a new trial based on the ground of newly discovered evidence will similarly extend the time for appeal from a judgment of conviction if the motion is made before or within 90 days after entry of judgment.

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

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

25.254 Proceedings in Forma Pauperis.

Proceedings on appeal in forma pauperis shall be as follows:

1. An indigent defendant wishing the service of an attorney in an appeal or post conviction case shall make application therefor to the office of the Public Defender, addressed as follows:

Minnesota State Public Defender\*

2. The office of the State Public Defender shall promptly send to such applicant a financial inquiry form and a preliminary questionnaire form.
3. The applicant shall, if he wishes to pursue his application, completely fill out both of these forms, sign each of these forms, and have his signature notarized on each of these forms.
4. The applicant shall then return these two completed documents to the office of the State Public Defender for further processing.
5. If the pauper status of the applicant appears to the State Public Defender's office to be established, the State Public Defender's office shall then request, by letter to the Minnesota Supreme Court, the appointment of the State Public Defender's office to represent the applicant. Otherwise the State Public Defender's office shall notify the applicant of any problem relative to his qualifications to obtain the services of the State Public Defender's office. Any applicant who contests a decision

\*The present address is: The Law School, University of Minnesota, Minneapolis, Minnesota 55455.

of the State Public Defender's office that the pauper status has not been established may apply to a Justice of the Minnesota Supreme Court for relief.

6. All requests for transcripts or efforts to have cases reviewed in which the defendant is not represented by an attorney, shall be referred by the court receiving the same to the Office of the State Public Defender for processing. Any applicant who then wishes to proceed without an attorney representing him shall advise the court and the State Public Defender's Office in writing that he waives any right he may have to the services of the State Public Defender's office.
7. All clerks of district court, all clerks of municipal and county courts and all justices of peace shall furnish the office of the State Public Defender, copies of any documents in their possession, without the prior payment of the fees therefor and shall bill the office of the State Public Defender for these copies after they have been furnished to the State Public Defender's office.
8. All fees, other than for furnishing copies of documents, including appeal fees, hearing fees or filing fees, ordinarily charged by the clerks of district court, municipal court or by justices of peace, shall automatically be waived in cases in which the State Defender's office, or a District Public Defender's office, represents the client in question.

9. Unless otherwise specifically provided by court order, the State Public Defender's office shall be appointed to represent all eligible indigent defendants in all appeal or post-conviction cases, regardless of which county in the state is the county in which the defendant was accused.
10. In post-conviction cases, the cost of transcripts and other necessary expenses shall be borne by the State of Minnesota from funds available to the State Public Defender's office, regardless of which county in the state is the county in which the defendant was accused.
11. The cost of transcripts and other necessary expenses in all indigent appeal cases shall likewise be paid from funds available to the State Public Defender's office when the county in which the defendant was accused is within a judicial district which has a District Public Defender, including Ramsey and Hennepin Counties.
12. In all indigent appeal cases arising from judicial districts which do not have a District Public Defender system, the costs of transcripts and other necessary expenses shall be borne by the county therein in which the defendant was accused, and the State Public Defender's appointment to represent the accused in these cases shall be pursuant to Minn. Stat. S611.071, subd. 4(a) (1971).



25.26 Stay.

When an appeal is taken by the defendant, the execution of judgment or sentence shall not be stayed unless a stay is granted by the trial judge or a justice of the Supreme Court.

25.27 Release of Defendant.

25.271 Conditions of Release.

Upon appeal, if the court grants a stay under Rule 6, the conditions for defendant's release and the factors determining the conditions of release shall be governed by Rules 6.21 and 6.22, except as hereinafter provided by this rule.

25.272 Burden of Proof.

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

25.273 Application for Release Pending Appeal.

Application for release pending appeal shall be made in the first instance to the district court. If the district court refuses release pending appeal, or imposes conditions of release, the court shall state on the record the reasons for the action taken. Thereafter, if an appeal is pending, a motion for release, or for modification of the conditions of release, pending review, may be made to the Supreme Court or a justice

thereof. The motion shall be determined promptly upon such papers, affidavits, and portions of the record as the parties shall present and after reasonable notice to the adverse party. The Supreme Court or a justice thereof may order the release of the defendant pending disposition of the motion.

25.28 Record on Appeal.

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

In lieu of the record as defined by this rule, the parties may prepare and sign a statement of the case showing how the issues presented by the appeal arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the issues presented. If the statement is accurate, it, together with such additions as the trial court may consider necessary to present the issues raised by the appeal, shall be approved by the trial court and shall be on the record on appeal.

25.29 Transcript of Proceedings and Transmission of the Transcript and Record.

The Minnesota Rules of Civil Procedure to the extent applicable shall govern the transcript of the proceedings, the transmission of the transcript and record to the Supreme Court, and the form and filing of briefs, except that the appellant's brief shall contain a statement of the procedural history and may, but need not, contain the appendix required by Rule 130.01 Minnesota Rules of Civil Appellate Procedure.

#### 25.2.10 Scope of Review.

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

#### 25.2.11 Action of Appellate Court.

On appeal from a judgment, if the court affirms the judgment, it shall direct the sentence pronounced be executed. If it reverses the judgment, it shall either direct a new trial, or that the defendant be absolutely discharged or that the conviction be reduced to a lesser included offense or to an offense of lesser degree, as the case may require. If the conviction is reduced, the case shall be returned to the district court for a resentencing.

### 25.3 Appeal by State.

#### 25.31 Appealable Orders.

The state may appeal to the Supreme Court from any pretrial order of the district court, except an order dismissing a complaint for lack of probable cause to believe the defendant has committed an offense.

#### 25.32 Procedure.

The procedure upon appeal by the state shall be as follows:

##### 25.321 Stay.

Upon oral notice that the state intends to appeal, the court shall order a further stay of proceedings of five days to allow time to perfect the appeal.

25.322 Notice of Appeal.

Within five days of entry of the order the state shall file with the clerk of the court a notice of appeal, together with an affidavit of service of said notice upon opposing counsel, and upon the attorney general of the State of Minnesota, and a copy of the written request to the court reporter for such transcript of the proceedings as appellant deems necessary.

25.323 Transcript.

The court reporter shall file with the clerk of court the original transcript and affidavits of delivery of same to counsel for the state and counsel for the defendant. The clerk of said court shall forthwith transmit to the Supreme Court any original papers, files and exhibits.

25.324 Briefs.

Within 15 days of delivery of the transcript appellant shall serve upon opposing counsel his brief and file with the clerk of the Supreme Court 15 copies thereof and within 8 days of such service upon him the respondent shall serve his brief and file with said clerk 15 copies thereof. Typewritten copies of the transcript and briefs may be submitted in lieu of printed transcripts and briefs.

25.325 Dismissal by Attorney General.

In appeals by the state the attorney general may, in his discretion, within 20 days after entry of the order staying proceedings, dismiss the appeal and shall within 3 days thereafter give notice thereof to the judge of the lower court and file with the clerk of said court notice of such dismissal. The lower court shall then proceed as if no appeal had been taken.

25.326 Hearing.

The appeal may be heard before the Supreme Court when it is in session upon application of either party to such court or a justice thereof. The date of hearing shall not be more than 6 months after entry of the order staying proceedings. The Supreme Court shall not have jurisdiction to hear any such appeal after 6 months after entry of the order staying proceedings and in such cases the lower court shall then proceed as if no appeal had been taken.

25.327 Attorneys' Fees.

Reasonable attorneys' fees incurred shall be allowed to the defendant on such appeal which shall be paid by the county in which the prosecution was commenced.

25.328 Joinder.

The state may appeal from one or several of the orders under this rule joined in a single appeal.

25.329 Time for Appeal.

The state may not appeal under this rule until after the Omnibus Hearing has been held under Rule 11 and all issues raised therein have been determined by the district court. An appeal by the state under this rule bars any further appeal by the state from any existing orders not included in the appeal.

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

25.33 Cross-Appeal by Defendant.

Upon appeal by the state, the defendant may obtain review of any pre-trial order, which will adversely affect him, by filing a notice of

appeal with the clerk of the Supreme Court within 10 days after service of notice of the appeal by the state under Rule 25.322. Within 5 days after the notice of cross-appeal is filed notice thereof shall be mailed to, or served upon the attorney general and the prosecuting attorney by the defendant. Failure to mail or serve the notice does not deprive the Supreme Court of jurisdiction over defendant's appeal, but is ground only for such action as the Supreme Court deems appropriate, including a dismissal of the cross-appeal.

25.34 Conditions of Release.

Upon appeal by the state, the conditions for defendant's release pending the appeal shall be governed by Rules 6.21 and 6.22.

COMMENT

RULE 25 APPEAL

Rule 25.1 Scope of Rules Governing Appeal.

These appellate rules govern appeals from the district courts to the Minnesota Supreme Court and supersede Minn. Stats. SS 632.01-632.13 (1971). Except when these rules provide otherwise the Minnesota Rules of Civil Appellate Procedure shall govern to the extent they may be applied to criminal appeals. The following civil appellate rules are therefore applicable: Rule 110 (The Record on Appeal); Rule 111 (Transmission of the Record); Rule 125 (Filing and Service of Papers); Rule 126 (Computation and Extension or Limitation of Time); Rule 127 (Motions); Rule 128 (Briefs) (But see Rule 25.29); Rule 129 (Brief of an Amicus Curiae); Rule 130 (Appendix to Briefs; Supplemental Record) (But see Rule 25.29); Rule 131 (Filing and Service of Briefs, the Appendix and the Supplemental Record); (Form of Briefs, Appendices, Supplemental Records, and Motions and Other Papers); Rule 133 (Calendar); Rule 134 (Oral Argument); Rule 135 (En Banc and Division Hearings); Rule 136 (Notice of Decision; Judgment; Remitter); Rule 137 (Judgment Roll); Rule 140 (Petition for Rehearing); Rule 142 (Dismissal; Default); Rule 143.01 (Parties); Rule 145 (Appendix of Forms).

The provisions of Rule 25.13 for suspension of the rules comes from Fed. R. App. P. 2 and Minn. R. Civ. App. P. 102. The court, however, may not extend or shorten the time for filing notice of appeal except as provided in Rule 25.253.

Rule 25.2 Appeal by Defendant.

Rule 25.21 (Review by Appeal.)

Under Rule 25.21 the defendant may obtain review of lower court orders and rulings only by appeal except as may be provided in the case of the extraordinary writs

authorized by Minn. Const. art. VI, sec. 2, and the post-conviction remedy (Minn. Stat. Ch. 590 (1971)). The statutory authorization for the extraordinary writs is contained in Minn. Stat. S480.04 (1971) and Chapters 586 (Mandamus), 587 (Prohibition), 589 (Habeas Corpus), 606 (Certiorari). The rule abolishes writs of error.

Rule 25.22 Appeal as of Right.

Rule 25.221 Final Judgment.

This rule and Rule 25.222 (Appeal from Orders) are taken from ABA Standards, Criminal Appeals, 1.3 (a) and 1.3 (b) (Approved Draft, 1970), and from Fed. R. App. P. 9 (a) and 18 U.S.C.S. 3147 (b). Rule 25.221 permits the defendant to appeal only from the final judgment except as otherwise provided in Rule 25.222 (Appeal from Specified Orders) and 25.23 (Discretionary Appeal). Under Rule 25.221 a judgment becomes final for the purpose of appeal (1) when sentence is imposed, or (2) when imposition of sentence is stayed and defendant is placed on probation, or if sentence is stayed for any other purpose. This does not permit appeal when there is a continuance for the purpose of a presentence investigation.

Upon appeal from the final judgment, the Supreme Court may review denials of motions for new trial, motions for judgment of acquittal, motions to vacate judgment (the timely making of which extend the time for appeal from the judgment) (Rule 25.253) as well as pretrial and trial rulings and orders.

Rule 25.222 Appeal from Orders.

Under Rule 25.222 the defendant may also appeal as of right (1) from an order granting a new trial when he contends he should have had final judgment in his favor, as for example, when he contends he is entitled to a judgment of acquittal; (2) from an order, not on his motion, declaring him incompetent to stand trial; and (3) from an order refusing or imposing conditions of release. (See ABA Standards,



Criminal Appeals 1.3 (b) (Approved Draft, 1970) and for provisions governing appeal from orders setting or denying bail or conditions of release, see Fed. R. App. P. 9 (a) and 18 U.S.C.S. 3147 (b).

Rule 25.23 (Discretionary Appeal) is taken from Minn. R. Civ. P. 105.

Rule 25.24 (Certification of Proceedings) continues the provisions of Minn. Stat. S632.10 (1971).

Rule 25.25 How Appeal is Taken.

Rule 25.251 Notice of Appeal.

Under Rule 25.251, based on Fed. R. App. P. 3, an appeal is accomplished by filing notice of appeal. The failure to take any other steps, such as service of the notice on the attorney general and prosecuting attorney, does not affect the validity of the appeal but may be grounds for dismissal if the Supreme Court considers that appropriate.

Rule 25.252 (Contents of Notice of Appeal) is taken from Fed. R. App. P. 3 (c).

Rule 25.253 Time for Taking an Appeal.

Except that the time for taking an appeal is set by this rule at 90 days instead of 10 days, the rule follows substantially the provisions of Fed. R. App. P. 4 (b).

A timely motion for new trial (Rule 23.413), motion for judgment of acquittal (Rule 23.3.173), or motion to vacate judgment (Rule 23.42) extends the time for taking appeal from the judgment for 90 days from the entry of the order on the motion. Upon appeal from the judgment the order on the post-trial motion may be reviewed whether entered before or after judgment. A motion for new trial on the ground of newly discovered evidence, if made within 90 days after the entry of judgment of conviction, will also extend the time for appeal from the judgment for a period of 90 days from the entry of the order on the motion. (By Rule 24.37 the sentence or stay of imposition of sentence is the judgment of conviction.) The provisions for extension of the time for appeal are based on Fed. R. App. P. 4 (b).

Rule 25.254 (Proceedings in Forma Pauperis) contains the substance of Minn. Sup. Ct. order of June 30, 1969, par. 13, M.S.A., following Minn. Stat. S611.22. See also Minn. Stats. SS 611.14 (b), 611.07, subd. 3, 611.071 (1971).

Rule 25.26 (Stay of Execution) continues present Minnesota law (Minn. Stat. S632.02 (1971)).

Rule 25.27 Release of Defendant.

Rules 25.271 and 25.272 (Conditions of Release and Burden of Proof) are adapted from ABA Standards, Criminal Appeals, 2.5 (Approved Draft, 1970) and Fed. R. App. P. 9 (c) and 18 U.S.C.S. 3148. These rules--25.271 and 25.272--provide that upon appeal, if a stay of execution is granted, the conditions for defendant's release and the factors determining those conditions shall be governed by the rules (6.21 and 6.22) applicable to pretrial release except that the defendant has the burden of proof on the risk of non-appearance and that he is not likely to commit a serious crime or interfere with the administration of justice and that the appeal is not frivolous or taken for delay.

Rule 25.273 (Application for Release Pending Appeal) is adapted from ABA Standards, Criminal Appeals 2.5 (Approved Draft, 1970) and Fed. App. R. P. 9 (b). It provides that application for release pending appeal shall be made in the first instance to the trial court. If the trial court denies the application or imposes conditions of release, a motion for release or for modification of the conditions imposed by the trial court shall be made to the Supreme Court or a justice thereof.

Rule 25.28 (Record on Appeal) adapts the provisions of Minn. R. Civ. App. P. 110.01 and 110.04 and does away with Bills of Exceptions and the settled case in criminal cases.

Rule 25.29 (Transcript of Proceedings and Transmission of the Transcript and Record and Form and Filing of Briefs) adopts the provisions of Minn. App. R. Civ.

P. 110.02-110.05, 111, 130, 131, 132 except that the appellant's brief shall contain a statement of the procedural history, and the appendix required by Minn. App. R. Civ. P. 130.01 may, but need not, be contained in the brief.

Rule 25.2.10 (Scope of Review) is adapted from Minn. App. R. Civ. P. 103.04 except that on appeal from the final judgment it permits review of pretrial and trial orders or rulings whenever or not a motion for new trial has been made, and timely post-trial motions may be reviewed whether ruled upon before or after judgment. The provision for review of any other matters in the interests of justice was not intended to include the appellate review of sentences.

Rule 25.2.11 (Action of Appellate Court) is adapted from Minn. Stat. S632.06 (1971) except that it permits the appellate court on reversal to direct that the conviction be reduced to a lesser offense and that the defendant be re-sentenced by the district court accordingly.

Rule 25.3 Appeal by State.

This rule, governing appeals by the state, follows Minn. Stats. SS 632.11-632.13 (1971) except that (1) the state under Rule 25.31 may appeal from any pretrial order except an order dismissing a complaint for lack of probable cause; (2) the statement required of the state by Minn. Stat. S632.12 (1971) is not required; (3) the conditions for defendant's release are governed by Rules 6.21 and 6.22 governing pretrial release (Rule 25.34); (4) the state may not appeal until after the Omnibus Hearing under Rule 11 and all issues raised at the Omnibus Hearing have been ruled upon by the district court; (5) the state must include all such rulings adverse to the state in its appeal or be barred from thereafter appealing from any omitted (Rule 25.329); and (5) if the state appeals, the defendant may cross-appeal from any pretrial order adversely affecting him by following the procedure prescribed by Rule 25.33. As provided by Minn. Stat. S632.11, subd. 2, the state may not appeal after the defendant has been placed in jeopardy except

that it is the opinion of the Advisory Committee that jeopardy attaches in a jury case when the jury is sworn and in a trial to the court when the first witness is sworn. (See comment to Rule 21.2.)

Rule 25.327 (Attorneys' Fees), providing for payment of attorneys' fees by the county in which the prosecution was commenced assumes that the prosecution was commenced in a proper county.

RULE 26 DISMISSAL

26.1 By Prosecuting Attorney.

The prosecuting attorney may in writing or on the record, stating the reasons therefor, dismiss a complaint without leave of court and an indictment with leave of court. If the dismissal is on the record, it shall be transcribed and filed.

26.2 By Court.

If there is unnecessary delay by the prosecution in bringing a defendant to trial, the court may dismiss the complaint or indictment.

COMMENT

RULE 26 DISMISSAL

Rule 26.1 (Dismissal by Prosecuting Attorney) is adopted from F. R. Crim. P.

48 (a) except that dismissal of a complaint does not require leave of court.

As to when jeopardy attaches, see comment to Rule 21.2.

Rule 26.2 (Dismissal by Court) is taken from F. R. Crim. P. 48 (b) and takes the place of Minn. Stat. S611.04 (1971). See also comment to Rule 11.110 relative to the constitutional right to a speedy trial and the consequences of a denial.

RULE 27 HARMLESS ERROR AND PLAIN ERROR

27.1 Harmless Error.

Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

27.2 Plain Error.

Plain errors or defects affecting substantial rights may be considered by the court upon motions for new trial, post-trial motions, and on appeal although they were not brought to the attention of the trial court.

COMMENT

RULE 27 HARMLESS ERROR AND PLAIN ERROR

Rule 27.1 (Harmless Error) comes from F. R. Crim. P. 52 (a).

Rule 27.2 (Plain Error) is adapted from F. R. Crim. P. 52 (b).



RULE 28 MOTIONS

An application to the court for an order shall be by motion. A motion other than one made during a trial or hearing shall be in writing unless the court or these rules permit it to be made orally. The motion shall state the grounds upon which it is made and shall set forth the relief or order sought and may be supported by affidavit.

COMMENT

RULE 28 MOTIONS

Rule 28 (Motions) is taken from F. R. Crim. P. 47 and Minn. R. Civ. P. 7.02.

RULE 29 SERVICE AND FILING OF PAPERS

29.1 Service: Where Required.

Written motions other than those which are heard exparte, written notices, and other similar papers shall be served upon each of the parties.

29.2 Service: How Made.

Whenever under these rules or by an order of court 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 himself is ordered by the court. Service upon the attorney or upon a party shall be made in the manner provided in civil actions or as ordered by the court or as required by these rules.

29.3 Notice of Orders.

Immediately upon the entry of an order made on a written motion subsequent to arraignment the clerk shall mail to each party a copy thereof and shall make a record of the mailing. Lack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted by these rules.

29.4 Filing.

Papers required to be served shall be filed with the court. Papers shall be filed in the manner provided in civil actions.

COMMENT

RULE 29 SERVICE AND FILING OF PAPERS

Rule 29.1 (Service: Where Required) comes from F. R. Crim. P. 49 (a).

Rule 29.2 (Service: How Made) is taken from F. R. Crim. P. 49 (b) and provides that service upon the attorney or a party shall be made in the manner provided in civil actions, or as ordered by the court or as provided by these rules. Minn. R. Civ. P. 5.02 provides the method for service in civil actions. Rule 19.2 of these rules provides how the defendant shall be served with notices of the taking of depositions. Rules requiring notice or service are: Rules 7.1 (Rasmussen and Spreigl notices); 9.213 (Notice of Defenses); 9.222 (Notice of Time and Place of Discovery on Order of Court); 9.224 (Notice of Results of Discovery Following Order of Court); 10.31 (Service of Motions); Rule 25.251 (Notice of Appeal by Defendant); Rule 25.322 (Notice of Appeal by State); Rule 25.33 (Cross-appeal by Defendant).

Rule 29.3 (Notice of Orders) comes from F. R. Crim. P. 49 (c) and Minn. R. Civ. P. 77.04. Rule 25.253 provides for extension of time for taking an appeal.

Rule 29.4 (Filing) adopts F. R. Crim. P. 49 (d) and Minn. R. Civ. P. 5.04.

RULE 30   TIME

30.1   Computation.

Except as provided by Rules 3.223 and 4.251, time shall be computed as follows:

The day of the act or event 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, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When a period of time prescribed or allowed is less than seven days, intermediate Saturdays, Sundays and legal holidays shall be excluded in the computation. As used in these rules, "legal holiday" includes New Year's Day, Washington's Birthday (Presidents' Birthday), Memorial Day, Independence Day, Labor Day, Columbus Day, Veteran's Day, Thanksgiving Day, Christmas Day, and any other day appointed as a holiday by the President or the Congress of the United States or by the State.

30.2   Enlargement.

When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice, order the period enlarged if request therefor is made before the expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after the expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but the court may not extend the time

for taking any action under Rules 23.3.173, 23.413, or 23.42 or except as provided by Rule 25.253, the time for taking an appeal.

30.3 For Motions; Affidavits.

A written motion, other than one which may be heard exparte, and notice of the hearing thereof shall be served not later than five days before the time specified for the hearing unless a different period is fixed by rule or order of court. For cause shown such an order may be made on exparte application. When a motion is supported by affidavit, the affidavit shall be served not less than one day before the hearing unless the court permits them to be served at a later time.

30.4 Additional Time After Service by Mail.

Whenever a party has the right or is required to do an act within a prescribed period after the service of a notice or other paper upon him and the notice or other paper is served upon him by mail, three days shall be added to the prescribed period.

30.5 Unaffected by Expiration.

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

COMMENT

RULE 30   TIME

Rule 30.1 (Computation) adopts Minn. R. Civ. P. 6.01 except that it specifies the legal holidays provided for by Minn. Stat. S645.44, subd. 5 (1971). Excepted from the computation of time under this rule is the 36-hour rule for initial appearance following an arrest provided by Rules 3.223, 4.251.

Rule 30.2 (Enlargement) is taken from F. R. Crim. P. 45 (b) and Minn. R. Civ. P. 6.02. It permits an extension of time except for motions for judgment of acquittal (Rule 23.3.173) for new trial (Rule 23.413) or to vacate judgment (Rule 23.42). Extension of time for taking an appeal may not be enlarged except as provided by Rule 25.253.

Rule 30.3 (For Motions; Affidavits) is taken from F. R. Crim. P. 46 (d) and Minn. R. Civ. P. 6.04. Rule 10.3 requires notice of motions not later than three days before the Omnibus Hearing.

Rule 30.4 (Additional Time After Service by Mail) is taken from Fed. R. Crim. P. 45 (e) and Minn. R. Civ. P. 6.05.

Rule 30.5 (Unaffected by Expiration of Term of Court) comes from Minn. R. Civ. P. 6.03.

RULE 31 COURTS AND CLERKS

The district court shall be deemed open at all times for the purpose of filing any proper paper, of issuing and returning or certifying process and of making motions and orders. Unless the court orders otherwise, the court shall be deemed opened at all times, except legal holidays, for the transaction of any other business that may be presented. The clerk's office with the clerk or a deputy in attendance shall be open during business hours on all days except Saturdays, Sundays, or particular legal holidays.



COMMENT

RULE 31 COURTS AND CLERKS

Rule 31 (Courts and Clerks) is adapted from F. R. Crim. P. 56 and Minn. R. Civ. P. 77.01. Legal holidays are defined by Minn. Stat. S645.441, subd. 5 (1971). The rule supersedes Minn. Stats. SS 484.07, 484.08 to the extent inconsistent.

