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MSBA Court Rules and Administration Committee  
March 16, 2020

REPORT AND RECOMMENDATION TO THE MINNESOTA STATE BAR ASSOCIATION  
REGARDING CORRECTIVE AMENDMENTS TO MINN. R. CIV. P. 26.05 AND 26.07

**Resolved:** That the Minnesota State Bar Association:

- 1) Petition the Minnesota Supreme Court to amend Minn. R. Civ. P. 26.05 so that it conforms with Fed. R. Civ. P. 26(e), as follows:

**26.05. Supplementing Disclosures and Responses**

(a) *In General.* A party who has made a disclosure under Rule 26.01—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(1) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(2) as ordered by the court.

(b) *Expert Witness.* For an expert whose report must be disclosed under Rule 26.01(b)(2), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26.01(c) are due.

- 2) Petition the Minnesota Supreme Court to amend Minn. R. Civ. P. 26.07 so that it conforms with Fed. R. Civ. P. 26(g), as follows:

**26.07 Signing Disclosures and Discovery Requests, Responses, and Objections.**

(a) *Signature Required; Effect of Signature.* Every disclosure under Rule 26.01(a) or 26.01(c) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if self represented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to

the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(1) with respect to a disclosure, it is complete and correct as of the time it is made; and

(2) with respect to a discovery request, response, or objection, it is:

(A) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;

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

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(b) *Failure to Sign.* Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(c) *Sanction for Improper Certification.* If a certification violates this rule, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

## Report<sup>1</sup>

In 2016, the MSBA successfully petitioned the Minnesota Supreme Court to amend the Minnesota Rules of Civil Procedure to substantially conform to the Federal Rules of Civil Procedure, which underwent substantial change in 2015. The MSBA petition was the culmination of the MSBA's Federal Conformity Project, a joint subcommittee of the Judiciary and Court Rules and Administration Committees. That subcommittee identified many specific non-conforming Minnesota rules with proposed conforming amendments, but failed to identify important nonconformities in both Minn. R. Civ. P. 26.05 and 26.07, which have not been amended since July 1, 2000, a time when Minn. R. Civ. P. 26.01 did not provide for automatic disclosures.

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<sup>1</sup> For reference, the text of the current Minn. R. Civ. P. 26.05 & 26.07 is set out fully in Attachment A.

Current Minn. R. Civ. P. 26.05 only identifies discovery responses as subject to a duty to supplement. This could be interpreted to mean that a party has no obligation to supplement its initial disclosures and could avoid sanctions under Minn. R. Civ. P. 37.03 for undisclosed witnesses by simply arguing that the disclosures were correct at the time they were made. In the case of initial disclosures, this would allow a party to identify the witnesses it intends to rely upon at the point of lowest information in the case, frustrating one of the main purposes of the mandatory disclosure regime: giving opposing parties clear notice of the witnesses the opposing party may use to support their claims and defenses, thereby reducing unnecessary depositions of persons who may be involved in the facts of the case but that neither party intends to rely upon.

Likewise, Minn. R. Civ. P. 26.07, on the subject of discovery certifications, also failed to be updated when the mandatory disclosure regime of Rule 26.01 was enacted. This could be interpreted to mean that a signature on a Rule 26.01(a) or (c) disclosure is meaningless and cannot result in sanctions for what would otherwise be a violation of the discovery rules.

Although clearly not in keeping with the spirit of the rules, these two oversights working together could be reasonably interpreted to mean that a party has neither an obligation to provide accurate information in mandatory disclosures initially, nor an obligation to supplement when new or inaccurate information in said disclosures is discovered subsequently.

The Committee believes this proposed change would correct an oversight in the rules and benefit Minnesota practitioners; therefore, it should be supported by the MSBA.

## **Attachment A**

### **26.05. Supplementation of Responses**

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

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

### **26.07. Signing of Discovery Requests, Responses and Objections**

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

- (1) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;
- (2) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and
- (3) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery had in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

If a request, response, or objection is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the party making the request, response or objection and a party shall not be obligated to take any action with respect to it until it is signed.

If a certification is made in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including reasonable attorney fees.