MINNESOTA PRACTICE SERIES™

Volume 11A

COURTROOM HANDBOOK OF MINNESOTA EVIDENCE

2026 Edition

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By

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The Late David F. Herr

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Introduction to the 2026 Edition

This 2026 edition incorporates significant additions, primarily relating to evidence rulings of the Minnesota court, but also discussing relevant federal developments as appropriate. These developments include:

- Interpretation of statutes related to evidentiary proof at trial;
- Updates to selected evidentiary statutes;
- Updates to procedures during trial;
- Expanded examples of exclusion of victim's prior conduct at trial;
- Judicial notice in trial and appellate courts;
- Proposed Rule 902(11) and amendment to Rule 803(6); and
- Alternative perpetrator evidence

Dedication

To all my former students who suffered under my heavy hand. In particular, to those who invariably had a right answer, but unfortunately not to the question I asked. I hope this book provides you with the answers to the questions you want answered.

P.N.T.

To David Herr, the only lawyer I know who didn't need this book, because he always knew the answer.

J.C.B

Acknowledgments

This book would not have been possible without the support and guidance of many. As is always true, our wonderful families have given the most, for which we are grateful. Our students and professional colleagues have taught us as much as we have taught them, and we appreciate it. We hope this book may help answer some of the remaining questions.

We have received valuable support and encouragement from Hamline University School of Law and William Mitchell College of Law—now Mitchell Hamline School of Law—and from our colleagues on the faculties of these schools. Our clients have taught us much about evidence law, and have made it all possible.

Sarah MacGillis, while a student at Hamline University School of Law, provided invaluable assistance in all aspects of the first edition of this book. We are indebted to her. We also thank Andrew Noel, Raymond Peterson, Timothy P. Griffin, Kimberly A. Tenerelli, Jonathan T. Trexler, Rachael J. Severson, Steve Kranz, Renee I. Uzong, Emily C. Johnson, Brian R. Christiansen, Nathan Aquino, and Jonathan L. Felt, former students at Hamline, for their diligent efforts in preparing subsequent editions of this book.

P.N.T.

J.C.B.

D.F.H.

Preface

This handbook is the inspiration of our friend and mentor David Herr. David had a driving passion aimed at helping others in the profession find paths to justice in fair and efficient ways. His hope for this handbook was that we could help Minnesota trial lawyers and judges find quick, accurate, and accessible answers to many of the questions that arise during trial. Perhaps the book may also serve as a starting point for research into more complicated issues, but that was not the focus. We tried to bring together relevant state statutes, rules, and case authority along with comparable federal references to permit assessment of the applicable legal rules and some practical suggestions on how to apply the rules. This handbook incorporates recent cases and legislation as well as recent rule changes, such as those found in the Minnesota Civil Trialbook.

This book is not necessarily the last word in evidence law. It should be the first word, however. We hope the leading authorities will be readily located in this book from which cogent arguments can be framed in the heat of battle. Reference to more comprehensive treatises, including Peter N. Thompson, 11 Minnesota Practice: Evidence, (5th ed.) is recommended. For handier, pocket-sized reference on specific evidentiary objections, David F. Herr & Peter N. Thompson, Minnesota Trial Objections (Thomson/West 2008), should be a convenient and useful reference. It is also available as an e-Book, ready to access from iPad or iPhone in the courtroom.

For more in-depth analysis of the Rules of Civil Procedure, see David F. Herr & Roger S. Haydock, 1, 1A, 2 & 2A, Minnesota Practice: Civil Rules Annotated (6th ed.). The General Rules of Practice are analyzed and explained in David F. Herr, 3A Minnesota Practice: General Rules Annotated (2024 ed.).

This book covers Minnesota appellate decisions reported through volume 23 of Northwestern Reporter, Third Series and legislation through June 2025. Among other issues it addresses the struggle the Courts have had developing consistent approaches to novel expert testimony under Rules 702 and 703, other crimes-*Spreigl* evidence, Rule 404(b) and the interplay between the hearsay rule and the modern, evolving approach to the Constitutional Right to Confrontation. In addition after a decade with no changes in the rules, the Court has now promulgated

amendments to the Rules of Evidence in 2016, 2018, and 2019. This work includes those changes as well as a proposed change by adding Rule 902(11) and amending Rule 803(6).

The Minnesota legislature and Supreme Court recently amended Minn. Stat Ann. § 480A.08 and Minn. R. Civ. App. 136.01 regulating the Court of Appeals' designation of unpublished opinions. Under Rule 136.01, opinions labeled as nonprecedential are now more readily available for citation without requiring prior notice.

The impetus for the rule changes was to encourage the Court of Appeals to be more generous in designating opinions as precedential and to make it easier for lawyers and judges to look to and use nonprecedential reasoned opinions. At least with regard to the Rules of Evidence the changes have not generated more precedential decisions. In the twelve-month period from May 31, 2021, to June 1, 2022, Westlaw lists 75 Court of Appeals opinions citing the Minnesota Rules of Evidence. Only two opinions were listed as precedential. Many of the nonprecedential opinions included reasoned resolution of important evidentiary issues. During that same period only 6 opinions from the Minnesota Supreme Court cited a Rule of Evidence. It appears that Minnesota lawyers and judges are not being guided by precedential evidentiary decisions by Minnesota appellate courts. To understand how the Rules of Evidence are being applied by Minnesota Courts, lawyers and judges must consult "nonprecedential opinions." Consequently, beginning in 2022 this Handbook includes significant decisions by the Court of Appeals, without regard to whether the decision is designated precedential or nonprecedential.

This book will be kept current annually to keep you up to date on trial practice in Minnesota trial courts. If you have any suggestions about how to make this handbook more useful, please let us know. Send your comments to:

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MINNESOTA SUPREME COURT
RULES OF EVIDENCE ADVISORY COMMITTEE

2025 PROPOSED AMENDMENTS

At the suggestion of the Minnesota County Attorneys Association and the Attorney General's Office the Supreme Court reinstated the Rules of Evidence Committee to consider adopting rules modeled on Fed. R. Evid. 803 (6), 902 (11), 902 (13) and 902 (14). The committee has submitted a proposal for Rule 803 (6) and 902 (11) addressing domestic certified copies of regularly conducted business. The committee proposal and report is provided below. The Committee intends to file a proposal on Fed. R. Evid. 902 (13) and (14) addressing self-authentication of electronic records in December 2025.

REPORT AND PROPOSED AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

MINNESOTA SUPREME COURT
RULES OF EVIDENCE ADVISORY COMMITTEE

ADM10-8047

May 23, 2025

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I. INTRODUCTION

The Supreme Court in an order filed June 3, 2024, directed that the Committee consider amendments proposed in a petition filed by the Minnesota County Attorneys Association (MCAA). Specifically, the MCAA proposes amending Rule 803(6) and adopting Federal Rule of Evidence 902(11) to allow domestic records of regularly conducted activity to be authenticated by a certification rather than requiring the testimony of the custodian. The Court in an order filed October 29, 2024, directed that the Committee file its report and recommendations on or before May 30, 2025.

In an order filed April 17, 2025, the Supreme Court directed that the Committee also consider a proposal filed by the Attorney General's office to adopt Federal Rules of Evidence 902(13) and 902(14). That report is due December 31, 2025, and will be filed separately.

II. DISCUSSION

The proposal to amend Rule 803(6) and adopt Rule 902(11) is intended to bring the Minnesota Rules of Evidence in conformity with the Federal Rules of Evidence and the Rules of Evidence of all neighboring states, to simplify the process, and to provide consistency. As part of its review of the proposal, the Committee reviewed a summary of every other state's approach to this issue. Thirty-three states have adopted some version of Rule 902(11). The Committee considered the various approaches taken in those other states and reviewed the commentary to their rules. The Committee also solicited input from the members' constituent groups and reviewed a case law survey to determine what if any challenges or problems the proposed rule amendments could create.

At the outset of its discussion, the Committee agreed that adoption of the proposed rule amendments governing domestic records makes sense with respect to civil cases. The parties generally have the records sought to be introduced well in advance of trial as part of discovery, including the certification document, which provides an advance opportunity to preview the documents and address any issues or inconsistencies. Parties in civil cases typically do not insist on foundation testimony unless there is an actual issue to litigate. Specifically with regards to medical records in medical malpractice cases, eliminating the need to call a witness would save time.

The Committee recognizes that some litigants may not stipulate to foundation and have little incentive to stipulate. Even if the opponent of the evidence does stipulate, the opponent could withdraw a stipulation, so the proponent always needs to secure a witness. Although this may be the scenario in only a small percent of cases, even in those cases there is usually no real foundation objection to the evidence. So even in those cases where parties might not stipulate to foundation, the proposed rule amendments still make good sense.

Additionally, the proposed rule amendments address the real and increasingly common challenge of securing a foundation witness in cases that involve records held by companies like Google and Meta. Those companies tend to ignore out-of-state subpoenas and refuse to send a witness to testify regarding their records. Although the interstate subpoena process can be used to try to obtain records from out-of-state businesses, at times a judge in the county of the company's headquarters will find the subpoena too burdensome and might not agree to order the witness to testify, even remotely. The current law and process also place a substantial burden on 911 centers as a records custodian is often required to be present in court all day only for a case to settle. The current process is inefficient, cumbersome, wasteful, and unnecessary as the records sought to be admitted are not created for purposes of litigation. The proposed rule amendments would result in real cost and time savings for all parties.

Although there are efficiencies to be gained by such a rule change, the Committee is mindful that under Rule 102, one goal and purpose of the evidence rules is efficiency, and another is ascertaining the truth. Efficiency cannot be the primary concern, especially in criminal cases where a defendant's liberty is at stake and the burden is on the state to prove its case. To ensure the search for truth and the criminal case process would not be compromised by the proposal, the Committee fully explored the

potential negative impacts of the proposed rule amendments.

One concern the Committee discussed is the breadth and impact of such a rule. The proposed rule amendments cover a wide swath of records and data, and not all covered records and data are saved and maintained consistently. Some members expressed concern that the proposed rule amendments could result in the admission of inaccurate and/or incomplete records, or records that are indecipherable by a layperson, without the opportunity to ask the custodian about the accuracy and completeness of the records. It is difficult to defend cases if there are records offered with no witness to explain them, and the factfinder could draw incorrect conclusions from incomplete records.

However, while the custodian of the records may have something valuable to add in response to certain questions, the presence of the custodian is not a guarantee that the records are accurate and complete. There can be gaps in what is disclosed from any source given the potential for human error and imperfect processes. Moreover, the custodian is not an expert regarding the accuracy and completeness of the records and is only called to testify that this is a record they keep, nothing more. Often the custodian does not know if what is being offered is a complete record and cannot testify regarding what the records mean. Perhaps there is someone else inside or outside the company who is an expert on those types of records and could testify regarding what the records mean, but that is not the custodian. Finally, if the concern is that records could be confusing, misleading, or prejudicial, a Rule 403 objection is still an option.

Another concern the Committee discussed is the potential for the proposed rule amendments to raise confrontation clause issues in criminal cases. However, the proposal only provides a means to authenticate the evidence; it does not establish that the records are admissible. An adverse party may challenge the certification's assertion that the records satisfy the business-record exception to the hearsay rule or may interpose other objections to admissibility with regard to the content of the records. As long as the parties have advance notice of what will be offered, they can ensure confrontation issues are addressed.

Concerns were also raised regarding the impact of the proposed rule amendments on child protection (CHIPS) cases, which may present unique situations and different types of records. Often the writer of a report offered into evidence is the custodian, for example, the social worker, parenting supervisor, or psychologist. Parties do not stipulate because they are not

sure what other testimony they might be able to get from the report writer/custodian; having the records custodian testify is important. There is not enough time to subpoena the drafter if the records are provided 7 days before trial. In some cases, a provider may bring handwritten documents on the day of trial, which are admitted. The issue under the current rule is that if the proponent opts not to call a witness or put in the record the adverse party loses the opportunity to get favorable information and testimony and there is no continuance granted. Under the proposed rule the same challenges regarding the loss of favorable testimony and inadequate time would remain, but the record might still be admitted.

Ultimately a majority of the Committee concluded that despite the concerns regarding the potential impacts in certain case types, eliminating the testimony of the custodian should not raise any new concern that does not already exist or create any new issue that cannot be resolved by other currently available remedies. The rule only addresses authentication; any other concerns about the impact of such a rule change, which go more to the weight of the evidence than authenticity, can be addressed in other ways and by applying other rules. Parties will not be relieved of all the other rule requirements, and there will still be litigation around the creation and substance of the records.

Because parties need the opportunity to litigate these issues, the Committee discussed at length the need for a robust process that affords the parties adequate time and opportunity to investigate and challenge the accuracy, authenticity, and completeness of the records, including the certification; to reconcile any discrepancies; to object to the records on any other grounds; and to secure a witness when needed. There was some concern that if the custodian will no longer be available, the party challenging the record will need to independently subpoena other witnesses, which shifts the burden as to who is calling the witnesses. However, under the federal rule if the opposing party makes a certain showing, the burden does not shift off the proponent. The challenge is ensuring adequate time for the challenge process so that the burden does not unreasonably shift. The rule needs to ensure enough time for both the adverse party and the proponent to verify records, address disagreements, resolve discrepancies, and procure witnesses when necessary.

The Committee discussed whether the rule should include a specific timeframe or number of days for disclosure and for objection, or a standard as to what constitutes "reasonable" or "sufficient" notice. Although there was some support for a timeline to ensure timely disclosure, the Committee is concerned that a

specific timeline would tend to result in parties getting records exactly that many days in advance, which might not always be adequate. Parties already generally get these records during discovery and that can be insufficient at times. The Committee agrees that a reasonableness standard works better than a specified number of days because what is "reasonable" will be different across different practice areas and will be case-dependent. The Committee recommends that the rule not require a certain number of days of notice, and instead include a reasonable written notice requirement that parties can argue, and judges can apply and determine in their discretion, including whether and when to grant a continuance. If more specific rules regarding the timeline and procedure are needed, those rules belong in the procedural rules applicable to criminal, civil, CHIPS, and other case types, not in the evidence rules.

Before voting on a recommendation, the Committee considered a variety of proposals based on the rules in other states. In addition to the reasonable notice requirement and fair opportunity to challenge the record, some proposals the Committee considered also incorporated some of the federal commentary, which addresses the sufficiency of the certification, includes additional language regarding the process for challenging the records, and specifically states that all other bases for challenge and objection remain, including hearsay, relevance, and confrontation. Although some members favor including the additional language, the concern with that approach is that adding more rule language could create more litigation. Bringing the federal comments into the rule would be a unique approach; no other state includes that language in its rule. A majority of the Committee agrees it is preferable to stay within the bounds of existing law so that parties can litigate the issue by citing to existing case law. Specifically, regarding the language stating that the remaining evidence objections still apply, the Committee notes that those remaining objections are not listed in any other rule, yet they all still apply.

Finally, with regard to the variation in other states' rules, one difference is how the certification is described and defined, with the federal rule and many states requiring that the certification comply with a specific statute or rule. The Committee agrees that no such requirement or additional legal reference is necessary and that a reference to an affidavit made under penalty of perjury is adequate to describe the legal requirements of the document. Another variation in other states is whether their rules include the foreign records provision, Federal Rule of Evidence 902(12). Some states have adopted the domestic records rule only, while some have adopted the domestic and foreign records rules, either

separately or by combining both rules into paragraph (11). The Committee discussed whether Minnesota should adopt Rule 902(12), but ultimately did not vote to include foreign records as no specific need for such a rule was identified and neither the MCAA nor the AG filings propose that Minnesota adopt the foreign records rule.

III. RECOMMENDATION

Having thoroughly considered a variety of approaches, some including more specificity as to certification requirements, the procedures including timelines, and the applicability of other remaining challenges and objections, the Committee agrees that a simple approach is best so as not to unnecessarily complicate the issue. Consideration of the various approaches was a worthwhile and valuable exercise and served to solidify the Committee's confidence in its recommendation. Ultimately the Committee's majority vote and recommendation is that the Court adopt the proposal as submitted by MCAA. Two members present for the vote voted against adopting the MCAA proposal. The members who voted no prefer the inclusion of language regarding the sufficiency of the certification, the process for challenging the records, and the reservation of other objections.

The majority recommends that if any additional language or clarity is needed, it should be kept in the comments to the rule. If the Court adopts the recommended rule changes, the Committee has drafted a comment to address the reasonable notice issue and to note that all other challenges and objections to the records remain available including hearsay, relevance, and confrontation.

Finally, the Committee recommends that if the Court has concerns with the lack of specific timelines or procedure in the proposed rule amendments, that the Court consider directing that other rules committees, including but not limited to the juvenile protection and criminal rules advisory committees, review their rules to address the process, reasonableness, timing, notice, and any other procedural requirements in their own discovery rules.

Respectfully Submitted,

RULES OF EVIDENCE ADVISORY COMMITTEE

PROPOSED AMENDMENTS TO THE RULES OF EVIDENCE

Note: Throughout these proposals, deletions are indicated by a line drawn through the words, and additions are underlined.

1. Amend Rule 803(6) as follows:

(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness or by certification that complies with Rule 902(11), unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit. A memorandum, report, record, or data compilation prepared for litigation is not admissible under this exception.

2. Add a new Committee Comment to Rule 803 as follows:

Committee Comment – 2025

Rule 803(6)

Rule 803(6) has been amended to provide that under certain circumstances the foundational requirements of the rule can be satisfied as provided in Rule 902(11).

3. Add a new paragraph (11) to Rule 902 as follows:

Rule 902. Self-authentication

Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:

.
.
.
.

(11) Certified Domestic Records of a Regularly Conducted Activity.

The original or a copy of a domestic record that meets the requirements of Rule 803(6), as shown by a certification of the custodian or another qualified person in the form of an affidavit made under penalty of perjury. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record — and must make the record and certification available for inspection — so that the party has a fair opportunity to challenge them.

4. Add a new Committee Comment to Rule 902 as follows:

Committee Comment – 2025

Rule 902(11)

Rule 902(11) has been added, consistent with Federal Rule of Evidence 902(11). It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity other than through the testimony of a foundation witness. See the amendment to Rule 803(6).

A proponent establishing authenticity under this Rule must present a certification containing information that would be sufficient to establish authenticity were that information provided by a witness at trial. If the certification provides information that would be insufficient to authenticate the record if the certifying person testified, then authenticity is not established.

The rule does not automatically establish admissibility. A certification under this Rule can establish only that the proffered item has satisfied the requirements for authenticity. The adverse party remains free to object to the admissibility of the proffered record or its contents on any other grounds—including but not limited to hearsay, relevance, or the rights of confrontation in criminal cases.

The rule requires reasonable written notice of intent to authenticate a record by a certification. Because pretrial procedures vary between case types, the Committee decided not to recommend a specific notice period or a specific notice procedure beyond requiring that the notice be in writing. Instead, the rule leaves the determination of what constitutes reasonable notice to be determined on a case-by-case basis. As appropriate to the case, reasonable written notice should include sufficient time for (1) the adverse party to meaningfully investigate the records and the certification; (2) the adverse party to make any objection; (3) the court to rule on any such objection in advance of the hearing; and (4) the proponent to obtain live testimony if the

court sustains the objection.

2018 AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

In 2018 the Minnesota Supreme Court Advisory Committee on Rules of Evidence proposed amendments to Rules 404 (*Spreigl*), 702 (*(Frye/Mack)*), 1101, and a new Rule 502 (inadvertent waiver). After a public hearing the Court issued an order on November 16, 2018, rejecting the amendment to Rule 702, rejecting most of the proposed amendment to Rule 404, adopting most of the proposed rule 502 and adopting the style changes in Rule 1101.

The proposed amendment to Rule 404 was yet another attempt to address the admissibility of *Spreigl*/other crimes evidence. It attempted to address Justice Stras' concerns expressed in State v. Griffin, 887 N.W.2d 257, 266-70 (Minn. 2016) that the scope of the plan exception to the *Spreigl* doctrine had been misused by Minnesota courts. The amendment also included more specificity in the notice requirement that the evidence must be offered for a relevant purpose and not to advance a propensity argument. The Supreme Court agreed with requiring more specificity in the notice requirement, but rejected the rest of the proposed changes. *See* Order Regarding Proposed Amendments to the Minnesota Rules of Evidence, ADM10-8047 (Minn. March 28, 2018).

The new Rule 502, addressing waiver of work product or attorney-client privilege is represented as a clarifying rule. It was not intended to change Minnesota law but to codify it. The rule was modeled after Fed. R. Evid. 502. It was adopted by the Minnesota Supreme Court with some changes to limit its scope.

The rejected amendment to Rule 702, modeled after Uniform Rule 702, attempted to reconcile recent conflicting Minnesota Supreme Court decisions addressing expert testimony by clarifying what is meant by foundational reliability. The proposed amendment made "general acceptance in the relevant community" one of several factors to consider when assessing foundational reliability and not a pre-requisite to admissibility. This, in theory, would change Minnesota law, but in practice was quite similar to the approach used by the Court in Doe v. Archdiocese of St. Paul, 817 N.W.2d 150, 164 (Minn. 2012). The Court was unwilling to adopt the proposed rule that in its view

would overrule its precedent.

The proposed change to Rule 1101 was a change in style, not substance. It was adopted by the Court. The Advisory Committee Report and Proposed Amendments are provided below.

REPORT AND PROPOSED AMENDMENTS TO THE

MINNESOTA RULES OF EVIDENCE

MINNESOTA SUPREME COURT

RULES OF EVIDENCE ADVISORY COMMITTEE

ADM10-8047

February 28, 2018

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I. INTRODUCTION

Since its last report to the Court, the Rules of Evidence Advisory Committee met throughout 2016 and 2017 and discussed a

* Term ended 2/28/2017

number of issues as summarized below. The Committee hereby recommends amendments to four Rules of Evidence.

II. PROPOSED AMENDMENTS

A. Rule 404 [THE SUPREME COURT REJECTED THE SUBSTANTIVE AMENDMENT RELATING TO PROVING PLAN AND ADOPTED THE ENHANCED NOTICE REQUIREMENT].

The Committee studied issues regarding Rule 404(b) and *Spreigl* doctrine for several years. This study was undertaken in part at the request of some members of the Court. See (Stras, J., concurring).

The Committee discussed the difficulties in distinguishing permissible from impermissible evidence under Rule 404(b) and the *Spreigl* doctrine. The issues are twofold: a procedural notice issue, and the substantive common-scheme-or-plan issue. Regarding the procedural issue, although the rule requires the prosecutor to clearly indicate what the evidence will be offered to prove, members noted that in practice *Spreigl* notice often lacks specificity, sometimes consisting only of a checkbox list of the purposes allowed under the rule. Regarding the substantive issue, under the current rule, common scheme or plan is hard to articulate and propensity is hard to differentiate.

The Committee approached various groups for feedback on Rule 404(b) to gauge the interest in a rule change and identify any other issues or concerns. Those contacted for input included judges, public defenders, and the Minnesota County Attorneys Association (MCAA). While there was no objection to an enhanced notice requirement, prosecutors expressed concern about any rule change that would limit the admissibility of Spreigl evidence, and the potential for exclusion of evidence over a notice requirement when the episode being offered is part of the crime.

As to the notice issue, the Committee agrees that adequate notice must consist of something more than a checkbox list, but need not be a full memorandum. The proposed rule requires the prosecutor to provide a summary of the evidence and the specific purpose(s) for which the evidence will be offered. The amended rule is intended to clarify the notice obligation and provide the needed specificity to facilitate issue resolution.

As to the substantive issue, the Committee extensively debated the matter and ultimately determined that the rule should expressly require the proponent of the evidence to estab-

lish a connection between the other crime, wrong, or act on one hand, and the current allegations on the other. A marginally similar bank robbery from 5 years ago would be admissible if there was evidence connecting the commission of the prior crime and the current charge. If the past crime is not so related to the current charge, then the evidence is just propensity evidence, which is precisely what Rule 404 is intended to prohibit. For this reason, the Committee proposes the rule changes outlined below, which will provide the needed boundaries and guidance on this issue and bring Minnesota in line with other states' more traditional approach.

The Committee recognizes that the proposed amendment will only alter common-scheme-or-plan, and thus will not affect other *Spreigl* doctrines. Nonetheless, the Committee believes the proposed amendment is a sensible change. Two members of the committee dissented. The members opposed further limits on the admissibility of other crimes evidence, particularly in sexual assault cases where it is often used to refute a consent defense. The dissenters also felt that the proposed language was confusing and unnecessarily blurred the line between other crimes evidence and immediate episode evidence.

B. Rule 502 [THE COURT ADOPTED THE PROPOSAL WITH MINOR CHANGES].

The Committee proposes adding a new Rule 502, which is based on Federal Rule 502. The rule does not affect the substantive scope of the attorney-client privilege. Rather, it seeks to clarify ancillary issues, including issues regarding waiver of the privilege. Two primary issues are addressed. First, the rule clarifies the scope of any waiver of the privilege. Second, the rule clarifies when inadvertent disclosure constitutes waiver. Federal Rule 502 has been in effect for a decade, and it has succeeded in clarifying these issues in federal practice. The Committee is of the opinion that a similar rule would be beneficial and would serve the trial courts well.

The Committee discussed concerns about its rulemaking authority in this area. The Rules Enabling Act for the Rules of Evidence, Minn. Stat. § 480.0591, subd. 6(1), states that the Court shall not have the power to promulgate rules of evidence which conflict, modify, or supersede substantive privilege law. Minn. Stat. § 595.02, subd. 1(b), the substantive statute that governs attorney-client privilege, is somewhat cumbersome and grounded in archaic law regarding witness competency. In modern litigation, inadvertent disclosure happens frequently, and the

substantive privilege statute does not explicitly address waiver. In sum, while it is clear that the issues covered by Rule 502 should be addressed, it is unclear whether those issues should be addressed in the Rules of Evidence.

Two members of the Committee dissented from the proposal. They believe that the proposed rule does modify the statute by changing from a consent standard to a negligence standard for waiver, and therefore, that the proposed rule if adopted would exceed the Court's statutory rulemaking authority. In addition to that ground, one of the dissenters disagreed on policy grounds with the proposed rule's move to a negligence standard. The majority of the Committee, however, did not express any reservations about the merits of Proposed Rule 502 and maintains that, because the proposed rule does not modify substantive privilege law, it is consistent with the Rules Enabling Act.

The Committee defers to the Supreme Court on the separation-of-powers question and whether the court should adopt a rule and/or approach the legislature to request statutory amendments. Other issues of privilege law may merit consideration in the future, and the judicial branch may wish to work with the legislature to address additional issues of privilege law. If requested, the Committee would be willing to work with the Court or the legislature on these issues.

C. Rule 702 [THE COURT REJECTED THE PROPOSED AMENDMENT].

The Committee has been studying potential changes to Rule 702 since 2014. During that time, the Committee has conducted substantial research regarding the rules and practices in other jurisdictions, and the Committee has also consulted with various bar associations and other organizations. The Committee members have extensively debated the matter. The Committee recommends amending Rule 702 to clarify the framework for assessing the admissibility of expert testimony. The amended rule includes a factor test that is taken from the Uniform Rules of Evidence, which are promulgated by the National Conference of Commissioners on Uniform State Laws.

The amended rule accomplishes several goals. First, it provides additional guidance to trial judges about how they should conduct the inquiry into foundational reliability. Second, it clarifies how the framework applies to different experts. Under the current rule, there has been confusion about different standards for scientific and other experts. The amended rule clarifies

that the same general framework applies to all expert testimony. Third, it clarifies that the Frye general acceptance inquiry is simply one aspect of the reliability inquiry. The current rule treats Frye as a separate "prong," but in practice, it has not functioned as such. The Committee is aware of no published cases finding the Frye prong satisfied but the Mack prong unsatisfied, or vice versa. Consistent with that practice, the proposed rule treats general acceptance as one aspect of the overall reliability inquiry rather than an independent requirement of admissibility.

Fourth and finally, the proposed rule solves a problem of mismatch between the current rule and current case law. Rule 702 in Minnesota was last amended in 2006 in an effort to codify then-current case law. Since then, however, the case law has changed as the Court altered standards for admissibility. The Committee believes that the proposed rule more accurately reflects the approach endorsed by the Court's more recent cases. See Doe v. Archdiocese of St. Paul, 817 N.W.2d 150, 164 (Minn. 2012); State v. Obeta, 796 N.W.2d 282, 289 (Minn. 2011); see also In re: 3M Bair Hugger Litigation, No. 62-CV-15-6432 (Minn. Dist. Ct. 2nd Dist. Jan. 8, 2018).

The Committee is mindful that any changes to Rule 702 will be controversial, especially to civil litigators. Many members of the plaintiffs' bar dislike the federal standard of Daubert and its progeny because they believe that federal courts have unduly restricted the admissibility of plaintiffs' experts. Conversely, many members of the civil defense bar, as well as business groups, strongly support Daubert adoption. In short, conventional wisdom is that Daubert is good for civil defense and bad for plaintiffs. Empirical evidence regarding Daubert adoption in state courts, however, may not support conventional wisdom.

In any event, the proposed rule change is not an adoption of Daubert or a rejection of Minnesota case law. The intent of the amendment is not to make it either easier or harder to admit expert testimony. Rather, the goal of the proposed rule change is to clarify the law, provide guideposts for what foundational reliability means, and add structure to the analysis. And in interpreting the amended rule, Minnesota courts would not be bound by interpretations that courts in other jurisdictions apply to their rules of evidence.

Four members of the committee dissented. They believe that the current rule appropriately describes the standards of admissibility, and that the proposed change will cause needless confusion, as well as opposition from some constituencies. They maintain that the proposed rule effectively adopts the Daubert

standard and overrules the Frye-Mack standard, which the Court has repeatedly reaffirmed as governing law in Minnesota. They believe that any change to that standard should come from the Court through changes in case law, rather than changes in court rule recommended by the Committee.

Conversely, several members of the committee would have preferred simply adopting the language of Federal Rule 702. They believe that adopting the federal framework would provide more clarity and consistency, as well as reduce any incentives for forum-shopping. Those members, however, uniformly believe that the rule proposed herein is both a sensible compromise and also an improvement over the existing rule.

The issue is controversial, and the debate in the Committee was spirited. Ultimately, a majority of the committee determined that the proposed amendment will improve the law by clarifying the standards of admissibility for expert testimony.

D. Rule 1101 [THE COURT ADOPTED THE PROPOSED AMENDMENT].

A Committee member raised an issue regarding Rule 1101(b), noting that the title is redundant for grand juries and is unclear as to whether the section on miscellaneous proceedings is an exclusive list. The Committee proposes clarifying amendments, which are not intended to alter existing law, as explained in the Committee's comment. The proposed amendments to Rule 1101 were unanimously approved by the committee.

III. OTHER ISSUES

The Court previously ordered the Rules of Evidence Advisory Committee and the Advisory Committee on Rules of Criminal Procedure to study whether and how the Rules of Evidence should apply to restitution hearings. As previously reported by a joint report, the two committees will form a joint subcommittee to continue working on that and related issues. The two committees will jointly report any recommended amendments to the Court. The Court also previously ordered the Rules of Evidence Advisory Committee to address eyewitness identification issues. A subcommittee has met several times, and has begun to consider a wide range of possible approaches to the problem across different areas of the judicial system. The Committee has no amendments to propose on that issue at this time, but will continue to study the issue, in consultation with the Supreme Court liaison, and will report to the Court as soon as practicable.

In addition to those two pending issues, the Committee will continue to monitor recent and pending amendments to the Federal Rules of Evidence, including the restyling amendments. The Committee will continue to monitor other issues of evidence law as they arise, and will address any issues as directed by the Supreme Court.

2006 AMENDMENTS TO THE MINNESOTA RULES OF EVIDENCE

On July 18, 2006, the Minnesota Supreme Court promulgated amendments to the Minnesota Rules of Evidence, effective September 1, 2006. The amendments do not reflect a change in practice, but clarify the language of the rules and conform the rules to the current practice. The rules changes were recommended by the Supreme Court Advisory Committee on Rules of Evidence. The Advisory Committee's preliminary comment, set forth below, provides a summary and explanation of the proposed amendments and the Committee's work.

2006 Advisory Committee Preliminary Comment

Chief Justice Kathleen A. Blatz signed an Order of the Minnesota Supreme Court on May 3, 2005 reconstituting the advisory committee on rules of evidence. The following members were appointed: Lisa M. Agrimonti, Minneapolis; Phillip A. Cole, Minneapolis; Elizabeth V. Cutter, Minneapolis; Christine Funk, Stillwater; Melissa Haley, Minneapolis; Gary Hoch, Minneapolis; Peter B. Knapp, St. Paul; Honorable Harriet Lansing, Court of Appeals; Brenda L. Miller, Waseca; Honorable James A. Morrow, Anoka County District Judge; Jeanne L. Schleh, St. Paul; Marc A. Sebora, Hutchinson; Honorable Gordon W. Shumaker, Court of Appeals; Peter W. Sipkins, Minneapolis; Peter N. Thompson, St. Paul (Chair); Honorable Edward Toussaint, Jr., Court of Appeals; John D. Undem, Grand Rapids; and Honorable Edward S. Wilson, Ramsey County District Judge. The order appointed the Honorable Alan C. Page, Associate Justice Minnesota Supreme Court to serve as liaison to the Supreme Court and Judith L. Rehak as staff to the advisory committee.

The order noted that the rules of evidence had not been reviewed since 1990. The Court charged the committee with the task of studying the Minnesota Rules of Evidence and making appropriate recommendations to the Court. The committee scheduled monthly meetings to study and deliberate. Because the Minnesota Rules of Evidence were modeled after the Federal Rules of Evidence, the committee reviewed the numerous changes in the Federal Rules of Evidence to determine whether the Minnesota rule should also be amended. In addition, recent cases and

statutes were examined to determine if new developments or difficulty in application of the current rules merited amending the Rules of Evidence.

In light of the fact that the rules had not been reviewed in fifteen years, the most noteworthy conclusion was that very few rules needed amending. The Minnesota Rules of Evidence appear to be working quite well in Minnesota courts, and the text of the rules do not create substantial appellate litigation. The committee did make recommendations for changes in some rules as set forth below.

Amendments Making Substantive Changes

Few of the proposed amendments reflect a substantive change in the rule. The amendments reflecting a substantive change in the rule include:

1. Rule 404(a) (allowing the prosecutor to admit evidence of a pertinent character trait of the accused if the accused opens the door by admitting evidence of that character trait of the victim, usually on the issue of who was the first aggressor) [Not approved by the Court];
2. Rule 410 (allowing false statements under oath made in a plea that is withdrawn or rejected to be admissible in a subsequent perjury prosecution) [Not approved by the Court]; and
3. Rule 804(b) (imposing a forfeiture that would preclude a party from raising a hearsay objection to a statement from an unavailable declarant when the party, through wrongdoing, intentionally procured the declarant's unavailability) [Not approved by the Court].

Amendments Codifying Existing Case Law or Practice

Most of the recommendations involved codifying existing case law or practice so that practitioners and judges can find the applicable Minnesota approach by reading the evidence rule. These amended rules include:

1. Rule 103 (codifying Minnesota practice that does not require repetitive objections to preserve an issue once ruled on definitively by the trial judge);
2. Rule 404(b) (codifying the Spreigl rules);
3. Rule 407 (clarifying the language to indicate that the protection against the admission of subsequent remedial is applicable in product liability and strict liability cases);
4. Rule 608(c) (codifying State v. Fallin, 540 N.W.2d 518 (Minn.1995) (requiring the prosecutor to provide notice and a sufficient foundation for impeaching a defendant or a

defense witness with evidence of bad acts reflecting on character for truthfulness or untruthfulness);
5. Rule 614 (codifying State v. Costello, 646 N.W.2d 204 (Minn. 2002) (precluding jurors from interrogating witnesses in criminal cases); and
6. Rule 702 (codifying the Minnesota approach to expert testimony).

Amendments Clarifying Language in the Rules

The remaining changes are intended to clarify or update the language in the rules and not to change the application of the rule. These changes include:

1. Rule 404(a)(b) and 412 (referring to the complainant in a sexual assault case as the "alleged" victim and changing the description of the types of cases that implicate Rule 412);
2. Rule 608(b) (clarifying that the rule is applicable only if the witness is impeached on the issue of character for truthfulness);
3. Rule 801(d)(2) (changing the title of the rule to better reflect the text of the rule); and
4. Merging Rules 803(24) and 804(b)(5) into new Rule 807.

Amendments to Advisory Committee Comments

Advisory Committee Comments accompany each rule change. In addition the committee amended the comments to:

1. Rule 604 (referencing the requirements for qualifying court interpreters as expert witnesses set forth in Minn. Gen. R. Prac. 8); and
2. Rule 801 (discussing recent decisions addressing the right to confrontation in criminal cases).

Areas Studied with No Recommended Changes

The committee studied a number of other issues but decided against recommending additional amendments to the Rules of Evidence. In particular the committee reviewed the current statutes, decisions, and practices relating to DNA evidence. The committee concluded that no change in the evidence rules is required. The committee considered other amendments adopted in the Federal Rules of Evidence. For example, the committee addressed Fed. R. Evid. 413-15 (allowing evidence of similar acts of sexual misconduct in sexual assault and child molestation cases). The committee believed that these issues are better left addressed under Minnesota's Spreigl analysis as codified in Rule 404(b).

The committee also reviewed amendments to Fed. R. Evid. 803(6) and 902(11) and (12). These rules authorize self-authentication of business records and a modification of Rule 803(6) that make self-authenticated business records admissible as an exception to the hearsay rule. Committee members concluded that these changes were not appropriate for Minnesota courts. These rules raise concerns in the criminal law context because of their potential impact on a defendant's right to confrontation. In addition, the rules might adversely affect civil practice. In Minnesota courts, business record issues are typically handled through records custodian depositions and stipulation. In the few civil cases where there is a dispute about the admissibility of a business record, the issue is readily determined by the court prior to trial without an evidentiary hearing. The federal rules could discourage this efficient means of addressing business records and would create a new process under which challenges to admissibility of a document would likely need to be addressed at a pre-trial evidentiary hearing to allow for the questioning of the records custodian, who under the proposed rules would sign a summary affidavit. The committee concluded that adoption of the federal certification process could potentially complicate rather than simplify the admissibility of business records in Minnesota courts.

The committee also reviewed issues relating to child witnesses, including the text of the Uniform Child Witness Testimony by Alternative Methods Act. The committee agreed that no change in the rules of evidence were called for, but referred the Uniform Act to the General Rules of Practice Committee for its consideration. The committee reviewed, but decided not to propose a rule making apologies inadmissible in a medical malpractice lawsuit.

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