

AGENDA

JOINT PROCEDURE COMMITTEE

September 29-30, 2016  
Bismarck, N.D.

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I.

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JUSTICES OF THE NORTH DAKOTA  
SUPREME COURT

Chief Justice  
Gerald W. VandeWalle

Justices  
Dale V. Sandstrom  
Carol Ronning Kapsner  
Daniel J. Crothers  
Lisa Fair McEvers

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JOINT PROCEDURE COMMITTEE  
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Laurie Fontaine, District Judge  
William A. Herauf, District Judge  
Jon J. Jensen, District Judge  
Steven L. Marquart, District Judge  
Steven McCullough, District Judge  
Thomas E. Merrick, District Judge  
David E. Reich, District Judge  
Robin Schmidt, District Judge

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Sean Foss  
Robert Hoy  
Margaret Moore Jackson  
Carol K. Larson  
Lonnie Olson  
Zachary Pelham  
Kent A. Reiersen  
Robert Schultz  
Lloyd Suhr

Staff Attorney  
Michael Hagburg

# MINUTES OF MEETING

Joint Procedure Committee  
May 12-13, 2016

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## CALL TO ORDER

The meeting was called to order at 1:00 p.m., on May 12, 2016, by the Chair, Justice Dale Sandstrom.

## ATTENDANCE

### Present:

Justice Dale Sandstrom, Chair  
Honorable Todd L. Cresap  
Honorable Laurie Fontaine  
Honorable Steven L. Marquart  
Honorable Steven McCullough  
Honorable Thomas E. Merrick (Friday only)  
Honorable David E. Reich  
Honorable Robin Schmidt  
Mr. Bradley Beehler  
Mr. Sean Foss  
Mr. Robert Hoy  
Prof. Margaret Jackson  
Ms. Carol Larson  
Mr. Lonnie Olson

Mr. Kent Reiersen  
Mr. Robert Schultz  
Mr. Lloyd Suhr

Absent:

Honorable William A. Herauf  
Honorable Jon Jensen  
Mr. Zachary Pelham

Staff:

Mike Hagburg  
Kim Hoge

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PRELIMINARY MATTERS

The Chair introduced a new committee member, Mr. Robert Schultz.

APPROVAL OF MINUTES

Judge Reich MOVED to approve the minutes. Ms. Larson seconded. By unanimous consent, a typographical error on page 4 was corrected. The motion to approve the minutes CARRIED.

Rule 43, N.D.R.Crim.P., Defendant's Presence (PAGES 26-37 OF THE AGENDA MATERIALS)

Staff explained that, at the January meeting, the committee had approved proposed amendments to Rule 10 and Rule 43 to clarify that a represented defendant in a felony case may waive the arraignment in writing. Staff said the committee sent these proposals directly to the Court. The Court considered the proposals, made some changes to Rule 43 related to acknowledgment of rights, and has now referred this rule back to the committee for work on a proposed form for defendants who wish to waive the preliminary hearing and the arraignment. Staff provided the committee with a proposed new N.D.R.Crim.P. 18 and proposed amendments to existing N.D.R.Crim.P. 17.

Judge Marquart MOVED to approve the proposed amendments to Rule 43. Mr. Beehler seconded. Motion CARRIED.

A member said there is a distinction between felony offenses and misdemeanor offenses. The member said under the misdemeanor waiver language a defendant can enter

a guilty plea on paper and should be required to acknowledge in the document the rights listed in Rule 11. The member said under the felony waiver language, the defendant is not allowed to enter a guilty plea on paper and should not need to acknowledge a waiver of Rule 11 rights.

The motion to return the proposed amendments to Rule 43 to the Supreme Court CARRIED unanimously.

Mr. Hoy MOVED to approve the proposed amendments to N.D.R.Crim.P. Form 17. Mr. Beehler seconded.

A member said that the proposed new language on the possibility of deportation was related to a collateral consequence of a conviction. The member questioned whether collateral consequences should be included in the form. The member said if the deportation consequences were included on the form they should be placed with the rights waived when pleading guilty.

The Chair said the U.S. Supreme Court had created the requirement that defendants needed to be advised of the possible deportation consequences that go along with a guilty plea. A member said that in Cass County, defendants were informed of all their rights at the initial appearance, including collateral consequences, so it would not be necessary to repeat the rights in a form. A member replied that the form would be for defendants who make no appearance.

A member said that the case record would be fine if defendants were informed of their rights at the initial appearance. Members replied that sometimes defendants do not show at the initial appearance and that other counties might not inform defendants of their rights to the extent done in Cass County.

A member said that there are many collateral consequences that might apply in misdemeanor cases that are not listed in the form. The Chair pointed out that the U.S. Supreme Court had decided that defendants must be advised of the deportation collateral consequence. A member said there are other collateral consequences that impact constitutional rights, such as firearms restrictions that can be imposed in domestic violence cases. The member said courts usually advise about these collateral consequences. The Chair said creating a written record that a defendant was advised about deportation consequences will limit the issue from coming up on post conviction relief.

A member suggested that the proposed language discussing deportation consequences should be in a separate paragraph.

Judge Reich MOVED to move the deportation consequences language into a separate paragraph number 6 and to renumber the remainder of the rule accordingly. Judge Marquart seconded.

A member said it would be important to also revise any internal references to paragraph numbers to match the renumbered paragraphs. Staff said it looked like only one reference would need to be renumbered.

Motion CARRIED.

A member said that paragraphs 5(a) and 5(b) of the form seem to be derived from Rule 11(b), which deals with the advice the court must provide to a defendant when accepting a plea of guilty. The member said the form did not seem to cover restitution, which the court must advise about under Rule 11(b). The member said the form should probably include an advisement that the court may order restitution.

Judge McCullough moved to add a new paragraph 7 reading: "I understand that I may be ordered to pay restitution." Judge Marquart seconded. Motion CARRIED.

Mr. Hoy MOVED to delete language from the lawyer's signature block at the end of the form: "and that I personally observed the defendant date and sign the above petition." Mr. Suhr seconded.

A member said that a lawyer does not have to observe the defendant signing the petition because the document is notarized. The member said lawyers and defendants often sign these documents at separate times and in different places. The member said a lawyer might email the form to the client and explain the form in the email. The defendant would then sign the form, have it notarized and mail it back to the attorney.

Motion CARRIED.

Prof. Jackson moved to delete the "19\_\_" language in the form's signature blocks and replace it with blank lines. Ms. Larson seconded. Motion CARRIED.

The motion to send the proposed amendments to Form 17 to the Supreme Court CARRIED unanimously.

Judge Marquart MOVED to approved proposed new N.D.R.Crim.P. Form 18. Judge Reich seconded.

Staff said Judge David Nelson had suggested by email that language be added to the form warning the defendant of the possible collateral consequence of deportation. Staff said Judge Nelson suggested this language be added to the part of the form where defendants were informed they could ask for a consular officer to be notified of their arrest, on page 34 of the materials.

A member said that in the judge's benchbook, the deportation warning was made after the advice about contacting a consular officer so it may be appropriate to put the two advisories together. A member said that the purpose of Form 18 was to enter a not guilty plea and it might not be necessary to advise of deportation consequences because this is something that is required only when a guilty plea is made. The Chair said if the committee desired to keep the language in Form 18 parallel to Form 17, the deportation consequence language would need to be placed later in the form. The Chair said it was important that defendants be advised of deportation consequences and that failing to advise had been the basis of many post conviction relief petitions in recent years.

Mr. Hoy MOVED to delete paragraphs 3-8 on page 33-34 of proposed Form 18. Ms. Jackson seconded.

A member said this form would only be used in a felony, in which case the defendant would already have received a complete explanation of rights at the initial appearance. The member said the preliminary hearing is a probable cause hearing and to waive this all the defendant should have to acknowledge is an understanding of the charge. The member said that the form is designed to allow the defendant to waive the preliminary hearing, arraignment and to enter a plea of not guilty so there is no need to explain all the rights a defendant who later pleads guilty might waive. The member said this is why it would be appropriate to delete the language in paragraphs 3-8.

The Chair asked whether there were any required advisements connected with the arraignment. A member said the defendant is provided with the complaint at the arraignment.

A member said the complete acknowledgment of rights should remain part of Form 18. The member said that sometimes defendants are not advised of all their rights at the initial appearance, they might get a shorter version. The member said if the defendant waives the preliminary hearing, they might not be advised of all their rights. The member said that even if defendants are advised of all their rights at the initial appearance, there is no harm having an acknowledgment of rights in Form 18 because this would create a written record they were advised of all their rights.

A member said it would be fine to include an acknowledgment of all the rights in the form. The member said that including a reference to Rule 11(b) in Rule 43(b)(1), however, is not necessary because Rule 11(b) refers to rights waived when a defendant pleads guilty and a defendant cannot plead guilty on paper under Rule 43(b)(1). A member said if there are counties in which defendants are not read all their rights at the initial appearance there is no harm keeping the list of rights in Form 18.

By unanimous consent, Mr. Hoy was allowed to withdraw his motion.

A member said that the language in paragraph 6 on page 34 on a defendant's right to notify a consular officer was not needed in Form 18 because advice of this right was required to be provided at the initial appearance. The member said the initial appearance would be done by the time a defendant requested to waive the preliminary hearing using Form 18.

Mr. Suhr MOVED to delete paragraph 6 on page 34. Mr. Hoy seconded.

A member said that at some initial appearances, the consular officer advice may not be provided. The member said there is no uniformity across the state as to the advice provided at the initial appearance. The Chair said if the advice was acknowledged in the form, this would correct any failure to provide the advice that may have taken place at the initial appearance. A member agreed it would be good to retain the language in the form to make up for any deficiencies at the initial appearance.

A member said that there is an express requirement in the rules that the consular office advice be provided at the initial appearance. The member said that having the advice in the form may give the impression that it is not important to provide the consular officer advice at the initial appearance.

Motion FAILED.

The Chair asked whether there were any suggestions based on Judge Nelson's suggestion that the form contain advice related to deportation consequences. A member said that, because a guilty plea cannot be entered using this form, it is not necessary to include the deportation consequence advice. A member said it would be useful to add the advice to the form so that there would be a written acknowledgment on the record that the advice had been given.

Judge Schmidt MOVED to add deportation consequence language to the end of line 38 on page 34: "I understand that a person convicted of a crime who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to

the United States in the future.” Mr. Olson seconded.

A member said one effect of adding this language to the form would be a reduction in requests for transcripts of initial appearances because the acknowledgment of rights related to non-citizens would be in writing.

Motion CARRIED.

A member asked whether additional language should be added to make it clear that the defendant could be denied citizenship specifically to the United States.

Ms. Larson MOVED to amend to add the words “United States” before the word “citizenship” in the new deportation warning language. Mr. Schultz seconded.

A member said including the additional proposed language would be a deviation from the text of Rule 11. The member said that the current language is an exact quote from the rule.

Motion FAILED 6-8.

A member said that the language beginning at line 12 on page 33 should be revised so that any mandatory minimum sentences in a case are clear. A member suggested that a new second sentence using language similar to the existing first sentence should be added specifically stating the applicable mandatory minimum sentences. The member said it was important for defendants to understand when the charges against them had mandatory minimums.

By unanimous consent, the term “days” was replaced with “years” at lines 13-14 on pages 33-34.

Judge Fontaine MOVED to amend lines 13-16 on pages 33-34 to add a second sentence as follows: “I understand the mandatory minimum sentence for the offense with which I am charged is imprisonment of \_\_\_\_\_ and a fine of \_\_\_\_\_.” Judge McCullough seconded.

A member asked whether administrative fees should be added to the form. A member replied that mandatory fees were not part of the statutory penalty. A member said judges have discretion to waive the fees so fees are not mandatory. The Chair asked whether there was a mandatory minimum that required a person to be imprisoned and pay a fine. Members responded that DUI cases require imprisonment and fines. A member said that most other

crimes have only a mandatory prison sentence.

Motion CARRIED.

Judge McCullough MOVED to make the first sentence of paragraph 3 consistent with the new second sentence as follows: "I understand the maximum possible sentence for the offense with which I am charged is imprisonment of \_\_\_\_\_ and a fine of \_\_\_\_." Prof. Jackson seconded. Motion CARRIED.

A member said courts are currently giving a firearms advisory: if defendants plead guilty to certain offenses, they will be precluded from using or possessing firearms or ammunition. A member said those are collateral consequences but they do not have the same impact on constitutional rights as the citizenship and deportation consequences. The Chair said courts can advise of collateral consequences but they should not give the impression they are advising of all possible collateral consequences.

Mr. Hoy MOVED to amend lines 88-90 on page 36 to remove the requirement that the attorney personally witness the defendant's signing and dating of the petition. Mr. Suhr seconded.

A member said that attorneys frequently work remotely with their clients in putting together these petitions and it is not practical for them to observe the defendant signing the petitions. The member said the notary will fulfill the requirement to observe the signing.

Motion CARRIED.

Mr. Hoy MOVED to insert text at line 66 on page 35 after the "the" as follows: "preliminary hearing be waived and the." Judge Marquart seconded. Motion CARRIED.

The Chair said he noticed that both the terms "preliminary hearing" and "preliminary examination" were used within the form. Staff said Rule 5.1 was titled "Preliminary Examination" so changing the term to "examination" throughout the form would make it consistent with the rule. The Chair suggested it may be better to change "examination" to "hearing" throughout the form and the rules because it was the widely used common term. Staff said parts of Rule 5.1 use the term "examination" while other parts use the term "hearing." Members of the committee said "preliminary hearing" was the commonly used term.

By unanimous consent, the word "examination" was changed to "hearing" at line 65 on page 35.

A member asked why the form stated that “the Court” would enter a plea of not guilty for the defendant. The member asked why the defendant would not be the person entering the plea. The member said the court generally only enters a plea on behalf of the defendant when the defendant refuses to enter a plea. A member said it is the judge that has the authority and discretion to allow the waivers requested in the form and it is appropriate to characterize any plea entered in the defendant’s absence as entered by the court. The Chair said the court may decide to have the defendant show up instead of allowing a waiver.

A member said that in Cass County, the defendant may be allowed to waive presence at the preliminary hearing and arraignment, but the attorney is required to show up in court with the waiver form. A member said this is not the procedure followed everywhere in the state and the real advantage of having the rule change and the form is that neither the client nor the lawyers need to show up in person, which saves the client money and the lawyer time that may have been spent in a long drive across the state. A member said it also clears the court’s schedule to allow everything to be done on paper rather than requiring lawyers to appear in court to turn in documents. A member said the rule allows the court discretion to accept or reject a written waiver.

A member said it is good to have the attorney turn in the waiver form in person because if there are unanticipated problems, the lawyer can work with the court to resolve them. A member said the solution in such a case is to deny the written waiver in the case. Members said that the court has discretion to handle waiver requests in whatever way it prefers.

Judge Reich MOVED to add “and arraignment in open court” to the new language at line 66 on page 35. Judge Cresap seconded. Motion CARRIED.

The motion to send the proposed new Form 18 to the Supreme Court CARRIED.

Judge Fontaine MOVED to further amend Form 17 to bring it into conformity with the amendments to Form 18. Judge Marquart seconded.

Mr. Schulz MOVED to amend the motion to remove the “misdemeanor” from the first sentence paragraph 5 of Form 17. Mr. Beehler seconded. Motion CARRIED.

A member suggested that an additional blank be added to the end of paragraph 5 so that any mandatory offense-dependent conditions (such as alcohol monitoring) could be added to the mandatory minimum advisement. A member said that the parties would likely be preparing the form and would need to add in any mandatory minimums that might apply.

By unanimous consent, “and the following requirements:” was added to the mandatory minimums section of paragraph 5.

The motion to further amend Form 17 CARRIED.

Judge McCullough MOVED to further amend Rule 43 at line 25 on page 28 to delete “and 11(b).” Mr. Schulz seconded.

A member said that the motion addresses the fact that a felony defendant will not be allowed to submit a guilty plea on paper—a felony defendant may only waive presence to enter a not guilty plea. The member said that, because the felony defendant cannot enter a guilty plea on paper, Rule 11 advisements that apply only to guilty plea proceedings are not necessary before allowing a waiver of presence to enter a not guilty plea. The member said Form 18 would need to be reworked if all the Rule 11 advisements were required before allowing a waiver to enter a not guilty plea.

The motion to further amend Rule 43 CARRIED.

Staff was instructed to prepare amendments to N.D.R.Crim.P. 5, 5.1, 7 and 9 for consideration by the committee at the Friday session, replacing the term “preliminary examination” in these rules with “preliminary hearing.”

RULE 26, N.D.R.Civ.P., GENERAL PROVISIONS GOVERNING DISCOVERY (PAGES 38-81 OF THE AGENDA MATERIAL)

Staff said that proposed amendments to Rule 26 had been prepared based on suggestions submitted in a letter from attorney Derrick Braaten that the committee reviewed at the January meeting. Mr. Braaten recommended that Rule 26 be amended to make it more consistent with the federal rule’s provisions on discovery of material related to expert witnesses. Staff said that the proposed amendments also consolidated language in the rule related to electronically stored information in subparagraph (b)(1)(B)(ii).

Judge Marquart MOVED to approve the proposed amendments to Rule 26. Prof. Jackson seconded.

The Chair suggested the committee begin by looking at the changes related to consolidating the rule text on electronically stored information. There were no objections to these proposed changes.

The committee then addressed the proposed amendment that would allow attorneys to obtain a report from an expert witness expected to testify at trial. Staff said the proposed amendment was adapted from the federal rule language.

A member said that the proposal would allow a party to require an expert witness to produce a report. Staff said experts are required to prepare reports in federal cases and this would extend the requirement to state cases. Staff said an alternative would be to require disclosure through interrogatories or other means of the material the expert would otherwise include in a report. A member said if the information is sought through interrogatories, there is a limit on the number allowed. A member said that a report could be requested under Rule 34, which requires production of documents. A member said that not all experts prepare reports and the proposal would require them now to do so at the opposing party's behest. A member said this would not really be a request for production but a request for creation.

A member asked why Rule 26's language was different from the federal rule. Staff explained that North Dakota has not adopted the part of Fed.R.Civ.P. 26 that requires preliminary disclosures so Rule 26 does not have an expert disclosure requirement. A member said the federal rule requires an expert report containing the items listed in the proposed new language. A member said if the proposed language were adopted, an expert report would likely be requested in every case that involved an expert. The member said, therefore, that the committee should consider whether to make preparation of an expert report mandatory as in the federal rule.

Mr. Reiersen MOVED to amend at lines 96-97 on page 44, replacing the language after "a party may" with "utilize discovery to obtain."

A member said the proposed change would allow a party to use discovery methods to obtain detailed information about an expert's opinion without requiring preparation of an expert report. A member said the effort involved on the part of the expert would be the same as would be expended if a report was required because the same detailed information would need to be produced.

Motion FAILED for lack of a second.

Judge McCullough MOVED to delete the proposed new language at lines 94-107 on pages 44-45. Judge Marquart seconded.

Staff said the proposed amendment had been prepared in response to Mr. Braaten's letter and draft brief, which asked for more details in the rule about the kind of information that could be obtained from an expert. A member said detailed information can be obtained

from experts under the existing rule if a deposition of the expert is taken. A member said if a report could be obtained, as is the practice under the federal rules, a deposition would not always be needed. A member said detailed information about an expert's opinions is difficult to obtain through interrogatories because these must be directed to a party.

A member asked why North Dakota had not followed the federal rule on requiring disclosures. Staff said the committee had consistently opposed proposals to amend Rule 26 to add a preliminary disclosure requirement. A member said that if the committee was considering requiring disclosures from experts it should also incorporate the other federal disclosure requirements into the rule. The member said this would allow courts and attorneys to seek guidance from federal cases that had interpreted the rule.

Motion CARRIED 11-2.

A member asked why the proposal would delete existing language related to overly burdensome discovery from lines 109-110 on page 45. Staff said deletion was proposed because the federal rule no longer includes the language.

Judge McCullough MOVED to delete the proposed new language at lines 110-125 on pages 45-46. Mr. Beehler seconded.

A member said that the language that would be deleted under the motion seems to relate to experts who would make reports. A member said it is preferable that communications between an expert and an attorney not have any special protections and that the opposing party should be able to inquire into these communications through cross-examination.

A member said the conflict between the federal rule, under which expert/attorney communications are not discoverable and the state rule, where they are, can create complications for lawyers. The member said some protection for communication is appropriate because lawyers discuss legal theories and other confidential matters with experts. The member said that an expert is hired by a party and the only truly independent expert is a master hired by the court.

Motion CARRIED 11-2.

By unanimous consent, all references to the now deleted proposed materials will revert back to existing text.

Mr. Hoy MOVED to restore struck through language at lines 109-110 on page 45.

Judge McCullough seconded.

A member said that without the specific language allowing a court to consider whether a deposition would be “unnecessary, overly burdensome, or unfairly oppressive,” the court might feel bound to allow the deposition to proceed. The member said in the proper case it might be necessary to stop a deposition based on these grounds. A member said it is not necessary to have this specific language in the expert witness section of the rule because the rule’s general limitations on frequency and extent would cover expert depositions that might be overly burdensome.

Motion CARRIED 9-4.

Mr. Foss MOVED to delete lines 91-93 on page 44 and replace with language from lines 98-101. Ms. Jackson seconded.

A member said the purpose of the motion was to increase the amount of information that could be obtained about an expert’s opinion through interrogatories. The member said the negative aspect of allowing collection of this information through interrogatories is that some of the limited number of interrogatories available to a party would be expended.

A member said the proposed language, except for the portion requiring identification of exhibits, would not add anything to the existing language of the rule. A member said it would be better to break up the proposed new sentence listing all the things that could be obtained from an expert into bullet points.

A member said that the new language is intended to specifically list what information must be provided about the expert’s opinions. A member said that the proposed language is too specific and may lead to needless disputes at trial about whether disclosure was adequate. The member said that the existing language is better because it requires parties to provide the essential substance of the expert’s opinion.

A member said that it is a problem when only the “substance” of the expert’s opinion is disclosed and later during testimony it turns out the expert has all sorts of opinions that were not disclosed. The member said, however, it would be difficult to disclose in writing all the facts and data the expert is relying on because these are so numerous. The member said most of the time a deposition is required to identify all the facts and data. The member also said that a continuing obligation to identify all facts and data is a burden because things tend to develop in the interim between expert disclosure and trial.

A member said that requiring identification of exhibits is impractical because these

are generally generated by the attorney, not the expert, and they are developed and disclosed as trial approaches. A member said the rule language refers to exhibits the expert would use to support an opinion so these should be available once the expert develops the opinion.

A member said that lay experts, like the mechanic at the local garage, would likely not be able to identify the facts and data that would be required by the proposed amendment and so this information would not be disclosed. The member said such non-disclosure may lead to discovery disputes and possible exclusion of useful testimony. The member said it would be difficult in many cases to disclose all the details that would be required under the proposed amendment. The member said the appropriate way to develop the details that underlay an expert opinion is to take a deposition.

A member said it would be good to get more information and it would be good to get all the information that the federal rules require to be disclosed. The member said the way to do this would be to adopt all the federal disclosure requirements rather than bits and pieces.

Motion FAILED.

A member said there seemed to be a sentiment among some members of the committee to consider adopting disclosure requirements like those in the federal rule. The member said it would be a way to save time and money because parties and lawyers would just know that they needed to turn over certain information in every case. The member said having to prepare an expert report does place a certain burden on the plaintiff, but the other initial disclosures provide important information without an excess burden. A member said that this would be a substantial change and the bar should be given the opportunity to comment. The Chair said that the committee distributes its agenda via the internet each meeting, which provides notice to anyone interested in the committee's work on rule changes. The Chair said the North Dakota rules in general follow the federal rules and the issue of whether to adopt the federal initial disclosure requirements would be a good topic to discuss at the next meeting.

Judge McCullough moved to delete lines 310-316 on pages 54 and 55 to conform the language of the explanatory note with the committee's actions on the rule text. Judge Marquart seconded. Motion CARRIED.

The main motion to send the proposed amendments to Rule 26 to the Supreme Court as part of the annual rules package CARRIED.

RULE 37, N.D.R.Civ.P., FAILURE TO MAKE OR COOPERATE IN DISCOVERY;  
SANCTIONS (PAGES 82-109 OF THE AGENDA MATERIAL)

Staff reviewed the committee's actions at the January meeting on proposed amendments to Rule 37 based on the 2015 amendments to the federal rule. Staff said the committee decided to postpone consideration of the amendments because they represented a substantial change in practice. After the January meeting, staff conducted additional research and worked with SBAND to get comments from attorneys on the proposed amendments. Staff presented the committee with the comments and modified proposed amendments to Rule 37.

The Chair said that the pending question was whether to adopt the proposed amendments to Rule 37 that were on the floor when consideration of the rule was postponed, which were at lines 118-137 on pages 89-90.

A member said that adopting a rule change that required a 2,500 word explanation in the federal rule book was a concern. A member said the committee had a good discussion of the proposed amendments at the last meeting and could not come to a conclusion. The member said the comments from the bar were limited and contradictory and did not provide the committee with a mandate to do anything. The member suggested that the proposal could be referred back to the bar for discussion at the convention to see if anyone cared about the proposal.

A member said much of the electronic material that would need to be preserved in anticipation of litigation under the proposed change is surveillance video. The member said that anything that might happen in a store or business might be material that has to be preserved in anticipation of litigation. The member said it is an undue burden on business owners to require them to maintain surveillance videos for upwards of six years. The member said if the owner chooses not to preserve everything and then becomes involved in litigation, the burden will be on them to prove it was not destroyed maliciously. The member said it is too harsh a rule.

The main motion to send the proposed amendments to Rule 37 to the Supreme Court as part of the annual rules package FAILED.

RULE 3.5, N.D.R.Ct., ELECTRONIC FILING IN DISTRICT COURTS (PAGES 110-123  
OF THE AGENDA MATERIAL)

Staff explained that the State Court Administrator had proposed an amendment to Rule 3.5 to make it clear that the presence of a document within the court's electronic filing

system is by itself enough to establish the document's authenticity as a court record and that no further stamping, certifying or application of a seal is required. Staff said the purpose of the amendment was to allow electronic transfers of court documents between different courts in the state without the need for certification before transmittal.

Judge Larson MOVED to approve the proposed amendments to Rule 3.5. Judge Marquart seconded.

A member asked whether the clerks could electronically stamp or seal documents output from the Odyssey system. Staff said that the IT department had indicated this was technically possible but administrative steps to develop an electronic clerk stamp system had not yet been taken.

A member said the term "authentic" was an evidentiary term of art and under the proposed amendment, it appeared any party could file anything into the Odyssey system and that item would then be self-authenticated. The Chair said that the intent of the proposal was that documents could move from one court to another within the system without the need for intermediate certification that the document was the document in the court record.

Judge McCullough moved to amend line 82 on page 115 to insert "as a court record" after the word "authentic" and on line 83 on page 116 to insert "as a court record" after the word "authenticity." Mr. Foss seconded.

A member said that one of the statutes that requires a seal is the one on execution. The member asked whether, if the rule is amended, the sheriff's office will have to accept executions without seals. Staff said the intent was to allow documents to move within the system without further certification, but if a document goes out of the system, it would then need to be certified or otherwise authenticated. Staff said that currently, some courts within the state were refusing to accept documents from other courts without the document being certified.

A member said this sounded like a training issue for the clerks. A member responded that the clerks were simply enforcing statutory requirements as written and a rule amendment was required so the clerks would have guidance about accepting documents transferred through the Odyssey system. A member said if the technology exists to allow clerks to certify documents using electronic means, this should be adopted because it could be used to authenticate documents both within the system and documents output from the system.

Motion CARRIED.

A member said that since the time Odyssey was implemented, court administration has been working to get rid of clerk stamps and seals. The member said some clerks are uncomfortable with this and do print out, stamp, and re-scan documents that they feel need to be certified. A member said it is appropriate to have a rule allowing court documents to be sent from one court to another in North Dakota without the need for certification of the documents as authentic court records.

A member asked whether the rule proposal should be tabled and more input sought from court administration about what they need to have in the rule. A member said what court administration wants seems fairly simple—being able to send documents from court to court without intermediate certification. A member replied that the language of the proposal seemed too broad and seemed to authorize distribution without certification beyond the courts. A member said use of the term “authenticity” especially could create problems.

A member asked if putting language in the explanatory note indicating that the proposed amendment was not intended to have any impact on the admissibility of evidence would address the objections that had been raised to the use of the term “authenticity” in the rule.

Judge McCullough MOVED to postpone consideration of the proposal pending further input from court administration. Mr. Schultz seconded. Motion CARRIED.

Staff was instructed to arrange to have a representative from court administration appear via telephone at the Friday session.

May 13, 2016 - Friday

The meeting was called to order at approximately 9:00 a.m., by Justice Dale Sandstrom, Chair.

RULE 3.5, N.D.R.Ct., ELECTRONIC FILING IN DISTRICT COURTS (PAGES 110-123 OF THE AGENDA MATERIAL)

State Court Administrator Sally Holewa and Deputy State Court Administrator Scott Johnson joined the meeting by telephone to answer questions about proposed amendments to Rule 3.5.

The Chair asked what court administration was seeking in requesting the proposed amendments. Mr. Johnson said that the rule change was sought to add simplicity and clarity to the movement of documents from court to court through the Odyssey system. Mr. Johnson

said different courts in different parts of the state had different standards regarding the need for certification of documents transferred electronically through the system. Mr. Johnson said with the advent of the electronic court records system, the authenticity of documents within the system appears to be clear. Mr. Johnson said the proposed rule amendment would clarify that these documents can be transferred electronically through the system without the clerks doing extra work to certify them along the way.

Staff explained that the committee had added language to the proposal to state that a document filed within Odyssey would be considered authentic “as a court record.” Staff said this change was intended to clarify that a document filed in Odyssey would not be self-authenticating for all purposes. The Chair explained, for example, that a will filed in Odyssey could still be challenged if there was evidence it was not the dead person’s will—the proposed change would not automatically make the will “authentic.”

Ms. Holewa said the state courts had been a unified system for many years, long before Odyssey, but that as far as transferring documents within the system, in many cases counties were still treating other counties as if they were a foreign court. Ms. Holewa said the proposed amendment was an attempt to eliminate this and recognize the unity of the court system. Ms. Holewa said state court administration recognized that there were many reasons court records might need to be certified, but not for transfer from one clerk’s office to another within the unified court system.

A member asked whether the proposed amendments were intended to apply to government agencies outside the court system that might receive documents through Odyssey, such as a sheriff’s department. Ms. Holewa said the proposal at present is intended to apply to court-to-court transfers. Ms. Holewa said eventually, the courts hoped to directly transfer documents to the Criminal Justice Information Sharing System, which is used by law enforcement. Ms. Holewa said that this is not happening yet, but in the future court administration may seek authority to make direct transfers CJISS without certification.

A member asked whether the purpose of the proposed change was to allow a clerk anywhere in the state to rely on the authenticity of records within the system regardless of what county they were from. Mr. Johnson said yes. The member asked whether there was a simpler way to express this in the rule. Mr. Johnson said that the rule should make it as clear as possible that records being moved from court to court within the system do not need to be certified. Ms. Holewa said the proposed amendment was also intended to make it clear to lawyers that documents within the system were legitimate court records.

A member said that the Odyssey system was capable of allowing clerks to attach images, such as clerk stamps, to documents. The member asked when clerks would be able

to apply electronic stamps or certificates to documents. Mr. Johnson said this question would be best directed to the court's IT staff.

A member asked whether the problem of clerks refusing to accept documents sent through Odyssey by other clerks without certification was a statewide problem or one concentrated in a particular area. Mr. Johnson said the problem was statewide. A member asked how much the problem came up. Mr. Johnson said it was fairly frequent and had been brought to the attention of state court administration at least 6 times in the past 6 months.

The Rule 3.5 proposal was taken off the table for continued consideration by the committee.

A member said that the proposed rule language would be clearer if it specifically referred to document transfers from one court to another in the state. A member said rather than adding language, the sentence at lines 82-83 on pages 115-116 could be removed to clarify the proposal. A member said that the sentence could be deleted and language could be added to the first sentence of the proposed amendment to limit the applicability of the authenticity provision to documents transferred within the North Dakota court system.

A member said that limiting the proposal to documents transferred from court to court was important because people outside the court system, such as attorneys and law enforcement, also obtain documents from Odyssey and there is no intent to apply the authenticity provision to them. A member said that it would not be desirable to have attorneys be able to print out documents from the Odyssey system and claim them to be self-authenticated documents.

Judge Fontaine MOVED to amend to replace the language at lines 80-86 on page 115-116 with the following: "If a document that has been filed, accepted and docketed in the Odyssey electronic filing system is transferred from one court to another in the state through the Odyssey system it is considered authentic as a court document. No further proof of authenticity as a court record such as a stamp or physical seal is required." Judge Cresap seconded.

By unanimous consent, the term "court record" was substituted for "court document" in the motion language.

A member said the only substantive change between the motion language and the original proposed language was the addition of a reference to transfers between one court and another. The member said the effect of this change would be that if a document was not transferred from one court to another but was transferred from one file to another at the same

court it would not be “considered authentic as a court document.”

A member said if the purpose of the proposed change is to allow clerks of court in the state to rely on Odyssey documents as true and correct copies that is what the rule should say. The member said if the rule was written to allow clerks to rely on all documents in the system as true and correct copies, documents would not need to be certified. A member said this could be accomplished by modifying the motion language to read: “If a document has been filed, accepted and docketed in the Odyssey electronic filing system it is considered authentic as a court document.” A member said that this was what the original proposal said.

A member said the original proposal’s intent was to have documents filed in Odyssey considered authentic as court records and to allow them to be transferred from court to court without certification. The member said the motion would limit application of the authenticity provision to records that were being transferred which would not satisfy the proposal’s intent.

Motion FAILED.

A member asked whether the phrase “distributed using the Odyssey system” on lines 85-86 on page 116 applied to all transfers including to non-court entities. A member said that some sheriff’s offices and other agencies could obtain documents using the Odyssey system. A member asked whether “utilized within the court system” would be a better phrase.

Judge McCullough MOVED to delete the sentence beginning at line 82 on page 115. Mr. Hoy seconded.

A member said the sentence was superfluous and redundant.

Motion CARRIED.

Mr. Hoy MOVED to amend at lines 85-86 on page 116 to delete the phrase beginning with the words “when the document” and replace it with the phrase “when the record is used within the North Dakota court system.” Judge McCullough seconded.

A member asked whether, under the motion language, a lawyer could print out a document from Odyssey and claim that the document is self-authenticated. A member suggested the motion language was too broad and provided much more than the clerks had been requesting. A member said that lawyers had been using N.D.R.Ev. 1001, which says that printouts from electronic databases are to be treated like “originals” for a long time.

The motion FAILED.

Judge Fontaine MOVED to add language at line 82 on page 115 at the end of the sentence: "within the North Dakota court system as between all files and all clerks of court." Mr. Reiersen seconded.

A member asked whether the problem that originally led to the proposal is big enough to justify all the attention and time the committee has given it. The member said court administration had cited only 6 problem cases in the last 6-8 months, all involving documents that would have required certification or a seal under statute. The member said the proposed amendment likely will not be needed once the clerks and IT develop an electronic clerk stamp in Odyssey.

Motion FAILED 6-10.

Mr. Foss MOVED to amend at line 85 on page 116 to add "between courts" after "distributed." Mr. Reiersen seconded.

A member said that court administration had presented the proposed changes twice to the committee and while this may not seem like a big issue to the committee, it is important to the clerks and a relatively simple fix.

By unanimous consent the words "or case files" were added to the end of the motion language.

Motion CARRIED.

Judge Reich MOVED to change the two occurrences of the word "document" in the sentence beginning at line 83 on page 116 to "record." Judge Merrick seconded.

Motion CARRIED.

A member asked whether the proposal was intended to eliminate all requirements that documents be certified or have a seal affixed. A member said the intent was that certification or a seal is not required when a document is moved within the Odyssey system by or between clerks. A member said the first sentence of the proposal states that once a document gets filed in the court system, our courts agree that it is an authentic court record. The member said that the second sentence says that certification is not required to affirm that authenticity when the record is moved between files and between courts in the system. The member said this seemed to be what court administration wanted.

The main motion to send the proposed amendments to Rule 3.5 to the Supreme Court as part of the annual rules package CARRIED 12-4.

Staff was instructed to rewrite the explanatory note to make it clear that the amendments apply only to the movement of documents within the court system and do not change the Rules of Evidence.

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 124-162 OF THE AGENDA MATERIAL)

Staff said the committee was taking up Rule 41 again based on a suggestion from Mr. Hoy, who requested that the committee consider amendments to provide additional protection for the records of people who have been arrested but never convicted of a crime. Staff presented proposed amendments based on Minnesota's approach, which limits access to pre-conviction records posted online by limiting name searches of these records. Staff said Court Administrator Sally Holewa had also requested an amendment to the rule stating that use of secure public access to court records was limited to attorneys.

During the committee's telephone conversation with Ms. Holewa and Mr. Johnson, the Chair asked about Ms. Holewa's proposed amendment to Rule 41. The Chair asked Ms. Holewa whether all the documents available to licensed attorneys via secure public access were also available to the public at courthouse terminals. Ms. Holewa said there was no rule or policy in writing covering what was available at the courthouse terminals. She said the proposal was not intended to limit what was available at the courthouse but to clarify who was eligible for secure public access.

Judge Schmidt MOVED to approve the proposed amendments to Rule 41. Mr. Beehler seconded.

Mr. Hoy MOVED to add Ms. Holewa's proposed amendment after line 115 on page 131. Mr. Suhr seconded.

The Chair explained that the change proposed by Ms. Holewa related only to remote access to court records not to public access via terminals at courthouses. The Chair said the news media has in the past sought the type of remote access currently available to attorneys.

Motion CARRIED.

Speaking to the proposed change relating to limiting access to pre-conviction records, a member said that people who are charged with crimes but never convicted do face

problems obtaining employment and housing. The member said that restricting remote access to the records of people who are not convicted, rather than eliminating or sealing their records, seems a good compromise. The member said that people who take the time to go to the courthouse to look at the full record in a case are not the ones causing problems for people who are charged but not convicted, it is the ones who take a cursory glance at the records available by remote access.

The Chair asked whether there was an intent to limit access to online court calendars. Staff said Minnesota dealt with this issue by changing court calendars to images so they could not be searched for names.

A member asked whether there was an intent to limit name searching of criminal records at all points in the process or only after the case had been closed. A member said the original intent was to limit access to closed matters where no conviction resulted. Members said that currently, records in ongoing criminal matters could be named searched. The Chair said the proposal as currently written would bar access to the records in ongoing matters.

A member said that, based on the committee's recommendations, the Supreme Court had approved changes to the rule allowing people who had criminal charges dismissed or who had been acquitted to request that public access to their records be restricted. The member said the committee had also developed a form that made it easier for people to submit such requests to the court. The member questioned the need for the proposed amendments.

By unanimous consent, the word "closed" was added before "criminal" at line 166 on page 131.

A member asked whether the term "secure public access system" was defined anywhere in the rules. The member said "public access" is defined and allows the public to gain access to court records. The member said "secure public access" did not seem to have anything to do with the "public access." The member said there was a need for a comprehensive overview of Rule 41 to deal with issues related to the rule being written before court records went electronic.

The member said there were three ways for members of the public to get access to court records: going to the courthouse and asking the clerk, going to the public access terminal at any courthouse to access statewide records, or using the internet to access the less complete records available there. The member said a particular shortcoming of the rule was that there is no provision covering courthouse terminal access, which is the most comprehensive form of access available to the public.

The Chair said the term "secure public access" was used internally in the court system and by the IT department. The Chair said that it was not "public access" because it was limited to a certain group. The Chair said there is a need to define the term because no one who is not a court system insider would know what it means.

A member said it would be good if the committee could move ahead with the proposed changes to the rule. The member admitted that the rule needed additional work that could be done in the future.

A member said that the previous amendments to the rule had allowed people to request that records in criminal cases where there had been dismissals or acquittals to petition to restrict remote access to these records. The member said the current proposal would essentially automatically restrict remote access to these records. The member said that in the case of deferred imposition of sentence, there is a reason behind having a set period before a judgment of not guilty is entered. The member said if a person did not comply with the court's order in a deferred imposition, the guilty plea would remain. The member said automatically restricting access to records is not a good approach when the rule already gives parties the ability to petition the court to restrict remote access.

A member said when the committee recommended the previous amendments to the rule, the committee had made a broad proposal to restrict access to records of people who had been charged with but not convicted of crimes. The member said the amendments the Supreme Court adopted were much narrower than the ones the committee proposed. The member said the new proposed language is broad in scope like the previous proposal the Court rejected.

A member said the intent of the current proposals is to take care of the people who have not been convicted of anything. The member said a deferred imposition was not covered by the proposal unless the case is dismissed. The member said most deferred impositions were not dismissed but were contingent on compliance by the defendant. The member said any dismissal in a deferred imposition case would not occur until the end of the contingent period with the agreement of the court and the prosecutor. The member said the current proposal would not apply to a deferred imposition during the period when the charges are still pending.

A member said that a deferred imposition case is administratively closed once the order of deferral is entered. A member replied that a defendant would not consider such a case closed until the end of the contingent period.

The Chair asked whether any more work needed to be done on the rule. Staff said the

explanatory note needed to be amended to reflect the addition of Ms. Holewa's proposal. A member asked whether the proposed language stating that attorneys may access court records by "secure public access" meant that only attorneys could use this method. The Chair said that was the current practice. A member said that attorney staff use secure public access, but under the attorney's log on credentials.

The main motion to send the proposed amendments to Rule 41 to the Supreme Court as part of the annual rules package CARRIED 12-4.

RULE 58, N.D. Sup. Ct. Admin. R., VEXATIOUS LITIGATION (PAGES 163-197 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court requested the committee consider a new rule to address vexatious litigants. Staff said the Court indicated that the rule is necessary to deal with litigants who consume the state's judicial resources by filing non-meritorious litigation, burdening both the court system and opposing parties. Staff presented a proposed new rule based on the Idaho vexatious litigant rule.

The Chair said there are existing orders out on litigants who keep filing over and over again, usually related to long resolved matters. A member asked whether a person who had an order against them in one county to go ahead and file in another county. The Chair said in the Odyssey system there would be a flag against the person's name to alert staff when there is an attempted filing. The Chair said vexatious litigation consumes a huge amount of judicial resources and has become a big problem.

Mr. Beehler MOVED to approve proposed new Rule 58. Judge Schmidt seconded.

A member asked why the Idaho rule was chosen as a model. Staff said Idaho was closest to North Dakota in size and structure of the court system. Staff said the Idaho rule also had all the key components that the vexatious litigant rules in other states had.

A member asked why, under the proposal, presiding judges would be the ones entering orders against vexatious litigants rather than any judge. The member also wanted to know whether the rule should also apply to citizens who might bring criminal complaints. Staff said that most states have some sort of disinterested third party making the decision on the pre-filing order and that the proposal followed the Idaho approach of having the supervising judge make the decision.

A member said that there is currently no set procedure in place to deal with vexatious litigants. The member said that in one case, the judge had worked with court administration

to formulate a standing order and an administrative flag in Odyssey to limit filings in a domestic relations case. The member said having the presiding judge determine whether to enter a pre-filing order would be a workable solution.

The member said the proposal currently only allows pre-filing orders against new litigation. The member said some problem litigants make excessive filings in existing litigation so there should also be a way to limit these.

Judge Reich MOVED to amend line 21 on page 165 to add "or any new motions in existing litigation" after the word "litigation." Judge Marquart seconded.

A member asked whether pre-filing orders are effective. The member said that a vexatious litigant could look at this rule and see that they can ask to be allowed to file. The member said that a vexatious litigant is likely to file multiple requests for permission to file if it is not initially granted. A member said nothing would stop them from filing a request to file, but if there is a pre-filing order in place it will have gone out to all the presiding judges and they will know the reasons why the person is not allowed to file without permission.

A member said because there is nothing stopping a vexatious litigant from making a request to file, this will just create a waste of resources at a different place in the process, dealing with requests to file. A member said this is a shorter fight than if the party is allowed to file substantive motions. A member said that the requests to file would not implicate the other parties, who are obligated to prepare a response if the vexatious litigant files a motion in the case.

A member said another advantage to pre-filing orders is that they save work for the clerks who are not obligated to scan in reams of documents submitted by vexatious litigants unless they have permission to file. A member suggested that the litigant would just attach whatever they wanted to file to the request for permission to file. Members explained that this was common, but that such supporting material would not be filed unless the request for permission was granted.

A member said that one particular litigant had been pursuing a case for several years, appealing it twice to the Supreme Court. The member said that all of the filings go back to the initial determination in the matter. The member said since the time the litigant has last appeared at a hearing (approximately six months prior to the committee meeting) the litigant had submitted more the 150 documents for filing in the original county of venue along with attempting to file new actions in two other counties and filing numerous petitions with the Supreme Court. The member said this shows how aggressive vexatious litigants can be and

also illustrates the burden this places on any other parties, who are obligated to respond to motions and other submissions, no matter how frivolous.

The Chair said that often, if a vexatious litigant fails to get permission to file, they file some sort of a writ of supervision from the Supreme Court seeking relief. The Chair said the most recent petition of this sort the Court had considered ran more than 200 pages.

A member suggested that the proposed motion language should not be limited to motions but should encompass all filings because vexatious litigants are not likely to give documents formal names like "motion."

Judge McCullough MOVED to amend the motion to delete the word "motions" and insert the word "documents." Mr. Beehler seconded.

The motion to amend the motion CARRIED.

By unanimous consent, the punctuation in the motion was adjusted.

The motion CARRIED.

A member pointed out the language at lines 64-66 on page 167 allowing a pre-filing order to be appealed as a matter of right. The member asked when such an appeal would take place and whether certification under N.D.R.Civ.P. 54(b) would be required before an appeal would be allowed. The Chair said generally in matters involving vexatious litigants there has been a determination or order issued in the case and the litigant keeps filing new documents to try to re-litigate the determination. The Chair said the Supreme Court has consistently reviewed pre-filing orders when the litigant has requested a review, but because conduct leading to a pre-filing order generally does not result from an inadvertent mistake, determining whether the pre-filing order is justified is usually not a complex process.

A member asked whether it would be a good idea for the committee to create a form to be used by litigants subject to a pre-filing order who want to seek permission to file. The member said this might head off the possibility of vexatious litigants filing lengthy free form requests for permission to file.

Judge McCullough MOVED to insert "or any documents in existing litigation" after the word "litigation" at line 83 on page 168 and to insert "or document" after the word "litigation" at line 84 on page 168. Mr. Hoy seconded.

A member said the proposed amendment was intended to make this section of the rule

consistent with the committee's previous amendment.

Motion CARRIED.

A member asked whether the list of vexatious litigants discussed in Section 9 of the proposal would be a public list. The Chair said in other states the lists were public. A member said under Administrative Rule 41 the vexatious litigant list contemplated in Section 9 would be a court record and subject to public access. The Chair says making the list public provides a service because if an individual is sued by someone it is useful to know at the start whether that person is on the roster of vexatious litigants.

Mr. Hoy MOVED to insert "or disciplinary" after the word "civil" on line 6 on page 164 and to replace "a civil action" with "litigation" on line 11 on page 164. Mr. Beehler seconded.

A member said that some of the same people who file endless documents in a civil case also file disciplinary actions against the judge and against lawyers involved in the matter. The member said this increases the amount of money and time people involved in an action are required to spend. The member said filing baseless disciplinary complaints is just as vexatious as filing piles of documents and motions.

A member said the motion might be a good idea if it only addressed attorney disciplinary complaints, but the idea of giving a judge the power to prevent a litigant from filing anything including a disciplinary complaint against the judge seems like an overreach. The member said both the disciplinary systems review complaints that have been filed and can summarily dismiss these complaints if there is no basis for discipline.

A member said one reason for the proposal is that it would make an unsuccessful disciplinary action one of the actions that can be counted against a litigant when the court is considering entering a pre-filing order. A member said if the definition of litigation is changed to include disciplinary actions, it will change the meaning of the term throughout the rule. The member said this means that filing a disciplinary action will then be something that a litigant with a pre-filing order will need to get approval to file. The member said requiring approval from the judge for filing a disciplinary action against the judge will cast the judicial system in a bad light by giving the impression that judges are trying to insulate themselves against disciplinary proceedings.

A member questioned what authority the judiciary would have to stop a litigant from filing a disciplinary complaint given that these are handled by entities outside of district court with the ultimate authority to decide in the Supreme Court. A member said that even if a

disciplinary action is considered “litigation,” the language of the rule only allows a pre-filing order to bar filings in court so a pre-filing order could not bar the submission of disciplinary complaints to non-court entities like the disciplinary board.

The motion CARRIED 10-4.

Mr. Hoy MOVED to add the words “expense or” before “delay” at line 50 on page 166. Judge McCullough seconded. Motion CARRIED.

Judge McCullough MOVED to add the words “in the courts of this state” after the word “litigation” at line 83 on page 168. Mr. Foss seconded.

A member said the change was needed to make the language of Section 8 parallel to the language of Section 3. A member said the change was not needed because a district court could not use a pre-filing order to bar the filing of a disciplinary complaint with a non-court entity. A member said that a district court could potentially punish disobedience of a pre-filing order with a contempt order.

Motion CARRIED.

The main motion to send proposed new Rule 58 to the Supreme Court as part of the annual rules package CARRIED.

RULE 5, N.D.R.Crim.P., INITIAL APPEARANCE BEFORE THE MAGISTRATE; RULE 5.1, N.D.R.Crim.P., PRELIMINARY EXAMINATION; RULE 7, N.D.R.Crim.P., THE INDICTMENT AND THE INFORMATION; RULE 9, N.D.R.Crim.P., WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

Staff said Rules 5, 5.1, 7 and 9 had been revised according to the committee’s instructions to change the term “preliminary examination” to “preliminary hearing.”

Mr. Hoy MOVED to approve the proposed amendments to Rules 5, 5.1, 7 and 9. Mr. Olson seconded.

The main motion to send proposed amendments to Rules 5, 5.1, 7 and 9 to the Supreme Court as part of the annual rules package CARRIED.

FOR THE GOOD OF THE ORDER

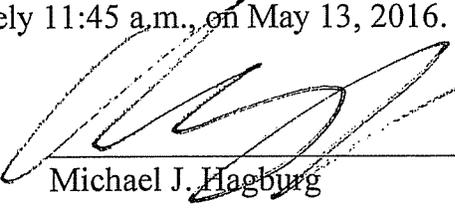
The Chair asked whether the committee had any suggestions on topics to be

considered at future meetings.

A member said that the committee should consider amendments to N.D.R.Civ.P. 26 that reflected the provisions in the federal rule on initial disclosures. The member said that Thursday's discussion had shown some level of interest in the committee for such a change. A member suggested that SBAND, the NDAJ and the NDDLA be contacted prior to the September for their views on such a change.

A member said the committee should consider how to update N.D. Sup. Ct. Admin. R. 41 to reflect changes that have occurred in providing access to court records since the time the Odyssey system was implemented. The member said that the public access terminals at each county courthouse were not accounted for under the rule and these had become a major means of providing access to court records. The member said it might be appropriate for other committees such as the Court Technology Committee or the Court Services Committee to provide input on any changes to Rule 41.

The meeting adjourned at approximately 11:45 a.m., on May 13, 2016.



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Michael J. Hagburg

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 16, 2016  
RE: Rule 41, N.D. Sup. Ct. Admin. R., Access to Court Records

The committee has discussed and approved amendments to Rule 41 at its last three meetings. The latest amendments are now before the Supreme Court as part of the Annual Rules Package.

At the May meeting, Judge McCullough suggested that a major overhaul for Rule 41 may be appropriate. In 2003-2004 a subcommittee of the Court Technology Committee took a comprehensive look at the rule and developed amendments to regulate electronic access to court records. After additional work by the Joint Procedure Committee, the Supreme Court approved these amendments July 1, 2006. Since that time the rule has been amended to address various issues but it has not been comprehensively reviewed to reflect the technological changes of the last 10 years such as the court system's adoption of the Odyssey system.

The Chair suggested as a first step toward a comprehensive review that the committee identify the problems it perceives in the rule and address them by proposing amendments. The committee noted two specific problems in the rule at the last meeting:

1. Records access at the courthouse currently is provided primarily through computer terminals that the public can use to access records stored in the Odyssey system. Rule 41, however, does not mention these terminals. Staff has prepared a proposed amendment to Rule 41 that would acknowledge that the courthouse terminals are available to provide the public access to court records stored in the statewide Odyssey system.

2. One of the committee's May amendments to Rule 41, proposed by the State Court Administrator, used the term "secure public access." This term is not defined in Rule 41. The term was developed by the IT department to describe a type of remote access to the Odyssey system that is available to attorneys but not available to the general public. Therefore, use of the term "public" is not accurate. Staff has prepared proposed amendments that would eliminate the term "secure public access" and replace it with a description of the enhanced remote access to court records that attorneys may obtain.

These proposed amendments are intended as a starting point to address the deficiencies in the rule the committee has identified. The committee may identify additional problems with the rule in the course of its discussion: for example, it may be that much of Section 4(a) of the rule is superfluous if most public access to court records at the courthouse will be through the computer terminal rather than from a clerk pulling paper files.

Proposed amendments to Rule 41 are currently pending before the Court. If the committee decides that amendments to the rule are needed now, it may wish to send those proposals to the Court immediately along with any suggestions it might have on the need for a comprehensive review of the rule and how this might be accomplished.

On the other hand, the committee may wish to retain the rule and take the first steps toward a comprehensive review on its own. The committee recently worked on the collaborative law rule through two years of meetings.

Proposed amendments to Rule 41 are attached. The new proposed amendments are highlighted and underlined. The amendments the committee has already approved and sent to the Court are underlined.

RULE 41. ACCESS TO COURT RECORDS

1 Section 1. Purpose.

2 The purpose of this rule is to provide a comprehensive framework for  
3 public access to court records. Every member of the public will have access to  
4 court records as provided in this rule.

5 Section 2. Definitions.

6 (a) "Court record," regardless of the form, includes:

7 (1) any document, information, or other thing that is collected, received, or  
8 maintained by court personnel in connection with a judicial proceeding;

9 (2) any index, calendar, docket, register of actions, official record of the  
10 proceedings, order, decree, judgment, minute, and any information in a case  
11 management system created by or prepared by court personnel that is related to a  
12 judicial proceeding; and

13 (3) information maintained by court personnel pertaining to the  
14 administration of the court or clerk of court office and not associated with any  
15 particular case.

16 (b) "Court record" does not include:

17 (1) other records maintained by the public official who also serves as clerk  
18 of court;

19 (2) information gathered, maintained or stored by a governmental agency or

20 other entity to which the court has access but which is not part of the court record  
21 as defined in this rule; and

22 (3) a record that has been disposed of under court records management  
23 rules.

24 (c) "Public access" means that the public may inspect and obtain a copy of  
25 the information in a court record.

26 (d) "Remote access" means the ability to electronically search, inspect, or  
27 copy information in a court record without the need to physically visit the court  
28 facility where the court record is maintained.

29 (e) "Bulk distribution" means the distribution of all, or a significant subset,  
30 of the information in court records, as is and without modification or compilation.

31 (f) "Compiled information" means information that is derived from the  
32 selection, aggregation or reformulation by the court of some of the information  
33 from more than one individual court record.

34 (g) "Electronic form" means information in a court record that exists as:

35 (1) electronic representations of text or graphic documents;

36 (2) an electronic image, including a video image, of a document, exhibit or  
37 other thing;

38 (3) data in the fields or files of an electronic database; or

39 (4) an audio or video recording, analog or digital, of an event or notes in an  
40 electronic file from which a transcript of an event can be prepared.

41 Section 3. General Access Rule.

42 (a) Public Access to Court Records.

43 (1) Court records are accessible to the public except as prohibited by this  
44 rule.

45 (2) There must be a publicly accessible indication of the existence of  
46 information in a court record to which access has been prohibited, which  
47 indication may not disclose the nature of the information protected.

48 (3) A court may not adopt a more restrictive access policy or otherwise  
49 restrict access beyond that provided for in this rule, nor provide greater access than  
50 that provided for in this rule or as governed by N.D. Sup. Ct. Admin. R. 40 with  
51 respect to recordings of trial court proceedings.

52 (b) When Court Records May Be Accessed.

53 (1) Court records in a court facility must be available for public access  
54 during normal business hours. Court records in electronic form to which the court  
55 allows remote access will be available for access subject to technical systems  
56 availability.

57 (2) Upon receiving a request for access to a court record, the clerk of court  
58 must respond as promptly as practical. If a request cannot be granted promptly, or  
59 at all, an explanation must be given to the requestor as soon as possible. The  
60 requestor has a right to at least the following information: the nature of any  
61 problem preventing access and the specific statute, federal law, or court or

62 administrative rule that is the basis of the denial. The explanation must be in  
63 writing if desired by the requestor.

64 (3) The clerk of court is not required to search within a court record for  
65 specific information that may be sought by a requestor.

66 (c) Access to Court Records Filed Before March 1, 2009. Court records  
67 filed before the adoption of N.D.R.Ct. 3.4 may contain protected information listed  
68 under N.D.R.Ct. 3.4(a). This rule does not require the review and redaction of  
69 protected information from a court record that was filed before the adoption of  
70 N.D.R.Ct. 3.4 on March 1, 2009.

71 (d) Fees for Access. The court may charge a fee for access to court records  
72 in electronic form, for remote access, for bulk distribution or for compiled  
73 information. To the extent that public access to information is provided exclusively  
74 through a vendor, the court will ensure that any fee imposed by the vendor for the  
75 cost of providing access is reasonable.

76 Section 4. Methods of Access to Court Records.

77 (a) Access to Court Records at Court Facility.

78 (1) Public Access Terminal. A terminal will be available at each county  
79 courthouse for viewing of all publically accessible court records stored statewide  
80 in the Odyssey system.

81 († 2) Request for Access. Any person desiring to inspect, examine, or copy  
82 a court record that is not available on the public access terminal must make an oral

83 or written request to the clerk of court. If the request is oral, the clerk may require  
84 a written request if the clerk determines that the disclosure of the record is  
85 questionable or the request is so involved or lengthy as to need further definition.  
86 The request must clearly identify the record requested so that the clerk can locate  
87 the record without doing extensive research. Continuing requests for a document  
88 not yet in existence may not be considered.

89 ~~(23)~~ Response to Request. The clerk of court is not required to allow access  
90 to more than ten files per day per requestor but may do so in the exercise of the  
91 clerk's discretion if the access will not disrupt the clerk's primary function. If the  
92 request for access and inspection is granted, the clerk may set reasonable time and  
93 manner of inspection requirements that ensure timely access while protecting the  
94 integrity of the records and preserving the affected office from undue disruption.  
95 The inspection area must be within full view of court personnel whenever possible.  
96 The person inspecting the records may not leave the court facility until the records  
97 are returned and examined for completeness.

98 ~~(34)~~ Response by Court. If a clerk of court determines there is a question  
99 about whether a record may be disclosed, or if a written request is made under  
100 Section 6(b) for a ruling by the court after the clerk denies or grants an access  
101 request, the clerk must refer the request to the court for determination. The court  
102 must use the standards listed in Section 6 to determine whether to grant or deny the  
103 access request.

104 (b) Remote Access to Court Records.

105 (1) In General. The following information in court records must be made  
106 remotely accessible to the public if it exists in electronic form, unless public access  
107 is restricted under this rule:

108 (1 A) litigant/party indexes to cases filed with the court;

109 (2 B) listings of new case filings, including the names of the parties;

110 (3 C) register of actions showing what documents have been filed in a case;

111 (4 D) calendars or dockets of court proceedings, including the case number  
112 and caption, date and time of hearing, and location of hearing; and

113 (5 E) reports specifically developed for electronic transfer approved by the  
114 state court administrator and reports generated in the normal course of business, if  
115 the report does not contain information that is excluded from public access under  
116 Section 5 or 6.

117 (2) Access Regulation.

118 (A) The Supreme Court may adopt and implement policies to regulate  
119 remote access to court records. These policies must be posted publicly on the  
120 Court's website.

121 (B) Attorneys licensed in North Dakota may remotely apply to obtain  
122 remote access to court records through the secure public access stored in the  
123 Odyssey system.

124 (C) A record of a closed criminal case for which there is no conviction may

125 not be remotely accessed through a name search except through the secure public  
126 access system by an attorney granted remote access to the Odyssey system.

127 (c) Requests for Bulk Distribution of Court Records.

128 (1) Bulk distribution of information in the court record is permitted for  
129 court records that are publicly accessible under Section 3(a).

130 (2) A request for bulk distribution of information not publicly accessible  
131 can be made to the court for scholarly, journalistic, political, governmental,  
132 research, evaluation or statistical purposes when the identification of specific  
133 individuals is ancillary to the purpose of the inquiry. Prior to the release of  
134 information under this subsection the requestor must comply with the provisions of  
135 Section 6.

136 (3) A court may allow a party to a bulk distribution agreement access to  
137 birth date, street address, and social security number information if the party  
138 certifies that it will use the data for legitimate purposes as permitted by law.

139 (d) Access to Compiled Information From Court Records.

140 (1) Any member of the public may request compiled information that  
141 consists solely of information that is publicly accessible and that is not already in  
142 an existing report. The court may compile and provide the information if it  
143 determines, in its discretion, that providing the information meets criteria  
144 established by the court, that the resources are available to compile the information  
145 and that it is an appropriate use of public resources. The court may delegate to its

146 staff or the clerk of court the authority to make the initial determination to provide  
147 compiled information.

148 (2) Requesting compiled restricted information.

149 (A) Compiled information that includes information to which public access  
150 has been restricted may be requested by any member of the public only for  
151 scholarly, journalistic, political, governmental, research, evaluation, or statistical  
152 purposes.

153 (B) The request must:

154 (i) identify what information is sought,

155 (ii) describe the purpose for requesting the information and explain how the  
156 information will benefit the public interest or public education, and

157 (iii) explain provisions for the secure protection of any information  
158 requested to which public access is restricted or prohibited.

159 (C) The court may grant the request and compile the information if it  
160 determines that doing so meets criteria established by the court and is consistent  
161 with the purposes of this rule, the resources are available to compile the  
162 information, and that it is an appropriate use of public resources.

163 (D) If the request is granted, the court may require the requestor to sign a  
164 declaration that:

165 (i) the data will not be sold or otherwise distributed, directly or indirectly, to  
166 third parties, except for journalistic purposes,

167 (ii) the information will not be used directly or indirectly to sell a product or  
168 service to an individual or the general public, except for journalistic purposes, and

169 (iii) there will be no copying or duplication of information or data provided  
170 other than for the stated scholarly, journalistic, political, governmental, research,  
171 evaluation, or statistical purpose.

172 The court may make such additional orders as may be needed to protect  
173 information to which access has been restricted or prohibited.

174 Section 5. Court Records Excluded From Public Access.

175 The following information in a court record is not accessible to the public:

176 (a) information that is not accessible to the public under federal law;

177 (b) information that is not accessible to the public under state law, court  
178 rule, case law or court order, including:

179 (1) affidavits or sworn testimony and records of proceedings in support of  
180 the issuance of a search or arrest warrant pending the return of the warrant;

181 (2) information in a complaint and associated arrest or search warrant to the  
182 extent confidentiality is ordered by the court under N.D.C.C. §§ 29-05-32 or  
183 29-29-22;

184 (3) documents filed with the court for in-camera examination pending  
185 disclosure;

186 (4) case information and documents in Child Relinquishment to Identified  
187 Adoptive Parent cases brought under N.D.C.C. ch. 14-15.1;

188 (5) domestic violence protection order files and disorderly conduct  
189 restraining order files when the restraining order is sought due to domestic  
190 violence, except for orders of the court;

191 (6) documents in domestic violence protection order and disorderly conduct  
192 restraining order cases in which the initial petition was dismissed summarily by the  
193 court without a contested hearing;

194 (7) names of qualified or summoned jurors and contents of jury  
195 qualification forms if disclosure is prohibited or restricted by order of the court;

196 (8) records of voir dire of jurors, unless disclosure is permitted by court  
197 order or rule;

198 (9) records of deferred impositions of sentences resulting in dismissal;

199 (10) records of a case in which the magistrate finds no probable cause for  
200 the issuance of a complaint;

201 ~~(10)~~ (11) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected  
202 information:

203 (A) except for the last four digits, social security numbers, taxpayer  
204 identification numbers, and financial account numbers,

205 (B) except for the year, birth dates, and

206 (C) except for the initials, the name of an individual known to be a minor,  
207 unless the minor is a party, and there is no statute, regulation, or rule mandating  
208 nondisclosure;

209           ~~(11)~~ (12) judge and court personnel work material, including personal  
210 calendars, communications from law clerks, bench memoranda, notes, work in  
211 progress, draft documents and non-finalized documents;

212           ~~(12)~~ (13) party, witness and crime victim contact information gathered and  
213 recorded by the court for administrative purposes, including telephone numbers  
214 and e-mail, street and postal addresses;

215           (14) the name of a patron of the North Dakota Legal Self Help Center or  
216 information sufficient to identify a patron or the subject about which a patron  
217 requested information.

218           (c) This rule does not preclude access to court records by the following  
219 persons in the following situations:

220           (1) federal, state, and local officials, or their agents, examining a court  
221 record in the exercise of their official duties and powers;

222           (2) parties to an action and their attorneys examining the court file of the  
223 action, unless restricted by order of the court, but parties and attorneys may not  
224 access judge and court personnel work material in the court file.

225           (d) A member of the public may request the court to allow access to  
226 information excluded under Section 5 as provided in Section 6.

227           Section 6. Requests to Prohibit Public Access to Information in Court  
228 Records or to Obtain Access to Restricted Information.

229           (a) Request to Prohibit Access.

230 (1) A request to the court to prohibit public access to information in a court  
231 record may be made by any party to a case, by the individual about whom  
232 information is present in the court record, or on the court's own motion on notice  
233 as provided in Section 6(c).

234 (2) The court must decide whether there are sufficient grounds to overcome  
235 the presumption of openness of court records and prohibit access according to  
236 applicable constitutional, statutory and case law.

237 (3) In deciding whether to prohibit access the court must consider that the  
238 presumption of openness may only be overcome by an overriding interest. The  
239 court must articulate this interest along with specific findings sufficient to allow a  
240 reviewing court to determine whether the closure order was properly entered.

241 (4) The closure of the records must be no broader than necessary to protect  
242 the articulated interest. The court must consider reasonable alternatives to closure,  
243 such as redaction or partial closure, and the court must make findings adequate to  
244 support the closure. The court may not deny access only on the ground that the  
245 record contains confidential or closed information.

246 (5) In restricting access the court must use the least restrictive means that  
247 will achieve the purposes of this rule and the needs of the requestor.

248 (6) If the court concludes, after conducting the balancing analysis and  
249 making findings as required by paragraphs (1) through (5), that the interest of  
250 justice will be served, it may prohibit public Internet access to an individual

251 defendant's electronic court record in a criminal case:

252 (A) if the charges against the defendant are dismissed; or

253 (B) if the defendant is acquitted.

254 If the court grants a request to prohibit public Internet access to an  
255 electronic court record in a criminal case, the search result for the record must  
256 display the words "Internet Access Prohibited under N.D.Sup.Ct. Admin.R 41."

257 (b) Request to Obtain Access.

258 (1) A request to obtain access to information in a court record to which  
259 access is prohibited under Section 4(a), 5 or 6(a) may be made to the court by any  
260 member of the public or on the court's own motion on notice as provided in  
261 Section 6(c).

262 (2) In deciding whether to allow access, the court must consider whether  
263 there are sufficient grounds to overcome the presumption of openness of court  
264 records and continue to prohibit access under applicable constitutional, statutory  
265 and case law. In deciding this the court must consider the standards outlined in  
266 Section 6(a).

267 (c) Form of Request.

268 (1) The request must be made by a written motion to the court.

269 (2) The requestor shall must give notice to all parties in the case.

270 (3) The court may require notice to be given by the requestor or another  
271 party to any individuals or entities identified in the information that is the subject

272 of the request. When the request is for access to information to which access was  
273 previously prohibited under Section 6(a), the court must provide notice to the  
274 individual or entity that requested that access be prohibited.

275 Section 7. Obligations Of Vendors Providing Information Technology  
276 Support To A Court To Maintain Court Records.

277 (a) If the court contracts with a vendor to provide information technology  
278 support to gather, store, or make accessible court records, the contract will require  
279 the vendor to comply with the intent and provisions of this rule. For purposes of  
280 this section, "vendor" includes a state, county or local governmental agency that  
281 provides information technology services to a court.

282 (b) By contract the vendor will be required to notify the court of any  
283 requests for compiled information or bulk distribution of information, including  
284 the vendor's requests for such information for its own use.

285 EXPLANATORY NOTE

286 Adopted on an emergency basis effective October 1, 1996; Amended and  
287 adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1,  
288 2009; March 15, 2009; March 1, 2010; March 1, 2012; March 1, 2015; March 1,  
289 2016; October 1, 2016;\_\_\_\_\_. Appendix amended effective August 1,  
290 2001, to reflect the name change of State Bar Board to State Board of Law  
291 Examiners.

292 Section 3(a)(1) was amended, effective October 1, 2016, to reference N.D.

293 Sup. Ct. Admin. R. 40, which governs access to recordings of trial court  
294 proceedings.

295 Section 3(b)(3) was added, effective March 1, 2016, to clarify that the clerk  
296 of court is not required to search within a court record for specific information that  
297 may be sought by a requestor.

298 Section 3(c) was adopted, effective March 1, 2010, to state that protected  
299 information may be contained in court records filed before the adoption of  
300 N.D.R.Ct. 3.4.

301 Section 4(a) was amended, effective \_\_\_\_\_, to specify  
302 that a public access terminal will be available at each county courthouse for  
303 viewing of all public court records stored in the Odyssey system.

304 Section 4(b) was amended, effective \_\_\_\_\_, to allow the  
305 Supreme Court to enact and implement policies to regulate remote access to court  
306 records and to limit remote access by name search to pre-conviction records in  
307 criminal cases. An additional amendment would allow attorneys to apply for  
308 remote access to public court records stored in the Odyssey system.

309 Section 4(c) was amended, effective March 15, 2009, to allow parties who  
310 enter into bulk distribution agreements with the courts to have access to birth date,  
311 street address, and social security number information upon certifying compliance  
312 with laws governing the security of protected information. Such laws include the  
313 Federal Fair Credit Reporting Act, the Gramm Leach Bliley Act, the USA Patriot

314 Act and the Driver's Privacy Protection Act.

315 Section 5(b)(6) was amended, effective March 1, 2015, to clarify that the  
316 restriction on public access to documents in domestic violence protection order  
317 and disorderly conduct restraining order cases under this paragraph is limited to  
318 cases that were dismissed summarily.

319 Section 5(b)(8) was amended, effective March 15, 2009, to list types of  
320 protected information open to the public. The term "financial-account number" in  
321 Section 5(b)(8) includes any credit, debit or electronic fund transfer card number,  
322 and any other financial account number.

323 Section 5(b)(8) was amended, effective March 1, 2010, to incorporate the  
324 exemptions from redaction contained in N.D.R.Ct. 3.4(b). A document containing  
325 protected information that is exempt from redaction under N.D.R.Ct. 3.4(b) is  
326 accessible to the public.

327 Section 5(b)(10) was added, effective \_\_\_\_\_, to exclude cases in which  
328 a magistrate finds no probable cause for the issuance of a complaint from public  
329 access.

330 Section 5(b)(12) was added, effective March 1, 2016, to exclude party,  
331 witness and crime victim contact information gathered and recorded by the court  
332 for administrative purposes from public access.

333 Section 5(b)(13) was added, effective \_\_\_\_\_, to exclude information  
334 about patrons of the North Dakota Legal Self Help Center from public access.

335 Section 6(a)(6) was added, effective March 1, 2012, to provide a method for  
336 the court to prohibit public Internet access to an electronic case record when  
337 charges against a defendant are dismissed or the defendant is acquitted. A request  
338 under Section 6(a)(1) is required before the court can act to prohibit access under  
339 Section 6(a)(6).

340 Nothing in this rule or N.D.R.Ct. 3.4 precludes a clerk of court or the  
341 electronic case management system from identifying non-confidential records that  
342 match a name and date of birth or a name and social security number.

343 Joint Procedure Committee Minutes of \_\_\_\_\_; January 28-29,  
344 2016, pages 2-7; September 24-25, 2015, pages 15-16, 20-21; April 23-24, 2015,  
345 pages 8-10; April 24-25, 2014, page 27; April 28-29, 2011, pages 9-12; September  
346 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009,  
347 pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6;  
348 January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27,  
349 2007, page 31; September 22-23, 2005, pages 6-16; April 28-29, 2005, pages  
350 22-25; April 29-30, 2004, pages 6-13, January 29-30, 2004, pages 3-8; September  
351 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12. Court Technology  
352 Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003;  
353 Conference of Chief Justices/Conference of State Court Administrators:  
354 Guidelines for Public Access to Court Records.

355 Cross Reference: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With

356 the Court).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: September 16, 2016

RE: Rule 26, N.D.R.Civ.P., General Provisions Governing Discovery

The committee has discussed proposed amendments to Rule 26 at its last two meetings. These proposals included adopting amendments based on the December 2015 amendments to Fed.R.Civ.P. 26 and amendments that would have made Rule 26 more consistent with the federal rule on discovery of material related to expert witnesses. The committee ultimately approved limited amendments to the section of the rule related to electronically stored information. These proposed amendments are now before the Supreme Court.

During the committee's work on Rule 26, the federal requirements for initial disclosures were discussed. At the May meeting, several members suggested that the committee consider making initial disclosure requirements part of Rule 26. Staff has prepared proposed amendments that would add initial disclosure requirements (based upon those contained in the federal rule) to Rule 26.

In drafting this proposal, staff retained all the listed proceedings mentioned in the federal rule as exempt from initial disclosure. The committee may wish to examine these proceedings and decide whether any need to be deleted, or whether any others need to be added, consistent with practice in the state courts.

Staff arbitrarily chose "45 days after service of the summons and complaint" as the deadline for initial disclosures. In federal court, initial disclosures take place 14 days after the Fed.R.Civ.P. 26 (f) discovery conference, something North Dakota does not require. The

45 day limit is based on language in Rule 34 that allows a defendant 45 days after service of the summons and complaint before responding to a production request. The committee may wish to discuss whether some other time frame is more appropriate.

Language requiring disclosure of expert testimony is also included in the proposal along with proposed amendments to the "Trial Preparation Experts" part of the rule. Rule 26 is more generous than the federal rule in allowing payment of the opposing party's expert fees and expenses and this is not changed under the proposal.

If the committee decides to approve any or all of the proposed changes to Rule 26, the other discovery rules will need to be examined and possibly amended for consistency with the changes.

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The proposed amendments to Rule 26 are attached.

RULE 26. DUTY TO DISCLOSE, GENERAL PROVISIONS GOVERNING DISCOVERY

1           (a) Required Disclosures.

2           (1) Initial Disclosure.

3           (A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise  
4 stipulated or ordered by the court, a party must, without awaiting a discovery  
5 request, provide to the other parties:

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

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

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

19           (iv) for inspection and copying as under Rule 34, any insurance agreement

20 under which an insurance business may be liable to satisfy all or part of a possible  
21 judgment in the action or to indemnify or reimburse for payments made to satisfy  
22 the judgment.

23 (B) Proceedings Exempt from Initial Disclosure. The following proceedings  
24 are exempt from initial disclosure:

25 (i) an action for review on an administrative record;

26 (ii) a forfeiture action in rem arising from a federal statute;

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

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

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

32 (vi) an action by the United States to recover benefit payments;

33 (vii) an action by the United States to collect on a student loan guaranteed  
34 by the United States;

35 (viii) a proceeding ancillary to a proceeding in another court; and

36 (ix) an action to enforce an arbitration award.

37 (C) Time for Initial Disclosures—In General. A party must make the initial  
38 disclosures within 45 days after service of the summons and complaint unless a  
39 different time is set by stipulation or court order, or unless a party objects that  
40 initial disclosures are not appropriate in this action. In ruling on the objection, the

41 court must determine what disclosures, if any, are to be made and must set the time  
42 for disclosure.

43 (D) Time for Initial Disclosures—For Parties Served or Joined Later. A  
44 party that is first served or otherwise joined after the initial summons and  
45 complaint must make the initial disclosures within 45 days after being served or  
46 joined, unless a different time is set by stipulation or court order.

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

52 (2) Disclosure of Expert Testimony.

53 (A) In General. In addition to the disclosures required by Rule 26(a)(1), a  
54 party must disclose to the other parties the identity of any witness it may use at trial  
55 to present evidence under N.D.R.Ev. 702, 703, or 705.

56 (B) Witnesses Who Must Provide a Written Report. Unless otherwise  
57 stipulated or ordered by the court, this disclosure must be accompanied by a  
58 written report—prepared and signed by the witness—if the witness is one retained  
59 or specially employed to provide expert testimony in the case or one whose duties  
60 as the party's employee regularly involve giving expert testimony. The report must  
61 contain:

- 62           (i) a complete statement of all opinions the witness will express and the  
63 basis and reasons for them;
- 65           (ii) the facts or data considered by the witness in forming them;
- 66           (iii) any exhibits that will be used to summarize or support them;
- 67           (iv) the witness's qualifications, including a list of all publications authored  
68 in the previous 10 years;
- 69           (v) a list of all other cases in which, during the previous 4 years, the witness  
70 testified as an expert at trial or by deposition; and
- 71           (vi) a statement of the compensation to be paid for the study and testimony  
72 in the case.

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

- 76           (i) the subject matter on which the witness is expected to present evidence  
77 under N.D.R.Ev. 702, 703, or 705; and
- 78           (ii) a summary of the facts and opinions to which the witness is expected to  
79 testify.

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

- 83           (i) at least 90 days before the date set for trial or for the case to be ready for

84 trial; or

85 (ii) if the evidence is intended solely to contradict or rebut evidence on the  
86 same subject matter identified by another party under Rule 26(a)(2)(B) or (C),  
87 within 30 days after the other party's disclosure.

88 (E) Supplementing the Disclosure. The parties must supplement these  
89 disclosures when required under Rule 26(e).

90 (3) Pretrial Disclosures.

91 (A) In General. In addition to the disclosures required by Rule 26(a)(1) and  
92 (2), a party must provide to the other parties and promptly file the following  
93 information about the evidence that it may present at trial other than solely for  
94 impeachment:

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

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

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

104 (B) Time for Pretrial Disclosures; Objections. Unless the court orders

105 otherwise, these disclosures must be made at least 30 days before trial. Within 14  
106 days after they are made, unless the court sets a different time, a party may serve  
107 and promptly file a list of the following objections: any objections to the use under  
108 Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii);  
109 and any objection, together with the grounds for it, that may be made to the  
110 admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not  
111 so made—except for one under N.D.R.Ev. 402 or 403—is waived unless excused  
112 by the court for good cause.

113 (4) Form of Disclosures. Unless the court orders otherwise, all disclosures  
114 under Rule 26(a) must be in writing, signed, and served.

115 (a) (5) Discovery Methods to Discover Additional Matter. Parties may  
116 obtain discovery by one or more of the following methods:

117 (1) depositions on oral examination or written questions;

118 (2) written interrogatories;

119 (3) production of documents or things or permission to enter on land or  
120 other property, for inspection and other purposes;

121 (4) physical and mental examinations; and

122 (5) requests for admission.

123 (b) Discovery Scope and Limits.

124 (1) In General.

125 (A) Scope. Unless otherwise limited by court order, the scope of discovery

126 is as follows: Parties may obtain discovery regarding any nonprivileged matter that  
127 is relevant to any party's claim or defense, including the existence, description,  
128 nature, custody, condition, and location of any documents, electronically stored  
129 information, or other tangible things and the identity and location of persons who  
130 know of any discoverable matter. For good cause, the court may order the  
131 discovery of any matter relevant to the subject matter involved in the action.  
132 Relevant information need not be admissible at the trial if the discovery appears  
133 reasonably calculated to lead to the discovery of admissible evidence. For the  
134 purposes of the discovery rules, the phrase "electronically stored information"  
135 includes reasonably accessible metadata that will enable the discovering party to  
136 have the ability to access such information as the date sent, date received, author,  
137 and recipients. The phrase does not include other metadata unless the parties agree  
138 otherwise or the court orders otherwise upon motion of a party and a showing of  
139 good cause for the production of certain metadata. All discovery is subject to the  
140 limitations imposed by Rule 26(b)(1)(B)(i).

141 (B) Limitations on Frequency and Extent.

142 (i) When Required. On motion or on its own, the court must limit the  
143 frequency or extent of discovery otherwise allowed by these rules if it determines  
144 that:

145 – discovery sought is unreasonably cumulative or duplicative, or it can be  
146 obtained from some other source that is more convenient, less burdensome, or less

147 expensive;

148 –the party seeking discovery has had ample opportunity to obtain the  
149 information by discovery in the action; or

150 –the burden or expense of the proposed discovery outweighs its likely  
151 benefit, considering the needs of the case, the amount in controversy, the parties'  
152 resources, the importance of the issues at stake in the action, and the importance of  
153 the discovery in resolving the issues.

154 (ii) Specific Limitations on Electronically Stored Information. For the  
155 purposes of the discovery rules, the phrase "electronically stored information"  
156 includes reasonably accessible metadata that will enable the discovering party to  
157 have the ability to access such information as the date sent, date received, author,  
158 and recipients. The phrase does not include other metadata unless the parties agree  
159 otherwise or the court orders otherwise upon motion of a party and a showing of  
160 good cause<sup>s</sup> for the production of certain metadata. A party need not provide  
161 discovery of electronically stored information from sources that the party identifies  
162 as not reasonably accessible because of undue burden or cost. On motion to  
163 compel discovery or for a protective order, the party from whom discovery is  
164 sought must show that the information is not reasonably accessible because of  
165 undue burden or cost. If that showing is made, the court may nonetheless order  
166 discovery from such sources if the requesting party shows good cause, considering  
167 the limitations of Rule 26(b)(1)(B). The court may specify conditions for the

168 discovery.

169 (2) Insurance Agreements. ~~If a person carrying on an insurance business~~  
170 ~~might be liable to satisfy part or all of a judgment in an action or to indemnify or~~  
171 ~~reimburse for payments made to satisfy the judgment, a party may obtain discovery~~  
172 ~~of the existence and contents of the insurance agreement.~~ Disclosure of the  
173 insurance agreement under Rule 26(a)(1)(A)(iv) is not reason for its admission in  
174 evidence at trial. An application for insurance may not be treated as part of an  
175 insurance agreement.

176 (3) Trial Preparation Materials.

177 (A) Documents and Tangible Objects. Ordinarily, a party may not discover  
178 documents and tangible things that are prepared in anticipation of litigation or for  
179 trial by or for another party or its representative (including the other party's  
180 attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule  
181 26(b)(5), these materials may be discovered if:

182 (i) they are otherwise discoverable under Rule 26(b)(1); and  
183 (ii) the party shows that it has substantial need of the materials to prepare its  
184 case and cannot, without undue hardship, obtain their substantial equivalent by  
185 other means.

186 (B) Protection Against Disclosure. If the court orders discovery of those  
187 materials, it must protect against disclosure of the mental impressions, conclusions,  
188 opinions, or legal theories of a party's attorney or other representative concerning

189 the litigation.

190 (C) Previous Statement. Any party or other person may, on request and  
191 without the required showing, obtain the person's own previous statement about  
192 the action or its subject matter. If the request is refused, the person may move for a  
193 court order and Rule 37(a)(5) applies to the award of expenses. A previous  
194 statement is:

195 (i) a written statement that the person has signed or otherwise adopted or  
196 approved; or

197 (ii) a contemporaneous stenographic, mechanical, electrical, or other  
198 recording, or a transcription of it, that recites substantially verbatim the person's  
199 oral statement.

200 (4) Trial Preparation Experts.

201 ~~(A) Expert Who May Testify. Discovery of facts known and opinions held~~  
202 ~~by experts, otherwise discoverable under Rule 26(b)(1) and acquired or developed~~  
203 ~~in anticipation of litigation or for trial, may be obtained only as follows:~~

204 ~~(i) a party may through interrogatories require any other party to identify~~  
205 ~~each person whom the other party expects to call as an expert witness at trial, to~~  
206 ~~state:~~

207 ~~= the subject matter on which the expert is expected to testify;~~

208 ~~= and to state the substance of the facts and opinions to which the expert is~~  
209 ~~expected to testify, and~~

210 ~~=and a summary of the grounds for each opinion;~~

211 ~~(ii) a party may depose any person who has been identified as an expert~~

212 ~~witness whose opinions may be presented at trial unless the court finds, on motion,~~

213 ~~that the deposition is unnecessary, overly burdensome, or unfairly oppressive.~~

214 Deposition of an Expert Who May Testify. A party may depose any person who

215 has been identified as an expert whose opinions may be presented at trial. If Rule

216 26(a)(2)(B) requires a report from the expert, the deposition may be conducted

217 only after the report is provided.

218 (B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules

219 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule

220 26(a)(2), regardless of the form in which the draft is recorded.

221 (C) Expert Employed Only for Trial Preparation. Ordinarily, a party may

222 not, by interrogatories or deposition, discover facts known or opinions held by an

223 expert who has been retained or specially employed by another party in

224 anticipation of litigation or to prepare for trial and who is not expected to be called

225 as a witness at trial. But a party may do so only:

226 (i) as provided in Rule 35(b); or

227 (ii) on showing exceptional circumstances under which it is impracticable

228 for the party to obtain facts or opinions on the same subject by other means.

229 ~~(E)~~ (D) Payment. Unless manifest injustice would result, the court must

230 require that the party seeking discovery:

231 (i) pay the expert a reasonable fee for time spent in responding to discovery  
232 under Rule 26(b)(4)(A) or ~~(B)~~ (C); and

233 (ii) for discovery under Rule 26(b)(4)(A) the court may require, and for  
234 discovery under Rule 26(b)(4)~~(B)~~(C) the court must require the party seeking  
235 discovery to pay the other party a fair portion of the fees and expenses it  
236 reasonably incurred in obtaining the expert's facts and opinions.

237 (5) Claiming Privilege or Protecting Trial Preparation Materials.

238 (A) Information Withheld. When a party withholds information otherwise  
239 discoverable by claiming that the information is privileged or subject to protection  
240 as trial-preparation material, the party must:

241 (i) expressly make the claim; and

242 (ii) describe the nature of the documents, communications, or tangible  
243 things not produced or disclosed, and do so in a matter that, without revealing  
244 information itself privileged or protected, will enable other parties to assess the  
245 claim.

246 (B) Information Produced. If information is produced in discovery that is  
247 subject to a claim of privilege or of protection as trial-preparation material, the  
248 party making the claim may notify any party that received the information of the  
249 claim and the basis for it. After being notified, a receiving party must promptly  
250 return, sequester, or destroy the specified information and any copies it has and  
251 may not use or disclose the information until the claim is resolved. A receiving

252 party may promptly present the information to the court under seal for  
253 determination of the claim. If the receiving party disclosed the information before  
254 being notified, it must take reasonable steps to retrieve it. The producing party  
255 must preserve the information until the claim is resolved.

256 (c) Protective Orders.

257 (1) In General. A party or any person from whom discovery is sought may  
258 move for a protective order in the court where the action is pending, or as an  
259 alternative on matters relating to a deposition, in the court in the district where the  
260 deposition will be taken. The court may, for good cause shown, issue an order to  
261 protect a party or person from annoyance, embarrassment, oppression, or undue  
262 burden or expense, including one or more of the following:

263 (A) forbidding the discovery;

264 (B) specifying terms and conditions, including time or place for the  
265 discovery;

266 (C) prescribing a discovery other than the one selected by the party seeking  
267 discovery;

268 (D) forbidding inquiry into certain matters, or limiting the scope of  
269 discovery to certain matters;

270 (E) designating the persons who may be present while the discovery is  
271 conducted;

272 (F) requiring that a deposition be sealed and opened only on court order;

273 (G) requiring that a trade secret or other confidential research, development,  
274 or commercial information not be revealed or be revealed only in a specified way;  
275 and

276 (H) requiring that the parties simultaneously file specified sealed documents  
277 or information to be opened as the court directs.

278 (2) Ordering Discovery. If a motion for a protective order is wholly or  
279 partially denied, the court may, on just terms, order that any party or person  
280 provide or permit discovery.

281 (3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

282 (d) Sequence and Timing of Discovery. Unless, on motion, the court orders  
283 otherwise for the parties' and witnesses' convenience and in the interests of justice,  
284 methods of discovery may be used in any sequence and discovery by one party  
285 does not require any other party to delay its discovery.

286 (e) Supplementing Responses.

287 (1) In General. A party who has made a disclosure under Rule 26(a)–or who  
288 has responded to an interrogatory, request for production, or request for  
289 admission—must supplement or correct its disclosure or response:

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

294 (B) as ordered by the court.

295 (2) Witnesses. A party has a duty to timely supplement a response about:

296 (A) the identity and location of persons having knowledge of discoverable  
297 matters, and

298 (B) the identity of each person expected to be called as an expert witness at  
299 trial, the subject matter on which the person is expected to testify, and the  
300 substance of the person's testimony.

301 (f) Discovery Meeting, Discovery Conference, Discovery Plan.

302 (1) Discovery Meeting. No earlier than 40 days after the complaint is filed  
303 in an action, any party's attorney or a self-represented party may request in writing  
304 a meeting on the subject of discovery, including the discovery of electronically  
305 stored information. If such a request is made, the parties must meet within 21 days,  
306 unless agreed otherwise by the parties or their attorneys or another time for the  
307 meeting is ordered by the court. Even if the parties or their attorneys do not seek to  
308 have a discovery meeting, at any time after the complaint is filed the court may  
309 direct the parties or their attorneys to appear before it for a discovery conference.

310 (2) Matters for Consideration. During a discovery meeting held under Rule  
311 26(f)(1), the attorneys and any self-represented parties must:

312 (A) consider the nature and basis of the parties' claims and defenses and the  
313 possibilities for promptly settling or resolving the case, and

314 (B) discuss the preparation of a discovery plan as set forth in Rule 26 (f)(3).

315 (3) Conduct of Meeting. Attorneys for the parties, and any self-represented  
316 parties, that have appeared in the case are jointly responsible for arranging the  
317 meeting, for being prepared to discuss a discovery plan, and for attempting in good  
318 faith to agree on a discovery plan. The meeting may be held by telephone, by  
319 videoconference, or in person, or by a combination of methods, unless the court,  
320 on motion, orders the attorneys and the self-represented parties to attend in person.

321 (4) Discovery Plan or Report.

322 (A) In General. If a discovery plan is agreed on, it must be submitted to the  
323 court within 14 days after the meeting, and the parties may request a conference  
324 with the court regarding the plan. If the parties do not agree on a discovery plan,  
325 they must submit to the court within 14 days after the meeting a joint report  
326 containing those parts of a discovery plan on which they agree and the position of  
327 each of the parties on the parts upon which they disagree. Unless the parties agree  
328 otherwise, the attorney for the first plaintiff listed on the complaint is responsible  
329 for submitting the discovery plan or joint report.

330 (B) Discovery Plan Contents. A discovery plan must contain the following:

331 (i) a statement of the issues as they then appear;

332 (ii) a proposed plan and schedule of discovery, including the discovery of  
333 electronically stored information;

334 (iii) with respect to electronically stored information, and if appropriate  
335 under the circumstances of the case, a reference to the preservation of such

336 information, the media form, format, or procedures by which such information will  
337 be produced, the allocation of the costs of preservation, production, and, if  
338 necessary, restoration, of such information, the method for asserting or preserving  
339 claims of privilege or of protection of the information as trial-preparation materials  
340 if different from that provided in Rule 26 (b)(5), the method for asserting or  
341 preserving confidentiality and proprietary status, and any other matters addressed  
342 by the parties;

343 (iv) any limitations proposed to be placed on discovery, including, if  
344 appropriate under the circumstances of the case, that discovery be conducted in  
345 phases or be limited to or focused on particular issues;

346 (v) when discovery should be completed; and

347 (vi) if appropriate under the circumstances of the case, any limitations or  
348 conditions under Rule 26 (c) regarding protective orders.

349 (5) Discovery Conference. If the parties are unable to agree to a discovery  
350 plan at a meeting held under Rule 26 (f)(1), they must, on motion of any party,  
351 appear before the court for a discovery conference at which the court must order  
352 the entry of a discovery plan after consideration of the report required to be  
353 submitted under Rule 26 (f)(4)(A) and the position of the parties. The order may  
354 address other matters, including the allocation of discovery costs, as are necessary  
355 for the proper management of discovery in the action. An order may be altered or  
356 amended as justice may require. The court may combine the discovery conference

357 with a pretrial conference authorized by Rule 16.

358 (g) Signing Discovery Request, Responses, and Objections.

359 (1) Signature Required; Effect of Signature. Every discovery request,  
360 response, or objection must be signed by at least one attorney of record in the  
361 attorney's individual name, or by the party personally, if self-represented, state the  
362 signer's address, electronic mail address for electronic service, telephone number,  
363 and State Board of Law Examiners identification number, if applicable. By  
364 signing, the attorney or party certifies that the signer has read the request,  
365 response, or objection, and that to the best of the signer's knowledge, information,  
366 and belief formed after a reasonable inquiry it is:

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

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

370 (i) consistent with these rules and warranted by existing law or by a good  
371 faith argument for extending, modifying or reversing existing law;

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

374 (iii) neither unreasonable nor unduly burdensome or expensive,  
375 considering the needs of the case, prior discovery in the case, the amount in  
376 controversy, and the importance of the issues at stake in the litigation.

377 (2) Failure to Sign. Other parties have no duty to act on an unsigned

378 request, response, or objection until it is signed, and the court, on motion or on its  
379 own, must strike it unless a signature is promptly supplied after the omission is  
380 called to the attorney's or party's attention.

381 (3) Sanction for Improper Certification. If a certification violates this rule,  
382 without substantial justification, the court, on motion or its own, must impose an  
383 appropriate sanction on the signer, the party on whose behalf the signer was acting,  
384 or both. The sanction may include an order to pay the reasonable expenses,  
385 including attorney's fees, caused by the violation.

386 EXPLANATORY NOTE

387 Rule 26 was amended, effective July 1, 1981; March 1, 1986; March 1,  
388 1990; March 1, 1996; March 1, 2008; March 1, 2011; March 1, 2013; March 1,  
389 2015;\_\_\_\_\_.

390 Rule 26 is derived from Fed.R.Civ.P. 26

391 As amended, effective March 1, 1996, a party deposing another party's  
392 expert witness under subdivision (b)(4)(A)(ii) must pay the expert a reasonable fee  
393 under subdivision (b)(4)(C), even though a court order has not been obtained  
394 authorizing the deposition or commanding payment of expert witness fees.

395 Rule 26 was amended, effective March 1, 2008, to implement changes  
396 related to discovery of electronically stored information. The changes reflect the  
397 2006 amendments to Fed.R.Civ.P. 26. Subdivision (b) was amended to incorporate  
398 a new subparagraph (b)(2)(B) on limitations to discovery of electronic information.

399 A new paragraph (b)(6) was also added to address claims of privilege or protection  
400 of trial preparation materials.

401 Rule 26 was amended, effective March 1, 2011, in response to the  
402 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language  
403 and organization of the rule were changed to make the rule more easily understood  
404 and to make style and terminology consistent throughout the rules.

405 Rule 26 was amended, effective \_\_\_\_\_, to require initial  
406 disclosures. The amendments were derived from Fed.R.Civ.P. 26.

407 Subparagraph (b)(1)(A) was amended, effective March 1, 2013, to include a  
408 definition of "electronically stored information" and to designate what types of  
409 metadata may be discovered. Effective \_\_\_\_\_, this language was transferred  
410 to subparagraph (b)(1)(B)(ii).

411 Subparagraph (c)(1)(H) was amended, effective March 1, 2015, to remove a  
412 reference to filing documents in a sealed paper envelope. Items are filed with the  
413 court electronically, and may be designated as sealed when submitted.

414 Subdivision (f) was amended, effective March 1, 2013, to provide a  
415 procedure for discovery meetings and conferences and for the formulation of  
416 discovery plans and reports, with an emphasis on discussing and planning for the  
417 discovery of electronic information.

418 Paragraph (g)(1) was amended, effective March 1, 2015, to specify that the  
419 attorney's electronic mail address for electronic service must be included with the

420 signature.

421 SOURCES: Joint Procedure Committee Minutes of \_\_\_\_\_;  
422 May 12-13, 2016, pages 10-15; January 28-29, 2016, pages 13-14; April 24-25,  
423 2014, page 25; January 26-27, 2012, page 17-19; January 29-30, 2009, page 6;  
424 September 25, 2008, pages 21-22; January 25, 2007, pages 9-10; September 28-29,  
425 2006, pages 18-20; January 26-27, 1995, pages 10-12; September 29-30, 1994,  
426 pages 21-22; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984,  
427 page 28; January 20, 1984, pages 23-31; December 11-12, 1980, page 2; October  
428 30-31, 1980, pages 9-10; September 20-21, 1979, page 19; Fed.R.Civ.P. 26.

429 CROSS REFERENCE: N.D.R.Civ.P. 16 (Pretrial Procedure-Formulating  
430 Issues), N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken),  
431 N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 30  
432 (Depositions Upon Oral Examination), N.D.R.Civ.P. 30.1 (Uniform Audio-Visual  
433 Deposition Rule), N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written  
434 Questions), N.D.R.Civ.P. 33 (Interrogatories to Parties), N.D.R.Civ.P. 34  
435 (Production of Documents and Things and Entry Upon Land for Inspection and  
436 Other Purposes), N.D.R.Civ.P. 35 (Physical and Mental Examination of Persons),  
437 N.D.R.Civ.P. 36 (Requests for Admission), and N.D.R.Civ.P. 37 (Failure to Make  
438 Discovery-Sanctions); N.D.R.Ev. 507 (Trade Secrets), N.D.R.Ev. 510 (Waiver of  
439 Privilege by Voluntary Disclosure), and N.D.R.Ev. 706 (Court-Appointed  
440 Experts).

Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

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

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

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

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

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

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

(ii) a forfeiture action in rem arising from a federal statute;

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

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

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

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

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

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

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

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

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

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

- (i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;
- (ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and
- (iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

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

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

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

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

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) Sequence. Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) 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

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), 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(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

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

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

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

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

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

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

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) 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 unrepresented—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:

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

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

(i) 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;

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

(iii) 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.

(2) 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.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, 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.

#### Notes

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 29, 2015, eff. Dec. 1, 2015.)

#### Committee Notes on Rules—2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on "facts or data" is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that "facts or data" be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data "considered" by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); see Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel's work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any "preliminary" expert opinions. Protected "communications" include those between the party's attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert's testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party's counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in

forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party’s attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party’s behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party’s attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party’s attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications “identifying” the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party’s attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert’s conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert’s testimony. A party’s failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney’s mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert’s own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

#### Changes Made After Publication and Comment.

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.

1 In response to concerns about the proposal raised at the June 15–16, 2005, Standing Committee meeting, the Committee Note was revised to emphasize that the courts will continue to examine whether a privilege claim was made at a reasonable time, as part of substantive law.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: September 18, 2016

RE: Rule 4, N.D.R.Civ.P., Persons Subject to Jurisdiction; Process; Service

Rod Olson, the court administrator for Unit 2, has requested that the committee consider adoption of a service by web posting system similar to that used in Alaska. This would replace the current system of service by publication. Mr. Olson says that service by publication is expensive and this puts a burden on parties, including our juvenile court. Mr. Olson also says that using service by web posting would make it more likely that notice is actually received by the persons to whom it is directed. Mr. Olson's email is attached.

Alaska's service by web posting procedure is contained in subdivision (e) of Alaska R.Civ.P. 4. The web posting is done on a service website created by the Alaska court system. Service by posting to the court website can be supplemented on court order by service by publication, posting to an online newspaper website, service by email, posting to a social network account, posting on a bulletin board or posting on the front door of the absent party's home. A copy of Alaska Rule 4 is attached.

Also attached is an article on why Alaska chose to switch to the service by web posting system. The article states that the main reason for making the change was because service by publication was ineffective at providing actual notice and default judgment was the result in most service by publication cases. The article states that service by web posting has proven more likely to provide actual notice than service by publication.

The attached proposed amendments to Rule 4 would replace the current service by publication subdivision with language based on the Alaska service by web posting provision.

Obviously North Dakota does not yet have a service by web posting website and if the committee is interested in going forward with the proposed change it would be necessary to query the IT department to see what sort of work would need to be done to create such a website. Also, a search would need to be made of all the other rules to determine what other changes would be need to be made to conform with the proposed new web posting service system.

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RULE 4. PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE

1           (a) Definition of Person. As used in this rule, "person", whether or not a  
2 citizen or domiciliary of this state and whether or not organized under the laws of  
3 this state, includes:

- 4           (1) an individual, executor, administrator or other personal representative;  
5           (2) any other fiduciary;  
6           (3) any two or more persons having a joint or common interest;  
7           (4) a partnership;  
8           (5) an association;  
9           (6) a corporation; and  
10          (7) any other legal or commercial entity.

11          (b) Personal Jurisdiction.

12           (1) Personal Jurisdiction Based on Presence or Enduring Relationship. A  
13 court of this state may exercise personal jurisdiction over a person found within,  
14 domiciled in, organized under the laws of, or maintaining a principal place of  
15 business in, this state as to any claim for relief.

16           (2) Personal Jurisdiction Based on Contacts. A court of this state may  
17 exercise personal jurisdiction over a person who acts directly or by an agent as to  
18 any claim for relief arising from the person's having such contact with this state  
19 that the exercise of personal jurisdiction over the person does not offend against

20 traditional notions of justice or fair play or the due process of law, under one or  
21 more of the following circumstances:

22 (A) transacting any business in this state;

23 (B) contracting to supply or supplying service, goods, or other things in this  
24 state;

25 (C) committing a tort within or outside this state causing injury to another  
26 person or property within this state;

27 (D) committing a tort within this state, causing injury to another person or  
28 property within or outside this state;

29 (E) having an interest in, using, or possessing property in this state;

30 (F) contracting to insure another person, property, or other risk within this  
31 state;

32 (G) acting as a director, manager, trustee, or officer of a corporation  
33 organized under the laws of, or having its principal place of business within, this  
34 state;

35 (H) enjoying any other legal status or capacity within this state; or

36 (I) engaging in any other activity, including cohabitation or sexual  
37 intercourse, within this state.

38 (3) Limitation on Jurisdiction Based on Contacts. If jurisdiction over a  
39 person is based solely on paragraph (2) of this subdivision, only a claim for relief  
40 arising from bases enumerated in paragraph (2) may be asserted against that

41 person.

42 (4) Acquisition of Jurisdiction. A court of this state may acquire personal  
43 jurisdiction over any person through service of process as provided in this rule or  
44 by statute, or by voluntary general appearance in an action by any person either  
45 personally or through an attorney or any other authorized person.

46 (5) Inconvenient Forum. If the court finds, in the interest of substantial  
47 justice, the action should be heard in another forum, the court may stay or dismiss  
48 the action in whole or in part on any condition that may be just.

49 (c) Process.

50 (1) Contents of Summons. The summons must:

51 (A) specify the venue of the court in which the action is brought;

52 (B) contain the title of the action specifying the names of the parties;

53 (C) be directed to the defendant;

54 (D) It must state the time within which these rules require the defendant to  
55 appear and defend;

56 (E) notify the defendant that, if the defendant fails to appear and defend,  
57 default judgment will be rendered against the defendant for the relief demanded in  
58 the complaint; and

59 (F) be dated and subscribed by the plaintiff or the plaintiff's attorney and  
60 include the post office address of the plaintiff or plaintiff's attorney.

61 (G) If the action involves real estate and service is by publication, include

62 the additional information required by Rule 4(e)(8).

63 (2) Copy of Complaint. A copy of the complaint must be served with the  
64 summons, except when service is by publication under Rule 4(e).

65 (d) Personal Service.

66 (1) By Whom. Service of all process may be made:

67 (A) within the state by any person of legal age and not a party to nor  
68 interested in the action; and

69 (B) outside the state by any person who may make service under the law of  
70 this state or under the law of the place where service is made, or by a person who  
71 is designated by a court of this state.

72 (2) How Service Made Within the State. Personal service of process within  
73 the state must be made as follows:

74 (A) Serving an Individual Fourteen Years of Age and Older. Service must  
75 be made on an individual 14 or more years of age by:

76 (i) delivering a copy of the summons to the individual personally;

77 (ii) leaving a copy of the summons at the individual's dwelling or usual  
78 place of residence in the presence of a person of suitable age and discretion who  
79 resides there;

80 (iii) delivering, at the office of the process server, a copy of the summons to  
81 the individual's spouse if the spouses reside together;

82 (iv) delivering a copy of the summons to the individual's agent authorized

83 by appointment or by law to receive service of process; or

84 (v) any form of mail or third-party commercial delivery addressed to the  
85 individual to be served and requiring a signed receipt and resulting in delivery to  
86 that individual.

87 (B) Serving an Individual Under the Age of Fourteen. Service must be  
88 made on an individual under the age of 14 by delivering a copy of the summons to:

89 (i) the individual's guardian, if the individual has one within the state;

90 (ii) the individual's parent or any person or agency having the individual's  
91 care or control, or with whom the individual resides, if the individual does not  
92 have a guardian within the state; or

93 (iii) the person designated by court order, if service cannot be made under  
94 (i) or (ii).

95 (C) Serving an Incompetent Individual or Appointed Guardian. Service  
96 must be made on an individual who has been judicially adjudged incompetent or  
97 for whom a guardian of the individual's person or estate has been appointed in this  
98 state, by delivering a copy of the summons to the individual's guardian. If a general  
99 guardian and a guardian ad litem have been appointed, both must be served.

100 (D) Serving a Corporation, Partnership, or Association. Service must be  
101 made on a domestic or foreign corporation or on a partnership or other  
102 unincorporated association, by:

103 (i) delivering a copy of the summons to an officer, director, superintendent

104 or managing or general agent, or partner, or associate, or to an agent authorized by  
105 appointment or by law to receive service of process on its behalf, or to one who  
106 acted as an agent for the defendant with respect to the matter on which the  
107 plaintiff's claim is based and who was an agent of the defendant at the time of  
108 service;

109 (ii) if the sheriff's return indicates no person upon whom service may be  
110 made can be found in the county, then service may be made by leaving a copy of  
111 the summons at any office of the domestic or foreign corporation, partnership, or  
112 unincorporated association within this state with the person in charge of the office;  
113 or

114 (iii) any form of mail or third-party commercial delivery addressed to any of  
115 the foregoing persons and requiring a signed receipt and resulting in delivery to  
116 that person.

117 (E) Serving a Municipal or Public Corporation. Service must be made on a  
118 city, township, school district, park district, county, or any other municipal or  
119 public corporation, by delivering a copy of the summons to any member of its  
120 governing board.

121 (F) Serving the State and Its Agencies.

122 (i) State. Service must be made on the state by delivering a copy of the  
123 summons to the governor or attorney general or an assistant attorney general.

124 (ii) State Agency. Service must be made on an agency of the state, such as

125 the Bank of North Dakota or the North Dakota Mill and Elevator Association, by  
126 delivering a copy of the summons to the managing head of the agency or to the  
127 attorney general or an assistant attorney general.

128 (G) Serving an Agent Not Authorized to Receive Process. If service is made  
129 on an agent who is not expressly authorized by appointment or by law to receive  
130 service of process on behalf of the defendant, a copy of the summons and  
131 complaint must be mailed or delivered via a third-party commercial carrier to the  
132 defendant with return receipt requested not later than ten days after service by  
133 depositing a copy of the summons and complaint, with postage or shipping  
134 prepaid, in a post office or with a commercial carrier in this state and directed to  
135 the defendant to be served at the defendant's last reasonably ascertainable address.

136 (3) How Service of Process is Made Outside the State. Service on any  
137 person subject to the personal jurisdiction of the courts of this state may be made  
138 outside the state:

139 (A) in the same manner as service within this state, with the force and effect  
140 as though service had been made within this state;

141 (B) under the law of the place where service is made for service in that  
142 place in an action in any of its courts of general jurisdiction; or

143 (C) as directed by court order.

144 (e) Service by Publication:

145 (1) ~~When Service by Publication Permitted. A defendant, whether known or~~

146 ~~unknown, who has not been served personally under subdivision (d) of this rule~~  
147 ~~may be served by publication in one or more of the following situations only if:~~

148 ~~(A) the claim for relief is based on one or more grounds for the exercise of~~  
149 ~~personal jurisdiction under paragraph (2) of subdivision (b) of this rule;~~

150 ~~(B) the subject of the action is real or personal property in this state, and:~~

151 ~~(i) the defendant has or claims a lien or other interest in the property,~~  
152 ~~whether vested or contingent;~~

153 ~~(ii) the relief demanded against the defendant consists wholly or partly in~~  
154 ~~excluding the defendant from that lien or interest or in defining, regulating, or~~  
155 ~~limiting that lien or interest, or~~

156 ~~(iii) the action otherwise affects the title to the property;~~

157 ~~(C) the action is to foreclose a mortgage, cancel a contract for sale, or to~~  
158 ~~enforce a lien on or a security interest in real or personal property in this state;~~

159 ~~(D) the plaintiff has acquired a lien on the defendant's property or credits~~  
160 ~~within this state by attachment, garnishment, or other judicial processes and the~~  
161 ~~property or credit is the subject matter of the litigation or the underlying claim for~~  
162 ~~relief relates to the property or credits;~~

163 ~~(E) the action is for divorce, separation, or annulment of a marriage of a~~  
164 ~~state resident;~~

165 ~~(F) the action is to determine parenting rights and responsibilities of an~~  
166 ~~individual subject to the court's jurisdiction; or~~

167           ~~(G) the action is to award, partition, condemn, or escheat real or personal~~  
168 ~~property in this state.~~

169           ~~(2) Filing of Complaint and Affidavit for Service by Publication. Before~~  
170 ~~service of the summons by publication is authorized, a complaint and affidavit~~  
171 ~~must be filed with the clerk of court where the action is venued. The complaint~~  
172 ~~must set forth a claim in favor of the plaintiff and against the defendant and be~~  
173 ~~based on one or more of the situations specified in paragraph (c)(1). The affidavit~~  
174 ~~must be executed by the plaintiff or the plaintiff's attorney and must state one or~~  
175 ~~more of the following:~~

176           ~~(A) that after diligent inquiry personal service of the summons cannot be~~  
177 ~~made on the defendant in this state to the best knowledge, information, and belief~~  
178 ~~of the affiant;~~

179           ~~(B) that the defendant is a domestic corporation that has forfeited its charter~~  
180 ~~or right to do business in this state or has failed to file its annual report as required~~  
181 ~~by law;~~

182           ~~(C) that the defendant is a domestic or foreign corporation and has no~~  
183 ~~officer, director, superintendent, managing agent, business agent, or other agent~~  
184 ~~authorized by appointment or by law on whom service of process can be made on~~  
185 ~~its behalf in this state; or~~

186           ~~(D) that all persons having or claiming an estate or interest in, or lien or~~  
187 ~~encumbrance on, the real property described in the complaint, whether as heirs,~~

188 ~~devisees, legatees, or personal representative of a deceased person, or under any~~  
189 ~~other title or interest, and not in possession, nor appearing of record in the office of~~  
190 ~~the register of deeds, the clerk of the district court, or the county auditor of the~~  
191 ~~county in which the real property is situated, to have such claim, title or interest in~~  
192 ~~the property, are proceeded against as unknown persons defendant under N.D.C.C.~~  
193 ~~Chs. 32-17 or 32-19, and stating facts necessary to satisfy the requirements of~~  
194 ~~those chapters.~~

195 ~~(3) Number of Publications. Service of the summons by publication may be~~  
196 ~~made by publishing the summons three times, once each week for three successive~~  
197 ~~weeks, in a newspaper published in the county where the action is pending. If no~~  
198 ~~newspaper is published in that county, publication may be made in a newspaper~~  
199 ~~having a general circulation in the county.~~

200 ~~(4) Mailing or Delivering Summons and Complaint. A copy of the~~  
201 ~~summons and complaint, at any time after the filing of the affidavit for publication~~  
202 ~~and no later than 14 days after the first publication of the summons, must be~~  
203 ~~deposited in a post office or with a third-party commercial carrier in this state,~~  
204 ~~postage or shipping prepaid, and directed to the defendant to be served at the~~  
205 ~~defendant's last reasonably ascertainable address.~~

206 ~~(e) Other Service. When it appears by affidavit of a person having~~  
207 ~~knowledge of the facts filed with the clerk that after diligent inquiry a party cannot~~  
208 ~~be served with process under Rule 4(d), service may be made by posting on the~~

209 North Dakota Court System's legal notice website and as otherwise directed by the  
210 court as provided in Rule 4(e). The party who seeks to have service made under  
211 Rule 4(e) must include in the affidavit of diligent inquiry a discussion of whether  
212 other methods of service listed in Rule 4(e)(4) may be more likely to give the  
213 absent party actual notice. In adoption cases, service by posting on the North  
214 Dakota Court System's legal notice website or by publication will be allowed only  
215 if ordered by the court for compelling reasons.

216 (1) Diligent Inquiry. Inquiry as to the absent party's whereabouts must be  
217 made by the party who seeks to have service made, or by the party's attorney  
218 actually entrusted with the conduct of the action, or by the agent of the attorney. It  
219 must be made of any person who the inquirer has reason to believe possesses  
220 knowledge or information as to the absent party's residence or address or the  
221 matter inquired of. Unless otherwise ordered by the court, diligent inquiry must  
222 include a reasonable effort to search the internet for the whereabouts of the absent  
223 party. The inquiry must also be undertaken in person or by letter, and the inquirer  
224 must state that an action has been or is about to be commenced against the party  
225 inquired for, that the object of the inquiry is to give such party notice of the action  
226 in order that such party may appear and defend it. When the inquiry is made by  
227 letter, postage must be enclosed sufficient for the return of an answer. The  
228 affidavit of inquiry must be made by the inquirer. It must fully specify the inquiry  
229 made, of what persons and in what manner it was made, and a description of any

230 efforts that were made to search the internet, so that by the facts stated in the  
231 affidavit it may appear that diligent inquiry has been made for the purpose of  
232 effecting actual notice.

233 (2) Filing of Complaint and Affidavit for Service by Publication. Before  
234 service of the summons by other service is authorized, a complaint and the  
235 affidavit of inquiry must be filed with the clerk of court where the action is  
236 venued. The complaint must set forth a claim in favor of the plaintiff and against  
237 the defendant.

238 (3) Service by Posting on the North Dakota Court System's Legal Notice  
239 Website. A notice must be continuously posted for four consecutive weeks on the  
240 North Dakota Court System's legal notice website. A copy of the notice and  
241 complaint, at any time after the filing of the affidavit of inquiry and no later than  
242 14 days after the first posting of the notice, must be deposited in a post office or  
243 with a third-party commercial carrier in this state, postage or shipping prepaid, and  
244 directed to the defendant to be served at the defendant's last reasonably  
245 ascertainable address.

246 (4) Additional Service by Other Methods. In addition to the service required  
247 under Rule 4(e)(3), the court, in its discretion, may require service of process to be  
248 made upon an absent party in any other manner that is reasonably calculated to  
249 give the party actual notice of the proceedings and an opportunity to be heard. The  
250 method of service could include publication of the notice in a print or online

251 newspaper or other publication at least once a week for four consecutive weeks;  
252 service of the notice to the absent party's e-mail account; posting of the notice to  
253 the absent party's social networking account; physically posting a copy of the  
254 notice and complaint on a public bulletin board or on the front door of the absent  
255 party's place of residence; or any method the court determines to be reasonable  
256 and appropriate.

257 (5) Mailing Required. If service is allowed by any method listed in Rule  
258 4(e)(4), the party who seeks to have service made must also send the absent party a  
259 copy of the notice and the complaint by mail as required in Rule 4(e)(3). Proof of  
260 mailing must be made by affidavit of a deposit in a post office of the copies of the  
261 notice and the complaint or other pleadings.

262 (6) Form and Contents of Notice – Time. The notice referred to in Rule  
263 4(e)(3), (4) and (7) must be in the form of a summons. It must state briefly the  
264 nature of the action, the relief demanded, and why the party to whom it is  
265 addressed is made a party to the action. Where the action concerns real property or  
266 where real property of a party has been attached, the notice must set forth a legal  
267 description of the property, must state the municipality or district in which it is  
268 located, and the street or road on which the property is situated, and if the property  
269 is improved, it must state the street number of the same. Where personal property  
270 of a party has been attached, the notice must generally describe the property. If a  
271 mortgage is to be foreclosed, the notice must state the names of all parties to the

272 mortgage and the dates that the mortgage was executed. The notice must specify  
273 the time within which the absent party has to appear or answer or plead, which  
274 may not be less than 21 days after personal service or, if service is made by  
275 publication, not less than 21 days after the last date of publication, and must state  
276 the effect of a failure to appear or answer or plead. If the absent party does not  
277 appear or answer or plead within the time specified within the notice, the court  
278 may proceed as if such party had been served with process within the state.

279 (7) Proof of Service.

280 (A) Service by Posting on the North Dakota Court System's Legal Notice  
281 Website. If service is made by posting to the North Dakota Court System's Legal  
282 Notice Website, proof of posting must be made by certification of the court clerk.  
283 A printed copy of the posted notice and the dates of posting must be attached to the  
284 clerk's certificate.

285 (B) Service by Publication in a Printed Newspaper. If service is made by  
286 publication in a printed newspaper, proof of publication must be made by the  
287 affidavit of the newspaper's publisher, printer, manager, foreman, or principal  
288 clerk, or by the certificate of the attorney for the party at whose instance the  
289 service was made. A printed copy of the published notice with the name of the  
290 newspaper and dates of publication marked must be attached to the affidavit or  
291 certificate.

292 (C) Service by Posting to an Online Publication Website. If service is made

293 by posting to an online publication website, proof of posting must be made by  
294 affidavit of the online publication's publisher, printer, manager, foreman, or  
295 principal clerk, or by the certificate of the attorney for the party at whose instance  
296 the service was made. A printed copy of the posted notice with the name of the  
297 online publication and dates of posting marked must be attached to the affidavit or  
298 certificate.

299 (D) Service by E-mail or Posting to a Social Networking Account. If service  
300 is made by e-mail or posting to a social networking account, proof of e-mail  
301 transmission or electronic posting must be made by affidavit. If service is made by  
302 e-mail, a copy of the sent e-mail transmission must be attached to the affidavit. If  
303 service is made by posting a notice on the absent party's social networking  
304 account, a screen print of the posting must be attached to the affidavit.

305 (E) Service by Posting to a Public Bulletin Board or on the Front Door of  
306 the Absent Party's Place of Residence. If service is made by posting to a public  
307 bulletin board or on the front door of the absent party's place of residence, proof of  
308 posting must be made by affidavit of posting of the notice and the complaint or  
309 other pleadings.

310 (F) Other Service by Court Order. If the court has allowed service of  
311 process to be made upon an absent party in any other manner calculated to give  
312 actual notice, proof of service must be made as directed by the court.

313 (5) (8) Personal Service Outside State is Equivalent to Publication. After

314 the affidavit for ~~publication of inquiry~~ and the complaint in the action are filed,  
315 personal service of the summons and complaint on the defendant out of state is  
316 equivalent to and has the same force and effect as the ~~publication other service~~ and  
317 mailing or delivery provided for in Rule 4(e)(4) and (5).

318 ~~(6)~~ (8) Time When First Publication Other Service or Service Outside State  
319 Must Be Made. The first ~~publication other service~~ of the summons, or personal  
320 service of the summons and complaint on the defendant outside the state, must be  
321 made within 60 days after the filing of the ~~for publication of inquiry~~. If not made,  
322 the action is considered discontinued as to any defendant not served within that  
323 time.

324 ~~(7)~~ (9) When Defendant Served by Publication Other Service is Permitted to  
325 Defend.

326 (A) The defendant who is served by ~~publication other service~~, or the  
327 defendant's representative, on application and sufficient cause shown at any time  
328 before judgment, must be allowed to defend the action.

329 (B) Except in an action for divorce, the defendant who is served by  
330 ~~publication other service~~, or the defendant's representative, on just terms, may be  
331 allowed to defend at any time within three years after entry of judgment if the  
332 defendant files an affidavit with the court that states:

333 (i) the defendant has a good and meritorious defense to the action; and

334 (ii) the defendant had no actual notice or knowledge of the action to enable

335 the defendant to make application to defend before the entry of judgment.

336 (C) If the defense is successful and the judgment, or any part of the  
337 judgment, has been collected or otherwise enforced, restitution may be ordered by  
338 the court, but the title to property sold under the judgment to a purchaser in good  
339 faith may not be affected.

340 (D) A defendant is considered to have had notice of the action and of the  
341 judgment if the defendant:

342 (i) receives a copy of the summons in the action by mail or delivery under  
343 paragraph Rule 4 (e)(4)(3) or (5); or

344 (ii) is personally served the summons outside the state under paragraph Rule  
345 4 (e)(5)(8).

346 ~~(8) Additional Information to be Published for Real Property. In all cases in~~  
347 ~~which publication of summons is made in an action that the title to, or an interest~~  
348 ~~in or lien on, real property is involved, the publication must also contain a~~  
349 ~~description of the real property and a statement of the object of the action.~~

350 (f) Serving a Person in a Foreign Country. Unless otherwise provided by  
351 law, an individual, other than a minor or an incompetent person, may be served at a  
352 place not within any judicial district of the United States:

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

356 (2) if there is no internationally agreed means, or if an international  
357 agreement allows but does not specify other means, by a method that is reasonably  
358 calculated to give notice:

359 (A) as prescribed by the foreign country's law for service in that country in  
360 an action in its courts of general jurisdiction;

361 (B) as the foreign authority directs in response to a letter rogatory or letter  
362 of request; or

363 (C) unless prohibited by the foreign country's law by

364 (i) delivering a copy of the summons and the complaint to the individual  
365 personally; or

366 (ii) using any form of mail or third-party commercial delivery that the clerk  
367 addresses and sends to the individual and that requires a signed receipt; or

368 (3) by other means not prohibited by international agreement, as the court  
369 orders.

370 (4) Serving a Minor or Incompetent Person. Unless otherwise provided by  
371 law, service must be made on a minor or an incompetent person in a place not  
372 within any judicial district of the United States in the manner prescribed by  
373 paragraphs (2)(A), (2)(B), and (3).

374 (5) Serving a Foreign Corporation, Partnership, or Association. Unless  
375 otherwise provided by law, service must be made on a foreign corporation,  
376 partnership or other unincorporated association, that is subject to suit under a

377 common name, in a place not within any judicial district of the United States in the  
378 manner prescribed for individuals in this subdivision except personal delivery  
379 under paragraph (2)(C)(i).

380 (g) When Other Service by Publication or Service Outside State Complete.  
381 Service by publication Other service is complete fifteen days after the first posting  
382 or publication of the summons. Personal service of the summons and complaint  
383 upon the defendant outside the state is complete fifteen days after the date of  
384 service.

385 (h) Amendment of Process or Proof of Service. The court may allow any  
386 process or proof of service to be amended at any time on notice and just terms,  
387 unless it clearly appears that the substantial rights of the party against whom the  
388 process was issued would be materially prejudiced.

389 (i) Proof of Service. Proof of service of the summons and of the complaint  
390 or notice, if any, accompanying the summons or of other process, must be made as  
391 follows:

392 (1) if served by the sheriff or other officer, by the officer's certificate of  
393 service;

394 (2) if served by any other person, by the server's affidavit of service;

395 (3) if served by publication, by an affidavit made as provided in N.D.C.C. ?  
396 31-04-06 and an affidavit of mailing or an affidavit of delivery via a third-party  
397 commercial carrier of a copy of the summons and complaint under paragraph

398 (e)(4) of this rule, if the summons and complaint has been deposited;  
399 (4) in any other case of service by mail or delivery via a third-party  
400 commercial carrier resulting in delivery under paragraph (d)(2) or (d)(3), by an  
401 affidavit of mailing or an affidavit of delivery of a copy of the summons and  
402 complaint or other process, with return receipt attached; or  
403 (5) by the written admission of the defendant.

404 (j) Contents of Proof of Service.

405 (1) The certificate, affidavit or admission of service mentioned in  
406 subdivision (i) must state the date, time, place, and manner of service.

407 (2) If the process, pleading, order of court, or other paper is served  
408 personally by a person other than the sheriff or person designated by law, the  
409 affidavit of service must also state that:

410 (A) the server is of legal age and not a party to the action nor interested in  
411 the action, and

412 (B) the server knew the person served to be the person named in the papers  
413 served and the person intended to be served.

414 (k) Contents of Affidavit of Mailing or Delivery via a Third-party  
415 Commercial Carrier. An affidavit of mailing or delivery required by this rule must:

416 (1) state a copy of the process, pleading, order of court, or other paper to be  
417 served was deposited by the affiant, with postage or shipping prepaid, in the mail  
418 or with a third-party commercial carrier and directed to the party shown in the

419 affidavit to be served at the party's last reasonably ascertainable address;

420 (2) contain the date and place of deposit;

421 (3) indicate the affiant is of legal age; and

422 (4) contain the return receipt, if any, attached to the affidavit.

423 (l) Effect of Mail or Delivery Refusal. If a summons and complaint or other

424 process is mailed or sent with delivery restricted and requiring a receipt signed by

425 the addressee, the addressee's refusal to accept the mail or delivery constitutes

426 delivery. Return of the mail or delivery bearing an official indication on the cover

427 that delivery was refused by the addressee is prima facie evidence of the refusal.

428 Service is complete on the date of refusal.

429 (m) Service Under Statute. If a statute requires service and does not specify

430 a method of service, service must be made under this rule.

431 EXPLANATORY NOTE

432 Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977;

433 January 1, 1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1,

434 1996; March 1, 1998; March 1, 1999; March 1, 2004; March 1, 2007; August 1,

435 2009; March 1, 2011; March 1, 2013; \_\_\_\_\_. The explanatory note was

436 amended, effective March 1, 2014.

437 Rule 4 governs civil jurisdiction and service of process. In contrast, Rule 5

438 applies to service of papers other than process.

439 Rule 4 was amended, effective March 1, 1999, to allow delivery via a

440 third-party commercial carrier as an alternative to the Postal Service. The  
441 requirement for a "third-party" is consistent with the rule's requirement for  
442 personal service by a person not a party to nor interested in the action. The  
443 requirement for a "commercial carrier" means it must be the regular business of the  
444 carrier to make deliveries for profit. A law firm may not act as its own commercial  
445 carrier service for service of process. Finally, the phrase "commercial carrier" is  
446 not intended to include or authorize electronic delivery. Service via e-mail or  
447 facsimile transmission is not permitted by Rule 4.

448 Originally, Rule 4 concerned process, with no mention of jurisdiction. In  
449 1971, what are now subdivisions (a) [Definition of Person] and (b) [Jurisdiction  
450 Over Person] were added. They were taken from the Uniform Interstate and  
451 International Procedure Act. Many changes were also made to subdivision (d)  
452 [previously (c)] concerning personal service, several of which were taken from that  
453 Act.

454 Subdivision (c) was amended, effective March 1, 1998, to provide a  
455 defendant with the means to compel the plaintiff to file the action.

456 Paragraph (c)(2) was amended, effective March 1, 2007, to require the  
457 complaint to be served with the summons under most circumstances.

458 Paragraph (c)(3) on making a demand to file the complaint was transferred  
459 to Rule 5, effective March 1, 2013.

460 Subdivision (d) was amended, effective March 1, 1998, to allow personal

461 service by delivering a copy of the summons to an individual's spouse. The time of  
462 service for an item served by mail or third-party commercial carrier under  
463 subdivision (d) is the time the item is delivered to or refused by the recipient.  
464 Refusal of delivery is tantamount to receipt of the mail or delivery for purposes of  
465 service. On the other hand, if the mail or delivery is unclaimed, no service is made.  
466 Subdivision (l) was added in 1983, effective September 1, 1983, to make it clear  
467 that refusal of delivery by the addressee constitutes delivery.

468 Paragraph (d)(4) was deleted and subdivision (m) was added, effective  
469 March 1, 2004, to clarify that, when a statute requires service and no method of  
470 service is specified, service must be made under this rule. Statutes governing  
471 special procedures often conflict with these rules. As an example, N.D.C.C.  
472 32-19-32 concerning the time period for mailing the summons and complaint after  
473 publication in a mortgage foreclosure conflicts with Rule 4(e)(4).

474 Paragraph (e)(4) was amended, effective March 1, 2011, to increase the  
475 time to deposit a copy of the summons and complaint with a post office or  
476 third-party commercial carrier from 10 to 14 days after the first publication of the  
477 summons.

478 A new subdivision (f) was added, effective March 1, 1996, to provide  
479 procedures for service upon a person in a foreign country. The new procedures  
480 follow Rule 26(f), Fed.R.Civ.P.

481 Rule 4 was amended, effective March 1, 2011, in response to the December

482 1, 2007, revision of the Federal Rules of Civil Procedure. The language and  
483 organization of the rule were changed to make the rule more easily understood and  
484 to make style and terminology consistent throughout the rules.

485 Service of process under statutory methods is allowed in some  
486 circumstances. Examples of service statutes include: N.D.C.C. § 10-01.1-13  
487 (service of process on foreign and dissolved business entities); N.D.C.C. §  
488 26.1-11-10 (service on a foreign insurance company); N.D.C.C. § 28-04.1-02  
489 (service on a person agreeing by contract to be sued in North Dakota); N.D.C.C.  
490 ch. 28-06.2 (service on the United States); N.D.C.C. § 39-01-11 (service on  
491 non-resident motorist); N.D.C.C. § 43-07-19 (service on non-resident contractors  
492 doing public work); N.D.C.C. § 52-04-12 (service on non-resident employers in  
493 unemployment compensation actions); N.D.C.C. § 53-05-04 (service of process in  
494 actions related to amusements).

495 SOURCES: Joint Procedure Committee Minutes of  
496 \_\_\_\_\_; January 31-February 1, 2013, page 12; September 27,  
497 2012, pages 7-8; January 26-27, 2012, pages 12-13; April 29-30, 2010, pages 5-6;  
498 May 21-22, 2009, pages 44-45; April 27-28, 2006, pages 11-14; January 30-31,  
499 2003, pages 6-10; September 26-27, 2002, pages 15-18; April 30-May 1, 1998,  
500 pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997,  
501 page 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16;  
502 January 26-27, 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages

503 1-4 and 11; May 21-22, 1987, page 5; November 29, 1984, pages 3-5; September  
504 30-October 1, 1982, pages 15-18; April 15-16, 1982, pages 2-5; December 11-12,  
505 1980, page 2, October 30-31, 1980, page 31; January 17-18, 1980, pages 1-3;  
506 November 29-30, 1979, page 2; October 27-28, 1977, page 10; April 8-9, 1976,  
507 pages 5-9; Fed.R.Civ.P. 4.

508 STATUTES AFFECTED:

509 SUPERSEDED: N.D.C.C. chs. 28-06, 28-06.1.

510 CONSIDERED: N.D.C.C. ch. 28-06.2; N.D.C.C. §§ 10-01.1-13;  
511 26.1-11-10; 28-04.1-02; 39-01-11; 43-07-19; 52-04-12; 53-05-04.

512 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings  
513 and Other Papers), N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 12 (Defenses and  
514 objections - When and how presented - By pleading or motion - Motion for  
515 judgment on pleadings); N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 81  
516 (Applicability In General); N.D.R.Ct. 8.4 (Summons in Action for Divorce or  
517 Separation).

## Hagburg, Mike

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**From:** Olson, Rodney  
**Sent:** Monday, August 22, 2016 1:59 PM  
**To:** Hagburg, Mike  
**Cc:** Holewa, Sally  
**Subject:** FW: Service via a Web Site  
**Attachments:** Cass\_Admin\_Sharp@court.state.nd\_20160819\_170011.pdf

Judge McCullough asked me to forward this to you.

Please let me know if you have any questions.

Rod

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**From:** Olson, Rodney  
**Sent:** Friday, August 19, 2016 2:47 PM  
**To:** McCullough, Steven; Marquart, Steven;  
**Cc:** Holewa, Sally; Iverson, Chris; Kringlie, Karen  
**Subject:** Service via a Web Site

I am forwarding this to you because you are members of the Joint Procedures Committee form Unit II.

In order to make service many parties including our juvenile court are forced to publish notice in local newspapers when parties cannot be found. This is very expensive, sometimes our juvenile court is forced to do this more than once on a case. Alaska approaches this differently. I have enclosed an article from Trends in Court 2016 which explains their approach. In short they have created a web site that parties can use for service.

Here is the link to this website. <http://www.courts.alaska.gov/notices/index.htm>

This would be much more cost effective for all parties including our juvenile court. Also if you are a person who is being served in this fashion it would make it much easier to locate this information rather than random newspapers. I have a colleague that is the Court Administrator in Juneau and he reports that have had no issues with this.

I thought this would be an excellent item for the Joint Procedures Committee to review. If you need more information, please contact me.

Rod Olson  
Unit II Court Administrator

available on the Alaska Court System website at:  
<http://www.courts.alaska.gov/rules/venuemapinfo.htm>.

**Note:** Chapter 64, SLA 2010 (SB 60); effective September 7, 2010, enacted changes relating to the Uniform Probate Code. According to section 12(a) of the Act, AS 13.16.055(a), as amended by section 9 of the Act, has the effect of amending Civil Rule 3 by establishing a special venue rule for the first informal or formal testacy or appointment proceedings after a decedent's death when the decedent was not domiciled in this state. According to section 12(b) of the Act, AS 13.12.540, as enacted by section 8 of the Act, has the effect of amending Civil Rule 3 by establishing special venue rules for a petition under AS 13.12.530 or 13.12.535, enacted by section 8 of the Act.

**Cross References**

CROSS REFERENCE: AS 09.10.010

**Rule 4. Process.**

(a) **Summons—Issuance.** Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it to the plaintiff or the plaintiff's attorney, who shall cause the summons and a copy of the complaint to be served in accordance with this rule. Upon request of the plaintiff separate or additional summonses shall issue against any defendants.

(b) **Summons—Form.**

(1) The summons shall be signed by the clerk, bear the seal of the court, identify the court and the parties, be directed to the defendant, and state the name and address of the plaintiff's attorney or the plaintiff's name and address if the plaintiff is unrepresented. It shall also state the time within which the defendant must appear and defend, and notify the defendant that failure to do so will result in judgment by default against the defendant for the relief demanded in the complaint. The summons must also notify the defendant that the defendant has a duty to inform the court and all other parties, in writing, of the defendant's or defendant's attorney's current mailing address and telephone number, and to inform the court and all other parties of any changes, as set out in Civil Rule 5(i).

(2) The summons must be on the current version of the summons form developed by the administrative director or a duplicate of the court form. A party or attorney who lodges a duplicate certifies by lodging the duplicate that it conforms to the current version of the court form.

(c) **Methods of Service—Appointments to Serve Process—Definition of Peace Officer.**

(1) Service of all process shall be made by a peace officer, by a person specially appointed by the Commissioner of Public Safety for that purpose or, where a rule so provides, by registered or certified mail.

(2) A subpoena may be served as provided in Rule 45 without special appointment.

(3) Special appointments for the service of all process relating to remedies for the seizure of persons or property pursuant to Rule 64 or for the service of process to enforce a judgment by writ of execution shall only be made by the Commissioner of Public Safety after a thorough investigation of each applicant, and such appointment may be made subject to such conditions as appear proper in the discretion of the Commissioner for the protection of the public. A person so appointed must secure the assistance of a peace officer for the completion of process in each case in which the person may encounter physical resistance or obstruction to the service of process.

(4) Special appointments for the service of all process other than the process as provided under paragraph (3) of this subdivision shall be made freely when substantial savings in travel fees and costs will result.

(5) The term "peace officer" as used in these rules shall include any officer of the state police, members of the police force of any incorporated city, village or borough, United States Marshals and their deputies, other officers whose duty is to enforce and preserve the public peace, and within the authority conferred upon them, persons specially appointed pursuant to paragraph (3) of this subdivision.

(d) **Summons—Personal Service.** The summons and complaint shall be served together. The plaintiff shall furnish the person making service with such copies as are necessary. Service shall be made as follows:

(1) *Individuals.* Upon an individual other than an infant or an incompetent person, by delivering a copy of the summons and of the complaint to the individual personally, or by leaving copies thereof at the individual's dwelling house or usual place of abode with some person of suitable age and discretion then residing therein, or by delivering a copy of the summons and of the complaint to an agent authorized by appointment or by law to receive service of process.

(2) *Infants.* Upon an infant, by delivering a copy of the summons and complaint to such infant personally, and also to the infant's father, mother or guardian, or if there be none within the state, then to any person having the care or control of such infant, or with whom the infant resides, or in whose service the infant is employed; or if any service cannot be made upon any of them, then as provided by order of the court.

(3) *Incompetent Persons.* Upon an incompetent person, by delivering a copy of the summons and complaint personally—

(A) To the guardian of the person or a competent adult member of the person's family with whom the person resides, or if the person is living in an institution, then to the director or chief executive officer of the institution, or if service cannot be made upon any of them, then as provided by order of the court; and

(B) Unless the court otherwise orders, also to the incompetent person.

## Rule 4

## ALASKA COURT RULES

(4) *Corporations or Limited Liability Companies.* Upon a domestic or foreign corporation or limited liability company, by delivering a copy of the summons and of the complaint to a managing member, an officer, a managing or general agent, or to any other agent authorized by appointment or by law to receive service of process.

(5) *Partnerships.* Upon a partnership, by delivering a copy of the summons and of the complaint personally to a general partner of such partnership, or to a managing or general agent of the partnership, or to any other agent authorized by appointment or by law to receive service of process, or to a person having control of the business of the partnership; or if service cannot be made upon any of them, then as provided by order of the court.

(6) *Unincorporated Associations.* Upon an unincorporated association, by delivering a copy of the summons and the complaint personally to an officer, a managing or general agent, or to any other person authorized by appointment or by law to receive service of process; or if service cannot be made upon any of them, then as provided by order of the court.

(7) *State of Alaska.* Upon the state, by sending a copy of the summons and the complaint by registered or certified mail to the Attorney General of Alaska, Juneau, Alaska, and

(A) to the chief of the attorney general's office in Anchorage, Alaska, when the matter is filed in the Third Judicial District; or

(B) to the chief of the attorney general's office in Fairbanks, Alaska, when the matter is filed in the Fourth Judicial District.

(8) *Officer or Agency of State.* Upon an officer or agency of the state, by serving the State of Alaska as provided in the preceding paragraph of this rule, and by delivering a copy of the summons and of the complaint to such officer or agency. If the agency is a corporation, the copies shall be delivered as provided in paragraph (4) of this subdivision of this rule.

(9) *Public Corporations.* Upon a borough or incorporated city, town, school district, public utility district, or other public corporation in the state, by delivering a copy of the summons and of the complaint to the chief executive officer or chief clerk or secretary thereof.

(10) *Unknown Parties.* Upon unknown persons who may be made parties in accordance with statute and these rules, by publication as provided in subdivision (e) of this rule.

(11) *Officer or Agency of State as Agent for Non-governmental Defendant.* Whenever, pursuant to statute, an officer or an agency of the State of Alaska has been appointed as agent to receive service for a non-governmental defendant, or whenever, pursuant to statute, an officer or agency of the State of Alaska, has been deemed, considered or construed to be appointed as agent for a non-governmental defendant by virtue of some act, conduct or transaction of such defendant, service of process shall be made in the manner provided by statute.

(12) *Personal Service Outside State.* Upon a party outside the state in the same manner as if service were made within the state, except that service shall be made by a sheriff, constable, bailiff, peace officer or other officer having like authority in the jurisdiction where service is made, or by a person specifically appointed by the court to make service, or by service as provided in subsection (h) of this rule. In an action to enforce any lien upon or claim to, or to remove any encumbrance or lien or cloud upon the title to, real or personal property within the state, such service shall also be made upon the person or persons in possession or in charge of such property, if any. Proof of service shall be in accordance with (f) of this rule.

(13) *Personal Service in a Foreign Country.* Upon an individual in a foreign country—

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

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

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

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

(iii) unless prohibited by the law of the foreign country, by delivery to the individual personally of a copy of the summons and the complaint, or by any form of mail requiring a signed receipt by the party to be served, so long as the return receipt is filed with the court; or

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

Regardless of which method of service is followed for personal service in a foreign country, before entry of judgment, the court must be satisfied that the method used was a method reasonably likely to effect actual notice.

(e) **Other Service.** When it shall appear by affidavit of a person having knowledge of the facts filed with the clerk that after diligent inquiry a party cannot be served with process under subsections (d) or (h) of this rule, service shall be made by posting on the Alaska Court System's legal notice website and as otherwise directed by the court as provided in this subsection. The party who seeks to have service made under this subsection shall include in the affidavit of diligent inquiry a discussion of whether other methods of service listed in paragraph (e)(3) may be more likely to give the absent party actual notice. In adoption cases, service by posting on the Alaska Court System's legal notice website or by publication will be allowed only if ordered by the court for compelling reasons.

(1) *Diligent Inquiry.* Inquiry as to the absent party's whereabouts shall be made by the party who seeks to have service made, or by the party's attorney actually entrusted with the conduct of the action, or by the agent of the attorney. It shall be made of any person who the inquirer has reason to believe possesses knowledge or information as to the absent party's residence or address or the matter inquired of. Unless otherwise ordered by the court, diligent inquiry shall include a reasonable effort to search the internet for the whereabouts of the absent party. The inquiry shall also be undertaken in person or by letter, and the inquirer shall state that an action has been or is about to be commenced against the party inquired for, that the object of the inquiry is to give such party notice of the action in order that such party may appear and defend it. When the inquiry is made by letter, postage shall be enclosed sufficient for the return of an answer. The affidavit of inquiry shall be made by the inquirer. It shall fully specify the inquiry made, of what persons and in what manner it was made, and a description of any efforts that were made to search the internet, so that by the facts stated therein it may appear that diligent inquiry has been made for the purpose of effecting actual notice.

(2) *Service by Posting on the Alaska Court System's Legal Notice Website.* A notice shall be continuously posted for four consecutive weeks on the Alaska Court System's legal notice website. Prior to the last week of posting, the party who seeks to have service made must send the absent party a copy of the notice and the complaint or the pleading (A) by registered or certified mail, with return receipt requested, with postage prepaid, and (B) by regular first class mail. The notice must be addressed in care of the absent party's residence or the place where the party usually receives mail, unless it shall appear by affidavit that the absent party's residence or place is unknown or cannot be determined after inquiry.

(3) *Additional Service by Other Methods.* In addition to the service required under paragraph (2), the court, in its discretion, may require service of process to be made upon an absent party in any other manner that is reasonably calculated to give the party actual notice of the proceedings and an opportunity to be heard. The method of service could include publication of the notice in a print or online newspaper or other publication at least once a week for four consecutive weeks; service of the notice to the absent party's e-mail account; posting of the notice to the absent party's social networking account; physically posting a copy of the notice and complaint on a public bulletin board or on the front door of the absent party's place of residence; or any method the court determines to be reasonable and appropriate.

(4) *Mailing Required.* If service is allowed by any method listed in paragraph (3), the party who seeks to have service made must also send the absent party a copy of the notice and the complaint by mail as required in paragraph (2). Proof of mailing shall be made by affidavit of a deposit in a post office of the copies of the notice and the complaint or other pleadings.

(5) *Form and Contents of Notice—Time.* The notice referred to in paragraphs (2), (3) and (6) shall be in the form of a summons. It shall state briefly the nature of the action, the

relief demanded, and why the party to whom it is addressed is made a party to the action. Where the action concerns real property or where real property of a party has been attached, the notice shall set forth a legal description of the property, shall state the municipality or district in which it is located, and the street or road on which the property is situated, and if the property is improved, it shall state the street number of the same. Where personal property of a party has been attached, the notice shall generally describe the property. If a mortgage is to be foreclosed, the notice shall state the names of all parties thereto and the dates that the mortgage was executed. The notice shall specify the time within which the absent party has to appear or answer or plead, which shall not be less than 20 days after personal service or, if service is made by publication, not less than 30 days after the last date of publication, and shall state the effect of a failure to appear or answer or plead. If the absent party does not appear or answer or plead within the time specified within the notice, the court may proceed as if such party had been served with process within the state.

(6) *Proof of Service.*

(A) *Service by Posting on the Alaska Court System's Legal Notice Website.* If service is made by posting to the Alaska Court System's Legal Notice Website, proof of posting shall be made by certification of the court clerk. A printed copy of the posted notice and the dates of posting shall be attached to the clerk's certificate.

(B) *Service by Publication in a Printed Newspaper.* If service is made by publication in a printed newspaper, proof of publication shall be made by the affidavit of the newspaper's publisher, printer, manager, foreman, or principal clerk, or by the certificate of the attorney for the party at whose instance the service was made. A printed copy of the published notice with the name of the newspaper and dates of publication marked therein shall be attached to the affidavit or certificate.

(C) *Service by Posting to an Online Publication Website.* If service is made by posting to an online publication website, proof of posting shall be made by affidavit of the online publication's publisher, printer, manager, foreman, or principal clerk, or by the certificate of the attorney for the party at whose instance the service was made. A printed copy of the posted notice with the name of the online publication and dates of posting marked therein shall be attached to the affidavit or certificate.

(D) *Service by E-mail or Posting to a Social Networking Account.* If service is made by e-mail or posting to a social networking account, proof of e-mail transmission or electronic posting shall be made by affidavit. If service is made by e-mail, a copy of the sent e-mail transmission shall be attached to the affidavit. If service is made by posting a notice on the absent party's social networking account, a screen print of the posting shall be attached to the affidavit.

(E) *Service by Posting to a Public Bulletin Board or on the Front Door of the Absent Party's Place of Residence.* If service is made by posting to a public bulletin board or on the front door of the absent party's place of residence, proof of

posting shall be made by affidavit of posting of the notice and the complaint or other pleadings.

(F) *Other Service by Court Order.* If the court has allowed service of process to be made upon an absent party in any other manner calculated to give actual notice, proof of service shall be made as directed by the court.

(f) **Return.** The person serving the process shall give proof of service thereof to the party requesting issuance of the process or to the party's attorney promptly and in any event within the time during which the person served must respond to the process. Within 120 days after filing of the complaint, the party shall file and serve an affidavit identifying the parties who have been served, the date service was made and the parties who remain unserved. If service is made by a person other than a peace officer, the person shall make affidavit thereof, proof of service shall be in writing and shall set forth the manner, place, date of service, and all pleadings or other papers served with the process. Failure to make proof of service does not affect the validity of the service.

(g) **Amendment.** At any time in its discretion and upon such terms as it deems just, the court may allow any process or proof of service thereof to be amended, unless it clearly appears that material prejudice would result to the substantial rights of the parties against whom the process issued.

(h) **Service of Process by Mail.** In addition to other methods of service provided for by this rule, process may also be served within this state or the United States or any of its possessions by registered or certified mail, with return receipt requested, upon an individual other than an infant or an incompetent person and upon a corporation, partnership, unincorporated association, or public corporation. In such case, copies of the summons and complaint or other process shall be mailed for restricted delivery only to the party to whom the summons or other process is directed or to the person authorized under federal regulation to receive the party's restricted delivery mail. All receipts shall be so addressed that they are returned to the party serving the summons or process or the party's attorney. Service of process by mail under this paragraph is complete when the return receipt is signed.

(i) RESERVED

(j) **Summons—Time Limit for Service.** The clerk shall review each pending case 120 days after filing of the complaint to determine whether all defendants have been served. If any defendant has not been served, the clerk shall send notice to the plaintiff to show good cause in writing why service on that defendant is not complete. If good cause is not shown within 30 days after distribution of the notice, the court shall dismiss without prejudice the action as to that defendant. The clerk may enter the dismissal if the plaintiff has not opposed dismissal. If the court finds good cause why service has not been made, the court shall establish a new deadline by which plaintiff must file proof of service or proof that plaintiff has made diligent efforts to serve.

(Adopted by SCO 5 October 9, 1959; amended by SCO 49 effective January 1, 1963; by SCO 66 effective July 1, 1964;

by SCO 90 effective July 24, 1967; by SCO 168 dated June 25, 1973; by SCO 215 effective May 23, 1975; by SCO 266 effective March 31, 1977; by SCO 282 effective November 15, 1977; by SCO 306 effective April 11, 1978; by SCO 357 effective June 30, 1978; by SCO 373 effective August 15, 1979; by SCO 465 effective June 1, 1981; by SCO 591 effective July 1, 1984; by SCO 679 effective June 15, 1986; by SCO 697 effective September 15, 1986; by SCO 714 effective September 15, 1986; by SCO 788 effective March 15, 1987; by SCO 815 effective August 1, 1987; by SCO 836 effective August 1, 1987; by SCO 1025 effective July 15, 1990; by SCO 1128 effective July 15, 1993; by SCO 1153 effective July 15, 1994; by SCO 1269 effective July 15, 1997; by SCO 1295 effective January 15, 1998; by SCO 1445 effective October 15, 2001; by SCO 1482 effective October 15, 2002; by SCO 1522 effective October 15, 2003; by SCO 1525 effective October 15, 2003; by SCO 1581 effective October 15, 2005; by SCO 1570 effective October 15, 2005; by SCO 1607 effective October 15, 2006; by SCO 1713 effective May 16, 2009; by SCO 1716 effective July 1, 2009; by SCO 1769 effective April 16, 2012; by SCO 1788 effective June 15, 2012; and by SCO 1834 effective October 15, 2014)

**Note:** In, 1996, the legislature enacted AS 18.66.160, which relates to service of process in a proceeding to obtain a domestic violence protective order. According to § 77 ch. 64 SLA 1996, this statute has the effect of amending Civil Rule 4.

**Note:** AS 10.06.580(b), as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 4 by allowing a corporation in an action brought under AS 10.06.580 to serve non-resident dissenting shareholders by certified mail and publication without satisfying the conditions under which certified mail and publication can be used under Civil Rule 4. AS 10.06.638, as enacted by ch. 166, § 1, SLA 1988, amended Civil Rule 4 by changing (1) the requirements for service by publication, and (2) how long a corporation has to respond to a complaint in an involuntary dissolution proceeding before the Commissioner of Commerce and Economic Development may take a default judgment against the corporation.

**Note:** Section 132 of ch. 87 SLA 1997 adds AS 25.27.265(c) which authorizes the court to allow CSED to serve a party by mailing documents to the last known address on file with the agency. This is permitted only if the court finds that CSED has made diligent efforts to serve documents in the appropriate manner. According to § 153 of the Act, § 132 has the effect of amending Civil Rules 4 and 5 by allowing service at the opposing party's last known address on file with the child support enforcement agency in certain circumstances.

**Note:** Ch. 61 SLA 2002 (HB 52), Section 2, repeals and reenacts AS 33.36.110 to authorize the governor to execute the Interstate Compact for Adult Offender Supervision. According to Section 6 of the Act, Article VIII(a)(2) of the Compact, contained in the new AS 33.36.110, would have the effect of amending Civil Rule 4 by entitling the Interstate Commission for Adult Offender Supervision to receive service of process of a judicial proceeding in this state that pertains to the Interstate Compact for Adult Offender Supervision and that may affect the powers, responsibilities or actions of that commission.

**Note:** Ch. 128 SLA 2002 (HB 393), Section 3, adds a new Chapter 66 to Title 45 of the Alaska Statutes, concerning the sale of business opportunities. According to Section 4 of the Act, AS 45.66.120(b) has the effect of amending Civil Rule 4 by requiring that the clerk of the court mail a copy of the complaint to the attorney general when an action is filed under AS 45.66.120.

**Note:** Chapter 87 SLA 03 (HB 1) enacted AS 18.65.865, which addresses service of process of protective orders issued under AS 18.65.850-860 for persons who are victims of stalking not involving domestic violence. According to Section 8(a) of the Act, the new AS 18.65.865 has the effect of amending Civil Rule 4 relating to service of process by requiring that service be made in accordance with AS 18.66.160, which governs service of domestic violence protective orders.

**Note to SCO 1570:** Civil Rule 4(d)(13), concerning service on individuals in a foreign country, parallels the language in Federal Rule of Civil Procedure 4(f). The Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents, referred to in Civil Rule 4(d)(13), generally provides for service of process by a central authority (usually the Ministry of Justice) in the Convention countries pursuant to a request submitted on a form USM-94 available at the office of any United States Marshall or at <http://www.usmarshals.gov/forms/usm94.pdf>. The Convention also permits service of process by international registered mail subject to the option of individual countries to object to such service. Many countries have objected, including Argentina, China, the Czech Republic, Egypt, Germany, Greece, the Republic of South Korea, Latvia, Lithuania, Luxembourg, Norway, Poland, the Slovak Republic, Sri Lanka, Switzerland, Turkey, Ukraine, and Venezuela; service by registered mail is therefore not appropriate in those countries. The full text of the Convention may be found at [http://hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=17](http://hcch.e-vision.nl/index_en.php?act=conventions.text&cid=17). Current information on the Convention may be found in the United States Department of State's Circular on Service of Process Abroad, available at <http://travel.state.gov/content/travel/english/legal-considerations/judicial/service-of-process.html>.

**Note:** Chapter 54 SLA 2005 (HB 95) enacted extensive amendments and new provisions related to public health, including public health emergencies and disasters. According to Section 13(a) of the Act, AS 18.15.375(c)(3), (d), and (e), and 18.15.385(d)-(k), enacted in Section 8, have the effect of amending Civil Rule 4 by adding special proceedings, timing, and pleading requirements for matters involving public health.

**Note (effective nunc pro tunc to May 16, 2009):** Chapter 10 SLA 2009 (HB 137), effective May 16, 2009, enacted changes relating to an Interstate Compact on Educational Opportunity for Military Children. According to section 2 of the Act, AS 14.34.010-.090 have the effect of changing Civil Rule 4 by entitling the Interstate Commission on Educational Opportunity for Military Children to receive service of process of a judicial proceeding in this state that pertains to the Interstate Compact on Educational Opportunity for Military Children, and in which the validity of a compact provision or

rule is an issue for which a judicial determination has been sought.

**Note (effective nunc pro tunc to July 1, 2009):** Chapter 37 SLA 2009 (HB 141), effective July 1, 2009, enacted changes relating to the Interstate Compact for Juveniles. According to section 11 of the Act the changes made to AS 47.15.010 have the effect of changing Civil Rule 4 by entitling the Interstate Commission for Juveniles to receive service of process of a judicial proceeding in this state that pertains to the Interstate Compact for Juveniles, and in which the validity of a compact provision or rule is an issue for which a judicial determination has been sought.

**Note (effective nunc pro tunc to June 15, 2012):** Chapter 65, SLA 2012 (HB 296) added a new subsection (c) to AS 09.05.050 relating to service of process on prisoners, effective June 15, 2012. According to section 5 of the Act, AS 09.05.050, including the amendment made by section 1, has the effect of amending Alaska Rule of Civil Procedure 4, relating to service of process on prisoners committed to the custody of the commissioner of corrections.

**Note:** The Alaska Court System's legal notice website, referenced in paragraph (e)(2), is found on the Alaska Court System Website at: <http://www.courts.alaska.gov/>.

**Cross References**

(d) CROSS REFERENCE: AS 09.05.010

(e)(5) CROSS REFERENCE: AS 09.25.070

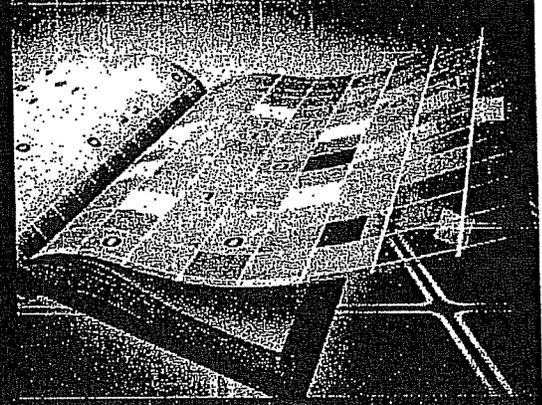
**Rule 5. Service and Filing of Pleadings and Other Papers.**

(a) **Service—When Required.** Every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, and similar paper shall be served upon each of the parties but no service need be made on parties in default for failure to appear except that pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in Rule 4.

In an action begun by seizure of property, whether through arrest, attachment, garnishment or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance shall be made upon the person having custody or possession of the property at the time of its seizure.

(b) **Service—How Made.** Whenever under these rules service is required or permitted to be made upon a party represented by an attorney the service shall be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party shall be made by delivering a copy to the attorney or party, by mailing it to the attorney's or party's last known address, by transmitting it to

# Opening Courts to the Public



## Alaska Court System Legal Notice Website\*

Alyce Roberts      Special Projects Coordinator,  
Alaska Court System

Stacey Marz        Director, Family Law Self-Help Center,  
Alaska Court System

\* This is an edited version of an article that was published in the *Court Manager*, vol. 30, no. 4 (2015-16). It is being used here with the permission of the National Association for Court Management.

**Declining readership reduces the effectiveness of publishing legal notices in print newspapers. Alaska's legal notice website offers a viable alternative for serving notice in lawsuits.**

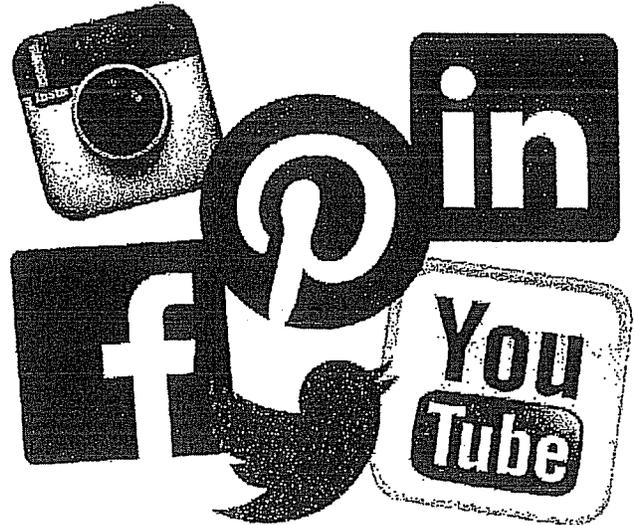
Imagine you filed a lawsuit in court but do not know where the opposing party is located to serve him or her. Instead of paying over \$500 to publish a legal notice for several weeks in a newspaper that you doubt the opposing party has ever heard of or read, the court allows you to serve by other methods. You could post the legal notice free on the court's legal notice website, which is "Google" searchable from anywhere in the world with an Internet connection. Alternatively, if you are in touch with the opposing party on Facebook but he or she refuses to provide a current mailing address, you could request to serve the notice via Facebook. This situation is now reality in the Alaska Court System.

Recognizing the need to respond to a new societal landscape, the Alaska Court System changed the default service method for absent defendants from publication in a print newspaper to an online posting to the court's legal notice website.<sup>1</sup> Court rules also permit other alternate service-delivery methods, including social-networking accounts, email, and online newspapers, in addition to traditional newspaper publication and posting to bulletin boards. Three factors spurred these changes: Notice by print publication was 1) ineffective, 2) expensive for litigants, and 3) outdated because of increasing availability of information on the Internet and society's reliance on social media.

<sup>1</sup> *Absent defendant* is the term used when the plaintiff is unable to serve the complaint after a diligent inquiry as to the defendant's whereabouts.

**History and Process**

In 2003 and 2007 there were unsuccessful proposals to replace the default method of notice by publication in a newspaper in cases involving name changes and absent defendants, respectively. These proposals lacked data about the ineffectiveness of service by newspaper publication, and newspaper print readership had yet to take a precipitous decline. In 2011 the Alaska Supreme Court changed the diligent-inquiry rule to require “a reasonable effort to search the internet for the whereabouts of the absent party.” Regular mail was also added as a requirement, in addition to certified mail, to address situations where the defendant is avoiding service by certified mail.



**Recognizing the need to respond to a new societal landscape, the Alaska Court System changed the default service method for absent defendants from publication in a print newspaper to an online posting to the court’s legal notice website.**

revenues had substantially declined as evidenced by reports of newspapers shutting down across the country. There was interest in having the court system consider publishing notices to absent defendants and name-change notices on the court’s website. A subcommittee, composed of two AOC staff members and an assistant attorney general, was formed to explore changes to the publication rule and draft a rule-change proposal.

In February 2012 the issue of alternate service arose again. This time it was spurred by a request from an online newspaper that wanted to be declared a “newspaper of general circulation” for purposes of publishing legal notices. When this matter was introduced, Civil Rules Committee members immediately raised the issue of the limited effectiveness and high cost of publishing notices in newspapers. The belief was that service by publication rarely reaches the intended parties or results in their appearance. In the intervening time since the idea was first considered in 2007, print-newspaper readership and advertising

The subcommittee met several times and early on decided to collect data to determine the effectiveness of service by publication. To do this, subcommittee members reviewed all cases statewide in which service by publication occurred in 2010 and 2011. Excluding name-change cases, in both years, family-law cases represented the majority of cases in which service by publication was used. The next largest category was debt cases. The remaining cases included personal-injury auto cases, real-estate matters, forcible-entry-and-detainer cases, and a smattering of other case types. The vast majority of notices by publication came from Anchorage cases, with almost all other notices coming from courts in larger communities and almost nothing coming out of rural Alaska.

**Service by publication rarely reaches the intended parties or results in their appearance.**

The subcommittee looked at all the cases in which service by publication was granted (excluding name-change cases). A default judgment was entered in almost all cases; a handful of defendants responded, and in only three cases could the defendant's participation be possibly attributed to effective notice by publication.

The subcommittee also researched the costs to publish in newspapers of general circulation. The costs varied based on the length of the notice and the individual newspaper's fees, but always exceeded several hundred dollars.

#### Subcommittee Findings and Recommendations

The analysis revealed:

- the number of cases in which service by newspaper publication occurs;
- the vast majority of notices served by publication in a newspaper occur in larger communities and not rural communities;
- the defendant response rate was incredibly low, making a strong case that service by newspaper publication is an ineffective method to notify parties of lawsuits against them; and
- service by publication is costly for litigants.

From this analysis, the subcommittee concluded that the current default practice for attempting to serve notice on absent defendants was ineffective and expensive. The subcommittee recommended to the Civil Rules Committee that the court system create a legal notice website and change the default method to posting on the website.

However, service by publication in a newspaper would still be an option a litigant could request if the litigant has reason to believe that this would be an effective method of service. The Civil Rules Committee unanimously recommended to the Alaska Supreme Court changes to the relevant rules providing the default method for service to be posting on the court system's legal notice website. The supreme court adopted the recommendation, with minor stylistic edits, effective October 14, 2014.

#### Rule Changes

The Alaska Supreme Court amended two rules that authorize posting to the court's legal notice website. Civil Rule 4(e) replaces newspaper publication as the default method of "other" service with posting on a new, Google-searchable legal-notice site accessible from the court system's home page. Civil Rule 84 replaces newspaper publication as the required method of publicizing a name change with posting on the court website. In adopting these changes, the supreme court considered the limited efficacy and high cost of newspaper publication, the evolving role of newspapers in many communities, and the development of other platforms to reach people.

**...the supreme court considered the limited efficacy and high cost of newspaper publication, the evolving role of newspapers in many communities, and the development of other platforms to reach people.**

## Civil Rule 4(e)—Other Service

The supreme court changed Civil Rule 4(e), which governs service when, after diligent inquiry, a party cannot be served. Revised Civil Rule 4(e) retains the mailing requirement, requires posting on the court website, and provides for additional service by other methods in the court's discretion. The additional service methods in Rule 4(e) (3) include service to an absent party's email, posting to the absent party's social-networking account, publication in a print or online newspaper, physical posting, or any other methods that the court determines to be reasonable and appropriate.

The amended rule requires that the party seeking to use an alternate service method discuss in the affidavit of diligent inquiry whether other methods of service listed above would be more likely to give the absent party notice. Website posting and mailing is just the minimum service effort required. If other service options exist that are better calculated to provide notice in a given case, the rule encourages the court to explore them.

## Civil Rule 84—Change of Name

The Supreme Court amended Civil Rule 84 to require that name-change applications and judgments be posted on the new court system legal notice website. The rule no longer requires newspaper publication in every name-change case, but the court retains discretion to order publication or posting as appropriate in particular cases. Child-name-change cases have additional service requirements for parents.

It is important to note that these rules changes did not impact case types for which there are statutory requirements for service by publication in a newspaper. For example, Alaska Statutes require newspaper publication for notice to creditors when probating an estate.

## Forms

To facilitate use of the alternate service process, the administrative office created new forms using plain language and amended existing forms. These forms are available on the court's website.

## Legal Notice Website

After the rules were adopted, the court's technology department began website development to ensure the site would be operational when the change went into effect three months later. The goal was to develop an automated process that would require minimal data entry by court clerks and reduce the potential for data-entry errors. As such, the decision was made to harness the power of the case management system and pull existing case data to populate notices to the extent possible.

Notices for certain case types (such as name changes and divorces with an absent spouse when only ending the marriage is at issue) include static information as to the nature of the action and the relief sought. For these case types, the case-specific information (case number, parties' names, hearing date, etc.) is auto populated from the case management system to create the notice.

### Notice of Judgment—Change of Name

A judgment has been issued by the Superior Court in Anchorage, Alaska, in Case # 3AN-15-XXXCI ordering that the petitioner's name will be changed from Alyce Simeonoff to Stacey Marz, effective on the effective date stated in the clerk's Certificate of Name Change.

Sample—Auto Populated Notice of Judgment

In all other cases, the moving party is required to submit to the court the notice to be served on the absent party. The notice must describe specifically the nature of the action and the relief sought. The clerk sends a scanned image of the notice in PDF format to an e-mail address specifically created for posting notices to the court's legal notice website. The posting process is automated by using case-management-system docket entries and a database for tracking posted notices and automatically removing said notices after the posting period is complete (see [www.courtrecords.alaska.gov/webdocs/scheduled/lnwabd.pdf](http://www.courtrecords.alaska.gov/webdocs/scheduled/lnwabd.pdf)).

After completion of the notice-posting period, the clerk prepares and distributes to the moving party a "Certificate of Service of Posting to the Alaska Court System's Legal Notice Website." When the court requires other methods of service in addition to posting on the legal notice website, the moving party must file proof of service using the form of proof required by the rule.

In the first 11 months since the rule permitting legal notice posting has been in effect, 1,924 legal notices have been posted to the website. Less than two months after the website went live, a U.S. District Court judge authorized service by posting on the Alaska Court System's Legal Notice website in one of its cases. The Alaska Court System has taken the position that it will post legal notices from other jurisdictions and provide a clerk's certificate of

posting. Surveys to clerks of court revealed high customer satisfaction with the legal notice website and the elimination of publication costs in most cases. In addition, clerks appreciate the ease of the process from the clerical end. Moreover, three clerks of court reported that litigants have appeared after learning about cases from the legal notice website. Interestingly, these clerks come from diverse locations—largest urban court, a midsized court, and a remote rural court.

In 2007 the proposal to create a legal notice website to publish notice to absent defendants was deemed too radical an idea. A relatively short time later, however, the importance and viability of print newspapers in society had changed dramatically. People rely on immediate electronic information and live their lives online. Courts must stay current and provide their customers with options that make sense in today's world. The time has come to reflect the societal cultural shift where online information should be the first approach.

**Alaska Court System**

Home - Legal Notices

**Legal Notices**

- New Notices Requests / Procedures Updated daily at 8:15 A.M.
- Notice to Absent Parties Updated daily at 8:15 A.M.
- Notice to Absent Parties (with court, district, county and legal separation) Updated daily at 11:30 A.M.
- Notice to Absent Parties on Unborn Parties In addition, this section also includes notices for parties who are absent daily at 8:15 A.M.
- Legal Notices from Other Courts Updated daily at 8:15 A.M.

South District of Alaska  
District of Alaska  
North District of Alaska  
Court of Appeals  
Alaska Superior Court  
Alaska State Court  
Court of Appeals  
Alaska Superior Court  
Alaska State Court

**Note: The legal notice website was created using existing court resources with no additional expenses ([www.courts.alaska.gov/notices/index.htm](http://www.courts.alaska.gov/notices/index.htm)).**

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: September 18, 2016

RE: Rule 11, N.D.R.Civ.P., Signing of Pleadings, Motions and Other Papers;  
Representations to Court; Sanctions

Attorney Clifton Rodenburg has requested that the committee consider a rule amendment that would limit requirements to notarize documents submitted in civil cases. In an email, attached, Mr. Rodenburg points out that, by statute, Minnesota has for the most part eliminated the requirement that documents filed with the court be notarized. Mr. Rodenburg states that notarizing documents in default judgment cases is expensive and time consuming because paper documents must be prepared, notarized, and then scanned in for filing via Odyssey. Mr. Rodenburg's email is attached in addition to a copy of the Minnesota statute he references.

Mr. Rodenburg also provided an article – “Goodbye to Affidavits” – that discusses the ongoing effort in the federal system to eliminate the need for notarized documents. The article notes that more than 20 states (including Minnesota) have limited notarization requirements. A copy of the article is attached.

Staff has prepared a proposed amendment to Rule 11 combining language from the Minnesota statute and the federal statute, 28 U.S.C. 1746, copy attached. The proposed language is intended to apply to civil actions only. The committee has previously acted to draft amendments to the criminal rules that would allow licensed peace officers to make unsworn declarations in support of complaints and arrest warrants. These proposed amendments are now before the Court as part of the Annual Rules Package.

The first sentence of the proposed amendment is based on the first sentence of the Minnesota statute. The remainder of the proposed amendment is based on the federal statute, which contains a comprehensive list of types of sworn documents and a list of unsworn documents which can be substituted. The language is a bit verbose and the committee may wish to look at ways to winnow it down.

There are several civil rules that the proposed change may impact: Rules 43 (evidence), 53 (masters), 55 (default), 56 (summary judgment), 59 (new trial) and 65 (injunctions) allow affidavits to be submitted as evidence and Rule 4 requires affidavits as proof of service. Rule 33 requires interrogatories to be submitted under oath and Rule 68 (confession of judgment) allows a defendant to make a verified statement under oath.

A copy of the proposed amendments is attached.

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RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS;  
REPRESENTATIONS TO COURT; SANCTIONS

1 (a) Signature.

2 (1) In General. Every pleading, written motion, and other paper must be  
3 signed by at least one attorney of record in the attorney's name or by a party  
4 personally if the party is self-represented. The paper must state the signer's  
5 address, electronic mail address for electronic service, and telephone number. If  
6 the signer is an attorney, the paper must contain the attorney's State Board of Law  
7 Examiners identification number. Unless a rule or statute specifically states  
8 otherwise, a pleading need not be verified or accompanied by an affidavit. The  
9 court must strike an unsigned paper unless the omission is promptly corrected after  
10 being called to the attorney's or party's attention.

11 (2) Notarization Not Required. Unless specifically required by court rule, a  
12 document filed with the court in a civil action is not required to be notarized.  
13 When any matter is required or permitted to be supported, evidenced, established,  
14 or proved by the sworn declaration, verification, certificate, statement, oath, or  
15 affidavit, in writing of the person making the same (other than a deposition, or an  
16 oath of office, or an oath required to be taken before a specified official other than  
17 a notary public), such matter may, with like force and effect, be supported,  
18 evidenced, established, or proved by the unsworn declaration, certificate,

19 verification, or statement, subscribed by the maker as true under penalty of  
20 perjury, and dated, in substantially the following form: "I declare (or certify,  
21 verify, or state) under penalty of perjury that the foregoing is true and correct."

22 (b) Representations to the Court. By presenting to the court a pleading,  
23 written motion, or other paper, whether by signing, filing, submitting, or later  
24 advocating it, an attorney or self-represented party certifies that to the best of the  
25 person's knowledge, information, and belief, formed after an inquiry reasonable  
26 under the circumstances:

27 (1) it is not being presented for any improper purpose, such as to harass,  
28 cause unnecessary delay, or needlessly increase the cost of litigation;

29 (2) the claims, defenses, and other legal contentions are warranted by  
30 existing law or by a nonfrivolous argument for extending, modifying, or reversing  
31 existing law or for establishing new law;

32 (3) the factual contentions have evidentiary support or will likely have  
33 evidentiary support after a reasonable opportunity for further investigation or  
34 discovery; and

35 (4) the denials of factual contentions are warranted on the evidence or are  
36 reasonably based on belief or a lack of information.

37 (c) Sanctions.

38 (1) In General. If, after notice and a reasonable opportunity to respond, the  
39 court determines that Rule 11(b) has been violated, the court may impose an

40 appropriate sanction on any attorney, law firm, or party that violated the rule or is  
41 responsible for the violation. Absent exceptional circumstances, a law firm must  
42 be held jointly responsible for a violation committed by its partner, associate, or  
43 employee.

44 (2) Motion for Sanctions. A motion for sanctions must be made separately  
45 from any other motion and must describe the specific conduct that allegedly  
46 violates Rule 11(b). The motion, brief, and other supporting papers must be served  
47 under Rule 5, but must not be filed or be presented to the court if the challenged  
48 paper, claim, defense, contention, or denial is withdrawn or appropriately corrected  
49 within 21 days after service or within another time the court sets. The respondent  
50 must have 10 days after a motion for sanctions is filed to serve and file an answer  
51 brief and other supporting papers. If warranted, the court may award to the  
52 prevailing party the reasonable expenses, including attorney's fees, incurred for the  
53 motion.

54 (3) On the Court's Initiative. On its own, the court may order an attorney,  
55 law firm, or party to show cause why conduct specifically described in the order  
56 has not violated Rule 11(b).

57 (4) Nature of a Sanction. A sanction imposed under this rule must be  
58 limited to what suffices to deter repetition of the conduct or comparable conduct  
59 by others similarly situated. The sanction may include nonmonetary directives; an  
60 order to pay a penalty into court; or, if imposed on motion and warranted for

61 effective deterrence, an order directing payment to the movant of part or all of the  
62 reasonable attorney's fees and other expenses directly resulting from the violation.

63 (5) Limitations on Monetary Sanctions. The court must not impose a  
64 monetary sanction:

65 (A) against a represented party for violating Rule 11(b)(2); or

66 (B) on its own, unless it issued the show-cause order under Rule 11(c)(3)

67 before voluntary dismissal or settlement of the claims made by or against the party

68 that is, or whose attorneys are, to be sanctioned.

69 (d) Inapplicability to Discovery. This rule does not apply to disclosures and  
70 discovery requests, responses, objections, and motions under Rules 26 through 37.

71 (e) Limited Representation.

72 (1) Preparation of Pleadings. An attorney who complies with Rule 1.2 of the  
73 N.D. Rules of Prof. Conduct, may prepare pleadings, briefs, and other documents  
74 to be filed with the court by a self-represented party. The attorney's preparation of  
75 pleadings, briefs, or other documents does not constitute an appearance by the  
76 attorney in the case and no notice under Rule 11(e)(2) is required. Any filing  
77 prepared under this paragraph must be signed by the party designated as  
78 "self-represented."

79 (2) Limited Appearance.

80 (A) In General. An attorney who complies with Rule 1.2 of the N.D. Rules  
81 of Prof. Conduct, may make a "limited appearance" on behalf of an otherwise

82 self-represented party involved in a proceeding to which these rules apply.

83 (B) Notice. An attorney who makes a limited appearance on behalf of an  
84 otherwise self-represented party must serve a notice of limited appearance on each  
85 party involved in the matter. The notice must state precisely the scope of the  
86 limited appearance. An attorney who seeks to act beyond the stated scope of the  
87 limited appearance must serve an amended notice of limited appearance. Upon  
88 completion of the limited appearance, the attorney must file and serve a  
89 "Certificate of Completion of Limited Appearance" as required by N.D.R.Ct.  
90 11.2(d).

91 (C) Filing. If the action is filed, the party who received assistance of an  
92 attorney on a limited basis must file the notice of limited appearance with the  
93 court.

94 (3) Scope of Rule. The requirements of this rule apply to every pleading,  
95 written motion and other paper signed by an attorney acting within the scope of a  
96 limited representation.

97 EXPLANATORY NOTE

98 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1,  
99 1996; March 1, 1997; August 1, 2001; March 1, 2009; March 1, 2011; March 1,  
100 2014; August 1, 2016;\_\_\_\_\_.

101 Rule 11 governs to the extent Rule 11 and N.D.R.Ct. 3.2, conflict.

102 Rule 11 was revised, effective March 1, 1996, in response to the 1993

103 revision of Fed.R.Civ.P. 11. North Dakota's rule differs from the federal rule in the  
104 following respects: 1) North Dakota's rule requires attorneys to cite their State  
105 Board of Law Examiners identification number when signing papers; and 2) North  
106 Dakota's rule does not require allegations or denials to be specifically identified  
107 when immediate evidentiary support is lacking.

108 Subdivision (a) was amended, effective March 1, 2014, to specify that the  
109 e-mail address required in documents signed by an attorney or party is the signer's  
110 e-mail address for electronic service.

111 Subdivision (a) was amended, effective \_\_\_\_\_, to state that  
112 notarization is not generally required for documents filed in civil actions and to  
113 provide a method for using unsworn statements made under a penalty or perjury.

114 Subdivision (e) was added, effective March 1, 2009, to permit an attorney  
115 to file a notice of limited representation indicating an intent to represent a party for  
116 one or more matters in a case, but not for all matters. An attorney must also serve a  
117 notice of termination of limited representation when the attorney's involvement  
118 ends. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to  
119 assist an otherwise self-represented party on a limited basis without undertaking  
120 full representation of the party. Under N.D.R. Prof. Conduct 1.2 (c) a lawyer may  
121 limit the scope of the representation if a client consents after consultation.

122 Subdivision (e) was amended, effective August 1, 2016, to add new  
123 paragraphs (1) and (2) providing additional details on the services an attorney may

124 perform while assisting a self-represented party on a limited basis and indicating  
125 when notice of these services must be provided to other parties and the court. The  
126 new paragraphs are based on language from Neb. R. Prof. Conduct 3-501.2.

127 Rule 11 was amended, effective March 1, 2011, in response to the  
128 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language  
129 and organization of the rule were changed to make the rule more easily understood  
130 and to make style and terminology consistent throughout the rules.

131 SOURCES: Joint Procedure Committee Minutes of  
132 \_\_\_\_\_; September 24-25, 2015, pages 2-11; April 23-24, 2015,  
133 pages 16-25; January 29-30, 2015, page 22; April 25-26, 2013, page 16;  
134 September 24-25, 2009, pages 13-14; January 24, 2008, pages 2-7; October 11-12,  
135 2007, pages 20-26; September 28-29, 1995, pages 2-3; April 27-28, 1995, pages  
136 3-4; January 26-27, 1995, pages 8-10; September 29-30, 1994, pages 24-26; April  
137 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 25-26;  
138 January 20, 1984, pages 16-18; September 20-21, 1979, page 7; Fed.R.Civ.P. 11.

139 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings  
140 and Other Papers); N.D.R.Ct. 11.1 (Nonresident Attorneys); N.D.R.Ct. 11.2  
141 (Withdrawal of Attorneys); N.D.R. Prof. Conduct 1.2 (Scope of Representation);  
142 N.D.C.C. §§ 28-26-01 (Attorney's Fees by Agreement-Exceptions-Awarding Costs  
143 and Attorney's Fees to Prevailing Party), and 28-26-31 (Pleadings Not Made in  
144 Good Faith).

## Hagburg, Mike

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**From:** RodenburgC@aol.com  
**Sent:** Thursday, August 04, 2016 2:52 PM  
**To:** Hagburg, Mike  
**Subject:** Proposed rule change  
**Attachments:** GoodbytoAffidavits.pdf

Hi Mike,

I would like to submit a request for a rule that would permit unsworn declarations in place of notarized signatures on pleadings, motions, affidavits and other documents filed with the court. Many jurisdictions, including Minnesota, have such a law or court rule. Section 358.116, Minnesota Statutes, for instance, reads as follows:

### **Minn. Stat. § 358.116 COURT DOCUMENTS.**

Unless specifically required by court rule, a pleading, motion, affidavit, or other document filed with a court of the Minnesota judicial branch is not required to be notarized. Signing a document filed with the court constitutes "verification upon oath or affirmation" as defined in section 358.41, clause (3), without administration of an oath under section 358.07, provided that the signature, as defined by court rules, is affixed immediately below a declaration using substantially the following language: "I declare under penalty of perjury that everything I have stated in this document is true and correct." In addition to the signature, the date of signing and the county and state where the document was signed shall be noted on the document. A person who signs knowing that the document is false in any material respect is guilty of perjury under section 609.48, even if the date, county, and state of signing are omitted from the document.

History: 2014 c 204 s 3

Our office files 700-800 default judgments a month, the majority of which require multiple notarizations. Besides the time and expense of notarization, each document must be first printed to paper, signed in front of a notary, notarized, and scanned for electronic filing with the court. Each paper document must thereafter be destroyed. There is no alternative; affidavits can neither be electronically signed nor electronically notarized.

Leaving aside the question about how many law offices consistently comply with the requirement that affiants sign in the presence of a notary after administration of an oath, it is doubtful that any lawyer or client of a lawyer would be more willing to sign a document containing a false statement because it lacked notarization.

There are many other reasons why requiring notarization of court documents is unnecessary, which are detailed in the attached law review article, Ira Shiflett, *Goodbye to Affidavits - Improving the Federal Affidavit Substitute Statute*, 54 Clev. St. L. Rev. 309 (2006).

The committee may question why the Minnesota rule change was legislative rather than judicial. The Minnesota constitution is silent on which branch of government has authority over the rules governing court proceedings. As a consequence, the Minnesota Supreme Court has tolerated the legislature's action in an area it views as procedural (judicial), provided the infringement on the judicial function is minimal and will enforce the legislative action as a matter of comity. Section 358.116, Minnesota Statutes quoted above was strongly supported by the Minnesota State Court Administrators who not infrequently had to cope with filings of affidavits that were signed but not notarized, or worse yet, notarized but not signed.

As you are aware, N.D. Const. art.VI, § 3 specifically authorizes the supreme court to adopt procedural rules. The suggested rule change would be procedural.

Thank you for your consideration.

Cliff

Clifton Rodenburg, Attorney

### 358.116. Court documents

Unless specifically required by court rule, a pleading, motion, affidavit, or other document filed with a court of the Minnesota judicial branch is not required to be notarized. Signing a document filed with the court constitutes "verification upon oath or affirmation" as defined in section 358.41, clause (3), without administration of an oath under section 358.07, provided that the signature, as defined by court rules, is affixed immediately below a declaration using substantially the following language: "I declare under penalty of perjury that everything I have stated in this document is true and correct." In addition to the signature, the date of signing and the county and state where the document was signed shall be noted on the document. A person who signs knowing that the document is false in any material respect is guilty of perjury under section 609.48, even if the date, county, and state of signing are omitted from the document.

Laws 2014, c. 204, § 3, eff. Aug. 1, 2014.

### Research References

#### Treatises and Practice Aids

- 1 Minnesota Practice Series R 4, Process.
- 2 Minnesota Practice Series R 56.05, Form of Affidavits; Further Testimony; Defense Required.

- 1A Minnesota Practice Series R 33.01, Availability; Procedure for Use.
- 3A Minnesota Practice Series R 507, Statement of Claim and Counterclaim; Contents; Verification.

28 U.S. Code § 1746 - Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date). (Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date). (Signature)".

(Added Pub. L. 94-550, § 1(a), Oct. 18, 1976, 90 Stat. 2534.)

Prior Provisions

A prior section 1746 was renumbered section 1745 of this title.

GOODBYE TO AFFIDAVITS? IMPROVING THE FEDERAL  
AFFIDAVIT SUBSTITUTE STATUTE

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I. INTRODUCTION

Perhaps the most common formality in law is the application of a notary stamp by one of America's 4.5 million notaries public<sup>1</sup> to an affidavit or other legal document. Each stamp or seal represents a transaction cost; multiplied by millions

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<sup>1</sup> See Keith M. Jajko & Armando Aquirre, *The NNA 2002 Notary Census*, NAT'L NOTARY, May 2002, at 12, 15. For the history of notaries in America, see Michael L. Closen & G. Grant Dixon, *Notaries Public from the Time of the Roman Empire to the United States Today, and Tomorrow*, 68 N.D. L. REV. 873 (1992); see also John E. Seth, *Notaries in the American Colonies*, 32 J. MARSHALL L. REV. 863 (1999).

of documents a year, the annual expenditure in time and money may well be in the hundreds of millions of dollars.<sup>2</sup>

Thirty years ago, Congress recognized that the costs of notarization generally outweighed the benefits. In 1976, Congress enacted 28 U.S.C. § 1746,<sup>3</sup> intending to limit the circumstances when a notary would be required. Section 1746 provides that whenever a document is required to be supported by a notarized statement other than a deposition, an oath of office, or an oath required to be taken before an official other than a notary, a declaration under penalty of perjury is a sufficient substitute.<sup>4</sup> Congress recognized that it could be inconvenient to find a notary, especially on the weekends or for people who lived or traveled internationally.<sup>5</sup> This section "has the advantage of avoiding the inconvenience, time and expense of the participation of a notary public."<sup>6</sup>

Nevertheless, § 1746 has had much less impact than might have been expected. By regulation, statute, and court rule, hundreds of federal forms and documents still apparently require notarization.<sup>7</sup> Thus, the law seems to continue to require the use of a notary public.

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<sup>2</sup> Assuming conservatively that each of America's 4.5 million notaries notarizes ten documents a year, that the process takes an average of five minutes for the signer and five minutes for the notary, and that all involved work forty hours per week, fifty weeks per year, the process of notarization costs 3750 person-years of work annually. Assuming an income of \$40,000 per annum, the cost is \$150 million annually. The fees paid by notaries for their licenses to the states may amount to \$28 million per year. Michael L. Closen, *To Swear . . . or Not to Swear Document Signers: The Default of Notaries Public and a Proposal to Abolish Oral Notarial Oaths*, 50 BUFF. L. REV. 613, 643 n.170 (2002).

<sup>3</sup> 28 U.S.C. § 1746 (2000) (added Oct. 18, 1976 by Pub. L. No. 94-550, § 1(a), 90 Stat. 2534) provides:

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

<sup>4</sup> *Id.*

<sup>5</sup> H.R. REP. NO. 94-1616, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 5644, 5645.

<sup>6</sup> Closen, *supra* note 2, at 697.

<sup>7</sup> See *infra* notes 59-137 and accompanying text.

Of course, the regulations or the government officials implementing them could be challenged as inconsistent with § 1746. Ultimately, a court might determine that something other than an affidavit is legally sufficient. However, there is little systematic incentive for someone to bring a lawsuit. Some users of notaries employ them quite rarely, annually or less. They are unlikely to file a lawsuit, which would cost them much more than they would gain. Regular users, by contrast, such as lawyers or other professionals, pass the costs along to clients. An individual client is unlikely to pay for a legal challenge. Accordingly, although in the aggregate the costs are quite high, they are so widely diffused that there is little or no systematic pressure for change.

In addition, court decisions have created a loophole for people who make false statements. Congress intended federal perjury laws to apply to statements made pursuant to § 1746. However, some arguably ambiguous language in the law has been read by some district and circuit courts to make the perjury provisions inapplicable to false statements made in § 1746 verifications.<sup>8</sup>

This article proposes that § 1746 be more systematically applied in federal law to achieve the savings Congress intended. In addition, the federal perjury statute should be amended to make clear that it applies to statements under § 1746.

## II. THE PURPOSES OF NOTARIZATION AND THE MOVEMENT AWAY

### *A. The Purposes of Notarization*

Notaries perform many millions of notarizations of signatures every year, perhaps as many as hundreds of thousands of notarizations of signatures daily.<sup>9</sup> In theory, notaries administer oral oaths or affirmations prior to a signer signing a document. The oath or affirmation reminds the signer of the obligation to be truthful and subjects her to sanctions if the facts in the document are known to be false. In addition, the procedure serves to verify the identity of the signer.<sup>10</sup> However, the purported benefits, in most cases, are actually rather limited.

#### 1. Truth

A main purpose of requiring an oath with respect to a particular document is to promote truth-telling.<sup>11</sup> Of course, a notary makes no independent investigation of the facts; truth is promoted through the ceremony which underscores the importance of signing a document. The declarant must give some affirmative indication that he or she has taken the oath and will tell the truth.<sup>12</sup> “[A]dministering an oath is one of a Notary’s most important duties and one that carries a tradition of thousands of

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<sup>8</sup> See *infra* notes 139-93 and accompanying text.

<sup>9</sup> Michael L. Closen, *Notarial Records and Preservation of the Expectation of Privacy*, 35 U.S.F. L. REV. 159, 161 (2001).

<sup>10</sup> Closen, *supra* note 2, at 613.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 628-29.

years.”<sup>13</sup> For example, the Nevada Notary Handbook instructs notaries to “first administer an oath by swearing in the document signer.”<sup>14</sup>

Any value this ceremony might have requires that it actually be performed, but some research suggests that notaries routinely fail to administer the oral oaths.<sup>15</sup> Most notaries affix their stamp or seal without actually administering the necessary oaths or affirmations.<sup>16</sup> One study in 1989 found that 91.7% of New York notaries failed to administer an oath.<sup>17</sup> Another study found that 75% of law students who had their signatures notarized once or more were never asked by the notaries to submit to an oath or affirmation.<sup>18</sup>

In addition, the premise itself is doubtful. Leaving aside the question of punishment which, as discussed below, is potentially available for sworn and unsworn falsehoods, very few people, probably, would be willing to sign a document containing a knowing lie, but would not do so if reminded of their obligation to tell the truth by an oath ceremony. That is, for honest people, a formal oath is unnecessary; for liars, it is no impediment.<sup>19</sup>

## 2. Punishment

An important feature of an oath is that it can make the taker subject to criminal sanctions for knowing lies.<sup>20</sup> While there are few prosecutions for perjury under the main federal statutes, 18 U.S.C. § 1621 and 18 U.S.C. § 1623, surely the penalty deters some.<sup>21</sup> However, notarization offers no special advantage because even unsworn false statements can be, and indeed, have been made criminally

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<sup>13</sup> *Id.* at 652 (quoting David S. Thun, *In the Spirit of Truth*, NAT'L NOTARY, Nov. 2000, at 10).

<sup>14</sup> *Id.* at 670 (quoting [NEVADA] NOTARY HANDBOOK 9 (1997)). “You (the notary) ask, “Do you swear that the statements in this document are true so help you God?”” The document signer then answers, “Yes.”” *Id.*

<sup>15</sup> See ALFRED E. PIOMBINO, NOTARY PUBLIC HANDBOOK 71 (1996) (reporting that eighty to ninety percent of the time notaries do not administer required oath or affirmation).

<sup>16</sup> Closen, *supra* note 2, at 653.

<sup>17</sup> *Id.* at 653 (quoting PIOMBINO, *supra* note 15, at xxii).

<sup>18</sup> Four hundred forty seven law students from three states who had used notaries were surveyed; 337 were never asked to submit to an oath. “Of the grand total of about 7604 notarizations performed, 6838 did not include the administration of an oath or affirmation: an even more disappointing ninety percent.” Closen, *supra* note 2, at 656.

<sup>19</sup> See, e.g., Gabriel J. Chin & Saira Rao, *Pledging Allegiance to the Constitution: The First Amendment and Loyalty Oaths for Faculty at Private Universities*, 64 U. PITT. L. REV. 431, 477 (2003).

<sup>20</sup> Closen, *supra* note 2, at 628; cf. Gabriel J. Chin & Scott C. Wells, *The “Blue Wall of Silence” as Evidence of Bias and Motive to Lie: A New Approach to Police Perjury*, 59 U. PITT. L. REV. 233 (1998) (discussing false statements in another judicial context). See generally Linda F. Harrison, *The Law of Lying: The Difficulty of Pursuing Perjury Under the Federal Perjury Statutes*, 35 U. TOL. L. REV. 397 (2003).

<sup>21</sup> Federal Justice Statistics Resource Center, [http://fjsrc.urban.org/noframe/wqs/q\\_intro.cfm](http://fjsrc.urban.org/noframe/wqs/q_intro.cfm) (last visited Feb. 1, 2005). There were 304 cases in federal court in 2002. *Id.*

punishable.<sup>22</sup> Accordingly, criminal deterrence of false statements can be achieved without the cost of notarization.

### 3. Identity

Notaries could also serve to verify the identity of the signers of documents. Notarization is usually recognized as independent proof of validity.<sup>23</sup> While of some value for this purpose, notaries do not offer a guarantee. First, a notary may fail to check the identity of the person signing the document. Second, the identity check is important only in cases of impostors. An impostor, presumably, would take the trouble to obtain a phony identification card. This would likely be sufficient to perpetrate a fraud because notaries generally do not independently verify the authenticity of proffered identification documents. In addition, recipients and users of notarized documents do not routinely check the identity and licensure of the notary public, so the perpetrator of a fraud could use a false notary stamp, readily available over the internet.<sup>24</sup> The real check on identity for notarized as well as non-notarized documents must come from the users of the documents, not from simple reliance on a notary stamp.

### 4. Witness

Notarization offers a benefit to the maker of a sworn document by creating a witness to the execution and establishing when the document was signed, which will often be of legal relevance. However, memorialization of a document's signing can be accomplished in other ways, such as with witnesses. Further, notarization is an issue because it is imposed by users of documents, such as government agencies and courts, on the makers of documents. If for some reason the signer of a document finds it useful to notarize it, there should be nothing stopping her.<sup>25</sup> But, that notarization might sometimes be useful to the maker, is no reason to require notarization in all cases, even where it is not useful.

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<sup>22</sup> 18 U.S.C. § 1001(a), (2000) (current version at 18 U.S.C.S. § 1001 (Lexis Nexis 2006)), provides:

[W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully --  
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact;  
(2) makes any materially false, fictitious, or fraudulent statement or representation; or  
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined [and/or imprisoned] . . . .

Note that 18 U.S.C. § 1001(b) provides that: "[s]ubsection (a) does not apply to a party to a judicial proceeding, or that party's counsel . . . ."

<sup>23</sup> Michael L. Closen, *The Public Official Role of the Notary*, 31 J. MARSHALL L. REV. 651, 683 (1998).

<sup>24</sup> Bruce Lambert, *What Happens If Process Server Doesn't Serve?*, N.Y. TIMES, Apr. 4, 1999, § 14LI, at 1. This was the technique of Intercounty Judicial Services of Long Island, which performed thousands of notarizations without a notary license. Many of the notary signatures were forged, and a fake notary stamp was used. Even though verifying that someone is a licensed notary in New York entails a single phone call (the number is (518) 474-4752), it took 18 years before anyone checked on Intercounty Judicial Services. *Id.*

<sup>25</sup> Closen, *supra* note 2, at 697-98.

*B. Congressional Rejection of a Notarization Requirement*

In 1976, Congress concluded that utilization of a notary was unnecessary in most cases and enacted 18 U.S.C. § 1746. According to the House Report, the primary goal of this legislation was to eliminate the inconvenience of finding a notary every time an affidavit needed to be signed by permitting the use of unsworn declarations under penalty of perjury in lieu of affidavits.<sup>26</sup> The legislation was endorsed by the American Bar Association and the Department of Justice.<sup>27</sup> The bill received bipartisan support in the Judiciary Committee and there was no reported opposition.<sup>28</sup> The bill made it out of the committee by a 30 to 0 vote.<sup>29</sup>

Missouri Representative William L. Hungate reported to the House that the bill<sup>30</sup> would include unsworn declarations within the scope of the general federal perjury statute (18 U.S.C. § 1621).<sup>31</sup> Even though 18 U.S.C. § 1623(a) allows for convictions for false declarations made pursuant to § 1746, he did not mention § 1623.<sup>32</sup> The bill was introduced in the Senate and subsequently enacted.<sup>33</sup>

More than twenty jurisdictions have adopted either a verbatim version of 28 U.S.C. § 1746, or a similar statute or rule, sometimes with a more limited scope. These jurisdictions include: Alaska,<sup>34</sup> Arizona,<sup>35</sup> California,<sup>36</sup> the District of Columbia,<sup>37</sup> Florida,<sup>38</sup> Guam,<sup>39</sup> Hawaii,<sup>40</sup> Illinois,<sup>41</sup> Indiana,<sup>42</sup> Iowa,<sup>43</sup> Kansas,<sup>44</sup>

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<sup>26</sup> H.R. REP. NO. 94-1616, at 1 (1976), as reprinted in 1976 U.S.C.C.A.N. 5644, 5644-45. For example, it is sometimes necessary for a document to be executed during non-business hours. Further, it can be inconvenient or even impossible for someone traveling internationally to find a notary. *Id.* at 5645.

<sup>27</sup> *Id.* at 5645; 122 CONG. REC. 32654 (1976).

<sup>28</sup> 122 CONG. REC. 32654 (Sept. 27, 1976).

<sup>29</sup> *Id.*

<sup>30</sup> H.R. 15531, 94th Cong. (1976) (enacted and codified at 18 U.S.C. § 1746).

<sup>31</sup> 122 CONG. REC. 32654 (1976).

<sup>32</sup> *Id.*

<sup>33</sup> 122 CONG. REC. 34447-48 (1976).

<sup>34</sup> ALASKA STAT. § 09.63.020 (2006).

<sup>35</sup> ARIZ. R. CIV. P. 80(I).

<sup>36</sup> CAL. CODE CIV. P. § 2015.5.

<sup>37</sup> D.C. CODE § 2-1831.13 (2006).

<sup>38</sup> FLA. STAT. § 92.525 (2006).

<sup>39</sup> GUAM CODE ANN. tit. 6, § 4308 (2006).

<sup>40</sup> HAW. R. CIR. CT. 7(g).

<sup>41</sup> 735 ILL. COMP. STAT. 5/1-109 (2006).

<sup>42</sup> IND. R. TRIAL P. 11(B).

<sup>43</sup> IOWA. CODE. § 622.1 (2005).

<sup>44</sup> KAN. STAT. ANN. § 53-601 (2006).

Massachusetts,<sup>45</sup> Minnesota,<sup>46</sup> New Jersey,<sup>47</sup> Nevada,<sup>48</sup> Oklahoma,<sup>49</sup> Oregon,<sup>50</sup> Pennsylvania,<sup>51</sup> Virginia,<sup>52</sup> Washington,<sup>53</sup> and West Virginia.<sup>54</sup> Maryland,<sup>55</sup> Michigan,<sup>56</sup> Missouri,<sup>57</sup> and New York<sup>58</sup> allow a declaration in place of an affidavit in more limited situations.

The virtue of these laws is that they let private actors do whatever they want. If a private employer or a bank for some reason wants applications notarized, or if a driver in a car accident chooses to notarize her memorialization of the event, nothing stands in the way. However, the number of government "gotcha's," instances where people forfeit rights or opportunities because they could not meet a deadline or satisfy a formal requirement for want of access to a handy notary public, the time to get a document notarized, or the funds to pay the required fee, will be reduced.

### III. THE LIMITED FEDERAL RESPONSE TO § 1746

In some ways, § 1746 has worked precisely as anticipated. Federal courts have consistently understood § 1746 to permit admission of documents into evidence when the document is accompanied by a signed declaration instead of a notarized affidavit. Court rules to the contrary have been held invalid.<sup>59</sup>

The statute has been flexibly construed. Following the language of the statute itself, substantial compliance, rather than strict compliance, is required. For example, the Ninth Circuit held that a signed declaration conformed with § 1746 when it stated "the facts stated in the ... complaint [are] true and correct as known to me."<sup>60</sup> The critical fact was that the writing was verified under penalty of perjury.<sup>61</sup>

<sup>45</sup> MASS. GEN. LAWS ch. 268, § 1A (2006).

<sup>46</sup> MINN. STAT. § 524.1-310 (2005).

<sup>47</sup> N.J. COURT RULES, R. 1:4-4.

<sup>48</sup> NEV. REV. ST. § 53.045 (2006).

<sup>49</sup> OKLA. STAT. tit. 12, § 426 (2005).

<sup>50</sup> OR. R. CIV. P. 1(E).

<sup>51</sup> 18 PA. CONS. STAT. § 4904 (2005); Pa. R. Civ. P. 76.

<sup>52</sup> VA. CODE ANN. § 8.01-4.3 (2006).

<sup>53</sup> WASH. REV. CODE § 9A.72.085 (2006).

<sup>54</sup> W.VA. CODE § 39-1-10a (2006).

<sup>55</sup> See, e.g., MD. CODE ANN., CORPS. & ASS'NS § 1-302 (LexisNexis 2006); MD. CODE ANN. EST. & TRUSTS § 1-102 (LexisNexis 2006).

<sup>56</sup> See MICH. COMP. LAWS. § 600.852 (2006); see also MICH. COMP. LAWS. § 2.114(b)(2) (2006).

<sup>57</sup> See MO. REV. STAT. § 472.080 (2006) (probate court).

<sup>58</sup> N.Y. C.P.L.R. 2106 (Consol. 1962) (certain state-licensed professionals).

<sup>59</sup> Carter v. Clark, 616 F.2d 228 (5th Cir. 1980) (invalidating a local rule requiring a notary as inconsistent with § 1746); see also 28 U.S.C. § 2071 (2000) (requiring consistency between local court rules and federal statutes).

<sup>60</sup> Schroeder v. McDonald, 55 F.3d 454, 460 (9th Cir. 1995).

The Seventh Circuit held that declaring under penalty of perjury that a complaint is true, and signing it, makes the document a valid declaration under § 1746.<sup>62</sup> In the Second Circuit, a declaration stating “[u]nder penalty of perjury, I make the statements contained herein,” substantially complied with § 1746.<sup>63</sup> In a case involving a declaration signed overseas, the Ninth Circuit upheld a declaration that stated, “I declare the foregoing to be true and correct under penalty of perjury under the laws of Hong Kong or any applicable jurisdiction.”<sup>64</sup> Here, the phrase “under the laws of ... any applicable jurisdiction” substantially complied with the language of § 1746.<sup>65</sup>

The Federal Rules of Civil Procedure require certain documents to be executed under oath.<sup>66</sup> For example, Rule 33(b) provides that interrogatories “shall be answered separately and fully in writing under oath.” However, all circuits have found that a declaration, instead of a notarized affidavit pursuant to § 1746, is sufficient.<sup>67</sup>

#### A. Federal Court Papers

Although the basic validity of § 1746 has been recognized, to some extent it has gone under the radar. In a Fifth Circuit reversal of the dismissal of an unnotarized habeas petition, the court dryly observed: “[a]pparently no one called to the attention of either the magistrate or the district court that an oath is not required when the petitioner declares under penalty of perjury that the matter contained therein is true.”<sup>68</sup> Other actors are equally unaware of § 1746, for example, many federal agencies require notarization of documents or forms.<sup>69</sup>

Perhaps the most ironic example of inconsistency with § 1746 is in the context of the federal courts themselves. Many federal courts require notarization of applications for admission to the bar. There is no notarization requirement for application to the bar of the First<sup>70</sup> and Seventh Circuits.<sup>71</sup> However, applications

<sup>61</sup> *Id.*

<sup>62</sup> *Ford v. Wilson*, 90 F.3d 245, 247 (7th Cir. 1996).

<sup>63</sup> *LeBoeuf, Lamb, Greene & MacRae, L.L.P. v. Worsham*, 185 F.3d 61, 65-66 (2d Cir. 1999).

<sup>64</sup> *Commodity Futures Trading Comm’n v. Topworth Int’l, Ltd.*, 205 F.3d 1107, 1112 (9th Cir. 1999).

<sup>65</sup> *Id.*

<sup>66</sup> *See, e.g.*, Fed. R. Civ. P. 33(b).

<sup>67</sup> Thomas W. Tobin, *The Execution “Under Oath” of U.S. Litigation Documents: Must Signatures Be Authenticated?*, 31 J. MARSHALL L. REV. 927, 932-33 (1998) (citing cases from each circuit where court papers were admitted pursuant to § 1746).

<sup>68</sup> *Dickinson v. Wainwright*, 626 F.2d 1184, 1185 (5th Cir. Unit B 1980) (per curiam).

<sup>69</sup> *See infra* notes 122 – 126.

<sup>70</sup> United States Court of Appeals for the First Circuit, Attorney Admission Application and Instructions, <http://www.ca1.uscourts.gov/files/forms/admission.pdf> (last visited Aug. 25, 2006).

<sup>71</sup> United States Court of Appeals for the Seventh Circuit, Application for Admission to Practice, <http://www.ca7.uscourts.gov/forms/applctn.pdf> (last visited Aug. 25, 2006).

require notarization in the Supreme Court,<sup>72</sup> the District of Columbia,<sup>73</sup> Second,<sup>74</sup> Third,<sup>75</sup> Fourth,<sup>76</sup> Fifth,<sup>77</sup> Sixth,<sup>78</sup> Eighth,<sup>79</sup> Eleventh,<sup>80</sup> and Federal<sup>81</sup> Circuits. Many trial courts also require notarization of bar applications, including U.S. District Courts in Arkansas,<sup>82</sup> Colorado,<sup>83</sup> Missouri,<sup>84</sup> New York,<sup>85</sup> New Jersey,<sup>86</sup> New

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<sup>72</sup> Supreme Court of the United States, Application for Admission to Practice,, <http://www.supremecourtus.gov/bar/barapplication.pdf> (last visited Aug. 25, 2006) (oath of admission).

<sup>73</sup> United States Court of Appeals for the District of Columbia Circuit, Application for Admission to Practice, <http://www.cadc.uscourts.gov/internet/internet.nsf> (follow "Forms" hyperlink; then follow "Forms for Attorneys Practicing Before the Court" hyperlink; then follow "Attorney Admission to Practice and Bar Membership Form" hyperlink; then follow "Application for Admission to Practice Form" hyperlink; then follow "ATTYADM3.pdf" hyperlink) (last visited Aug. 25, 2006) (oath of admission).

<sup>74</sup> United States Court of Appeals for the Second Circuit, Attorney Admission Application, <http://www.ca2.uscourts.gov/Docs/AttAdm/Adm Appl.pdf> (last visited Aug. 25, 2006) (sponsor's affidavit).

<sup>75</sup> United States Court of Appeals for the Third Circuit, Instructions and Application for Admission to Practice, <http://www.ca3.uscourts.gov/admissio.htm> (follow "Application for Admission to the Bar of the Third Circuit with Instructions" hyperlink) (last visited Aug. 25, 2006) (admission oath).

<sup>76</sup> United States Court of Appeals for the Fourth Circuit, Application for Admission to the Bar, <http://www.ca4.uscourts.gov/pdf/AttyAdm.pdf> (last visited Aug. 25, 2006) (admission oath).

<sup>77</sup> United States Court of Appeals for the Fifth Circuit, Application and Oath for Admission, <http://www.ca5.uscourts.gov/documents/dkt-5b.pdf> (last visited Aug. 25, 2006) (admission oath and truth of statements).

<sup>78</sup> United States Court of Appeals for the Sixth Circuit Application for Admission to the Bar, [http://www.ca6.uscourts.gov/internet/forms/attorney\\_admissions/application.pdf](http://www.ca6.uscourts.gov/internet/forms/attorney_admissions/application.pdf) (last visited Aug. 25, 2006) (admission oath).

<sup>79</sup> United States Court of Appeals for the Eighth Circuit, Admission Form, <http://www.ca8.uscourts.gov/newcoa/forms/admission.pdf> (last visited Aug. 21, 2006) (admission oath).

<sup>80</sup> United States Court of Appeals for the Eleventh Circuit, Application for Admission to the Bar, <http://www.ca11.uscourts.gov/documents/pdfs/appadmbar.pdf> (last visited Aug. 21, 2006) (admission oath and truth of statements).

<sup>81</sup> United States Court of Appeals for the Federal Circuit, Form 21: Application for Admission to the Bar, [http://fedcir.gov/pdf/form21\\_2005.pdf](http://fedcir.gov/pdf/form21_2005.pdf) (last visited Aug. 21, 2006) (oath of admission).

<sup>82</sup> United States District Court for the Eastern District of Arkansas, In-State Attorney Enrollment Information, [http://www.are.uscourts.gov/pdf/forms/attorney\\_in\\_state.pdf](http://www.are.uscourts.gov/pdf/forms/attorney_in_state.pdf) (last visited Aug. 21, 2006). In Arkansas, both in the Eastern and Western District, an attorney's application to practice law in the federal court must be notarized. *Id.*

<sup>83</sup> United States District Court for the District of Colorado, Application for Admission to the Bar of the Court, [http://www.co.uscourts.gov/forms/bar\\_app\\_new.pdf](http://www.co.uscourts.gov/forms/bar_app_new.pdf) (last visited Aug. 21, 2006). In Colorado, an application for admission to the U.S. District Court must be notarized. *Id.*

Mexico,<sup>87</sup> North Dakota,<sup>88</sup> Pennsylvania,<sup>89</sup> South Carolina,<sup>90</sup> Texas,<sup>91</sup> Utah,<sup>92</sup> Washington,<sup>93</sup> the Tax Court,<sup>94</sup> and the Court of International Trade.<sup>95</sup>

Most of the aforementioned courts require notarization of the oath printed on the application form. This practice could be defended at first blush under the "oath of office" exception of § 1746. However, this seems at least questionable in light of the Supreme Court's decision in *In re Griffiths*<sup>96</sup> that an attorney, as important as he might be, is "not an 'officer' within the ordinary meaning of that term."<sup>97</sup>

<sup>84</sup> United States District Court for the Eastern District of Missouri, Application for Admission to Practice Law, <http://www.moed.uscourts.gov/forms/ApplicationForAdmissionToPracticeLaw.pdf> (last visited Aug. 19, 2006).

<sup>85</sup> United States District Court for the Southern District of New York, Attorney Admission Forms, <http://www.nysd.uscourts.gov/forms/adm.pdf> (last visited Aug. 31, 2006).

<sup>86</sup> United States District Court for the District of New Jersey, U.S. District Court for the District of New Jersey Home Page, <http://pacer.njd.uscourts.gov> (follow "Attorney Services" hyperlink; then follow "Attorney Admissions" hyperlink) (last visited Aug. 19, 2006).

<sup>87</sup> United States District Court for the District of New Mexico, Petition for Admission to Practice, <http://www.nmcourt.fed.us/web/DCDOCS/dcindex.html> (follow "Admission Form and Process" hyperlink; then follow "Form" hyperlink; then follow "Application for Admission to Practice in the USDC, DNM PDF" hyperlink) (last visited Aug. 21, 2006).

<sup>88</sup> United States District Court for the District of North Dakota, Out of State Counsel Admission Information, <http://www.ndd.uscourts.gov/OutState.pdf> (last visited Aug. 21, 2006).

<sup>89</sup> United States District Court for the Eastern District of Pennsylvania, Attorney Admission Application (Pro Hac Vice), [http://www.paed.uscourts.gov/documents/handbook/forms/app\\_x.pdf](http://www.paed.uscourts.gov/documents/handbook/forms/app_x.pdf) (last visited Aug. 21, 2006) (oath and sponsor's motion).

<sup>90</sup> United States District Court for the District of South Carolina, Application for Admission to Practice, <http://www.scd.uscourts.gov/DOCS/admprac.pdf> (last visited Aug. 21, 2006).

<sup>91</sup> United States District Court for the Eastern District of Texas, Application for Admission to Practice, <http://www.txed.uscourts.gov> (follow "Attorney Admission Fee" hyperlink; then follow "Attorney Admissions Application" hyperlink) (last visited Aug. 21, 2006) (oath of admission).

<sup>92</sup> United States District Court for the District of Utah, Application for Admission of Non-Resident Attorney, [http://www.utd.uscourts.gov/forms/nonres\\_atty\\_pkg.pdf](http://www.utd.uscourts.gov/forms/nonres_atty_pkg.pdf) (last visited Aug. 28, 2006).

<sup>93</sup> United States District Court for the Eastern District of Washington, Petition for Admission to Practice, <http://www.waed.uscourts.gov/attorney/petition.pdf> (last visited Aug. 21, 2006).

<sup>94</sup> United States District Court for the United States Tax Court, Application for Admission to Practice, [http://www.ustaxcourt.gov/forms/Admission\\_Attorney.pdf](http://www.ustaxcourt.gov/forms/Admission_Attorney.pdf) (last visited Aug. 31, 2006).

<sup>95</sup> United States Court of International Trade, Application for Admission to Practice, <http://www.cit.uscourts.gov/Forms/PDF/form-new10.pdf> (last visited Aug. 21, 2006).

<sup>96</sup> *In re Griffiths*, 413 U.S. 717 (1973).

<sup>97</sup> *Id.* at 728. The Court explained:

Some oath requirements would seem to be permissible based on the § 1746 exception for “an oath required to be taken before a specified official other than a notary public.” The Eastern District of Michigan requires applicants to be sworn before a U.S. District, Magistrate, or Bankruptcy Judge.<sup>98</sup> Applicants in Vermont<sup>99</sup> and Delaware<sup>100</sup> must be sworn by a Deputy Clerk. Part of the application in Nebraska must be completed by a clerk.<sup>101</sup>

However, some federal bar applications require notarization of matters other than an oath. These practices are clearly in tension with § 1746. In the Second Circuit, the only part of the form that must be notarized is the sponsor’s affidavit.<sup>102</sup> The application to the Eastern and Western Districts of Arkansas requires attorneys to sign an admissions form that says, “I certify that I have read and understand the local rules of this Court and that I agree to attend all conferences set by the Court or I shall associate local counsel to attend in my absence.”<sup>103</sup> In New York, notarization is required for identity and truthfulness;<sup>104</sup> in Washington the petition is notarized for

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‘Certainly nothing . . . in any . . . case decided by this Court places attorneys in the same category as marshals, bailiffs, court clerks or judges. Unlike these officials a lawyer is engaged in a private profession, important though it be to our system of justice. . . . The word ‘officer’ as it has always been applied to lawyers conveys quite a different meaning from the word ‘officer’ as applied to people serving as officers within the conventional meaning of that term.’

. . . [T]hey are not officials of government by virtue of being lawyers. Nor does the status of holding a license to practice law place one so close to the core of the political process as to make him a formulator of government policy.  
*Id.* at 728-29 (quoting *Cammer v. United States*, 350 U.S. 399, 405 (1956)).

<sup>98</sup> United States District Court for the Eastern District of Michigan, Attorney Information, [http://www.mied.uscourts.gov/\\_attyadm/attyinfo.htm#admission](http://www.mied.uscourts.gov/_attyadm/attyinfo.htm#admission) (last visited Aug. 21, 2006).

<sup>99</sup> United States District Court for the District of Vermont, Application for Admission, <http://www.vtd.uscourts.gov/AttorneyAd.htm> (follow “Admissions Application (PDF)” hyperlink) (last visited Aug. 21, 2006).

<sup>100</sup> United States District Court for the District of Delaware, Attorney Admission Application, <http://www.ded.uscourts.gov/CLKmain.htm> (follow “Forms” hyperlink; then follow “Attorney Admission Application (with instructions)” hyperlink) (last visited Aug. 21, 2006).

<sup>101</sup> United States District Court for the District of Nebraska, Application for Admission to Practice, <http://www.ned.uscourts.gov/fpo/forms/attyadm.pdf> (last visited Aug. 21, 2006).

<sup>102</sup> United States Court of Appeals for the Second Circuit, Attorney Admissions Application, <http://www.ca2.uscourts.gov/Docs/AttAdm/AdmAppl.pdf> (follow “2d Cir. Handbook”) (last visited Aug. 21, 2006).

<sup>103</sup> In-State Attorney Enrollment Information, [http://www.are.uscourts.gov/pdf/forms/attorney\\_in\\_state.pdf](http://www.are.uscourts.gov/pdf/forms/attorney_in_state.pdf) (last visited Aug. 21, 2006).

<sup>104</sup> United States District Court for the Southern District of New York, Attorney Admission Forms, <http://www.nysd.uscourts.gov/forms/adm.pdf> (last visited Aug. 31, 2006) (“\_\_\_\_\_ being duly sworn, deposes and says that he/she is the petitioner in the above captioned matter, that he/she read the foregoing petition and knows the contents thereof and that the same is true to his/her knowledge.”).

truthfulness.<sup>105</sup> Procedural forms in the Districts of Puerto Rico,<sup>106</sup> Rhode Island,<sup>107</sup> and Colorado<sup>108</sup> also seem to require notarization.

In addition to official court forms, the pervasiveness of the use of notaries in federal litigation, in spite of § 1746, is suggested by privately published form pleadings. Often these forms include a place for a notary seal in spite of § 1746.<sup>109</sup>

*B. Notarization Requirements in the U.S. Code and the Code of Federal Regulations*

Hundreds of provisions in the U.S. Code and Code of Federal Regulations refer to notaries public or notarized documents. Some of the provisions found in the U.S. Code include the following: any person who believes a violation of Federal election campaign funding has occurred must have the complaint notarized,<sup>110</sup> a military power of attorney must be notarized,<sup>111</sup> and many banking transactions may not be completed until the transaction is acknowledged before a notary public.<sup>112</sup> For example, a banking association may not increase its capital stock without the use of a notary.<sup>113</sup> Also, a bank's organization certificate must be acknowledged by either a judge or a notary.<sup>114</sup> A banker may not issue preferred stock until an acknowledgement is made before a notary.<sup>115</sup> When a director of a bank is appointed

<sup>105</sup> United States District Court for the Eastern District of Washington, Petition for Admission to Practice, <http://www.waed.uscourts.gov/attorney/petition.pdf> (last visited Aug. 31, 2006) ("\_\_\_\_\_, Petitioner herein, being first duly sworn, deposes and says that he/she has read the foregoing Petition and the facts stated therein are true to the best of his/her knowledge.").

<sup>106</sup> United States District Court for the District of Puerto Rico, District Court Forms for Attorneys, [http://www.prd.uscourts.gov/usdcpr/a\\_forms.htm](http://www.prd.uscourts.gov/usdcpr/a_forms.htm) ((follow "Form F-Affidavit of Service (Foreclosure of Mortgage)" hyperlink); (follow "Form J-Affidavit" hyperlink); (follow "Form K-Affidavit (Foreclosure of Mortgage)" hyperlink)) (last visited Aug. 31, 2006).

<sup>107</sup> Local Rules of The United States District Court For The District Of Rhode Island, Appendix A, Form 5A (petition under 28 U.S.C. § 2254) (on file with author).

<sup>108</sup> United States District Court for the District of Colorado, Guide for Filing a Civil Suit, Motion and Affidavit for Leave to Proceed Pursuant to 28 U.S.C. § 1915, [http://www.co.uscourts.gov/forms/f\\_gen\\_guide\\_new.pdf](http://www.co.uscourts.gov/forms/f_gen_guide_new.pdf) (last visited Sept. 5, 2006) (moving for appointment of counsel under 28 U.S.C. § 1915 in the District of Colorado requires a notary).

<sup>109</sup> 5 FEDERAL PROCEDURAL FORMS § 10:299 (2006) (affidavit of plaintiff's attorney); 12 FEDERAL PROCEDURAL FORMS § 45:156 (2006) (attorney's fees); 14 FEDERAL PROCEDURAL FORMS § 58:59 (2006) (removal petition).

<sup>110</sup> 2 U.S.C. § 437(g)(a)(1) (2000).

<sup>111</sup> 10 U.S.C. § 1044b (2000).

<sup>112</sup> See *infra* notes 111 – 114.

<sup>113</sup> 12 U.S.C. § 57 (2000).

<sup>114</sup> 12 U.S.C. § 23 (2000).

<sup>115</sup> 12 U.S.C. § 51a (2000).

or elected, she must take an oath before a notary public.<sup>116</sup> Many provisions of the Code of Federal Regulations also require notarization.<sup>117</sup>

Many parts of the code that refer to a notary do not make any reference to § 1746, leading a user of the code to believe that a notary is required.<sup>118</sup> On the other hand, some parts of the code have been updated to include § 1746. Still, other parts of the code are ambiguous as to whether they require a notary. For example, reclamation waivers of mining claims under the general mining laws require that an application must be “certified and/or notarized,” but there is no explanation of what certified means.<sup>119</sup> Also, for a valid power of attorney agreement within the treasury department “[a] power of attorney must be executed in the presence of a notary public or a certifying individual.”<sup>120</sup> Conceivably, the signer of a declaration could be a certifying individual, but it is not clear. Other parts of the code are arguably ambiguous. Under the Department of Parks, Forests and Public Property, the proceedings for pleadings and motions require complaints and answers to be “by affidavit or ... notarized.”<sup>121</sup>

Some sections of the Code of Federal Regulations refer to § 1746. For example, Title 29 on labor has been updated to include § 1746.<sup>122</sup> Title 47 on the Federal Communications Commission has a section on unsworn declarations in lieu of affidavits. For FCC filings, the regulations provide that anytime a document needs to be verified, a declaration may be substituted for an affidavit.<sup>123</sup> Notwithstanding that provision, other parts of the code regarding the FCC require a notary. This could cause confusion for someone filing a document with the FCC. For example,

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<sup>116</sup> 12 U.S.C. § 73 (2000).

<sup>117</sup> See, e.g., 30 U.S.C. § 1232(c) (2000) (stating that the operator of a coalmine must include a notarized document together with payment of the required reclamation fee to the Department of the Interior); 30 U.S.C. § 1238(a) (2000) (stating that appraisal of land that was formally used for mining and has been restored must be notarized). Also, insurance companies that provide Medicare supplemental policies must be certified to comply with minimum federal requirements. Once certified, the insurance company must file a notarized statement stating that the policy continues to meet such standards. 42 U.S.C. § 1395ss(a)(1) (2000).

<sup>118</sup> See *infra* App.

<sup>119</sup> 43 C.F.R. § 3835.11(c) (2005).

<sup>120</sup> 31 C.F.R. § 357.28(g) (2005). See also 31 C.F.R. § 360.40(d)(1) (2005) (power of attorney must be “properly certified or notarized”); 32 C.F.R. § 239.4 (under the Homeowners Assistance Program, applicants must submit evidence of homeownership that “should be notarized or certified”).

<sup>121</sup> 36 C.F.R. § 1150.48(b)–(c) (2005).

<sup>122</sup> See 29 C.F.R. §§ 101.2, .17, .26, 102.11, .60, .83, 1501.3 (2005). But see 29 C.F.R. §§ 1611.4(d), 4902.3(c)(1) (requests for records by mail must be notarized). Also, if a non-attorney is given power of attorney for representation during administrative review of pension agency decisions, that person must provide a notarized power of attorney statement. 29 C.F.R. § 4003.6 (2005).

<sup>123</sup> 47 C.F.R. § 1.16 (2005). Title 49 on Transportation also provides that affirmations or declarations under penalty of perjury in accordance with perjury provisions are acceptable in lieu of an oath. 49 C.F.R. § 1104.5(b) (2005).

any party receiving confidential information from the FCC must sign a notarized statement saying they understand the rules of confidentiality.<sup>124</sup> There are other FCC procedures that require notarization. For example, requests to modify international settlement arrangements must be notarized.<sup>125</sup> Payphone compensation procedures must also be notarized.<sup>126</sup>

Some statutes do not absolutely require a notary, but still do not comply with § 1746. For example, requests for records through Title 11 of the Federal Elections Act must either be notarized or witnessed by at least two people.<sup>127</sup>

Some parts of the code require notarization to be obtained internationally.<sup>128</sup> Ships exporting goods to countries the United States boycotts, that also do business with the United States, must provide a notarized certificate regarding the goods exported.<sup>129</sup> This can be especially difficult because international notaries are not always available and can be expensive.

There is also a lack of uniformity with respect to records requests. Notwithstanding a decision of the U.S. Court of Appeals for the District of Columbia Circuit holding that § 1746 declarations are sufficient to make a request under FOIA,<sup>130</sup> some agencies do not comply. Under the CFR, each department within the government has a different procedure for obtaining records that pertain to individuals under the Freedom of Information Act. All departments try to verify the identity of the requestor. Some departments will only verify an individual's identity with a notarized document,<sup>131</sup> while other departments will allow either a notarized

<sup>124</sup> 47 C.F.R. §§ 1.731(c), 76.9(e) (2005).

<sup>125</sup> 47 C.F.R. § 64.1001(c) (2005).

<sup>126</sup> 47 C.F.R. § 64.1310(f)(1) (2005).

<sup>127</sup> 11 C.F.R. §§ 1.4, .10(a) (2005).

<sup>128</sup> See, e.g., 15 C.F.R. pt. 760, supp. 1 (2005).

<sup>129</sup> *Id.*

<sup>130</sup> *Summers v. U.S. Dep't of Justice*, 999 F.2d 570 (D.C. Cir. 1993), *aff'd* 776 F. Supp. 575 (D.D.C. 1991).

<sup>131</sup> See, e.g., 7 C.F.R. § 1.113(e) (2006) (Department of Agriculture); 8 C.F.R. §§ 103.10, .21 (2006) (Immigration records from the Department of Homeland Security); 14 C.F.R. § 1212.202 (2006) (NASA records); 15 C.F.R. §§ 4.23-.24 (including requests for census data), 80.1 (2006) (Office of the Secretary of Commerce); 16 C.F.R. §§ 1014.3-.4 (2006) (Consumer Product Safety Commission); 18 C.F.R. §§ 701.304, .310 (2006) (Department of Conservation of Power and Water Resources); 18 C.F.R. § 1301.14 (2006) (Tennessee Valley Authority); 20 C.F.R. § 401.45 (2006) (Social Security Administration); 22 C.F.R. § 215.4 (2006) (Agency for International Development); 22 C.F.R. § 308.15 (2006) (Peace Corps); 22 C.F.R. § 505.5 (2006) (Broadcasting Board of Governors); 22 C.F.R. § 1101.6 (2006) (International Boundary and Water Commission); 22 C.F.R. § 1507.6 (2006) (African Development Foundation); 23 C.F.R. §§ 1327.5-.6 (2006) (National Highway Traffic Safety Administration); 25 C.F.R. §§ 515.3, .8 (2006) (National Indian Gaming Commission); 28 C.F.R. § 700.11 (2006) (Office of Independent Counsel); 32 C.F.R. § 295.7 (2006) (Office of the Inspector General); 32 C.F.R. §§ 321.4-.5 (2006) (Defense Security Service); 37 C.F.R. §§ 102.23-.24 (2006) (United States Patent and Trademark Office); 45 C.F.R. §§ 1115.4, 1159.9 (2006) (National Foundation on the Arts and the Humanities); 46 C.F.R. § 503.63, .65 (2006) (Federal Maritime Commission); 49 C.F.R. § 802.7 (2006) (National Transportation Safety Board); 50 C.F.R. § 501.4 (2006) (Marine Mammal Commission); While requests for records

document or a declaration under § 1746.<sup>132</sup> Some parts of the code give government employees the discretion to require notarization for records pertaining to an individual.<sup>133</sup> If the employee determines the records are embarrassing or harmful, the records will not be released without a notary.<sup>134</sup>

In a certain way, the hundreds of statutes, regulations, rules and forms seemingly requiring notarization are completely consistent with § 1746, which, after all, does not prohibit notarization requirements. Section 1746 merely states that a non-notarized statement can satisfy that requirement. By leaving notarization requirements in the law and permitting the creation of new ones, millions of litigants and others dealing with the government, must make a choice, "Do I do it the easy way, spend twenty minutes and \$3.00 to get the thing notarized, or do I take a chance by sending in a § 1746 declaration even though they ask for notarization? If a document gets sent back because it has a declaration instead of a notary stamp, do I then challenge the government at great personal cost, or take the path of least resistance and just get the document notarized?" The easy way is very attractive

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from the Office of Banks and Banking must be notarized, 12 C.F.R. §§ 404.14, 1102.102 (2006), requests under the Privacy Act to the Office of Banks and Banking allow an individual to substitute an affidavit for a notarized statement. 12 C.F.R. § 913.3 (2006). To receive records on individuals from the Office of the Secretary of the Treasury, the request by mail must include a copy of a driver's license, or alternatively, a notarized statement affirming the individual's identity. 31 C.F.R. pt. 1, subpt.C, apps. A-L, N (2006). National Driver Register records requests must be made using a proper NDR form, or by way of a notarized letter. 46 C.F.R. §§ 10.201, 12.02-.04. Other records requests also require either a driver's license or a notarized statement. *See*, 12 C.F.R. § 261a.5 (2006) (Department of Banks and Banking); 36 C.F.R. § 903.3 (2006) (Pennsylvania Avenue Development Corporation); 45 C.F.R. § 705.4 (2006) (Commission on Civil Rights).

<sup>132</sup> This includes records from the Department of Defense. 32 C.F.R. § 286.22 (2006). *See also* 6 C.F.R. § 5.21(d) (2006) (Department of Homeland Security); 19 C.F.R. § 201.25 (2006) (United States International Trade Commission); 22 C.F.R. §§ 171.12, 171.32 (2006) (Department of State); 32 C.F.R. § 298.4 (2006) (Defense Investigative Service); 32 C.F.R. § 311.6 (2006) (Office of the Secretary of Defense); 32 C.F.R. § 318.6 (2006) (Defense Threat Reduction Program); 32 C.F.R. §§ 320.4-.5 (2006) (National Geospatial Agency); 32 C.F.R. § 322.5 (2006) (National Security Agency); 32 C.F.R. §§ 326.6.8 (2006) (National Reconnaissance Office); 32 C.F.R. § 701.8 (2006) (Department of the Navy); 32 C.F.R. § 806b.13 (2006) (Air Force); 32 C.F.R. § 1801.13 (2006) (National Counterintelligence Center); 32 C.F.R. § 1901.13 (2006) (Central Intelligence Agency); 34 C.F.R. § 5b.5 (2006) (Department of Education); 40 C.F.R. § 1602.2 (2006) (Chemical Safety and Hazard Board); 45 C.F.R. § 5b.5 (2006) (Department of Health and Human Services); 45 C.F.R. § 613.2 (2006) (National Science Foundation).

<sup>133</sup> For example, records from the Defense Information Systems Agency "may require" a notarized statement "if the sensitivity of the data warrants." 32 C.F.R. § 316.6 (2006). *See also* 5 C.F.R. §§ 1205.13, 1302.2 (2006) (Administrative Personnel); 10 C.F.R. § 1008.4 (2006) (Department of Energy); 17 C.F.R. § 146.4 (2006) (Commodity Futures Trading Commission); 18 C.F.R. § 3b.222 (2006) (Federal Energy Regulatory Commission); 32 C.F.R. § 1665.2. (2006) (Selective Service); 40 C.F.R. § 16.4 (2006) (Environmental Protection Agency); 41 C.F.R. § 51-9.302 (2006) (Department of Public Contracts and Property Management); 45 C.F.R. § 2508.14 (2006) (Corporation for National and Community Service).

<sup>134</sup> *Id.*

here; it is not surprising that, for example, no new lawyer has sued the Supreme Court or the Circuits to force them to accept an unnotarized application, or to test the "oath of office" exception's applicability to attorneys.

Cases testing the scope of § 1746 in novel areas are rare. Yet, a lack of knowledge about § 1746 on the part of litigants means that the scope and validity of § 1746 is frequently questioned in routine cases where it is clearly applicable. A stream of appellate cases deals with the effectiveness of § 1746 declarations in the face of litigants and sometimes judges unfamiliar with the law.<sup>135</sup>

The lack of an incentive for litigants to test the law coupled with a general lack of knowledge about § 1746 cries out for a positive law solution. The simplest solution would be to remind the government and litigants of § 1746 by positive law. Every title of the Code of Federal Regulations should have a definition of "affidavit" and "notarization" consistent with § 1746;<sup>136</sup> so, too, should the Federal Rules of Procedure.<sup>137</sup>

#### IV. APPLICATION OF THE FEDERAL PERJURY STATUTES

In addition to the underutilization of the statute, when it is utilized, the criminal provisions punishing false statements have gaps. The affidavit substitute of § 1746

<sup>135</sup> See, e.g., *United States v. Thomas*, 128 F.App'x 986, 992 (4th Cir. 2005) ("[The document] does not appear to have been re-notarized. However, § 1746 does not require a notarized statement."); *Vineyard v. Dretke*, 125 F.App'x 551, 553 (5th Cir. 2005) ("Vineyard's unsworn declaration under penalty of perjury was competent sworn testimony under 28 U.S.C. § 1746, and it carried the same 'force and effect' as an affidavit."); *United States v. Bueno-Vargas*, 383 F.3d 1104 (9th Cir. 2004) (questioning whether § 1746 declaration counts for purposes of "oath or affirmation" required for search warrant); *Hartsfield v. Colburn*, 371 F.3d 454, 456 (8th Cir. 2004) ("We agree with Hartsfield that the allegations made in his verified complaints satisfy affidavit requirements [in] 28 U.S.C. § 1746."); *Hart v. Lutz*, 102 F.App'x 10, 13 (6th Cir. 2004) ("Plaintiff's complaint was not verified, and two 'affidavits' submitted by him were not sworn or otherwise subscribed pursuant to 28 U.S.C. § 1746."); *Lyons-Bey v. Pennell*, 93 F.App'x 732, 733-34 (6th Cir. 2004) ("[L]yons-Bey explicitly states that 'under the penalty of perjury the foregoing is true and correct, under 28 U.S.C. § 1746.' Lyons-Bey's statement satisfies § 1746 as he even referenced the statute in his declaration of service of process."); *Betouche v. Ashcroft*, 357 F.3d 147, 150 n.5 (1st Cir. 2004) ("Moreover, the Betouche letter failed to comply with 28 U.S.C. § 1746, which arguably may have permitted, in lieu of an affidavit, an 'unsworn declaration . . . in writing of such. . . .'"); *Sterling China Co. v. Glass, Molders, Pottery, Plastics & Allied Workers Local 24*, 357 F.3d 546, 557 n.1 (6th Cir. 2004) (Nelson, J., concurring) ("The district court questioned whether 'declarations' can be given any consideration in summary judgment proceedings, since Rule 56(c) . . . authorizes consideration of 'affidavits,' not declarations. Under 28 U.S.C. § 1746, however, an unsworn declaration has the same force and effect as an affidavit if it recites . . . that it was executed 'under penalty of perjury.'"); *Hart v. Hairston*, 343 F.3d 762, 764 n.1 (5th Cir. 2003) ("[A] declaration [u]nder 28 U.S.C. § 1746 . . . is competent sworn testimony for summary-judgment purposes."); *Fenlon v. Thomas*, 69 F.App'x 659, 659 (5th Cir. 2003) ("[T]he affidavit Fenlon submitted in opposition to Thomas's summary judgment motion was competent summary judgment evidence under 28 U.S.C. § 1746. . . .").

<sup>136</sup> See *supra* note 3 and accompanying text.

<sup>137</sup> See FED. R. BANKR. P. 1008 ("All petitions, lists, schedules, statements and amendments thereto shall be verified or contain an unsworn declaration as provided in 28 U.S.C. § 1746. . . .").

is intended to save the cost of notarization, not to let declarants lie with impunity. The required statement itself recognizes that false statements are intended to be subject to penalty of perjury. Yet, a series of court decisions make it more difficult to convict people who make false statements under § 1746 than in a notarized affidavit.

18 U.S.C. § 1621(2) defines the federal crime of perjury to include false declarations under § 1746. It provides:

Whoever . . . in any declaration certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code, willfully subscribes as true any material matter which he does not believe to be true . . . is guilty of perjury.<sup>138</sup>

In addition, declarations under § 1746 are covered by the judicial perjury statute, 18 U.S.C. § 1623(a), which states:

Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration [may be convicted of perjury].<sup>139</sup>

Although the parenthetical language was added when § 1746 was enacted in 1976,<sup>140</sup> some federal courts have construed § 1623 in such a way as to make it virtually inapplicable to § 1746 statements.

A. "Context Less Formal Than A Deposition"

Based on *Dunn v. United States*,<sup>141</sup> a Supreme Court case apparently requiring a high level of formality to trigger § 1623, some courts hold that § 1746 statements do not count because they are informally executed. Typically they are signed at home or in a business office, rather than in court.

In *Dunn*, the Court found § 1623(a) inapplicable to statements made under oath, but not associated with any specific federal judicial proceeding.<sup>142</sup> *Dunn* testified before a grand jury investigating one Musgrave.<sup>143</sup> Months later, before a stenographer and after being sworn by a notary public, he made statements inconsistent with his grand jury testimony in the office of Musgrave's private defense attorney.<sup>144</sup> There was no particular indication that the statements would be presented as evidence in any court proceeding.<sup>145</sup> However, a transcript of the

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<sup>138</sup> 18 U.S.C. § 1621(2) (2000).

<sup>139</sup> 18 U.S.C. § 1623(a) (2000).

<sup>140</sup> H.R. REP. NO. 94-1616, at 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5644, 5646.

<sup>141</sup> 442 U.S. 100 (1979).

<sup>142</sup> *Id.* at 113.

<sup>143</sup> *Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 112.

statement was later submitted in support of Musgrave's motion to dismiss the indictment.<sup>146</sup> Subsequently, Dunn was indicted for perjury under § 1623.<sup>147</sup>

The government argued that § 1623(a) covered all affidavits,<sup>148</sup> but a unanimous Court disagreed, holding that a false affidavit drafted in an attorneys office on behalf of a third party could not be prosecuted under that section.<sup>149</sup> The outcome in *Dunn* was undoubtedly correct; a false affidavit submitted in connection with, say, a high school disciplinary proceeding or a state workers' compensation action, could well wind up, at some future time or place, as evidence before a federal court. Yet, it is clear that such a person has not made a false statement in a federal court proceeding, the conduct Congress meant to define as perjury under § 1623(a).

If a statement under oath with a transcriptionist present is "less formal than a deposition" then it is likely that the circumstances surrounding *any* out-of-court signing of a declaration would be even less formal. Thus, under such a reading of *Dunn*, § 1746 declarations could never be the basis of a prosecution under § 1623. On this logic, several courts have held that a statement which, like that in *Dunn* was made out of court, but unlike that in *Dunn*, was intended to be introduced in court, was not subject to § 1623.<sup>150</sup>

For example, in *United States v. Lamplugh*,<sup>151</sup> the U.S. District Court for the Middle District of Pennsylvania dismissed a perjury indictment based on a false declaration in support of the return of property.<sup>152</sup> The court concluded that a declaration for the return of property could never rise to the level of formality required of an ancillary proceeding to give rise to a prosecution under § 1623.<sup>153</sup>

Similarly, in *United States v. Savoy*,<sup>154</sup> the defendant was charged with perjury after it became apparent that he lied in a declaration filed in connection with a civil lawsuit.<sup>155</sup> The court cited *Dunn*, and concluded that § 1623 did not apply to "statements made in contexts less formal than a deposition."<sup>156</sup> An affidavit for civil litigation is, admittedly, less formal than a deposition.<sup>157</sup>

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<sup>146</sup> *Id.* at 103.

<sup>147</sup> *Dunn*, 442 US at 103.

<sup>148</sup> *Id.* at 110.

<sup>149</sup> *Id.* at 111-112. "We cannot conclude here that Congress in fact intended or clearly expressed an intent that § 1623 should encompass statements made in contexts less formal than a deposition. Accordingly, we hold that petitioner's [out of court] declarations were not given in a proceeding ancillary to a court or grand jury within the meaning of the statute." *Id.* at 113.

<sup>150</sup> See, e.g., *United States v. Lamplugh*, 17 F. Supp. 2d 354 (M.D. Pa. 1998).

<sup>151</sup> 17 F. Supp. 2d 354 (M.D. Pa. 1998).

<sup>152</sup> *Id.* at 355.

<sup>153</sup> *Id.* at 357.

<sup>154</sup> 38 F. Supp. 2d 406 (D. Md. 1998).

<sup>155</sup> *Id.* at 409.

<sup>156</sup> *Id.* at 411 (quoting *Dunn*, 442 U.S. at 113 (1979)).

<sup>157</sup> *Id.* at 412.

Finally, the U.S. District Court for the Northern District of Illinois followed this approach in *United States v. Benevolence International Foundation*,<sup>158</sup> holding § 1623 inapplicable to unsworn declarations submitted in connection with an application for a preliminary injunction.<sup>159</sup> “In this case, defendants are being prosecuted for out-of-court declarations made by [a defendant], signed under penalty of perjury, and attached to memoranda filed . . . in support of a motion for a preliminary injunction in a civil case. *Dunn* makes clear that this was not a context as formal as a deposition. . . . Accordingly, the indictment is dismissed.”<sup>160</sup>

The simultaneous existence of a unanimous opinion in *Dunn* and a specific reference to § 1746 in § 1623(a) creates a conundrum: *Dunn* requires a certain level of formality to sustain a prosecution under § 1623(a) and § 1746 is designed to be executed informally and yet is specifically included in § 1623(a). *Dunn*, § 1746, and § 1623(a) can be reconciled by interpreting the “less formal than a deposition” language from *Dunn* as not referring to the pomp and circumstance surrounding the taking of the particular statement, but rather to the statement’s connection to a formal proceeding. After all, while admirable advocacy and not affirmatively illegal, no law, regulation, or rule allows a private attorney to take *ex parte* testimony of a potential witness; the interview was not formally connected to any federal case.

The Fourth Circuit followed this logic, distinguishing *Dunn* in a case involving a § 1746 declaration because the statement was clearly headed to court.<sup>161</sup> In *United States v. Johnson*,<sup>162</sup> the defendant filed a § 2254 petition which was alleged to contain false statements.<sup>163</sup> The court rejected Johnson’s argument that his petition did not rise to the level of a “proceeding” before the court, concluding that if it followed Johnson’s reasoning it would be contrary to the plain meaning of § 1623 and would also render much of the statute meaningless.<sup>164</sup>

The *Johnson* court found *Dunn* inapplicable because filing a habeas corpus petition was not an “ancillary proceeding.”<sup>165</sup> Instead, Johnson’s petition directly triggered the formalities of the judicial process, and therefore § 1623 applied.<sup>166</sup> *Dunn* was concerned with “the scope of the term ancillary proceeding in § 1623,”<sup>167</sup> where perjury convictions could be obtained for “any statements made under oath for submission to a court, whether given in an attorney’s office or in a local bar and grill,

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<sup>158</sup> No. 02 CR 414, 2002 WL 31050156 (N.D. Ill. Sept. 13, 2002).

<sup>159</sup> *Id.* at \*8.

<sup>160</sup> *Id.*

<sup>161</sup> *United States v. Johnson*, 325 F.3d 205 (4th Cir. 2003).

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* at 206-207. Defendant lied about the date he filed a habeas corpus petition to get around the Antiterrorism and Effective Death Penalty Act’s time bar. Defendant alleged his petition was dated March, 1997, but the finder of fact found it was dated March 2000. *Id.*

<sup>164</sup> *Id.* at 209.

<sup>165</sup> *Id.* at 210.

<sup>166</sup> *Id.* at 209.

<sup>167</sup> *Johnson*, 325 F.3d at 210 (citing *Dunn*, 442 U.S. at 102).

fell within the ambit of § 1623.<sup>168</sup> Johnson's case did not implicate the "ancillary proceeding" part of § 1623 because his false material statements were made directly to the court.<sup>169</sup> Thus, in the Fourth Circuit, a habeas corpus petition satisfies the formality requirements underscored in *Dunn*.<sup>170</sup>

*Johnson* offers, by some length, the more persuasive analysis. If the *Savoy/Lamplugh/Benevolence* interpretation of *Dunn* is correct, then false declarations can never be the basis of a § 1623 prosecution, in spite of express statutory language saying they can. In addition, *Dunn* did not involve a § 1746 statement, so courts should hesitate to read it as banning, *sub silentio*, without briefing or argument, a body of prosecutions contemplated by the statute's plain terms. All that being said, the Court's language in *Dunn* is strong enough that three reasonable courts interpreted it as imposing a limitation. Given the judicial division, a legislative fix would be appropriate.

#### B. "Under Oath"

Notwithstanding the existence of § 1621, covering false statements in all declarations under § 1746, § 1623 liability remains important because of the special procedural provisions of the latter statute. Perjury convictions are difficult to obtain.<sup>171</sup> Under § 1621, the prosecutor must prove both falsity and criminal intent.<sup>172</sup> In § 1623, Congress eased the burden of proving falsity in cases where two sworn statements were flatly inconsistent.<sup>173</sup> Section 1623(c) merely required that the government prove that one statement is inconsistent with another statement; it need not prove which is false.<sup>174</sup> However, by its terms, § 1623(c) applies only to statements made "under oath." Unlike some other provisions of the perjury laws, § 1623(c) does not mention § 1746.

Using a plain language analysis, the Ninth Circuit, in *United States v. Jaramillo*,<sup>175</sup> held that perjury under § 1623(c) could not be established unless the relevant statements were made "under oath."<sup>176</sup> In *Jaramillo*, two inconsistent statements were shown.<sup>177</sup> The first was made out of court, signed by Jaramillo under penalty of perjury.<sup>178</sup> Although the statement was notarized, there was no

<sup>168</sup> *Id.* (citing *Dunn*, 442 U.S. at 107).

<sup>169</sup> *Id.*

<sup>170</sup> *Id.* Cf. *United States v. Gomez-Vigil*, 929 F.2d 254, 257 (6th Cir. 1991) (affirming conviction under § 1621 based on § 1746 declaration without addressing *Dunn* question).

<sup>171</sup> See generally *Harrison*, *supra* note 20.

<sup>172</sup> 18 U.S.C. § 1621 (2000); cf. *United States v. Porter*, 994 F.2d 470, 473 n.5 (8th Cir. 1993). Section 1621, unlike § 1623, requires proof by two witnesses. *Harrison*, *supra* note 20, at 408-09.

<sup>173</sup> 18 U.S.C. § 1623 (2000); S. REP. NO. 91-617, at 59 (1969).

<sup>174</sup> *Id.*

<sup>175</sup> 69 F.3d 388 (9th Cir. 1995).

<sup>176</sup> *Id.*

<sup>177</sup> *Id.*

<sup>178</sup> *Id.* at 389.

evidence that the statement was made under oath.<sup>179</sup> The statement was made to assist the Drug Enforcement Administration's investigation of a drug trafficker, and Jaramillo knew it was going to be presented to a grand jury.<sup>180</sup> Jaramillo's subsequent trial testimony contradicted his out-of-court statement.<sup>181</sup> The court concluded that § 1623(c) applied only if the two declarations were made "under oath."<sup>182</sup> Since Jaramillo's first statement was not, he could not be convicted of perjury using § 1623(c).<sup>183</sup>

In *United States v. Moriel*,<sup>184</sup> the U.S. District Court for the Southern District of Iowa disagreed, finding that a statement by a defendant did not have to be made under oath to sustain a conviction for perjury under § 1623(c).<sup>185</sup> Moriel was convicted of perjury based on statements made in a bankruptcy petition where she failed to list all of the businesses she owned.<sup>186</sup> The petition was inconsistent with her subsequent grand jury testimony, where she testified she owned businesses not listed on the bankruptcy petition.<sup>187</sup>

The court denied a motion to dismiss a perjury indictment, finding that a bankruptcy petition submitted under penalty of perjury triggered § 1623(c).<sup>188</sup> The petition could be used to prove a perjury conviction because of the formal context under which the document was submitted: the defendant herself had submitted the petition directly to the court with the assistance of her attorney.<sup>189</sup> Moreover, it was reasonable to believe that submission of a perjured affidavit could lead to prosecution for perjury.<sup>190</sup> Although the decision is persuasive as a matter of policy, it did not explain how the language in § 1623(c) "under oath" could be interpreted to mean "under oath or not under oath."<sup>191</sup>

*Jaramillo's* outcome is supported by a powerful plain language argument, but the language is probably an oversight rather than a congressional judgment. Perhaps Congress wanted false statements to be covered by § 1623(a), but, because of their relative informality, not to be subject to the special rule of § 1623(c). Much more likely is that Congress meant § 1623(c) to apply to § 1746 declarations, but did not

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<sup>179</sup> *Id.* at 391.

<sup>180</sup> *Id.* at 389.

<sup>181</sup> *Id.*

<sup>182</sup> *Jaramillo*, 69 F3d at 389.

<sup>183</sup> *Id.* at 392.

<sup>184</sup> 201 F. Supp. 2d 952 (S.D. Iowa 2002).

<sup>185</sup> *Id.* at 955.

<sup>186</sup> *Id.* at 953.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.* at 955-956.

<sup>189</sup> *Id.*

<sup>190</sup> *Moriel*, 201 F.Supp.2d at 956.

<sup>191</sup> *Id.*

write it in. Even in terms of ceremonial formality, there is no real difference between signing under penalty of perjury and having a notary stamp the page.

*C. Legislative Repair*

Section 1623(a) should be amended to make clear that the decision in *Johnson*<sup>192</sup> should be applied elsewhere. This could be done by adding the language: "This section applies to any pleading, motion, petition, affidavit or other document that the signer knows will be filed presented as evidence in court or to a grand jury."

In addition, § 1623(c) should be amended to make it clear that it applies to § 1746 declarations. On its face, § 1623(a) covers false statements in § 1746 declarations,<sup>193</sup> and § 1623(c) is just a method of proving a violation of § 1623(a). Amending § 1623(c) by adding the parenthetical language of § 1623(a) would make it clear that § 1623(c) applies. This is what § 1623(c) would look like:

in any proceedings before any court the defendant under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28 United States Code) has knowingly made two or more declarations which are inconsistent to the degree that one of them is necessarily false, need not specify which declaration is false.

V. CONCLUSION

Congress attempted to limit the need to use notaries and to make unsworn statements the equivalent of statements made under oath. Despite the merit of the idea, § 1746 has not worked as anticipated. The changes proposed in this article would save consumers money while making it easier to prosecute people who lie to the court.

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<sup>192</sup> *Johnson*, 325 F.3d 205.

<sup>193</sup> See 18 U.S.C. § 1623(a) (2000) (mentioning § 1746 and talking about books and papers).

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 15, 2016  
RE: Rule 36, N.D.R.Civ.P., Requests for Admission

At the January meeting, the committee approved amendments to Rule 34 on production of documents and things. Among these amendments was a new subdivision requiring the person responding to the request to sign the response. Mr. Beehler requested that the committee consider a similar amendment to Rule 36 on requests for admission.

Attached are proposed amendments to Rule 36, adding a new subdivision (c) that would require the person responding to the request to sign the response and an attorney making objections to sign the objections.

RULE 36. REQUESTS FOR ADMISSION

1 (a) Scope and Procedure.

2 (1) Scope. A party may serve on any other party a written request to admit,  
3 for purposes of the pending action only, the truth of any matters within the scope  
4 of Rule 26(b) relating to:

5 (A) facts, the application of law to fact, or opinions about either; and

6 (B) the genuineness of any described documents.

7 (2) Form; Copy of a Document; Timing. Each matter must be separately  
8 stated. A request to admit the genuineness of a document must be accompanied by  
9 a copy of the document unless it is, or has been, otherwise made available for  
10 inspection and copying. A party may serve the request on the plaintiff after  
11 commencement of the action and on any other party after service of the summons  
12 and complaint on it.

13 (3) Time to Respond; Effect of Not Responding. A matter is admitted  
14 unless, within 30 days after being served, the party to whom the request is directed  
15 serves on the requesting party a written answer or objection addressed to the matter  
16 and signed by the party or its attorney. A defendant is not required to serve its  
17 answer or any objections until 45 days after service of the summons and complaint  
18 on it. A shorter or longer time for responding may be stipulated to under Rule 29  
19 or be ordered by the court.

20 (4) Answer. If a matter is not admitted, the answer must specifically deny it  
21 or state in detail why the answering party cannot truthfully admit or deny it. A  
22 denial must fairly respond to the substance of the matter; and when good faith  
23 requires that a party qualify an answer or deny only a part of a matter, the answer  
24 must specify the part admitted and qualify or deny the rest. The answering party  
25 may assert lack of information or knowledge as a reason for failing to admit or  
26 deny only if a party states that it has made reasonable inquiry and that the  
27 information it knows or can readily obtain is insufficient to enable it to admit or  
28 deny.

29 (5) Objections. The grounds for objecting to a request must be stated.

30 (6) Matter Presenting a Trial Issue. A party must not object to a request  
31 solely on the ground that it presents a genuine issue for trial. The party may deny  
32 the matter or state why it cannot admit or deny.

33 (7) Motion Regarding the Sufficiency of an Answer or Objection. The  
34 requesting party may move to determine the sufficiency of an answer or objection.  
35 Unless the court finds an objection justified, it must order that an answer be  
36 served, On finding that an answer does not comply with this rule, the court may  
37 order either that the matter is admitted or that an amended answer be served. The  
38 court may defer its final decision until a pretrial conference or a specified time  
39 before trial. Rule 37(a)(4) applies to an award of expenses.

40 (b) Effect of an Admission; Withdrawing or Amending It. A matter

41 admitted under this rule is conclusively established unless the court, on motion,  
42 permits the admission to be withdrawn or amended. Subject to Rule 16, the court  
43 may permit withdrawal or amendment if it would promote the presentation of the  
44 merits of the action and if the court is not persuaded that it would prejudice the  
45 requesting party in maintaining or defending the action on the merits. An  
46 admission under this rule is not an admission for any other purpose and cannot be  
47 used against the party in any other proceeding.

48 (c) Signature. The person who responds to the request must sign the  
49 response, and the attorney who objects must sign any objections.

50 EXPLANATORY NOTE

51 Rule 36 was amended, effective March 1, 1990; March 1, 1997; March 1,  
52 2011;\_\_\_\_\_.

53 Rule 36 was amended, effective March 1, 2011, in response to the  
54 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language  
55 and organization of the rule were changed to make the rule more easily understood  
56 and to make style and terminology consistent throughout the rules.

57 Subdivision (c) was added, effective \_\_\_\_\_, to require the person  
58 who responds to a request for admission to sign the response document and for an  
59 attorney who makes objections to sign the objections.

60 SOURCES: Joint Procedure Committee Minutes of  
61 \_\_\_\_\_; January 29-30, 2009, page 31; September 28-29, 1995,

62 page 15; April 20, 1989, page 2; December 3, 1987, page 11; November 29-30,  
63 1979, page 7; Fed.R.Civ.P. 36.

64 CROSS REFERENCE: N.D.R.Civ.P. 16 (Pre-Trial Procedure Formulating  
65 Issues), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P.  
66 29 (Stipulations Regarding Discovery Procedure), and N.D.R.Civ.P. 37 (Failure to  
67 Make Discovery Sanctions).

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 15, 2016  
RE: Rule 3, N.D.R.Crim.P., The Complaint

Attorney Tom Dickson has requested that the committee consider amendments to Rule 3 that would stop the filing of criminal complaints by private citizens. He said private citizens should not be able to file criminal charges on their own and that they can file a civil case if they have a claim against someone. His email is attached.

Attached are proposed amendments to Rule 3 that would allow only licensed peace officers and prosecutors to file complaints. The new proposed amendments are highlighted. The other amendments shown in the draft were approved at the September 2015 meeting and are part of the Annual Rules Package. They relate to swearing requirements for complaints by licensed peace officers.

Most of the criminal statutes related to complaints were superseded when Rule 3 took effect. The remaining statutes are silent on whether citizens may file complaints. Prior to Rule 3, N.D.C.C. 29-05-02, copy attached, required anyone "who has reason to believe that a crime or public offense has been committed" to make a complaint against the offender. This does not seem to have been a controversial statute: staff has been unable to find any North Dakota case law on it or its predecessor statutes, which date back to the Revised Code of 1895.

RULE 3. THE COMPLAINT

1           (a) General. The complaint is a written statement of the essential facts  
2           constituting the elements of the offense charged. The complaint must be sworn to  
3           and subscribed before an officer authorized by law to administer oaths within this  
4           state, or if made by a licensed peace officer, must contain a written declaration that  
5           it is made and subscribed under penalty of perjury, and be presented to a  
6           magistrate. Only licensed peace officers and prosecuting attorneys may present  
7           complaints. The complaint may be presented as provided in Rule 4.1.

8           (b) Magistrate Review. The magistrate may examine on oath the  
9           complainant and other witnesses and receive any affidavit filed with the complaint.  
10          If the magistrate examines the complainant or other witnesses on oath, the  
11          magistrate shall cause their statements to be reduced to writing and subscribed by  
12          the persons making them or to be recorded.

13          (c) Amendment. The magistrate may permit a complaint to be amended at  
14          any time before a finding or verdict if no additional or different offense is charged  
15          and if substantial rights of the defendant are not prejudiced. If the prosecuting  
16          attorney chooses not to pursue a charge contained in the initial complaint, a  
17          dismissal of that charge must be stated on the amended complaint.

18                   EXPLANATORY NOTE

19                  Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1,

20 2006; March 1, 2007; August 1, 2011; March 1, 2013; March 1,  
21 2016; \_\_\_\_\_.

22 Subdivision (a) was amended, effective January 1, 1995, to allow a  
23 complaint to be subscribed and sworn to outside the presence of a magistrate. An  
24 effect of this amendment is to allow facsimile transmission of the complaint. For a  
25 listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The  
26 amendment does not preclude a magistrate from examining a complainant or other  
27 witnesses under oath when making the probable cause determination.

28 Subdivision (a) was amended, effective March 1, 1996, to clarify that the  
29 complaint is the initial document for charging a person with a misdemeanor or  
30 felony.

31 Subdivision (a) was amended, effective March 1, 2007, to specify that the  
32 complaint must contain a statement of the facts that establish the elements of the  
33 offense charged.

34 Subdivision (a) was amended, effective August 1, 2011, to eliminate  
35 language about the complaint being the initial charging document for all criminal  
36 offenses. N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A  
37 prosecution is commenced when a uniform complaint and summons, a complaint,  
38 or an information is filed or when a grand jury indictment is returned.”

39 Subdivision (a) was amended, effective March 1, 2013, to allow the  
40 complaint to be presented to the magistrate by telephone or other reliable

41 electronic means under Rule 4.1.

42 Subdivision (a) was amended, \_\_\_\_\_, to allow a  
43 licensed peace officer to make a complaint under a written declaration that it is  
44 made and subscribed under penalty of perjury.

45 Subdivision (a) was amended, \_\_\_\_\_, to clarify that  
46 only licensed peace officers and prosecuting attorneys may present complaints:

47 Subdivision (c) is similar to Rule 7(e).

48 Subdivision (c) was amended, effective March 1, 2016, to require a written  
49 dismissal to be filed with the amended complaint if the prosecuting attorney  
50 chooses not to pursue charges raised in the initial complaint.

51 Rule 3 was amended, effective March 1, 2006, in response to the December  
52 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and  
53 organization of the rule were changed to make the rule more easily understood and  
54 to make style and terminology consistent throughout the rules.

55 SOURCES: Joint Procedure Committee Minutes of \_\_\_\_\_;  
56 September 24-25, 2015, pages 14-15; January 26-27, 2012, page 25; April 28-29,  
57 2011, pages 17-18; April 24-25, 2003, pages 25-26; January 26-27, 1995, pages 3-  
58 5; April 28-29, 1994, pages 20-22; January 27-29, 1972, pages 4-7 September 27-  
59 28, 1968, pages 1-2; November 17-18, 1967, page 2.

60 STATUTES AFFECTED:

61 SUPERSEDED: N.D.C.C. §§ 29-01-13(1), 29-05-01 to the extent that it

62 requires a complaint to be sworn, 29-05-02 to the extent that it requires a  
63 complaint to be subscribed and sworn to before a magistrate, 29-05-03, 33-12-03,  
64 33-12-04, 33-12-05, 33-12-16, 33-12-25.

65 CONSIDERED: N.D.C.C. §§ 29-04-05, 12-01-04(12), 29-01-14, 29-02-06,  
66 29-02-07, 29-04-05, 29-05-01, 29-05-05.

67 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or  
68 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 7  
69 (The Indictment and the Information).

## Hagburg, Mike

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**To:** Hagburg, Mike  
**Subject:** ND Crimp 3

**From:** Tom Dickson [<mailto:tdickson@dicksonlaw.com>]

**Sent:** Tuesday, March 15, 2016 4:51 PM

**To:** Hagburg, Mike

**Subject:** RE: NDCrimP 41

Mike:

I think the Committee should also look at NDCrimP 3. I don't think private citizens should be able to sign criminal complaints and initiate criminal charges. They can file a civil claim if they want. This also might require some old statutes to be re-examined.

The criminal justice system is the province of the State.

Tom

Tom Dickson  
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Bismarck, ND 58502  
(701) 222-4400  
[tdickson@dicksonlaw.com](mailto:tdickson@dicksonlaw.com)

29-05-02. Who must make complaint.—Every person who has reason to believe that a crime or public offense has been committed by another person must make complaint against such person before some magistrate having authority to make inquiry of the same.

Source: R. C. 1895, § 7887; R. C. 1899, § 7887; R. C. 1905, § 9695; C. L. 1913, § 10531; R. C. 1943, § 29-0502.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: September 18, 2016

RE: Rule 5, N.D.R.Crim.P., Initial Appearance Before the Magistrate

Attorney Jackson Lofgren, writing on behalf of the North Dakota Association of Criminal Defense Lawyers, has requested the committee to consider an amendment to Rule 5 that would require defendants to be advised at the initial appearance that a conviction for a misdemeanor crime of domestic violence could result in a lifetime firearms ban. A copy of Mr. Lofgren's letter is attached.

Mr. Lofgren states that defendants who plead guilty to misdemeanors are often surprised to learn that they are forbidden from possessing firearms. The committee has previously discussed how it is common for defendants to plead guilty at the initial appearance because they want to get out of jail and go back to work. Requiring advice of firearms consequences may be useful in such a situation. The committee, however, has also discussed how courts are being required to provide a growing number of warnings and that adding more could be counterproductive.

Proposed amendments to Rule 5 are attached. Under the proposal, a firearms advisory would be added to the list of advice that must be given in a misdemeanor case – misdemeanor convictions seemed to be the main concern expressed by Mr. Lofgren. If the committee thinks that requiring advice at the initial appearance about firearms consequences would be useful, it may wish to discuss whether to require a firearms advisory in both misdemeanor and felony cases.

The committee previously approved amendments to Rule 5 on changing the term “preliminary examination” to “preliminary hearing.” These amendments are before the Court and they are included in the provided draft. The new proposed amendments on the firearms advisory are highlighted.

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

1 (a) General.

2 (1) Appearance Upon an Arrest. An officer or other person making an arrest  
3 must take the arrested person without unnecessary delay before the nearest  
4 available magistrate.

5 (2) Arrest Without a Warrant. If an arrest is made without a warrant, the  
6 magistrate must promptly determine whether probable cause exists under Rule  
7 4(a). If probable cause exists to believe that the arrested person has committed a  
8 criminal offense, a complaint or information must be filed in the county where the  
9 offense was allegedly committed. A copy of the complaint or information must be  
10 given within a reasonable time to the arrested person and to any magistrate before  
11 whom the arrested person is brought, if other than the magistrate with whom the  
12 complaint or information is filed.

13 (b) Statement by the Magistrate at the Initial Appearance.

14 (1) In All Cases. The magistrate must inform the defendant of the  
15 following:

16 (A) the charge against the defendant and any accompanying affidavit;

17 (B) the defendant's right to remain silent; that any statement made by the  
18 defendant may later be used against the defendant;

19 (C) the defendant's right to the assistance of counsel before making any

20 statement or answering any questions;

21 (D) the defendant's right to be represented by counsel at each and every  
22 stage of the proceedings;

23 (E) if the offense charged is one for which counsel is required, the  
24 defendant's right to have legal services provided at public expense to the extent  
25 that the defendant is unable to pay for the defendant's own defense without undue  
26 hardship; and

27 (F) the defendant's right to be admitted to bail under Rule 46.

28 (2) Felonies. If the defendant is charged with a felony, the magistrate must  
29 inform the defendant also of:

30 (A) the defendant's right to a preliminary examination hearing;

31 (B) the defendant's right to the assistance of counsel at the preliminary  
32 examination hearing;

33 (C) that a defendant who is not a United States citizen may request that an  
34 attorney for the state or a law enforcement officer notify a consular officer from  
35 the defendant's country of nationality that the defendant has been arrested.

36 (3) Misdemeanors. If the defendant is charged with a misdemeanor, the  
37 magistrate must inform the defendant also of the defendant's right to trial by jury in  
38 all cases as provided by law, and of the defendant's right to appear and defend in  
39 person or by counsel and that if the defendant is convicted of a misdemeanor crime  
40 involving domestic violence, the defendant may be prohibited from using or

41 possessing firearms.

42 (c) Right to Preliminary Examination Hearing.

43 (1) Waiver.

44 (A) If the offense charged is a felony, the defendant has the right to a  
45 preliminary examination hearing. The defendant may waive the right to  
46 preliminary examination hearing at the initial appearance if assisted by counsel.

47 (B) If the defendant is assisted by counsel and waives preliminary  
48 examination hearing and the magistrate is a judge of the district court, the  
49 defendant may be permitted to plead to the offense charged in the complaint or  
50 information at the initial appearance.

51 (C) If the defendant waives preliminary examination hearing and does not  
52 plead at the initial appearance, an arraignment must be scheduled.

53 (D) The magistrate must admit the defendant to bail under the provisions of  
54 Rule 46.

55 (2) Non-waiver. If the defendant does not waive preliminary examination  
56 hearing, the defendant may not be called upon to plead to a felony offense at the  
57 initial appearance. A magistrate of the county in which the offense was allegedly  
58 committed must conduct the preliminary examination hearing. The magistrate must  
59 admit the defendant to bail under the provisions of Rule 46.

60 (d) Reliable Electronic Means. Contemporaneous audio or audiovisual  
61 transmission by reliable electronic means may be used to conduct an appearance

62 under this rule as permitted by N.D. Sup. Ct. Admin. R 52.

63 (e) Uniform Complaint and Summons.

64 (1) In General. Notwithstanding Rule 5(a), a uniform complaint and  
65 summons may be used in lieu of a complaint and appearance before a magistrate,  
66 whether an arrest is made or not, for an offense that occurs in an officer's presence  
67 or for a motor vehicle or game and fish offense. An individual held in custody  
68 must be brought before a magistrate for an initial appearance without unnecessary  
69 delay.

70 (2) Duty of Prosecuting Attorney. When a uniform complaint and summons  
71 is issued for a felony offense, the prosecuting attorney must also subsequently file  
72 a complaint or information that complies with Rule 5(a). If the prosecuting  
73 attorney after review declines to prosecute a charge that has been filed with the  
74 court on a uniform complaint and summons, a dismissal of the charge must be  
75 stated on the complaint or information or filed separately with the court.

76 EXPLANATORY NOTE

77 Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1,  
78 2006; June 1, 2006; March 1, 2010; August 1, 2011; March 1,  
79 2016;\_\_\_\_\_.

80 Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the  
81 defendant of the charge against the defendant and to inform the defendant of the  
82 defendant's rights. This procedure differs from arraignment under Rule 10 in that

83 the defendant is not called upon to plead.

84 Subdivision (a) provides that an arrested person must be taken before the  
85 magistrate "without unnecessary delay." Unnecessary delay in bringing a person  
86 before a magistrate is one factor in the totality of circumstances to be considered in  
87 determining whether incriminating evidence obtained from the accused was given  
88 voluntarily.

89 Subdivision (a) was amended, effective January 1, 1995, to clarify that a  
90 "prompt" judicial determination of probable cause is required in warrantless arrest  
91 cases.

92 Subdivision (b) is designed to carry into effect the holding of *Miranda v.*  
93 *Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966).  
94 Because the *Miranda* rule is constitutionally based, it applies to all officers  
95 whether state or federal. One should note that the protections required by *Miranda*  
96 apply as soon as a person "has been taken into custody or otherwise deprived of his  
97 freedom of action in any significant way," while the requirement that an accused  
98 be taken before a magistrate is applicable only to an "arrested person." The  
99 *Miranda* decision is based upon the Fifth Amendment privilege against  
100 self-incrimination, and holds that no statement obtained by interrogation of a  
101 person in custody is admissible, unless, before the interrogation begins, the  
102 accused has been effectively warned of the accused's rights, including the right not  
103 to answer questions and the right to have counsel present.

104 Subdivision (b) specifies the action which must be taken by the magistrate.  
105 Subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C) are stated by Miranda to be  
106 absolute prerequisites to interrogation and cannot be dispensed with on even the  
107 strongest showing that the person in custody was aware of those rights.

108 Paragraph (b)(1) was amended, effective June 1, 2006, to remove a  
109 reference to court appointment of counsel for indigents. Courts ceased appointing  
110 counsel for indigents on January 1, 2006, when the North Dakota Commission on  
111 Legal Counsel for Indigents became responsible for defense of indigents.

112 Paragraph (b)(2) provides an additional requirement to the instructions  
113 given by the magistrate in paragraph (b)(1) when the charge is a felony. It requires  
114 the magistrate to inform the defendant of the right to a preliminary examination  
115 hearing. The Sixth Amendment right to counsel applies to a preliminary  
116 examination hearing granted under state law because the preliminary examination  
117 hearing is a critical stage of the state's criminal process.

118 Paragraph (b)(2) was amended, effective March 1, 2016, to require the  
119 defendant in a felony case to be informed at the initial appearance of the right of a  
120 defendant who is not a U.S. citizen to request that a consular officer be informed  
121 of the defendant's arrest. This amendment was based on the December 1, 2014  
122 amendment to Fed.R.Crim.P. 5.

123 Paragraph (b)(3) was amended, effective March 1, 2016, to require  
124 misdemeanor defendants to be advised that conviction of a misdemeanor crime

125 involving domestic violence may result in the defendant being prohibited from  
126 using or possessing firearms.

127 Subdivisions (b) and (c) were amended, effective March 1, 1990. The  
128 amendments track the 1987 amendments to Fed.R.Crim.P. 5, which are technical  
129 in nature, and no substantive change is intended.

130 Subdivision (c) was amended, effective January 1, 1995, in response to  
131 elimination of county courts and to ensure that a defendant is not called upon to  
132 waive the preliminary examination hearing or to plead without the assistance of  
133 counsel at the initial appearance.

134 Subdivision (d) was amended, effective March, 1, 2004, to permit the use of  
135 interactive television to conduct initial proceedings. Subdivision (d) was amended,  
136 effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs  
137 proceedings conducted by interactive television. Subdivision (d) was further  
138 amended, March 1, 2016, to allow the use of contemporaneous audio or  
139 audiovisual transmission by reliable electronic means to conduct initial  
140 proceedings.

141 Subdivision (e) was added, effective March 1, 2010, to provide a procedure  
142 for using the uniform complaint and summons. Statutory provisions governing the  
143 uniform complaint and summons, which is commonly referred to as the "uniform  
144 citation," are in N.D.C.C. §§ 20.1-02-14.1 and 29-05-31.

145 Subdivision (e) was amended, effective March 1, 2016, to require the

146 prosecuting attorney to file a written dismissal if the prosecuting attorney decides  
147 not to pursue a charge filed with the court on a uniform complaint and summons.

148 Rule 5 was amended, effective March 1, 2006, in response to the December  
149 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and  
150 organization of the rule were changed to make the rule more easily understood and  
151 to make style and terminology consistent throughout the rules.

152 Rule 5 was amended, effective August 1, 2011, to include new language  
153 indicating that either “the complaint or information” can be used as a charging  
154 document. N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A  
155 prosecution is commenced when a uniform complaint and summons, a complaint,  
156 or an information is filed or when a grand jury indictment is returned.”

157 Rule 5 was amended, effective \_\_\_\_\_, to replace the term  
158 “preliminary examination” with “preliminary hearing” throughout the rule.

159 SOURCES: Joint Procedure Committee Minutes of \_\_\_\_\_; May  
160 12-13, 2016, page 29; September 24-25, 2015, page 15; April 23-24, 2015, pages  
161 14-15; April 28-29, 2011, pages 17-18; May 21-22, 2009, pages 2-10; April 27-28,  
162 2006, pages 2-5, 15-17; January 29-30, 2004, pages 22-23; September 26-27,  
163 2002, pages 12-13; January 27-28, 1994, pages 3-5; September 23-24, 1993, pages  
164 4-7; April 20, 1989, page 4; December 3, 1987, page 15; February 22-23, 1973,  
165 page 18; March 23-24, 1972, pages 2-3, 11-12; January 27, 1972, pages 17-22;  
166 November 21-22, 1969, pages 2, 8-9, 17-19; May 3-4, 1968, pages 1-2; January

167 26-27, 1968, pages 7-9.

168 STATUTES AFFECTED:

169 SUPERSEDED: N.D.C.C. §§ 29-05-04, 9-05-11, 29-05-17, 29-05-19,  
170 29-07-01, 29-07-02, 29-07-04, 29-07-05, 29-07-07, 29-07-08, 29-07-09, 29-07-10,  
171 33-12-07, 33-12-09.

172 CONSIDERED: N.D.C.C. §§ 20.1-02-14.1, 29-04-05, 29-05-31, 29-07-03,  
173 29-07-06, 40-18-15, 40-18-16, 40-18-18.

174 CROSS REFERENCES: N.D.R.Crim.P. 5.1 (Preliminary examination  
175 Hearing); N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 35 (Correcting or  
176 Reducing a Sentence); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P.  
177 44 (Right to and Assignment of Counsel); N.D.Sup.Ct.Admin.R. 52  
178 (Contemporaneous Transmission by Reliable Electronic Means).



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**Jackson J. Lofgren**

August 25, 2016

Michael J. Hagburg  
Joint Procedure Committee  
Supreme Court Judicial Wing First Fl.  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0530

*Re: Requested Amendments to the Rules of Criminal Procedure*

Dear Mr. Hagburg,

I am writing on behalf of the North Dakota Association of Criminal Defense Lawyers. Recently, our legislative committee met and discussed several issues we feel are appropriate for consideration by the Joint Procedure Committee. First, we would like the Joint Procedure Committee to consider amending Rule 5 of the North Dakota Rules of Criminal Procedure to include an advisement regarding the right to possess firearms after a conviction for a misdemeanor crime of domestic violence.

Under 18 U.S.C. 922 any person convicted of a misdemeanor crime involving domestic violence is subject to a lifetime firearm prohibition. Because of N.D.C.C. Ch. 14-07.1 defendants charged with crimes involving domestic violence usually make their first appearance before the municipal or district court in custody without legal representation. Currently, there is nothing in Rule 5 requiring a defendant be advised a conviction for a misdemeanor crime of domestic violence can result in a lifetime firearm ban.

Defense attorneys are often contacted after the conviction by upset defendants learning for the first time that they can never hunt or possess firearms again. In a state like North Dakota where the right to bear arms is a part of every day life for many this can be a devastating loss. We would request the Joint Procedure Committee considering amending Rule 5 to include an advisement that a conviction for a misdemeanor crime of domestic violence can result in a prohibition of the ability to use or possess firearms.

Another suggested change relates to pretrial diversion agreements under Rule 32.2 of the North Dakota Rules of Criminal Procedure. With a pretrial diversion agreement the defendant and prosecutor enter into an agreement, subject to court approval, for the resolution of a criminal case without a plea or conviction. Currently, under Rule 32.2(f) upon the successful completion of a pretrial diversion agreement the complaint,

indictment, or information is dismissed but the file is not sealed. We would like the Joint Procedure Committee to consider amending Rule 32.2 to allow for sealing the file upon the successful completion of a pretrial diversion agreement.

Please feel free to contact me with any questions or concerns.

Sincerely,



Jackson J. Lofgren  
President of the NDACDL

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 16, 2016  
RE: Rule 17, N.D.R.Crim.P., Subpoena

Committee member Bob Hoy has located language in Rule 17 that seems to require a court order before a subpoena can be issued to compel attendance at a deposition in a criminal case. He requests that the committee consider amendments allowing an attorney to issue deposition subpoenas. His email is attached

Proposed amendments to Rule 17 that would allow an attorney for a party to the proceeding to issue a deposition subpoena are attached.

Paragraph (a)(2) of Rule 17 already allows attorneys to issue subpoenas under the rule. This is different from the federal rule, copy attached, which does not contain this language. Paragraph (a)(2) has been part of the rule since 1983.

The proposed amendment would make the part of the rule on deposition subpoenas consistent with the rest of the rule and would also eliminate any reference to a court order for a deposition. N.D.R.Crim.P. 15, copy attached, is not wholly based on the federal rule and does not require court orders for all depositions.

The committee may wish to discuss whether it is necessary to retain paragraph (f)(2) given that Rule 15(a)(4) allows objections to subpoenas and Rule 15(b) has a procedure for witnesses who do not respond to subpoenas.

RULE 17. SUBPOENA

1 (a) Content.

2 (1) A subpoena must state the court's name and the title of the action, and  
3 command the witness to attend and testify at the time and place the subpoena  
4 specifies. The clerk or magistrate shall issue a signed blank subpoena, or a signed  
5 blank subpoena for the production of documentary evidence or objects, to the party  
6 requesting it, and that party must fill in the blanks before the subpoena is served.

7 (2) The attorney for a party to any proceeding may issue a subpoena, or a  
8 subpoena for the production of documentary evidence or objects, in the court's  
9 name. A subpoena issued by an attorney has the same effect as a subpoena issued  
10 under Rule 17(a)(1). The subpoena must state the attorney's name, office address,  
11 and the party for whom the attorney appears.

12 (b) [Deleted].

13 (c) Producing Documents and Objects.

14 (1) In General. A subpoena may order the witness to produce any books,  
15 papers, documents, data, or other objects the subpoena designates. The court may  
16 direct the witness to produce the designated items in court before trial or before  
17 they are to be offered in evidence. When the items arrive, the court may permit the  
18 parties and their attorneys to inspect all or part of them.

19 (2) Quashing or Modifying the Subpoena. On motion made promptly, the

20 court may quash or modify the subpoena if compliance would be unreasonable or  
21 oppressive.

22 (d) Service. A peace officer or any nonparty who is at least 18 years old  
23 may serve a subpoena. The server must deliver a copy of the subpoena to the  
24 witness and must tender to the witness one day's witness attendance fee and the  
25 legal mileage allowance. The server need not tender the attendance fee or mileage  
26 allowance when the prosecution or an indigent defendant has requested the  
27 subpoena.

28 (e) Place of service.

29 (1) In North Dakota. A subpoena requiring a witness to attend a hearing or  
30 trial may be served anywhere within North Dakota.

31 (2) Witness Outside State. Service on a witness outside this state may be  
32 made only as provided by law.

33 (3) Subpoena in Out-of-State Action. N.D.R.Ct. 5.1 defines the procedure  
34 for discovery or depositions in an out-of-state action.

35 (f) Issuing a Deposition Subpoena.

36 (1) Issuance. An order to take a deposition authorizes the clerk of court or, a  
37 magistrate or an attorney for a party to the proceeding to issue a subpoena for any  
38 witness named or described in the order.

39 (2) Place. After considering the convenience of the witness and the parties,  
40 the court may order—and the subpoena may require—the witness to appear

41 anywhere the court designates.

42 (g) Contempt. Failure by any witness without adequate excuse to obey a  
43 subpoena served upon that witness may be a contempt of the court from which the  
44 subpoena issued.

45 (h) Information Not Subject to Subpoena. No party may subpoena a  
46 statement of a witness or of a prospective witness under this rule. Rule 16 governs  
47 the production of a statement.

48 EXPLANATORY NOTE

49 Rule 17 was amended September 1, 1983; March 1, 1990; March 1, 2006;  
50 June 1, 2006; March 1, 2008; March 1, 2013;\_\_\_\_\_.

51 Rule 17 follows Fed.R.Crim.P. 17 in substance and controls with respect to  
52 all subpoenas in criminal cases issued by the courts of this state.

53 Rule 17 is not limited to subpoena for the trial. A subpoena may be issued  
54 for a preliminary hearing, in aid of a grand jury investigation, for a deposition, or  
55 for a determination of an issue of fact raised by a pretrial motion. Rule 17 is also  
56 intended to obtain witnesses and documents for use as evidence, although it is not  
57 a discovery device.

58 Rule 17 was amended, effective March 1, 2006, in response to the  
59 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The  
60 language and organization of the rule were changed to make the rule more easily  
61 understood and to make style and terminology consistent throughout the rules.

62 Paragraph (a)(1) follows Fed.R.Crim.P. 17(a) except that subpoenas may be issued  
63 by the magistrate as well as the clerk of court. The fact that some of the lesser state  
64 courts are without the benefit of a clerk necessitates this requirement.

65 Paragraph (a)(2) was amended, effective September 1, 1983, to provide that  
66 an attorney for a party may issue subpoenas with the same effect as the clerk or  
67 magistrate.

68 Subdivision (b), which provided assistance for indigent defendants seeking  
69 to subpoena persons, was deleted, effective June 1, 2006. As of January 1, 2006,  
70 the North Dakota Commission on Legal Counsel for Indigents became responsible  
71 for providing defense services, including subpoenas, to indigent defendants.

72 Subdivision (c) follows Fed.R.Crim.P. 17(c) and authorizes issuance of a  
73 subpoena duces tecum. Rule 17 generally is available to any "party" and this is no  
74 less true of subdivision (c). Thus the prosecution as well as the defendant may use  
75 subdivision (c), subject to the limitations imposed by the Fourth and Fifth  
76 Amendments.

77 Subdivision (d) was amended, effective March 1, 2006, to simplify service  
78 instructions for a subpoena and to eliminate outmoded methods of service.

79 Subdivision (d) was amended, effective March 1, 2008, to eliminate an obsolete  
80 cross-reference.

81 A subpoena will ordinarily be served by a peace officer although  
82 subdivision (d) permits service by any person who is not a party and who is 18 or

83 more years old. Service of a subpoena under Fed.R.Crim.P. 17 has been held  
84 effective only if the fee for one day's attendance and the mileage allowed by law  
85 are tendered to the witness when the subpoena is delivered. Fees and mileage need  
86 not be tendered if the subpoena is issued in behalf of the state or on behalf of a  
87 defendant unable to pay.

88 Subdivision (e) is an adaptation of the Colorado Rules of Criminal  
89 Procedure. Under N.D.C.C. ch. 31-03 (Means of Compelling Attendance of  
90 Witnesses), North Dakota has adopted a Uniform Act to secure the attendance of  
91 witnesses from another state in criminal proceedings. Under paragraph (e)(2)  
92 service of subpoenas on witnesses out-of-state is governed by N.D.C.C. ch. 31-03.

93 Subdivision (e) was amended, effective March 1, 2013, to direct persons to  
94 N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in  
95 an action pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for  
96 interstate depositions and discovery.

97 Subdivision (f) follows Fed.R.Crim.P. 17(f), with appropriate changes to  
98 satisfy the requirements of North Dakota. Paragraph (f)(1) provides that a court  
99 order for the taking of depositions gives authority to the clerk of court ~~or~~  
100 magistrate or an attorney for a party to the proceeding to issue subpoenas for the  
101 persons named or described therein.

102 Paragraph (f)(2) provides the court with discretion in determining where the  
103 deposition is to be taken.

104 Subdivision (g) follows N.D.R.Civ.P. 45(e). This provision merely restates  
105 existing law.

106 Subdivision (h) was adopted, effective September 1, 1983, to provide that  
107 statements made by witnesses or prospective witnesses are not subject to subpoena  
108 under Rule 17 but are subject to production in accordance with Rule 16. This  
109 correlates to Rule 16's provisions relating to production of statements.

110 SOURCES: Joint Procedure Committee Minutes of  
111 \_\_\_\_\_; January 26-27, 2012, pages 3-7; September 30, 2011,  
112 pages 12-15; April 28-29, 2011, page 25; April 26-27, 2007, pages 22-23; April  
113 27-28, 2006, pages 2-5, 15-17; January 27-28, 2005, pages 13-14; April 20, 1989,  
114 page 4; December 3, 1987, page 15; November 18-19, 1982, pages 10-13; October  
115 15-16, 1981, pages 6-10; October 12-13, 1978, page 8; June 26-27, 1972, pages  
116 14-20; July 25-26, 1968, pages 6-10; Fed.R.Crim.P. 17.

117 STATUTES AFFECTED:

118 SUPERSEDED: N.D.C.C. § § 31-03-04, 31-03-07, 31-03-08, 31-03-09,  
119 31-03-13, 31-06-07, 40-18-09.

120 CONSIDERED: N.D.C.C. § § 29-10.1-19, 31-03-01, 31-03-15, 31-03-16,  
121 31-03-17, 31-03-18, 31-03-25, 31-03-26, 31-03-27, 31-03-28, 31-03-29, 31-03-30,  
122 31-03-31.

123 CROSS REFERENCE: N.D.R.Civ.P. 45 (Subpoena); N.D.R.Ct. 5.1  
124 (Interstate Depositions and Discovery).

## Hagburg, Mike

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**From:** Robert G. Hoy <RHoy@OhnstadLaw.com>  
**Sent:** Friday, March 11, 2016 9:44 AM  
**To:** Hagburg, Mike  
**Subject:** Joint Procedure Committee

Mike;

Some years ago Rule 15, NDRCrImP was changed to allow depositions to be taken without prior court approval. Recently, however, I was looking at Rule 17(f), NDRCrImP regarding subpoenas for depositions. It is stated in terms reminiscent of the former Rule 15 where a Court Order was required to take the deposition. I think Rule 17 should be updated to reflect counsel is authorized to issue the subpoena for attendance at a deposition. Perhaps this could be addressed by the Joint Procedure Committee at some point. Thanks. Bob

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Effective March 1, 2016

## RULE 15. DEPOSITIONS

(a) When Taken. At any time after the defendant has appeared, any party may take testimony of any person by deposition including audio-visual depositions taken as provided in N.D.R.Civ.P. 30.1, except:

(1) the defendant may not be deposed unless the defendant consents and the defendant's lawyer, if the defendant has one, is present or the defendant waives the lawyer's presence;

(2) a discovery deposition may be taken after the time set by the court only with leave of court;

(3) a deposition to perpetuate testimony may be taken only with leave of court, which must be granted upon motion of any party if it appears that the deponent may be able to give material testimony but may be unable to attend a trial or hearing; and

(4) upon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress, or cause undue burden or expense to, the deponent or a party, the court in which the prosecution is pending or a court of the jurisdiction where the deposition is being taken may order that the deposition not be taken or continued or may limit the scope and manner of its taking. Upon demand of the objecting party or deponent, the taking of the deposition may be suspended for the time necessary to make the motion.

Attendance of witnesses and production of documentary evidence and objects may be compelled by subpoena under Rule 17.

(b) Witness Who Would Not Respond To Subpoena. If a party is granted leave to take a deposition to perpetuate testimony, the court, upon motion of the party and a showing of probable cause to believe that the deponent would not respond to a subpoena, by order must direct a law enforcement officer to take the deponent into custody and hold the deponent until the taking of the deposition commences but not to exceed six hours and to keep the deponent in custody during the taking of the deposition. If the motion is by the prosecuting attorney, the court, upon further motion by the prosecuting attorney and a showing of probable cause to believe the defendant would not otherwise attend the taking of the deposition, may make the same order for the defendant.

(c) Notice Of Taking. The party at whose instance the deposition is to be taken shall give all parties reasonable written notice of the name and address of each person to be examined, the time and place for the deposition, and the manner of recording. Upon motion of a party or of the deponent, the court may change the time, place, or manner of record.

(d) How Taken. The deposition must be taken in the manner provided in civil actions, except:

(1) if the deposition is taken at a place over which this state lacks jurisdiction, it may be taken instead in the manner provided by the law of that place;

(2) it must be recorded by the means specified in the notice; and

(3) upon motion of a party and a showing that a party or the deponent is engaging in serious misconduct at the taking of a deposition, the court by order may direct that the deposition's taking be continued in the presence of a designated officer, in which case the designated officer may preside over the remainder of the deposition's taking.

(e) Place Of Taking. The deposition must be taken in a building where the trial may be held, at a place agreed upon by the parties, or at a place designated by special or general order of the court. If the defendant is in custody or subject to terms of release that prohibit leaving the state and does not appear before the court and understandingly and voluntarily waives the right to be present, a deposition to perpetuate testimony must not be taken at a place which requires transporting the defendant within a jurisdiction that does not confer upon law enforcement officers of this state the right to transport prisoners within it.

(f) Presence Of Defendant.

(1) At Discovery Deposition. The defendant may be present at the taking of a discovery deposition, but if the defendant is in custody, the defendant may be present only with leave of court.

(2) At Deposition To Perpetuate Testimony. The defendant must be present at the taking of a deposition to perpetuate testimony, but if the defendant's counsel is present at the taking:

(A) the court may excuse the defendant from being present if the defendant appears before the court and understandingly and voluntarily waives the right to be present;

(B) the taking of the deposition may continue if the defendant, present when it commenced, leaves voluntarily; or

(C) if the deposition's taking is presided over by a judicial officer, the judicial officer may direct that the deposition's taking or part of the deposition's taking be conducted in the defendant's absence if the judicial officer has justifiably excluded the defendant because of the defendant's disruptive conduct.

(3) Unexcused Absence. If the defendant is not present at the commencement of the taking of a deposition to perpetuate testimony and the defendant's absence has not been excused:

(A) its taking may proceed, in which case the deposition may be used only as a discovery deposition;  
or

(B) if the deposition is taken at the instance of the prosecution, the prosecuting attorney may direct that the commencement of its taking be postponed until the defendant's attendance can be obtained, and the court, upon application of the prosecuting attorney, by order may direct a law enforcement officer to take the defendant into custody during the taking of the deposition.

(4) Taking Depositions Outside the United States Without the Defendant's Presence. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(g) Payment Of Expenses. If the deposition is taken at the instance of the prosecution, the court may, and in all cases where the defendant is unable to bear the expense the court must, direct the state to pay the expense of taking the deposition, including the reasonable expenses of travel and subsistence of defense counsel and, if the deposition is to perpetuate testimony or if the court permits for a discovery deposition, of the defendant in attending the deposition.

(h) Substantive Use On Grounds Of Unavailability. So far as otherwise admissible under the rules of evidence, a deposition to perpetuate testimony may be used as substantive evidence at the trial or upon any hearing if the deponent is unavailable as defined in N.D.R.Ev. 804(a). A discovery deposition may then be so used if the court determines that the use is fair in light of the nature and extent of the total examination at the taking thereof, but it may be offered by the prosecution only if the defendant was present at its taking. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it that is relevant to the part offered.

(i) Objections To Admissibility. Objections to receiving in evidence a deposition or part of a deposition may be made as provided in civil actions.

(j) Deposition By Agreement Not Precluded. Nothing in this rule precludes the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties.

#### EXPLANATORY NOTE

Rule 15 was amended, effective January 1, 1980; March 1, 1990; March 1, 2006; March 1, 2016.

Rule 15 is substantially the same as Rule 431, Uniform Rules of Criminal Procedure (1974). Former Rule 15, effective until January 1, 1980, was an adaptation of Fed.R.Crim.P. 15. The present rule provides for a greatly expanded use of depositions in criminal cases. Subdivisions (a), (b), (f) and (h) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 15 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) permits depositions to be taken to perpetuate testimony, as in the former rule, but also for discovery purposes, which was not previously provided for. Rather than requiring court approval of discovery depositions, this subdivision changes the emphasis by allowing them without court approval, subject to the right of a party or deponent to move under paragraph (4) to have a court order that the deposition be continued, not taken, or limited in scope or manner of taking. The court will set a time after which discovery depositions may not be taken without court permission. Leave of court is required for the taking of a deposition to perpetuate testimony.

Subdivision (a) was amended, effective March 1, 1990. The amendment was made to clarify the fact that audio-visual depositions may be taken under the rule. The amendment also provides that the method of taking audio-visual depositions is governed by N.D.R.Civ.P. 30.1.

Subdivision (b) provides a method for securing the attendance of a deponent who would not respond to a subpoena. In addition, to ensure confrontation and the presence of the defendant required by subdivision (f)(2) to use the deposition at trial, the prosecuting attorney may move the court for an order to secure defendant's presence at the taking of a deposition.

Requirements for notice of the taking of a deposition are set forth in subdivision (c). The court may change the noticed time, place, or manner of recording upon motion of the deponent, as well as any party.

Subdivision (d) specifies that a deposition be taken in the same manner as in civil actions, with certain exceptions. Paragraph (1) covers depositions on enclaves over which the State of North Dakota lacks jurisdiction, such as Indian reservations, as well as depositions outside the physical boundaries of the state. Paragraph (2) allows depositions to be recorded by other than stenographic means, without a court order. Provision is made in paragraph (3) for a court to designate an official to preside over a deposition upon a showing of misconduct by a party or the deponent.

The place of taking a deposition is governed by subdivision (e). Restriction is placed on taking depositions outside of this state in situations where the defendant may not travel or be transported to the proposed location, unless the defendant waives the right to be present.

Subdivision (f) concerns the presence of the defendant at a deposition. Distinction is made between a discovery deposition and one to perpetuate testimony. The defendant is not required to be present at a discovery deposition, but the defendant's presence may enable the prosecution to use the deposition as substantive evidence at trial, as provided in subdivision (h). The taking of a deposition to perpetuate testimony necessitates the defendant's presence, with four exceptions: defendant is excused by the court upon an appearance and voluntary waiver of the right to be present; defendant is voluntarily absent after start of deposition; a judicial officer presiding over the deposition justifiably excludes the defendant because of the defendant's disruptive conduct; or the court allows a deposition to be taken outside the United States without the defendant's presence after making case-specific findings. No warning is expressly required before exclusion, as in Rule 43(b)(2). If the defendant is not present at a deposition to perpetuate testimony under one of the above exceptions, the defendant's counsel must be.

Paragraph (3) of subdivision (f) covers the situation when the defendant is not present at the start of a deposition to perpetuate testimony and has not been excused under paragraph (2). The taking may proceed as a discovery deposition or the prosecuting attorney, if the prosecuting attorney is taking the deposition, may postpone the taking and secure a court order to take the defendant into custody to assure the defendant's presence, so that the deposition will have the greater admissibility of a perpetuation deposition.

Paragraph (f)(4) was adopted, effective March 1, 2016, to allow a deposition to be taken outside the United States without the defendant's presence in certain specified circumstances. The provision was based on Fed.R.Crim.P. 15(c)(3).

SOURCES: Joint Procedure Committee Minutes of April 23-24, 2015, pages 26-27; January 27-28, 2005, page 12; April 20, 1989, pages 4-5; March 24-25, 1988, pages 6-7; December 3, 1987, pages 9-10 and 15; January 25-26, 1979, pages 5-7; December 7-8, 1978, pages 33-37; October 12-13, 1978, page 3; April 2-26, 1973, pages 9-10; June 26-27, 1972, page 3; December 11-12, 1968, pages 2-24; September 26-27, 1968, pages 2-6; Rule 431, Uniform Rules of Criminal Procedure (1974).

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. ch. 31-06.

CONSIDERED: N.D.C.C. ch. 31-04.

CROSS REFERENCE: N.D.R.Crim.P. 17 (Subpoena); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Civ.P. 30.1 (Uniform Audio-Visual Deposition Rule); N.D.R.Ev. 804 (Hearsay Exceptions; Declarant Unavailable).

## Rule 17. Subpoena

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

### (c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

### (e) Place of Service.

(1) In the United States. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) In a Foreign Country. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

### (f) Issuing a Deposition Subpoena.

(1) Issuance. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) Place. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

Notes

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, §3(29), July 31, 1975, 89 Stat. 375; Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 23, 2008, eff. Dec. 1, 2008.)

Notes of Advisory Committee on Rules—1944

Note to Subdivision (a). This rule is substantially the same as Rule 45(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (b). This rule preserves the existing right of an indigent defendant to secure attendance of witnesses at the expense of the Government, 28 U.S.C. [former] 656 (Witnesses for indigent defendants). Under existing law, however, the right is limited to witnesses who are within the district in which the court is held or within one hundred miles of the place of trial. No procedure now exists whereby an indigent defendant can procure at Government expense the attendance of witnesses found in another district and more than 100 miles of the place of trial. This limitation is abrogated by the rule so that an indigent defendant will be able to secure the attendance of witnesses at the expense of the Government no matter where they are located. The showing required by the rule to justify such relief is the same as that now exacted by 28 U.S.C. [former] 656.

Note to Subdivision (c). This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (d). This rule is substantially the same as Rule 45(c) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix]. The provision permitting persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in Government cases is new matter.

Note to Subdivision (e)(1). This rule continues existing law, 28 U.S.C. [former] 654 (Witnesses; subpoenas; may run into another district). The rule is different in civil cases in that in such cases, unless a statute otherwise provides, a subpoena may be served only within the district or within 100 miles of the place of trial, 28 U.S.C. [former] 654; Rule 45(e)(1) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (e)(2). This rule is substantially the same as Rule 45(e)(2) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix]. See *Blackmer v. United States*, 284 U.S. 421, upholding the validity of the statute referred to in the rule.

Note to Subdivision (f). This rule is substantially the same as Rule 45(d) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (g). This rule is substantially the same as Rule 45(f) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Notes of Advisory Committee on Rules—1948 Amendment

The amendment is to substitute proper reference to Title 28 in place of the repealed act.

Notes of Advisory Committee on Rules—1966 Amendment

Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the

government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. *Id.* at 40–41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith v. United States*, 312 F.2d 867 (D.C.Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell v. United States*, 317 F.2d 108 (D.C.Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An *ex parte* application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d).—The subdivision is revised to bring it into conformity with 28 U.S.C. §1825.

Notes of Advisory Committee on Rules—1972 Amendment

Subdivisions (a) and (g) are amended to reflect the existence of the “United States magistrate,” a phrase defined in rule 54.

Notes of Advisory Committee on Rules—1974 Amendment

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, *Federal Practice and Procedure: Criminal* §278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

Notes of Committee on the Judiciary, House Report No. 94–247; 1975 Amendment

A. Amendments Proposed by the Supreme Court. Rule 17 of the Federal Rules of Criminal Procedure deals with subpoenas. Subdivision (f)(2) as proposed by the Supreme Court provides:

The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.

B. Committee Action. The Committee added language to the proposed amendment that directs the court to consider the convenience of the witness and the parties when compelling a witness to attend where a deposition will be taken.

Notes of Advisory Committee on Rules—1979 Amendment

Note to Subdivision (h). This addition to rule 17 is necessary in light of proposed rule 26.2, which deals with the obtaining of statements of government and defense witnesses.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on Rules—1993 Amendment

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101-650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

#### Committee Notes on Rules—2002 Amendment

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word “data” has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

Rule 17(g) has been amended to recognize the contempt powers of a court (other than a magistrate judge) and a magistrate judge.

#### Committee Notes on Rules—2008 Amendment

Subdivision (c)(3). This amendment implements the Crime Victims’ Rights Act, codified at 18 U.S.C. §3771(a)(8), which states that victims have a right to respect for their “dignity and privacy.” The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim’s interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase “personal or confidential information,” which may include such things as medical or school records, is left to case development.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2)—or object by other means such as a letter—on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim’s privacy and dignity interests.

Changes Made to Proposed Amendment Released for Public Comment. The proposed amendment omits the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim’s personal or confidential information can be served upon a third party. It was also revised to add the language “or otherwise object” to make it clear that the victim’s objection might be lodged by means other than a motion, such as a letter to the court.

#### Amendment by Public Law

1975 —Subd. (f)(2). Pub. L. 94-64 amended par. (2) generally.

#### Effective Date of 1979 Amendment

Amendment of this rule by addition of subd. (h) by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96-42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

#### Effective Date of Amendments Proposed April 22, 1974; Effective Date of 1975 Amendments

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94-64, effective Dec. 1, 1975, see section 2 of Pub. L. 94-64, set out as a note under rule 4 of these rules.

#### Supersedure

Provision of subd. (d) of this rule that witness shall be tendered the fee for 1 day's attendance and mileage allowed by law as superseded by section 1825 of Title 28, Judiciary and Judicial Procedure, see such section and Reviser's Note thereunder.

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 19, 2016  
RE: Rule 32.2, N.D.R.Crim.P., Pretrial Diversion

Attorney Jackson Lofgren, writing on behalf of the North Dakota Association of Criminal Defense Lawyers, has requested the committee to consider an amendment to Rule 32.2 allowing for sealing of the file after successful completion of a diversion agreement.

A proposed amendment to Rule 32.2 is attached. It would allow for a party to move to have the file sealed under N.D. Sup. Ct. Admin. R. 41 after successful completion of a diversion agreement. This proposal would essentially give a party permission to do what they are already allowed to do under Rule 41: Section 6(a) allows a party to move to prohibit access to any record and Section 6(a)(6) specifically allows a defendant whose criminal charges have been dismissed to move to have internet access to the case restricted.

Mr. Lofgren did not request that the file in a successfully completed diversion case be automatically sealed, which is what happens by statutory requirement in deferred imposition of sentence cases. If the committee believes that this would be appropriate in diversion cases, Rule 41 would need to be amended to add this case type to Section 5.

RULE 32.2. PRETRIAL DIVERSION

1 (a) Agreements Permitted.

2 (1) Generally. After due consideration of the victim's views and subject to  
3 the court's approval, the prosecuting attorney and the defendant may agree that the  
4 prosecution will be suspended for a specified period after which it will be  
5 dismissed under Rule 32.2(f) on condition that the defendant not commit a felony,  
6 misdemeanor or infraction during the period. The agreement must be in writing  
7 and signed by the parties. It must state that the defendant waives the right to a  
8 speedy trial. It may include stipulations concerning the existence of specified facts  
9 or the admissibility into evidence of specified testimony, evidence, or depositions  
10 if the suspension of prosecution is terminated and there is a trial on the charge.

11 (2) Additional Conditions. Subject to the court's approval after due  
12 consideration of the victim's views and upon a showing of substantial likelihood  
13 that a conviction could be obtained and that the benefits to society from  
14 rehabilitation outweigh any harm to society from suspending criminal prosecution,  
15 the agreement may specify additional conditions to be observed by the defendant  
16 during the period, including:

17 (A) that the defendant not engage in specified activities, conduct, and  
18 associations;

19 (B) that the defendant participate in, and if appropriate successfully

20 complete, a rehabilitation program, which may include treatment, counseling,  
21 training, and education;

22 (C) that the defendant make restitution in a specified manner for harm or  
23 loss caused by the crime charged;

24 (D) that the defendant pay specified fees or costs;

25 (E) that the defendant perform specified community service.

26 (3) Limitations on Agreements. The agreement may not specify a period  
27 longer or any condition other than could be imposed upon probation after  
28 conviction of the crime charged.

29 (b) Filing of Agreement; Release. Promptly after the agreement is made and  
30 approved by the court, the prosecuting attorney shall file the agreement together  
31 with a statement that under the agreement the prosecution is suspended for a  
32 period specified in the statement. Upon the filing, the defendant must be released  
33 under Rule 46 from any custody.

34 (c) Modification of Agreement. Subject to Rule 32.2 (a) and (b) and with  
35 the court's approval, the parties by mutual consent may modify the terms of the  
36 agreement at any time before its termination.

37 (d) Termination of Agreement; Resumption of Prosecution. The court may  
38 order the agreement terminated and the prosecution resumed if, upon motion of the  
39 prosecuting attorney stating facts supporting the motion and upon hearing, the  
40 court finds:

41 (1) the defendant or defense counsel misrepresented material facts affecting  
42 the agreement, if the motion is made within six months after the date of the  
43 agreement; or

44 (2) the defendant has committed a violation of the agreement, if the motion  
45 is made not later than one month after the expiration of the period of suspension  
46 specified in the agreement.

47 (e) Emergency Order. The court by warrant may direct any officer  
48 authorized by law to bring the defendant before the court for the hearing of the  
49 motion if the court finds from affidavit or testimony:

50 (1) there is probable cause to believe the defendant committed a violation of  
51 the agreement; and

52 (2) there is a substantial likelihood that the defendant otherwise will not  
53 attend the hearing. In any case the court may issue a summons instead of a warrant  
54 to secure the appearance of the defendant at the hearing.

55 (f) Termination of Agreement; Dismissal. If no motion by the prosecuting  
56 attorney to terminate the agreement is pending, the agreement is terminated and the  
57 complaint, indictment, or information must be dismissed by order of the court 60  
58 days after expiration of the period of suspension specified by the agreement. If  
59 such a motion is then pending, the agreement is terminated and the complaint,  
60 indictment, or information must be dismissed by order of the court upon entry of a  
61 final order denying the motion. Following a dismissal under Rule 32.2(f) the

62 defendant may not be further prosecuted for the offense involved and may move to  
63 have the file sealed under Section 6 of N.D.Sup.Ct.Admin.R. 41.

64 (g) Modification or Termination and Dismissal upon Defendant's Motion.

65 If, upon motion of the defendant and hearing, the court finds that the prosecuting  
66 attorney obtained the defendant's consent to the agreement as a result of a material  
67 misrepresentation by a person covered by the prosecuting attorney's obligation  
68 under Rule 16, the court may:

69 (1) order appropriate modification of the terms resulting from the  
70 misrepresentation; or

71 (2) if the court determines that the interests of justice require, order the  
72 agreement terminated, dismiss the prosecution, and bar further prosecution for the  
73 offense involved.

74 (h) Pre-Charge Diversion. This rule does not preclude the prosecuting  
75 attorney and defendant from agreeing to diversion of a case without court approval  
76 if charges are not pending before the court.

77 EXPLANATORY NOTE

78 Rule 32.2 was amended, effective March 1, 2013; \_\_\_\_\_.

79 Rule 32.2 was adopted March 1, 2009.

80 Rule 32.2 is patterned after Minn.R.Crim.P. 27.05.

81 Subdivision (a) was amended, effective March 1, 2013, to include payment  
82 of fees or costs as an additional condition to a pretrial diversion agreement.

83            Subdivision (f) was amended, effective \_\_\_\_\_, to allow a party  
84            who successfully completed an agreement to move to have the file sealed under  
85            Section 6 of N.D.Sup.Ct.Admin.R. 41.

86            Sources: Joint Procedure Committee Minutes of \_\_\_\_\_;  
87            September 30, 2011, pages 19-20; October 11-12, 2007, pages 15-20; April 26-27,  
88            2007, pages 23-27.

89            CROSS REFERENCES: N.D. Sup. Ct. Admin. R. 41 (Access to Court  
90            Records).



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**Lloyd C. Suhr**  
**Jackson J. Lofgren**

August 25, 2016

Michael J. Hagburg  
Joint Procedure Committee  
Supreme Court Judicial Wing First Fl.  
600 E. Boulevard Ave.  
Bismarck, ND 58505-0530

*Re: Requested Amendments to the Rules of Criminal Procedure*

Dear Mr. Hagburg,

I am writing on behalf of the North Dakota Association of Criminal Defense Lawyers. Recently, our legislative committee met and discussed several issues we feel are appropriate for consideration by the Joint Procedure Committee. First, we would like the Joint Procedure Committee to consider amending Rule 5 of the North Dakota Rules of Criminal Procedure to include an advisement regarding the right to possess firearms after a conviction for a misdemeanor crime of domestic violence.

Under 18 U.S.C. 922 any person convicted of a misdemeanor crime involving domestic violence is subject to a lifetime firearm prohibition. Because of N.D.C.C. Ch. 14-07.1 defendants charged with crimes involving domestic violence usually make their first appearance before the municipal or district court in custody without legal representation. Currently, there is nothing in Rule 5 requiring a defendant be advised a conviction for a misdemeanor crime of domestic violence can result in a lifetime firearm ban.

Defense attorneys are often contacted after the conviction by upset defendants learning for the first time that they can never hunt or possess firearms again. In a state like North Dakota where the right to bear arms is a part of every day life for many this can be a devastating loss. We would request the Joint Procedure Committee considering amending Rule 5 to include an advisement that a conviction for a misdemeanor crime of domestic violence can result in a prohibition of the ability to use or possess firearms.

Another suggested change relates to pretrial diversion agreements under Rule 32.2 of the North Dakota Rules of Criminal Procedure. With a pretrial diversion agreement the defendant and prosecutor enter into an agreement, subject to court approval, for the resolution of a criminal case without a plea or conviction. Currently, under Rule 32.2(f) upon the successful completion of a pretrial diversion agreement the complaint,

indictment, or information is dismissed but the file is not sealed. We would like the Joint Procedure Committee to consider amending Rule 32.2 to allow for sealing the file upon the successful completion of a pretrial diversion agreement.

Please feel free to contact me with any questions or concerns.

Sincerely,



Jackson J. Lofgren  
President of the NDACDL

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 19, 2016  
RE: Rule 41, N.D.R.Crim.P., Search and Seizure

In response to the U.S. Supreme Court's decision in Birchfield v. North Dakota, which made search warrants mandatory for blood tests in impaired driving cases, our Court formed an Electronic Search Warrant Workgroup to discuss ways to streamline the process of obtaining a search warrant in such cases. A copy of the workgroup's report is attached.

One of the workgroup's suggestions was that Rule 41 be amended to allow licensed peace officers to make an unsworn declaration under penalty of perjury in support of a request for a search warrant. Proposed amendments to Rule 41 that would make this change are attached. The committee has previously acted on amendments to the criminal rules that would allow licensed peace officers to make unsworn declarations in support of complaints and arrest warrants.

Attorney Tom Dickson has requested that the committee consider further amendments to Rule 41 that would supersede the part of N.D.C.C. 29-29-01 that requires evidence seized under a search warrant to be brought before the magistrate. He says the statute is outdated and has led to unfortunate consequences. His email is attached and proposed amendments to supersede the requested part of N.D.C.C. 29-29-01 are included in the attached draft.

N.D.C.C. 29-29-01, copy attached, was considered but not superseded by the committee and the Supreme Court when the rule was first adopted. This means that they knew the statute existed and it was part of what they considered when drafting Rule 41.

Rule 41 was somewhat unique in that it was discussed at several meetings before it was finally approved by the committee. There is nothing in the minutes, however, on whether property seized under a search warrant would have to be delivered directly to the magistrate. Rule 41 has always required return only of an inventory.

It is possible that the committee did not supersede N.D.C.C. 29-29-01 because it defines what can be done under a warrant (bring the property before the magistrate) while Rule 41 sets out the specific procedure for accomplishing the return (inventory the property and bring the magistrate the inventory).

RULE 41. SEARCH AND SEIZURE

1 (a) Authority to Issue a Warrant. A state or federal magistrate acting within  
2 or for the territorial jurisdiction where the property or person sought is located, or  
3 from which it has been removed, may issue a search warrant authorized by this  
4 rule.

5 (b) Persons or Property Subject to Search and Seizure. A warrant may be  
6 issued for any of the following:

7 (1) property that constitutes evidence of a crime;

8 (2) contraband, the fruits of crime, or things criminally possessed;

9 (3) property designed or intended for use, or which is or has been used as  
10 the means of, committing a crime;

11 (4) a person for whose arrest there is probable cause, or who is unlawfully  
12 restrained.

13 (c) Issuing the Warrant.

14 (1) Warrant on Affidavit or Sworn Recorded Testimony.

15 (A) In General. A warrant other than a warrant on oral testimony under  
16 Rule 41 (c)(2) may issue only on when the grounds for issuing the warrant are  
17 established in:

18 (i) a written declaration by a licensed peace officer made and subscribed  
19 under penalty of perjury, or

20           (ii) an affidavit or affidavits sworn to or sworn recorded testimony taken  
21 before a state or federal magistrate and establishing the grounds for issuing the  
22 warrant.

23           (B) Examination. Before ruling on a request for a warrant, the magistrate  
24 may require the affiant or other witnesses to appear personally and may examine  
25 under oath the affiant and any witnesses the affiant may produce. This examination  
26 must be recorded and made part of the proceedings.

27           (C) Probable Cause. If the state or federal magistrate is satisfied that  
28 grounds for the application exist or that there is probable cause to believe they  
29 exist, the magistrate must issue a warrant identifying the property or person to be  
30 seized and naming or describing with particularity the person or place to be  
31 searched. The finding of probable cause may be based upon hearsay evidence in  
32 whole or in part.

33           (D) Command to Search. The warrant must be directed to a peace officer  
34 authorized to enforce or assist in enforcing any law of this state. It must command  
35 the officer to search, within a specified period of time not to exceed ten days, the  
36 person or place named for the property or person specified.

37           (E) Service and Return. The warrant must be served in the daytime, unless  
38 the issuing authority, by appropriate provision in the warrant, and for reasonable  
39 cause shown, authorizes its execution at times other than daytime. It may designate  
40 a state or federal magistrate to whom it must be returned.

41           (2) Warrant by Telephonic or Other Reliable Electronic Means. In  
42 accordance with Rule 4.1, the magistrate may issue a warrant based on information  
43 communicated by telephone or other reliable electronic means.

44           (3) Warrant Seeking Electronically Stored Information. A warrant under  
45 Rule 41(c) may authorize the seizure of electronic storage media or the seizure or  
46 copying of electronically stored information. Unless otherwise specified, the  
47 warrant authorizes a later review of the media or information consistent with the  
48 warrant. The time for executing the warrant refers to the seizure or on-site copying  
49 of the media or information, and not to any later off-site copying or review.

50           (d) Execution and Return With Inventory.

51           (1) Execution. The person who executes the warrant must enter the date and  
52 time of the execution on the face of the warrant.

53           (2) Inventory. An officer present during the execution of the warrant must  
54 prepare and verify an inventory of any property seized. The officer must do so in  
55 the presence of the applicant for the warrant and the person from whom, or from  
56 whose premises, the property was taken. If either one is not present, the officer  
57 must prepare and verify the inventory in the presence of at least one other credible  
58 person. In a case involving the seizure of electronic storage media or the seizure or  
59 copying of electronically stored information, the inventory may be limited to  
60 describing the physical storage media that were seized or copied. The officer may  
61 retain a copy of the electronically stored information that was seized or copied.

62 (3) Receipt. The officer taking property under the warrant must:

63 (A) give a copy of the warrant and a receipt for the property taken to the  
64 person from whom or from whose premises the property was taken; or

65 (B) leave a copy of the warrant and receipt at the place from which the  
66 officer took the property.

67 (4) Return. The officer executing the warrant must promptly return  
68 it—together with a copy of the inventory—to the magistrate designated on the  
69 warrant. The officer may do so by reliable electronic means. The magistrate on  
70 request must give a copy of the inventory to the person from whom, or from whose  
71 premises, the property was taken and to the applicant for the warrant.

72 (e) Motion for Return of Property. A person aggrieved by an unlawful  
73 search and seizure of property or by the deprivation of property may move the trial  
74 court for the property's return. The court must receive evidence on any factual  
75 issue necessary to decide the motion. If it grants the motion, the court must return  
76 the property to the moving party, although the court may impose reasonable  
77 conditions to protect access and use of the property in later proceedings. If a  
78 motion for return of property is made or heard after an indictment, information, or  
79 complaint is filed, it must be treated also as a motion to suppress under Rule 12.

80 (f) Motion to Suppress. A motion to suppress evidence may be made in the  
81 trial court as provided in Rule 12.

82 (g) Return of Papers to Clerk. The magistrate to whom the warrant is

83 returned must attach to the warrant a copy of the return, inventory and all other  
84 related papers and must file them with the clerk of the trial court.

85 (h) Scope and Definitions.

86 (1) Scope. This rule does not modify any statute regulating search or  
87 seizure, or the issuance and execution of a search warrant in special circumstances.

88

89 (2) Definitions. The following definitions apply under this rule:

90 (A) "Property" includes documents, books, papers and any other tangible  
91 objects.

92 (B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to  
93 local time.

94 EXPLANATORY NOTE

95 Rule 41 was amended, effective September 1, 1983; March 1, 1990; March  
96 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1,  
97 2013;\_\_\_\_\_.

98 Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement  
99 the provisions of Article I, Section 8, of the North Dakota Constitution and the  
100 Fourth Amendment to the United States Constitution, which guarantee, "The right  
101 of the people to be secure in their persons, houses, papers and effects against  
102 unreasonable searches and seizures shall not be violated; and no warrant shall issue  
103 but upon probable cause, supported by oath or affirmation, particularly describing

104 the place to be searched and the persons and things to be seized." To implement  
105 this constitutional protection, an illegal search and seizure will bar the use of such  
106 evidence in a criminal prosecution. The suppression sanction is imposed in order  
107 to discourage abuses of power by law enforcement officials in conducting searches  
108 and seizures.

109 Subdivision (a) provides that a search warrant be issued by a magistrate,  
110 either state or federal, acting within or for the territorial jurisdiction. The provision  
111 which permits a federal magistrate to issue a search warrant is the reciprocal of the  
112 federal rule, which permits a state magistrate to issue a search warrant pursuant to  
113 a federal matter. It is contemplated that a search warrant will be issued by a federal  
114 magistrate only on the nonavailability of a state magistrate.

115 Subdivision (a) does not require that the individual requesting the search  
116 warrant be a law enforcement officer. There appears to be common-law support  
117 for the use of the search warrant as a means of getting an owner's property back.  
118 The primary purpose of the rule, however, is the authorization of a search in the  
119 interest of law enforcement and as a practical matter the request for issuance of a  
120 search warrant by someone other than a law enforcement officer is virtually  
121 nonexistent.

122 Subdivision (b) describes the property or persons which may be seized with  
123 a lawfully issued search warrant. Issuance of a search warrant to search for items  
124 of solely evidential value is authorized. There is no intention to limit the protection

125 of the Fifth Amendment against compulsory self-incrimination, so items that are  
126 solely "testimonial" or "communicative" in nature might well be inadmissible on  
127 those grounds.

128 Paragraph (c)(1) follows the federal rule except that North Dakota's rule  
129 permits the issuance of a warrant on sworn recorded testimony without an  
130 affidavit. Probable cause for the issuance of a search warrant should be assessed  
131 under the totality-of-circumstances test.

132 Paragraph (c)(1) was amended, effective \_\_\_\_\_, to allow  
133 grounds for issuance of a search warrant to be established in a written declaration  
134 by a licensed peace officer made and subscribed under penalty of perjury.

135 The provision for examination of the affiant before the magistrate is  
136 intended to assure the magistrate an opportunity to make a careful decision as to  
137 whether there is probable cause based on legally obtained evidence. The  
138 requirement that the testimony be recorded is to insure an adequate basis for  
139 determining the sufficiency of the evidentiary grounds for the issuance of the  
140 search warrant if a motion to suppress is later filed.

141 The language of subparagraph (c)(1)(E), "for reasonable cause shown," is  
142 intended to explain the necessity for executing the warrant at a time other than the  
143 daytime. This provision is intended to be a substantive prerequisite to the issuance  
144 of a warrant that is to be executed at a time other than daytime, although it is not  
145 necessary that the quoted language ("for reasonable cause shown") be defined in

146 subdivision (h).

147 Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph  
148 (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a  
149 warrant based on information communicated by telephone or other reliable  
150 electronic means under the procedure set out in Rule 4.1.

151 Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective  
152 March 1, 2012, to provide guidelines for warrants authorizing the seizure of  
153 electronic storage media and electronically stored information and for the  
154 inventory of seized electronic material. The amendments were based on the  
155 December 1, 2009, amendments to Fed.R.Crim.P. 41.

156 Subdivision (d) is intended to make clear that a copy of the warrant and an  
157 inventory receipt for property taken shall be left at the premises at the time of the  
158 lawful search or with the person from whose premises the property is taken if he is  
159 present.

160 Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer  
161 to make a return by reliable electronic means.

162 Subdivision (e) requires that the motion for return of property be made in  
163 the trial court rather than in a preliminary hearing before the magistrate who issued  
164 the warrant. It further provides for a return of the property if: (1) the person is  
165 entitled to lawful possession, and (2) the seizure is illegal. However, property  
166 which is considered contraband does not have to be returned even if seized

167 illegally. The last sentence of subdivision (e) provides that a motion for return of  
168 property, made in the trial court, shall be treated as a motion to suppress under  
169 N.D.R.Crim.P. 12. The purpose of this provision is to have a series of pretrial  
170 motions disposed of in a single appearance, such as at a Rule 17.1 (Omnibus  
171 Hearing), rather than in a series of pretrial motions made on different dates causing  
172 undue delay in administration.

173 Subdivisions (a), (b), and (c) were amended in 1983, effective September 1,  
174 1983, to add persons as permissible objects of search warrants. These amendments  
175 follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible  
176 for a search warrant to issue to search for a person if there is probable cause to  
177 arrest that person; or that person is being unlawfully restrained.

178 Subdivisions (c) and (d) were amended, effective March 1, 1990. The  
179 amendments are technical in nature and no substantive change is intended.

180 Subdivision (e) was amended, effective March 1, 1992, to track the federal  
181 rule.

182 Rule 41 was amended, effective March 1, 2006, in response to the  
183 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The  
184 language and organization of the rule were changed to make the rule more easily  
185 understood and to make style and terminology consistent throughout the rules.

186 SOURCES: Joint Procedure Committee Minutes of  
187 \_\_\_\_\_; January 26-27, 2012, pages 26-27; April 28-29, 2011,

188 page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26;  
189 April 28-29, 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29,  
190 1994, pages 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages  
191 15-16; April 20, 1989, page 4; December 3, 1987, page 15; October 15-16, 1981,  
192 pages 12-15; December 7-8, 1978, pages 23-26; October 12-13, 1978, pages  
193 15-19; April 24-26, 1973, page 14; December 11-15, 1972, pages 31-37;  
194 November 18-20, 1971, pages 3-9; September 16-18, 1971, pages 11-32; March  
195 12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May 15-16, 1969,  
196 pages 21-23; Fed.R.Crim.P. 41.

197 STATUTES AFFECTED:

198 SUPERSEDED: N.D.C.C. §§ 29-29-01 to the extent that it requires  
199 personal property to be brought before the magistrate, 29-29-02, 29-29-03,  
200 29-29-04, 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13,  
201 29-29-14, 29-29-15, 29-29-16, 29-29-17.

202 CONSIDERED: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3),  
203 ~~29-29-01~~, 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.  
204 N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

205 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or  
206 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12  
207 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and  
208 Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct.



# Final Report

August 20, 2016

## Electronic Search Warrant Workgroup

On May 11, 2016, Chief Justice VandeWalle established a workgroup on search warrants in anticipation of the U.S. Supreme Court ruling in *Birchfield v. North Dakota*. A list of the Workgroup members is contained in Appendix A. The anticipated ruling was expected to expand the need for search warrants for blood, and potentially breath, tests when an individual is stopped for suspicion of driving under the influence. Because the law relies on the test being taken within two hours of a stop for DUI, the Chief Justice charged the workgroup with developing a recommendation for a statewide response to the need to respond to warrant requests for DUI stops in a consistent, timely, and efficient manner. Specifically, the workgroup was asked to address four questions:

1. Who will respond to requests for search warrants?
2. To what extent should state's attorneys be involved in the search warrant process?
3. How can the court system leverage technology to address search warrant requests in an expedited manner?
4. Are there any rules or statutory amendments needed to allow for a more time-sensitive search warrant process?

The Workgroup received information in the chart below from the North Dakota Department of Transportation regarding the number of DUI tests refusals over the past few years. The Department of Transportation does not collect data on whether the refusal was for a breath or blood test.

Calendar Year	Number of Refusals
2015	1,037
2014	1,273
2013	1,330
2012	1,591
2011	1,181

The U.S. Supreme Court subsequently ruled in *Birchfield* that a search warrant is required for blood tests but not for breath tests.

### I. Response to Search Warrants

In regard to the first issue of who should respond to search warrant requests, the Workgroup debated whether a single statewide on-call system utilizing a single point of contact, such as a phone number or email address, or a district-by-district on-call system would be most effective in providing quick and reliable access to a judge who is available to review an application for a search warrant regardless of the time of day.

Several factors were identified as an impediment to creating a statewide on-call system. Of primary concern is that a district court judge's jurisdiction is limited to the district in which the judge is elected. This issue would need to be addressed by temporary appointments made by the Chief Justice or a rule or statutory change before a judge could exercise statewide jurisdiction to issue search warrants. There would also be a need to train law enforcement and prosecutors regarding the protocols and practical implementation aspects of a statewide on-call system. Both of these factors would have a direct impact on how quickly a solution could be rolled out. Other considerations involved the various, long-established practices within each district, and the varying role of prosecutors in the warrant process as currently required within each district. Because of the time constraints imposed by the need to respond to the changes following the *Birchfield* decision, the uncertainty of the impact on judicial workload, and law enforcement's familiarity with the district practices within their jurisdiction, **the Workgroup recommends that the state respond to search warrant requests on a district basis. This recommendation is predicated on the directive that every district develop a written, on-call judge rotation and that the rotation be regularly updated and distributed to all law enforcement agencies within the respective judicial districts.**

Recognizing that in addition to state and county officials, municipal law enforcement agencies have a significant role in enforcing DUI laws, the Workgroup discussed the role of municipal judges in issuing search warrants. The Workgroup reviewed the authority of municipal judges under N.D.C.C. 40-18 and Administrative Rule 30, the authority of magistrates under N.D.C.C. 27-05-31 and Administrative Rule 20, the administrative authority of the Chief Justice and Supreme Court as established by the North Dakota Constitution, and Attorney General opinions 99-L-132(issued 12-30-1999) and 02-L-03(issued 01-04-2002). The Workgroup concluded that a municipal judge has the authority to issue a search warrant only if the judge has been appointed a magistrate by the presiding judge of the district in which the municipality is located. It was the consensus of the Workgroup that if municipal judges are included as part of a district's on-call rotation, that this be limited to only law-trained municipal judges.

The Workgroup was divided on whether it was necessary to include municipal judges in an on-call rotation. The primary factor in favor of including municipal judges was the large number of DUI cases that originate from municipal law enforcement stops which are subsequently handled through the municipal court. The primary factors in opposition to including municipal judges was current local practice where all search warrant requests are being handled by district judges regardless of the agency making the request, and the uncertainty as to the future impact on workload created by the *Birchfield* decision.

The municipal judges were surveyed on this issue. Of the five responses received, four were opposed and one was in favor. Reasons for opposing inclusion included the additional, unfunded

costs to the municipality, the part-time status of the judges, and the lack of recording equipment and personnel to transcribe recordings since municipal courts are not courts of record. Reasons for favoring inclusion included existing authority to carry out this function and current local practice.

There was discussion on whether a presiding judge could compel a municipal judge to accept authority as a state magistrate by amending the presiding judge's AR 30 magistrate order to include this authority and then placing the municipal judge in the district's on-call rotation. The Workgroup concluded that while this may be possible, the political considerations in doing so outweigh the potential gain, particularly since the impact of the *Birchfield* decision is still unknown.

For all of the reasons indicated above, the **Workgroup recommends that the review of search warrant applications be restricted to district court judges, except in those jurisdictions where law-trained municipal judges or licensed attorneys have agreed to serve as magistrates.**

## II. State's Attorney Involvement

In regard to the second issue of involvement of the state's attorney in the search warrant process, the Workgroup reviewed the current local practice for each district. In three judicial districts law enforcement is required to seek the assistance of the prosecutor prior to submitting an application for a search warrant. In five judicial districts the prosecutor's role is limited to the extent that law enforcement determines it is necessary. There is a concern that if law enforcement is contacting judges directly they will expect the judge to provide legal advice to them as to any deficiency in the application. However, it was determined that this concern could be alleviated to some degree with careful conduct by the judge and by a process where the judge can reject a search warrant application without comment. Additionally, the Workgroup determined that it may be possible to create a technological solution for reviewing and issuing search warrants which could be written to allow for the option of requiring a state's attorney to sign off on, or comment on, a search warrant application prior to it reaching the judge.

The state's attorneys were surveyed regarding their position on this issue and were divided in their response. Those that are currently involved in the search warrant process would prefer to continue in that role while those that are not currently involved would prefer to remain uninvolved. Some state's attorneys also raised the question of whether municipal prosecutors should be involved in and responsible for the search warrant applications that may be needed by municipal law enforcement.

The Workgroup also considered the extent to which municipal prosecutors should be involved in the search warrant process. The Workgroup was unaware of any district in which the municipal prosecutor is currently required to be involved in the search warrant process. Workgroup member Aaron Birst contacted several municipal prosecutors to ascertain their position on whether or not municipal prosecutors should be involved in the process. He reported that no municipal prosecutor was in favor of the idea. The concerns raised by the municipal prosecutors largely echoed those raised by the municipal judges.

After considering the information received, **the Workgroup recommends that the involvement of the state's attorney and municipal prosecutors be determined on a district basis, depending on local practice and the need for additional resources if the volume of search warrant requests increases significantly.**

### III. Use of Technology

In regard to the third issue of leveraging technology, the Workgroup reviewed the provisions of Rules 4.1 and 41 of the North Dakota Rules of Criminal Procedure. These rules currently allow a magistrate to issue a warrant using information received by telephone or other reliable electronic means. The rules require that any testimony taken through these methods, beyond merely swearing to the contents of the written document, must be recorded verbatim. The rules also require the magistrate and the applicant to create duplicate written copies of the warrant application and warrant and file both versions along with the verbatim record of the proceeding with the clerk of court.

The Workgroup discussed the requirement to record testimony verbatim and to ensure that the recorded testimony is filed. The Workgroup learned that the practice for obtaining and filing recordings of the testimony vary by judge and by district. In some districts, the judge records the testimony and the judge's court reporter or court recorder transcribes the tape on the next work day. The transcript is then filed with the search warrant application. In other districts, the judge uses a conference call service and purchases a recording of the call from the vendor. The CD is then filed with the clerk of court. Some judges use a conference call service and purchase a digital audio file from the vendor. The digital audio file is then transcribed by the court recorder and filed with the warrant. Some judges have law enforcement officials make the telephone call through their dispatch center which records the call and the dispatch center maintains the record of the call. Some judges have law enforcement officials make the telephone call through State Radio which will record the call. State Radio will then copy the recording to a CD or digital audio file and forward it to the judge for filing.

The Workgroup was informed by member Mike Lynk that State Radio services are available to all law enforcement officials in the state at no cost to the agency. The Workgroup learned that State Radio may be able to accommodate more use of its services if there is a significant increase in the number of search warrants being requested. However, State Radio would need some time to work with the state's Information and Technology Department to review options on adding a dedicated search warrant line that could host multiple conference calls simultaneously. Mr. Lynk also raised concerns about the potential impact of a large increase of calls on State Radio staff and the additional cost of storing numerous digital audio files on servers owned by State Radio. The Workgroup was informed that a web-based solution could be built to include the ability for State Radio to drop the digital files onto the website where they would be stored on servers owned by the Court System.

The Workgroup solicited information on how various district court judges are currently reviewing and issuing warrants and on the type of technology currently being used by law enforcement. Additionally, at the suggestion of Workgroup member Judge Hagerty, she, Judge

Marquart and Judge Tufte provided a demonstration to the members of the Judges Association, on how each of them is currently using technology to review and issue search warrants.

The Workgroup learned that while many district court judges are very comfortable using technology, some are less comfortable with it. The Workgroup heard that some judges would prefer to continue to have the option of issuing warrants by telephone or requiring law enforcement officers to appear personally before them with the search warrant application.

The Workgroup discussed the need to have a “platform agnostic” solution which would allow a judge or law enforcement official to utilize the solution regardless of whether they were using a cell phone, tablet, laptop or personal computer. The Workgroup discussed the need to maintain an alternative solution for those law enforcement agencies that lack some technology, such as printers, in their squad cars. At the suggestion of Workgroup member Judge Racek the group considered incorporating the use of cell phone-created photos into a web-based solution.

The Workgroup heard concerns from some judges about using their personal cell phone or computer to use a web-based search warrant process to do official business. The Workgroup learned that the web-based solution being proposed would be housed on the Court’s servers, and as such, none of the information would be retained or stored on the device used to access the website. The Workgroup discussed the option of providing low-end, low-cost technology that is internet capable to judges if the number of after-hours search warrant requests increases substantially.

The Workgroup discussed the need to create a template for a search warrant application for a blood test that could be incorporated into a web-based solution that would eliminate the need for law enforcement officials to have a printer in their squad car. The Workgroup identified a concern that approving a template would be inappropriate since a district court judge may be required to rule on the sufficiency of the documents. The Workgroup considered other types of forms created by court committees and the self-help center and the disclaimers that accompany those forms. After discussion, the Workgroup concluded that it would be more appropriate for the template to be developed by the State’s Attorneys Association and for the web-based solution to be built in a manner that will allow individual law enforcement officials or prosecutors to upload alternate documents if they choose not to use the built-in template. A sample template can be found in Appendix B.

**The Workgroup recommends a web-based solution that will allow law enforcement to input data into a template approved by the State’s Attorneys Association, and allows for documents to be uploaded if a state’s attorney or law enforcement official chooses not to use the template. The Workgroup further recommends that the web-based solution allow for an officer to upload a cell phone photo of a handwritten form if the law enforcement official lacks a printer or laptop in their squad car.**

#### **IV. Statutory or Rule Amendments**

In regard to the fourth issue regarding any statutory or rule amendments that are needed, the Workgroup concluded that use of telephone and other technology to review and issue warrants is

already allowed and no further amendments are needed in that regard. The Workgroup identified one area in which N.D.R.Crim.P. 41 could be amended to increase efficiency and save costs.

Currently there is a requirement that an individual making a search warrant application must sign the application under oath. This requires either a printed document that is notarized or that a judge has verbal contact with the applicant to put him or her under oath to attest to the content of the application. If verbal contact is made, it must be recorded verbatim. Amending the rule to allow the applicant to attest to the contents of the application under penalty of perjury would resolve these issues and reduce the times when a recording and transcript are needed to only those instances when a judge requires the applicant to supplement the search warrant application with additional information. For those reasons, **the Workgroup recommends that N.D.R.Crim.P. 41 be amended as shown in Appendix C.**

#### V. Other Issues

Throughout the course of its meetings, the Workgroup became aware of several other issues that are of concern to law enforcement but are outside the scope of the Workgroup. These issues are noted here without any recommendation.

The Workgroup learned that certification to administer the Intoxilyzer test is conducted by the North Dakota Bureau of Criminal Investigation. The infrequency of the classes, limits on class size and the length of the training have led to the current situation in which few officers are certified to administer the test. Following the release of the *Birchfield* decision, the Workgroup heard that the BCI intends to shorten the training and to offer several classes in the coming year.

The Workgroup learned that hospitals may refuse to honor a search warrant for a blood draw unless the patient consents to the procedure because to do otherwise may be a violation of patient care practices. The Workgroup also learned that some hospitals may charge the law enforcement agency for the cost of the blood draw.

Respectfully submitted,

Sally A. Holewa  
State Court Administrator

## Hagburg, Mike

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**From:** Hagburg, Mike  
**Sent:** Monday, May 02, 2016 11:20 AM  
**To:** Hagburg, Mike  
**Subject:** FW: ND Crimp 41

**From:** Tom Dickson [<mailto:tdickson@dicksonlaw.com>]  
**Sent:** Monday, March 14, 2016 3:27 PM  
**To:** Hagburg, Mike  
**Subject:** RE: NDCrimP 41

Mike:

Thank you for your assistance.

However, the statute is outdated. It was written in 1877. No one brings evidence to the courthouse anymore. It is also cause for great confusion as was recently witnessed in the payloader case. A law enforcement got criminally charged because the AG's office uses out of date forms.

Some of these statutes need to be addressed by your committee. Another one is the appealable order statute which was also enacted in the 19<sup>th</sup> Century.

Appealing an order deferring imposition of sentence should not be so complicated.

Tom

Tom Dickson  
Dickson Law Office  
P.O. Box 1896  
Bismarck, ND 58502  
(701) 222-4400  
[tdickson@dicksonlaw.com](mailto:tdickson@dicksonlaw.com)

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**From:** Hagburg, Mike [<mailto:MHagburg@ndcourts.gov>]  
**Sent:** Monday, March 14, 2016 2:43 PM  
**To:** Tom Dickson  
**Subject:** RE: NDCrimP 41

I see by the rule history that 29-29-01 was considered, but not superseded, by the committee and the court when the rule was first adopted. This means that they knew the statute existed and it was presumably part of their materials when they were drafting the rule.

Looking at the early minutes, Rule 41 was somewhat unique in that it was discussed at several meetings before it was finally approved by the committee. However, the issue of whether property seized under a search warrant would ever have to be delivered directly to the magistrate was not discussed. This is probably because the original version of the rule, just like the current version, only required return of the warrant and the inventory to the magistrate. So I think the continuing intent as the rule has been developed was that the magistrate gets the inventory, not the actual property.

I think it also could be argued that 29-29-01 defines what can be done under a warrant (bring the property before the magistrate) while Rule 41 sets out the specific procedure for accomplishing the return (inventory the property and bring the magistrate the inventory). Under the state constitution, a court promulgated rule of procedure prevails when it is in

conflicts with a legislatively enacted rule of procedure. N.D. Const. Art. VI, Section 3, City of Fargo v. Dawson, 466 N.W.2d 584 (N.D. 1991).

Mike

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**From:** Tom Dickson [<mailto:tdickson@dicksonlaw.com>]  
**Sent:** Sunday, March 13, 2016 3:05 PM  
**To:** Hagburg, Mike  
**Subject:** NDCrimP 41

Mike:

I am calling upon your expertise once again. An issue has come up and I need some historical perspective. Section 29-29-01 NDCC was initially passed in 1877. It provided that "the peace officer to search for personal property and to bring it before the magistrate."

NDCrimP 41 like all modern rules requires only that that the inventory be filed with the Magistrate. There is no requirement that the property literally be brought before the Magistrate. This is in compliance with common sense and with modern police procedure that the contraband is not literally be given to the Magistrate.

My question is when or if Rule 41 was amended to eliminate the actual delivery of the evidence to the magistrate.

Thank you.

Tom

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**29-29-01. Search warrant defined.** A search warrant is an order in writing, made in the name of the state, signed by a magistrate, directed to a peace officer, commanding the peace officer to search for personal property and to bring it before the magistrate.

**Source:** C.Crim.P. 1877, § 561; R.C. 1895, § 8461; R.C. 1899, § 8461; R.C. 1905, § 10271; C.L. 1913, § 11129; R.C. 1943, § 29-2901.

**Cross-References.**

Declaration of rights, see N.D. Const., Art. I.  
Search and seizure, see N.D.R.Crim.P., Rule 41.

**Federal Prosecution.**

In bank robbery prosecution under federal

statute, search warrant issued by police magistrate rather than federal court was held proper. *Gallagher v. United States*, 406 F.2d 102 (8th Cir. 1969), cert. denied, 395 U.S. 968, 89 S. Ct. 2117, 23 L. Ed. 2d 756 (1969).

**Collateral References.**

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone, 38 A.L.R.4th 1145.

Validity of anticipatory search warrants — state cases, 67 A.L.R.5th 361.

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 16, 2016  
RE: Rule 3.1, N.D.R.Ct., Pleadings

The Odyssey User Group recently reviewed Rule 3.1 as part of an effort to update how documents are handled within the Odyssey system. They developed a procedure for dealing with non-conforming documents that are stricken under Rule 3.1(j). Basically, they decided that the documents would be hidden from system users, but not destroyed or deleted.

In the process of this review, they asked staff what the legal effect of having a document “stricken” would be. This is explained in the rule text: its service is to be of no effect. They suggested that the committee consider whether this is appropriate and whether some safe harbor relief should be allowed.

Under Rule 3.1(j), ordering a document to be stricken is something that can be done at the discretion of the court and can only happen if a party refused to obey an order to reform a non-conforming document. Therefore, it is possible that the committee considered having “service to be of no effect” an appropriate remedy for a party’s refusal to fix a document. On the other hand, Rule 3.5, copy attached, provides a safe harbor for documents that are rejected on initial filing and the committee may consider it appropriate to provide the same relief to parties who have documents stricken under Rule 3.1(j).

Proposed amendments to Rule 3.1 that would offer a safe harbor provision based on the provision in Rule 3.5 are attached.

## RULE 3.1 PLEADINGS

1 (a) Legibility and Numbering. All pleadings and other documents must be  
2 typewritten, printed, or reproduced and easily readable. Each sheet must be  
3 separately numbered. Pleadings and other documents filed with the court, except as  
4 otherwise permitted by the court, must be prepared on 8 1/2 x 11 inch white paper.

5 (b) Signature. All pleadings and other documents of a party represented by  
6 an attorney must be signed by at least one attorney of record in the attorney's  
7 individual name and contain the attorney's address, telephone number, e-mail  
8 address for electronic service, and State Board of Law Examiners identification  
9 number. All pleadings and other documents of a party who is not represented by an  
10 attorney must be signed by the party and contain the party's address and telephone  
11 number.

12 (c) Spacing and Names. Writing must appear on one side of the sheet only  
13 and must be double-spaced, except for quoted material. Names must be typed or  
14 printed beneath all signatures.

15 (d) Binding. All pleadings and other documents in an action or proceeding  
16 must be filed by the clerk flat and unfolded and each set of papers firmly fastened  
17 together.

18 (e) Filing of Documents. A party seeking to file a pleading or other  
19 document must submit it to the clerk. The first submitted version of a pleading or

20 document will be treated as the original unless otherwise ordered by the court. A  
21 party need only file a single copy of any pleading or document.

22 (f) Lost Papers. If any original document is lost or withheld by any person,  
23 the court may authorize a copy to be filed.

24 (g) File Numbers. The clerk, at the time of the filing of a case and at the  
25 time of the filing of any responsive pleading, must assign a file number to the case  
26 and immediately notify the attorney of record of the assigned file number.  
27 Thereafter, all documents and pleadings to be filed must bear the assigned file  
28 number on the front or title page in the upper righthand portion of the document to  
29 be filed.

30 (h) Filing After Service. After the complaint is filed, all documents required  
31 to be served on a party, together with certificate of service, must be filed with the  
32 court within a reasonable time after service. Discovery documents may only be  
33 filed as allowed by N.D.R.Civ.P. 5(d)(3).

34 (i) Privacy Protection. Parties must follow privacy protection instructions in  
35 N.D.R.Ct. 3.4 when making filings with the court. Court personnel have no duty to  
36 review documents for compliance with N.D.R.Ct. 3.4.

37 (j) Non-Conforming Documents.

38 (1) Documents and pleadings that do not conform to this rule may not be  
39 filed.

40 (2) If a non-conforming document is filed by mistake, the court on motion

41 or on its own may order the pleading or other document reformed. If the order is  
42 not obeyed, the court may order the document stricken and its service to be of no  
43 effect.

44 (3) If a document is stricken, the time for filing is tolled from the time of  
45 submission to the time the order striking the document is filed. The document will  
46 be considered timely filed if resubmitted in corrected form within three days after  
47 the order striking the document is filed.

48 EXPLANATORY NOTE

49 Rule 3.1 was amended, effective January 1, 1988; March 1, 1996; March 1,  
50 1999; August 1, 2001; March 1, 2005; March 1, 2007; March 1, 2009; May 1,  
51 2012; March 1, 2013; April 15, 2013; March 1,  
52 2014;\_\_\_\_\_.

53 Rule 3.1 was reorganized, effective May 1, 2012, to make it clear that all  
54 documents presented for filing must conform to all applicable requirements of the  
55 rule.

56 A new subdivision (b) was added, effective March 1, 1996, which contains  
57 signature requirements. The letter designation of each existing subdivision was  
58 amended accordingly.

59 Subdivision (b) was amended, effective April 15, 2013, to require the  
60 e-mail address for electronic service under Rule 3.5 to be provided in filed  
61 documents.

62           A new subdivision (e) was added, effective March 1, 2005, to clarify that  
63 documents must be filed with the clerk. Submitting a document to a judge or to  
64 court personnel other than the clerk does not constitute filing. The first version of a  
65 given document submitted to the clerk, regardless of what form it is in, will be  
66 filed and treated as the original. A party seeking to correct the original or have  
67 another document treated as the original must obtain an order from the court.

68           Subdivision (e) was amended, effective March 1, 2014, to clarify that only a  
69 single copy of any pleading or document need be filed with the court. This  
70 provision supersedes the requirement in N.D.C.C. § 29-15-21 that a demand for  
71 change of judge be filed in triplicate and the requirements in N.D.C.C. §§  
72 14-12.2-36 and 14-14.1-25 for the filing of two copies of an order. This provision  
73 should be interpreted as superseding any statutory requirement that multiple copies  
74 of a document be filed with the court.

75           Subdivision (h) was amended, effective March 1, 2014, to require, once the  
76 complaint has been filed, filing of all documents that must be served, along with a  
77 certificate of service, within a reasonable time after service. This provision is  
78 modeled after Minn. R. Civ. P. 5.04.

79           Subdivision (i) was amended, effective March 1, 2007, to specify that court  
80 personnel have no duty to review documents for compliance with privacy  
81 protection rules.

82           Subdivision (i) was amended, effective March 1, 2009, to reflect the

83 addition of document privacy protection requirements to N.D.R.Ct. 3.4.

84 Subdivision (j) was amended, effective \_\_\_\_\_ to time of  
85 filing to be tolled pending resubmission of a stricken document.

86 SOURCES: Joint Procedure Committee Minutes of  
87 \_\_\_\_\_; September 26, 2013, pages 7-11; April 25-26, 2013,  
88 pages 13-15; September 27, 2012, page 14; January 26-27, 2012, pages 16-17;  
89 January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27,  
90 2007, page 31; September 22-23, 2005, pages 16-17; September 23-24, 2004,  
91 pages 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30, 2004, pages 3-8;  
92 September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12; January 29-30,  
93 1998, page 22; September 29-30, 1994, pages 6-7.

94 STATUTES AFFECTED:

95 Superseded: N.D.C.C. §§ 14-12.2-36 (in part), 14-14.1-25 (in part), and  
96 29-15-21 (in part).

97 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings  
98 and Other Papers); N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other  
99 Papers; Representations to Court; Sanctions); N.D.R.Ct. 3.4 (Privacy Protection  
100 for Filings Made with the Court); N.D.R.Ct. 3.5 (Electronic Filing in the District  
101 Courts); N.D.Sup.Ct.Admin.R. 41 (Access to Judicial Records).

RULE 3.5 ELECTRONIC FILING IN DISTRICT COURTS

1 (a) Electronic Filing.

2 (1) Documents filed electronically in the district courts must be submitted  
3 through the Odyssey® electronic filing system.

4 (2) All documents filed after the initiating pleadings in criminal and  
5 juvenile cases must be filed electronically. All documents in civil, non-juvenile,  
6 cases must be filed electronically. A party who files a complaint in a civil case  
7 must electronically serve notice of filing on the other parties or their attorneys.

8 (3) Self-represented litigants and prisoners are exempt from the electronic  
9 filing requirement and may file paper documents in person, by mail, or by third  
10 party commercial carrier. Self-represented litigants and prisoners who wish to file  
11 documents by electronic means must use the Odyssey® system.

12 (4) On a showing of exceptional circumstances in a particular case, anyone  
13 may be granted leave of court to file paper documents. Original wills, codicils and  
14 other documents of independent legal significance may be filed as paper  
15 documents. Colored or shaded documents may be filed as paper documents if  
16 necessary to ensure legibility.

17 (5) A document filed electronically has the same legal effect as a paper  
18 document.

19 (6) Any signature on a document filed electronically is considered that of

20 the officer of the court or party it purports to be for all purposes. If it is established  
21 that the documents were transmitted without authority, the court must strike the  
22 filing.

23 (7) A party who electronically files a proposed order must identify the filing  
24 party in the Odyssey® comments field.

25 (b) Filing Formats.

26 (1) Approved formats for documents filed electronically are WordPerfect  
27 (.wpd), Tagged Image File (.tif), Portable Document File (.pdf) and ASCII (.txt).

28 (2) All paragraphs must be numbered in documents filed electronically.  
29 Reference to material in such documents must be to paragraph number, not page  
30 number. Paragraph numbering is not required in exhibits, documents prepared  
31 before the action was commenced, or in documents not prepared by the parties or  
32 court.

33 (c) Time of Filing.

34 (1) A document in compliance with the rules and submitted electronically to  
35 the district court clerk by 11:59 p.m. local time is considered filed on the date  
36 submitted. A document electronically signed by the court is considered filed when  
37 the e-signature is affixed.

38 (2) After reviewing an electronically filed document, the district court clerk  
39 must inform the filer, through an e-mail generated by the Odyssey® system,  
40 whether the document has been accepted or rejected.

41 (3) If a document submitted for electronic filing is rejected, the time for  
42 filing is tolled from the time of submission to the time the e-mail generated by the  
43 Odyssey® system notifying the filer of rejection is sent. The document will be  
44 considered timely filed if resubmitted within three days after the notice of  
45 rejection. A party seeking to take advantage of this tolling provision must file and  
46 serve a separate document providing notice that the rejected document is being  
47 resubmitted under N.D.R.Ct. 3.5(c)(3).

48 (4) Any required filing fee must be paid by credit card or debit card at the  
49 time the document is filed.

50 (d) Confidentiality. In documents prepared for filing with the court,  
51 information that would otherwise be included in the document but required by  
52 N.D.R.Ct. 3.4 to be redacted in court documents must be separately filed in a  
53 reference sheet (confidential information form, see appendix) and may be included  
54 in those documents only by reference. Any document not complying with this  
55 order is subject to N.D.R.Ct. 3.4(g).

56 (e) Electronic Service.

57 (1) All documents filed electronically after the initiating pleadings must be  
58 served electronically through the Odyssey® system except for documents served  
59 on or by self-represented litigants and prisoners. On a showing of exceptional  
60 circumstances in a particular case, anyone may be granted leave of court to serve  
61 paper documents or to be exempt from receiving electronic service. Attorneys who

62 are required by rule or statute to serve documents on their own clients may serve  
63 paper documents.

64 (2) Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service of a  
65 document is not effective if the party making service learns through any means that  
66 the document did not reach the person to be served.

67 (3) All attorneys must provide at least one e-mail address to the State Board  
68 of Law Examiners for accepting electronic service. Designated e-mail service  
69 addresses will be posted on the North Dakota Supreme Court website.

70 (4) For purposes of computation of time, any document electronically  
71 served must be treated as if it were mailed on the date of transmission. If an  
72 attorney who is not exempt from electronic service fails to provide an e-mail  
73 address for service or fails to accept or open electronically served e-mail, the  
74 server's attempt at electronic service constitutes delivery. Service made impossible  
75 due to an attorney's failure to provide an e-mail address must be shown by an  
76 affidavit or certificate of attempted service.

77 (f) Technical Issues; Relief. On a showing of good cause, the court may  
78 grant appropriate relief if electronic filing or electronic service was not completed  
79 due to technical problems.

80 (g) Authenticity of Filed Electronic Documents. An electronic document  
81 that has been filed, accepted and docketed in the Odyssey® electronic filing  
82 system is considered authentic as a court record. No further proof of authenticity.

83 such as a physical stamp or seal, is required to be applied to a record to confirm its  
84 authenticity when the record is distributed between courts or files using the  
85 Odyssey® system.

86 EXPLANATORY NOTE

87 Adopted effective January 15, 2013; amended effective April 15, 2013;  
88 June 1, 2013; June 1, 2015; March 1, 2016;\_\_\_\_\_.

89 Rule 3.5 was originally adopted as N.D.Sup.Ct.Admin.O. 16 on March 1,  
90 2006. Order 16 was later amended, effective March 1, 2008; March 1, 2009;  
91 August 1, 2010; March 1, 2011; July 1, 2012.

92 Order 16 was amended, effective July 1, 2012, to incorporate the provisions  
93 of the Order 16 Addendum (Filing in the District Court where Odyssey®  
94 Electronic Filing is Available) and N.D.Sup.Ct.Admin.O. 18 (Filing in Counties  
95 Using the Odyssey® Case Management System). The Order 16 Addendum and  
96 Order 18 were repealed, effective July 1, 2012.

97 In an appeal from an agency determination under N.D.C.C. § 28-32-42, the  
98 notice of appeal must be served on all the entities listed in the statute, some of  
99 whom may not be subject to electronic service through the Odyssey® system.

100 Subdivision (a) was amended, effective March 1, 2016, to clarify that  
101 self-represented litigants and prisoners who wish to file documents electronically  
102 must use the Odyssey® system and to require a party filing a proposed order to  
103 identify the party in the Odyssey® comments field.

104 Paragraph (b)(1) was amended, effective June 1, 2015, to remove Word  
105 documents from the list of approved formats for electronic filing in the Odyssey®  
106 system. If a court requests that parties submit editable documents such as proposed  
107 findings or orders, Word or other editable format documents still may be e-mailed  
108 to the court for that purpose but only after e-filing the documents in Odyssey in an  
109 approved format.

110 Subdivision (c) was amended, effective March 1, 2016, to clarify that a  
111 document electronically signed by the court is considered filed when the  
112 e-signature is affixed.

113 Subdivision (g) was added, effective \_\_\_\_\_, to explain that  
114 once a document is accepted into the Odyssey® system, the document is  
115 considered authentic as a court record and no further proof of authenticity needs to  
116 be applied to it when it is distributed between courts or files using the Odyssey®  
117 system.

118 Sources: Joint Procedure Committee Minutes of May 12-13, 2016, pages  
119 15-22; January 28-29, 2016, pages 8-11; April 23-24, 2015, pages 2-3; January  
120 29-30, 2015, pages 13-14; April 25-26, 2013, pages 3-16; January 31-February 1,  
121 2013, pages 2-5, 15-18; September 27, 2012, pages 14-21; April 29-30, 2010, page  
122 21; April 24-25, 2008, pages 12-16; October 11-12, 2007, pages 3-5; April 26-27,  
123 2007, pages 16-18; January 25, 2007, pages 15-16; September 23-24, 2004, pages  
124 18-27.

125 Statutes Affected:

126 Considered: N.D.C.C. § 28-32-42.

127 Cross References: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with  
128 the Court); N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction; Process; Service);  
129 N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Documents); N.D.  
130 Admission to Practice R. 1 (General Requirements for Admission).

MEMO

TO: Joint Procedure Committee  
FROM: Mike Hagburg  
DATE: September 28, 2016  
RE: Rule 8.3.1, N.D.R.Ct., Case Management (Non-Divorce Cases)

Judge Reich requests that the committee consider adoption of a new Rule 8.3.1 dealing with case management in family law matters other than divorce cases. He also suggests adoption of a new form to accompany the rule. The proposed new rule and form are based on Rule 8.3 and the Appendix C form that is used with it.

In an email, copy attached, Judge Reich states that many family law cases the court sees involve parties that have never been married or motions made post-judgment after a divorce has been concluded. Judge Reich states that requiring scheduling orders in these cases would make them easier to track and resolve.

Copies of the proposed new rule and form are attached along with Judge Reich's rough draft proposal which shows how these new items relate to existing Rule 8.3

## RULE 8.3.1 CASE MANAGEMENT (NON-DIVORCE CASES)

1           (a) Compulsory Meeting. In a family law matter other than a divorce case,  
2 including an action for the determination of parental rights or a motion for change  
3 of primary residential responsibility, the parties and their attorneys must meet in  
4 person or by electronic means to prepare a joint informational statement within 30  
5 days after service of the complaint or entry of an order for an evidentiary hearing  
6 under N.D.C.C. 19-09-06.6. The statement must be in the form shown in appendix  
7 K. The complaint and joint informational statement must be filed no later than  
8 seven days after the compulsory meeting. The parties must exchange information  
9 and documentary evidence necessary for the determination of child support. At a  
10 minimum, the parties must be prepared to exchange current paystubs, employment  
11 and income information and tax returns. The parties must determine at the meeting  
12 what additional information is necessary in order to complete the matter. The  
13 parties must decide at the meeting whether alternative dispute resolution methods  
14 are appropriate.

15           (b) Scheduling Order. Within 30 days after the informational statement is  
16 filed, the court must issue its scheduling order. The court may issue the order after  
17 either a telephone or in-court scheduling conference, or without a conference or  
18 hearing if none is needed. The scheduling order may establish any of the following  
19 deadlines:

- 20 (1) specific dates for the completion of discovery and other pretrial  
21 preparations;
- 22 (2) specific dates for serving, filing, or hearing motions;
- 23 (3) specific dates for completion of mediation or alternative dispute  
24 resolution;
- 25 (4) a specific date for the parties to complete parent education;
- 26 (5) specific dates for completion of parenting evaluation;
- 27 (6) a specific date by which the parties will be prepared for the pretrial  
28 conference;
- 29 (7) a specific date by which the parties will be prepared for the trial or  
30 evidentiary hearing;
- 31 (8) a specific date for identification of witnesses and documents; and
- 32 (9) a specific date by which the parties will submit the parenting plans.

33 EXPLANATORY NOTE

34 Rule 8.3.1 was adopted \_\_\_\_\_. It is based on Rule 8.3 and  
35 intended to apply in family law cases other than divorce cases.

36 SOURCES: Joint Procedure Committee Minutes of

37 \_\_\_\_\_.

APPENDIX K. RULE 8.3.1 INFORMATIONAL STATEMENT

STATE OF NORTH DAKOTA

IN \_\_\_\_\_

(name of court)

County of \_\_\_\_\_.

\_\_\_\_\_ Judicial District

Civil No. \_\_\_\_\_

\_\_\_\_\_

Plaintiff

N.D.R.Ct. 8.3.1

vs.

INFORMATIONAL

\_\_\_\_\_

STATEMENT

Defendant

1. It is estimated that the discovery specified below can be completed within \_\_\_ months from the date of this form.(Check all that apply and supply estimates where indicated.)

A. Written discovery No \_\_\_ Yes \_\_\_

B. Factual Depositions No \_\_\_ Yes \_\_\_

Identify the persons who will be deposed by either party:

C. Medical/Vocational/Parenting Evaluations No \_\_\_ Yes \_\_\_

Identify the person who will conduct such evaluations [for either party]:

D. Experts No \_\_\_ Yes \_\_\_

Identify any experts or area of expertise for either party:

2. Date ready for trial:
3. Estimated length of trial:
4. Please list any additional information, which might be helpful to the court when scheduling this matter, including, e.g., facts that will affect readiness for trial:

It is ORDERED

1. Deadline for completion of discovery and other pretrial preparations: 45 days before trial.
2. Deadline for pretrial motions: 30 days before trial.
3. Deadline for completion of mediation/alternative dispute resolution: 60 days before trial.
4. Deadline for completion of parent education: 60 days before trial.
5. Deadline for exchanging all information necessary to calculate child support including tax returns for the past three years and pay stubs for the past 90 days: 14 days before trial
6. Deadline for completion of primary residential responsibility/parenting time report/evaluation: 30 days before trial.
7. Date by which the parties will be prepared for trial: \_\_\_\_\_
8. Deadline for identification of witnesses and exhibits: 14 days before trial.

9. Deadline for filing proposed parenting plan: 14 days before trial.

10. Estimated length of trial: \_\_\_\_\_ (days/hours).

Absent a showing of good cause or exceptional circumstances, late filed Parenting Plans, will not be considered by the Court

## Hagburg, Mike

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**From:** Reich, David  
**Sent:** Tuesday, September 27, 2016 12:20 PM  
**To:** Hagburg, Mike  
**Subject:** Joint Procedure Committee: Proposed amendments to Rule 8.3 N.D.R.Ct. to address case management in non-divorce cases  
**Attachments:** 20160927\_121239.pdf

Hi Mike,

I was asked at our recent SCJD judges meeting to bring this issue to the Joint Procedure Committee for consideration. I know this may be too late for our meeting this week and I apologize for not getting this to you sooner. I was traveling last week and on master calendar the week before that so I wasn't able to get this done before today.

Rule 8.3 N.D.R.Ct. provides for case management procedures in divorce cases. Many of the cases we see, including actions for a determination of parental rights by parties that have never been married and post-judgment motions for changes in primary residential responsibility, are not covered by Rule 8.3. Without a requirement for a scheduling order, these cases are more difficult to track and tend to linger in the system.

To address this issue, we thought either amendments to Rule 8.3, or adoption of a companion rule, to address case management in non-divorce cases might be beneficial. For the purpose of discussion, I have attached a rough draft of suggested revisions to the current language of 8.3 to address these situations. I don't know whether these changes could be included in the current rule or would be better addressed in a companion rule.

Also attached is a rough draft of a proposed informational statement patterned after the current Appendix C and a draft of a proposed scheduling order.

Thanks, Mike! I will see you on Thursday.

Judge Reich

**Rule 8. \_\_\_\_ . Case Management (Non-Divorce Cases including actions for a determination of parental rights and motions for change of primary residential responsibility.)**

**(a) Compulsory Meeting.** Within 30 days after service of the complaint or entry of an order for an evidentiary hearing under N.D.C.C. § 14-09-06.6(4), the parties and their attorneys must meet in person or by electronic means to prepare a joint informational statement (in the form shown in appendix \_\_\_\_). The complaint and joint informational statement must be filed no later than seven days after the compulsory meeting. The parties must exchange information and documentary evidence ~~relating to the existence and valuation of assets and liabilities~~ necessary for the determination of child support. At a minimum, the parties must be prepared to exchange current pay stubs, employment and income information, and tax returns, preliminary pension information, and asset, debt and expense documentation. The parties must determine at the meeting what additional information is necessary in order to complete the case. The parties must decide at the meeting whether alternative dispute resolution methods are appropriate.

**(b) Scheduling Order.** Within 30 days after the informational statement is filed, the court must issue its scheduling order. The court may issue the order after either a telephone or in-court scheduling conference, or without a conference or hearing if none is needed. The scheduling order may establish any of the following deadlines:

- (1) specific dates for the completion of discovery and other pretrial preparations;
- (2) specific dates for serving, filing, or hearing motions;
- (3) specific dates for completion of mediation/alternative dispute resolution;
- (4) a specific date for the parties to complete parent/divorce education;
- ~~(5) a specific date for filing the property and debt listing;~~
- (6) specific dates for completion of parenting evaluation;
- (7) a specific date by which the parties will be prepared for the pretrial conference;
- (8) a specific date by which the parties will be prepared for the trial /evidentiary hearing;
- (9) a specific date for identification of witnesses and documents; and
- (10) a specific date by which the parties will submit the parenting plans.

**~~(c) Pretrial Conferences.~~**

~~(1) Each party must complete a pretrial conference statement substantially in the form set forth in appendix D which must be served upon all parties and filed with the court at least 14 days prior to the date of the pretrial conference.~~

~~(2) Unless excused by the court for good cause, the parties and attorneys who will try the proceedings must attend the pretrial conference, prepared to discuss settlement. If a stipulation is reduced to writing prior to the pretrial conference, the case may be heard as a default at the time scheduled for the conference. In that event, only one party need appear. If a party fails to appear at a pretrial conference, the court may dispose of the proceedings without further notice to that party.~~

~~(3) If the parties are unable to resolve the case, in whole or in part, at the pretrial conference, the court must issue an order concerning any remaining discovery and motions, and identifying the contested issues for trial.~~

~~(4) Unless otherwise ordered, at least 14 days before trial, the parties must file a joint property and debt listing substantially in the form set forth in appendix E. Each asset or liability must be numbered separately~~

Informational statement for cases involving parenting, but not divorce. (Post-judgment modification and cases where parents were never married.) This is modeled on Rule 8.3 Informational Statement.

1. It is estimated that the discovery specified below can be completed within \_\_\_\_\_ months from the date of this form. (Check all that apply and supply estimates where indicated.)

a. Written discovery            No \_\_\_\_\_ Yes \_\_\_\_\_

b. Factual Depositions        No \_\_\_\_\_ Yes \_\_\_\_\_  
Identify the persons who will be deposed by either party:

c. Medical/Vocational/Parenting Evaluations        No \_\_\_\_\_ Yes \_\_\_\_\_  
Identify the person who will conduct such evaluations [for either party]:

d. Experts        No \_\_\_\_\_ Yes \_\_\_\_\_  
Identify any experts or area of expertise for either party:

2. Date ready for trial:

3. Estimated length of trial:

4. Please list any additional information, which might be helpful to the court when scheduling this matter, including, e.g., facts that will affect readiness for trial:

**It is ORDERED**

1. Deadline for completion of discovery and other pretrial preparations: 45 days before trial.
2. Deadline for pretrial motions: 30 days before trial.
3. Deadline for completion of mediation/alternative dispute resolution: 60 days before trial.
4. Deadline for completion of parent education: 60 days before trial.
5. Deadline for exchanging all information necessary to calculate child support including tax returns for the past three years and pay stubs for the past 90 days: 14 days before trial
6. Deadline for completion of primary residential responsibility/parenting time report/evaluation: 30 days before trial.
7. Date by which the parties will be prepared for trial: \_\_\_\_\_.
8. Deadline for identification of witnesses and exhibits: 14 days before trial.
9. Deadline for filing proposed parenting plan: 14 days before trial.
10. Estimated length of trial: \_\_\_\_\_ (days/hours).

***Absent a showing of good cause or exceptional circumstances, late filed Parenting Plans, will not be considered by the Court.***