

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

ORIGINAL

**ORDER OF ADOPTION**  
Supreme Court No. 980217

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**Amendments to the North Dakota Rules of Civil Procedure, Rules of Criminal Procedure,  
Rules of Appellate Procedure, and Rules of Court**

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The Joint Procedure Committee filed proposed amendments to Rules 4, 5, 6, 23, 30, 30.1, 31, 43, 45, 51 and 77, of the North Dakota Rules of Civil Procedure, Rules 30, 32, 32.1, 37, 45, 46, 49, and Form 8, of the North Dakota Rules of Criminal Procedure, Rules 3, 4, 8, 25, 26, 36, 42, 45, and 47.1, of the North Dakota Rules of Appellate Procedure, Rules 3.1, 6.9, 6.10, 7.1, 8.2, and 11.2, of the North Dakota Rules of Court and §27-10-01.3 of the North Dakota Century Code. Notice was provided under Section 7, N.D.R.Proc.R., and a hearing was held on the proposed amendments on Tuesday, October 20, 1998, at 1:30 p.m. At that time, any written comments received were also submitted to the Court.

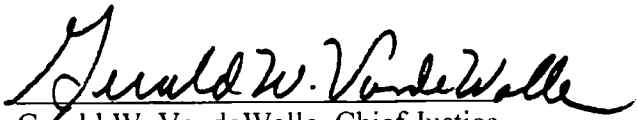
The Court considered the matter, and at the Joint Procedure Committee's request, proposed amendments to §27-10-01.3, North Dakota Century Code, will be submitted to the 1999 Legislature by the Court. The Court considered the amendments to the Rules, and


**ORDERED**, proposed amendments to Rules 4, 5, 6, 23, 30, 30.1, 31, 43, 45, 51 and 77, of the North Dakota Rules of Civil Procedure, Rules 30, 32, 32.1, 37, 45, 46, 49, and Form 8, of the North Dakota Rules of Criminal Procedure, Rules 3, 4, 8, 25, 26, 36, 42, 45, and 47.1, of the North Dakota Rules of Appellate Procedure, Rules 3.1, 6.9, 7.1, 8.2, and 11.2, of the North Dakota Rules of Court, as further amended, are ADOPTED, effective March 1, 1999.

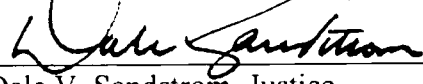
**IT IS FURTHER ORDERED**, proposed amendments to Rule 6.10 of the North Dakota Rules of Court, as further amended, are ADOPTED, with Chief Justice Gerald W. VandeWalle and Justice William A. Neumann, dissenting, effective March 1, 1999.

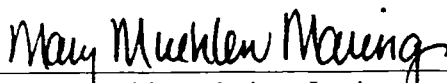
**IT IS FURTHER ORDERED**, that Source Notes in the North Dakota Rules of Civil Procedure, Rules of Criminal Procedure, Rules of Evidence, Rules of Appellate Procedure, and the North Dakota Rules of Court, be amended to refer to the "Joint Procedure Committee Minutes" instead of the "Procedure Committee Minutes"; that the dates in the appendix of forms to the North Dakota Rules of Civil Procedure, Rules of Criminal Procedure and Rules of Court be amended to refer to "[Month] [Day], [Year]" rather than the present date formats; and, that all citations to rules contained in the "North Dakota Court Rules" publication and the "North Dakota Court Rules Annotated" publication be amended, if necessary, to conform with the citation forms adopted by this Court effective August 1, 1998.

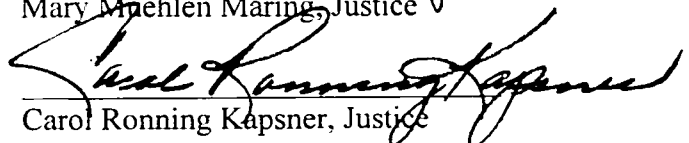
Dated at Bismarck, North Dakota, this 2nd day of December, 1998.

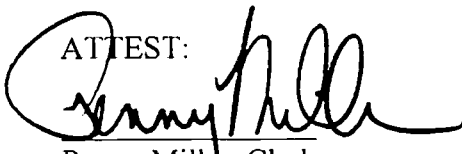
  
Gerald W. VandeWalle, Chief Justice

  
William A. Neumann, Justice

  
Dale V. Sandstrom, Justice

  
Mary Muehlen Maring, Justice

  
Carol Ronning Kapsner, Justice

ATTEST:  
  
Penny Miller, Clerk

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1                   RULE 4. PERSONS SUBJECT TO JURISDICTION--

2                                   PROCESS--SERVICE

3  
4                                   \*           \*           \*           \*           \*

5                   (c) Process.

6                                   \*           \*           \*           \*           \*

7                   (3) Summons Served and Complaint Not Filed. The  
8 defendant may serve a written demand ~~upon~~ on the  
9 plaintiff to file the complaint. Service of the demand  
10 must be made under subdivision (d) on the plaintiff's  
11 attorney or on the plaintiff if the plaintiff is not  
12 represented by an attorney. If the plaintiff does not  
13 file the complaint within 20 days after service of the  
14 demand, service of the summons is void. The demand must  
15 contain notice that if the complaint is not filed within  
16 20 days, service of the summons is void under this rule.

17                   (4) The defendant may file the summons and  
18 complaint, and the costs incurred on behalf of the  
19 plaintiff may be taxed as provided in Rule 54(e).

20                   (d) Personal Service.

21                   (1) By Whom Process Served. Service of all process  
22 may be made: within the state by any person of legal age  
23 not a party to nor interested in the action; and outside  
24 the state by any person who may make service under the  
25 law of this state or under the law of the place in which

26 service is made or who is designated by a court of this  
27 state.

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

31 (A) upon an individual 14 or more years of age  
32 by (i) delivering a copy of the summons to the  
33 individual personally; (ii) leaving a copy of the  
34 summons at the individual's dwelling house or usual  
35 place of abode in the presence of a person of  
36 suitable age and discretion then residing therein;  
37 (iii) delivering, at the office of the process  
38 server, a copy of the summons to the individual's  
39 spouse if the spouses reside together; (iv)  
40 delivering a copy of the summons to the  
41 individual's agent authorized by appointment or by  
42 law to receive service of process; or (v) any form  
43 of mail or third-party commercial delivery  
44 addressed to the individual to be served and  
45 requiring a signed receipt and resulting in  
46 delivery to that individual;

47 (B) upon an individual under the age of 14  
48 years, by delivering a copy of the summons to the  
49 individual's guardian, if the individual has one  
50 within the state, and, if not, then to the  
51 individual's father or mother or any person or

52 agency having the individual's care or control, or  
53 with whom the individual resides. If service  
54 cannot be made upon any of them, then as directed  
55 by order of the court;

56 (C) upon an individual who has been judicially  
57 adjudged incompetent or for whom a guardian of the  
58 individual's person or estate has been appointed in  
59 this state, by delivering a copy of the summons to  
60 the individual's guardian. If a general guardian  
61 and a guardian ad litem have been appointed, both  
62 must be served;

63 (D) upon a domestic or foreign corporation or  
64 upon a partnership or other unincorporated  
65 association, by (i) delivering a copy of the  
66 summons to an officer, director, superintendent or  
67 managing or general agent, or partner, or  
68 associate, or to an agent authorized by appointment  
69 or by law to receive service of process in its  
70 behalf, or to one who acted as an agent for the  
71 defendant with respect to the matter upon which the  
72 claim of the plaintiff is based and who was an  
73 agent of the defendant at the time of service;  
74 (ii) if the sheriff's ~~makes a return that indicates~~  
75 no person upon whom service may be made can be  
76 found in the county, then service may be made by  
77 leaving a copy of the summons at any office of the

78 domestic or foreign corporation, partnership or  
79 unincorporated association within this state with  
80 the person in charge of the office; or (iii) any  
81 form of mail or third-party commercial delivery  
82 addressed to any of the foregoing persons and  
83 requiring a signed receipt and resulting in  
84 delivery to that person;

85 (E) upon a city, township, school district,  
86 park district, county, or any other municipal or  
87 public corporation, by delivering a copy of the  
88 summons to any member of its governing board;

89 (F) upon the state, by delivering a copy of  
90 the summons to the governor or attorney general or  
91 an assistant attorney general and, upon an agency  
92 of the state, such as the Bank of North Dakota or  
93 the State Mill and Elevator Association, by  
94 delivering a copy of the summons to the managing  
95 head of the agency or to the attorney general or an  
96 assistant attorney general; or

97 (G) if service is made upon an agent who is  
98 not expressly authorized by appointment or by law  
99 to receive service of process in on behalf of the  
100 defendant, a copy of the summons and complaint must  
101 be mailed or delivered via a third-party commercial  
102 carrier to the defendant ~~by registered or certified~~  
103 ~~mail~~ with return receipt requested not later than



104 ten days after service by depositing the same, with  
105 postage or shipping prepaid, in a post office or  
106 with a commercial carrier in this state and  
107 directed to the defendant to be served at his the  
108 defendant's last reasonably ascertainable address.

109 (3) How Service Made Outside the State. Service  
110 upon any person subject to the personal jurisdiction of  
111 the courts of this state may be made outside the state:

112 (A) in the manner provided for service within  
113 this state, with the same force and effect as  
114 though service had been made within this state;

115 (B) in the manner prescribed by the law of the  
116 place in which the service is made for service in  
117 that place in an action in any of its courts of  
118 general jurisdiction; or

119 ~~(C) by any form of mail addressed to the~~  
120 ~~person to be served and requiring a signed receipt~~  
121 ~~and resulting in delivery to that person;~~

122 ~~(D)~~ (C) as directed by order of the court.

123 (4) Service Under Statute. Whenever a statute of  
124 this state or an order of the court ~~made pursuant thereto~~  
125 provides for the service of a summons or of a notice or  
126 of an order in lieu of summons upon a party not an  
127 inhabitant of or found within the state, service must be  
128 made under the circumstances and in the manner prescribed

129 by the statute or order or in any manner permitted by  
130 these rules and not precluded by the statute or order.

131 (e) Service by Publication.

132 \* \* \* \* \*

133 (4) Mailing or Delivering Summons and Complaint. A  
134 copy of the summons and complaint, at any time after the  
135 filing of the affidavit for publication and not later  
136 than 10 days after the first publication of the summons,  
137 must be deposited in ~~some~~ a post office or with a third-  
138 party commercial carrier in this state, postage or  
139 shipping prepaid, and directed to the defendant to be  
140 served at the defendant's last reasonably ascertainable  
141 ~~post-office~~ address.

142 (5) Personal Service Outside State Equivalent to  
143 Publication. After the affidavit for publication and the  
144 complaint in the action are filed, personal service of  
145 the summons and complaint upon the defendant out of state  
146 is equivalent to and has the same force and effect as the  
147 publication and mailing or delivery provided for in  
148 paragraphs (3) and (4) of this subdivision.

149 \* \* \* \* \*

150 (7) When Defendant Served by Publication Permitted  
151 to Defend. The defendant upon whom service by publication  
152 is made, or the defendant's representative, on  
153 application and sufficient cause shown at any time before  
154 judgment, must be allowed to defend the action. Except

155 in an action for divorce, the defendant upon whom service  
156 by publication is made, or the defendant's  
157 representative, upon making it appear to the satisfaction  
158 of the court by affidavit, stating the facts, that the  
159 defendant has a good and meritorious defense to the  
160 action, and ~~that~~ the defendant had no actual notice or  
161 knowledge of the pendency of the action so as to enable  
162 the defendant to make application to defend before the  
163 entry of judgment ~~therein~~, and upon filing an affidavit  
164 of merits, may be allowed to defend at any time within 3  
165 years after entry of judgment on such terms as may be  
166 just. If the defense is successful and the judgment, or  
167 any part ~~thereof~~ of the judgment, has been collected or  
168 otherwise enforced, ~~such restitution thereupon~~ may be  
169 ~~compelled as ordered by~~ the court ~~directs~~, but the title  
170 to property sold under ~~that~~ the judgment to a purchaser  
171 in good faith is may not be ~~thereby~~ affected. A  
172 defendant who receives a copy of the summons in the  
173 action mailed or delivered to the defendant as provided  
174 in paragraph (4), or upon whom the summons is personally  
175 served out of this state, as provided in paragraph (5),  
176 is deemed to have had notice of the pendency of the  
177 action and of the judgment ~~therein entered~~.

178 \* \* \* \* \*

179 (f) Service Upon a Person in a Foreign Country.  
180 Unless otherwise provided by law, service upon an

181 individual, other than an infant or an incompetent  
182 person, may be effected in a place not within any  
183 judicial district of the United States:

184 \* \* \* \* \*

185 (2) if there is no internationally agreed means of  
186 service or the applicable international agreement allows  
187 other means of service, provided ~~that~~ the service is  
188 reasonably calculated to give notice:

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

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

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

198 (i) delivery to the individual  
199 personally of a copy of the summons and the  
200 complaint; or

201 (ii) any form of mail or third-party  
202 commercial delivery requiring a signed  
203 receipt, to be addressed and dispatched by the  
204 clerk of the court to the party to be served;  
205 or

206 \* \* \* \* \*

207 (i) Proof of Service. Proof of service of the  
208 summons and of the complaint or notice, if any,  
209 accompanying the same or of other process, must be made  
210 as follows:

211 (1) if served by the sheriff or other officer, by  
212 the officer's certificate ~~thereof~~ of service;

213 (2) if served by any other person, by the server's  
214 affidavit ~~thereof~~ of service;

215 (3) if served by publication, by an affidavit made  
216 as provided in Section 31-04-06 of the North Dakota  
217 Century Code and an affidavit of ~~the mailing~~ or an  
218 affidavit of delivery via a third-party commercial  
219 carrier of a copy of the summons and complaint in  
220 accordance with subdivision (4) of subsection (e) of this  
221 rule, if the same ~~shall have~~ has been deposited;

222 (4) in any other case of service by ~~mailing mail or~~  
223 delivery via a third-party commercial carrier resulting  
224 in delivery in accordance with paragraph (2) or (3) of  
225 subdivision (d) of this rule, by an affidavit of ~~the~~  
226 mailing or an affidavit of delivery of a copy of the  
227 summons and complaint or other process, with return  
228 receipt attached; or

229 (5) by the written admission of the defendant.

230 \* \* \* \* \*

231 (k) Content of Affidavit of Mailing or Delivery via  
232 a Third-party Commercial Carrier. An affidavit of

mailing or delivery required by this rule must state ~~that~~  
a copy of the process, pleading, order of court, or other  
paper to be served was deposited by the affiant, with  
postage or shipping prepaid, in the ~~United States~~ mail or  
with a third-party commercial carrier and directed to the  
party shown in the affidavit to be served at the party's  
last reasonably ascertainable ~~post-office~~ address,  
~~showing~~ The affidavit must contain the date and place of  
~~depositing deposit~~ and ~~that~~ indicate the affiant is of  
legal age, ~~and having attached thereto the~~ The return  
receipt, if any, must be attached to the affidavit.

(1) Effect of Mail or Delivery Refusal. If a  
summons and complaint or other process is mailed or sent  
with delivery restricted and requiring a receipt signed  
by the addressee, the addressee's refusal to accept the  
mail or delivery constitutes delivery. Return of the  
mail or delivery bearing an official indication on the  
cover ~~that~~ delivery was refused by the addressee is prima  
facie evidence of the refusal.

#### EXPLANATORY NOTE

Rule 4 was amended, effective 1971; January 1, 1976;  
January 1, 1977; January 1, 1979; September 1, 1983;  
March 1, 1986; March 1, 1990; March 1, 1996; March 1,  
1998; March 1, 1999.

258           Rule 4 governs civil jurisdiction and service of  
259 process. In contrast, Rule 5 applies to service of  
260 papers other than process.

261           Rule 4 was amended, effective March 1, 1999, to  
262 allow delivery via a third-party commercial carrier as an  
263 alternative to the Postal Service. The requirement for  
264 a "third-party" is consistent with the rule's requirement  
265 for personal service by a person not a party to nor  
266 interested in the action. The requirement for a  
267 "commercial carrier" means it must be the regular  
268 business of the carrier to make deliveries for profit.  
269 A law firm may not act as its own commercial carrier  
270 service for service of process. Finally, the phrase  
271 "commercial carrier" is not intended to include or  
272 authorize electronic delivery. Service via e-mail or  
273 facsimile transmission is not permitted by Rule 4.

274           Originally, Rule 4 concerned process, with no  
275 mention of jurisdiction. In 1971, what are now  
276 subdivisions (a) [Definition of Person] and (b)  
277 [Jurisdiction Over Person] were added. They were taken  
278 from the Uniform Interstate and International Procedure  
279 Act. Many changes were also made to subdivision (d)  
280 [previously (c)] concerning personal service, several of  
281 which were taken from that Act.

282           Subdivision (c) was amended, effective March 1,  
283           1998, to provide a defendant with the means to compel the  
284           plaintiff to file the action.

285           Subdivision (d) was amended, effective March 1,  
286           1998, to allow personal service by delivering a copy of  
287           the summons to an individual's spouse.

288           A problem may arise with service by mail or delivery  
289           by third-party commercial carrier, under subdivisions  
290           (d) (2) or (d) (3) (C) when the person to be served refuses  
291           delivery. This refusal of delivery is tantamount to  
292           receipt of the mail or delivery for purposes of service.  
293           On the other hand, if the mail or delivery is unclaimed,  
294           no service is made. Subdivision ~~(k)~~ (1) was added in  
295           1983, effective September 1, 1983, to make it clear that  
296           refusal of delivery by the addressee constitutes  
297           delivery.

298           Statutes governing special procedures often conflict  
299           with these rules. As an example, NDCC 32-19-32  
300           concerning the time period for mailing the summons and  
301           complaint after publication in a mortgage foreclosure  
302           conflicts with Rule 4(e) (4). In this situation, Rules  
303           4(d) (4) and 81(a) recognize that provisions of the  
304           statute prevail.

305           A new subdivision (f) was added, effective March 1,  
306           1996, to provide procedures for service upon a person in  
307           a foreign country. The new procedures follow Rule 26(f),



Fed.R.Civ.P. The letter designation of each subdivision was changed accordingly.

SOURCES: Procedure Committee Minutes of April 30-May 1, 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997, page 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16; January 26-27, 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages 1-4 and 11; May 21-22, 1987, page 5; November 29, 1984, pages 3-5; September 30-October 1, 1982, pages 15-18; April 15-16, 1982, pages 2-5; December 11-12, 1980, page 2; October 30-31, 1980, page 31; January 17-18, 1980, pages 1-3; November 29-30, 1979, page 2; October 27-28, 1977, page 10; April 8-9, 1976, pages 5-9; Rule 4, FRCivP.

STATUTES AFFECTED:

SUPERSEDED: Sections 28-0502, 28-0503, 28-0504, 28-0505, 28-0601, 28-0602, 28-0603, 28-0604, 28-0605, 28-0606, 28-0607, 28-0608, 28-0609, 28-0610, 28-0616, 28-0619, 28-0620, 28-0621, 28-0622, 28-0623, 28-0624, 28-0625, 28-0626, 28-0627, 28-0628, 28-0629, 28-0632, 28-3001, NDRC 1943, and Chapters 28-06, 28-06.1, NDCC.

CROSS REFERENCE: Rules 5 (Service and Filing of Pleadings and Other Papers), 45 (Subpoena), and 81 (Applicability In General), NDRCivP; Rule 8.4 (Summons in Action for Divorce or Separation), NDROC.

1           RULE 5.   SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

2  
3                           \*       \*       \*       \*       \*

4           (b)   Service--How made.   Whenever under these rules  
5   service is required or permitted to be made upon a party  
6   represented by an attorney, the service must be made  
7   upon the attorney unless service upon the party is  
8   ordered by the court.   Service upon the attorney or upon  
9   a party must be made by delivering a copy to the  
10   attorney or party, or by facsimile transmission if  
11   available to the attorney or party, or by mailing or  
12   delivering via third-party commercial carrier a copy to  
13   the attorney or party at the attorney's or party's last  
14   known address or, if no address is known, upon order of  
15   the court by leaving it with the clerk of the court.  
16   Delivery of a copy within this rule means:   handing it  
17   to the attorney or to the party; or, leaving it at the  
18   attorney's or party's office with a clerk or other  
19   individual in charge ~~thereof~~; or, if there is no one in  
20   charge, leaving it in a conspicuous place therein; or,  
21   if the office is closed or the party to be served has no  
22   office, leaving it at the party's dwelling or usual  
23   place of abode with some individual of suitable age and  
24   discretion then residing therein.   Service by mail is  
25   complete upon mailing.   Service via a third-party  
26   commercial carrier is complete upon deposit of the paper  
27   to be served with the commercial carrier.

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\* \* \* \* \*

(f) Proof of Service. Proof of service under this rule may be made as provided in Rule 4 or by certificate of an attorney showing that the attorney has made service pursuant to subdivision (b).

\* \* \* \* \*

EXPLANATORY NOTE

Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988; March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995; March 1, 1998; March 1, 1999.

Rule 5 applies to service of papers other than "process." In contrast, Rule 4 governs civil jurisdiction and service of process. When a statute or rule requiring service does not pertain to service of process, nor require personal service under Rule 4, nor specify how service is to be made, service may be made as provided in Rule 5(b).

Subdivision (b) was amended, effective March 1, 1999, to permit service via a third-party commercial carrier as an alternative to the Postal Service. The requirement for a "third-party commercial carrier" means the carrier may not be a party to nor interested in the action, and it must be the regular business of the carrier to make deliveries for profit. A law firm may not act as or provide its own commercial carrier service

55 with service complete upon deposit. In addition, the  
56 phase "commercial carrier" does not include electronic  
57 delivery services. Service via e-mail is not permitted,  
58 and service via facsimile transmission is already  
59 covered by the Rule.

60 SOURCES: Procedure Committee Minutes of April 30-  
61 May 1, 1998, page 3; January 29-30, 1998, page 18;  
62 September 26-27, 1996, pages 16-17, 20; September 23-24,  
63 1993, pages 19-20; April 29-30, 1993, page 20-21;  
64 November 7-8, 1991, page 3; October 25-26, 1990, pages  
65 10-12; April 20, 1989, page 2; December 3, 1987, page  
66 11; May 21-22, 1987, pages 17-18; February 19-20, 1987,  
67 page 4; September 18-19, 1986, page 8; November 30,  
68 1984, pages 26-27; October 18, 1984, pages 8-11;  
69 November 29-30, 1979, page 2; September 20-21, 1979,  
70 pages 4-5; Rule 5, FRCivP.

71 STATUTES AFFECTED:

72 SUPERSEDED: Sections 28-0511, 28-0630, 28-  
73 2810, 28-2811, 28-2812, 28-2813, 28-2814, 28-2819,  
74 28-2820, 28-2821, 28-3005, 31-0510, NDRC 1943.

75 CROSS REFERENCE: Rules 4 (Persons Subject to  
76 Jurisdiction-Process-Service), 45 (Subpoena), and 77  
77 (District Courts and Clerks), NDRCivP; Rule 49 (Service  
78 and Filing of Papers), NDRCrimP; Rules 6.4 (Exhibits),  
79 7.1 (Judgments, Orders and Decrees), NDROC.

1 RULE 6. TIME

2  
3 \* \* \* \* \*

4 (e) Additional Time After Service by Mail or  
5 Commercial Carrier. Whenever a party has the right or  
6 is required to do some act or take some proceedings  
7 within a prescribed period after ~~the~~ service of a notice  
8 or other paper ~~upon the party~~ and the notice or paper is  
9 served upon the party by mail or third-party commercial  
10 carrier, 3 days must be added to the prescribed period.  
11 Service by facsimile transmission is not service by mail  
12 or third-party commercial carrier for purposes of this  
13 rule.

14  
15 EXPLANATORY NOTE

16 Rule 6 was amended, effective 1971; March 1, 1990;  
17 on an emergency basis, March 1, 1992; January 1, 1995;  
18 March 1, 1997; March 1, 1999.

19 This rule omits the listing of "legal holidays"  
20 found in subdivision (a) of the federal rule. See  
21 Chapter 103, NDCC, concerning holidays in North Dakota.

22 Subdivision (e) was amended, effective March 1,  
23 1999, to make the three-day extension for service by  
24 mail applicable when service is via commercial carrier.  
25 The proof of service must contain the date of mailing or  
26 deposit with the commercial carrier. See Rule 4(k) and  
27 Rule 5(f), N.D.R.Civ.P.

28           Subdivision (d) was amended, effective March 1,  
29           1997, because Rule 3.2, NDROC, governs when papers  
30           supporting or opposing a motion must be served.

31           SOURCES:    Procedure Committee Minutes of January  
32           29-30, 1998, page 18; April 25, 1996, pages 8-11; April  
33           28-29, 1994, pages 15-17; January 27-28, 1994, pages 24-  
34           25; September 23-24, 1993, pages 14-16 and 20; April 29-  
35           30, 1993, page 20; November 7-8, 1991, page 3; October  
36           25-26, 1990, page 12; April 20, 1989, page 2; December  
37           3, 1987, page 11; June 22, 1984, pages 30-31; September  
38           20-21, 1979, pages 5-6; Rule 6, FRCivP.

39           STATUTES AFFECTED:

40                    SUPERSEDED:    Sections 28-0739, 28-2803, 28-  
41                    2815, 28-2816, 28-2817, 28-2818, 28-2902, 28-2903,  
42                    28-3006, N.D.Rev. Code 1943.

43           CROSS REFERENCE:    Rules 4 (Persons Subject to  
44           Jurisdiction Process Service), 52 (Findings by the  
45           Court), 59 (New Trials Amendment of Judgments), and 60  
46           (Relief From Judgment or Order), NDR CivP; Rule 45  
47           (Time, NDR CrimP; Rule 3.2 (Motions), NDROC.

1                   RULE 23.   CLASS ACTIONS RULE

2  
3                   \*       \*       \*       \*       \*

4                   (g) Notice of Action.

5                   (1) Following certification, the court by order,  
6 after hearing, shall direct the giving of notice to the  
7 class.

8                   (2) The notice, based on the certification order and  
9 any amendment of the order, ~~shall~~ must include:

10                   (A) a general description of the action,  
11 including the relief sought, and the names and  
12 addresses of the representative parties;

13                   (B) a statement of the right of a member of  
14 the class under subdivision (h) to be excluded from  
15 the action by filing an election to be excluded, in  
16 the manner specified, by a certain date;

17                   (C) a description of possible financial  
18 consequences ~~on~~ for the class;

19                   (D) a general description of any counterclaim  
20 being asserted by or against the class, including  
21 the relief sought;

22                   (E) a statement that the judgment, whether  
23 favorable or not, will bind all members of the  
24 class who are not excluded from the action;

25                   (F) a statement that any member of the class  
26 may enter an appearance either personally or  
27 through counsel;

28 (G) an address to which inquiries may be  
29 directed; and

30 (H) other information the court deems  
31 appropriate;

32 (3) the order ~~shall~~ must prescribe the manner of  
33 notification to be used and specify the members of the  
34 class to be notified. In determining the manner and form  
35 of the notice to be given, the court shall consider the  
36 interests of the class, the relief requested, the cost of  
37 notifying the members of the class, and the possible  
38 prejudice to members who do not receive notice.

39 (4) Each member of the class, not a representative  
40 party, whose potential monetary recovery or liability is  
41 estimated to exceed \$100 ~~shall~~ must be given personal  
42 notice, or mailed notice, or notice via third-party  
43 commercial carrier if ~~his~~ the person's identity and  
44 whereabouts can be ascertained by the exercise of  
45 reasonable diligence.

46 (5) For members of the class not given ~~personal or~~  
47 ~~mailed~~ notice under paragraph (4), the court shall  
48 provide, as a minimum, a means of notice reasonably  
49 calculated to apprise the members of the class of the  
50 pendency of the action. Techniques calculated to assure  
51 effective communication of information concerning  
52 commencement of the action ~~shall~~ must be used. The  
53 techniques may include personal notice, or mailed notice,  
54 or notice via third-party commercial carrier.



55 ~~notification by means of~~ newspaper, television, radio,  
56 posting in public or other places, and distribution  
57 through trade, union, public interest, or other  
58 appropriate groups.

59 (6) The plaintiff shall advance the expense of  
60 notice under this subdivision if there is no counterclaim  
61 asserted. If a counterclaim is asserted the expense of  
62 notice ~~shall~~ must be allocated as the court orders in the  
63 interest of justice.

64 (7) The court may order that steps be taken to  
65 minimize the expense of notice.

66 \* \* \* \* \*

67  
68 EXPLANATORY NOTE

69 Rule 23 was amended, effective February 15, 1977;  
70 January 1, 1995; March 1, 1999.

71 Rule 23 is substantially the same as the Model Class  
72 Actions Rule as drafted by the National Conference of  
73 Commissioners on Uniform State Laws. Prior to February  
74 15, 1977, the effective date of this rule, Rule 23 was  
75 the same as Rule 23, FRCivP.

76 The following comments are based upon the official  
77 Comments to the Model Rule.

78 \* \* \* \* \*

79 Subdivision (g):

80           The hearing required by paragraph (1), if the court  
81 wishes, can be combined with the hearing required by  
82 subdivision (b) (1).

83           Subdivision (g) was amended, effective March 1,  
84 1999, to allow notice via third-party commercial carrier  
85 as an alternative to mail.

86           Personal mailed notice to all members of the class  
87 is not required by this Rule. See Grant v. City of  
88 Lincoln, 225 N.W.2d 549 (Neb, 1975); Cartt v. Superior  
89 Court in and for County of Los Angeles, 50 Cal.App.3d  
90 960, 124 Cal.Rptr. 376 (Ct.App. 1975).

91           The type of notice to be given may vary as to the  
92 persons to be notified and the form of notice and, to  
93 some extent, the content. Paragraph (3) indicates that  
94 the court must consider a number of factors in deciding  
95 what type of notice to give.

96           Paragraph (8) would allow the court to order a  
97 defendant who has a mailing list of class members to  
98 cooperate with the representative parties in notifying  
99 the class members. Use of a computer or enclosing notice  
100 in a regular mailing would be possibilities.

101                   \*       \*       \*       \*       \*

102           SOURCES: Procedure Committee Minutes of January 29-  
103 30, 1998, pages 18-19; April 28-29, 1994, page 23;  
104 September 20-21, 1979, pages 14-17; September 23-24,  
105 1976, pages 62-76; Uniform Class Actions Rule (1976).

106           STATUTES AFFECTED:

107                   SUPERSEDED: Section 28-0208, NDRC 1943.

108                   CROSS REFERENCE: Rules 19 (Joinder of Persons  
109 Needed for Just Adjudication), 20 (Permissive Joinder of  
110 Parties), and 24 (Intervention), NDR CivP.

1           RULE 30. DEPOSITIONS UPON ORAL EXAMINATION

2  
3                   \*       \*       \*       \*       \*

4           (f) Certification; Copies.

5           (1) The officer shall certify on the deposition  
6 ~~that~~ the witness was duly sworn by the officer and ~~that~~  
7 the deposition is a true record of the testimony given  
8 by the witness. Unless otherwise ordered by the court,  
9 the officer shall securely seal the original transcript  
10 of the deposition in an envelope indorsed with the title  
11 of the action and marked "Deposition of (here insert  
12 name of witness)" and shall promptly deliver ~~it~~ or send  
13 ~~it the transcript~~ by registered or certified mail or a  
14 traceable third-party commercial delivery service to the  
15 party noticing the deposition, who must be identified on  
16 the record.

17                   \*       \*       \*       \*       \*

18  
19                   EXPLANATORY NOTE

20           Rule 30 was amended, effective January 1, 1980;  
21 July 1, 1981; March 1, 1986; March 1, 1990; March 1,  
22 1999.

23           Rule 30 was amended, effective March 1, 1999, to  
24 allow an original deposition transcript to be shipped  
25 via a commercial delivery service offering a traceable  
26 means of shipping similar to registered or certified  
27 mail.

SOURCES: Procedure Committee Minutes of January 29-30, 1998, page 19; April 27-28, 1995, pages 5-7; April 20, 1989, page 2; December 3, 1987, page 11; November 30, 1984, pages 27-29; October 18, 1984, page 11; December 11-12, 1980, pages 1, 5-6; October 30-31, 1980, pages 11-16; November 29-30, 1979, pages 5-6; April 26-27, 1979, pages 9-14; Rule 30, FRCivP.

STATUTES AFFECTED:

SUPERSEDED: Sections 31-0507, 31-0509, 31-0511, 31-0512, 31-0513, 31-0514, 31-0515, 31-0516, 31-0517, 31-0520, 31-0521, 31-0707, 31-0708, 31-1710, 31-1711, 31-0714, 31-0715, NDRC 1943.

CROSS REFERENCE: Rules 4 (Persons Subject to Jurisdiction Process Service), 26 (General Provisions Governing Discovery), 27 (Depositions Before Action or Pending Appeal), 28 (Persons Before Whom Depositions May Be Taken), 29 (Stipulations Regarding Discovery Procedure), 31 (Depositions of Witnesses Upon Written Questions), 32 (Use of Depositions in Court Proceedings), 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), 37 (Failure to Make Discovery Sanctions), and 45 (Subpoena), NDRCivP; Rule 611 (Mode and Order of Interrogation and Presentation), NDREv.

1           RULE 30.1   UNIFORM AUDIO-VISUAL DEPOSITION RULE

2  
3                   \*       \*       \*       \*       \*

4           (d) Procedure.   The following procedure must be  
5 observed in recording an audio-visual deposition:

6           (1) Opening of Deposition.   The deposition must  
7 begin with an oral or written statement on camera which  
8 includes:

9                   (A) the operator's name and business address;

10                   (B) the name and business address of the  
11 operator's employer;

12                   (C) the date, time, and place of the  
13 deposition;

14                   (D) the caption of the case;

15                   (E) the name of the witness;

16                   (F) the party on whose behalf the deposition  
17 is being taken; and

18                   (G) any stipulations by the parties.

19           (2) Counsel.   Counsel shall identify themselves on  
20 camera.

21           (3) Oath.   The oath must be administered to the  
22 witness on camera.

23           (4) Multiple Units.   If the length of a deposition  
24 requires the use of more than one recording unit, the  
25 end of each unit and the beginning of each succeeding  
26 unit must be announced on camera.

27 (5) Closing of Deposition. At the conclusion of a  
28 deposition, a statement must be made on camera that the  
29 deposition is concluded. A statement may be made on  
30 camera setting forth any stipulations made by counsel  
31 concerning the custody of the audio-visual recording and  
32 exhibits or other pertinent matters.

33 (6) Index. Depositions must be indexed by a time  
34 generator or other method specified by the Supreme  
35 Court.

36 (7) Objections. An objection must be made as in  
37 the case of stenographic depositions.

38 (8) Editing. If the court issues an editing order,  
39 the original audio-visual recording ~~must~~ may not be  
40 altered.

41 (9) Delivery. Unless otherwise stipulated by the  
42 parties, the operator shall deliver, ~~or send mail, or~~  
43 ~~ship by registered or certified mail~~ to the party  
44 noticing the audio-visual deposition the original audio-  
45 visual recording of a deposition, any copy edited  
46 pursuant to an order of the court, and any exhibits.  
47 If mailed or shipped, the deposition, and any exhibits,  
48 must be sent via registered or certified mail or a  
49 traceable third-party commercial delivery service.

50 (e) Costs. The reasonable expense of recording,  
51 editing, and using an audio-visual deposition may be  
52 taxed as costs.

EXPLANATORY NOTES

Rule 30.1 was adopted, effective January 1, 1980;  
amended effective March 1, 1986; March 1, 1999.

Rule 30.1 is substantially the same as the Uniform Audio-Visual Deposition Rule as drafted by the National Conference of Commissioners on Uniform State Laws.

The taking of depositions by other than stenographic means has previously been allowed by Rule 30(b) (4) pursuant to court order. However, as stated in the official comment to the Uniform Rule:

"This Rule (1) does not require a court order for the taking of an audio-visual deposition; (2) sets out uniform standards for recording, preserving, filing, and using the depositions rather than leaving it to individual orders; and (3) specifically designates the audio-visual recording as an official record of the deposition.

"The provisions for audio-visual depositions contained in this Rule supplement, and are in addition to, the general provisions applicable to the taking and use of depositions."

Subdivision (a)(2), as indicated in the official comment:

"Provides that the audio-visual recording is an official record of the deposition. If a typewritten transcript is prepared \* \* \* (as



81           prescribed by Rule 30(c)) it too is an official  
82           record of the deposition. Both can be used by the  
83           parties for briefing, argument, and appeal. In the  
84           event of conflict between the two records, the  
85           court would have to resolve the disparity, just as  
86           it might now, if the witness contended the  
87           stenographic transcription was inaccurate. Because  
88           the audio-visual recording is an exact recording,  
89           it would normally be relied upon to resolve any  
90           disparity; but, in rare circumstances, perhaps the  
91           stenographic transcription might be adopted by the  
92           court as a better recording."

93           Subdivision (a)(3) allows the court to order the  
94           proponent of the deposition to bear the expense of  
95           preparing a typewritten transcript when "good cause" is  
96           shown. The transcript could either be prepared  
97           simultaneously with the audio-visual recording or at a  
98           later time from the audio portion of the audio-visual  
99           recording.

100           The use of an audio-visual deposition, as stated in  
101           subdivision (b), is the same as for a stenographic  
102           deposition, which is found in Rule 32. The official  
103           comment suggests other uses and some advantages of this  
104           type of deposition:

105                   "This Rule does not expand the use of  
106                   depositions; however, as is true with other  
107                   depositions, the parties may wish to stipulate the

108 use of an audio-visual deposition in a situation  
109 where its use is not authorized hereby. In such an  
110 event, an audio-visual recording is superior to the  
111 reading of a stenographic deposition, because it  
112 provides an exact visual and audio recording of the  
113 testimony. It has many of the attributes of live  
114 testimony and will be advantageous for taking of  
115 medical and other expert testimony where both delay  
116 and cost may be minimized substantially by an  
117 audio-visual recording."

118 ~~Subdivision (d) specifies procedures to be followed~~  
119 ~~in recording an audio-visual deposition. These~~  
120 ~~procedures are designed to insure integrity of the~~  
121 ~~recording and uniformity when the deposition will be~~  
122 ~~used in other jurisdictions. In this subdivision, and~~  
123 ~~throughout the Rule, provisions have been made for~~  
124 ~~improved technology in the recording process. Changes~~  
125 ~~in the Rule will not be necessary when advancements are~~  
126 ~~made in the recording medium (e.g., from the present~~  
127 ~~"video-tape" to a disc or other method) and associated~~  
128 ~~equipment.~~

129 Subdivision (d)(9) was amended, effective March 1,  
130 1986, to reflect the 1986 amendment to NDR CivP 5(d)(1),  
131 which limits the situations when discovery materials may  
132 be filed. ~~Subdivision (d)(9), as amended, requires the~~  
133 ~~operator taking the audio-visual deposition to deliver~~  
134 ~~it or send it by registered or certified mail to the~~

135 ~~party noticing the audio-visual deposition.~~ Subdivision  
136 (d) (9) was amended, effective March 1, 1999, to allow an  
137 audio-visual deposition to be sent via a commercial  
138 delivery service offering a traceable means of shipping  
139 similar to registered or certified mail.

140 The official comment to subdivision (d) expanded on  
141 several areas:

142 "In paragraph (6) indexing is by "'\_time generator  
143 or other method \* \* \*" in anticipation that yet better  
144 techniques for indexing may be developed.

145 "Paragraph (7) provides that objections will be  
146 handled in the same manner as for stenographic  
147 depositions. However, the Special Committee anticipates  
148 that, for ease of editing of objections and testimony  
149 ordered to be struck, the parties may frequently wish to  
150 stipulate that objections may be made immediately after  
151 the answer.

152 "The Rule does not set out alternative methods of  
153 editing because improving technology may develop better  
154 techniques than those presently employed. Various  
155 techniques are currently used for editing, including (1)  
156 preparation of an edited copy omitting testimony that  
157 has been struck and (2) suppressing the audio, or audio-  
158 visual, display of any portion of the testimony struck.  
159 The integrity of the recording, regardless of the  
160 editing technique employed, requires that the original

161 recording remain unaltered and thus paragraph (8)so  
162 provides.

163 "No provisions are included for retention and  
164 storage of the recording by the clerk of court or its  
165 return at the conclusion of the proceedings. Local  
166 rules can best make provision for those matters. If the  
167 clerk of court has display equipment that cannot erase,  
168 free accessibility under his supervision would be  
169 appropriate. If not, controls should be developed by  
170 local rule or court order to preserve the integrity of  
171 the recording from inadvertent, or intentional, erasing  
172 or destruction of the recording. The videotape itself  
173 is reusable and normally should be returned to the party  
174 supplying it when the case is concluded."

175 SOURCES: Procedure Committee Minutes of January  
176 29-30, 1998, page 19; November 29, 1984, pages 29-31;  
177 October 18, 1984, page 17; April 26-27, 1979, pages 1-  
178 4; January 25-26, 1979, pages 7-10; December 7-8,  
179 1978, page 2; Uniform Audio-Visual Deposition Rule.

180 CROSS REFERENCE: Rules 27 (Depositions Before  
181 Action or Pending Appeal), 28 (Persons Before Whom  
182 Depositions May be Taken), 29 (Stipulations Regarding  
183 Discovery Procedure), 30 (Depositions Upon Oral  
184 Examination), 31 (Depositions of Witnesses Upon Written  
185 Questions), and 32 (Use of Depositions in Court  
186 Proceedings), NDR CivP.

1                   RULE 31. DEPOSITIONS OF WITNESSES  
2                   UPON WRITTEN QUESTIONS  
3

4                   \*       \*       \*       \*       \*

5                   (b) Officer to Take Responses and Prepare Record.  
6                   A copy of the notice and copies of all questions served  
7                   must be delivered by the party noticing the deposition  
8                   to the officer designated in the notice, who shall  
9                   proceed promptly, in the manner provided by Rule 30(c),  
10                  (e), and (f), to take the testimony of the witness in  
11                  response to the questions and to prepare and certify the  
12                  deposition and deliver it or send it by registered or  
13                  certified mail or a traceable third-party commercial  
14                  delivery service to the party noticing the deposition.  
15

16                   EXPLANATORY NOTE

17                  Rule 31 was amended, effective March 1, 1986; March  
18                  1, 1990; March 1, 1997; March 1, 1999.

19                  Subdivision (b) was amended, effective March 1,  
20                  1999, to allow a deposition to be sent via a commercial  
21                  delivery service offering a traceable means of shipping  
22                  similar to registered or certified mail.

23                  SOURCES: Procedure Committee Minutes of January  
24                  29-30, 1998, page 19; September 28-29, 1995, page 12;  
25                  April 20, 1989, page 2; December 3, 1987, page 11;  
26                  November 29, 1984, page 8; November 29-30, 1979, page 6;  
27                  Rule 31, FRCivP.

28                   STATUTES AFFECTED:

29                   SUPERSEDED:   Sections 31-0506, 31-0705, NDRC  
30                   1943.

31                   CROSS REFERENCE:  Rules 29 (Stipulations Regarding  
32                   Discovery    Procedure),   30   (Depositions   Upon   Oral  
33                   Examination), and 45 (Subpoena), NDR CivP;   Rule 611  
34                   (Mode and Order of Interrogation and Presentation),  
35                   NDREv.

RULE 43. EVIDENCE

(a) Form and Admissibility. In ~~all~~ every trials, the testimony of witnesses ~~shall~~ must be taken orally or by non-oral means in open court, unless otherwise provided by statute or these rules. Testimony must be taken orally unless a witness is unable to reasonably communicate orally. All evidence ~~shall~~ must be admitted which is admissible under the statutes of this State, the North Dakota Rules of Evidence, or other ~~Rules~~ rules adopted by the North Dakota Supreme Court. The court may, upon the agreement of the parties, or for good cause shown in compelling and unexpected circumstances, and upon appropriate safeguards, permit presentation of testimony in open court by contemporaneous transmission from a different location. Notice must be given to the other parties as soon as reasonably possible for testimony by contemporaneous transmission or by a witness who is unable to reasonably communicate orally.

(b) Scope of Examination and Cross-Examination. A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, superintendent or managing agent of a public or private corporation or of a partnership or association which is an adverse party, or a witness identified with an adverse party, and

interrogate ~~him~~ the witness by leading questions and contradict and impeach ~~him~~ the witness in all respects as if ~~he~~ the witness had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of ~~his~~ the witness's examination in chief.

(c) [Abrogated, effective January 1, 1980].

(d) [Abrogated, effective March 1, 1999].

~~Affirmation in Lieu of Oath. Whenever under these rules an oath is required to be taken, a solemn affirmation shall be accepted in lieu thereof as provided by the North Dakota Rules of Evidence.~~

~~(e) Evidence on Motions. When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.~~

#### EXPLANATORY NOTE

Rule 43 was amended, effective 1976; January 1, 1980; March 1, 1999.

~~Rule 43 is derived from Rule 43, FRCivP.~~

~~Rule 43(a) was amended in 1976 to reflect the adoption and promulgation of the North Dakota Rules of Evidence. Those rules generally control the~~



55 ~~admissibility of evidence in all civil trials, unless~~  
56 ~~otherwise provided by statute or rule. Matters of~~  
57 ~~competency and privileges of witnesses, although not~~  
58 ~~specifically referred to in the rule, are also governed~~  
59 ~~by the North Dakota Rules of Evidence unless otherwise~~  
60 ~~provided by statute or other rules adopted by the North~~  
61 ~~Dakota Supreme Court.~~

62 ~~In subdivision (a), the provision for taking~~  
63 ~~testimony in open court was retained, but those~~  
64 ~~provisions dealing with admissibility of evidence and~~  
65 ~~competency of witnesses were deleted.~~

66 Subdivision (a) was amended, effective March 1,  
67 1999, to follow the 1996 federal amendment. See 1996  
68 Advisory Committee Note, Rule 43, Fed.R.Civ.P. The  
69 requirement for testimony to be taken orally is deleted.  
70 The rule now allows testimony of a witness to be given  
71 in open court by non-oral means, if the witness is  
72 unable to reasonably communicate orally. The amendment  
73 also provides for presentation of testimony in open  
74 court by contemporaneous transmission from a different  
75 location. However, the amendment is not intended to  
76 allow contemporaneous transmission based upon mere  
77 convenience for a witness as the requirement for "good  
78 cause shown in compelling and unexpected circumstances"  
79 is not met. The parties may agree to such evidence, but  
80 trial court approval is necessary. Ordinarily,  
81 deposition testimony should be used over contemporaneous

82 transmission. In addition, due process for an  
83 involuntary commitment hearing requires the respondent  
84 have an opportunity to confront and cross-examine  
85 witnesses. In Interest of J.S., 530 N.W.2d 331, 335  
86 (N.D. 1995).

87 Although abrogated in the federal rule after  
88 adoption of the Rules of Evidence, subdivision (b) on  
89 examination and cross-examination of unwilling, hostile,  
90 and adverse witnesses has been retained, with the  
91 addition of the phrase, "a witness identified with an  
92 adverse party," effective January 1, 1980. This phrase  
93 is borrowed from Rule 611 of the Rules of Evidence which  
94 deals generally with the mode and order of interrogation  
95 and presentation of witnesses. The added phrase is  
96 designed to enlarge the category of adverse witnesses  
97 callable. Retention of subdivision (b) is designed to  
98 assure the retention of the rights to call and  
99 interrogate an adverse witness by leading questions and  
100 of the adverse party to cross-examine that witness upon  
101 the subject matter of his examination in chief, which  
102 Rule 611 does not clearly do as a matter of right.

103 ~~Subdivision (c) was abrogated, effective January 1,~~  
104 ~~1980, to comport with the same action in the federal~~  
105 ~~rules. It concerned making an offer of proof and making~~  
106 ~~a record of excluded evidence, both matters now covered~~  
107 ~~in Rule 103, North Dakota Rules of Evidence.~~

108           The federal rule contains a subdivision (f)  
109 governing the appointment of interpreters. This is not  
110 needed in these rules, as it is adequately covered in  
111 Section 31-01-11, NDCC.

112           SOURCES: Procedure Committee Minutes of January  
113 29-30, 1998, pages 11-13; September 25-26, 1997, pages  
114 10-11; November 29-30, 1979, page 16; April 26-27,  
115 1979, pages 17-18; September 23-24, 1976, page 79;  
116 June 3-4, 1976, pages 16-18; Rule 43, FRCivP.

117           STATUTES AFFECTED:

118                   SUPERSEDED: Sections 31-0122, 31-0202, 31-  
119 0206, NDRC 1943.

120           CROSS REFERENCE: Rules 101 (Scope), 103 (Rules on  
121 Evidence), 104 (Preliminary Questions), 603 (Oath or  
122 Affirmation), 607 (Who May Impeach), and 611 (Mode and  
123 Order of Interrogation and Presentation), NDREv.

RULE 45. SUBPOENA

\* \* \* \* \*

(f) Notice. All subpoenas commanding pretrial or prehearing production, inspection or copying must contain the following notice:

"You may object to this subpoena by ~~mailing~~ sending or delivering a written objection, stating your valid reason, to [Insert the name and address of the party, or attorney representing the party seeking production, inspection or copying]. Any objection must be received within 10 days after you receive the subpoena. If the time specified in the subpoena for compliance is less than 10 days, any objection must be received at least 24 hours before the time specified for compliance.

If you make a timely objection, you do not need to comply with this subpoena unless the court orders otherwise. You will be notified if the party serving the subpoena seeks a court order compelling compliance with this subpoena. You will then have the opportunity to contest enforcement.

Failure to obey this subpoena, without making a timely objection, and stating a valid reason, may be contempt of court."

28 EXPLANATORY NOTE

29 Rule 45 was amended, effective July 1, 1981;  
30 January 1, 1988; January 1, 1995; March 1, 1997; March  
31 1, 1999.

32 Rule 45 was revised, effective January 1, 1995, in  
33 response to the 1991 federal revision. Significant  
34 changes to North Dakota's rule include the following:  
35 (1) An action must be filed before a subpoena may  
36 issue; (2) A subpoena may compel a non-party to produce  
37 evidence independent of any deposition; (3) A subpoena  
38 may compel the inspection of premises in the possession  
39 of a non-party upon order of the court for good cause  
40 shown; and (4) Notice must be printed on a subpoena  
41 advising of the right to object when pretrial or  
42 prehearing production or inspection is commanded. The  
43 scope of discovery under Rule 26 is not intended to be  
44 altered by the revision.

45 Subdivision (f) was amended, effective March 1,  
46 1999, to allow an objection to a subpoena to be sent via  
47 a commercial carrier as an alternative to mail.

48 SOURCES: Procedure Committee Minutes of January  
49 29-30, 1998, page 20; January 25-26, 1996, page 20;  
50 January 27-28, 1994, pages 11-16; April 29-30, 1993,  
51 pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May  
52 21-22, 1987, page 3; February 19-20, 1987, pages 3-4;  
53 October 30-31, 1980, pages 26-29; November 29-30, 1979,  
54 page 12; Rule 45, FRCivP.

55                   STATUTES AFFECTED:

56                   SUPERSEDED:   Sections 31-0113, 31-0120, 31-  
57                   0121 31-0302, 31-0303, 31-0305, 31-0306, 31-0310,  
58                   31-0311, 31-0312, 31-0314, NDRC 1943; Section 31-  
59                   05-22, NDCC.

60                   CROSS REFERENCE:   Rules 26 (General Provisions  
61                   Governing Discovery), 30 (Depositions Upon Oral  
62                   Examination), and 31 (Depositions of Witnesses Upon  
63                   Written Questions), NDR CivP;   Rule 17 (Subpoena)  
64                   NDR CrimP.

RULE 51. INSTRUCTIONS TO JURY

(a) Instructions to Jury-Written or Oral. Immediately after the jury is sworn, the court may instruct the jury concerning its duties, its conduct, the order of proceedings, the elementary legal principles governing the proceeding, and the procedure for submitting written questions of witnesses as provided in Rule 6.8, N.D.R.Ct., if allowed by the court. The Court shall instruct the jury immediately before or after the arguments of counsel, ~~to the jury are concluded.~~ The court shall instruct the jury only as to the law of the case. The instructions ~~shall~~ must be reduced to writing unless the parties otherwise agree. If written instructions are given they ~~shall~~ must be signed by the judge and ~~shall~~ must be taken by the jurors in their retirement. When oral instructions are given, they ~~shall~~ may not be taken by the jurors in retirement unless, after they have been transcribed, it is so ordered by the court. All instructions taken by the jurors in retirement ~~shall~~ must be returned into court with their verdict.

(b) Requested Instructions. At the close of the evidence or at ~~such an~~ an earlier time during the trial as the court reasonably directs, any party may file proposed jury instructions ~~written requests that the court instruct the jury on the law as set forth in the requests.~~ The court may require ~~that~~ each instruction to be written on a separate sheet, provided ~~that~~ North Dakota pattern jury instructions may be requested by reference to instruction number only. The

28 court shall inform counsel in writing of its action upon  
29 requested instructions prior to their argument to the jury.  
30 All instructions given by the court to the jurors must be read  
31 or given to them orally by the court without disclosing  
32 whether ~~such~~ the instructions were requested.

33 (c) Exceptions to Instructions. The giving of  
34 instructions and the failure to instruct the jurors are deemed  
35 excepted to unless the court, before instructing the jurors,  
36 submits to counsel the written instructions it proposes to  
37 give to the jurors and asks for exceptions to be noted.  
38 Thereupon, counsel shall designate the parts or omissions ~~of~~  
39 ~~such instructions as that~~ counsel considers objectionable.  
40 Thereafter, only the parts or omissions so designated are  
41 deemed excepted to by the counsel designating the same. All  
42 proceedings connected with the taking of ~~such~~ exceptions must  
43 be in the absence of the jurors and a reasonably sufficient  
44 time must be allowed counsel to take exceptions and to note  
45 them in the record of the proceedings.

46  
47 EXPLANATORY NOTE

48 Rule 51 was amended, effective 1971; March 1, 1990; March  
49 1, 1999.

50 ~~Rule 51 is one of the few rules not derived from the~~  
51 ~~federal rule. Instead, it is taken substantially from North~~  
52 ~~Dakota statutes in effect at the time of the adoption of these~~  
53 ~~rules in 1957.~~

54 This rule is similar to Rule 30, N.D.R.Crim.P.



55           ~~Subdivision (a) was amended, effective March 1, 1999, to~~  
56           ~~provide for expanded preliminary jury instructions.~~

57           ~~Subdivision (a) was taken from Section 28-1411, NDRC~~  
58           ~~1943. It provides when and upon what the jury is to be~~  
59           ~~instructed, and the methods of doing so.~~

60           ~~The requesting of instructions is governed by subdivision~~  
61           ~~(b), originally taken from Section 28-1412, NDRC 1943, but~~  
62           ~~amended in 1971 to partially comply with the federal rule and~~  
63           ~~to delete the provision requiring the judge to write "given"~~  
64           ~~or "refused" in the margin of each requested instruction.~~

65           ~~In requiring the court to inform counsel of its action~~  
66           ~~upon requested instructions, counsel are informed as to which~~  
67           ~~requests are granted or denied, thus enabling counsel to argue~~  
68           ~~the facts in light of the court's instruction upon the law.~~

69           ~~Subdivision (c) specifies when exceptions to instructions~~  
70           ~~must be noted. This is taken from Sections 28-1413 and 28-~~  
71           ~~1414, NDRC 1943. Subdivision (c) was amended, effective March~~  
72           ~~1, 1990. The amendments are technical in nature and no~~  
73           ~~substantive change is intended.~~

74           SOURCES: Procedure Committee Minutes of September 25-26,  
75           1997, pages 16-17; April 20, 1989, pages 2-3; December 3,  
76           1987, page 11; November 29-30, 1979, pages 13-14; Rule 51,  
77           FRCivP.

78           STATUTES AFFECTED:

79           SUPERSEDED: Sections 28-1411, 28-1412, 28-1413, 28-  
80           1414, NDRC 1943.

81           CROSS REFERENCE:   Rule 46 (Exceptions Unnecessary),  
82   NDR CivP; Rule 30 (Instructions), NDR CrimP; Rule 103 (Rulings  
83   on Evidence), NDREv.

1                   RULE 77. DISTRICT COURTS AND CLERKS

2  
3           (a) District Courts Always Open.    The district  
4 courts ~~shall be~~ is deemed to always be open for the  
5 purpose of filing any pleading or other proper paper, of  
6 issuing and returning mesne and final process, and of  
7 making and directing all interlocutory motions, orders,  
8 and rules.

9           (b) Trials and Hearings Orders in Chambers.   All  
10 trials upon the merits ~~shall~~ must be conducted in open  
11 court and so far as convenient in a regular court room.  
12 All other acts or proceedings may be done or conducted  
13 by a judge in chambers, without the attendance of the  
14 clerk or other court officials and at any place either  
15 within or without the district; but no hearing, other  
16 than one ex parte, ~~shall~~ may be conducted outside the  
17 district without the consent of all parties affected  
18 thereby.

19           (c) Clerk's Office and Orders by Clerk.   All  
20 motions and applications in the clerk's office for  
21 issuing mesne process, for issuing final process to  
22 enforce and execute judgments, and for other proceedings  
23 ~~that do not require~~ requiring allowance by or an order  
24 of the court are grantable of course by the clerk; but  
25 the court upon cause shown may suspend, alter, or  
26 rescind the clerk's action.

27 (d) Notice of Entry of Judgment Served. Within 10  
28 days after entry of judgment in an action in which an  
29 appearance has been made, notice of ~~such~~ entry of  
30 judgment, together with a copy of ~~such~~ the judgment or a  
31 general description of the nature and amount of relief  
32 and damages ~~thereby~~ granted, ~~shall~~ must be served by the  
33 prevailing party upon the adverse party and filed.  
34 Service of notice of entry of judgment is not necessary  
35 to begin the time for filing a post-judgment motion or  
36 an appeal if the record clearly evidences actual  
37 knowledge of entry of judgment through the affirmative  
38 action of the moving or appealing party.

39  
40 EXPLANATORY NOTE

41 Rule 77 was amended, effective March 1, 1990; March  
42 1, 1999.

43 ~~Subdivisions (a) and (b) are identical to Rule~~  
44 ~~77(a) and (b), FRCP.~~

45 ~~Both the Federal Rule 77(c) and the North Dakota~~  
46 ~~Rule 77(c) set forth motions and applications grantable~~  
47 ~~of course by the clerk. The federal rule covers~~  
48 ~~additional matters.~~

49 Subdivision (c) was amended, effective March 1,  
50 1990. The amendment is technical in nature and no  
51 substantive change is intended.

52           Although subdivision (d) only refers to a judgment,  
53           Rule 54(a) defines a judgment as including "any order  
54           from which an appeal lies."

55           Subdivision (d) varies considerably from the  
56           federal rule. In an action where an appearance has been  
57           made by an adverse party, the prevailing party has 10  
58           days after entry of judgment in which to serve the  
59           adverse party with notice of entry of judgment. The 60-  
60           day time period for appeal by the adverse party does not  
61           start until notice of entry of judgment is served [see  
62           Rule 4(a), NDRAppP].

63           Subdivision (d) was amended, effective March 1,  
64           1999, to incorporate the case law exception holding  
65           service of notice of entry of judgment is not necessary  
66           to start the time running for filing a post-judgment  
67           motion or an appeal if the record clearly evidences  
68           actual knowledge of entry of judgment by the affirmative  
69           action of the moving or appealing party. See Gierke v.  
70           Gierke, 1998 ND 100, ¶¶ 6-12, 578 N.W.2d 522, 525-26;  
71           Thorson v. Thorson, 541 N.W.2d 692, 694-95 (N.D. 1996).

72           ~~Subdivision (c) was amended, effective March 1,~~  
73           ~~1990. The amendment is technical in nature and no~~  
74           ~~substantive change is intended.~~

75           SOURCES: Procedure Committee Minutes of April 30-  
76           May 1, 1998, pages 12-13; April 20, 1989, page 2;  
77           December 3, 1987, page 11; January 17-18, 1980, pages  
78           9-10; Rule 77, FRCivP.

79                   STATUTES AFFECTED:   Sections 28-2002, NDRC 1943,  
80                   and 27-05-07, NDCC.  
81                   CROSS REFERENCE:   Rule 4 (Appeal When Taken),  
82                   NDRAppP.

RULE 30. INSTRUCTIONS

(a) Instructions to Jury; Written or Oral. Immediately after the jury is sworn, the court may instruct the jury concerning its duties, its conduct, the order of proceedings, and the elementary legal principles governing the proceeding. The court shall instruct the jury immediately before or after the arguments of counsel, ~~to the jury are concluded.~~ The court shall instruct the jury only as to the law of the case. The instructions ~~shall~~ must be reduced to writing unless the parties otherwise agree. If written instructions are given they ~~shall~~ must be signed by the judge and ~~shall~~ must be taken by the jurors in their retirement. When oral instructions are given, they ~~must~~ may not be taken by the jurors in retirement unless, after they have been transcribed, it is so ordered by the court. All instructions taken by the jurors in retirement ~~shall~~ must be returned into court with their verdict.

(b) Requested Instructions. At the close of the evidence or at such an earlier time during the trial as the court reasonably directs, any party may file proposed jury instructions ~~written requests that the court instruct the jury on the law as set forth in the requests.~~ The court may require that each instruction to be written on a separate sheet, provided ~~that~~ North Dakota pattern jury instructions may be requested by reference to instruction number only. The court shall inform counsel in writing of its action upon requested instructions prior to their argument to the jury.

28 All instructions given by the court to the jurors must be read  
29 or given to them orally by the court without disclosing  
30 whether the instructions were requested.

31 (c) Exceptions to Instructions. The giving of  
32 instructions and the failure to instruct the jurors are deemed  
33 excepted to unless the court, before instructing the jurors,  
34 submits to counsel the written instructions it proposes to  
35 give to the jurors and asks for exceptions to be noted.  
36 Thereupon, counsel shall designate the parts or omissions of  
37 ~~the instructions as that~~ counsel considers objectionable.  
38 Thereafter, only the parts or omissions so designated are  
39 deemed excepted to by the counsel designating the same. All  
40 proceedings connected with the taking of exceptions must be in  
41 the absence of the jurors and a reasonably sufficient time  
42 must be allowed counsel to take exceptions and to note them in  
43 the record of the proceedings.

44  
45 EXPLANATORY NOTE

46 Rule 30 was amended, effective March 1, 1986; March 1,  
47 1990; March 1, 1999.

48 This rule is ~~identical~~ similar to Rule 51, NDR CivP. Rule  
49 ~~30 was amended, effective March 1, 1990. The amendments are~~  
50 ~~technical in nature and no substantive change is intended.~~

51 Subdivision (a) was amended, effective March 1, 1999, to  
52 provide for preliminary jury instructions.

53 SOURCES: Minutes of Rules Committee Meetings of September  
54 25-26, 1997, pages 16-17; April 20, 1989, page 4; December 3,



1987, page 15; November 29, 1984, page 6; June 21, 1984,  
page 6; April 24-26, 1973, page 12; October 17-20, 1972,  
pages 38-41; September 26-27, 1968, pages 14-15; FRCrimP,  
Rule 30; ~~Wright, Federal Practice and Procedure: Criminal,~~  
~~§ 481-502 (1969); 8 Moore's Federal Practice, Chapter 30~~  
~~(Cipes, 2d Ed. 1970); Barron, Federal Practice and Procedure:~~  
~~Criminal, § 2231-2235 (1951); NDRCivP, Rule 51, as amended~~  
~~August 1, 1971.~~

STATUTES AFFECTED:

SUPERSEDED: 29-21-30, 29-21-31, 29-21-32,\* 29-21-  
33, 33-07-17, NDCC.

CONSIDERED: 29-22-04, 29-22-05, 29-22-06, 33-12-20,  
NDCC.

\*Section 29-21-32 is superseded except as it relates to  
the court reporter's fees.

1 RULE 32. SENTENCE AND JUDGMENT

2  
3 (a) Sentence.

4 (1) Imposition of Sentence. Sentence must be  
5 imposed or other authorized disposition made without  
6 unreasonable delay. ~~Pending~~ Until disposition, the  
7 court may ~~commit the defendant or~~ continue or alter the  
8 bail or require the defendant to be held without bail.  
9 Before imposing sentence, the court shall:

10 ~~(i)~~ (A) determine ~~that~~ the defendant and the  
11 defendant's counsel ~~have~~ had ~~the~~ an opportunity to read  
12 and discuss the presentence investigation report if made  
13 available ~~pursuant to~~ under subdivision (c) ~~(3) (i)~~ (4) (A)  
14 or a summary ~~thereof~~ made available ~~pursuant to~~ under  
15 subdivision (c) ~~(3) (ii)~~ (4) (C);

16 ~~(ii)~~ (B) ~~give~~ afford counsel an opportunity to  
17 speak on behalf of the defendant; and

18 ~~(iii)~~ (C) ~~address the defendant personally, except~~  
19 ~~as provided by Rule 43, to~~ determine whether the  
20 defendant wishes to make a statement in the defendant's  
21 own behalf or wishes to present ~~any~~ information in  
22 mitigation of punishment or information which would  
23 require the court to withhold pronouncement of judgment  
24 and sentence: ~~if the defendant expresses a desire to do~~  
25 ~~so, the court shall provide the defendant with that~~  
26 opportunity. The prosecution must be given an

27 opportunity to be heard on any matter material to the  
28 imposition of sentence.

29 (2) Notification of Right to Appeal. After  
30 imposing sentence in a case that has gone to trial ~~on a~~  
31 ~~plea of not guilty~~, the court shall advise the defendant  
32 of the defendant's right to appeal and of the right of a  
33 person who is unable to pay the costs of an appeal to  
34 apply for appointment of counsel for purposes of appeal.  
35 The court is under no duty to advise the defendant of  
36 any right of appeal after sentence is imposed following  
37 a plea of guilty.

38 (b) Judgment. A judgment of conviction must ~~set~~  
39 ~~forth~~ include the plea, the verdict, and the  
40 ~~adjudication of~~ sentence imposed. If the defendant is  
41 found not guilty or for any reason is entitled to be  
42 discharged, judgment must be entered accordingly. The  
43 judgment must be signed by the judge and entered by the  
44 clerk.

45 (c) Presentence Investigation.

46 (1) When Made. The court may order a presentence  
47 investigation and report at any time. Except with the  
48 written consent of the defendant, the report may not be  
49 submitted to the court or its contents disclosed unless  
50 the defendant has pleaded guilty or has been found  
51 guilty.

52 (2) Presence of Counsel. The defendant's counsel  
53 is entitled to notice and a reasonable opportunity to

54 attend any interview of the defendant by parole and  
55 probation staff in the course of a presentence  
56 investigation.

57 (2) (3) Report.

58 (A) The report of the presentence investigation may  
59 contain any previous criminal record of the defendant  
60 and such information about the defendant's  
61 characteristics, including the defendant's family,  
62 educational, and social history, the defendant's  
63 employment history and financial condition and the  
64 circumstances affecting the defendant's behavior as  
65 which may be helpful in imposing sentence or in granting  
66 probation or in the correctional treatment of the  
67 defendant, and any information required by the court.

68 (B) The following types of information may not be  
69 included in a presentence report, but may be submitted  
70 to the court as an addendum to the report:

71 (i) any diagnostic or prognostic opinion that,  
72 if disclosed, might seriously disrupt a program of  
73 rehabilitation;

74 (ii) information or sources of information  
75 obtained confidentially, but subject to disclosure  
76 by the court as provided in subdivision (C) (4) (A);

77 (iii) any sentence recommendation by parole  
78 and probation staff or the victim;

79 (iv) any victim impact statement;

80           (v) any other information, including medical,  
81           psychiatric, or psychological information,  
82           information relating to the victim or victims, and  
83           other matters the court may consider confidential,  
84           that if disclosed, might result in harm, physical  
85           or otherwise, to the defendant, to a victim, or to  
86           other persons.

87           ~~(3)~~ (4) Disclosure.

88           ~~(i) At least 10 days before imposing sentence,~~  
89           ~~unless this minimum period is waived by the~~  
90           ~~defendant, the court shall provide the defendant,~~  
91           ~~and the defendant's counsel if the defendant is so~~  
92           ~~represented, with a copy of the report of the~~  
93           ~~presentence investigation unless in the opinion of~~  
94           ~~the court the report contains information which if~~  
95           ~~disclosed would be harmful to the defendant or~~  
96           ~~other persons, and the court shall afford the~~  
97           ~~defendant and the defendant's counsel an~~  
98           ~~opportunity to comment on the report and, in the~~  
99           ~~discretion of the court, to introduce testimony or~~  
100           ~~other information relating to any alleged factual~~  
101           ~~inaccuracy contained in the presentence report.~~

102           (A) The presentence investigation report is  
103           confidential and may not be read or copied by the  
104           public, or copied by the parties unless permitted  
105           by the court in its discretion. Any addendum to  
106           the presentence investigation report is

107 confidential and may not be read or copied by the  
108 public or the parties unless permitted by the court  
109 in its discretion. If the court is of the opinion  
110 the report contains information that would be  
111 harmful to the defendant or other persons if  
112 disclosed, the court may not allow the public or  
113 the parties to read or copy that portion of the  
114 presentence investigation report or addendum.

115 (B) Any disclosure to the defendant of the  
116 presentence investigation report and addendum, or  
117 any part thereof, must occur at least 10 days  
118 before sentence is imposed unless this minimum  
119 period is waived by the defendant. Any disclosure  
120 to the defendant must be made by providing the  
121 defendant and the defendant's counsel with a copy  
122 of the material to be disclosed. The defendant and  
123 the defendant's counsel must be given an  
124 opportunity to comment on the disclosed material,  
125 and in the discretion of the court, to introduce  
126 testimony or other information relating to any  
127 alleged factual inaccuracy.

128 ~~(ii)~~ (C) If the court ~~is of the view that~~  
129 ~~finds~~ there is information in the presentence  
130 report or addendum, ~~disclosure of~~ which would be  
131 harmful to the defendant or to other persons if  
132 disclosed, the court ~~in lieu of making the report~~  
133 ~~or part thereof available~~ shall state orally or in

134 writing a summary of the factual information  
135 ~~contained therein~~ to be relied on in determining  
136 sentence, and shall give the defendant or the  
137 defendant's counsel an opportunity to comment  
138 ~~thereon~~. The statement may be made to the parties  
139 in camera.

140 ~~(iii)~~ (D) Any material ~~that may be~~ disclosed  
141 to the defendant and the defendant's counsel must  
142 also be disclosed to the prosecuting attorney.

143 ~~(iv)~~ (E) If the comments of the defendant and  
144 the defendant's counsel or testimony or other  
145 information introduced by them allege any factual  
146 inaccuracy in the presentence investigation report  
147 ~~or the summary of the report or part thereof~~ any of  
148 the information summarized, the court, as to each  
149 matter controverted, shall make (i) a finding as to  
150 the allegation, or (ii) a determination ~~that~~ no  
151 finding is necessary because the matter  
152 controverted will not be taken into account in  
153 sentencing. A written record of those findings and  
154 determinations must be appended to and accompany  
155 any copy of the presentence investigation report  
156 ~~thereafter~~ later made available to the State Parole  
157 Board or to the pardon clerk.

158 (d) Plea Withdrawal.

159 (1) The court shall allow the defendant to withdraw  
160 a plea of guilty whenever the defendant, ~~upon~~ on a

161 timely motion for withdrawal, proves ~~that~~ withdrawal is  
162 necessary to correct a manifest injustice.

163 (2) A motion for withdrawal is timely if made with  
164 due diligence, considering the nature of the allegations  
165 ~~therein~~, and is not necessarily barred because made  
166 subsequent to judgment or sentence.

167 (3) In the absence of a showing that withdrawal is  
168 necessary to correct a manifest injustice, a defendant  
169 may not withdraw a plea of guilty as a matter of right  
170 once the plea has been accepted by the court. Before  
171 sentence, the court in its discretion may allow the  
172 defendant to withdraw a plea for any fair and just  
173 reason unless the prosecution has been substantially  
174 prejudiced by reliance upon the defendant's plea.

175 (e) Probation. After conviction of an offense, the  
176 defendant may be placed on probation as provided by law.

177 (f) Revocation of Probation Where the Court Retains  
178 Jurisdiction Under the Law.

179 (1) Taking Into Custody. ~~Upon~~ On probable cause to  
180 believe ~~that~~ a probationer has violated a condition of  
181 probation, any State parole and probation officer, or  
182 any peace officer ~~upon direction of~~ directed by a State  
183 parole and probation officer or ~~upon direction or~~  
184 directed by an order of the court having jurisdiction  
185 may take the probationer into custody and ~~thereafter~~  
186 ~~shall forthwith~~ bring the probationer before the court  
187 that originally placed the probationer ~~upon~~ on probation



188 for a hearing on the alleged violation. Costs incurred  
189 in bringing the probationer before the court must be  
190 borne by the county ~~wherein~~ in which the probation was  
191 granted. The probationer may be admitted to bail  
192 pending the hearing.

193 (2) Hearing. The hearing ~~shall~~ must be in open  
194 court with:

- 195 ~~(i)~~ (A) ~~The~~ the probationer present,
- 196 ~~(ii)~~ (B) ~~A~~ a prior written notice of the  
197 alleged violation given to the probationer, and
- 198 ~~(iii)~~ (C) ~~Representation~~ representation by  
199 retained or appointed counsel unless waived.

200 If the violation is contested, the prosecution shall  
201 establish the violation by a preponderance of the  
202 evidence. ~~Upon~~ After the hearing, the court, subject to  
203 limitations imposed by law, may revoke an order  
204 suspending a sentence or an order suspending the  
205 imposition of sentence, or continue probation on the  
206 same or different conditions, as the circumstances  
207 warrant. A record of the proceedings must be made ~~in~~  
208 ~~such manner that it can be transcribed as needed.~~

209  
210 EXPLANATORY NOTE

211 Rule 32 was amended, effective January 1, 1980;  
212 March 1, 1986; March 1, 1990; March 1, 1992, on an  
213 emergency basis; July 14, 1993; March 1, 1999.

214           Rule 32 was amended, effective March 1, 1999, to  
215           address whether a presentence investigation report and  
216           any addendum may be inspected by the public or the  
217           parties.

218           When conducting a presentence investigation, parole  
219           and probation staff must be mindful they cannot make a  
220           binding promise of complete confidentiality as to  
221           information included in the addendum to a presentence  
222           report. The promise of confidentiality is subject to  
223           the court's discretion to allow the parties to inspect  
224           the addendum.

225           ~~Rule 32 is similar to FRCrImP 32.~~

226           ~~Subdivision (a) deals with sentencing and follows~~  
227           ~~the federal rule with the addition of a provision for~~  
228           ~~bail pending disposition of sentence and the deletion of~~  
229           ~~a provision requiring the clerk of court, if requested~~  
230           ~~by the defendant, to file a notice of appeal on behalf~~  
231           ~~of the defendant.~~

232           ~~Subdivision (a)(1), as amended effective March 1,~~  
233           ~~1986, requires the court to determine that the defendant~~  
234           ~~and the defendant's counsel have had an opportunity to~~  
235           ~~read and discuss the presentence report or summary.~~  
236           ~~This change follows the federal rule as amended in 1983.~~

237           ~~Subdivision (b) provides for judgment, and follows~~  
238           ~~the language of the federal rule follows Rule 32(d),~~  
239           ~~Fed.R.Civ.P.; but the words "or findings" are omitted~~  
240           ~~from the first sentence as unnecessary. Section 1-01-~~

241 41, NDCC, includes in the definition of "verdict,"  
242 findings of fact by the judge. ~~Subdivision (b) of the~~  
243 ~~federal rule includes a provision for a judgment of~~  
244 ~~criminal forfeiture which authorizes the Attorney~~  
245 ~~General to seize the property subject to forfeiture.~~

246 Subdivision (c) (1) makes a presentence  
247 investigation and report discretionary with the court  
248 and differs from its federal counterpart which makes a  
249 presentence report mandatory subject to waiver by the  
250 defendant or a specific finding by the court that the  
251 record includes sentencing discretion.

252 Subdivision (c) (2) is similar to its federal  
253 counterpart. Although this subdivision does not contain  
254 explicit language dealing with information concerning  
255 victims of the offense, as the federal rule does, the  
256 language is intended to be broad enough to include that  
257 information.

258 Subdivision (c) (3) follows its federal counterpart  
259 as amended in 1983 and provides for the disclosure of  
260 the presentence report to the defendant and the  
261 defendant's counsel a reasonable time before sentencing.  
262 This provision permits the defendant and the defendant's  
263 counsel to have an opportunity to review the report for  
264 any inaccurate, incomplete or misleading information and  
265 to point it out to the court and, effective January 1,  
266 1980, at the discretion of the court, introduce  
267 testimony or other information.

Subdivision (c) (3) (iv), as amended effective March 1, 1986, follows the 1983 amendment to the federal rule, and requires the sentencing court to make a finding as to any alleged factual inaccuracies in the presentence report or to determine that no finding is necessary because the issue controverted will not be taken into account in sentencing. The rule is intended to insure an accurate presentence report for sentencing purposes and for later custody or parole determinations.

Subdivision (d) is adapted from A.B.A. Standards relating for Criminal Justice, Standards Relating to Pleas of Guilty, §§ 2.1(a), 2.1(a)(i) and 2.1(b). (Approved Draft, 1968).

Subdivision (e) deals with probation. Whenever a sentence for a felony is suspended (Section 12-53-06, NDCC) or is deferred (Section 12-53-13, NDCC) the court shall place the defendant on probation. Section 12-53-04 provides that the court may place the defendant on probation or parole as part of an order suspending a sentence of imprisonment in a county jail upon a conviction for a misdemeanor.

Subdivision (f) has no counterpart in FRCrimP 32, however, FRCrimP 32.1 deals with the same subject in a different way. Subdivision (f) is not intended to include those situations in which the court no longer has jurisdiction over the individual.

Subdivision (f)(1) is adapted from and supersedes NDCC § 12-53-15. ~~The subdivision, as amended effective January 1, 1980, clarifies that a probationer may be admitted to bail pending the hearing.~~

Subdivision (f)(2) is adapted in part from the A.B.A. Standards for Criminal Justice, Standards Relating to Probation, § 5.4 at 65 (Approved Draft, 1970).

~~An appeal from revocation of probation is not precluded under Section 12-53-20, NDCC. See State v. Lesmeister, 288 N.W.2d 57 (N.D. 1980), NDCC § 29-28-07(5).~~

~~Subdivisions (a), (c), (d) and (f) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

~~Subdivision (c) was amended, effective March 1, 1992, to track the federal rule.~~

SOURCES: Procedure Committee Minutes of January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30, 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6; December 7 8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15, 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February

321 20-21, 1969, pages 5-14; FRCrimP, Rule 32, ~~48 F.R.D.~~  
322 ~~553, 612 (1970); 52 F.R.D. 409, 454 (1951); Wright,~~  
323 ~~Federal Practice and Procedure: Criminal, § 521-550;~~  
324 ~~8A Moore's Federal Practice, Chapter 32 (Cipes, 2d Ed.~~  
325 ~~1970); A.B.A. Standards for Criminal Justice, Standards~~  
326 ~~Relating to Pleas of Guilty (Approved Draft, 1968);~~  
327 ~~Standards Relating to Probation (Approved Draft, 1970).~~

328 STATUTES AFFECTED:

329 SUPERSEDED: 12-53-15, 29-14-22, 29-26-01, 29-  
330 26-02, 29-26-15, 29-26-19, 33-12-26, 33-12-27, 33-  
331 12-29, NDCC.

332 CONSIDERED: 1-01-41, 12-53-03, 12-53-04, 12-  
333 53-05, 12-53-06, 12-53-10, 12-53-11, 12-53-12, 12-  
334 53-13, 12-53-14, 12-53-17, 12-53-20, 12-55-30, 29-  
335 26-03, 29-26-11, 29-26-12, 29-26-13, 29-26-14, 29-  
336 26-16, 29-26-17, 29-26-18, 29-26-20, 29-26-23, 33-  
337 12-28, NDCC.

1                   RULE 32.1. DEFERRED IMPOSITION OF SENTENCE

2  
3           An order deferring imposition of sentence for an  
4           infraction or a misdemeanor must provide for withdrawal of the  
5           defendant's plea of guilty, or for the verdict of guilty to be  
6           set aside, the case to be dismissed, and the file to be sealed  
7           61 days after expiration or termination of probation, unless  
8           otherwise ordered by the court.

9  
10                   EXPLANATORY NOTE

11           Rule 32.1 was adopted, effective March 1, 1999. The  
12           purpose of the rule is to provide uniformity in the processing  
13           of deferred impositions of sentence, and to prevent the  
14           disparity of treatment received by defendants depending upon  
15           their county of venue in misdemeanor cases. See Appendix Form  
16           8.

17           When deferring imposition of sentence, the judge should  
18           advise the defendant if the defendant fulfills the conditions  
19           of probation the guilty plea will be withdrawn, or the guilty  
20           verdict set aside, the case dismissed, and the file sealed.  
21           See Section 12.1-32-07.1 and 12.1-03-07.2, N.D.C.C.

22           An order deferring imposition of sentence is not a  
23           judgment. However, for purpose of appeal, an order deferring  
24           imposition of sentence is equivalent to a judgment under Rule  
25           32(b), N.D.R.Crim.P. See N.D.C.C. § 12.1-32-02(4); State v.  
26           Trosen, 547 N.W.2d 735, 737 n.1 (N.D. 1996).

27                    SOURCES: Procedure Committee Minutes of January 29-30,  
28                    1990, pages 14-17; September 25-26, 1997, pages 8-10.



1                   RULE 37. APPEAL AS OF RIGHT TO DISTRICT  
2                   COURT; HOW TAKEN  
3

4                   \*       \*       \*       \*       \*

5                   (d) Service of the Notice of Appeal. The clerk of  
6 the trial court shall serve notice of the filing of the  
7 notice of appeal ~~either by personal service on the~~  
8 ~~defendant, or by mail addressed to him, and by mailing a~~  
9 ~~copy thereof~~ In addition, the clerk shall mail or send  
10 by third-party commercial carrier a copy of the notice  
11 of the filing of the notice of appeal to the prosecutor  
12 and to the defendant's counsel, if any, of record. The  
13 clerk shall also ~~mail~~ send a copy of the notice of  
14 appeal and of the docket entries to the clerk of the  
15 appellate court. The clerk shall note on each copy  
16 served the date on which the notice of appeal was filed.  
17 Failure of the clerk to serve notice ~~shall~~ does not  
18 affect the validity of the appeal. Service ~~shall be~~ is  
19 sufficient notwithstanding the death of a party or the  
20 party's ~~his~~ counsel. The clerk shall note in the docket  
21 the names of the parties to whom copies are sent ~~he~~  
22 ~~mails copies, with the date of mailing and the date they~~  
23 were sent.

24                   \*       \*       \*       \*       \*

25  
26                   EXPLANATORY NOTE

27           Rule 37 was amended, effective September 1, 1983;  
28           March 1, 1986; January 1, 1995; March 1, 1999.

29           Rule 37 has no counterpart in the Federal Rules of  
30           Criminal Procedure. The requirement for a rule of  
31           procedure for criminal appeals is necessary because the  
32           North Dakota Rules of Appellate Procedure, promulgated  
33           in 1973, are limited in scope to appeals to the supreme  
34           court while the scope of criminal rules includes the  
35           municipal courts. The Rule is intended to parallel as  
36           closely as possible the procedure of the Appellate  
37           Rules.

38           Subdivision (a) parallels NDRAppP 3(a). Under the  
39           provisions of subdivision (a) nothing more is required  
40           for the perfection of an appeal than the filing of a  
41           notice of appeal with the clerk of the court that  
42           rendered the judgment. This subdivision acknowledges  
43           that the right to appeal in a criminal case is limited  
44           by statute. See, e.g., State v. Gohl, 477 N.W.2d 205,  
45           207 (N.D. 1991).

46           Under existing law (NDCC § 40-18-19) the defendant  
47           may take an appeal from a judgment of conviction in  
48           municipal court. The State may take an appeal from any  
49           trial court in specific instances which are provided  
50           under Section 29-28-07, NDCC, provided the appeal does  
51           not infringe upon the defendant's constitutional right  
52           prohibiting double jeopardy.

53           Subdivision (b) parallels NDRAppP 4(b).

Subdivision (b) governs the time for appeal with respect to all appeals that may be taken within the scope of these Rules 10--days for the defendant and 30 days for the prosecution. This requirement is intended to avoid prolongation of the process and to keep delays at a minimum. The requirement that the notice of appeal be filed [with the clerk of the trial court] within 10 days of the entry of judgment or order appealed from is "mandatory and jurisdictional". State v. Guthmiller, 497 N.W.2d 407 (N.D. 1993). The "mandatory and jurisdictional" requirement is eased by the provision in subdivision (b) which permits the trial court to extend the time for appeal upon a showing of excusable neglect. The provision in Rule 32 which requires ~~that~~ the defendant to be advised of his right to appeal and the right of a person who is unable to pay the cost of appeal to have it provided at public expense is clearly a necessary part of a valid sentence and until it is given, the 10-day period for taking an appeal cannot begin to run because there is no valid sentence in existence. See State v. Carmody, 243 N.W.2d 348 (N.D. 1976). The provision which precludes the extension of time for appeal pending motion for new trial based on newly discovered evidence is necessary because, under Rule 33, that motion may be made within two years. The provision that "A notice of appeal filed after the announcement of the verdict, decision, sentence or order

81 but before entry of the judgment or order ~~shall~~ must be  
82 treated as filed after the entry and on the day  
83 thereof," incorporates the holding of Lemke v. United  
84 States, 346 U.S. 325, 74 S.Ct. 1, 98 L.Ed. 3 (1953).

85 Subdivision (c) is adapted from the language of  
86 Rule 3(c), NDRAppP, which has its origins in former Rule  
87 37(a), FRCrimP. Three requirements for the notice of  
88 appeal are set out in this subdivision: it must (1)  
89 specify the parties taking the appeal, (2) designate the  
90 verdict, judgment or order or part thereof appealed  
91 from, and (3) name the court to which the appeal is  
92 taken. Under the first requirement, it is important that  
93 the notice specify by name the appellant or appellants.  
94 Failure of the notice to correctly designate the court  
95 to which the appeal is taken does not vitiate it.  
96 Misnomer is immaterial, at least if it is obvious to  
97 which appellate court the appeal must go. [Cutting v.  
98 Bullerdick, 178 F.2d 774 (9th Cir. 1949).] The  
99 requirement that the notice of appeal "designate the  
100 judgment or part thereof appealed from" was designed to  
101 simplify the taking of an appeal by requiring nothing  
102 more for its perfection than an identification of the  
103 judgment by the date of its entry.

104 Subdivision (d) is adapted from Rule 3(d), NDRAppP,  
105 and provides for service of the notice of appeal. Under  
106 this subdivision, the appellant is not obligated to  
107 serve the notice of appeal on other parties to the

108 action. It is the duty of the clerk of the trial court  
109 (or magistrate where there is no clerk) to: (1) serve  
110 notice of the filing of notice of appeal ~~either by~~  
111 ~~personal service~~ on the defendant ~~or by mail addressed~~  
112 ~~to him,~~ and ~~by mailing~~ to send a copy ~~thereof~~ to the  
113 prosecutor and to the defendant's counsel, if any [The  
114 "if any, of record" provision recognizes that a  
115 defendant need not be represented by counsel, but if he  
116 is so represented, it must be noted on the record.];  
117 (2) ~~mail~~ send a copy of the notice of appeal and of the  
118 docket entries to the clerk of the appellate court; and  
119 (3) note on each copy served the date on which the  
120 notice of appeal was filed.

121 Subdivision (d) was amended, effective March 1,  
122 1999, to allow the clerk to send the notice of the  
123 filing of the notice of appeal via a commercial carrier  
124 as an alternative to mail.

125 Subdivision (e) establishes a five-day maximum time  
126 limit within which the clerk, or judge where there is no  
127 clerk, must forward the file with those documents listed  
128 in the Rule to the clerk of court to which the appeal is  
129 taken.

130 Subdivision (f) provides the designation of parties  
131 to the appeal. It makes explicit that the title of the  
132 action shall not be changed "in consequence" of the  
133 appeal. The designation of the party who contends  
134 against the appeal as an appellee rather than respondent

is intended to avoid confusion, especially in special proceedings.

Subdivision (g) defines the effect of appeal. This subdivision follows Section 40-18-19, NDCC in providing for trial anew when an appeal is taken to the district court from the municipal court. ~~This subdivision, along with the title, was amended in 1983, effective September 1, 1983, to delete obsolete references to the county court with increased jurisdiction. Subdivision (g), along with the title, was amended, effective January 1, 1995, to delete obsolete references to county court.~~

Subdivision (h) is adapted from Rule 39, FRCrimP (abrogated in 1968). Provision for supervision of appeal is included in this Rule to cover appeals to the District Courts. This subdivision provides ~~that~~ the appellee may obtain relief from the appeal by one of the methods stated. The provision contemplates ~~that~~ the parties shall first apply to the trial court for any relief regarding the appeal; however, once the appeal passes to the appellate court, the trial court has no power to modify its judgment or dismiss the appeal.

The term "appellate court" as used in this Rule refers to the district court only.

It should be noted ~~that~~ although the rule does not always explicitly say so, it is the intent of this rule that the judge will perform the duties of the clerk where no clerk is appointed.

SOURCES: Minutes of the Rules Committee Meetings of January 29-30, 1998, page 20; April 28-29, 1994, pages 6-7; January 27-28, 1994, page 10; September 23-24, 1993, page 10; November 29, 1984, page 20; February 17-18, 1983, pages 14-20; February 20-23, 1973, pages 5-8; December 11-15, 1972, pages 5-16; July 10-11, 1969, pages 4-6; May 15-16, 1969, pages 2-11; February 20-21, 1969, pages 15-17.

SEE ALSO: Art. VI, § 8, North Dakota Constitution [formerly § 103].

STATUTES AFFECTED:

SUPERSEDED: 29-28-04, 29-28-08, 29-28-09, 29-28-11, 33-12-35, 33-12-40, NDCC.

CONSIDERED: 27-07-02, 27-07.1-18, 27-08-21, 28-27-06, 29-23-11, 29-28-02, 29-28-06, 29-28-07, 29-28-20, 29-28-21, 33-12-34, 33-12-41, 40-18-19, NDCC.

CROSS REFERENCES: Rule 33.-NDRCrimP, New Trial; Rule 3.-NDRAppP, Appeals from the District Court; Rule 4.-NDRAppP, Appeal When Taken.

[Note: Rules 3 and 4 pertain to appeals to the Supreme Court.]

1 RULE 45. TIME

2  
3 \* \* \* \*

4 (e) Additional Time After Service by Mail or  
5 Commercial Carrier. Whenever a party has the right or  
6 is required to do an act within a prescribed period  
7 after the service of a notice or other paper ~~upon that~~  
8 ~~party~~ and the notice or other paper is served by mail or  
9 third-party commercial carrier, 3 days must be added to  
10 the prescribed period. Service by facsimile  
11 transmission is not service by mail or third-party  
12 commercial carrier for purposes of this rule.

13  
14 EXPLANATORY NOTE

15 Rule 45 was amended, effective March 1, 1990;  
16 January 1, 1995; March 1, 1999.

17 Rule 45 is an adaptation of FRCrimP 45 with certain  
18 modifications. The rule is similar, as well, to NDRCivP  
19 6 which deals with time.

20 ~~Subdivision (a) differs from its federal~~  
21 ~~counterpart in that the last sentence of subdivision (a)~~  
22 ~~of the federal rule, which lists federally recognized~~  
23 ~~holidays, is excluded from the North Dakota rule.~~

24 ~~The exception to subdivision (b) is in its~~  
25 ~~application to Rules 29 (Motion for Judgment of~~  
26 ~~Acquittal); 33 (New Trial); 34 (Arrest of Judgment);~~  
27 ~~35 (Reduction of Sentence); and 37 (Appeals as of Right~~



28 ~~to District Court. How Taken), some of which contain~~  
29 ~~specific provisions permitting enlargement.~~

30 Subdivision (c) is an ~~adopted in the language~~  
31 ~~adaptation~~ of NDR CivP 6(c), ~~with the only modification~~  
32 ~~in the last line, changing the word "civil" to~~  
33 ~~"criminal."~~ Subdivision (c) of the federal rule was  
34 ~~abrogated in 1966 with the adoption of 28 U.S.C. § 452,~~  
35 ~~which provides that the existence or expiration of a~~  
36 ~~session of court in no way affects the power of the~~  
37 ~~court to do any act. An important provision of~~  
38 ~~subdivision (c) is that the expiration of a term of~~  
39 ~~court has no effect on the power of that court.~~

40 Subdivisions (d) and (e) are ~~adapted from~~  
41 adaptations of NDR CivP 6(d) and (e). Subdivision (d)  
42 must be construed with Rule 47 relating to motions  
43 generally, Rule 49 relating to the service and filing of  
44 papers, and NDROC 3.2 relating to submission of motions  
45 ~~on brief.~~

46 Subdivision (d) was amended, effective January 1,  
47 1995, to require service of a written motion, and  
48 notice, at least 14 days before the hearing instead of  
49 five.

50 Subdivision (e), which provides additional time for  
51 the exercise of a right or the doing of an act when  
52 service of notice is by mail, is ~~identical~~ similar to  
53 NDR CivP 6(e). ~~Subdivision (e) was amended, effective~~

~~March 1, 1998. The amendments are technical in nature  
and no substantive change is intended.~~

Subdivision (e) was amended, effective March 1,  
1999, to make the three-day extension for service by  
mail applicable when service is via commercial carrier.  
The proof of service must contain the date of mailing or  
deposit with the commercial carrier. See Rule 49(e),  
N.D.R.Crim.P., and Rules 4(k) and 5(f), N.D.R.Civ.P.

Subdivisions (a) and (e) were amended, effective  
January 1, 1995, to clarify time computations when  
making service by facsimile transmission.

SOURCES: Minutes of Rules Committee Meetings of  
January 29-30, 1998, page 20; April 28-29, 1994, pages  
15-16; January 27-28, 1994, pages 24-25; September 23-  
24, 1993, pages 14-16 and 20; April 29-30, 1993, pages  
20-22; April 20, 1989, page 4; December 3, 1987, page  
15; June 22, 1984, page 31; December 11-15, 1972, pages  
48-50; September 17-19, 1970, page 10; March 12-14,  
1970, pages 16-18; Rule 45, FRCrimP.

STATUTES AFFECTED:

SUPERSEDED INSOFAR AS CRIMINAL PROCESS: 1-02-  
15, NDCC.

CONSIDERED: 1-01-33, 1-03-01(2 14), NDCC.

CROSS REFERENCES: Rule 6.-NDR CivP, Time; Rule  
26.-NDR AppP, Computation and Extension of Time.

1                    RULE 46.   RELEASE FROM CUSTODY

2  
3                    \*           \*           \*           \*           \*

4                    (g) Forfeiture.

5                    (1) Declaration.   If there is a breach of condition  
6 of a bond, the court shall declare a   forfeiture of the  
7 bail.

8                    (2) Setting Aside.   The court may direct ~~that~~ a  
9 forfeiture be set aside, upon such conditions as the  
10 court may impose, if it appears ~~that~~ justice does not  
11 require ~~the~~ enforcement of the forfeiture.

12                    (3) Enforcement.   If a forfeiture has not been set  
13 aside, the court on motion shall enter a judgment of  
14 default and execution may issue thereon.   By entering  
15 into a bond the obligors submit to the jurisdiction of  
16 any appropriate court and irrevocably appoint the clerk  
17 of the court as their agent upon whom any papers  
18 affecting their liability may be served.   Their  
19 liability may be enforced on motion without the  
20 necessity of an independent action.   The motion and such  
21 notice of the motion as the court prescribes may be  
22 served on the clerk of the court, who shall forthwith  
23 mail or send by third-party commercial carrier copies to  
24 the obligors at their respective last-known addresses.

25                    \*           \*           \*           \*           \*

EXPLANATORY NOTE

Rule 46 was amended, effective March 1, 1986; March 1, 1990; January 1, 1995; March 1, 1999.

Rule 46 is an adaptation of Rule 46, FRCrimP, as amended in 1972.

~~Subdivisions (a) (b) (c) (e) and (f) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

Subdivision (a) is adapted from the language of the Bail Reform Act of 1966 (P.L. 89-465, 80 Stat. 214), 18 U.S.C. § 3146.

Subdivision (a) was amended, effective January 1, 1995, to make the safety of any other person or the community a relevant consideration when determining which conditions of release will reasonably assure the appearance of a person charged with an offense. Additional conditions of release were added from the Bail Reform Act of 1984, 18 U.S.C. § 3142(c).

Subdivision (b) is adapted from the Bail Reform Act of 1966 (P.L. 89-465, 80 Stat. 215), 18 U.S.C. § 3147(a).

Subdivision (c) follows subdivision (b) of the federal rule and provides for bail during trial. This provision continues previous North Dakota law (Section 29-08-08, NDCC).

Subdivision (d) and NDRAppP 9(b) are identical and are derived from FRAppP 9(b). These subdivisions

55 regulate the procedure for release of the defendant when  
56 the jurisdiction of the appellate court has attached by  
57 virtue of the filing of an appeal from a judgment of  
58 conviction. Both subdivision (d) and NDRAppP 9(b) were  
59 amended, effective March 1, 1986, to permit modification  
60 or revocation of the release of a defendant who was  
61 initially released pending appeal and to clarify that an  
62 application for release after a notice of appeal is  
63 filed must be made in the first instance in the trial  
64 court and thereafter in the supreme court.

65 Subdivision (e) is similar to 18 U.S.C. § 3149.

66 Subdivision (f) follows subdivision (d) of the  
67 federal rule.

68 Subdivision (g)(1) follows subdivision (e)(1) of  
69 the federal rule and ~~existing~~ previous North Dakota law  
70 (Section 29-08-21, NDCC) and requires ~~that~~ a forfeiture  
71 of the bond must be declared if there is a breach of  
72 conditions on the bond. Although this provision has  
73 been held to be mandatory, subdivision (g)(2) permits an  
74 excusal of the forfeiture if "justice does not require  
75 the enforcement of the forfeiture". "The forfeiture  
76 provision is designed to discourage violations of bail  
77 covenants and to deter defaults which create unnecessary  
78 delay and expense to the government [prosecution]."  
79 Smith v. United States, 357 F.2d 486, 490 (5th Cir.  
80 1966).

81            Subsection (g)(3) follows subdivision (e)(3) of the  
82            federal rule and establishes a single procedure, copied  
83            from Rule 65.1, FRCivP, through which the court, on  
84            motion, can enforce forfeited bail bonds. Subdivision  
85            (g)(3) was amended, effective March 1, 1986, to delete  
86            "district" court and make clear that ~~the~~ obligors, by  
87            entering into bond, subject themselves to the  
88            jurisdiction of an appropriate court and appoint the  
89            clerk as their agent for service of any papers.

90            Subdivision (g)(3) was amended, effective March 1,  
91            1999, to allow copies of the motion to be served via  
92            commercial carrier as an alternative to mail.

93            Subdivision (g)(4) follows subdivision (e)(4) of  
94            the federal rule. A determination for remission should  
95            be made only after judgment of default has been entered.  
96            [United States v. Miller, 323 F.2d 403 (6th Cir. 1963).]

97            Subdivision (h) follows subdivision (e)(4) of the  
98            federal rule. The provision that the surety may  
99            surrender the defendant into custody, whether or not the  
100           case has been disposed of, is consistent with ~~existing~~  
101           previous North Dakota law (Section 29-08-20, NDCC) and  
102           avoids a breach and forfeiture when the surety has  
103           reason to anticipate that defendant will not appear.

104           Subdivision (i) follows subdivision (g) of the  
105           federal rule.

106           SOURCES: Minutes of Rules Committee Meetings of  
107           January 29-30, 1998, page 20; April 28-29, 1994, pages

4-6; January 27-28, 1994, pages 18-23; September 23-24, 1993, pages 21-23; April 20, 1989, page 4; December 3, 1987, page 15; November 29, 1984, page 12; April 26, 1984, pages 11-17 and 21; January 19, 1984, pages 5-9; April 24-26, 1973, pages 14-15; December 11-15, 1972, pages 50-53; November 18-20, 1971, pages 12-22; Rule 46, FRCrimP.

STATUTES AFFECTED:

SUPERSEDED: 29-08-04, 29-08-05, 29-08-06, 29-08-07, 29-08-08, 29-08-09, 29-08-10, 29-08-11, 29-08-12, 29-08-13, 29-08-14, 29-08-15, 29-08-17, 29-08-18, 29-08-19, 29-08-20, 29-08-21, 29-08-23, 29-08-24, 29-08-25, 29-12-02, 29-21-34, 29-28-16, 29-28-17, 31-03-21, 31-03-22, 31-03-23, 33-12-10, 33-12-36, 33-12-37, 33-12-38, NDCC.

CONSIDERED: 12-01-13, 22-02-09, 29-05-12, 29-05-13, 29-05-14, 29-08-01, 29-08-02, 29-08-03, 29-08-16, 29-08-22, 29-08-26, 29-08-27, 29-21-21, 29-21-23, 29-22-31, 31-03-19, 31-03-20, 31-03-24, NDCC.

1                   RULE 49. SERVICE AND FILING OF PAPERS

2  
3                   \*       \*       \*       \*       \*

4                   (c) Notice of Orders. Immediately upon ~~the~~ entry  
5 of an order made on a written motion ~~subsequent to~~ after  
6 arraignment, the clerk shall mail, or send by third-  
7 party commercial carrier, ~~to~~ or otherwise serve on each  
8 party affected ~~thereby~~ a notice of the entry thereof and  
9 note the service in the docket. Lack of notice of the  
10 entry by the clerk does not affect the time to appeal or  
11 relieve or authorize the court to relieve a party for  
12 failure to appeal within the time allowed, except as  
13 permitted by Rule 37(b) of these Rules and Rule 4(b) of  
14 the N.D.R.App.P.

15                   \*       \*       \*       \*       \*

16  
17                   EXPLANATORY NOTE

18                   Rule 49 was amended, effective March 1, 1990; March  
19 1, 1999.

20                   Rule 49 is an adaptation of Rule 49 of the FRCrimP.  
21 ~~The procedure for the service and filing of papers under~~  
22 ~~Rule 49 is similar to that under Rule 5, NDR CivP, with~~  
23 ~~such modifications as are necessary to conform to~~  
24 ~~criminal cases.~~

25                   ~~Subdivision (a) is similar to Rule 5(a) of the~~  
26 ~~NDR CivP with such adaptations as are necessary for~~



27 ~~criminal cases. [See Notes of Advisory Committee, 18~~  
28 ~~U.S.C.A., Rule 49, Federal Rules of Criminal Procedure.]~~

29 ~~The first sentence of Subdivision (b) is~~  
30 ~~substantially the same as the first sentence of Rule~~  
31 ~~5(b) of the NDRCivP. The second sentence incorporates~~  
32 ~~the following provisions of 5(b), NDRCivP.~~

33 ~~"Service upon the attorney or upon a party must be~~  
34 ~~made by delivering a copy to the attorney or party~~  
35 ~~or by mailing it to the attorney or party at the~~  
36 ~~attorney's or party's last known address or, if no~~  
37 ~~address is known, upon order of the court by~~  
38 ~~leaving it with the clerk of the court. Delivery~~  
39 ~~of a copy within this rule means: handing it to~~  
40 ~~the attorney or the party, or, leaving it at the~~  
41 ~~attorney's or party's office with a clerk or other~~  
42 ~~individual in charge thereof, or, if there is no~~  
43 ~~one in charge, leaving it in a conspicuous place~~  
44 ~~therein, or, if the office is closed or the party~~  
45 ~~to be served has no office, leaving it at the~~  
46 ~~party's dwelling house or usual place of abode with~~  
47 ~~some individual of suitable age and discretion then~~  
48 ~~residing therein. Service by mail is complete upon~~  
49 ~~mailing."~~

50 ~~When service is made by mail or third-party~~  
51 ~~commercial carrier, three days are added to any period~~  
52 ~~of time within which a party is required to do an act~~  
53 ~~{Rule 45(e)}. See Rule 45(e), NDRCrP.~~

54           ~~Subdivision (b) was amended, effective March 1,~~  
55           ~~1990. The amendment tracks the 1987 Federal amendment~~  
56           ~~which is technical in nature and no substantive change~~  
57           ~~is intended.~~

58           Subdivision (c) is substantially in the language of  
59           its Federal counterpart with minor style changes in the  
60           first sentence to add flexibility in serving notice and  
61           to make it clear ~~that~~ only a party affected by the order  
62           needs to be served with ~~such~~ the notice. The language  
63           of Subdivision (c) of the Federal Rule is an adaptation  
64           for criminal proceedings of Rule 77(d), FRCivP. The  
65           second sentence of Subdivision (c) provides ~~that~~ lack of  
66           notice of entry does not affect the time to appeal,  
67           except insofar as it may give rise to a claim of  
68           "excusable neglect" under Rule 37(b) of these Rules and  
69           Rule 4(b), NDRAppP. ~~[See 8A Moore's, supra, at page 49-~~  
70           ~~6, citing the Advisory Committee Note to Federal Rule~~  
71           ~~49.]~~

72           Subdivision (c) was amended, effective March 1,  
73           1999, to allow the clerk to send notice by commercial  
74           carrier as an alternative to the Postal Service.

75           Subdivision (d) incorporates by reference the  
76           provisions of Rule 5(d) and (e), NDRCivP.

77           Subdivision (e) has no Federal counterpart and was  
78           adapted from the Alaska Rules of Criminal Procedure and  
79           regulates the manner for proving ~~that~~ service has been  
80           made.

81 SOURCES: Minutes of Rules Committee Meetings of  
82 January 29-30, 1998, page 21; April 20, 1989, page 4;  
83 December 3, 1987, page 15; February 20-23, 1973, page  
84 10; December 10-12, 1970, pages 17-19; Alaska  
85 R.Crim.P., Rule 44; FRCrimP, Rule 49, ~~Wright, Federal~~  
86 ~~Practice and Procedure: Criminal, § 821-824, 8A~~  
87 ~~Moore's Federal Practice, Chapter 49 (Cipes, 2d Ed.~~  
88 ~~1971), Barron, Federal Practice and Procedure:~~  
89 ~~Criminal, § 2541-2543 (1951).~~

90 STATUTES AFFECTED:

91 SUPERSEDED: 29-28-10, NDCC.

92 CROSS REFERENCE: Rule 5, NDRCivP. Service and  
93 Filing of Pleadings and Other Papers.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF \_\_\_\_\_

\_\_\_\_\_ JUDICIAL DISTRICT

The State of North Dakota,

)

Plaintiff,

)

ORDER DEFERRING IMPOSITION  
OF SENTENCE

vs.

)

Criminal No. \_\_\_\_\_

)

Defendant.

)

On \_\_\_\_\_, ~~19~~\_\_\_\_\_, \_\_\_\_\_ (Month) (day),

~~(year)~~, \_\_\_\_\_ County State's Attorney and the  
above-named defendant appeared in person (with \_\_\_\_\_ as)  
(without) \_\_\_\_\_ counsel, for pronouncement of judgment upon a  
(plea) (verdict) of guilty to the offense of:

The defendant was asked by the court whether (he) (she)  
had any statement to make in (his) (her) own behalf or wished to  
present any information in mitigation of punishment or which  
would require the court to withhold pronouncement of judgment and  
sentence. The court found no sufficient cause why judgment should  
not be pronounced,

IT IS ORDERED imposition of sentence of the defendant be  
deferred under N.D.C.C. § 12.1-32-02(4) for a period of \_\_\_\_\_  
beginning at 12:00 noon on ~~the~~ \_\_\_\_\_ day of \_\_\_\_\_,  
~~19~~\_\_\_\_ (Month) (day), (year).

37 IT IS FURTHER ORDERED during the period of deferment,  
38 the defendant be (on supervised probation subject to the  
39 supervision, management and control of the North Dakota  
40 Department of Corrections and Rehabilitation and its officers)  
41 (on unsupervised probation), and subject to the conditions (in  
42 attached Appendix A) (following: \_\_\_\_\_). A violation of  
43 the rules or conditions may result in revocation and termination  
44 of probation.

45 (\*IT IS FURTHER ORDERED, 61 days after expiration or  
46 termination of probation, the guilty plea is withdrawn or the  
47 guilty verdict set aside, the case dismissed, and the file sealed  
48 under N.D.C.C. § 12.1-32-07.1 and 12.1-32-07.2, unless otherwise  
49 ordered.)

50 Dated this \_\_\_\_\_ day of, 19\_\_ (Month) (day),  
51 (year).

52

53 BY THE COURT:

54

55

56 \_\_\_\_\_  
DISTRICT JUDGE

57

58 \*[The alternative language is for an order deferring  
59 imposition of sentence for an infraction or a  
60 misdemeanor. See Rule 32.1, N.D.R.Crim.P.1

1                   RULE 3. APPEAL AS OF RIGHT--HOW TAKEN

2  
3                   \*           \*           \*           \*           \*

4                   (d) Service of the Notice of Appeal. The clerk of  
5 the trial court shall ~~cause mail or send by third-party~~  
6 commercial carrier a copy of the notice of appeal ~~to be~~  
7 ~~mailed~~ to the clerk of the supreme court and to counsel  
8 of record for each party other than the appellant, or,  
9 if a party is not represented by counsel, to the party's  
10 last known address.

11                  In criminal cases, habeas corpus proceedings, or  
12 post-conviction proceedings, the clerk shall also ~~mail~~  
13 send a copy of the docket entries to the clerk of the  
14 supreme court. The clerk shall note on each copy ~~mailed~~  
15 sent the date on which the notice of appeal was filed.  
16 Failure of the clerk to ~~cause send~~ the notice ~~to be~~  
17 ~~mailed~~ does not affect the validity of the appeal.  
18 Service is sufficient notwithstanding the death of a  
19 party or the party's counsel. The clerk shall note in  
20 the docket the names of the parties to whom copies are  
21 ~~mailed sent, with and~~ sent, with and the date ~~of mailing they were~~  
22 sent.

23                  The title of the action is not to be changed in  
24 consequence of the appeal.  
25  
26

27 EXPLANATORY NOTE

28 Rule 3 was amended, effective January 1, 1988;  
29 March 1, 1999.

30 ~~The federal rules governing appeal as of right are~~  
31 ~~adopted for general use because the appeals by~~  
32 ~~permission contemplated by federal practice are absent~~  
33 ~~from our appellate structure. Rule 3, FRAppP, is~~  
34 ~~substantially adopted in this rule. Rule 3 is patterned~~  
35 after Rule 3, Fed.R.App.P. Nothing other than the  
36 timely filing of the notice of appeal in the trial court  
37 is required to give the Supreme Court jurisdiction over  
38 the appeal. After the party files the notice, the clerk  
39 of the trial court mails sends copies to the Clerk of  
40 the Supreme Court and to the opposing parties. For the  
41 service of other papers, these rules place the  
42 responsibility of service on counsel rather than the  
43 Clerk.

44 It should be noted ~~that~~ Rule 10(b) requires ~~that~~  
45 proof of service of the order for transcript and a copy  
46 of the stipulation of excluded portions, if any, to be  
47 filed with the notice of appeal, Rule 12(a) requires the  
48 docket fee to accompany the filing of the notice of  
49 appeal, and Rule 7 requires ~~that~~ a bond for costs or  
50 equivalent security be filed with the notice of appeal  
51 in civil cases.

52 Subdivision (a) provides ~~that~~ failure to follow any  
53 Rule may result in dismissal of the appeal, and award of

costs, or other appropriate action. ~~For a brief summary of many of the cases decided by the North Dakota Supreme Court on this subject, see Gerhardt v. Fleck, 251 N.W.2d 764, 766-767 (N.D. 1977).~~

~~Subdivision (d) was amended, effective January 1, 1988. The amendment tracks in part the 1986 amendment to the Federal Rule. The amendment is technical in nature with no substantive change.~~

Subdivision (d) was amended, effective March 1, 1999, to allow copies to be sent via a carrier as an alternative to mail.

SOURCES: Procedure Committee Minutes of January 29-30, 1998, page 21; February 19-20, 1987, pages 4-5; September 18-19, 1986, pages 12-13; May 25-26, 1978, page 3; March 16-17, 1978, page 1; January 12-13, 1978, pages 2-3; September 15-16, 1977, pages 4-5. Rule 3, FRAppP; § 3.13(b) ABA Standards Relating to Appellate Courts (Approved Draft, 1977).

STATUTES AFFECTED:

SUPERSEDED: §§ 28-18-09, 28-27-05, 28-27-26, 29-28-05, 29-28-20, 29-28-21, NDCC.

CROSS REFERENCE: Rule 7 (Bond for Costs on Appeal in Civil Cases), 10 (The Record on Appeal), 11 (Transmission and Filing of the Record), 12 (Docketing the Appeal), and 31 (Filing and Service of Briefs), NDRAppP; Rule 54(b), NDR CivP (Judgment Upon Multiple Claims or Involving Multiple Parties).



1                   RULE 4. APPEAL--WHEN TAKEN

2

3           (a) Appeals in Civil Cases. In a civil case the

4 notice of appeal required by Rule 3 must be filed with

5 the clerk of the trial court within 60 days of service of

6 notice of entry of the judgment or order appealed from.

7 If a timely notice of appeal is filed by a party, any

8 other party may file a notice of appeal within 14 days

9 after the first notice of appeal was filed, or within the

10 time otherwise prescribed by this subdivision, whichever

11 period last expires.

12           The running of the time for filing a notice of

13 appeal is terminated as to all parties by a timely motion

14 filed in the trial court by any party under the North

15 Dakota Rules of Civil Procedure hereafter enumerated in

16 this sentence, and the full time for appeal fixed by this

17 subdivision commences to run and is to be computed from

18 service of notice of the entry of any of the following

19 orders made upon a timely motion under such rules: (1)

20 granting or denying a motion for judgment under Rule

21 50(b), NDR CivP; (2) granting or denying a motion under

22 Rule 52(b), NDR CivP, to amend or make additional findings

23 of fact, whether or not an alteration of the judgment

24 would be required if the motion is granted; (3) granting

25 or denying a motion under Rule 54, NDR CivP, for

26 attorneys' fees; (4) granting or denying a motion under

27 Rule 59, NDRCivP, to alter or amend the judgment; (5)  
28 denying a motion for a new trial under Rule 59, NDRCivP;  
29 or (6) granting or denying a motion for relief under Rule  
30 60, NDRCivP, if the motion is served and filed no later  
31 than 15 days after notice of entry of judgment.

32 Upon a showing of excusable neglect, the trial court  
33 may extend the time for filing the notice of appeal by  
34 any party for a period not to exceed 30 days from the  
35 expiration of the time otherwise prescribed for appeal by  
36 this subdivision, other rule, or statute. Such an  
37 extension may be granted before or after the time  
38 otherwise prescribed by this subdivision has expired; but  
39 if a request for an extension is made after such time has  
40 expired, it ~~shall~~ must be made by motion with such notice  
41 as the trial court ~~shall~~ deems appropriate.

42 \* \* \* \* \*

43  
44 EXPLANATORY NOTE

45 Rule 4 was amended, effective March 1, 1986; March  
46 1, 1994; March 1, 1997; March 1, 1998; March 1, 1999.

47 ~~Given the existing state practice with respect to~~  
48 ~~entry of orders and judgment, the~~ The time for civil  
49 appeals runs from "service of notice of entry" of the  
50 order or judgment. However, service of notice of entry  
51 of judgment is not necessary to start the time running  
52 for filing a post-judgment motion or appeal if the record

53 clearly evidences actual knowledge of entry of judgment  
54 by the affirmative action of the moving or appealing  
55 party. See Rule 77(d), N.D.R.Civ.P.; Gierke v. Gierke,  
56 1998 ND 100, ¶¶ 6-12, 578 N.W.2d 522, 525-26. Thorson v.  
57 Thorson, 541 N.W.2d 692, 694-95 (N.D. 1996). This  
58 ~~differs from the federal rule which provides that the~~  
59 ~~period is to run from "the date of entry."~~

60 The responsibility under subdivision (a) is shifted  
61 to counsel to serve the notice and commence the period  
62 for appeal. This differs from the federal rule, which  
63 provides the time for appeal is to run from "the date of  
64 entry."

65 The time limit for taking an appeal ~~would~~ does not  
66 prevent the taking of an appeal at any time after the  
67 entry of the judgment or order and before service of  
68 notice of entry.

69 Subdivision (a) was amended, effective March 1,  
70 1999, to provide the 30 day extension for excusable  
71 neglect is to be added to the time for appeal provided by  
72 the statute or rule setting the time for appeal.

73 Subdivision (b) is similar to NDRCrimP 37(b).  
74 Paragraphs one and two pertain to appeals by the  
75 defendant and prosecution, respectively, and paragraph  
76 three pertain to appeals by either the prosecution or  
77 defendant.

78                   SOURCES: Procedure Committee Minutes of April 30-  
79                   May 1, 1998, page 13; January 30, 1997, page 8; January  
80                   25-26, 1996, pages 7-10; April 29-30, 1993, pages 2-3,  
81                   16-18; November 29, 1984, pages 19-20; April 26, 1984,  
82                   pages 23-24; January 20, 1984, pages 10-15; September  
83                   18-19, 1980, page 20; January 12-13, 1978, page 25; Rule  
84                   4, FRAppP.

85                   STATUTES AFFECTED:

86                   SUPERSEDED: § 28-27-04, NDCC.

1           RULE 8.   STAY OR INJUNCTION PENDING APPEAL

2  
3                   \*       \*       \*       \*       \*

4           (b)   Stay May Be Conditioned Upon Giving of Bond;  
5   Proceedings Against Sureties.   Relief available in the  
6   supreme court under this rule may be conditioned upon  
7   the filing of a bond or other appropriate security in  
8   the trial court.   If security is given in the form of a  
9   bond or stipulation or other undertaking with one or  
10   more sureties, each surety submits to the jurisdiction  
11   of the trial court and irrevocably appoints the clerk of  
12   the trial court as the surety's agent upon whom any  
13   papers affecting the surety's liability on the bond or  
14   undertaking may be served.   A surety's liability may be  
15   enforced on motion in the trial court without the  
16   necessity of an independent action.   The motion and the  
17   notice of the motion the trial court prescribes may be  
18   filed with the clerk of the trial court, who shall  
19   forthwith mail or send by third-party commercial carrier  
20   copies to the sureties if their addresses are known.

21                   \*       \*       \*       \*       \*

22  
23                           EXPLANATORY NOTE

24           Rule 8 was amended, effective January 1, 1988;  
25   March 1, 1999.

27           Derived from Rule 8, FRAppP, this rule provides a  
28 ~~clear statement of the procedure for obtaining a stay or~~  
29 similar relief with respect to the action of the court,  
30 pending appeal. ~~The previous appellate practice rules~~  
31 ~~provided no clear definition of this matter, except as~~  
32 ~~to the statutes governing stays in criminal cases.~~

33           Subdivision (b) was amended, effective March 1,  
34 1999, to allow copies of the motion to be sent via a  
35 commercial carrier as an alternative to mail.

36           Subdivision (c) assures ~~that~~ the procedure for  
37 ~~stays a stay~~ in a criminal ~~matters~~ matter is consistent  
38 with Rule 38, North Dakota Rules of Criminal Procedure.

39           In this rule the authority of a single justice to  
40 act on procedural matters is first mentioned. These  
41 rules contemplate that many applications for procedural  
42 relief may be handled by a single justice, with  
43 substantial savings in time and reduction of the actions  
44 requiring a quorum of the Court.

45           ~~Subdivision (b) was amended, effective January 1,~~  
46 ~~1988, to track the 1986 amendment to the Federal Rule.~~  
47 ~~The amendment is technical in nature with no substantive~~  
48 ~~change.~~

49           SOURCES: Procedure Committee Minutes of January  
50 29-30, 1998, page 21; February 19-20, 1987, pages 5-6;  
51 September 18-19, 1986, pages 13-14; May 25-26, 1978,  
52 page 5; March 16-17, 1978, page 16. Rule 8, FRAppP.

53           STATUTES AFFECTED:

54                   SUPERSEDED: § 28-27-22, NDCC.

55                   CROSS REFERENCE: Rules 7 (Bond for Costs on Appeal  
56                   in Civil Cases), and 9 (Release in Criminal Cases),  
57                   NDRAppP Rule 38, NDRCrimP (Stay of Execution and Relief  
58                   Pending Appeal).

RULE 25. FILING AND SERVICE

(a) Filing. Papers required or permitted to be filed in the supreme court must be filed with the clerk. Filing may be accomplished by mail or delivery addressed to the clerk, but filing is not timely unless the papers are received by the clerk within the time fixed for filing. However, briefs, appendices, transcripts, and petitions for rehearing are deemed filed on the day of mailing or deposit with a third-party commercial carrier. Papers may not be filed with the clerk of the supreme court by means of facsimile transmission. If a motion requests relief that may be granted by a single justice, the justice may receive the motion for filing. If this occurs, the justice shall note ~~thereon~~ on the motion the date of filing and ~~thereafter~~ transmit it to the clerk.

\* \* \* \* \*

(c) Manner of Service. Service may be personal, or by mail, or via a third-party commercial carrier. Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel. Service by mail is complete ~~on~~ upon mailing. Service via a third-party commercial carrier is complete upon deposit of the paper to be served with the commercial carrier.



27 (d) Proof of Service. Papers presented for filing  
28 must contain an acknowledgment of service by the person  
29 served or proof of service by the person who made  
30 service. Proof of service may appear on or be affixed  
31 to the papers filed. The clerk may permit papers to be  
32 filed without acknowledgment or proof of service but  
33 shall require acknowledgment or proof of service to be  
34 filed promptly thereafter.

35  
36 EXPLANATORY NOTE

37 Rule 25 was amended, effective January 1, 1988; on  
38 an emergency basis, September 5, 1990; on an emergency  
39 basis, November 16, 1994; March 1, 1996; March 1, 1999.

40 ~~Rule 25 was amended, effective January 1, 1988,~~  
41 ~~March 1, 1996.~~ This rule is derived from Rule 25,  
42 FRAppP. Rule 25 was amended, effective March 1, 1999,  
43 to allow the use of a third-party commercial carrier as  
44 an alternative to the Postal Service. The phrase  
45 "commercial carrier" is not intended to encompass  
46 electronic delivery services.

47 Subdivision (a) provides ~~that generally~~ papers are  
48 not deemed filed until they are received by the Clerk of  
49 the Supreme Court. Briefs, appendices, transcripts,  
50 and petitions for rehearing are exceptions to this  
51 general rule.

52           Subdivision (d) allows proof of service by  
53 admission of service, affidavit of service, or  
54 certificate of an attorney.

55           SOURCES: Procedure Committee Minutes of April 30-  
56 May 1, 1998, page 3; January 29-30, 1998, page 21;  
57 January 26-27, 1995, pages 6-7; September 29-30, 1994,  
58 page 12; February 19-20, 1987, pages 6-7; September 18-  
59 19, 1986, pages 14-15; May 25-26, 1978, page 10; March  
60 16-17, 1978, pages 3-4. Rule 25, FRAppP.

61           STATUTES AFFECTED:

62           SUPERSEDED: § 28-27-05, NDCC.

63           CROSS REFERENCE: Rule 10(c), NDRAppP. (The Record  
64 on Appeal).

1           RULE 26.   COMPUTATION AND EXTENSION OF TIME

2  
3                   \*       \*       \*       \*       \*

4           (c) Additional Time After Service by Mail or  
5 Commercial Carrier. Whenever a party is required or  
6 permitted to do an act within a prescribed period after  
7 service of a paper ~~upon that party~~ and the paper is  
8 served by mail or third-party commercial carrier, 3 days  
9 must be added to the prescribed period.

10  
11                           EXPLANATORY NOTE

12           Rule 26 was amended, effective January 1, 1988;  
13 March 1, 1999.

14           This rule is patterned upon Rule 26, FRAppP.  
15 ~~Provisions of the Federal Rule with respect to petitions~~  
16 ~~for allowance, applications for permission to appeal,~~  
17 ~~and appeals from advisory agencies are omitted.~~ The  
18 existing legislative definition of "legal holiday" is  
19 substituted for the federal definition.

20           Subdivision (c) was amended, effective January 1,  
21 1988, to track the 1986 amendment to the Federal Rule.  
22 The amendment is technical in nature with no substantive  
23 change.

24           Subdivision (c) was amended, effective March 1,  
25 1999, to make the three-day extension for service by  
26 mail applicable when service is by commercial carrier.

28                   SOURCES:    Procedure Committee Minutes of January  
29                   29-30, 1998, page 21; February 19-20, 1987, page 7;  
30                   September 18-19, 1986, page 15;   May 25-26, 1978, pages  
31                   11-12.   Rule 26, FRAppP.

1                   RULE 36. ENTRY OF JUDGMENT

2

3           The notation of a judgment in the docket

4           constitutes entry of the judgment. The clerk shall

5           prepare, sign and enter the judgment following receipt

6           of the opinion of the court unless the opinion directs

7           settlement of the form of the judgment, in which event

8           the clerk shall prepare, sign and enter the judgment

9           following final settlement by the court. If a judgment

10          is rendered without an opinion, the clerk shall prepare,

11          sign and enter the judgment following instruction from

12          the court. The clerk shall, on the date judgment is

13          entered, mail or send by third-party commercial carrier

14          to all parties a copy of the opinion, if any, or of the

15          judgment if no opinion was written, and notice of the

16          date of entry of the judgment.

17

18                   EXPLANATORY NOTE

19          This rule is taken, without substantial change,

20          from Rule 36, FRAppP. It is intended to clarify what

21          constitutes ~~the~~ entry of a judgment or order.

22          Rule 36 was amended, effective March 1, 1999, to

23          allow the clerk to send a copy of the opinion by

24          commercial carrier as an alternative to the Postal

25          Service.

26          SOURCES: Procedure Committee Minutes of January 27-

27          30, 1998, page 21. Rule 36, FRAppP.

28                   STATUTES AFFECTED:

29                   SUPERSEDED: § 28-27-30 and § 29-28-32, NDCC.

1                   RULE 42. ~~VOLUNTARY~~ DISMISSAL; MOOTNESS

2  
3                   (a) Voluntary Dismissal. If the parties to an  
4 appeal or other proceeding ~~shall~~ sign and file with the  
5 clerk of the supreme court an agreement that the  
6 proceeding be dismissed, ~~specifying which specifies~~ the  
7 terms as to payment of costs, and ~~shall~~ the parties pay  
8 whatever fees are due, the clerk shall enter the case  
9 dismissed, but no mandate or other process ~~shall~~ may  
10 issue without an order of the court. An appeal may be  
11 dismissed on motion of the appellant upon such terms as  
12 may be agreed upon by the parties or fixed by the court.

13                   (b) Involuntary Dismissal. When an appellant is in  
14 violation of any appellate rule and no motion to dismiss  
15 has been filed by the appellee, the clerk of the supreme  
16 court shall notify the appellant that unless the  
17 appellant gives reason within ten days why the case  
18 should not be dismissed, the case will be dismissed.

19                   (c) Mootness. When a party believes an appealed  
20 issue has become moot due to a change in circumstance,  
21 the party shall advise the court in writing about the  
22 change in circumstance and explain why appeal of the  
23 issue should or should not be dismissed.

24  
25                   EXPLANATORY NOTE

26                   This rule is derived from Rule 42, FRAppP, although  
27 subdivision (a) of the Federal Rule, relating to

28 dismissal in the trial court before the appeal is  
29 docketed, has been deleted. All stipulations and motions  
30 for dismissal must be filed in the Supreme Court.

31 Rule 42 was amended, effective March 1, 1990. The  
32 amendment provides for an involuntary dismissal when an  
33 appellant fails to comply with the appellate rules.

34 Subdivision (c) was added, effective March 1, 1999,  
35 because generally the Supreme Court will not consider a  
36 moot issue. See Ashley Education Association v. Ashley  
37 Public School, 556 N.W.2d 666 (N.D. 1996).

38 SOURCES: Supreme Court Conference Minutes of  
39 October 23, 1989. Procedure Committee Minutes of  
40 September 25-26, 1997, pages 6-7; January 30, 1997, pages  
41 13-14; April 20, 1989, pages 17-18; May 25-26, 1978, page  
42 21; March 16-17, 1978, page 14. Rule 42, FRAppP.



1 RULE 45. DUTIES OF CLERK

2  
3 \* \* \* \* \*

4 (c) Notice of Orders or Judgments. Immediately  
5 upon the entry of an order or judgment, the clerk shall  
6 serve a notice of entry by mail or third-party  
7 commercial carrier upon each party to the proceeding  
8 together with a copy of any opinion respecting the order  
9 or judgment, ~~and The clerk shall make a note in the~~  
10 ~~docket of the mailing the notice and opinion were~~  
11 served. Service on a party represented by counsel ~~shall~~  
12 must be made on counsel.

13 \* \* \* \* \*

14  
15 EXPLANATORY NOTE

16 Rule 45 was amended, effective January 1, 1988;  
17 March 1, 1999.

18 This rule is derived from Rule 45, FRAppP. The  
19 last sentence in subdivision (a) provides ~~that~~ the Clerk  
20 of the Supreme Court has no obligation to notify counsel  
21 of approaching deadlines. Conversely, neither counsel  
22 nor parties have the right to require or rely on  
23 notification from the Clerk. Gerhardt v. Fleck, 251  
24 N.W.2d 764, 766 (N.D. 1977).

25 ~~Subdivisions (a), (b), and (d) were amended,~~  
26 ~~effective January 1, 1988, to track the 1986 amendments~~

27 ~~to the Federal Rule. The amendments are technical in~~  
28 ~~nature with no substantive changes.~~

29 Subdivision (c) was amended, effective March 1,  
30 1999, to allow the clerk to send the notice and opinion  
31 via commercial carrier as an alternative to mail.

32 As noted in the rule, the Clerk prepares the court  
33 calendar under the direction of the Supreme Court.  
34 Presently, a case is assigned to the next court term at  
35 least 17 days after the brief of the appellee or cross-  
36 appellee is filed. For example, if an appellee's brief  
37 is filed on March 25, the case will be heard on the May  
38 term of court.

39 SOURCES: Procedure Committee Minutes of January  
40 29-30, 1998, page 22; February 19-20, 1987, page 9;  
41 September 18-19, 1986, pages 23-25; January 12-13, 1978,  
42 pages 24-25. Rule 45, FRAppP.

43 STATUTES AFFECTED:

44 SUPERSEDED: §§ 28-27-30, 28-31-02, 28-31-03,  
45 and 29-28-22, NDCC.

1                   RULE 47.1 CERTIFICATION OF QUESTIONS  
2                               OF LAW BY STATE COURT  
3

4           (a) Who May Certify Questions of Law. Any district  
5 court ~~or county court in its discretion~~ may submit a question  
6 of law ~~pursuant to~~ under Section 32-24-01, N.D.C.C., to the  
7 supreme court for final determination ~~by the use of~~ through a  
8 certification order.

9           (b) Contents of Certification Order and Supporting  
10 Documentation.

11           (1) A certification order must contain:

12                   (i) Findings of fact ~~of~~ on all ~~pertinent~~ facts  
13 needed to resolve the question of law.

14                   (ii) ~~The~~ A question of law formulated in ~~such~~ a  
15 manner ~~that it may~~ allowing the question to be answered  
16 by ~~a~~ yes or no answer, ~~and the~~

17                   (iii) The trial court's ~~answers~~ answer to each  
18 question.

19           (2) The certifying court shall transmit with the  
20 certification order any parts of the record and other  
21 documents ~~it deems necessary in answering~~ to answer the  
22 certified questions. The supreme court may require ~~that~~ an  
23 original or copies of all or any portion of the record to be  
24 filed if ~~in its opinion the record or portion thereof is~~  
25 necessary ~~in answering~~ to answer the certified questions.

26           (c) Procedure in Supreme Court. In supreme court  
27 proceedings, the parties shall retain the same designations as

28 in the certifying court. The plaintiff in the certifying  
29 court shall file a brief with the clerk of the supreme court  
30 within the time specified by the trial court. The defendant  
31 shall file a brief in response to the brief of the plaintiff  
32 within the time specified by the trial court. Any party may  
33 request an extension of time pursuant to Rule 26(b), but  
34 promptness is required. Oral argument ~~shall be~~ is governed by  
35 Rule 34.

36 (d) Costs. Fees and costs ~~shall be~~ are the same as in  
37 civil appeals docketed before the supreme court and ~~shall~~ must  
38 be equally divided by the parties unless otherwise ordered by  
39 the certifying court in its order of certification.

40  
41 EXPLANATORY NOTE

42 Rule 47.1 was amended, effective January 1, 1979;  
43 September 1, 1983; March 1, 1999.

44 ~~This rule provides a method by which certain trial courts~~  
45 ~~in this State may certify questions of law in civil or~~  
46 ~~criminal cases to the Supreme Court for its determination.~~  
47 ~~The certification~~ Certification is discretionary with the  
48 trial court, and a certified question need not be answered by  
49 the Supreme Court. See § 32-24-02, NDCC. ~~An order by the~~  
50 ~~trial court denying certification is not an appealable order.~~  
51 ~~Schaff v. Kennelly, 69 N.W.2d 777 (N.D. 1955).~~

52 Subdivision (a), by reference, contains the requirements  
53 of § 32-24-01, NDCC. That statute states questions of law  
54 may be certified only if the case in which they arise depends

55 "principally or wholly on the construction of the laws  
56 applicable thereto, and such construction or interpretation is  
57 vital, or of great moment in the cause." ~~Subdivision (a) was~~  
58 ~~amended in 1983, effective September 1, 1983, to delete an~~  
59 ~~obsolete reference to a county court "with increased~~  
60 ~~jurisdiction."~~

61 The certification order may be prepared by the court or  
62 the parties, but it must be transmitted to the Supreme Court  
63 by the clerk of the certifying court. See § 32-24-04, NDCC.  
64 ~~It is imperative that the Supreme Court be sufficiently~~  
65 ~~apprised of the facts in the case.~~ The questions of law must  
66 first be ruled upon by the certifying court, and any issues of  
67 fact necessary for the determination of the questions of law  
68 must also be found by the trial court.

69 The intent of subdivision (c) is to assure that the  
70 questions are presented to the Supreme Court as expeditiously  
71 as possible, with little delay in the final hearing and  
72 determination of the case.

73 Technical amendments were made to Rule 47.1, effective  
74 March 1, 1999, and the obsolete reference to "county court" was  
75 deleted.

76 SOURCES: Procedure Committee Minutes of April 30-May 1,  
77 1998, page 11.

78 STATUTES AFFECTED:

79 CONSIDERED: §§ 32-24-01, 32-24-02, 32-24-03, 32-24-  
80 04, NDCC.

1 RULE 3.1 PLEADINGS

2  
3 \* \* \* \* \*

4 (g) File Numbers. The clerk, at the time of the  
5 filing of a case and at the time of the filing of any  
6 responsive pleading, shall assign a file number to the  
7 case and immediately notify, ~~by mail~~ the attorney of  
8 record of the file number assigned to the proceedings.  
9 Thereafter, all instruments and pleadings to be filed  
10 must bear the assigned file number on the front or title  
11 page in the upper righthand portion of the instrument to  
12 be filed. Instruments and pleadings that do not conform  
13 to this rule will not be filed by the clerk until they  
14 are in compliance with this rule.

15 \* \* \* \* \*

16  
17 EXPLANATORY NOTE

18 Rule 3.1 was amended, effective January 1, 1988;  
19 March 1, 1996; March 1, 1999.

20 A new subdivision (b) was added, effective March 1,  
21 1996, which contains signature requirements. The letter  
22 designation of each existing subdivision was amended  
23 accordingly.

24 Subdivision (g) was amended, effective March 1,  
25 1999, to allow notification by means other than mail.

26 SOURCES: Procedure Committee Minutes of January  
27 29-30, 1998, page 22; September 29-30, 1994, pages 6-7.

1                   RULE 6.9 ASSISTING JURORS AT IMPASSE

2  
3           If the jury informs the court it has reached an impasse,  
4           the court, after conferring with counsel, may invite the  
5           jurors to list in writing the divisive issues, which if  
6           addressed further in the courtroom might bring about a  
7           verdict. After receiving the jurors' written response, the  
8           judge, after conferring with counsel, may direct further  
9           proceedings to occur as appropriate.

10  
11                   EXPLANATORY NOTE

12           Rule 6.9 was adopted, effective March 1, 1999.

13           Rule 6.9 is patterned after Rule 39(h), Ariz.R.Civ.P.,  
14           and Rule 22.4, Ariz.R.Crim.P. When a jury reports it is at an  
15           impasse, the rule allows a judge to offer assistance in hopes  
16           of improving the chances of a verdict. A judge must be  
17           careful not to be coercive, suggestive, or unduly intrusive.  
18           The comments to the Arizona rules suggest the judge's response  
19           to the jurors' report of impasse take the following form:

20                   "This instruction is offered to help your  
21                   deliberations, not to force you to reach a verdict.

22  
23                   You may wish to identify areas of agreement  
24                   and areas of disagreement. You may then wish to  
25                   discuss the law and the evidence as they relate to  
26                   areas of disagreement.

27  
28                   If you still have disagreement, you may wish  
29                   to identify for the court and counsel which issues  
30                   or questions or law or fact you would like counsel  
31                   or the court to assist you with. If you elect this  
32                   option, please list in writing the issues where  
33                   further assistance might help bring about a  
34                   verdict.

35                   I do not wish or intend to force a verdict.  
36                   We are merely trying to be responsive to your  
37                   apparent need for help. If it is reasonably  
38                   probable that you could reach a verdict as a result  
39                   of this procedure, it would be wise to give it a  
40                   try."  
41

42                   Some of the ways a judge may give assistance include: giving  
43                   additional instructions, clarifying earlier instructions,  
44                   directing the attorneys to make additional closing argument,  
45                   reopening the evidence for limited purposes, or a combination  
46                   of these measures. The court may decide it is not legally or  
47                   practically possible to respond to the jury's concerns.  
48

49                   SOURCES: Procedure Committee Minutes of September 25-26,  
50                   1997, pages 15-16.



RULE 6.10 COURTROOM OATHS

(a) Oath. Unless an affirmation is used, an oath substantially in the following form must be administered:

(1) To a Prospective Juror. Do you solemnly swear to truthfully answer the questions you are asked about your qualifications to be a juror? So help you God.

(2) To a Jury. Do you solemnly swear that you will consider all the evidence in this case, follow the instructions given to you, deliberate fairly and impartially and reach a fair verdict? So help you God.

(3) To a Witness. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth? So help you God.

(4) To an Interpreter. Do you solemnly swear to justly, truly, and impartially act as an interpreter and make a true translation to the best of your ability? So help you God.

(5) To a Bailiff to Keep Jury After Cause Submitted. Do you solemnly swear to keep the jury together until they are returned to the Court and not permit anyone to communicate with them unless you are ordered to do so by the Court? So help you God.

27           (6) To a Grand Jury. Do you solemnly swear to  
28           listen to, examine, and consider all of the  
29           evidence, to follow all of the Court's  
30           instructions, and to decide matters placed  
31           before you in accordance with the law and  
32           evidence presented? So help you God.

33           (7) To a Grand Jury Witness. Do you solemnly  
34           swear to tell the truth, the whole truth, and  
35           nothing but the truth, and you will keep  
36           secret all of the proceedings of the grand  
37           jury conducted in your presence? So help you  
38           God.

39           (8) To a Grand Jury Reporter. Do you solemnly  
40           swear you will keep secret the testimony taken  
41           and evidence considered by the grand jury  
42           except as you may be required by law to  
43           disclose? So help you God.

44           (9) To a Grand Jury Bailiff. Do you solemnly  
45           swear to impartially perform the duties of  
46           your office to the best of your ability, to  
47           obey your instructions, and not to eavesdrop  
48           or communicate with the grand jurors regarding  
49           any matter being considered by them? So help  
50           you God.

51           (b) Affirmation. A person must be allowed to make  
52           an affirmation instead of taking an oath, by substituting  
53           the word "affirm" for the word "swear" and substituting

54 the phrase "under the pains and penalties of perjury" for  
55 the phrase "so help you God."

56  
57 EXPLANATORY NOTE

58 Rule 6.10 was adopted, effective March 1, 1999.

59 The intent of the rule is to modernize the language  
60 used in courtroom oaths and to consolidate the various  
61 oaths into one location.

62 SOURCES: Procedure Committee Minutes of January 29-  
63 30, 1998, pages 3-10; September 25-26, 1997, pages 11-12.

64 STATUTES AFFECTED:

65 SUPERSEDED: Sections 28-14-08; 29-10.1-12;  
66 and 29-10.1-25. In Section 29-17-12, the language  
67 regarding an oath or affirmation. Section 29-17-  
68 14. In Section 31-01-11, the oath or affirmation  
69 for an interpreter. Section 44-05-02.

70 CROSS REFERENCE: NDREv 603 (Oath or Affirmation).

1                   RULE 7.1 JUDGMENTS, ORDERS AND DECREES

2  
3                   \*       \*       \*       \*       \*

4                   (d) Satisfaction of Judgment for Money When  
5 Judgment Creditor Cannot Be Found.

6                   (1) Motion to Satisfy. A judgment for money, if no  
7 execution is outstanding and the time for appeal has  
8 expired, may be satisfied by the court upon written  
9 motion of the debtor supported by affidavit stating:

10                   a. the amount, the judgment balance, accrued  
11 interest, and costs;

12                   b. that after the exercise of due diligence  
13 the judgment creditor and ~~his~~ the judgment  
14 creditor's attorney cannot be found or that the  
15 judgment creditor or ~~his~~ the judgment creditor's  
16 attorney has failed or refused to deliver a  
17 satisfaction of judgment upon being tendered the  
18 amount due; and

19                   c. that notice of the motion has been sent by  
20 mail or third-party commercial carrier to the  
21 judgment creditor and ~~his~~ the judgment creditor's  
22 attorney at their respective last known addresses.

23                   \*       \*       \*       \*       \*

24  
25                   EXPLANATORY NOTE

26                   Rule 7.1 was amended, effective March 1, 1994;  
27 March 1, 1999.

28 Rule 7.1 was amended, effective March 1, 1994, in  
29 response to GeoStar Corp. v. Parkway Petroleum, Inc.,  
30 495 N.W.2d 61, 65-66 (N.D. 1993) and Disciplinary Action  
31 Against Wilson, 461 N.W.2d 105 (N.D. 1990). The  
32 amendment to subdivision (a) requires the prevailing  
33 party to prepare a draft of the order or decree whenever  
34 the court makes a ruling other than in the course of  
35 trial. Former subdivision (a) also required the  
36 prevailing party to prepare drafts of the order, order  
37 for judgment, or decree to be entered, whenever the  
38 court made a final determination in an action.

39 New subdivisions (b) and (c) were added. Former  
40 subdivision (b) was changed to subdivision (d). New  
41 subdivision (b) concerns the preparation of findings of  
42 fact and conclusions of law under Rule 52(a), NDRCivP.  
43 New subdivision (c) was added to provide notice to all  
44 parties and to prevent ex parte contact with the court.

45 Subdivision (d) was amended, effective March 1,  
46 1999, to allow a notice of the motion to satisfy to be  
47 sent via commercial carrier as an alternative to mail.

48 SOURCES: Procedure Committee Minutes of January  
49 29-30, 1998, page 22; April 29-30, 1993, page 11;  
50 January 28-29, 1993, pages 9-10.

51 CROSS REFERENCE: Rules 52 (Findings by the Court),  
52 and 60 (Relief From Judgment of Order), NDRCivP.

1                   RULE 8.2 INTERIM ORDERS IN DOMESTIC RELATIONS CASES

2  
3                   (a) Ex Parte Interim Order.

4                   (1) No interim order may issue except upon notice  
5 and hearing unless the court specifically finds  
6 exceptional circumstances. Exceptional circumstances  
7 include:

8                   (A) Threat of imminent danger to any party or  
9 minor child of the party; or

10                   (B) Circumstances indicating that an ex parte  
11 order is necessary to protect the parties, any minor  
12 children of the parties, or the marital estate.

13                   (2) No ex parte interim order may be issued unless  
14 the movant executes an affidavit setting forth specific  
15 facts justifying the issuance of the order. A  
16 restraining and eviction order may not be issued ex  
17 parte unless the movant also appears personally and good  
18 cause is shown for issuance of the order.

19                   (3) The provisions which may be included in an ex  
20 parte interim order are temporary custody, support and  
21 other appropriate expenses, use of real or personal  
22 property, restraining and eviction.

23                   (4) If there has been an appearance in the action  
24 by the adverse party, or if the attorney for the moving  
25 party has knowledge that the adverse party is  
26 represented by an attorney, the attorney for the moving  
27 party shall notify the court. After receiving notice of

28 the appearance or representation, the court shall  
29 attempt to hold an emergency hearing, either in person  
30 or by telephonic conference, at which both parties may  
31 be heard, before issuing any order. The issuance of an  
32 order following an emergency hearing will in no manner  
33 affect a party's right to a further hearing on the  
34 merits of the order as provided in Rule 8.2 (a) (5).

35 (5) An interim order issued ex parte must provide  
36 specifically:

37 A. That the party to whom the order is directed,  
38 upon written motion may have a hearing upon the  
39 necessity for the issuance of the order or the amounts  
40 to be paid; and

41 B. That unless the motion is served and filed in  
42 the office of the clerk of district court within 10 days  
43 after service of the interim order, the order becomes  
44 final and is nonappealable, pending a final  
45 determination of the issues raised by the pleadings or  
46 until further order of the court in the event of a  
47 material change of circumstances.

48 C. That any hearing on the order must be held  
49 within 30 days from the date the motion is filed, unless  
50 an earlier hearing is required under chapter 14-07.1,  
51 NDCC, or an application for change of venue is pending.  
52 If the ex parte order contains provisions delineated in  
53 chapter 14-07.1, NDCC, the hearing must be scheduled in  
54 a timely manner to conform with the chapter.

55           (6) The ex parte interim order remains in effect  
56 until it is amended following a court hearing.

57           (b) Interim Orders Upon Motion and Hearing.

58           (1) Support. An interim order may provide for  
59 payment of support and other appropriate expenses. In  
60 the event support is ordered, a current mailing address  
61 must be listed for both parties.

62           (2) Custody - Visitation. An interim order  
63 providing for temporary custody of minor children may be  
64 granted, in which case the order must provide for  
65 reasonable visitation rights, unless the evidence  
66 establishes that visitation should be restricted to  
67 certain times and places or prohibited.

68           (3) Attorney's Fees and Costs. An interim order  
69 may provide for payment of attorney's fees and costs if  
70 evidence establishes that a party has insufficient  
71 personal income or funds with which to pay attorney's  
72 fees and costs.

73           (4) Use of Property. An interim order may provide  
74 for the use of real or personal property, and for  
75 restraining and eviction.

76           (c) Payments to Clerk. The interim order must  
77 provide that all support payments be paid to and through  
78 the clerk of the district court. Payments must be in a  
79 manner acceptable to the clerk unless otherwise ordered  
80 by the court.



81           (d) Time for Hearing Upon Notice. If a notice of  
82 motion and motion are served to obtain an interim order,  
83 the court shall hold a hearing no later than 30 days  
84 from the date of filing the motion. If venue is changed  
85 before the hearing for an interim order is held, the  
86 hearing for an interim order must be held no later than  
87 30 days after venue is changed.

88           (e) Submission of Evidence.

89           (1) In any proceedings under this rule, each party  
90 shall file an itemized financial statement prepared as  
91 illustrated in appendix B.

92           (2) Unless the court otherwise orders, evidence  
93 either in support of or in opposition to the interim  
94 order must be presented by affidavit. Evidence  
95 presented by affidavit may not be considered unless, at  
96 the time of the evidentiary hearing, the party offering  
97 the affidavit makes the affiant available for cross  
98 examination. The party initially seeking interim relief  
99 shall proceed first at the hearing. The affidavits and  
100 itemized financial statement of the moving party must be  
101 served and filed no later than ten days prior to the  
102 commencement of the hearing. Respondent's affidavits  
103 and itemized financial statement must be served and  
104 filed no later than three days prior to the commencement  
105 of the hearing.

EXPLANATORY NOTE

Rule 8.2 was amended, effective September 1, 1983;  
January 1, 1995; March 1, 1996; March 1, 1999.

A motion for a change of venue must be promptly  
ruled upon in order to accomplish the Committee's intent  
for interim orders to be expeditiously heard.

SOURCES: Procedure Committee Minutes of April 30-  
May 1, 1998, pages 8-9; April 27-28, 1995, pages 9-15;  
September 23-24, 1993, pages 16-17; April 20, 1989, page  
17; April 26, 1984, page 17; September 30-October 1,  
1982, pages 18-21; December 11-12, 1980, pages 3-4 and  
7.

1                   RULE 11.2 WITHDRAWAL OF ATTORNEYS

2

3           (a) Notice of Withdrawal. An attorney may withdraw

4 ~~his~~ their appearance for a party only upon leave of the

5 court, ~~after giving reasonable~~ Reasonable notice ~~of the~~

6 ~~time and place of the presentation~~ of the motion for

7 leave to withdraw must be given by personal service, ~~or~~

8 by registered or certified mail, or via a third-party

9 commercial carrier providing a traceable delivery,

10 directed to the party at ~~his~~ their last known business

11 or residence address.

12           (b) Motion to Withdraw. The motion for leave to

13 withdraw must be in writing and, unless another attorney

14 is substituted, must state the last known address of the

15 party represented.

16

17                   EXPLANATORY NOTE

18           Rule 11.2 was amended, effective March 1, 1999, to

19 allow notice via a commercial carrier providing a

20 traceable delivery service.

21           SOURCES: Procedure Committee Minutes of January 29-

22 30, 1998, page 22.