IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION
Supreme Court No. 20110230

Proposed Amendments to North Dakota Rules of Civil Procedure, North Dakota Rules of Appellate Procedure, North Dakota Rules of Criminal Procedure, North Dakota Rules of Court, and North Dakota Supreme Court Administrative Rules and Orders

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On August 9, 2011, the Joint Procedure Committee filed a Petition for Adoption, Amendment or Repeal of Court Rules with proposed amendments to North Dakota Rules of Civil Procedure 45, 54 and 65; North Dakota Rules of Appellate Procedure 4 and 29; North Dakota Rules of Criminal Procedure 32.1 and 41; North Dakota Rules of Court 6.4 and 8.13; and North Dakota Supreme Court Administrative Rules 13, 20, and 41. The proposed Amendments are available at http://www.ndcourts.gov/Court/Notices/Notices.htm. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal. The Court considered the matter, and

ORDERED, that the proposed amendments to North Dakota Rules of Civil Procedure 45 and 54; North Dakota Rules of Appellate Procedure 4 and 29; North Dakota Rules of Criminal Procedure 32.1 and 41; North Dakota Rules of Court 6.4 and 8.13; and North Dakota Supreme Court Administrative Rules 13, 20, and 41, as further amended by the Court, are ADOPTED, effective March 1, 2012.

IT IS FURTHER ORDERED, the proposed amendments North Dakota Rule of Civil Procedure 65, as further amended by the Court, are ADOPTED, effective July 1, 2012.

The Supreme Court of the State of North Dakota convened this 21st day of December, 2011, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner, and the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order.

Sandstrom, Justice, dissenting as to the adoption of N.D. Sup. Ct. Admin. R. 41(6)(a).

Although the adopted change to N.D. Sup. Ct. Admin. R. 41(6)(a) is much less objectionable than what had been proposed, I do not believe it appropriate to permit court orders denying to the public Internet access to truthful information sought about specific persons, while permitting third parties to buy and sell the information unrestricted, and burdening clerks of court with telephone requests for the information.

Petra H. Mandigo Hulm
Chief Deputy Clerk
North Dakota Supreme Court

RULE 4. APPEAL – WHEN TAKEN

(a) Appeal in civil case.

(1) Time for filing notice of appeal. In a civil case, except as provided in paragraph (a)(4), the notice of appeal required by Rule 3 must be filed with the clerk of district court within 60 days from service of notice of entry of the judgment or order being appealed.

(2) Multiple appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this subdivision, whichever period ends later.

(3) Effect of motion on notice of appeal.

(A) If a party timely files with the clerk of district court any of the following motions under the North Dakota Rules of Civil Procedure, the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is served and filed no later than 28 days

after notice of entry of judgment;

(B) (i) If a party files with the clerk of district court any motion listed in subparagraph (a)(3)(A) after a notice of appeal is filed, the party filing the motion must notify the supreme court clerk in writing, and the court may remand the case to the district court ~~for disposition of~~ to decide the motion. The supreme court retains jurisdiction on remand unless it expressly dismisses the appeal. If the supreme court remands and retains jurisdiction, the parties must promptly notify the supreme court clerk when the district court has decided the motion on remand.

(ii) A party intending to challenge an order disposing of any motion listed in subparagraph (a)(3)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal, in compliance with Rule 3(c), within the time prescribed by this rule measured from the service of notice of the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(4) Motion for extension of time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by subdivision (a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) If a motion for extension of time is filed, notice must be given to the other parties.

(C) No extension under paragraph (a)(4) may exceed 30 days after the prescribed time.

(b) Appeal in criminal case.

(1) Time for filing notice of appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed with the clerk of district court within 30 days after the entry of the judgment or order being appealed.

(B) If an appeal by the state is authorized by statute, the notice of appeal must be filed with the clerk of district court within 30 days after the entry of the judgment or order being appealed.

(2) Filing before entry of judgment. A notice of appeal filed after the district court announces a decision, sentence, or order, but before the entry of the judgment or order, is treated as filed on the date of and after the entry.

(3) Effect of motion on notice of appeal.

(A) If a defendant timely makes any of the following motions under the North Dakota Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period ends later:

(i) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 30 days after the entry of the judgment;

(ii) for arrest of judgment under Rule 34.

(B) If the defendant files with the clerk of district court any motion listed in subparagraph (b)(3)(A) after a notice of appeal is filed, the defendant must notify the supreme court clerk in writing, and the court may remand the case to the district court for

disposition of the motion.

(C) A notice of appeal filed after the district court announces a decision, sentence, or order, but before it disposes of any of the motions referred to in subparagraph (b)(3)(A), becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion;

(ii) the entry of the judgment of conviction.

(D) A valid notice of appeal is effective, without amendment, to appeal from an order disposing of any of the motions referred to in subparagraph (b)(3)(A).

(4) Motion for extension of time. Upon a finding of excusable neglect or good cause, the district court may -- before or after the time has expired, with or without motion and notice -- extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(5) Jurisdiction. The filing of a notice of appeal under this subdivision does not divest a district court of jurisdiction to correct a sentence under Rule 35(a), nor does the filing of a motion under Rule 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under N.D.R.Crim.P. 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry defined. A judgment or order is entered for purposes of this subdivision when it is entered on the criminal docket.

(c) Appeal in Contempt Case. A notice of appeal must be filed with the clerk of district court within 60 days after entry of the judgment or order being appealed. Upon a

finding of excusable neglect or for good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(d) Appeal in post-conviction proceeding. A notice of appeal must be filed with the clerk of district court within 60 days of service of notice of entry of the judgment or order being appealed. Upon a finding of excusable neglect or good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(e) Appeal in Proceeding Under Uniform Juvenile Court Act. A notice of appeal must be filed with the clerk of district court within 30 days of service of notice of entry of the judgment, order or decree being appealed. Upon a finding of excusable neglect or good cause, the supreme court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(f) Mistaken filing in supreme court. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the supreme court, the supreme court clerk must note on the notice the date when it was received and send it to the clerk of district court. The notice is then considered filed in the district court on the date so noted.

EXPLANATORY NOTE

Rule 4 was amended, effective March 1, 1986; March 1, 1994; March 1, 1997; March 1, 1998; March 1, 1999; August 1, 2001; March 1, 2003; March 1, 2007; March 1, 2008; March 1, 2011; March 1, 2012.

The time for civil appeals runs from "service of notice of entry" of the order or judgment. However, service of notice of entry of judgment is not necessary to start the time running for filing a post-judgment motion or appeal if the record clearly evidences actual knowledge of entry of judgment by the affirmative action of the moving or appealing party. See N.D.R.Civ.P. 58(b).

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

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

Subdivision (a) was amended, effective March 1, 1999, to provide the 30 day extension for excusable neglect is to be added to the time for appeal provided by the statute or rule setting the time for appeal. A party seeking an extension of time to appeal should file a notice of appeal with the motion for extension.

~~Subdivision~~ Subparagraph (a)(3)(A)(vi) was amended, effective March 1, 2011, to increase the time to file a Rule 60 motion from 15 to 28 days after notice of entry of judgment.

Subparagraph (a)(3)(B) was amended, effective March 1, 2012, to provide that the

supreme court retains jurisdiction when remanding a case to the district court to decide a motion unless the supreme court expressly dismisses the appeal.

~~Subdivision~~ Subparagraph (a)(3)(B)(ii) was amended, effective March 1, 2011, to track the 2009 amendments to Fed.R.App.P. 4. The amendment changed t he phrase "judgment altered or amended" to "judgment's alteration or amendment."

Subdivision (b) was amended, effective March 1, 2003, to increase the time for a criminal defendant to appeal from 10 days to 30 days.

Subdivision (b) was amended, effective March 1, 2008, to clarify that the time for appeal continues to run even if a motion to correct a sentence under N.D.R.Crim.P. 35 is filed.

Subdivision (d) was adopted, effective August 1, 2001, to provide a time for appeal in a post-conviction proceeding.

Subdivision (e) was adopted, effective March 1, 2007, to clarify the time for appeal in a proceeding under the Uniform Juvenile Court Act. Requests for extension of time in juvenile cases must be directed to the supreme court.

Subdivision (f) was adopted, effective March 1, 2003, to provide a procedure to be used when a notice of appeal is mistakenly filed in the supreme court.

Rule 4 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 4. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, page 18; April 29-30, 2010, page 23; January 25, 2007, page 16; September 22-23, 2005, pages 25-26; April 26-27, 2001, pages 4-5; September 28-29, 2000, pages 10-13; January 27-28, 2000, pages 4-9; September 23-24, 1999, pages 10-12; April 30-May 1, 1998, page 13; January 30, 1997, page 8; January 25-26, 1996, pages 7-10; April 29-30, 1993, pages 2-3, 16-18; November 29, 1984, pages 19-20; April 26, 1984, pages 23-24; January 20, 1984, pages 10-15; September 18-19, 1980, page 20; January 12-13, 1978, page 25; Fed.R.App.P. 4.

Statutes Affected:

Considered: N.D.C.C. § 27-20-56.

Superseded: N.D.C.C. § 28-27-04.

RULE 65. INJUNCTIONS

~~The procedure for granting restraining orders and temporary and permanent injunctions shall be as provided by statute. To the extent that the statute is silent on procedure, these rules apply.~~

(a) Temporary restraining order. A temporary restraining order is short-lived injunctive relief that the court may issue with less notice than required for a preliminary injunction. It prevents irreparable injury until the court decides whether to issue a preliminary injunction.

(1) Motion; Proposed Complaint; Filing. The party moving for a temporary restraining order must submit a proposed complaint seeking injunctive relief with the motion. The moving party must file the motion, proposed complaint, and other supporting documents no later than the next court business day after submission. If the moving party does not timely file these documents, an issued temporary restraining order terminates at the end of that next business day.

(2) Notice. The party moving for a temporary restraining order must submit an affidavit reciting the efforts made to give the opposing party's attorney, if known, or if not known, the opposing party, reasonable notice of the motion or the reasons why notice should not be required. Reasonable notice means any form of notice reasonably calculated to give

actual notice of the date and time of submission of the motion to the court, affording the opposing party an opportunity to be heard.

(3) Basis for Relief. The court may issue a temporary restraining order only if it finds:

(A) appropriate injunction grounds;

(B) a clear need for immediate relief; and

© either:

(i) the moving party gave reasonable notice or made reasonable efforts to give reasonable notice to the opposing party's attorney, if known, or if not known, to the opposing party; or

(ii) a substantial reason exists for not giving notice.

(4) Preliminary Injunction Hearing Date. Unless for good cause the court directs otherwise, a party that obtains a temporary restraining order must obtain a preliminary injunction hearing time no less than 21 days, and no more than 28 days, from the temporary restraining order date.

(5) Temporary Restraining Order Expiration. A temporary restraining order expires at the end of the 28th day after issuance unless the court for good cause directs a shorter time or the opposing party consents to a longer time. If the party that obtained the temporary restraining order cannot obtain a preliminary-injunction hearing within 21 to 28 days of the temporary restraining order date, the court may extend the temporary restraining order until the earliest possible time the motion may be heard. At or after the preliminary injunction

hearing, the court may extend the temporary restraining order for no more than 14 days if necessary for deciding the preliminary injunction motion, unless for good cause a longer time is necessary. The court must enter the reasons for any extension in the record.

(6) Temporary Restraining Order Service. A party that obtains a temporary restraining order must serve the order and the notice for the preliminary injunction hearing on the opposing party as follows:

(A) Summons and Complaint Not Served. If the summons and complaint have not yet been served under Rule 4, then with the summons and complaint under Rule 4.

(B) Summons and Complaint Served. If the summons and complaint have been served under Rule 4, then under Rule 5.

(7) Motion to Dissolve or Modify.

(A) Notice and Hearing. If the opposing party received less than four days actual notice of the temporary restraining order motion before the temporary restraining order was issued, the opposing party may move to dissolve or modify the order on four days actual notice, or on shorter notice the court for good cause sets, to the party that obtained the order.

(B) Burden. The party that obtained the temporary restraining order has the burden of justifying its continuation.

(8) Not Extended by Implication. A temporary restraining order remains a temporary restraining order even if the opposing party appears in opposition to the temporary restraining

order motion or the court denies a motion to dissolve or modify the temporary restraining order.

(b) Preliminary Injunction. A preliminary injunction prevents irreparable injury until the court decides whether to issue a permanent injunction at trial. A court may issue a preliminary injunction only after the Rule 65(b)(1) required notice of hearing. The moving party must file and serve the summons and complaint under Rule 4 no later than the time the party serves and files the notice of motion and motion for a preliminary injunction.

(1) Notice and Hearing. Unless for good cause the court directs otherwise, the court may issue a preliminary injunction only when the moving party serves the preliminary injunction motion, supporting brief, and supporting materials on the opposing party at least 14 days before the hearing date.

(2) Briefing Schedule. Unless for good cause the court directs otherwise, the briefing schedule for a preliminary-injunction motion is as follows:

(A) Temporary Restraining Order in Place. When the moving party moves for a preliminary injunction with a temporary restraining order in place, the moving party must serve the preliminary injunction motion, supporting brief, and supporting materials within seven days after the temporary restraining order date. The opposing party must serve the response brief and supporting materials within seven days after service of the moving party's brief. Only on order of the court, for good cause shown, may the moving party serve a reply brief. Unless good cause is shown, the court must dissolve the temporary restraining order

if the party that obtained it does not timely serve the preliminary injunction motion, supporting brief, and supporting materials.

(B) Temporary Restraining Order Not in Place. When the moving party moves for a preliminary injunction without a temporary restraining order in place, the moving party must serve the preliminary-injunction motion, supporting brief, and supporting materials on the opposing party. The opposing party must serve the response brief and supporting materials within seven days after service of the moving party's brief. The moving party must serve any reply brief within five days after service of the opposing party's response brief.

(3) Interim Relief. If at the hearing on a preliminary injunction motion brought without a temporary restraining order in place, the moving party shows appropriate injunction grounds and the clear need for immediate relief, the court may on its own motion issue a temporary restraining order effective for no more than 14 days. The court may extend this order for good cause, but must enter the reasons for any extension in the record.

© Unnamed Parties. Any unnamed party that a temporary restraining order or preliminary injunction would or does directly affect may be heard at an injunction hearing.

(d) Evidence.

(1) Temporary Restraining Order Evidence. Unless the court directs otherwise, evidence on a motion for a temporary restraining order, or a motion to dissolve or modify a temporary restraining order, must be by affidavit. An affidavit supporting or opposing a motion for a temporary restraining order or a motion to dissolve or modify a temporary

restraining order may be based on information and belief. The affiant must identify those parts of the affidavit based on personal knowledge and those based on information and belief.

(2) Preliminary Injunction Evidence. Unless the court directs otherwise, evidence on a motion for a preliminary injunction may be by oral testimony. An affidavit supporting or opposing a preliminary injunction must be based on personal knowledge and served with the parties' briefs. The court may permit additional affidavits to be filed at or after the hearing.

(e) Trial on Permanent Injunction. If the court issues a preliminary injunction, the trial must be held within 180 days from the date a temporary restraining order or preliminary injunction was first issued unless the court for good cause extends the time or the opposing party consents to a longer time. The court should issue its decision within 60 days after the trial, unless for good cause a longer time is necessary. The court must enter the reasons for any extension in the record.

(f) Previous Denial. A party moving for a temporary restraining order or preliminary injunction must state in the motion whether a judge previously denied the motion or a similar motion based on the same transaction or occurrence or series of transactions or occurrences, and if so, the identity of the judge or judges who denied the motion.

(g) Findings; Contents and Scope of Injunction.

(1) Findings. The court must state its findings of fact and conclusions of law under Rule 52 supporting the denial, issuance, dissolution or modification of an injunction. If the court issues a temporary restraining order without reasonable notice to the opposing party's

attorney or the opposing party, the court must state why it issued the order without that notice.

(2) Contents.

(A) In General. A temporary restraining order or preliminary injunction must:

(i) state its terms specifically.

(ii) describe in reasonable detail, and not by referring to the complaint or other document, the acts restrained or required.

(B) Temporary Restraining Order. Unless the court specifically finds the opposing party received four day's actual notice of the temporary restraining order motion before the temporary restraining order was issued, the temporary restraining order must state that the opposing party may move to dissolve or modify the order under Rule 65(a)(7) on four day's actual notice, or on shorter notice the court for good cause sets, to the party that obtained the order.

(3) Persons Bound. A temporary restraining order or preliminary injunction binds only the following that receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

© other parties that are in active concert or participation with anyone described in Rule 65(g)(3)(A) or (B).

(4) Clarification. Any party subject to, or potentially subject to, a temporary restraining order or preliminary injunction may move the court to clarify whether the order or injunction would apply to specified conduct.

(h) Security.

(1) In General. Except for good cause shown and recited in the record, a temporary restraining order or preliminary injunction does not become effective for enforcement until the moving party posts security in a form and amount that the court considers sufficient to pay the enjoined party's costs and damages if the court ultimately decides the moving party was not entitled to the order or injunction.

(2) No Security Required. The United States, the State of North Dakota, or an agency or political subdivision of either, or an officer of any of these acting in an official capacity, need not provide security.

(3) Form of Security. The moving party may give the security in any form the court considers sufficient to secure the opposing party. Security may include a surety on a bond or other undertaking, a cashier's check, a certified check, a letter of credit, or a negotiable bond.

(4) Additional Security. A party enjoined under a temporary restraining order or preliminary injunction may move the court for security if the court did not initially require it, or additional or different security if the court did require it. If the court decides on motion that security, or different or additional security, is required, it must vacate the order or

injunction unless the party that obtained it provides the form and amount of security that the court requires within a reasonable time established by the court.

(5) Not a Cap. The amount of security does not limit the costs and damages a wrongfully-enjoined party may recover from the party that obtained the temporary restraining order or preliminary injunction.

(i) Contempt. The court may punish disobedience of a temporary restraining order, preliminary injunction, or permanent injunction as a contempt.

(j) Other Laws Not Modified. This rule does not modify statutes or rules that prescribe specific procedures for obtaining injunctive relief in any of the following actions:

(1) actions affecting employer and employee;

(2) actions for divorce, child or spousal support, parental rights and responsibilities, or domestic violence; or

(3) actions involving disorderly conduct.

EXPLANATORY NOTE

Rule 65 was amended, effective July 1, 1981; July 1, 2012.

~~This rule differs substantially from Rule 65 FRCivP.~~

As amended, Rule 65 is designed to provide a framework for injunction procedure in North Dakota. It integrates elements of the state's injunction procedure statutes, now superseded, with the federal rule on injunctions, Fed.R.Civ.P. 65, and concepts from injunction rules from other states.

Grounds for granting a permanent injunction are listed in N.D.C.C. § 32-05-03. Grounds for granting a temporary restraining order or preliminary injunction are listed in N.D.C.C. § 32-06-02.

The court should promptly hear and decide a motion to dissolve or modify a temporary restraining order. If the parties stipulate, the court may convert the hearing on the motion to dissolve or modify into the preliminary injunction hearing.

If the parties stipulate, the court may advance the trial and consolidate it with the preliminary injunction hearing. The parties and the court should take care, however, to preserve the right a party may have to a jury trial on issues separate from the issue of injunctive relief.

An opposing party may combine a Rule 65(h)(4) motion for security, or additional or different security, with a Rule 65(a)(7) motion to dissolve or modify a temporary restraining order.

~~N.D.C.C. chs. 32-05 and 32-06 generally govern the procedure for the issuance of injunctions and restraining orders.~~

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages 2-8; January 27-28, 2011, pages 2-29; April 29-30, 2010, pages 27-28; January 28-29, 2010, page 14; January 17-18, 1980, pages 5-6.

Statutes Affected:

Superseded: N.D.C.C. §§ 32-06-03, 32-06-04, 32-06-05, 32-06-06, 32-06-07, 32-06-08, 32-06-09, 32-06-10, 32-06-11.

Considered: N.D.C.C. chs. 12.1-31.2, 14-07.1, 32-05; §§ 32-06-01, 32-06-02.

RULE 54. JUDGMENT; COSTS

(a) Definition; Form. "Judgment" as used in these rules includes a decree and any order from which an appeal lies. A judgment should not include recitals of pleadings, a master's report, or a record of prior proceedings.

(b) Judgment on Multiple Claims or Involving Multiple Parties.

If an action presents more than one claim for relief, whether as a claim, counterclaim, crossclaim, or third-party claim, or if multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

(c) Demand for Judgment; Relief to be Granted. A default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings. Every other final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings.

(d) Death Before Judgment. If a party dies after a verdict or decision on any issue of fact and before judgment, the court may still render judgment. That judgment is not a lien on the real property of the deceased party, but is payable as provided in N.D.C.C. ch. 30.1-19.

(e) Costs; Objections; Attorneys' Fees.

(1) Costs Other Than Attorneys' Fees. Costs and disbursements must be allowed as provided by statute. A party awarded costs and disbursements must submit a detailed, verified statement to the clerk. Upon receipt of the statement, the clerk must allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment.

(2) Objections to Costs. Objections must be served and filed with the clerk within 14 days after notice of entry of judgment or within a longer time fixed by court order within the 14 days. The grounds for objections must be specified. If objections are filed, the clerk must promptly submit them to the judge who ordered the judgment. The court by ex parte order must fix a time for hearing the objections. Unless otherwise directed by the court, the parties may waive the right to a hearing and submit written argument instead within a time specified by the court.

(3) Attorneys' Fees. A claim for attorneys' fees and related nontaxable expenses not determined by the judgment must be made by motion. The motion must be served and filed within 21 days after notice of entry of judgment. The trial court may decide the motion even after an appeal is filed.

EXPLANATORY NOTE

Rule 54 was amended, effective January 1, 1980; September 1, 1983; March 1, 1990; March 1, 1997; March 1, 1998; March 1, 2011; March 1, 2012.

Under subdivision (b), entry of a final judgment adjudicating fewer than all of the

claims of all of the parties is permitted only in the infrequent harsh case involving unusual circumstances where failure to allow an immediate appeal would create demonstrated prejudice or hardship. ~~Subdivision (b) requires the trial court to exercise its discretion in directing the entry of final judgment as to one or more but fewer than all of the claims or parties.~~ The party requesting ~~certification~~ entry of judgment under subdivision (b) carries the burden of establishing that unusual and compelling or out-of-the-ordinary circumstances exist and that prejudice or hardship will result if ~~certification~~ entry of judgment is denied~~,~~. ~~and the trial court, in exercising its discretion,~~ The district court must weigh the overall policy prohibiting piecemeal appeals against the exigencies of the case and must delineate the unusual or compelling circumstances justifying order of entry of judgment. ~~See criteria in Union State Bank v. Woell, 357 N.W.2d 234 (N.D. 1984).~~ If the district court does not enter judgment under Rule 54(b), a partial summary judgment adjudicating fewer than all of the claims of all of the parties is not a final judgment and is not immediately appealable. A party seeking to appeal must wait until the end of the case, when all claims have been resolved and final judgment has been entered, before filing an appeal.

Paragraph (e)(2) was amended, effective March 1, 2011, to increase the time to object to costs from 7 to 14 days after notice of entry of judgment.

Paragraph (e)(3) was amended, effective March 1, 2011, to increase the time to make a claim for attorneys' fees from 15 to 21 days after notice of entry of judgment.

Rule 54 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule

were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, page 13; April 29-30, 2010, page 14; September 24-25, 2009, page 23; January 30, 1997, page 8; January 25-26, 1996, pages 7-10; September 28-29, 1995, page 18; April 20, 1989, page 2; December 3, 1987, page 11; November 29, 1984, page 18; September 30-October 1, 1982, pages 1-3; November 29-30, 1979, page 14; April 26-27, 1979, pages 19-20; ~~Rule~~ Fed.R.Civ.P. 54; ~~FRCivP~~.

Cross Reference: N.D.R.Civ.P. 8 (General Rules of Pleading), N.D.R.Civ.P. 52 (Findings by the Court), N.D.R.Civ.P. 58 (Entry of Judgment), N.D.R.Civ.P. 59 (New Trials -- Amendment of Judgments) and N.D.R.Civ.P. 77 (District Courts and Clerks); N.D.R.App.P. 3 (Appeal as of Right -- How Taken). See also, N.D.R.Civ.P. 20 (Permissive Joinder of Parties) and N.D.R.Civ.P. 21 (Misjoinder and Non-Joinder of Parties).

RULE 45. SUBPOENA

(a) In General.

(1) Form and Contents.

(A) Requirements. Every subpoena must:

(i) state the title of the action, the court in which it is pending, and its civil-action number;

(ii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises; and

(iii) set out the text of the notice in Rule 45(f).

(B) Command to Attend a Deposition; Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing or trial or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to

produce documents, electron ically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued by Whom. The clerk shall issue a subpoena in the name of the court for the county in which the action is filed, signed and sealed but otherwise blank, to a party who requests it. That party shall complete it before service. An attorney for a party also may issue a subpoena, which must be signed by the attorney, include the attorney's office address and identify the party the attorney represents.

(3) Subpoena in Out-of-State Action.

(A) "State" Defined. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

(~~A~~ B) In General. The clerk, may issue a subpoena under seal of the court to a party involved in a civil action pending in another state if:

(i) the party's attorney files proof of service of notice under Rule 45(b)(2); or

(ii) the party files a letter of request from a ~~foreign~~ court of the other state.

(~~B~~ C) Requirements. The subpoena must be issued in the name of the court for the county where the subpoena will be served. The subpoena may be used and discovery obtained within this state in the same manner and subject to the same conditions and limitations as if the action were pending within this state. Any dispute regarding the subpoena, or discovery demanded, needing judicial involvement must be submitted to the court for the county where the subpoena issued.

(b) Service; Notice.

(1) Service of Subpoena.

(A) A subpoena to a named person must be served under Rule 4(d). A subpoena may be served at any place within the state.

(B) If the subpoena requires the person's attendance, fees for one day's attendance, mileage and travel expense allowed by law must be tendered. If fees, mileage and travel expense are not tendered with the subpoena, the person need not obey the subpoena. Fees, mileage and travel expense need not be tendered if they are to be paid by the state or a political subdivision.

(2) Service of Notices.

(A) Notice of Deposition. If the subpoena commands a person to attend, give testimony and produce documents, electronically stored information or tangible things at a pretrial deposition, then before the subpoena is served, a notice to take a deposition must be served on each party.

(B) Notice of Demand for Production or Inspection. If a deposition notice has not been served, and if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice of demand for production or inspection must be served on each party.

(C) Notice Mandatory Before Service of Subpoena. The notice required by Rule 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a pretrial deposition, for pretrial production of documents, electronically stored information,

or tangible things or for the inspection of premises may be served.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises or to producing electronically stored information in the form or forms requested. The objection must be received before the earlier of 24 hours before the time specified for compliance or ten days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Location.

(A) Resident Witness. A subpoena may require a resident of this state to attend a deposition only in the county where the person resides, is employed or transacts business in person, or at a convenient place ordered by the issuing court. A resident may be required to attend a hearing or trial any place within this state.

(B) Nonresident Witness. A subpoena may require a nonresident of this state who is served with a subpoena within this state to attend a deposition ,hearing or trial in any county of this state.

(4) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires attendance beyond the location requirements of Rule 45 (c)(3);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information.

(A) Documents. A person responding to a subpoena to produce documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person

responding need not produce the same electronically stored information in more than one form.

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

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy

the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3).

(f) Notice. All subpoenas commanding pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises must contain the following notice:

"You may object to this subpoena by 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 of documents, electronically stored information, or tangible things or the inspection of premises]. Any objection must be received within ten days after you receive the subpoena. If the time specified in the subpoena for compliance is less than ten 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."

EXPLANATORY NOTE

Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1, 2012.

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

Rule 45 was amended, effective March 1, 2008, in response to the 2006 federal revision. Language was added to the rule to clarify that production of electronically stored materials may be demanded by subpoena and to provide guidance in dealing with requests for electronically stored materials.

Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments

to Fed.R.Civ.P. 45. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Paragraph (a)(3) was amended, effective March 1, 2012, to define "state" to include the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.

Subdivision (b) was amended, effective March 1, 2007, to eliminate the requirement for parties to serve a separate notice for production when commanding a person to attend a deposition to give testimony and produce documents or things.

Paragraph (b)(2) was amended, effective March 1, 2009, to make it clear that notice must be served on each party in a matter before a subpoena to take testimony or for production is served.

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

Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 32-33; April 24-25, 2008, pages 22-25; September 28-29, 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987, pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P. 45.

Statutes Affected:

Superseded: N.D.C.C. § 31-05-22

Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), and N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions); N.D.R.Crim.P. 17 (Subpoena); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure).

RULE 41. SEARCH AND SEIZURE

(a) Authority to Issue a Warrant. A state or federal magistrate acting within or for the territorial jurisdiction where the property or person sought is located, or from which it has been removed, may issue a search warrant authorized by this rule.

(b) Persons or Property Subject to Search and Seizure. A warrant may be issued for any of the following:

(1) property that constitutes evidence of a crime;

(2) contraband, the fruits of crime, or things criminally possessed;

(3) property designed or intended for use, or which is or has been used as the means of, committing a crime;

(4) a person for whose arrest there is probable cause, or who is unlawfully restrained.

(c) Issuing the Warrant.

(1) Warrant on Affidavit or Sworn Recorded Testimony.

(A) In General. A warrant other than a warrant on oral testimony under Rule 41(c)(2) may issue only on an affidavit or affidavits sworn to or sworn recorded testimony taken before a state or federal magistrate and establishing the grounds for issuing the warrant.

(B) Examination. Before ruling on a request for a warrant, the magistrate may require the affiant or other witnesses to appear personally and may examine under oath the affiant and any witnesses the affiant may produce. This examination must be recorded and made part of the proceedings.

(C) Probable Cause. If the state or federal magistrate is satisfied that grounds for the application exist or that there is probable cause to believe they exist, the magistrate must issue a warrant identifying the property or person to be seized and naming or describing with particularity the person or place to be searched. The finding of probable cause may be based upon hearsay evidence in whole or in part.

(D) Command to Search. The warrant must be directed to a peace officer authorized to enforce or assist in enforcing any law of this state. It must command the officer to search, within a specified period of time not to exceed 14 days, the person or place named for the property or person specified.

(E) Service and Return. The warrant must be served in the daytime, unless the issuing authority, by appropriate provision in the warrant, and for reasonable cause shown, authorizes its execution at times other than daytime. It may designate a state or federal magistrate to whom it must be returned.

(2) Warrant on Remote Communication.

(A) In General. When reasonable under the circumstances, a state or federal magistrate may issue a warrant based on sworn oral testimony communicated by telephone or other appropriate means.

(B) Application. The person requesting the warrant must prepare a duplicate original warrant and must read the duplicate original warrant, verbatim, to the magistrate. The magistrate must enter, verbatim, what is so read to the magistrate on the original warrant. The magistrate may direct the warrant to be modified.

(C) Issuance. If the magistrate is satisfied that grounds for the application exist or that there is probable cause to believe that they exist, the magistrate must order the issuance of a warrant by directing the person requesting the warrant to sign the magistrate's name on the duplicate original warrant. The magistrate must immediately sign the original warrant and enter on the face of the original warrant the date and time when the warrant was ordered to be issued. The finding of probable cause for a warrant on oral testimony may be based on the same kind of evidence as is sufficient for a warrant on affidavit.

(D) Recording and Certifying Testimony. If a caller informs the magistrate that the purpose of the call is to request a warrant, the magistrate must immediately place under oath each person whose testimony forms the basis of the application and each person applying for that warrant. If a voice recording device is available, the magistrate must use the device to record the call. Otherwise a stenographic or longhand verbatim record must be made. If a longhand verbatim record is made, the magistrate must file a signed copy with the court.

(E) Contents. The contents of a warrant on oral testimony are the same as the contents of a warrant on affidavit.

(F) Additional Rules for Execution. The person who executes the warrant must enter the exact time of execution on the face of the duplicate original warrant.

(G) Motion to Suppress Precluded. Absent a finding of bad faith, evidence obtained under a warrant issued under Rule 41(c)(2) is not subject to a motion to suppress on the ground that it was not reasonable under the circumstances to issue the warrant on oral testimony.

(3) Warrant by Electronic Transmission.

(A) General Rule. An affidavit in support of a warrant may be submitted by electronic transmission. A warrant may be transmitted by electronic transmission.

(B) Application. The magistrate must orally administer the oath or affirmation to the affiant over the telephone. The affiant must sign the affidavit and submit the affidavit to the magistrate by electronic transmission. An affidavit sworn to a magistrate over the telephone is sworn to before a magistrate for the purposes of Rule 41(c).

(C) Issuance. The magistrate must note on the warrant the date and time of issuance of the warrant, and indicate on the warrant that the supporting affidavit was sworn to over the telephone. The electronic transmission has the same effect as the original.

(D) Execution. The person who executes the warrant must enter the date and time of the execution on the face of the warrant.

(4) Warrant Seeking Electronically Stored Information. A warrant under Rule 41(c) may authorize the seizure of electronic storage media or the seizure or copying of electronically stored information. Unless otherwise specified, the warrant authorizes a later review of the media or information consistent with the warrant. The time for executing the warrant refers to the seizure or on-site copying of the media or information, and not to any later off-site copying or review.

(d) Execution and Return With Inventory.

(1) Inventory. An officer present during the execution of the warrant must prepare and verify an inventory of any property seized. The officer must do so in the presence of the

applicant for the warrant and the person from whom, or from whose premises, the property was taken. If either one is not present, the officer must prepare and verify the inventory in the presence of at least one other credible person. In a case involving the seizure of electronic storage media or the seizure or copying of electronically stored information, the inventory may be limited to describing the physical storage media that were seized or copied. The officer may retain a copy of the electronically stored information that was seized or copied.

(2) Receipt. The officer taking property under the warrant must:

(A) give a copy of the warrant and a receipt for the property taken to the person from whom or from whose premises the property was taken; or

(B) leave a copy of the warrant and receipt at the place from which the officer took the property.

(3) Return. The officer executing the warrant must promptly return it--together with a copy of the inventory--to the magistrate designated on the warrant. The magistrate on request must give a copy of the inventory to the person from whom, or from whose premises, the property was taken and to the applicant for the warrant.

(e) Motion for Return of Property. A person aggrieved by an unlawful search and seizure of property or by the deprivation of property may move the trial court for the property's return. The court must receive evidence on any factual issue necessary to decide the motion. If it grants the motion, the court must return the property to the moving party, although the court may impose reasonable conditions to protect access and use of the property in later proceedings. If a motion for return of property is made or heard after an

indictment, information, or complaint is filed, it must be treated also as a motion to suppress under Rule 12.

(f) Motion to Suppress. A motion to suppress evidence may be made in the trial court as provided in Rule 12.

(g) Return of Papers to Clerk. The magistrate to whom the warrant is returned must attach to the warrant a copy of the return, inventory and all other related papers and must file them with the clerk of the trial court.

(h) Scope and Definitions.

(1) Scope. This rule does not modify any statute regulating search or seizure, or the issuance and execution of a search warrant in special circumstances.

(2) Definitions. The following definitions apply under this rule:

(A) "Property" includes documents, books, papers and any other tangible objects.

(B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to local time.

EXPLANATORY NOTE

Rule 41 was amended, effective September 1, 1983; March 1, 1990; March 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012.

Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement the provisions of Article I, Section 8, of the North Dakota Constitution and the Fourth Amendment to the United States Constitution, which guarantee, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated; and no warrant shall issue but upon probable cause, supported

by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." To implement this constitutional protection, an illegal search and seizure will bar the use of such evidence in a criminal prosecution. The suppression sanction is imposed in order to discourage abuses of power by law enforcement officials in conducting searches and seizures.

Subdivision (a) provides that a search warrant be issued by a magistrate, either state or federal, acting within or for the territorial jurisdiction. The provision which permits a federal magistrate to issue a search warrant is the reciprocal of the federal rule, which permits a state magistrate to issue a search warrant pursuant to a federal matter. It is contemplated that a search warrant will be issued by a federal magistrate only on the nonavailability of a state magistrate.

Subdivision (a) does not require that the individual requesting the search warrant be a law enforcement officer. There appears to be common-law support for the use of the search warrant as a means of getting an owner's property back. The primary purpose of the rule, however, is the authorization of a search in the interest of law enforcement and as a practical matter the request for issuance of a search warrant by someone other than a law enforcement officer is virtually nonexistent.

Subdivision (b) describes the property or persons which may be seized with a lawfully issued search warrant. Issuance of a search warrant to search for items of solely evidential value is authorized. There is no intention to limit the protection of the Fifth Amendment against compulsory self-incrimination, so items that are solely "testimonial" or

"communicative" in nature might well be inadmissible on those grounds.

Paragraph (c)(1) follows the federal rule except that North Dakota's rule permits the issuance of a warrant on sworn recorded testimony without an affidavit. Probable cause for the issuance of a search warrant should be assessed under the totality-of-circumstances test.

The provision for examination of the affiant before the magistrate is intended to assure the magistrate an opportunity to make a careful decision as to whether there is probable cause based on legally obtained evidence. The requirement that the testimony be recorded is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if a motion to suppress is later filed.

The language of subparagraph (c)(1)(E), "for reasonable cause shown," is intended to explain the necessity for executing the warrant at a time other than the daytime. This provision is intended to be a substantive prerequisite to the issuance of a warrant that is to be executed at a time other than daytime, although it is not necessary that the quoted language ("for reasonable cause shown") be defined in subdivision (h).

Paragraph (c)(2) establishes a procedure for the issuance of a search warrant when it is not reasonably practicable for the person obtaining the warrant to present a written affidavit to a magistrate as required by paragraph (c)(1). A warrant may be issued on the basis of an oral statement of a person not in the physical presence of a magistrate. Telephone, radio, interactive television, or other electronic methods of communication are contemplated.

Subparagraph (c)(2)(D) was amended, effective March 1, 2006, to delete a sentence requiring immediate transcription of the record of a remote communication.

Paragraph (c)(3) was added, effective January 1, 1995, to provide for the issuance of warrants by facsimile transmission without the personal appearance of the affiant. Paragraph (c)(3) was amended, effective March 1, 2006, to substitute the term "electronic" for "facsimile." This change was intended to expand the means available for obtaining a warrant without the personal appearance of the affiant to include facsimile, e-mail, and other electronic transmission methods.

Paragraph (c)(4) was added and paragraph (d)(1) was amended, effective March 1, 2012, to provide guidelines for warrants authorizing the seizure of electronic storage media and electronically stored information and for the inventory of seized electronic material. The amendments were based on the December 1, 2009, amendments to Fed.R.Crim.P. 41.

Subdivision (d) is intended to make clear that a copy of the warrant and an inventory receipt for property taken shall be left at the premises at the time of the lawful search or with the person from whose premises the property is taken if he is present.

Subdivision (e) requires that the motion for return of property be made in the trial court rather than in a preliminary hearing before the magistrate who issued the warrant. It further provides for a return of the property if: (1) the person is entitled to lawful possession, and (2) the seizure is illegal. However, property which is considered contraband does not have to be returned even if seized illegally. The last sentence of subdivision (e) provides that a motion for return of property, made in the trial court, shall be treated as a motion to suppress under N.D.R.Crim.P. 12. The purpose of this provision is to have a series of pretrial motions disposed of in a single appearance, such as at a Rule 17.1 (Omnibus Hearing), rather

than in a series of pretrial motions made on different dates causing undue delay in administration.

Subdivisions (a), (b), and (c) were amended in 1983, effective September 1, 1983, to add persons as permissible objects of search warrants. These amendments follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible for a search warrant to issue to search for a person if there is probable cause to arrest that person; or that person is being unlawfully restrained.

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

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

Rule 41 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26; April 28-29, 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29, 1994, pages 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987, page 15; October 15-16, 1981, pages 12-15; December 7-8, 1978, pages 23-26; October 12-13, 1978, pages 15-19; April 24-26, 1973, page 14; December 11-15, 1972, pages 31-37; November 18-20, 1971, pages 3-9; September 16-18, 1971, pages 11-32; March

12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May 15-16, 1969, pages 21-23; Fed.R.Crim.P. 41.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-29-02, 29-29-03, 29-29-04, 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14, 29-29-15, 29-29-16, 29-29-17.

Considered: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3), 29-29-01, 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02. N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

Cross Reference: N.D.R.Crim.P. 12 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

RULE 32.1. DEFERRED IMPOSITION OF SENTENCE

~~Unless the court orders otherwise, an~~ An order deferring imposition of sentence for an infraction or a misdemeanor must require that 61 days after expiration or termination of probation:

(a) the defendant's guilty plea be withdrawn, or the guilty verdict be set aside;

(b) the case be dismissed; and

(c) the file be sealed ~~61 days after expiration or termination of probation~~.

The court may, by order, modify an order deferring imposition of sentence no later than 60 days after expiration or termination of probation.

EXPLANATORY NOTE

Rule 32.1 was amended, effective March 1, 2006; March 1, 2012.

Rule 32.1 was adopted, effective March 1, 1999. The purpose of the rule is to provide uniformity in the processing of deferred impositions of sentence, and to prevent the disparity of treatment received by defendants depending upon their county of venue in misdemeanor cases.

When deferring imposition of sentence, the judge should advise the defendant if the defendant fulfills the conditions of probation the guilty plea will be withdrawn, or the guilty verdict set aside, the case dismissed, and the file sealed.

An order deferring imposition of sentence is not a judgment. However, for purpose of appeal, an order deferring imposition of sentence is equivalent to a judgment under

N.D.R.Crim.P. 32(b).

This rule does not follow Fed.R.Crim.P. 32.1, which deals with revoking or modifying probation or supervised release.

Rule 32.1 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 32.1 was amended, effective March 1, 2012, to clarify that any modification of an order deferring imposition of sentence must take place no later than 60 days after the expiration or termination of probation.

Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 23-24; January 27-28, 2005, page 29; January 29-30, 1998, pages 14-17; September 25-26, 1997, pages 8-10.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-32-02, 12.1-32-07.1, 12.1-32-07.2.

Cross Reference: N.D.R.Crim.P. Form 8 (Order Deferring Imposition of Sentence).

RULE 41. ACCESS TO COURT RECORDS

Section 1. Purpose.

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

Section 2. Definitions.

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

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

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

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

(b) "Court record" does not include:

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

(2) information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in this rule; and

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

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

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

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

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

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

(1) electronic representations of text or graphic documents;

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

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

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

Section 3. General Access Rule.

(a) Public Access to Court Records.

(1) Information in the court record is accessible to the public except as prohibited by this rule.

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

(3) A court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided for in this rule, nor provide greater access than that provided for in this rule.

(b) When Court Records May Be Accessed.

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

(2) Upon receiving a request for access to information, the clerk of court ~~shall~~ must respond as promptly as practical. If a request cannot be granted promptly, or at all, an explanation must be given to the requestor as soon as possible. The ~~requesting person~~ requestor has a right to at least the following information: the nature of any problem preventing access and the specific statute, federal law, or court or administrative rule that is the basis of the denial. The explanation must be in writing if desired by the requestor.

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

(d) Fees for Access. The court may charge a fee for access to court records in

electronic form, for remote access, for bulk distribution or for compiled information. To the extent that public access to information is provided exclusively through a vendor, the court will ensure that any fee imposed by the vendor for the cost of providing access is reasonable.

Section 4. Methods of Access to Court Records.

(a) Access to Court Records at Court Facility.

(1) Request for Access. Any person desiring to inspect, examine, or copy a court record ~~shall~~ must make an oral or written request to the clerk of court. If the request is oral, the clerk may require a written request if the clerk determines that the disclosure of the record is questionable or the request is so involved or lengthy as to need further definition. The request must clearly identify the record requested so that the clerk can locate the record without doing extensive research. Continuing requests for a document not yet in existence may not be considered.

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

(3) Response by Court. If a clerk of court determines there is a question about whether

a record may be disclosed, or if a written request is made under Section 6(b) for a ruling by the court after the clerk denies or grants an access request, the clerk ~~shall~~ must refer the request to the court for determination. The court must use the standards listed in Section 6 to determine whether to grant or deny the access request.

(b) Remote Access to Court Records. The following information in court records must be made remotely accessible to the public if it exists in electronic form, unless public access is restricted under this rule:

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

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

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

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

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

(c) Requests for Bulk Distribution of Court Records.

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

(2) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes ~~where~~ when the identification of specific individuals is ancillary to the

purpose of the inquiry. Prior to the release of information under this subsection the requestor must comply with the provisions of Section 6.

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

(d) Access to Compiled Information From Court Records.

(1) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already in an existing report. The court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the court, that the resources are available to compile the information and that it is an appropriate use of public resources. The court may delegate to its staff or the clerk of court the authority to make the initial determination to provide compiled information.

(2) Requesting compiled restricted information.

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

(B) The request must:

(i) identify what information is sought,

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

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

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

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

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

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

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

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

Section 5. Court Records Excluded From Public Access.

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

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

(b) ~~Information~~ information that is not accessible to the public under state law, court

rule, case law or court order, including:

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

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

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

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

~~(4)~~(5) domestic violence protection order files and disorderly conduct restraining order files when the restraining order is sought due to domestic violence, except for orders of the court;

(6) domestic violence protection order and disorderly conduct restraining order cases in which the initial petition was dismissed by the court without further hearing;

~~(5)~~(7) names of qualified or summoned jurors and contents of jury qualification forms if disclosure is prohibited or restricted by order of the court;

~~(6)~~(8) records of voir dire of jurors, unless disclosure is permitted by court order or rule;

~~(7)~~(9) records of deferred impositions of sentences resulting in dismissal;

~~(8)~~(10) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected information:

~~-~~ (A) except for the last four digits, social security numbers, taxpayer identification

numbers, and financial account numbers,

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

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

~~(9)~~(10) judge and court personnel work material, including personal calendars, communications from law clerks, bench memoranda, notes, work in progress, draft documents and non-finalized documents.

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

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

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

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

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

(a) Request to Prohibit Access.

(1) A request to the court to prohibit public access to information in a court record may be made by any party to a case, by the individual about whom information is present in

the court record, or on the court's own motion, on notice as provided in Section 6(c).

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

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

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

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

(6) If the court concludes, after conducting the balancing analysis and making findings as required by paragraphs (1) through (5), that the interest of justice will be served, it may prohibit public Internet access to an individual defendant's electronic court record in a criminal case:

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

(B) if the defendant is acquitted.

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

(b) Request to Obtain Access.

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

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

(c) Form of Request.

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

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

(3) The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under Section 6(a), the court must provide notice to the individual or entity that requested that access be prohibited.

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

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

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

EXPLANATORY NOTE

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

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

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

Section 5(b)(8) was amended, effective March 15, 2009, to list types of protected

information open to the public.

The term "financial-account number" in Section 5(b)(8) includes any credit, debit or electronic fund transfer card number, and any other financial account number.

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

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

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

HISTORY: Joint Procedure Committee Minutes of April 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009, pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13, January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12. Court Technology Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003; Conference of Chief Justices/Conference of State Court Administrators:

Guidelines for Public Access to Court Records.

CROSS REFERENCE: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With the Court).

APPENDIX

Statutes, court rules and policies, and federal regulations making certain records confidential, in whole or in part, include:

ND Century Code

12.1-32-07.2(2) Records and papers concerning deferred imposition of sentence when guilty plea is withdrawn or guilty verdict set aside

12.1-32-09(3) Notice specifying defendant as a dangerous special offender for sentencing purposes

12.1-35-03 Information identifying a child victim of a crime

14-02.1-03.1(3), (4), (11) Records involving judicial authorization for abortion for unmarried minor

14-09.1-06 Mediation proceedings concerning contested child support, custody, or visitation

14-09.2-06 Parent Coordinator proceedings

14-15-16(4) Adoption proceedings

14-15.1 Child Relinquishment to Identified Adoptive Parent proceedings

14-20-54 Paternity proceedings

23-07.6-11 Confinement proceedings for those with communicable diseases

23-02.1-27 Certain information in birth and death certificates

25-03.1-43 Mental health commitments

25-03.3-03 Commitment proceedings for sexually dangerous individuals

27-20-51 Juvenile court records

27-09.1-12(4) Jury selection records

29-10.1-30, -31 Grand jury proceedings

30.1-11-01 Wills deposited for safekeeping

37-01-34 Recorded military discharge papers

50-06-05.1(15) Social-psychological evaluations and predisposition reports provided by department of human services

Court Rules and Policies

N.D.R.Civ.P. 26(c) Protective orders

N.D.R.Crim.P. 32(c) Presentence investigation reports

N.D.R.Crim.P. 32.1 Deferred imposition of sentence records

N.D.R.Crim.P. 44(b) Ex parte application for financial assistance

Administrative Rule 40 Audiotapes of closed or confidential proceedings

Administrative Policy 215 Access to computer-based data

Administrative Policy 402 Access to Juvenile Court Records

Federal Regulations

22 C.F.R. Section 51.33 Passport records

Boards and commissions governed by rules adopted by the Supreme Court include:

Commission for Continuing Legal Education; Disciplinary Board; Judicial Conduct Commission, State Board of Law Examiners.

RULE 29. BRIEF OF AN AMICUS CURIAE

(a) When permitted. An amicus curiae brief may be filed only with leave of court or at the court's request. An amicus brief must be limited to issues raised on appeal by the parties.

(b) Motion for leave to file. The motion may be accompanied by the proposed brief. The motion must state:

(1) the ~~movant's~~ moving party's interest; and

(2) the reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and form. An amicus brief must comply with Rule 32. In addition to the requirements of Rule 32, the cover must identify the party or parties supported, if any, and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities -- cases (alphabetically arranged), statutes and other authorities -- with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, and its interest in the case;

(4) a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund preparing

or submitting the brief; and

(C) a person — other than the amicus curiae, its members, or its counsel — contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

~~(4)~~ (5) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief (see Rule 32(a)(7)). If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for filing. An amicus curiae must file its brief within the time allowed for filing the principal brief of the party being supported. An amicus curiae that does not support either party must file its brief within the time allowed for filing the appellant's principal brief. The court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral argument. An amicus curiae may participate in oral argument only with the court's permission.

EXPLANATORY NOTE

Rule 29 was amended, effective March 1, 1996; March 1, 2003; March 1, 2012.

Rule 29 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 29. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended, effective March 21, 2007. New language was added to clarify that an amicus brief may deal only with issues raised on appeal by the parties.

Subdivision (b) was amended, effective March 1, 2003. New language in paragraph (2) was added to require that the motion state the relevance of the matters asserted to the disposition of the case.

Subdivision (c) was adopted, effective March 1, 2003, to eliminate any confusion as to contents and form and to require compliance with Rule 32.

Subdivision (c) was amended, March 1, 2012, to include a new paragraph (c)(4) establishing disclosure requirements concerning the authorship and funding of an amicus brief. The disclosure requirements are derived from Fed.R.App.P. 29.

Subdivision (d) was adopted, effective March 1, 2003, to establish a shorter page limit for an amicus brief than for a party's principal brief. The rationale for this limitation is that an amicus brief is supplemental -- it need not address all issues or facets of a case, but only matters not adequately addressed by a party.

Subdivision (f) was adopted, effective March 1, 2003, to prohibit the filing of a reply brief by an amicus curiae without the permission of the court.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, page 26;

September 27-28, 2001, pages 19-22; September 29-30, 1994, page 16; May 25-26, 1978, pages 13-14. Fed.R.App.P. 29.

Cross Reference: N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Papers).

N.D. Sup. Ct. Admin. R.

Administrative Rule 20 - MAGISTRATES--QUALIFICATIONS, AUTHORITY, EDUCATION AND PROCEDURES

Section 1. Authority.

In accordance with Article VI, Section 3, North Dakota Constitution, and ~~Section~~ N.D.C.C. § 27-05-31, ~~NDCC,~~ the Supreme Court adopts the following administrative rule relating to magistrates appointed by a presiding judge.

Section 2. Statement of Policy.

The North Dakota Judicial System's policy is to provide for the qualifications, the extent and assignment of authority, and the conduct of the office of magistrate within the North Dakota Judicial System in each judicial district.

Section 3. Qualifications of Magistrates.

Minimum qualifications for magistrates ~~shall~~ includes:

(a) United States' citizenship.~~;~~

(b) ~~Except~~ except for duties delegated under Section 5(a)(3), (4), and (6), admission to practice as an attorney in the state of North Dakota, and~~;~~

(c) ~~Physical~~ physical residence in the county of appointment after appointment unless physical residence is waived by the appointing and confirming authorities.

Section 4. Appointment.

The presiding judge of the judicial district may appoint a magistrate to serve at the pleasure of the presiding judge. A copy of an order appointing a magistrate and designating

delegated duties or an order modifying delegated duties must be filed with the State Court Administrator within three business days of the date of the order. Magistrates may be paid a salary as determined by the Supreme Court.

Section 5. Scope of Delegable Duties.

(a) The presiding judge of the judicial district may delegate the following duties and authority to a magistrate who has met the qualifications in Section 3:

~~1.~~(1) ~~To~~ to issue search warrants under ~~Section~~N.D.C.C. § 29-29-01, ~~NDCC,~~ and N.D.R.Crim.P. 41~~,~~

~~2.~~(2) ~~To~~ to issue administrative search warrants under ~~Section~~N.D.C.C. § 29-29.1-01~~;~~ ~~NDCC.~~

~~3.~~(3) ~~To~~ to approve complaints and to issue summonses or warrants under N.D.C.C. ~~Chapter~~ ch. 29-05~~,~~ ~~NDCC~~, and N.D.R.Crim.P. 3 and N.D.R.Crim.P. 4~~,~~

~~4.~~(4) ~~To~~ to hold initial appearance under N.D.R.Crim.P. 5, and to set bail under N.D.C.C. ~~Chapter~~ ch. 29-08~~,~~ ~~NDCC~~, and N.D.R.Crim.P. 46~~,~~

~~5.~~(5) ~~To~~ to conduct preliminary examinations under N.D.R.Crim.P. 5.1~~,~~

~~6.~~(6) ~~To~~ to perform registrar and clerk duties under the Uniform Probate Code, N.D.C.C. ~~Title~~ tit. 30.1, ~~NDCC,~~ particularly ~~Sections~~N.D.C.C. §§ 30.1-14-02 and 30.1-14-07~~,~~ ~~NDCC,~~ in informal probate proceedings and ~~Section~~N.D.C.C. § 30.1-15-05~~;~~ ~~NDCC,~~ in uncontested formal probate proceedings~~,~~

~~7.~~(7) ~~To~~ to conduct preliminary mental health commitment proceedings under ~~Section~~N.D.C.C. § 25-03.1-09~~,~~ ~~NDCC~~, notwithstanding and consistent with ~~Section~~ §

25-03.1-02(3) and (8)~~:~~;

~~8.~~(8) ~~To~~ to issue temporary domestic violence protection orders under N.D.C.C. ~~ch.~~ § 14-07.1-08~~:~~; and

~~9.~~ (9) ~~To~~ to issue temporary disorderly conduct restraining orders under N.D.C.C. ch. 12.1-31.2.

(b) The duties delegated to each magistrate under this section must be reduced to writing and signed by the presiding judge of the judicial district.

(c) The duties of a magistrate may be diminished by the presiding judge of the judicial district upon notice in writing to the magistrate.

Section 6. Geographical Jurisdiction.

Each magistrate has the geographical jurisdiction within the judicial district as assigned by the presiding judge of the judicial district, and is expected to maintain an office in conjunction with a district judge.

Section 7. Alternate Magistrate.

The presiding judge of the judicial district may appoint an alternate magistrate in a county in which the presiding judge or another district judge does not reside. The alternate magistrate ~~shall~~ must meet the qualifications of Section 3 and may be delegated duties under Section 5. The alternate magistrate ~~shall~~ will serve as magistrate whenever the magistrate for the county is unavailable to fulfill the duties of magistrate.

Section 8. Vacancy.

The presiding judge of the judicial district may fill any vacancy in the office of

magistrate or alternate magistrate under Section 4 and Section 7.

Section 9. Proceedings on the Record.

Proceedings must be heard on the record as in district court.

Section 10. Removal From Office.

A magistrate may be removed from the office of magistrate by the presiding judge of the judicial district upon notice in writing to the magistrate. The presiding judge ~~shall~~ must notify the State Court Administrator of the removal.

Section 11. Standard of Conduct.

The Code of Judicial Conduct is the standard of conduct which ~~shall~~ must be observed by each magistrate. The Judicial Conduct Commission has jurisdiction over the conduct of magistrates to the same extent as it has over other judges.

Section 12. Continuing Education.

(a) Each magistrate appointed under ~~Section~~N.D.C.C. § 27-05-31~~, NDCC,~~ must attend a continuing education program every odd calendar year as provided by the Judicial Branch Education Commission. The magistrate must be reimbursed for necessary expenses, travel, and subsistence by the judicial system.

(b) If any magistrate fails to attend an educational session without being excused by the State Court Administrator, the State Court Administrator ~~shall~~ will report such fact to the presiding judge of the judicial district and to the Judicial Conduct Commission, for such action as it deems appropriate.

Section 13. Effective Date.

This Rule, as amended, is effective ~~July 1, 2009~~; March 1, 2012.

~~Dated: June 3, 2009.~~

EXPLANATORY NOTE

~~Source: N.D. Const., Art. VI, Sec. 3; Sec. 27-07.1-07, NDCC. AR~~ Rule 20 adopted December 22, 1982, effective January 1, 1983; amended effective June 24, 1985; emergency amendments adopted effective December 20, 1989, readopted February 22, 1990; amended June 24, 1992, which amendments became effective on August 1, 1993; ~~Sec.~~N.D.C.C. § 27-05-31~~, NDCC~~; amended November 16, 1994, with amendments effective January 1, 1995; amended April 1, 1998; amended March 1, 2005; amended effective July 1, 2007; amended effective January 1, 2009; amended effective July 1, 2009; amended effective March 1, 2012.

Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 14-15, 21. N.D. Const., Art. VI, § 3; N.D.C.C. § 27-07.1-07;.

Administrative Rule 13 - JUDICIAL REFEREES

Section 1. Authority.

The 1985 Legislative Assembly provided for appointment of judicial referees under House Bill 1586. Under N.D. Const. art. VI, § 3, and N.D.C.C. § 27-05-30, the Supreme Court adopts the following administrative rule relating to judicial referees.

Section 2. Statement of Policy.

The North Dakota Judicial System's policy is to provide for the qualifications, the extent and assignment of authority, procedure and the conduct of the role of judicial referees within the North Dakota Judicial System in each judicial district.

Section 3. Qualifications of Judicial Referees.

Minimum qualifications for a judicial referee include:

(a) United States citizenship;

(b) physical residence in the judicial district of the appointment after appointment unless physical residence is waived by the presiding judge of the judicial district; and

(c) a license to practice law in the state of North Dakota; or a juvenile supervisor/referee meeting the requirements of N.D.C.C. § 27-20-06(i).

Section 4. Appointment.

The presiding judge, on behalf of all of the district court judges of the judicial district, must execute in writing the appointment of all judicial referees, to serve at the pleasure of the district court judges of the judicial district. Judicial referees must be compensatedunder

the personnel system of the North Dakota Judicial System

Section 5. Scope of Delegable Duties.

(a) A presiding judge, after consultation with the district court judges of the judicial district, may authorize a judicial referee to preside in any individual or class of proceedings under:

(1) N.D.C.C. title 14, except contested divorce trials;

(2) N.D.C.C. ch. 27-20; ~~and~~

(3) N.D.C.C. ch. 28-25; and

(4) N.D.C.C. ch. 12.1-31.2.

(b) A judicial referee has such other authority of a district court judge as is necessary to carry out the delegated duties, including the issuance of orders to show cause, temporary restraining orders, temporary injunctions, and the power to impose remedial sanctions for contempt of court.

(c) The order issued under Subsection (a) of this section must be reduced to writing and signed by the presiding judge of the judicial district. The order must be filed with the clerk of district court of each county of the judicial district. The presiding judge mustsend a copy of this document to the State Court Administrator. A copy must be made available to any party upon request.

(d) Within the limits set forth in the written order of the presiding judge, district court judges may refer individual cases or classes of cases to a judicial referee by written order.

(e) After July 1, 1987, a judicial referee who hears matters under N.D.C.C. ch. 27-20

may not exercise supervision of personnel who supervise juveniles.

Section 6. Geographical Jurisdiction.

Each judicial referee will have jurisdiction only within the judicial district of appointment and is expected to maintain an office as assigned by the presiding judge of the judicial district. A judicial referee may be appointed to temporary duty in another judicial district by the presiding judge of the judicial district, with the consent of the presiding judge of the receiving judicial district or by the chief justice under N.D. Const. art. VI, § 3.

Section 7. Proceedings on the Record.

Proceedings must be heard on the record.

Section 8. Removal from Referee.

Any party to a proceeding before a judicial referee is entitled to have the matter heard by a district court judge, if written request is filed by the party within seven days after service of either the initiating documents or other notice informing the party of this right.

Section 9. Standard of Conduct.

The Rules of Judicial Conduct must be observed by each judicial referee.

Section 10. Findings and Order.

(a) The findings and order of the judicial referee have the effect of the findings and order of the district court until superseded by a written order of a district court judge.

(b) Copies of the findings and order together with written notice of the right of review must be promptly served on the parties under N.D.R.Civ.P. 5.

Section 11. Procedure for Review.

(a) A review of the findings and order may be ordered at any time by a district court judge and must be ordered if a party files a written request for a review within seven days after service of the notice in Section 10(b). The request for review must state the reasons for the review. A party requesting review must give notice to all other parties. A party seeking to respond to a request for review must file a response within 14 days after service of notice of the request.

(b) The review by a district court judge must be a de novo review of the record. The district court may:

(1) adopt the referee's findings;

(2) remand to the referee for additional findings; or

(3) reject the referee's findings.

(c) If the district court judge rejects the referee's findings, the court shall issue its own findings of fact, with or without a hearing.

~~Dated October 23, 2003.~~

EXPLANATORY NOTE

Section 5 was amended, effective March 1, 2012, to allow a presiding judge to authorize a judicial referee to preside in proceedings involving disorderly conduct restraining orders.

Section 8 was amended, effective March 1, 2011, to increase the time to request a district court judge from five to seven days after service of initiating documents.

Section 11(a) was amended, effective March 1, 2011, to increase the time to request

a review from a district court judge from five to seven days after service of the right to review. The time to respond to a request for review was increased from 10 to 14 days after service of notice of the request.

SOURCE: Joint Procedure Committee Meeting Minutes of September 23-24, 2010, pages 14-15, 21; April 29-30, 2010, page 21; April 24-25, 2003, page 3; January 30-31, 2003, pages 21-23;April 25-26, 2002, pages 16-17; May 6-7, 1999, pages 14-15; April 29-30, 1993, page 2.Court Services Administration Committee Meeting Minutes of May 17, 1985, pages 2-4. Family Caselaw Referee Study Subcommittee of Court Services Administration Committee Meeting Minutes of April 19, 1985, pages 3-8; March 15, 1985, pages 1-6; February 22, 1985, pages 1-9;January 11, 1985, pages 2-8; and December 17, 1984, page 5. North Dakota Constitution, Article VI, Section 3; and Section 27-05-30 NDCC.

[Adopted as emergency rule effective June 13, 1985; readopted September 17, 1985; amended effective March 1, 1994; January 1, 1995; March 1, 2000; March 1, 2003; March 1, 2004; March 1, 2011; March 1, 2012.]

RULE 8.13 IN CHAMBERS INTERVIEW OF CHILD IN DOMESTIC RELATIONS CASE

(a) Parents' Consent. If the parents consent, the district court may conduct an in chambers interview of a child in a proceeding to determine primary residential responsibility or parenting time. A parent is considered to have consented to an in chambers interview if the parent is voluntarily absent from the proceeding. The parents may not be present during the in chambers interview.

(b) Record. The court must make a record of the in chambers interview.

(c) Presence of Counsel. The district court must allow counsel to be present during the in chambers interview and may allow counsel to ask or submit questions.

(d) Access to Interview Record. In the event of an appeal, the district court retains jurisdiction to determine whether exceptional circumstances exist which endanger the safety of the child. If the court finds exceptional circumstances, the interview transcript will be available only to a reviewing court. If no appeal is taken, the district court may deny access to the transcript of the in chambers interview.

EXPLANATORY NOTE

Rule 8.13 was adopted, effective March 1, 2012.

This rule is designed to establish a procedure for in chambers interviews in domestic relations cases that balances parental due process rights with a child's right to be heard.

For the purposes of subdivision (c), parties, with the court's approval, may waive the

presence of counsel at the in chambers interview.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages 13-17; September 23-24, 2010, pages 27-32.

Statutes Affected:

Considered: N.D.C.C. § 14-09-06.2.

RULE 6.4. EXHIBITS

(a) Exhibits to be left with clerk. All exhibits that have been offered or received in evidence must be ~~left with the clerk and~~ retained ~~in his custody~~ by the clerk until 180 days after the case file is closed, unless otherwise directed by the court.

(b) Exhibits too large for filing ~~to be returned~~. All physical exhibits, including books, maps, models, and documents, too large for convenient filing, offered by either party, ~~shall~~ may not be filed, but must be retained by the clerk until ~~after the time for appeal has expired or until all remedies by way of appeal, motion for new trial and appeal therefrom are exhausted, when they must be returned to the custody of the respective attorneys who offered them in evidence. If the attorney does not claim an exhibit within sixty days after being notified to accept return, the clerk may dispose of it as the court may by order direct. The clerk shall take a receipt for all exhibits returned.~~ 180 days after the case file is closed.

(c) Return of exhibits. A party seeking return of exhibits must file a document return request form as provided under N.D.Sup.Ct.Admin.O. 19 (Scanned Documents; Document Return).

EXPLANATORY NOTE

Rule 6.4 was amended, effective March 1, 2012, to specify time periods for retention of exhibits and the method for requesting return of exhibits.

Sources: Joint Procedure Committee Minutes of April 28-29, 2011, pages 24-25.

Cross References: N.D.Sup.Ct.Admin.O. 19 (Scanned Documents; Document Return).