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STATE OF NORTH DAKOTA

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Proposed Amendments to the North Dakota:

Rules of Civil Procedure
Rules of Criminal Procedure
Rules of Evidence
Rules of Appellate Procedure
Rules of Court

Submitted by the
Joint Procedure Committee
June 2006

TABLE OF CONTENTS

I.	Petition for adoption, amendment, or repeal of court rules	1
II.	Synopsis of proposed amendments	3
III.	Amendments Proposed by Joint Procedure Committee	
A.	<u>North Dakota Rules of Civil Procedure</u>	
	Rule 4 - Persons Subject to Jurisdiction–Process–Service	6
	Rule 6 - Time	23
	Rule 27 - Depositions Before Action or Pending Appeal	27
	Rule 38 - Jury Trial of Right	32
	Rule 45 - Subpoena	35
B.	<u>North Dakota Rules of Criminal Procedure</u>	
	Rule 7 - The Indictment and the Information	42
	Rule 29 - Motion for a Judgment of Acquittal	47
	Rule 32 - Sentencing and Judgment	51
	Rule 33 - New Trial	60
	Rule 34 - Arresting Judgment	64
	Rule 45 - Computing and Extending Time	66
C.	<u>North Dakota Rules of Evidence</u>	
	Rule 702 - Testimony by Experts	70
	Rule 703 - Bases of Opinion Testimony by Experts	71
D.	<u>North Dakota Rules of Appellate Procedure</u>	
	Rule 3 - Appeal as of Right–How Taken	73
	Rule 4 - Appeal–When Taken	77
	Rule 32 - Form of Briefs, Appendices and Other Papers	84
E.	<u>North Dakota Rules of Court</u>	
	Rule 3.1 - Pleadings	90
	Rule 3.2 - Motions	94
	Rule 8.4 - Summons in Action for Divorce or Separation	99

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

Joint Procedure Committee,)	PETITION FOR ADOPTION,
)	AMENDMENT, OR
Petitioner,)	REPEAL OF COURT RULES
)	
)	

TO: The Supreme Court of the State of North Dakota:

The Joint Procedure Committee petitions the Supreme Court, under N.D.R.Proc.R. § 3, for an order adopting the following proposals:

North Dakota Rules of Civil Procedure

Rule 4 - Persons Subject to Jurisdiction–Process–Service
Rule 6 - Time
Rule 27 - Depositions Before Action or Pending Appeal
Rule 38 - Jury Trial of Right
Rule 45 - Subpoena

North Dakota Rules of Criminal Procedure

Rule 7 - The Indictment and the Information
Rule 29 - Motion for a Judgment of Acquittal
Rule 32 - Sentencing and Judgment
Rule 33 - New Trial
Rule 34 - Arresting Judgment
Rule 45 - Computing and Extending Time

North Dakota Rules of Evidence

Rule 702 - Testimony by Experts
Rule 703 - Bases of Opinion Testimony by Experts

North Dakota Rules of Appellate Procedure

Rule 3 - Appeal as of Right–How Taken
Rule 4 - Appeal–When Taken
Rule 32 - Form of Briefs, Appendices, and Other Papers

North Dakota Rules of Court

Rule 3.1 - Pleadings

Rule 3.2 - Motions

Rule 8.4 - Summons in Action for Divorce or Separation

This petition is supported by the attached material containing the proposed rules, proposed explanatory notes, and synopsis of the proposals.

Dated June 26, 2006.

Members of the Joint Procedure Committee:

Honorable Georgia Dawson
Honorable Donovan Foughty
Honorable M. Richard Geiger
Honorable Gail Hagerty
Honorable Debbie Gordon Kleven
Honorable David W. Nelson
Honorable Allan L. Schmalenberger
Honorable Thomas J. Schneider
Honorable Mikal Simonson
Honorable Michael G. Sturdevant

Mr. John C. Kapsner
Mr. Daniel S. Kuntz
Mr. Galen J. Mack
Ms. Jeanne McLean
Mr. Ronald H. McLean
Ms. Sherry Mills Moore
Mr. Stephen W. Plambeck
Mr. Bruce D. Quick
Ms. Cathy Howe Schmitz



Justice Dale V. Sandstrom
Chair

SYNOPSIS OF PROPOSED AMENDMENTS

A. North Dakota Rules of Civil Procedure

Rule 4 - Persons Subject to Jurisdiction—Process—Service

An amendment to paragraph (c)(2) is proposed requiring a copy of the complaint to be served with the summons under most circumstances.

An amendment to paragraph (c)(3) is proposed:

- allowing a demand to file complaint to be served on attorney under N.D.R.Civ.P. 5;
- specifying that, in a multiple defendant case, service of a demand to file complaint by one defendant is effective for all defendants; and
- providing an exception for excusable neglect in responding to a demand to file complaint.

Rule 6 - Time

An amendment to subdivision (e) is proposed clarifying how to count the three-day extension for service by mail or commercial carrier.

Rule 27 - Depositions Before Action or Pending Appeal

New language is proposed for paragraph (a)(2) to improve organization and make the paragraph easier to understand.

Rule 38 - Jury Trial of Right

New language for the explanatory note is proposed clarifying that the rule applies to a jury trial demand under the Uniform Probate Code.

Rule 45 - Subpoena

An amendment to subdivision (b) is proposed to eliminate the requirement for parties to serve a separate notice for production when they are serving a deposition notice.

B. North Dakota Rules of Criminal Procedure

Rule 7 - The Indictment and the Information

An amendment to subdivision (c) is proposed specifying that the indictment or information must contain a statement of facts establishing the elements of the offense charged.

Rule 29 - Motion for a Judgment of Acquittal

An amendment to paragraph (c)(1) is proposed deleting language requiring the trial court to rule on a motion for extension of time within ten days.

Rule 32 - Sentencing and Judgment

Language is proposed for paragraph (f)(3) clarifying that a probationer must be given an opportunity to make a statement of mitigation at a revocation hearing.

Rule 33 - New Trial

An amendment to paragraph (b)(2) is proposed deleting language requiring the trial court to rule on a motion for extension of time within ten days.

Rule 34 - Arresting Judgment

An amendment to subdivision (b) is proposed deleting language requiring the trial court to rule on a motion for extension of time within ten days.

Rule 45 - Computing and Extending Time

An amendment to subdivision (b) is proposed to take into account the proposed amendments to Rules 29, 33, and 34.

An amendment to subdivision (c) is proposed to clarify how to count the three-day extension for service by mail or commercial carrier.

C. North Dakota Rules of Evidence

Rule 702 - Testimony by Experts

An amendment to the explanatory note is proposed deleting an obsolete case reference.

Rule 703 - Bases of Opinion Testimony by Experts

The addition of new language derived from the 2000 amendment to Fed.R.Ev. 703 is proposed.

D. North Dakota Rules of Appellate Procedure

Rule 3 - Appeal as of Right—How Taken

Language is proposed for paragraph (d)(4) specifying that, if the State of North Dakota is a real party in interest to an action, it must be named as a party on appeal, regardless of whether it was named as a party in the action below.

Rule 4 - Appeal—When Taken

A new subdivision (e) is proposed specifying time deadlines for an appeal under the Uniform Juvenile Court Act.

Rule 32 - Form of Briefs, Appendices, and Other Papers

Language is proposed for paragraph (a)(2) clarifying that covers of petitions for rehearing must be the same color as the petitioning party's principal brief.

E. North Dakota Rules of Court

Rule 3.1 - Pleadings

Deletion of the final sentence of paragraph (j)(4) on court personnel review of filed documents is proposed.

Rule 3.2 - Motions

Reorganization of subdivision (a) for clarity is proposed.

A new subdivision (b) on hearings is proposed. The new subdivision would contain new language allowing hearings by electronic means and new language requiring the court to review parties' submissions before ordering a hearing.

A new paragraph (f)(2) is proposed clarifying that the rule applies to formal proceedings under the Uniform Probate Code.

Rule 8.4 - Summons in Action for Divorce or Separation

A new subdivision (c) is proposed that would require restraining provisions to be included in the summons in a custody matter.

RULE 4. PERSONS SUBJECT TO JURISDICTION–PROCESS–SERVICE

(a) Definition of person. As used in this rule, “person”, whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state, includes: an individual, executor, administrator or other personal representative; any other fiduciary; any two or more persons having a joint or common interest; a partnership; an association; a corporation; and any other legal or commercial entity.

(b) Jurisdiction Over Person.

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

(2) Personal Jurisdiction Based Upon Contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person’s having such contact with this state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:

(A) transacting any business in this state;

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

(C) committing a tort within or without this state causing injury to another person or property within this state;

(D) committing a tort within this state, causing injury to another person or property within or without this state;

(E) owning, having any interest in, using, or possessing property in this state;

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

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

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

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

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

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

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

(c) Process.

(1) Summons—Contents. The summons must specify the venue of the court in which

the action is brought, contain the title of the action specifying the names of the parties, and be directed to the defendant. It must state the time within which these rules require the defendant to appear and defend, and must notify the defendant that in case of the defendant's failure to do so, judgment by default will be rendered against the defendant for the relief demanded in the complaint. It must be dated and subscribed by the plaintiff or the plaintiff's attorney, and include the post office address of the plaintiff or plaintiff's attorney. (See Rule 4(c)(8) for additional information required if the action involves real estate and service is by publication.)

(2) Summons Served With ~~or without~~ Complaint. ~~A copy of the complaint need not be served with the summons in which case the summons must state that the complaint is or will be filed with the clerk of the court in which the action is commenced, and if the defendant within 20 days after service of the summons causes notice of appearance to be given and in person or by an attorney demands in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof within 20 days thereafter must be served accordingly. If, in that case, the complaint is not filed with the clerk within 20 days after service of the summons, the action is deemed discontinued.~~ A copy of the complaint must be served with the summons, except when service is by publication as provided in N.D.R.Civ.P. 4(e).

(3) Summons Served and Complaint Not Filed. The defendant may serve a written demand on the plaintiff to file the complaint. Service of the demand must be made under ~~subdivision (d)~~ N.D.R.Civ.P. 5(b) on the plaintiff's attorney or under N.D.R.Civ.P. 4(d) on

the plaintiff if the plaintiff is not represented by an attorney. In cases with multiple defendants, service of a demand by one defendant is effective for all the defendants. If the plaintiff does not file the complaint within 20 days after service of the demand, service of the summons is void, unless the court finds excusable neglect. The demand must contain notice that if the complaint is not filed within 20 days, service of the summons is void under this rule.

(4) The defendant may file the summons and complaint, and the costs incurred on behalf of the plaintiff may be taxed as provided in N.D.R.Civ.P. 54(e).

(d) Personal Service.

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

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

(A) upon an individual 14 or more years of age by (i) delivering a copy of the summons to the individual personally; (ii) leaving a copy of the summons at the individual's dwelling house or usual place of abode in the presence of a person of suitable age and discretion then residing therein; (iii) delivering, at the office of the process server, a copy of the summons to the individual's spouse if the spouses reside together; (iv) delivering a copy of the summons to the individual's agent authorized by appointment or by law to receive

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

88 (B) upon an individual under the age of 14 years, by delivering a copy of the summons
89 to the individual's guardian, if the individual has one within the state, and, if not, then to the
90 individual's father or mother or any person or agency having the individual's care or control,
91 or with whom the individual resides. If service cannot be made upon any of them, then as
92 directed by order of the court;

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

97 (D) upon a domestic or foreign corporation or upon a partnership or other
98 unincorporated association, by (i) delivering a copy of the summons to an officer, director,
99 superintendent or managing or general agent, or partner, or associate, or to an agent
100 authorized by appointment or by law to receive service of process in its behalf, or to one who
101 acted as an agent for the defendant with respect to the matter upon which the claim of the
102 plaintiff is based and who was an agent of the defendant at the time of service; (ii) if the
103 sheriff's return indicates no person upon whom service may be made can be found in the
104 county, then service may be made by leaving a copy of the summons at any office of the
105 domestic or foreign corporation, partnership or unincorporated association within this state

with the person in charge of the office; or (iii) any form of mail or third-party commercial delivery addressed to any of the foregoing persons and requiring a signed receipt and resulting in delivery to that person;

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

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

(G) if service is made upon an agent who is not expressly authorized by appointment or by law to receive service of process on behalf of the defendant, a copy of the summons and complaint must be mailed or delivered via a third-party commercial carrier to the defendant with return receipt requested not later than ten days after service by depositing the same, with postage or shipping prepaid, in a post office or with a commercial carrier in this state and directed to the defendant to be served at the defendant's last reasonably ascertainable address.

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

(A) in the manner provided for service within this state, with the same force and effect

as though service had been made within this state;

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

(C) as directed by order of the court.

(e) Service by Publication.

(1) When Service by Publication Permitted. A defendant, whether known or unknown, who has not been served personally under the foregoing subdivisions of this rule may be served by publication in the manner hereinafter provided in one or more of the following situations only if:

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

(B) The subject of the action is real or personal property in this state and the defendant has or claims a lien thereon or other interest therein, whether vested or contingent, or the relief demanded against the defendant consists wholly or partly in excluding the defendant from that lien or interest or in defining, regulating, or limiting that lien or interest, or the action otherwise affects the title to the property;

(C) The action is to foreclose a mortgage, cancel a contract for sale, or to enforce a lien upon or a security interest in real or personal property in this state;

(D) The plaintiff has acquired a lien upon property or credits or the defendant within this state by attachment, garnishment, or other judicial processes and the property or credit is the subject matter of the litigation or the underlying claim for relief relates to the property

or credits;

(E) The action is for divorce, separation from bed and board, or annulment of a marriage of a resident of this state or to determine custody of an individual subject to the court's jurisdiction; or

(F) The action is to award, partition, condemn, or escheat real or personal property in this state.

(2) Filing of Complaint and Affidavit for Service by Publication. Before service of the summons by publication is authorized in any case, there must be filed with the clerk of the court in which the action is commenced a complaint setting forth a claim in favor of the plaintiff and against the defendant based on one or more of the situations specified in paragraph (1) of this subdivision and an affidavit executed by the plaintiff or the plaintiff's attorney stating, as may be applicable, one or more of the following:

(A) That after diligent inquiry personal service of the summons cannot be made upon the defendant in this state to the best knowledge, information, and belief of the affiant;

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

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

(D) That all persons having or claiming an estate or interest in, or lien or encumbrance

upon, the real property described in the complaint, whether as heirs, devisees, legatees, or personal representative of a deceased person, or under any other title or interest, and not in possession, nor appearing of record in the office of the register of deeds, the clerk of the district court, or the county auditor of the county in which the real property is situated, to have such claim, title or interest therein, are proceeded against as unknown persons defendant pursuant to Chapter 32-17 or 32-19 of the North Dakota Century Code, and stating facts necessary to satisfy the requirement of those chapters.

(3) Number of Publications. Service of the summons by publication may be made by publishing the same 3 times, once in each week for 3 successive weeks, in a newspaper published in the county in which the action is pending, and if no newspaper is published in that county then in a newspaper having a general circulation therein although published in another county.

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

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

subdivision.

(6) Time When First Publication or Service Outside State Must Be Made. The first publication of the summons, or personal service of the summons and complaint upon the defendant out of the state, must be made within 60 days after the filing of the affidavit for publication. If not so made, the action is deemed discontinued as to any defendant not served within that time.

(7) When Defendant Served by Publication Permitted to Defend. The defendant upon whom service by publication is made, or the defendant's representative, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action. Except in an action for divorce, the defendant upon whom service by publication is made, or the defendant's representative, upon making it appear to the satisfaction of the court by affidavit, stating the facts, that the defendant has a good and meritorious defense to the action, and the defendant had no actual notice or knowledge of the pendency of the action so as to enable the defendant to make application to defend before the entry of judgment, and upon filing an affidavit of merits, may be allowed to defend at any time within 3 years after entry of judgment on such terms as may be just. If the defense is successful and the judgment, or any part of the judgment, has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold under the judgment to a purchaser in good faith may not be affected. A defendant who receives a copy of the summons in the action mailed or delivered to the defendant as provided in paragraph (4), or upon whom the summons is personally served out of this state, as provided in paragraph (5), is deemed to

211 have had notice of the pendency of the action and of the judgment.

212 (8) Additional Information to be Published. In all cases where publication of summons
213 is made in an action in which the title to, or an interest in or lien upon, real property is
214 involved or affected or brought into question, the publication must also contain a description
215 of the real property and a statement of the object of the action.

216 (f) Service Upon a Person in a Foreign Country. Unless otherwise provided by law,
217 service upon an individual, other than an infant or an incompetent person, may be effected
218 in a place not within any judicial district of the United States:

219 (1) by any internationally agreed means reasonably calculated to give notice, such as
220 those means authorized by the Hague Convention on the Service Abroad of Judicial and
221 Extrajudicial Documents; or

222 (2) if there is no internationally agreed means of service or the applicable international
223 agreement allows other means of service, provided the service is reasonably calculated to
224 give notice:

225 (A) in the manner prescribed by law to the foreign country for service in that country
226 in an action in any of its courts of general jurisdiction; or

227 (B) as directed by the foreign authority in response to a letter rogatory or letter of
228 request; or

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

230 (i) delivery to the individual personally of a copy of the summons and the complaint;
231 or

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

(3) by any other means not prohibited by international agreement as may be directed by the court. Unless otherwise provided by law, service must be effected upon an infant or an incompetent person in a place not within any judicial district of the United States in the manner prescribed by paragraphs (2)(A) or (B), and (3). Unless otherwise provided by law, service must be effected upon a foreign corporation, partnership or other unincorporated association, that is subject to suit under a common name, in a place not within any judicial district of the United States in the manner prescribed for individuals in this subdivision except personal delivery as provided in paragraph (2)(C)(i).

(g) When Service by Publication or Outside State Complete. Service by publication is complete upon the expiration of fifteen days after the first publication of the summons. Personal service of the summons and complaint upon the defendant out of state is complete upon the expiration of fifteen days after the date of service.

(h) Amendment. At any time and upon such notice and terms as it deems just, the court, in its discretion, may allow any process or proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the party against whom the process issued.

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

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

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

254 (3) if served by publication, by an affidavit made as provided in Section 31-04-06 of
255 the North Dakota Century Code and an affidavit of mailing or an affidavit of delivery via a
256 third-party commercial carrier of a copy of the summons and complaint in accordance with
257 subdivision (4) of subsection (e) of this rule, if the same has been deposited;

258 (4) in any other case of service by mail or delivery via a third-party commercial carrier
259 resulting in delivery in accordance with paragraph (2) or (3) of subdivision (d) of this rule,
260 by an affidavit of the mailing or an affidavit of delivery of a copy of the summons and
261 complaint or other process, with return receipt attached; or

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

263 (j) Content of Proof of Service. The certificate, affidavit or admission of service
264 mentioned in subdivision (i) of this rule must state the date, time, place and manner of
265 service. If the process, pleading, order of court, or other paper is served personally by a
266 person other than the sheriff or person designated by the law, the affidavit of service must
267 also state that the server is of legal age and not a party to the action nor interested in the
268 action, and that the server knew the person served to be the person named in the papers
269 served and the person intended to be served.

270 (k) Content of Affidavit of Mailing or Delivery via a Third-party Commercial Carrier.
271 An affidavit of mailing or delivery required by this rule must state a copy of the process,
272 pleading, order of court, or other paper to be served was deposited by the affiant, with
273 postage or shipping prepaid, in the mail or with a third-party commercial carrier and directed

to the party shown in the affidavit to be served at the party's last reasonably ascertainable address. The affidavit must contain the date and place of deposit and indicate the affiant is of legal age. The return receipt, if any, must be attached to the affidavit.

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

(m) Service Under Statute. If a statute requires service and does not specify a method of service, service must be made under this rule.

EXPLANATORY NOTE

Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977; January 1, 1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1998; March 1, 1999; March 1, 2004;_____.

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

Rule 4 was amended, effective March 1, 1999, to allow delivery via a third-party commercial carrier as an alternative to the Postal Service. The requirement for a "third-party" is consistent with the rule's requirement for personal service by a person not a party to nor interested in the action. The requirement for a "commercial carrier" means it must be the

295 regular business of the carrier to make deliveries for profit. A law firm may not act as its own
296 commercial carrier service for service of process. Finally, the phrase “commercial carrier”
297 is not intended to include or authorize electronic delivery. Service via e-mail or facsimile
298 transmission is not permitted by Rule 4.

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

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

306 Paragraph (c)(2) was amended, effective _____, to require the
307 complaint to be served with the summons under most circumstances.

308 Paragraph (c)(3) was amended, effective _____. The amendment
309 allows a demand to file the complaint to be served on an attorney using N.D.R.Civ.P. 5
310 procedure. The amendment clarifies that, in a multiple defendant case, service of a demand
311 by one defendant is effective for all defendants. The amendment provides an exception for
312 excusable neglect in responding to a demand to file complaint.

313 Subdivision (d) was amended, effective March 1, 1998, to allow personal service by
314 delivering a copy of the summons to an individual’s spouse.

315 A problem may arise with service by mail or delivery by third-party commercial

316 carrier, under subdivisions (d)(2) or (d)(3)(C) when the person to be served refuses delivery.
317 This refusal of delivery is tantamount to receipt of the mail or delivery for purposes of
318 service. On the other hand, if the mail or delivery is unclaimed, no service is made.
319 Subdivision (l) was added in 1983, effective September 1, 1983, to make it clear that refusal
320 of delivery by the addressee constitutes delivery.

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

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

329 SOURCES: Joint Procedure Committee Minutes of April 27-28, 2006, pages 11-14;
330 January 30-31, 2003, pages 6-10; September 26-27, 2002, pages 15-18; April 30-May 1,
331 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997, page
332 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16; January 26-27,
333 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages 1-4 and 11; May 21-22,
334 1987, page 5; November 29, 1984, pages 3-5; September 30-October 1, 1982, pages 15-18;
335 April 15-16, 1982, pages 2-5; December 11-12, 1980, page 2; October 30-31, 1980, page 31;
336 January 17-18, 1980, pages 1-3; November 29-30, 1979, page 2; October 27-28, 1977, page

337 10; April 8-9, 1976, pages 5-9; Fed.R.Civ.P. 4.

338 STATUTES AFFECTED:

339 SUPERSEDED: N.D.R.C. §§ 28-0502, 28-0503, 28-0504, 28-0505, 28-0601, 28-
340 0602, 28-0603, 28-0604, 28-0605, 28-0606, 28-0607, 28-0608, 28-0609, 28-0610, 28-0616,
341 28-0619, 28-0620, 28-0621, 28-0622, 28-0623, 28-0624, 26-0625, 28-0626, 28-0627, 28-
342 0628, 28-0629, 28-0632, 28-3001 (1943), and N.D.C.C. Chapters 28-06, 28-06.1.

343 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
344 Papers), N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 81
345 (Applicability In General); N.D.R.Ct. 8.4 (Summons in Action for Divorce or Separation).

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation. Service by facsimile transmission must be completed by 5:00 p.m., receiver's time, on a weekday, which is not a legal holiday, or service is considered made on the following weekday which is not a legal holiday.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request for enlargement is made before expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under Rules 4(e)(7), 52(b), 59(c), (i) and (j), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by Expiration of Term. The period of time provided for the doing of

any act or the taking of any proceeding is not affected or limited by the continued existence or expiration of a term of court. The continued existence or expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which is pending.

(d) For Motions–Affidavits. A written motion, other than one which may be heard ex parte, and notice of the motion must be served at least 18 days before the motion may be heard, unless a different period is fixed by rule or court order. A party may apply ex parte for the court to hear a motion sooner than 18 days after service of the motion.

(e) Service by Mail or Commercial Carrier.

(1) Whenever a party ~~has the right or is required to do an~~ must or may act within a prescribed period after service ~~of a notice or other paper and the notice or paper is served and service is made~~ by mail or third-party commercial carrier under Rule 5, ~~3 days must be three days are~~ added to after the prescribed period would otherwise expire under N.D.R.Civ.P. 6(a).

(2) If service is made by mail or third-party commercial carrier under Rule 4, the prescribed period begins running upon delivery.

(3) Service by facsimile transmission is not service by mail or third-party commercial carrier for purposes of this rule.

EXPLANATORY NOTE

Rule 6 was amended, effective 1971; March 1, 1990; on an emergency basis, March

1, 1992; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2001; March 1, 2004;

_____.

This rule omits the listing of “legal holidays” found in subdivision (a) of the federal rule. See N.D.C.C. ch. 1-03, concerning holidays in North Dakota.

Subdivision (a) was amended, effective March 1, 2001, to extend the period from 7 days to 11 days when intermediate Saturdays, Sundays, and legal holidays are excluded from time computations.

Subdivision (d) was amended, effective March 1, 1997, because N.D.R.Ct. 3.2, governs when papers supporting or opposing a motion must be served. The March 1, 2001 amendment changes from 14 to 18 days when a motion must be served before it may be heard.

Subdivision (e) was amended, effective March 1, 1999, to make the three-day extension for service by mail applicable when service is via commercial carrier. The proof of service must contain the date of mailing or deposit with the commercial carrier.

Subdivision (e) was amended, effective March 1, 2004, to restrict applicability of the three-day extension for service by mail or commercial carrier to items served under Rule 5. The time of service for an item served by mail or commercial carrier under Rule 4 is the time the item is delivered to or refused by the recipient.

Subdivision (e) was amended, effective _____, to clarify how to count the three-day extension for service by mail or commercial carrier.

SOURCES: Joint Procedure Committee Minutes of April 27-28, 2006, pages 6-7;

January 26, 2006, page 11; January 30-31, 2003, pages 4-6; September 26-27, 2002, pages 15-18; January 27-28, 2000, pages 16-17; September 23-24, 1999, pages 20-21; January 29-30, 1998, page 18; April 25, 1996, pages 8-11; April 28-29, 1994, pages 15-17; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 14-16 and 20; April 29-30, 1993, page 20; November 7-8, 1991, page 3; October 25-26, 1990, page 12; April 20, 1989, page 2; December 3, 1987, page 11; June 22, 1984, pages 30-31; September 20-21, 1979, pages 5-6; Fed.R.Civ.P. 6.

STATUTES AFFECTED:

SUPERSEDED: N.D.R.C. §§ 28-0739, 28-2803, 28-2815, 28-2816, 28-2817, 28-2818, 28-2902, 28-2903, 28-3006 (1943).

CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction–Process–Service), N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers), N.D.R.Civ.P. 52 (Findings by the Court), N.D.R.Civ.P. 59 (New Trials–Amendment of Judgments), and N.D.R.Civ.P. 60 (Relief From Judgment or Order); N.D.R.Crim.P. 45 (Time); N.D.R.Ct. 3.2 (Motions).

RULE 27. DEPOSITIONS BEFORE ACTION OR PENDING APPEAL

(a) Before Action.

(1) Petition. A person who desires to perpetuate testimony regarding any matter may file a verified petition in the district court of the county of the residence of any expected adverse party. The petition must be entitled in the name of the petitioner and show: (i) that the petitioner expects to be a party to an action but is presently unable to bring it or cause it to be brought, (ii) the subject matter of the expected action and the petitioner's interest therein, (iii) the facts the petitioner desires to establish by the proposed testimony and the reasons for desiring to perpetuate it, (iv) the names or a description of the persons the petitioner expects will be adverse parties and their addresses so far as known, and (v) the names and addresses of the persons to be examined and the substance of the testimony which the petitioner expects to elicit from each, and shall ask for an order authorizing the petitioner to take the depositions of the persons to be examined named in the petition, for the purpose of perpetuating their testimony.

(2) Notice and Service. ~~The petitioner shall thereafter serve a notice upon each person named in the petition as an expected adverse party, together with a copy of the petition, stating that the petitioner will apply to the court, at a time and place named therein, for the order described in the petition. At least 20 days before the date of hearing the notice shall be served either within or without the state in the manner provided in Rule 4(d) for service of summons, but if such service cannot with due diligence be made upon any expected~~

~~adverse party named in the petition, the court may make such order as is just for service by publication or otherwise, and shall appoint, for persons not served in the manner provided in Rule 4(d), an attorney who shall represent them, and, in case they are not otherwise represented, may cross-examine the deponent. If any expected adverse party is a minor or incompetent the provisions of Rule 17(b) apply. At least 20 days before the hearing date, the petitioner must serve each expected adverse party with a copy of the petition and a notice stating the time and place of the hearing. The notice may be served either inside or outside the state in the manner provided in N.D.R.Civ.P. 4. If that service cannot be made with due diligence on an expected adverse party, the court may order service by publication or otherwise. The court must appoint an attorney to represent persons not served in the manner provided in N.D.R.Civ.P. 4 and to cross-examine the deponent if an unserved person is not otherwise represented. N.D.R.Civ.P. 17(b) applies if any expected adverse party is a minor or is incompetent.~~

(3) Order and Examination. If the court is satisfied that the perpetuation of the testimony may prevent a failure or delay of justice, it shall make an order designating or describing the persons whose depositions may be taken and specifying the subject matter of the examination and whether the depositions shall be taken upon oral examination or written interrogatories. The depositions may then be taken in accordance with these rules; and the court may make orders of the character provided for by Rules 34 and 35. For the purpose of applying these rules to depositions for perpetuating testimony, each reference therein to the court in which the action is pending shall be deemed to refer to the court in which the petition

for such deposition was filed.

(4) Use of Deposition. If a deposition to perpetuate testimony is taken under these rules or if, although not so taken, it would be admissible in evidence in the courts of the United States or of the state in which it is taken, it may be used in any action involving the same subject matter subsequently brought in a district court of this state, in accordance with the provisions of Rule 32(a).

(b) Pending Appeal. If an appeal has been taken from a judgment of a district court or before the taking of an appeal if the time therefor has not expired, the district court in which the judgment was rendered may allow the taking of the depositions of witnesses to perpetuate their testimony for use in the event of further proceedings in the district court. In that case, the party who desires to perpetuate testimony may make a motion in the district court for leave to take the depositions, upon the same notice and service thereof as if the action was pending in the district court. The motion must show (i) the names and addresses of persons to be examined and the substance of the testimony which the party expects to elicit from each, and (ii) the reasons for perpetuating their testimony. If the court finds that the perpetuation of the testimony is proper to avoid a failure or delay of justice, it may make an order allowing the depositions to be taken and may make orders of the character provided for by Rules 34 and 35. Thereupon, the depositions may be taken and used in the same manner and under the same conditions as are prescribed in these rules for depositions taken in actions pending in the district court.

(c) Perpetuation by Action. This rule does not limit the power of a court to entertain

an action to perpetuate testimony.

EXPLANATORY NOTE

Rule 27 was amended, effective March 1, 1990; _____.

This rule is an adaption of Fed.R.Civ.P. 27, with only minor changes to conform to the court system of North Dakota.

Paragraph (a)(2) was amended, effective _____. The language and organization of the paragraph were changed to make it more easily understood.

Rule 27 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

SOURCES: Joint Procedure Committee Minutes of January 26, 2006, page 12; April 20, 1989, page 2; December 3, 1987, page 11; September 20-21, 1979, page 19; Fed.R.Civ.P. 27.

STATUTES AFFECTED:

SUPERSEDED: N.D.R.C. §§ 31-0201, 31-0206, 31-0701, 31-0702, 31-0703, 31-0704, 31-0705, 31-0709, 31-0712, 31-0713, 31-0715 (1943).

CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction–Process–Service), N.D.R.Civ.P. 17 (Parties Plaintiff and Defendant–Capacity), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), N.D.R.Civ.P. 32 (Use of Depositions in Court Proceedings), N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), and N.D.R.Civ.P. 35 (Physical and Mental Examination

85 of Persons).

RULE 38 JURY TRIAL OF RIGHT

(a) Right Preserved. The right of trial by jury as declared by the Constitution of the United States or by the Constitution of the State of North Dakota or as given by a statute of the United States or of the State of North Dakota shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by jury by:

(1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue, and

(2) filing the demand as required by Rule 5(d). Such demand may be endorsed upon a pleading of the party.

(c) Size of Jury. If trial by jury is demanded, the jury shall consist of six qualified jurors unless a jury of nine is specifically demanded within the time required by these rules for demanding trial by jury.

(d) Demand–Specifications of Issue. In the demand a party may specify the issues the party wishes so tried; otherwise the party is deemed to have demanded trial by jury of all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within ten days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(e) Waiver. The failure of a party to serve and file a demand as required by this rule

constitutes a waiver by the party of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

EXPLANATORY NOTE

Rule 38 was amended, effective January 1, 1978; January 1, 1988; March 1, 1990; March 1, 1998_____.

Rule 38 applies to a demand made under N.D.C.C. § 30.1-15-04 for a jury trial in a formal testacy proceeding.

SOURCES: Joint Procedure Committee Minutes of April 27-28, 2006, page 14; September 26-27, 1996, page 20; April 20, 1989, page 2; December 3, 1987, page 11; September 18-19, 1986, page 3; September 26-27, 1985, pages 3-4; November 29-30, 1979, pages 8-9; September 15-16, 1977, pages 3-4, 9-10; June 2-3, 1977, pages 7, 10; Section 28-14-03.1; Fed.R.Civ.P. 38.

STATUTES AFFECTED:

SUPERSEDED: N.D.R.C. §§ 28-1206, 28-1214 (1943).

CONSIDERED: N.D.C.C. § 30.1-15-04.

CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers) and N.D.R.Civ.P. 39 (Trial by Jury or by the Court), N.D.R.Civ.P. 48 (Juries of Less

43 Than Nine-Majority Verdict).

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena must

(A) state the title of the action, the name of the court in which it is filed, and its civil action number; and

(B) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or upon order of the court for good cause shown, to permit inspection of premises, at a time and place therein specified.

A copy of any court order must be attached to the subpoena.

A command to produce evidence or to permit inspection may be joined with a command to appear at a trial or hearing or at a deposition, or may be issued separately.

(2) A subpoena must be issued by the clerk under the seal of the court or by an attorney for a party to the action or special proceeding. The subpoena must be issued in the name of the court for the county in which the action is filed. If issued by the clerk, it must be issued signed and sealed but otherwise blank, and the party requesting the subpoena shall complete it before service. If issued by an attorney for a party, the subpoena must be subscribed in the name of the attorney together with the attorney's office address and must identify the party for whom the attorney appears.

(3) A subpoena may be issued by the clerk, under seal of the court, to an attorney

representing a party in a civil action pending in another state upon filing proof of service of notice under subdivision (b)(2), or to a party in a civil action pending in another state upon filing a letter of request from a foreign court. 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) Service of a subpoena upon a named person ~~named therein~~ must be made by personal service under Rule 4(d) ~~and~~, A subpoena may be served at any place within the state.

~~(B) if the~~ If a person's attendance is commanded, ~~by tendering to that person the fees~~ for one day's attendance and ~~the~~ mileage and travel expense allowed by law must be tendered to the person. ~~The~~ A witness need not obey ~~the~~ a subpoena if the witness fee and payment for mileage and travel expense are not tendered with the subpoena. The witness fee, mileage and travel expense are not required to be tendered, if the witness fee, mileage and travel expense are to be paid by ~~this~~ the state or ~~any~~ a political subdivision ~~thereof.~~ ~~A subpoena may be served at any place within the state.~~

(2) Service of Notices.

43 (A) Service of a notice to take a deposition as provided in Rules 30(b) and 31(a) is a
44 prerequisite for the issuance of a subpoena that commands a person to attend, and give
45 testimony and produce documents or things at a pretrial deposition.

46 (B) If a deposition notice has not been served, service ~~Service~~ of a notice for
47 production, inspection or copying, as provided in this rule, is a prerequisite for the issuance
48 of a subpoena that commands production, inspection or copying before trial. A description
49 of the material to be produced, inspected or copied, or a description of the premises to be
50 inspected, must be included in the notice or attached to the notice.

51 (C) Notice must be served on each party in the manner set by Rule 5(b). A copy of the
52 notice and of the proof of service are sufficient authorization for the clerk to issue a subpoena
53 for a pretrial deposition, pretrial production, pretrial inspection or pretrial copying. The
54 attorney's signature on a subpoena issued by an attorney for a party constitutes certification
55 that notice was served.

56 (c) Protection of Person Subject to Subpoenas.

57 (1) A party or an attorney responsible for the issuance and service of a subpoena shall
58 take reasonable steps to avoid imposing undue burden or expense on a person subject to that
59 subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and
60 impose upon the party or attorney in breach of this duty an appropriate sanction, which may
61 include, but is not limited to, lost earnings and a reasonable attorney's fee.

62 (2) (A) A person commanded to produce and permit inspection and copying of
63 designated books, papers, documents or tangible things or inspection of premises need not

64 appear in person at the place of production, inspection or copying unless commanded to
65 appear for a deposition, hearing or trial.

66 (B) Subject to paragraph (d)(2) of this rule, a person commanded to produce, permit
67 inspection or copying before a trial or hearing may object in writing. The objection must be
68 received by the party or attorney designated in the subpoena within ~~10~~ ten days after receipt
69 of the subpoena. If the time specified in the subpoena for compliance is less than ~~10~~ ten days,
70 any objection must be received at least 24 hours before the time specified for compliance.
71 If objection is made, the party serving the subpoena is not entitled to production, inspection
72 or copying except upon order of the court by which the subpoena was issued. If objection is
73 made, the party serving the subpoena may, upon notice to the person commanded to produce,
74 permit inspection or copying, move at any time for an order to compel production, inspection
75 or copying. An order to compel production, inspection or copying must protect any person
76 who is not a party or an officer of a party from significant expense resulting from production,
77 inspection or copying.

78 (3) A resident of this state may be required by subpoena to attend a deposition only
79 in the county where that person resides, is employed or transacts business in person, or at
80 such other convenient place as prescribed by order of court. A nonresident of this state may
81 be required by subpoena to attend a deposition in any county of this state. A resident or
82 nonresident may be required to attend a hearing or trial any place within this state.

83 (4) On timely motion, the court by which a subpoena was issued shall quash or modify
84 a subpoena that

(i) fails to allow reasonable time for compliance;

(ii) requires attendance beyond the requirements of paragraph (c)(3) of this rule;

(iii) subjects a person to undue burden; or

(iv) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party.

(d) Duties in Responding to Subpoena.

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

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim must be made expressly and must be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by paragraph (c)(3).

(f) Notice. All subpoenas commanding pretrial or prehearing production, inspection or copying 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, inspection or copying]. Any objection must be received within ~~10~~ ten days after you receive the subpoena. If the time specified in the subpoena for compliance is less than ~~10~~ 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;_____.

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 upon order of the court for good cause shown; 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.

Subdivision (b) was amended, effective _____, the 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.

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 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.R.C. §§ 31-0113, 31-0120, 31-0121, 31-0302, 31-0303, 31-0305, 31-0306, 31-0310, 31-0311, 31-0312, 31-0314 (1943); 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).

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) When Used.

(1) Felony. All felony prosecutions in the district court must be by indictment after grand jury inquiry or information after preliminary examination.

(2) Misdemeanor. All misdemeanor and other prosecutions in the district court, including appeals, must be by indictment, information, or complaint.

(b) Waiver of Indictment. [Intentionally omitted].

(c) Nature and Contents.

(1) In General. The indictment or the information must name or otherwise identify the defendant, and must be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged. It must be signed by the prosecuting attorney. All prosecutions except appeals from municipal courts must be carried on in the name and by the authority of the State of North Dakota and must conclude “against the peace and dignity of the State of North Dakota.” Except as required by this rule, the indictment or information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specific means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have

22 violated.

23 (2) Citation Error. Unless the defendant was prejudicially misled, neither an error in
24 the citation nor its omission is a ground to dismiss the indictment or information or to reverse
25 a conviction.

26 (d) Surplusage. On motion of either party or on its own motion, the court may strike
27 surplusage from the information or indictment.

28 (e) Amending an Information. Unless an additional or different offense is charged or
29 a substantial right of the defendant is prejudiced, the court may permit an information to be
30 amended at any time before the verdict or finding.

31 (f) Bill of Particulars. The court may direct the filing of a bill of particulars. The
32 defendant may move for a bill of particulars before arraignment or within one day after
33 arraignment or at a later time if the court permits. The motion must be in writing and must
34 specify the particulars sought by the defendant. A bill of particulars must be granted if the
35 court finds it necessary to protect the defendant against a second prosecution for the same
36 offense or to enable the defendant to adequately prepare for trial. A bill of particulars may
37 be amended at any time subject to such conditions as justice requires.

38 (g) Names of Witnesses to Be Endorsed on Indictment or Information. When an
39 indictment or information is filed, the names of all the witnesses on whose evidence the
40 indictment or information was based must be endorsed on it before it is presented. The
41 prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the
42 indictment or information the names of other witnesses the prosecuting attorney proposes to

43 call. A failure to endorse those names does not affect the validity or sufficiency of the
44 indictment or information, but the court in which the indictment or information was filed
45 must direct the names of those witnesses to be endorsed on application of the defendant. The
46 court may not allow a continuance because of the failure to endorse any of those names
47 unless the application was made at the earliest opportunity and then only if a continuance is
48 necessary in the name of justice.

50 EXPLANATORY NOTE

51 Rule 7 was amended effective March 1, 1990; January 1, 1995; March 1, 1996; March
52 1, 2006;_____.

53 Rule 7 is an adaptation of Fed.R.Crim.P. 7 and controls all indictments and
54 informations. Although North Dakota provides that a defendant may be prosecuted by
55 indictment or information, indictments are seldom used.

56 Subdivision (a) was amended, effective January 1, 1995, in response to county court
57 elimination. The amendment allows misdemeanors to be charged by complaint in district
58 court, and for the inclusion of misdemeanor charges with felony charges in an indictment or
59 information.

60 Subdivision (a) was amended, effective March 1, 1996, to clarify that even though a
61 felony is initially charged by complaint, the subsequent prosecution must be by indictment
62 or information.

63 Subdivision (b) entitled "Waiver of Indictment" is retained in title and number only

to conform with the outline and form of Fed.R.Crim.P. 7. Article I, Section 10 of the North Dakota Constitution provides that an individual must be prosecuted by indictment in cases of felony unless otherwise provided by the legislature, but in all cases either by information or indictment. Since the legislature has provided the state with an alternative to a prosecution by indictment in N.D.C.C. § 29-09-02, it follows that under the state constitution, there is no right in the accused to demand prosecution by indictment.

The language of subdivision (c), “must be carried on in the name * * * of the State of North Dakota;” does not mandate a change in the style of prosecution before municipal courts. The purpose of the indictment or information is to inform the defendant of the precise offense of which the defendant is accused so that the defendant may prepare the defendant’s defense and further that a judgment will safeguard the defendant from subsequent prosecution for the same offense. The language employed in subdivision (c) is intended to provide the defendant with the Sixth Amendment protection to “be informed of the nature and the cause of the accusation * * *.” With this view in mind, subdivision (c) is established for the benefit of the defendant and is intended simply to provide a means by which the defendant can be properly informed of the proceedings without jeopardy to the prosecution.

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

Subdivision (c) was amended, effective _____, to specify that the indictment or information must contain a statement of the facts that establish the elements of the offense charged.

85 The purpose of subdivision (d) is to protect the defendant against prejudicial
86 allegations of irrelevant or immaterial facts.

87 Rule 7 was amended, effective March 1, 2006, in response to the December 1, 2002,
88 revision of the Federal Rules of Criminal Procedure. The language and organization of the
89 rule were changed to make the rule more easily understood and to make style and
90 terminology consistent throughout the rules.

91 SOURCES: Joint Procedure Committee Minutes of January 26, 2006, page 3; January
92 29-~~20~~ 30, 2004, pages 24-25; January 26-27, 1995, pages 3-5; January 27-28, 1994, pages
93 8-9; September 23-24, 1993, pages 8-10; April 20, 1989, page 4; December 3, 1987, page
94 15; March 23-25, 1972, pages 3-11; December 11-12, 1968, pages 1-2; July 25-26, 1968,
95 pages 1-4.

96 STATUTES AFFECTED:

97 SUPERSEDED: N.D.C.C. §§ 29-09-01, 29-09-03, 29-09-04, 29-09-05, Chapter 29-
98 11.

99 CONSIDERED: N.D.C.C. §§ 29-09-02, 29-09-06, 29-09-07.

100 CROSS REFERENCES: N.D.C.C. ch. 29-10.1 (Grand Jury).

RULE 29. MOTION FOR A JUDGMENT OF ACQUITTAL

(a) Before Submission to the Jury. After the prosecution closes its evidence or after the close of all the evidence, the court on the defendant's motion must enter a judgment of acquittal of any offense for which the evidence is insufficient to sustain a conviction. The court may on its own consider whether the evidence is insufficient to sustain a conviction. If the court denies a motion for a judgment of acquittal at the close of the prosecution's evidence, the defendant may offer evidence without having reserved the right to do so.

(b) Reserving Decision. The court may reserve decision on the motion, proceed with the trial (where the motion is made before the close of all the evidence), submit the case to the jury, and decide the motion either before the jury returns a verdict or after it returns a verdict of guilty or is discharged without having returned a verdict. If the court reserves decision, it must decide the motion on the basis of the evidence at the time the ruling was reserved.

(c) After Jury Verdict or Discharge.

(1) Time for a Motion. A defendant may move for a judgment of acquittal, or renew such a motion, within ~~10~~ ten days after a guilty verdict or after the court discharges the jury, whichever is later, ~~or within any other time the court sets during the 10-day period.~~

(2) Ruling on the Motion. If the jury has returned a guilty verdict, the court may set aside the verdict and enter an acquittal. If the jury has failed to return a verdict, the court may enter a judgment of acquittal.

(3) No Prior Motion Required. A defendant is not required to move for a judgment of acquittal before the court submits the case to the jury as a prerequisite for making such a motion after jury discharge.

(d) Conditional Ruling on a Motion for a New Trial.

(1) Motion for a New Trial. If the court enters a judgment of acquittal after a guilty verdict, the court must also conditionally determine whether any motion for a new trial should be granted if the judgment of acquittal is later vacated or reversed. The court must specify the reasons for that determination.

(2) Finality. The court's order conditionally granting a motion for a new trial does not affect the finality of the judgment of acquittal.

(3) Appeal.

(A) Grant of a Motion for a New Trial. If the court conditionally grants a motion for a new trial and the appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise.

(B) Denial of a Motion for a New Trial. If the court conditionally denies a motion for a new trial, an appellee may assert that the denial was erroneous. If the appellate court later reverses the judgment of acquittal, the trial court must proceed as the appellate court directs.

EXPLANATORY NOTE

Rule 29 was amended, effective March 1, 2006;_____.

Rule 29 is based on Fed.R.Crim.P. 29.

Subdivision (a) is intended to preserve the right of the defendant to offer evidence if a motion for a judgment of acquittal is denied.

Subdivision (b) was added to Rule 29, effective March 1, 2006. It allows the court to reserve decision on a motion for judgment of acquittal made at the close of all the evidence, submit the case to the jury, and then decide the motion either (1) before the jury returns a verdict, or (2) after it returns a verdict of guilty, or (3) is discharged without having returned a verdict.

Subdivision (c) follows Fed.R.Crim.P. 29. Paragraph (c)(1) was amended, effective March 1, 2006, to increase the time for filing a motion for judgment of acquittal from seven to ten days. Paragraph (c)(1) was amended, effective _____, to eliminate the requirement that the trial court decide a motion for extension of time within ten days. Motions for extension of time must be made under Rule 45(b).

Subdivision (d) was added to Rule 29, effective March 1, 2006. It sets out a method for the court to use in making a conditional ruling on a motion for a new trial and designates how a trial court must proceed after appeal when it has made a conditional ruling on a new trial motion.

Rule ~~21~~ 29 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 January 26, 2006, page 10;

64 January 27-28, 2005, pages 23-24; June 22, 1984, pages 28-29; October 17-20, 1972, pages
65 33-38; December 11-12, 1968, pages 15-17; September 26-27, 1968, page 14; Fed.R.Crim.P.
66 29.

67 STATUTES AFFECTED:

68 SUPERSEDED: N.D.C.C. § 29-21-37.

69 CONSIDERED: N.D.C.C. §§ 12-05-03, 29-21-08, 29-21-09, 29-21-10.

70 CROSS REFERENCE: N.D.R.Crim.P. 33 (New Trial); N.D.R.Crim.P. 34 (-Arresting
71 Judgment); N.D.R.Crim.P. 45 (Computing and Extending Time).

RULE 32. SENTENCING AND JUDGMENT

(a) Sentence.

(1) Time of Sentencing. The court must impose sentence or other authorized disposition without unnecessary delay. Until disposition, the court may continue or alter bail or require the defendant to be held without bail.

(2) Presentence Requirements. Before imposing sentence, the court must:

(A) determine whether the defendant and the defendant's counsel had an opportunity to read and discuss the presentence investigation report, if made available under Rule 32(c)(4)(B), or a summary made available under Rule 32(c)(4)(D);

(B) give counsel an opportunity to speak on behalf of the defendant; and

(C) determine whether the defendant wishes to make a statement on the defendant's own behalf or wishes to present information in mitigation of punishment or information that would require the court to withhold judgment and sentence.

The court must give the prosecution an opportunity to be heard on any matter material to the imposition of sentence.

(2) Notification of Right to Appeal. After imposing sentence in a case that has gone to trial, the court must advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to apply for appointment of counsel for purposes of appeal. The court is under no duty to advise the defendant of any right of appeal when sentence is imposed following a plea of guilty.

(b) Judgment. A judgment of conviction must include the plea, the verdict, and the sentence imposed. If the defendant is found not guilty or for any reason is entitled to be discharged, the court must enter judgment accordingly. The judge shall sign and the clerk shall enter the judgment.

(c) Presentence Investigation.

(1) When Made. The court may order a presentence investigation and report at any time. Except when the defendant consents in writing, the report may not be submitted to the court or its contents disclosed unless the defendant has pleaded guilty or has been found guilty.

(2) Presence of Counsel. The defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant conducted by parole and probation staff in the course of a presentence investigation.

(3) Report.

(A) Contents of Report. The presentence report may contain the defendant's previous criminal record and information about the defendant's characteristics, including:

- (i) family, educational, and social history;
- (ii) employment history and financial condition;
- (iii) circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant; and
- (iv) any information required by the court.

(B) Information Excluded from Report. The following types of information may not

be included in a presentence report, but may be submitted to the court as an addendum to the report:

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

(ii) information or sources of information obtained confidentially, but subject to disclosure by the court as provided in Rule 32(c)(4)(A);

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

(iv) any victim impact statement; or

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

(4) Disclosure of Presentence Report.

(A) Confidentiality. The presentence report and any addendum are confidential. Neither the public nor the parties may read or copy the presentence report or any addendum, unless the court, in its discretion, gives permission.

(B) Disclosure to Defendant. If the court allows the defendant to examine any part of the presentence report or any addendum, this disclosure must be made at least ~~10~~ ten days before sentence is imposed, unless the defendant waives the ~~10~~ ten-day requirement. The court must provide the defendant and the defendant's counsel a copy of the disclosed material and give them an opportunity to comment. The court may allow the defendant and

the defendant's counsel to introduce testimony or other information relating to any alleged factual inaccuracy in the disclosed material. Any material disclosed to the defendant and the defendant's counsel must also be disclosed to the prosecuting attorney.

(C) Disclosure to Attorney General. The court may disclose the presentence report and any addendum to the Attorney General or the Attorney General's designee only for purposes of the individual risk assessment required by N.D.C.C. § 12.1-32-15 (12) and (13). A presentence report and addendum disclosed to the Attorney General or the Attorney General's designee must remain confidential and may not be read or copied by anyone else except as allowed by Rule 32(c) or applicable federal law.

(D) Harmful Information. If the court finds there is information in the presentence report or any addendum that would be harmful to the defendant or to other persons if disclosed, the court must not permit the public or the parties to read or copy that portion of the report or the addendum. The court must give an oral or written summary of any non-disclosed information it will rely on in determining sentence and must give the defendant or the defendant's counsel an opportunity to comment. The court may give its summary to the parties in camera.

(E) Defendant's Comments. If the comments of the defendant and the defendant's counsel, or testimony or other information introduced by them, allege any factual inaccuracy in the presentence report or any addendum, or in any of the information summarized, the court, for each matter controverted, must:

(i) make a finding on the allegation, or

(ii) make a determination that no finding is necessary because the matter controverted will not be taken into account in sentencing.

A written record of the court's findings and determinations must be appended to and accompany any copy of the presentence report later made available to the parole board or the pardon clerk.

(d) Plea withdrawal.

(1) In General. The court must allow the defendant to withdraw a plea of guilty whenever the defendant, on a timely motion for withdrawal, proves withdrawal is necessary to correct a manifest injustice.

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

(3) Court's Discretion. If the defendant does not show that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty as a matter of right once the court has accepted the plea. Before sentence, the court in its discretion may allow the defendant to withdraw a plea for any fair and just reason unless the prosecution has been substantially prejudiced by reliance on the defendant's plea.

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

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

(1) Taking into Custody. If there is probable cause to believe a probationer has

violated a condition of probation, the court that originally placed the probationer on probation may conduct a hearing on the alleged violation. Any state parole and probation officer or any peace officer directed by a state parole and probation officer or directed by an order of the court having jurisdiction may take the probationer into custody and bring the probationer before the court. Costs incurred in bringing the probationer before the court must be borne by the county in which the probation was granted. The probationer may be admitted to bail pending the hearing.

(2) Transfer. If the probationer does not contest the violation, the hearing may be transferred, under the procedure set out in Rule 20, to the county where the probationer is arrested, held or present. This procedure is available only upon the consent of the court that placed the probationer on probation.

(3) Hearing.

(A) In General. The hearing must be in open court with:

- (i) the probationer present;
- (ii) a prior written notice of the alleged violation given to the probationer; and
- (iii) representation by retained or appointed counsel unless waived.

The probationer must be given an opportunity to make a statement and present any evidence in mitigation.

(B) Resolution. If the probationer contests the violation, the prosecution must establish the violation by a preponderance of the evidence. After the hearing and subject to limitations imposed by law, the court may:

(i) revoke an order suspending a sentence or an order suspending the imposition of sentence; or

(ii) continue probation on the same or different conditions.

A record of the proceedings must be made.

EXPLANATORY NOTE

Rule 32 was amended, effective January 1, 1980; March 1, 1986; March 1, 1990; March 1, 1992, on an emergency basis; July 14, 1993; March 1, 1999; October 31, 2001, on an emergency basis; April 1, 2002; March 1, 2006;_____.

Rule 32 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.

Paragraph (c)(4) was amended, effective March 1, 1999, to allow the court to decide, in its discretion, whether a presentence investigation report and any addendum may be inspected by the public or the parties.

Parole and probation staff conducting a presentence investigation must be mindful that they cannot make a binding promise of complete confidentiality regarding information included in the addendum to a presentence report. Under paragraph (c)(4), the promise of confidentiality is subject to the court's discretion to allow the parties to inspect the addendum.

Paragraph (c)(4) was amended, effective October 31, 2001, to allow disclosure of the presentence report and any addendum to the Attorney General or the Attorney General's designee to enable the Attorney General to comply with subsections 12 and 13 of N.D.C.C. § 12.1-32-15. Disclosure to the Attorney General or the Attorney General's designee must comply with all applicable state and federal statutes, rules and regulations governing drug and alcohol records, and private medical information.

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

Paragraph (f)(1) is adapted from and supersedes N.D.C.C. § 12-53-15.

Paragraph (f)(2) was added, effective March 1, 2006, to allow transfer of a revocation hearing to the county where the probationer is present. Rule 20 (Transfer from the County for Plea and Sentence) sets out the procedure for obtaining a transfer.

Paragraph (f)(3) is adapted in part from the A.B.A. Standards for Criminal Justice, Standards Relating to Probation, § 5.4 at 65 (Approved Draft, 1970). Paragraph (f)(3) was amended, effective, _____, to clarify that a probationer must be given the opportunity to make a statement and present mitigating information at a revocation hearing.

SOURCES: Joint Procedure Committee Minutes of January 26, 2006, page 9; April 28-29, 2005, pages 3-5; January 27-28, 2005, pages 28-29; January 24-25, 2002, pages 9-14; January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30, 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987,

page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6; December 7-8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15, 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February 20-21, 1969, pages 5-14; Fed.R.Crim.P. 32.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 12-53-15, 29-14-22, 29-26-01, 29-26-02, 29-26-15, 29-26-19, 33-12-26, 33-12-27, 33-12-29.

CONSIDERED: N.D.C.C. §§ 1-01-41, 12-53-03, 12-53-04, 12-53-05, 12-53-06, 12-53-10, 12-53-11, 12-53-12, 12-53-13, 12-53-14, 12-53-17, 12-53-20, 12-55-30, 29-26-03, 29-26-11, 29-26-12, 29-26-13, 29-26-14, 29-26-16, 29-26-17, 29-26-18, 29-26-20, 29-26-23, 33-12-28.

CROSS REFERENCES: N.D.R.Crim.P. 20 (Transfer from the County for Plea and Sentence); N.D.C.C. § 12.1-32-15.

RULE 33. NEW TRIAL

(a) Defendant's Motion. On the defendant's motion, the court may vacate any judgment and grant a new trial to that defendant if the interest of justice so requires. A motion for a new trial must specify the alleged defects and errors with particularity. If the case was tried without a jury, the court may take additional testimony and enter a new judgment.

(b) Motions.

(1) Newly Discovered Evidence. Any motion for a new trial based on newly discovered evidence must be filed within three years after the verdict or finding of guilty and be supported by an affidavit.

(2) Other Grounds. Any motion for a new trial based on any reason other than newly discovered evidence must be filed within ~~10~~ ten days after the verdict or finding of guilty; ~~or within such further time frame as the court sets during the 10-day period.~~ Any motion for a new trial based on jury misconduct must be supported by an affidavit. Any motion for a new trial based on any other grounds may be made on the file, exhibits, and minutes of the court. Pertinent facts not a part of the minutes may be shown by affidavit except as otherwise provided in these rules. Either party may procure a complete or partial transcript of the proceedings for use on the hearing of the motion.

(3) Appeal Pending. If an appeal is pending, the court may not grant a motion for a new trial until the case is remanded.

22 (c) Affidavits.

23 (1) Response to Affidavit. If a motion for a new trial is based on an affidavit, the
24 affidavit must be served with the notice of motion. The opposing party may respond with
25 opposing affidavits, which must be served within ~~10~~ ten days after service of the motion for
26 new trial. The court may extend the period for filing an opposing affidavit and may permit
27 reply affidavits.

28 (2) Affiant's Attendance. If an affidavit is presented to the court in support of or in
29 opposition to a motion for a new trial and the affiant is a resident of this state, the court may
30 require the affiant to attend a hearing for examination under oath.

31 (d) Other Post-Conviction Remedies. Nothing in this rule may be construed to affect
32 the remedies provided by N.D.C.C. ch. 29-32.1.

33
34 EXPLANATORY NOTE

35 Rule 33 was amended, effective January 1, 1979; March 1, 1990; March 1, 2000;
36 March 1, 2006;_____.

37 Subdivision (b) was amended, effective March 1, 2000, to provide the time for
38 moving for a new trial runs from the "verdict or finding of guilty" rather than the "final
39 judgment." The amendment also extended the time for moving for a new trial based on
40 newly discovered evidence from two to three years.

41 Paragraph (b)(1) was amended, effective March 1, 2006, to eliminate the requirement
42 that a motion for a new trial based on newly discovered evidence be made within 30 days

43 after discovery of the new evidence.

44 Paragraph (b)(2) was amended, effective March 1, 2006, to increase the time to make
45 a motion for new trial for a reason other than newly discovered evidence from seven to ten
46 days. Paragraph (c)(1) was concurrently amended to increase the time to respond to a new
47 trial affidavit from seven to ten days.

48 Paragraph (b)(2) was amended, effective _____, to eliminate the
49 requirement that the trial court decide a motion for extension of time within ten days.
50 Motions for extension of time must be made under Rule 45(b).

51 Rule 33 was amended, effective March 1, 2006, in response to the December 1, 2002,
52 revision of the Federal Rules of Criminal Procedure. The language and organization of the
53 rule were changed to make the rule more easily understood and to make style and
54 terminology consistent throughout the rules.

55 Under this rule, the court has no power to order a new trial on its own motion, but may
56 act only upon a timely motion made by the defendant. This provision is intended to avoid
57 problems of double jeopardy. The rule does not affect the power of the court to declare a
58 mistrial and order a new trial prior to the verdict or finding of guilty.

59 A timely motion for a new trial suspends the time to appeal from the judgment of
60 conviction. An appeal may be taken within 30 days after entry of the order denying the
61 motion for a new trial. The appeal may then be taken from the judgment of conviction using
62 the grounds raised in the motion for a new trial.

63 To prevail on a motion for a new trial on the ground of newly discovered evidence,

the defendant must show (1) the evidence was discovered after trial, (2) the failure to learn about the evidence at the time of trial was not the result of the defendant's lack of diligence, (3) the newly discovered evidence is material to the issues at trial, and (4) the weight and quality of the newly discovered evidence would likely result in an acquittal.

Minutes include the unofficial and untranscribed notes of the court reporter or court recorder and notes of the clerk of court indicating which exhibits have been received. The file includes all formal documents in the court file.

SOURCES: Joint Procedure Committee Minutes of January 26, 2006, page 10; April 28-29, 2005, page 33; January 27-28, 2005, pages 29-31; May 6-7, 1999, pages 17-18; April 20, 1989, page 4; December 3, 1987, page 15; January 12-13, 1978, pages 6-7; June 2-3, 1977, pages 5-7; December 11-15, 1972, pages 16-19; September 26-27, 1968, pages 16-17; Fed.R.Crim.P. 33.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. ch. 29-24.

CONSIDERED: N.D.C.C. §§ 29-23-11, 29-28-29, ch. 29-32, ch. 29-32.1, ch. 31-03.

CROSS REFERENCE: N.D.R.App.P. 4, (Appeals—When taken); N.D.R.Crim.P. 37 (Appeal as of Right to District Court; How Taken); N.D.R.Crim.P. 45 (Computing and Extending Time); N.D.R.Crim.P. 47 (Motions).

RULE 34. ARRESTING JUDGMENT

(a) In General. On the defendant's motion or on its own, the court must arrest judgment if:

(1) the indictment, information, or complaint does not charge an offense; or

(2) the court does not have jurisdiction of the charged offense.

(b) Time to File. The defendant must move to arrest judgment within ~~10~~ ten days after verdict or finding of guilty, or after a plea of guilty, ~~or within such a further time as the court may fix set during the seven 10-day period.~~

EXPLANATORY NOTE

Rule 34 was amended, effective March 1, 2006; _____.

Rule 34 is an adaption of Fed.R.Crim.P. 34 and differs only to the extent that it includes the ~~complaints~~ complaint as a charging document. The rule recognizes two grounds for a motion in arrest of judgment: (1) that the indictment, information, or complaint does not charge an offense; and (2) that the court is without jurisdiction of the offense charged. These grounds are among the nonwaivable defenses referred to in Rule 12(b)(2).

An attack on the sufficiency of the evidence should be by motion for acquittal under Rule 29; a claim of errors at the trial should be made by motion for a new trial under Rule 33; and defects of form in the indictment, information, or complaint must be raised before trial by motion under Rule 12.

22 A motion for arrest of judgment should ordinarily be made in writing and served upon
23 the parties and filed. The grounds for the motion are stated in the language of the rule.

24 Subdivision (b) was amended, effective March 1, 2006, to increase to the time to file
25 a motion to arrest judgment from seven to ten days. Subdivision (b) was amended, effective
26 _____, to eliminate the requirement that the trial court decide a motion for
27 extension of time within ten days. Motions for extension of time must be made under Rule
28 45(b).

29 Rule 34 was amended, effective March 1, 2006, in response to the December 1, 2002,
30 revision of the Federal Rules of Criminal Procedure. The language and organization of the
31 rule were changed to make the rule more easily understood and to make style and
32 terminology consistent throughout the rules.

33 SOURCES: Joint Procedure Committee Minutes of January 26, 2006, page 10;
34 January 27-28, 2005, page 31; April 24-26, 1973, page 13; December 11-15, 1972, pages 19-
35 20; September 26-27, 1968, pages 17-18; Fed.R.Crim.P. 34.

36 STATUTES AFFECTED:

37 SUPERSEDED: N.D.C.C. §§ 29-25-01, 29-25-02, 29-25-03, 29-25-04.

38 CONSIDERED: N.D.C.C. §§ 29-25-05, 29-25-06.

39 CROSS REFERENCE: N.D.R.Crim.P. 12 (Pleadings and Pretrial Motions);
40 N.D.R.Crim.P. 29 (Motion for a Judgment of Acquittal); N.D.R.Crim.P. 33 (New Trial);
41 N.D.R.Crim.P. 45 (Computing and Extending Time); N.D.R.Crim.P. 47 (Motions);
42 N.D.R.Crim.P. 49 (Serving and Filing Documents).

RULE 45. COMPUTING AND EXTENDING TIME

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) Day of the Event Excluded. Exclude the day of the act, or event, or default that begins the period.

(2) Exclusion from Brief Periods. Exclude intermediate Saturdays, Sundays and legal holidays when the period is less than 11 days.

(3) Last Day. Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday or day when the clerk's office is inaccessible.

(4) Facsimile Service. Service by facsimile transmission must be completed by 5:00 p.m., receiver's time, on a weekday that is not a legal holiday, or service is considered made on the following weekday that is not a legal holiday.

(5) "Legal Holiday" Defined. As used in this rule, "legal holiday" means:

(A) a specific day set aside as a holiday under N.D.C.C. § 1-03-01; or

(B) any other day declared a public holiday by the President of the United States or the governor of this state.

(b) Extending Time.

(1) In General. When an act must or may be done within a specified time, the court

on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed period or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exceptions. The court may not extend the time for taking any action under Rules ~~29, 33, 34,~~ 35; and 37, except as stated in those rules.

(c) Additional Time After Service by Mail or Commercial Carrier. Whenever a party must or may ~~do an act within a prescribed period after service of a notice or other document,~~ ~~and the notice or document is served~~ and service is made by mail or third-party commercial carrier, three days ~~must be~~ are added to after the prescribed period would otherwise expire under Rule 45(a). Service by facsimile transmission is not service by mail or third-party commercial carrier.

EXPLANATORY NOTE

Rule 45 was amended, effective March 1, 1990; January 1, 1995; March 1, 1999; March 1, 2001; March 1, 2006;_____.

Rule 45 is an adaptation of Fed.R.Crim.P. 45 with certain modifications. The rule is similar to N.D.R.Civ.P. 6, which also deals with computing time.

Rule 45 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.

43 A subdivision referring to terms of court was deleted, effective March 1, 2006. The
44 district courts of North Dakota are in continuous session and terms of court are not a factor
45 in computing or extending time. At the same time, and consistent with the federal rule, a
46 subdivision dealing with motions and affidavits was transferred to Rule 47.

47 Subdivision (a) was amended, effective March 1, 2001, to extend the period from 7
48 days to 11 days when intermediate Saturdays, Sundays, and legal holidays are excluded from
49 time computations.

50 Subdivision (a) was amended, effective March 1, 2006, to include a paragraph
51 defining the term “legal holiday”.

52 Subdivision (b) was amended, effective _____, to delete Rules 29, 33
53 and 34 from the exceptions paragraph.

54 Subdivision (c) is an adaptation of N.D.R.Civ.P. 6 (e).

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

59 Subdivisions (a) and (c) were amended, effective January 1, 1995, to clarify time
60 computations when making service by facsimile transmission. Subdivision (c) was amended,
61 effective _____, to clarify how to count the three-day extension for service by mail
62 or commercial carrier.

63 SOURCES: Joint Procedure Committee Minutes of April 27-28, 2006, pages 6-7;

January 26, 2006, page 11; January 27-28, 2005, page 37; January 27-28, 2000, pages 16-17;
January 29-30, 1998, page 20; April 28-29, 1994, pages 15-16; January 27-28, 1994, pages
24-25; September 23-24, 1993, pages 14-16 and 20; April 29-30, 1993, pages 20-22; April
20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, page 31; December 11-15,
1972, pages 48-50; September 17-19, 1970, page 10; March 12-14, 1970, pages 16-18;
Fed.R.Crim.P. 45.

STATUTES AFFECTED:

SUPERSEDED INsofar AS CRIMINAL PROCESS: N.D.C.C. § 1-02-15.

CONSIDERED: N.D.C.C. §§ 1-01-33, 1-03-01(2-14).

CROSS REFERENCE: N.D.R.Crim.P. 29 (Motion for a Judgment of Acquittal);
N.D.R.Crim.P. 33 (New Trial); N.D.R.Crim.P. 34 (Arresting Judgment); N.D.R.Crim.P. 35
(Correcting or Reducing a Sentence); N.D.R.Crim.P. 37 (Appeal as of Right to District
Court; How Taken); N.D.R.Crim.P. 47 (Motions); N.D.R.Civ.P. 4 (Persons Subject to
Jurisdiction—Process—Service); N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
Papers); N.D.R.Civ.P. 6 (Time); N.D.R.App.P. 26 (—Computing and Extending Time).

RULE 702. TESTIMONY BY EXPERTS

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

EXPLANATORY NOTE

Rule 702 ~~is taken from Rule 702 of the Federal Rules of Evidence, and states the~~ general rule governing expert testimony. ~~The rule is consistent with North Dakota law.~~

~~In *Stein v. Ohlhauser*, 211 N.W.2d 737 (N.D. 1973), the North Dakota Supreme Court affirmed the exclusion of an expert opinion as to the speed of a vehicle based upon crash damage. The Court stated that, in order to establish a foundation for expert testimony, "... a showing must be made that the subject matter is one where expert testimony is accepted by the scientific community and the courts and that the proffered expert has sufficient expertise in the area of his competence." Syllabus ¶1 at 738.~~

~~The case should be consulted further for its extensive discussion of this rule.~~

SOURCES: Joint Procedure Committee Minutes: of September 22-23, 2005, pages 2-6; June 3, 1976, page 6; ; Rule 702, Federal Rules of Evidence; ~~Rule 702. SBAND~~ proposal.

CROSS REFERENCE: N.D.R.Ev. 703 (Bases of Opinion Testimony by Experts).

RULE 703. BASES OF OPINION TESTIMONY BY EXPERTS

The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissible shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.

EXPLANATORY NOTE

Rule 703 was amended, effective March 1, 1990, _____.

Rule 703 is ~~an adoption of~~ based on Rule 703 of the Federal Rules of Evidence.

~~In a recent opinion, the North Dakota Supreme Court set out all of Article VII as a "reliable guide for State courts, in the absence of statutory provisions on the subject or rules of evidence declaring otherwise." Minot Sand & Gravel v. Hjelle, 231 N.W.2d 716, 728 (N.D. 1975). The Court dealt specifically with the subject matter of Rule 703, stating that an expert witness need not prove the basis of an opinion as fact. The import of the Court's decision was that the basis for an opinion need not be proved by admissible evidence and that if the basis is weak or nonexistent, this goes to the expert's credibility and not necessarily to~~

22 ~~the admissibility of the opinion evidence.~~

23 Rule 703 was amended, effective March 1, 1990. The amendments are technical in
24 nature and no substantive change is intended.

25 Rule 703 was amended, effective _____, to incorporate the 2000
26 amendments to Fed.R.Ev. 703.

27 SOURCES: Joint Procedure Committee Minutes: of September 22-23, 2005, pages
28 2-6; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6.
29 Rule 703, Federal Rules of Evidence; ~~Rule 703, SBAND proposal.~~

30 CROSS REFERENCE: N.D.R.Ev. 702 (Testimony by Experts).

RULE 3. APPEAL AS OF RIGHT—HOW TAKEN

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to the supreme court may be taken only by filing a notice of appeal with the clerk of district court within the time allowed by Rule 4.

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for the supreme court to act as it considers appropriate, including dismissing the appeal.

(b) Joint or Consolidated Appeals. When two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant. Appeals may be consolidated by order of the supreme court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal. The notice of appeal must:

- (1) specify the party or parties taking the appeal;
- (2) designate the judgment, order, or part thereof being appealed;
- (3) name the court to which the appeal is taken.

(d) Serving the Notice of Appeal.

(1) The clerk of district court must promptly serve notice of the filing of a notice of appeal by mailing or sending by third-party commercial carrier a copy of the notice of appeal

to the supreme court clerk and to each party's counsel of record—excluding the appellant's—or, if a party is proceeding pro se, to the party's last known address. The clerk of district court must note on each copy the date when the notice of appeal was filed.

(2) In criminal cases, habeas corpus proceedings, or post-conviction proceedings, the clerk of district court must also send a copy of the docket entries to the supreme court clerk with the copy of the notice of appeal.

(3) The clerk of district court's failure to serve a copy of the notice of appeal does not affect the validity of the appeal. The clerk of district court must note on the docket the names of the parties to whom the clerk sends copies, and the date they were sent. Service is sufficient despite the death of a party or the party's counsel.

(4) The title of the action is not to be changed as a consequence of the appeal, but if the State of North Dakota is a real party in interest and was not named as a party in the original title, its name must be added to the title on appeal.

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1988; March 1, 1999; March 1, 2003.

Rule 3 is patterned after Fed.R.App.P. 3. Nothing other than the timely filing of the notice of appeal in the trial court is required to give the supreme court jurisdiction over the appeal. After a party files a notice of appeal, the clerk of district court sends copies to the supreme court clerk and to each of the parties. For the service of other papers, these rules place the responsibility of service on counsel rather than the clerk of district court.

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

48 Subdivision (a) provides failure to follow any rule may result in dismissal of the
49 appeal, an award of costs, or other appropriate action.

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

52 Paragraph (d)(4) requires the title of the action to remain the same on appeal.
53 Consistent with N.D.R.App.P. 1(c), the party who first files the notice of appeal must be
54 designated as the appellant in the title and the responding party must be designated as the
55 appellee. Paragraph (d)(4) was amended, effective _____, to specify that, if the State
56 of North Dakota is a real party in interest to an action, it must be named as a party on appeal,
57 regardless of whether it was named as a party in the original title.

58 Rule 3 was amended, effective March 1, 2003, in response to the December 1, 1998,
59 amendments to Fed.R.App.P. 3. The language and organization of the rule were changed to
60 make the rule more easily understood and to make style and terminology consistent
61 throughout the rules.

62 SOURCES: Joint Procedure Committee Minutes of September 22-23, 2005, page 25;
63 September 23-24, 1999, pages 9-10; January 29-30, 1998, page 21; February 19-20, 1987,

64 pages 4-5; September 18-19, 1986, pages 12-13; May 25-26, 1978, page 3; March 16-17,
65 1978, page 1; January 12-13, 1978, pages 2-3; September 15-16, 1977, pages 4-5.
66 Fed.R.App.P. 3; § 3.13(b) ABA Standards Relating to Appellate Courts (Approved Draft,
67 1977).

68 STATUTES AFFECTED:

69 SUPERSEDED: N.D.C.C. § 28-18-09, 28-27-05, 28-27-26, 29-28-05, 29-28-20, 29-
70 28-21.

71 CONSIDERED: N.D.C.C. § 14-09-09.26

72 CROSS REFERENCE: N.D.R.App.P. 1 (Scope of Rules); N.D.R.App.P. 10 (The
73 Record on Appeal), N.D.R.App.P. 11 (Transmission and Filing of the Record), N.D.R.App.P.
74 12 (Docketing the Appeal), and N.D.R.App.P. 31 (Filing and Service of Briefs),
75 N.D.R.Civ.P. 54(b) (Judgment Upon Multiple Claims or Involving Multiple Parties).

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 15 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 the motion.

(ii) A party intending to challenge an order disposing of any motion listed in subparagraph (a)(3)(A), or a judgment altered or amended 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

43 district court within 30 days after the entry of the judgment or order being appealed.

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

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

50 (3) Effect of Motion on Notice of Appeal.

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

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

57 (ii) for arrest of judgment under Rule 34.

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

62 (C) A notice of appeal filed after the district court announces a decision, sentence, or
63 order, but before it disposes of any of the motions referred to in subparagraph (b)(3)(A),

64 becomes effective upon the later of the following:

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

66 (ii) the entry of the judgment of conviction.

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

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

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

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

79 (c) Appeal in Contempt Case. A notice of appeal must be filed with the clerk of
80 district court within 60 days after entry of the judgment or order being appealed. Upon a
81 finding of excusable neglect or for good cause, the district court may, before or after the time
82 has expired, with or without motion and notice, extend the time for filing a notice of appeal
83 for a period not to exceed 30 days from the expiration of the time otherwise prescribed by
84 this subdivision.

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

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

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

101
102 EXPLANATORY NOTE

103 Rule 4 was amended, effective March 1, 1986; March 1, 1994; March 1, 1997; March
104 1, 1998; March 1, 1999; August 1, 2001; March 1, 2003.

105 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); ~~Gierke v. Gierke, 1998 ND 100, ¶¶ 6-12, 578 N.W.2d 522, Thorson v. Thorson, 541 N.W.2d 692 (N.D. 1996).~~

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

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

Subdivision (e) was adopted, effective _____, 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.

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

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

133 SOURCES: Joint Procedure Committee Minutes of September 22-23, 2005, pages 25-
134 26; April 26-27, 2001, pages 4-5; September 28-29, 2000, pages 10-13; January 27-28, 2000,
135 pages 4-9; September 23-24, 1999, pages 10-12; April 30-May 1, 1998, page 13; January 30,
136 1997, page 8; January 25-26, 1996, pages 7-10; April 29-30, 1993, pages 2-3, 16-18;
137 November 29, 1984, pages 19-20; April 26, 1984, pages 23-24; January 20, 1984, pages 10-
138 15; September 18-19, 1980, page 20; January 12-13, 1978, page 25; Fed.R.App.P. 4.

139 STATUTES AFFECTED:

140 CONSIDERED: N.D.C.C. § 27-20-56.

141 SUPERSEDED: N.D.C.C. § 28-27-04.

RULE 32. FORM OF BRIEFS, APPENDICES AND OTHER PAPERS

(a) Form of a Brief.

(1) Reproduction.

(A) A brief must be typewritten, printed, or reproduced by any process that yields a clear black image on white paper. Only one side of a paper may be used.

(B) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original.

(2) Cover. The cover of the appellant's brief must be blue; the appellee's red; an intervenor's or amicus curiae's green; a cross-appellee's and any reply brief gray. Covers of petitions for rehearing must be the same color as the petitioning party's principal brief. The front cover of a brief must contain:

(A) the number of the case;

(B) the name of the court;

(C) the title of the case (see Rule 3(d));

(D) the nature of the proceeding (e.g., Appeal from Order Denying Summary Judgment) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed;

(F) the name, bar identification number, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound at the left in a secure manner that does not

obscure the text and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 8 1/2 by 11 inch paper. Margins must be at least one and one-half inch at the left and at least one inch on all other sides. Pages must be numbered at the bottom, either centered or at the right side.

(5) Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must be 12 point or larger with no more than 16 characters per inch. The text must be double-spaced, except quotations may be single-spaced and indented. Headings and footnotes may be single-spaced and must be in the same typeface as the text.

(B) A monospaced face must be a 12-point font having ~~10~~ ten characters per inch. The text, including quotations and footnotes, must be double-spaced with no more than 27 lines of type per page.

(6) Type Styles. A brief must be in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Page and Type-Volume Limitations.

(A) Word Limit for Proportional Typeface. If proportionately spaced typeface is used, a principal brief may not exceed 10,500 words, and a reply brief may not exceed 2,500 words, excluding words in the table of contents, the table of citations, and any addendum. Footnotes must be included in the word count.

(B) Page Limit for Monospaced Typeface. If monospaced typeface is used, a principal brief may not exceed 40 pages, and a reply brief may not exceed ~~10~~ ten pages, excluding the

table of contents, the table of citations, and any addendum.

(b) Form of an Appendix. An appendix must comply with paragraphs (a)(1), (2), (3), and (4), with the following exceptions:

- (1) the cover of a separately bound appendix must be white;
- (2) an appendix may include a legible photocopy of any document found in the record of a printed judicial or agency decision;
- (3) pages in the appendix must be consecutively numbered;
- (4) an appendix may be prepared with double sided pages. The appendix must be 8 1/2 by 11 inches in size. Documents of a size other than 8 1/2 by 11 inches may be included in the appendix but must be folded or placed in a file or folder within the 8 1/2 by 11 inch appendix.

(c) Form of Other Papers.

(1) Motion. Rule 27 governs motion content. The form of all motion papers must comply with the requirements of paragraph (c)(3) below.

(2) Petition for Rehearing. Rule 40 governs petition for rehearing content. Petitions for rehearing must comply with the following length requirements:

(A) Word Limit for Proportional Typeface. If proportionately spaced typeface is used, a petition for rehearing may not exceed 2,500 words, excluding words in the table of contents, the table of citations, and any addendum. Footnotes must be included in the word count.

(B) Page Limit for Monospaced Typeface. If monospaced typeface is used, a petition

for rehearing may not exceed ~~10~~ ten pages, excluding the table of contents, the table of citations, and any addendum.

(3) Other Papers. Any other paper must be reproduced in the manner prescribed by subdivision (a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page together contain the information required by subdivision (a);

(B) Paragraph (a)(7) does not apply.

(d) Non-compliance. Documents not in compliance with this rule will not be filed.

EXPLANATORY NOTE

Rule 32 was amended, effective March 1, 1996; amended effective September 11, 1996, subject to comment; final adoption on October 23, 1996; amended effective ~~August~~ 1, 2001; March 1, 2003.

Rule 32 was amended, effective September 11, 1996, with respect to the allowable characters per inch with proportionally spaced typeface in subparagraph (a)(5)(A).

Rule 32 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 32. 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), effective March 1, 2003, requires a brief to be bound in a secure manner, however, this is not intended to allow staples or slide-lock or slide-grip bindings.

Paragraphs (a)(6) and (a)(7), which include type style requirements and page and type-volume limitations, were adopted, effective March 1, 2003. These limitations were moved to this rule from Rule 28 and generally do not follow the federal formal requirements. As used in paragraph (a)(6), “plain, roman style” does not include italicized, bold, or cursive type-styles.

Paragraph (a)(7), effective March 1, 2003, limits the length of a brief. A person may rely on the word or line count of the word-processing system used to prepare the brief.

Paragraph (b)(3), effective March 1, 2003, provides an exception to the size requirement for odd-sized documents in an appendix. This exception is intended to allow inclusion of technical or other documents, such as maps or charts, which may not be clear or legible if reduced to meet the size requirement.

Paragraph (c)(2) effective March 1, 2003, specifies length requirements for petitions for rehearing.

SOURCES: Joint Procedure Committee Minutes of September 22-23, 2005, page 27; January 24-25, 2002, pages 7-9; September 27-28, 2001, pages 23-25; April 26-27, 2001, page 8; April 27-28, 1995, pages 15-17; May 25-26, 1978, pages 17-18; January 12-13, 1978, pages 20-22. Fed.R.App.P. 32, § § 3.13(e) and 3.31, ABA Standards Relating to Appellate Courts (Approved Draft, 1977).

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 29-28-19.

CROSS REFERENCE: N.D.R.App.P. 27 (Motions); N.D.R.App.P. 28 (Briefs);

106 N.D.R.App.P. 29 (Brief of an Amicus Curiae); N.D.R.App.P. 30 (Appendix to the Briefs);
107 N.D.R.App.P. 40 (Petition for Rehearing).

RULE 3.1. PLEADINGS

(a) Legibility and Numbering. All pleadings and other documents must be typewritten, printed, or reproduced and easily readable. Each sheet must be separately numbered. Pleadings and other documents filed with the court, except as otherwise permitted by the court, must be prepared on 8 1/2 x 11 inch white paper.

(b) Signature. All pleadings and other documents of a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name and contain the attorney's address, telephone number, and State Board of Law Examiners identification number. All pleadings and other documents of a party who is not represented by an attorney must be signed by the party and contain the party's address and telephone number.

(c) Spacing and Names. Writing must appear on one side of the sheet only and must be double-spaced, except for quoted material. Names must be typed or printed beneath all signatures.

(d) Binding. All pleadings or other documents in an action or proceeding must be filed by the clerk flat and unfolded and each set of papers firmly fastened together.

(e) Filing of Documents. A party seeking to file a pleading or other document must submit it to the clerk. The first submitted version of a pleading or document will be treated as the original unless otherwise ordered by the court.

(f) Non-conforming Documents—Sanctions. If a party fails to comply with this rule,

the court on motion of a party or its own motion, may order the pleading or other document reformed. If the order is not obeyed, the court may order the document stricken and its service to be of no effect.

(g) Copy of Lost Papers. If any document is lost or withheld by any person, the court may authorize a copy to be filed.

(h) File Numbers. The clerk, at the time of the filing of a case and at the time of the filing of any responsive pleading, shall assign a file number to the case and immediately notify the attorney of record of the file number assigned to the proceedings. Thereafter, all documents and pleadings to be filed must bear the assigned file number on the front or title page in the upper righthand portion of the instrument to be filed. Documents and pleadings that do not conform to this rule will not be filed by the clerk until they are in compliance with this rule.

(i) Proof of Service Attached. Proof of service must be securely attached to pleadings or documents submitted to the clerk for filing.

(j) Personal Information.

(1) "Personal information" means a person's social security number, any credit, debit, or electronic fund transfer card numbers, and any other financial account numbers.

(2) Restrictions on Personal Information in Filings. Parties should refrain from including personal information in filings submitted to the court, except when required by law. When personal information is included in a filing or attachment, only the last four digits of the number may be used.

43 (3) Non-Redacted Filings. If a party is required to include non-redacted personal
44 information in a document that is filed, the document must be marked clearly to reflect that
45 it contains confidential information. The clerk must then retain the document in a restricted
46 part of the case file. The party shall file a redacted copy of the document for public access.

47 (4) Responsibility for Redaction. The responsibility for redacting personal information
48 and marking documents containing non-redacted personal information rests solely with
49 counsel and the parties. ~~Court personnel will not review documents for compliance with this~~
50 ~~rule.~~

52 EXPLANATORY NOTE

53 Rule 3.1 was amended, effective January 1, 1988; March 1, 1996; March 1, 1999;
54 March 1, 2005;_____.

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

57 A new subdivision (e) was added, effective March 1, 2005, to clarify that documents
58 must be filed with the clerk. Submitting a document to a judge or to court personnel other
59 than the clerk does not constitute filing. The first version of a given document submitted to
60 the clerk, regardless of what form it is in, will be filed and treated as the original. A party
61 seeking to correct the original or have another document treated as the original must obtain
62 an order from the court.

63 Subdivision (h) was amended, effective March 1, 1999, to allow notification by means

64 other than mail.

65 Subdivision (j) was added, effective March 1, 2005, to protect personal information
66 submitted with pleadings or other documents filed with the court. Parties must limit the
67 amount of personal information they include in court filings and redact personal information
68 when its inclusion in a filing cannot be avoided. Filings containing non-redacted personal
69 information should be filed only when a party is required by statute, policy or rule to include
70 personal information in a filing.

71 SOURCES: Joint Procedure Committee Minutes of September 22-23, 2005, pages 16-
72 17; September 23-24, 2004, pages 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30,
73 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12; January
74 29-30, 1998, page 22; September 29-30, 1994, pages 6-7.

75 CROSS REFERENCE: N.D.Sup.Ct.Admin.R. 41 (Access to Judicial Records).

RULE 3.2 MOTIONS

(a) Submission of motion.

(1) Notice. Notice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested.

(2) Briefs. Upon serving and filing a motion, the moving party shall serve and file a brief and other supporting papers and the adverse party shall have ~~10~~ ten days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within ~~5~~ five days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is deemed submitted to the court unless counsel for any party requests oral argument on the motion.

(3) Requesting oral argument. If any party who has timely served and filed a brief requests oral argument, the request must be granted. A timely request for oral argument must be granted even if the movant has previously served notice indicating that the motion is to be decided on briefs. The party requesting oral argument shall secure a time for the argument and serve notice upon all other parties. Requests for oral argument or the taking of testimony must be made not later than five days after expiration of the time for filing the answer brief.

(b) Court hearing.

The court may hear oral argument on any motion. If permitted by the court, a hearing

may be held using electronic means, including telephonic conference or interactive television. ~~The~~ After reviewing the parties' submissions, the court may require oral argument and may allow or require testimony on the a motion. ~~Requests for oral argument or the taking of testimony must be made not later than 5 days after expiration of the time for filing the answer brief.~~

(b) (c) Failure to file briefs. Failure to file a brief by the moving party may be deemed an admission that, in the opinion of party or counsel, the motion is without merit. Failure to file a brief by the adverse party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must still demonstrate to the court that it is entitled to the relief requested.

(c) (d) Extension of time. Extensions of time for filing briefs and other supporting papers, or for continuance of the hearing on a motion, may be granted only by written order of court. All requests for extension of time or continuance, whether written or oral, must be accompanied by an appropriate order form.

(d) (e) Time limit for filing motion. Except for good cause shown, a motion must be filed in such time that it may be heard not later than the date set for pretrial of the case.

(e) (f) Application of rule.

(1) Conflicting rules. This rule does not apply to the extent it conflicts with another rule adopted by the Supreme Court.

(2) Probate code. This rule applies to formal proceedings under Uniform Probate Code.

43 EXPLANATORY NOTE

44 Rule 3.2 was amended, effective September 1, 1983; March 1, 1986; January 1, 1988;
45 March 1, 1990; January 1, 1995; March 1, 1997; March 1, 2002; March 1, 2005;
46 _____.

47 ~~The language of subdivision (a) does not prevent a court from adopting a local rule~~
48 ~~requiring that every motion be noticed for oral argument, if due allowance is made for a~~
49 ~~telephonic hearing.~~

50 Subdivision (a) was amended, effective March 1, 1990, to provide that the request for
51 oral argument on the motion must be granted when the party requesting oral argument has
52 timely served and filed a brief.

53 Subdivision (a) was amended, effective January 1, 1995, to provide that a written
54 motion must be noticed, and that the notice must indicate that oral argument has been
55 requested or that the motion will be decided on briefs unless oral argument is requested. In
56 addition, the amendment shortened the time between the date a motion is filed and the date
57 a motion may be heard by eliminating the five-day period within which the movant's brief
58 could be filed.

59 Although the rule contemplates filing a brief with every motion, what constitutes a
60 brief should be liberally construed.

61 Subdivision (b) was amended, effective _____, to expand hearing
62 options to include hearing by interactive television and to add a requirement that the court
63 review the parties' submissions before it orders oral argument or testimony.

64 ~~Subdivision (c)~~ Paragraph (f)(1) was added, effective March 1, 1997, to clarify that,
65 in the case of a conflict between this rule and any other Supreme Court rule, the other rule
66 will govern. For example, N.D.R.Civ.P. 56 allows parties 30 days to respond to a summary
67 judgment motion, which conflicts with the ~~10~~ ten day response period specified in
68 subdivision (a) of this rule. Under subdivision (e), the N.D.R.Civ.P. 56 response period
69 would prevail.

70 Paragraph (f)(2) was added, effective _____, to specify that this rule
71 applies to formal proceedings under the Uniform Probate Code. N.D.C.C. § 30.1-01-06(19)
72 defines “formal proceedings” as “proceedings conducted before a judge with notice to
73 interested persons.”

74 SOURCES: Joint Procedure Committee Minutes of April 27-28, 2006, pages 7-9, 17-
75 19; January 26, 2006, pages 12-13; April 29-30, 2004, pages 25-26; September 28-29, 2000,
76 page 13; April 25, 1996, pages 8-11; January 25-26, 1996, pages 10-16; April 28-29, 1994,
77 pages 15-17; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 13-16; April
78 29-30, 1993, pages 20-22; April 20, 1989, pages 10-15; March 24-25, 1988, pages 7-10 and
79 13-15; Dec. 3, 1987, pages 4-5; February 19-20, 1987, pages 21-22; June 22, 1984, page 30;
80 April 26, 1984, pages 17-19.

81 STATUTES AFFECTED:

82 CONSIDERED: N.D.C.C. ch. 30.1.

83 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
84 Papers); N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 7 (Pleading Allowed—Form of Motions);

85 N.D.R.Civ.P. 56 (Summary Judgment); N.D.R.Crim.P. 45 (Time); N.D.R.Crim.P. 47
86 (Motions); N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.App.P. 27 (Motions);
87 N.D.R.App.P. 34 (Oral Argument); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

RULE 8.4 SUMMONS IN ACTION FOR DIVORCE, ~~OR SEPARATION~~ OR
CUSTODY

(a) Restraining Provisions – Divorce or Separation. A summons in a divorce or separation action must be issued by the clerk under the seal of the court, or by an attorney for a party to the action, and include the following restraining provisions:

(1) Neither spouse ~~shall~~ may dispose of, sell, encumber, or otherwise dissipate any of the parties' assets, except:

a. (A) For necessities of life or for the necessary generation of income or preservation of assets; or

b. (B) For retaining counsel to carry on or to contest the proceeding.

If a spouse disposes of, sells, encumbers, or otherwise dissipates assets during the interim period, that spouse shall provide to the other spouse an accounting within 30 days.

(2) Neither spouse ~~shall~~ may harass the other spouse.

(3) All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation.

(4) ~~Neither~~ Except for temporary periods, neither spouse ~~shall~~ may remove any of their minor children from North Dakota without the written consent of the other spouse or order of the court ~~except for temporary periods~~.

(5) Each summons must include the following statement in bold print: ~~IF EITHER SPOUSE VIOLATES ANY OF THESE PROVISIONS, THAT SPOUSE MAY BE IN~~

22 CONTEMPT OF COURT : If either spouse violates any of these provisions, that spouse may
23 be in contempt of court.

24 (b) Restraining Provisions–Custody. A summons in a custody action must be issued
25 by the clerk under seal of the court, or by an attorney for a party to the action, and include
26 the following restraining provisions:

27 (1) Except for temporary periods, neither party may remove any of their minor
28 children from North Dakota without the written consent of the other party or order of the
29 court.

30 (2) Each summons must include the following statement in bold print: If a party
31 violates any of these provisions, that party may be in contempt of court.

32 ~~(b)~~ (c) Applicability of Restraining Provisions. The restraining provisions contained
33 in the summons apply to both ~~spouses~~ parties upon service of the summons. The provisions
34 are effective until otherwise provided by court order or by written stipulation of the parties
35 filed with the court.

36
37 EXPLANATORY NOTE

38 Rule 8.4 was amended, effective_____.

39 Rule 8.4 was adopted, effective March 1, 1996.

40 Subdivision (c) was added, effective_____ , to require restraining
41 provisions to be included in summons in custody matters.

42 SOURCES: Joint Procedure Committee Minutes of April 27-28, 2006, pages 9-10:

43 January 26, 2006, page 13; April 27-28, 1995, pages 17-21.

44 CROSS REFERENCE: Appendix A (Summons in Action for Divorce or Separation)

45 N.D.R.Ct.