IN THE SUPREME COURT
STATE OF NORTH DAKOTA

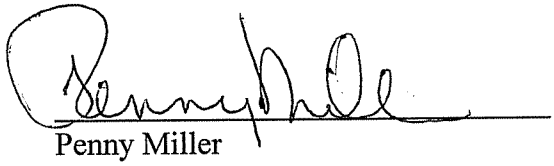
ORDER OF ADOPTION
Supreme Court No. 20070205

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

On July 13, 2007, the Joint Procedure Committee filed a Petition with proposed amendments to North Dakota Rules of Civil Procedure 5, 26, 33, 34, 37, 40, 45, 50; Criminal Procedure 17, 37, 43; Evidence 404, 408, 510, 606, 609; Appellate Procedure 2.1, 4, 10, 14, 25, 26, 28, 31, 32, 40, 44; Rules of Court 10.1; and Supreme Court Administrative Orders 14 and 16. Subsequently, on October 16, 2007, the Joint Procedure Committee filed supplemental proposed amendments to North Dakota Rules of Appellate Procedure 10; Civil Procedure 26, 33, 34, 37; and a complementary amendment to Civil Procedure Rule 16. The Court, on its own, considered amendments to North Dakota Rules of Civil Procedure 12 and Form 20, as well as North Dakota Rule of Court 8.3, which conform the rules to the proposed amendments. The Court considered the matter, and

ORDERED, that proposed amendments to the North Dakota Rules of Civil Procedure 5, 12, 16, 26, 33, 34, 37, 40, 45, 50, and Form 20; Criminal Procedure 17, 37, and 43; Evidence 404, 408, 510, 606, and 609; Appellate Procedure 2.1, 4, 10, 14, 25, 26, 28, 31, 32, 40, and 44; Rules of Court 8.3 and 10.1; and Supreme Court Administrative Orders 14 and 16, as further amended by the Court, are ADOPTED effective March 1, 2008.

The Supreme Court of the State of North Dakota convened December 12, 2007, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner, the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order.



Penny Miller
Clerk
North Dakota Supreme Court

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service-When required. ~~Except as otherwise provided in these rules, every order required by its terms to be served, and, unless otherwise ordered by the court, every pleading subsequent to the original complaint, every paper relating to discovery required to be served upon a party, every written motion other than one which may be heard ex parte, every proposed order, order for judgment, decree, finding of fact and conclusion of law, every paper filed with the clerk or submitted to the judge, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper must be served on each of the parties.~~

(1) In General. Other than service of a summons and complaint under Rule 4, each of the following papers must be served under this rule on every party, unless the rules provide otherwise:

(A) an order, unless the court orders otherwise;

(B) a pleading served after the original summons and complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper; and

(F) every paper filed with the clerk or submitted to the judge.

~~No service need be made on parties in default for failure to appear except pleadings asserting new or additional claims for relief against them must be served upon them in the manner provided for service of summons in Rule 4.~~

(2) If a Party Fails to Appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

~~In an action begun by seizure of property, whether through arrest, attachment, garnishment, or similar process, in which no person need be or is named as defendant, any service required to be made prior to the filing of an answer, claim, or appearance must be made upon the person having custody or possession of the property at the time of its seizure.~~

(3) If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an answer, claim, or appearance must be made on the person who had custody or possession of the property when it was seized.

(b) Service-How made. Whenever under these rules service is required or permitted to be made upon a party represented by an attorney, the service must be made upon the attorney unless service upon the party is ordered by the court. Service upon the attorney or upon a party must be made by delivering a copy to the attorney or party, or by facsimile transmission if available to the attorney or party, or by mailing or delivering via third-party commercial carrier a copy to the attorney or party at the attorney's or party's last known address or, if no address is known, upon order of the court by leaving it with the clerk of the

court. Delivery of a copy within this rule means: handing it to the attorney or to the party; or, leaving it at the attorney's or party's office with a clerk or other individual in charge; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the party to be served has no office, leaving it at the party's dwelling or usual place of abode with some individual of suitable age and discretion then residing therein. Service by mail is complete upon mailing. Service via a third-party commercial carrier is complete upon deposit of the paper to be served with the commercial carrier.

(c) Service-Numerous defendants. In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order that the service of the pleadings of the defendants and the replies thereto need not be made as between the defendants, and that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties and that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties. A copy of every such order shall be served upon the parties in such manner and form as the court directs.

(d) Filing.

(1) The summons and complaint, or other initiating pleading, must be filed before a subpoena may be issued. The plaintiff shall serve notice of filing the complaint or initiating pleading upon the defendant or respondent. Within a reasonable time after service of the notice of filing the complaint or initiating pleading, the defendant or respondent shall file the answer and notify the plaintiff of the filing. Unless otherwise provided by statute, these rules

or by order of the court, all pleadings, affidavits, bonds and other papers in an action must be filed with the clerk ~~at or prior to the time of the filing of the note of issue~~. A party may not file discovery materials with the clerk unless the materials are to be submitted to the court for disposition of a pending motion, the court orders them to be filed, or a party certifies that the filing is necessary for safekeeping of the papers or exhibits pending completion of the case. A party certifying that safekeeping is necessary shall state the reasons necessary for safekeeping. The clerk shall return all filed depositions, interrogatories, requests for admission, requests for interrogatories, requests for production of documents, and answers and responses thereto, to the filing party upon final disposition of an appeal or, if no appeal is filed, upon expiration of the time for appeal. If the filing party does not claim a filed document within sixty (60) days after being notified to do so, the clerk may dispose of the document as the court by order may direct. The clerk shall take a receipt for all documents returned.

(2) All affidavits, notices and other papers designed to be used upon the hearing of a motion or order to show cause shall be filed at least 24 hours before the hearing unless otherwise directed by the court.

(3) If a party fails to comply with this subdivision, the court, on motion of any party or its own motion, may order the papers to be filed forthwith and if the order is not obeyed, the court may order them to be regarded as stricken and their service to be of no effect.

(4) The clerk must not accept for filing any document that adds a party to an action or proceeding without an order of the court or unless ~~pursuant to~~ under Rule 13 or Rule 14.

The clerk shall endorse on the document a notation that the document is rejected for filing ~~pursuant to~~ under this rule and return the document to the person who tendered it for filing.

(e) Removal of pleadings for service. Upon the request of a party filing the same, any original pleading or paper in any civil action or proceeding, which by law is required to be filed in the office of the clerk of court in which such action or proceeding is pending, may be removed from the files for the purpose of serving the same either within or without the state but shall be returned thereto without delay.

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

EXPLANATORY NOTE

Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988; March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995; March 1, 1998; March 1, 1999; March 1, 2003; March 1, 2008.

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

~~Subdivision (f) was amended, effective March 1, 2003, to permit proof of service to be made by court personnel as well as by an attorney. Proof of service may also be made in the same manner as provided by Rule 4(i).~~

Subdivision (a) was amended, effective March 1, 2008, to improve organization and to make the subdivision easier to understand.

Subdivision (b) was amended, effective March 1, 1999, to permit service via a third-party commercial carrier as an alternative to the Postal Service. The requirement for a "third-party commercial carrier" means the carrier may not be a party to nor interested in the action, and it must be the regular business of the carrier to make deliveries for profit. A law firm may not act as or provide its own commercial carrier service with service complete upon deposit. In addition, the phrase "commercial carrier" does not include electronic delivery services. ~~Service via e-mail is not permitted, and service via facsimile transmission is already covered by the Rule.~~

Paragraph (d)(1) was amended, March 1, 2008, to delete a reference to the note of issue and certificate of readiness.

Subdivision (f) was amended, effective March 1, 2003, to permit proof of service to be made by court personnel as well as by an attorney. Proof of service may also be made in the same manner as provided by Rule 4(i).

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 19-22; September 27-28, 2001, pages 11-12; April 30-May 1, 1998, page 3; January 29-30, 1998, page 18; September 26-27, 1996, pages 16-17, 20; September 23-24, 1993, pages 19-20; April 29-30, 1993, pages 20-21; November 7-8, 1991, page 3; October 25-26, 1990, pages 10-12; April 20, 1989, page 2; December 3, 1987, page 11; May 21-22, 1987, pages 17-18; February 19-20, 1987, page 4; September 18-19, 1986, page 8; November 30, 1984, pages

26-27; October 18, 1984, pages 8-11; November 29-30, 1979, page 2; September 20-21, 1979, pages 4-5; Fed.R.Civ.P. 5.

Statutes Affected:

Superseded: N.D.R.C. 1943 §§ 28-0511, 28-0630, 28-2810, 28-2811, 28-2812, 28-2813, 28-2814, 28-2819, 28-2820, 28-2821, 28-3005, 31-0510.

Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction - Process - Service), N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 77 (District Courts and Clerks); N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.Ct. 6.4 (Exhibits), N.D.R.Ct. 7.1 (Judgments, Orders and Decrees).

RULE 12. DEFENSES AND OBJECTIONS - WHEN AND HOW PRESENTED - BY PLEADING OR MOTION - MOTION FOR JUDGMENT ON THE PLEADINGS

(a) When presented. A defendant who is served with a summons shall serve an answer thereto within 20 days after service of the summons, unless the court directs otherwise when service of process is made pursuant to Rule 4(m). A party who is served with a cross-claim shall serve an answer thereto within 20 days after service of the cross-claim. The plaintiff shall serve a reply to a counterclaim in the answer within 20 days after service of the answer or, if a reply is ordered by court, within 20 days after service of the order, unless the order otherwise directs. The service of a motion permitted under this rule alters those periods of time as follows, unless a different time is fixed by order of the court:

(i) if the court denies the motion or postpones its disposition until the trial on the merits, the responsive pleading must be served within 10 days after notice of the court's action;

(ii) if the court grants a motion for a more definite statement, the responsive pleading must be served within 10 days after the service of the more definite statement.

(b) How presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, must be asserted in the responsive pleading thereto if one is required, but the following defenses at the option of the pleader may be made by motion: (i) lack of jurisdiction over the subject matter, (ii) lack of jurisdiction over the person, (iii) improper venue, (iv) insufficiency of process, (v)

insufficiency of service of process, (vi) failure to state a claim upon which relief can be granted, (vii) failure to join a party under Rule 19. A motion making any of these defenses must be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting defense numbered (vi), to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion must be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties must be given reasonable opportunity to present all material made pertinent to the motion by Rule 56.

(c) Motion for judgment on the pleadings. After the pleadings are closed but within such time as not to delay the trial, any party may move for judgment on the pleadings. If, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

(d) Preliminary hearings. The defenses specifically enumerated (i)-(vii) in subdivision (b) of this rule, whether made in a pleading or by motion, and the motion for judgment mentioned in subdivision (c) of this rule shall be heard and determined before trial on

application of any party, unless the court orders that the hearing and determination .pdf be deferred until the trial.

(e) Motion for more definite statement. If a pleading to which a responsive pleading is permitted is so vague or ambiguous that a party cannot reasonably be required to frame a responsive pleading, the party may move for a more definite statement before interposing a responsive pleading. The motion must point out the defects complained of and the details desired. If the motion is granted and the order of the court is not obeyed within ten days after notice of the order or within such other time as the court may fix, the court may strike the pleading to which the motion was directed or make such order as it considers just.

(f) Motion to strike. Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty days after the service of the pleading upon the party or upon the court's own initiative at any time, the court may order stricken from any pleading any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter.

(g) Consolidation of defenses in motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party may not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or preservation of certain defenses.

(1) A defense of lack of jurisdiction over the person, insufficiency of process, or insufficiency of service of process is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment ~~thereof~~ permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(i) Offer of fixed damages. Service. In an action arising on contract, the defendant may serve upon the plaintiff with the answer an offer in writing that if the defense fails the damages will be assessed at a specific sum, and if the plaintiff signifies acceptance ~~thereof~~ in writing ~~with or before service of the note of issue and certificate of readiness~~ and on the trial has a verdict, the damages must be assessed accordingly.

(j) Effect if offer of fixed damages rejected. If the plaintiff does not accept an offer of fixed damages, the plaintiff must prove the plaintiff's damages as if it had not been made and is not permitted to introduce the offer in evidence. If the damages in the plaintiff's favor do not exceed the sum stated in the offer, the defendant may recover costs incurred in consequence of any necessary preparations or defense in respect to the question of damages.

EXPLANATORY NOTE

Rule 12 was amended, effective 1971; January 27, 1977; March 1, 1990; March 1, 2002; September 1, 2004; March 1, 2007; March 1, 2008.

This rule is derived from Fed.R.Civ.P. 12, with the addition of subdivisions (i) and (j) providing for an offer of fixed damages.

Subdivision (a) has been changed slightly to conform to numbering differences between these rules and the federal rules and to delete references to statutes, agencies, and officers of the United States.

Subdivision (a) was amended, effective September 1, 2004, to replace an obsolete reference to N.D.R.Civ.P. 4(d)(4) with a reference to N.D.R.Civ.P. 4(m).

Subdivision (a) was amended, effective March 1, 2007, to delete a reference to service of a summons without a complaint. N.D.R.Civ.P. 4(c)(2) requires the complaint to be served with the summons.

Subdivision (b) was amended, effective March 1, 2002, to incorporate a time limitation for an objection to improper venue.

Subdivisions (i) and (j) are derived from N.D.R.C. 1943 §§ 28-0711 and 28-0712. Subdivision (h) was amended in 1971 to conform to changes in the federal rule.

Subdivision (i) was amended, March 1, 2008, to delete a reference to the note of issue and certificate of readiness.

Rule 12 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 14-15; September 28-29, 2000, page 8; April 20, 1989, page 2; December 3, 1987, page 11; September 20-21, 1979, page 8; Fed.R.Civ.P. 12.

Statutes Affected:

Superseded: N.D.R.C. 1943 §§ 28-0504, 28-0704, 28-0706, 28-0707, 28-0708, 28-0709, 28-0711, 28-1712, 28-1713, 28-0716, 28-1718, 28-0722, 28-0724, 28-0725, 28-0734, 28-0910, 28-1104, 28-1606.

Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction - Process - Service), N.D.R.Civ.P. 7 (Pleadings Allowed - Form of Motions), N.D.R.Civ.P. 8 (General Rules of Pleading), N.D.R.Civ.P. 9 (Pleading Special Matters), N.D.R.Civ.P. 10 (Form of Pleadings), N.D.R.Civ.P. 15 (Amended and Supplemental Pleadings), N.D.R.Civ.P. 19 (Joinder of Persons Needed for Just Adjudication), N.D.R.Civ.P. 39.1 (Change in Location of a Hearing, Proceeding, or Trial; Change of Venue), N.D.R.Civ.P. 56 (Summary Judgment). N.D.R.Ev. 408 (Compromise and Offers to Compromise). N.D.R.Ct. 8.8 (Alternative Dispute Resolution), N.D.R.Ct. 8.9 (Roster of Alternative Dispute Resolution Neutrals).

RULE 16. PRETRIAL CONFERENCES, SCHEDULING, MANAGEMENT

(a) Pretrial conferences; objectives.

The court in its discretion may, and upon the occurrence of any of the triggering events specified in subdivision (b), must, direct the attorneys for the parties and any unrepresented parties to appear before it in person, telephonically, or by other electronic means, for a conference or conferences in advance of trial for such purposes as:

(1) expediting the disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating the settlement of the case; and

(6) discussing the desirability of using an alternative dispute resolution process.

(b) Scheduling and planning; triggering events.

The court must conduct a conference and enter an order to schedule and manage the case under the following circumstances:

(1) if more than six months have passed since filing of the summons and complaint or answer without final disposition of the case or filing of a dispositive motion;

(2) if the summons and complaint or answer was served more than six months before filing and ninety days have passed since filing without final disposition of the case or filing

of a dispositive motion;

(3) if a Rule 40(e) notice has been issued and any response to the notice contained a request that the case be left open; or

(4) if any party makes a written request for a scheduling and planning conference.

(c) When conference held.

The scheduling and planning conference must be held within 60 days of the triggering event.

(d) Subjects for consideration at pretrial conferences.

At any conference under this rule consideration may be given, and the court may take appropriate action, with respect to the following:

(1) the formulation and simplification of the issues, including the elimination of frivolous claims or defenses;

(2) the necessity or desirability and the time for joinder of other parties and of amendments to the pleadings;

(3) the possibility of obtaining admissions of fact and documents which will avoid unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings from the court on the admissibility of evidence;

(4) the avoidance of unnecessary proof and of cumulative evidence, and limitations or restrictions on the use of testimony under Rule 702 of the North Dakota Rules of Evidence;

(5) the appropriateness and timing of motions for summary adjudication under Rule

56 and any other motions;

(6) the control and scheduling of discovery;

(7) any issues relating to disclosure or discovery of electronically stored information, including the form or forms in which it should be produced;

~~(7)~~ (8) the appropriateness and timing of disclosure of witnesses and documents, the need and schedule for filing and exchanging pretrial briefs, and the date or dates for further conferences and for trial;

~~(8)~~ (9) the advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

~~(9)~~ (10) settlement and the use of special procedures to assist in resolving the dispute;

~~(10)~~ (11) the form and substance of the pretrial order;

~~(11)~~ (12) the disposition of pending motions;

~~(12)~~ (13) the need for adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

~~(13)~~ (14) an order for a separate trial under Rule 42(b) with respect to a claim, counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the case;

~~(14)~~ (15) an order directing a party or parties to present evidence early in the trial with respect to a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

~~(15)~~ (16) an order establishing a reasonable limit on the time allowed for presenting evidence;

~~(16)~~ (17) the allocation of peremptory challenges; and

~~(17)~~ (18) such other matters as may facilitate the just, speedy, and inexpensive disposition of the action.

At least one of the attorneys for each party participating in any conference before trial must have authority to enter stipulations and to make admissions regarding all matters that the participants may reasonably anticipate may be discussed. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone in order to consider possible settlement of the dispute.

(e) Modification.

A scheduling order issued under this rule may be modified by leave of court or as permitted by Rule 29.

(f) Final pretrial conference.

Any final pretrial conference must be held as close to the time of trial as reasonable under the circumstances. The participants at any such conference shall formulate a plan for trial, including a program for facilitating the admission of evidence. The conference must be attended by at least one of the attorneys who will conduct the trial for each of the parties and by any unrepresented parties.

(g) Pretrial orders.

After any conference held under this rule, an order must be entered reciting the action

taken. This order controls the subsequent course of the action unless modified by a subsequent order. The order following a final pretrial conference may be modified only to prevent manifest injustice.

(h) Sanctions.

If (i) a party or party's attorney fails to obey a pretrial order, (ii) no appearance is made on behalf of a party at a pretrial conference, (iii) a party or party's attorney is substantially unprepared to participate in the conference, or (iv) a party or party's attorney fails to participate in good faith, the court, upon motion of a party or its own motion, may make such orders with regard thereto as are just, and among others any of the orders provided in Rules 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the judge shall require the party or the attorney representing the party or both to pay the reasonable expense incurred because of any noncompliance with this rule, including attorney's fees, unless the judge finds that the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

EXPLANATORY NOTE

Rule 16 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2000; August 1, 2004; March 1, 2008.

Rule 16 was amended, effective March 1, 2000, to add a new subdivision (a)(6) relating to alternative dispute resolution. Under N.D.R.Ct. 8.8, all parties in civil cases are required to discuss early alternative dispute resolution and must file a statement with the district court regarding participation in ADR.

Subdivision (a) was amended and new subdivisions (b), (c) and (e) were added, effective August 1, 2004, to incorporate a mechanism to trigger scheduling and planning conferences when certain events occur in an action.

Subdivision (d) was amended, effective March 1, 2008, to add issues related to electronically stored information to the list of possible subjects for discussion at a pretrial conference.

Subdivision (d) was amended, effective March 1, 1996, to follow the 1993 amendment to Rule 16(c), ~~FRCivP.~~ Fed.R.Civ.P.

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

Sources: Joint Procedure Committee Minutes of October 11-12, 2007, page 3; September 18-19, 2003, pages 11-18; April 24-25, 2003, pages 26-30; May 6-7, 1999, pages 7-8; January 28-29, 1999, pages 7-12; January 26-27, 1995, page 10; September 29-30, 1994, pages 22-23; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 26-28; January 20, 1984, pages 18-23; September 18-19, 1980, pages 12-13; September 20-21, 1979, page 11; Rule 16, ~~FRCivP.~~ Fed.R.Civ.P.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery methods. Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery scope and limits. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) Limitations.

(A) The frequency or extent of use of the discovery methods set forth in subdivision (a) must be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient,

less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation. The court may act upon its own initiative after reasonable notice or pursuant to a motion under subdivision (c).

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

(~~2~~ 3) Insurance agreements. A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(~~3~~ 4) Trial preparation-Materials. Subject to the provisions of subdivision (b)(~~4~~ 5) a

party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of those materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is

(A) a written statement signed or otherwise adopted or approved by the person making it, or

(B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(~~4~~ 5) Trial preparation-Experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) A party may depose each person whom the other party expects to call as an expert witness at trial unless, upon motion, the court finds that the deposition is unnecessary, overly burdensome, or unfairly oppressive.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect

to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(6) Claims of Privilege or Protection of Trial Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial-preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a matter that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.

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

(c) Protective orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or

alternatively, on matters relating to a deposition, the court in the district where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(1) that discovery not be had;

(2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place;

(3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery;

(4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters;

(5) that discovery be conducted with no one present except persons designated by the court;

(6) that a deposition after being sealed be opened only by order of the court;

(7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; or

(8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in

relation to the motion.

(d) Sequence and timing of discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement the response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement the response with respect to any question directly addressed to

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

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

(2) A party is under a duty seasonably to amend a previous response if the party obtains information upon the basis of which

(A) the party knows that the response was incorrect when made, or

(B) the party knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing

concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time before trial through new requests for supplementation of previous responses.

(f) Discovery conference. At any time after an action has been filed, the court may direct the attorneys for the parties to appear before it for a conference on the subject of discovery. The court shall do so upon motion by the attorney for any party if the motion includes:

(1) A statement of the issues as they then appear;

(2) A proposed plan and schedule of discovery;

(3) Any limitations proposed to be placed on discovery;

(4) Any other proposed orders with respect to discovery; and

(5) A statement showing that the attorney making the motion has made a reasonable effort to reach agreement with opposing attorneys on the matters set forth in the motion. Each party and each party's attorney are under a duty to participate in good faith in the framing of a discovery plan if a plan is proposed by the attorney for any party. Notice of the motion must be served on all parties. Objections or additions to matters set forth in the motion must be served not later than ten days after service of the motion.

Following the discovery conference, the court shall enter an order tentatively identifying the issues for discovery purposes, establishing a plan and schedule for discovery, setting limitations on discovery, if any, and determining such other matters, including the

allocation of expenses, as are necessary for the proper management of discovery in the action. An order may be altered or amended whenever justice so requires.

Subject to the right of a party who properly moves for a discovery conference to a prompt convening of the conference, the court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing of discovery request, responses, and objections. Every request for discovery or response or objection thereto made by 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 and State Board of Law Examiners identification number. A party who is not represented by an attorney shall sign the request, response, or objection and state the party's address. The signature of the attorney or party constitutes a certification that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is: (i) consistent with these rules and warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; (ii) not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation; and (iii) not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation. If a request, response, or objection is not signed, the court on motion of a party shall or on its own motion may order the instrument to be stricken unless it is signed promptly after the omission is called to the attention of the party making the

request, response, or objection and the party is not obligated to take any action with respect to it until it is signed.

If a certification is made in violation of the rule, the court, on motion of a party or its own motion, shall impose upon the person who made the certification, the party on whose behalf the request, response, or objection is made, or both, an appropriate sanction, which may include an order to pay the amount of the reasonable expenses incurred because of the violation, including a reasonable attorney's fee.

EXPLANATORY NOTE

Rule 26 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2008.

Before the 1993 federal amendment, Rule 26 was almost identical to Rule 26, Fed.R.Civ.P.

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

Rule 26 was amended, effective March 1, 2008, to implement changes related to discovery of electronically stored information. The changes reflect the 2006 amendments to Fed.R.Civ.P. 26. Subdivision (b) was amended to incorporate a new subparagraph (b)(2)(B) on limitations to discovery of electronic information. A new paragraph (b)(6) was also added to address claims of privilege or protection of trial preparation materials.

Sources: Joint Procedure Committee Minutes of January 25, 2007, pages 9-10; September 28-29, 2006, pages 18-20; January 26-27, 1995, pages 10-12; September 29-30, 1994, pages 21-22; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, page 28; January 20, 1984, pages 23-31; December 11-12, 1980, page 2; October 30-31, 1980, pages 9-10; September 20-21, 1979, page 19; ~~Rule~~ Fed.R.Civ.P. 26~~, FRCivP~~.

Statutes Affected:

Superseded: N.D.R.C. 1943 §§ 31-0203, 31-0204, 31-0206, 31-0501, 31-0502, 31-0511, 31-0515, 31-0519, 31-0710.

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

RULE 33. INTERROGATORIES TO PARTIES

(a) Availability-Procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served or, if the party served is a public or private corporation or a partnership or association or governmental agency, by any officer or agent, who shall furnish such information as is available to the party. Interrogatories, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of summons and complaint upon that party.

(b) Answers and objections.

(1) Each interrogatory must be answered separately and fully in writing under oath, unless it is objected to, in which event the objecting party shall state the reasons for objection and shall answer to the extent the interrogatory is not objectionable.

(2) The answers are to be signed by the person making them, and the objections signed by the attorney making them.

(3) The party upon whom the interrogatories have been served must serve a copy of the answers, and objections if any, within 30 days after the service of the interrogatories, but a defendant may serve answers or objections within 45 days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties subject to Rule 29. Any stipulated extension of time applies to interrogatory answers and objections.

(4) A party shall restate the interrogatory being answered immediately preceding the

answer to that interrogatory.

(5) All grounds for an objection to an interrogatory must be stated with specificity. Any ground not stated in a timely objection is waived unless the party's failure to object is excused by the court for good cause shown.

(6) The party submitting the interrogatories may move for an order under Rule 37(a) with respect to any objection to or other failure to answer an interrogatory.

(7) A party is not required to answer an interrogatory that is repetitive of any interrogatory it has already answered. A party who has been served with a response to an interrogatory submitted by another party is to be regarded as having served the interrogatory.

(c) Scope; Use at trial. Interrogatories may relate to any matters that can be inquired into under Rule 26(b)(1), and the answers may be used to the extent permitted by the rules of evidence.

An interrogatory otherwise proper is not necessarily objectionable merely because an answer to the interrogatory involves an opinion or contention that relates to fact or the application of law to fact, but the court may order that such an interrogatory need not be answered until after designated discovery has been completed or until a pretrial conference or other later time.

(d) Option to produce business records. If the answer to an interrogatory may be derived or ascertained from the business records, <u>including electronically stored information,</u> of the party upon whom the interrogatory has been served or from an examination, audit or inspection of those business records, including a compilation, abstract or summary thereof,

and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification must be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

EXPLANATORY NOTE

Rule 33 was amended, effective January 1, 1981; September 1, 1983; March 1, 1992 on an emergency basis; July 14, 1993; March 1, 1997; March 1, 2004; March 1, 2008.

Paragraph (b)(3) was amended, effective March 1, 2004, to clarify that any stipulated extension applies to answers and objections.

Subdivision (d) was amended, effective March 1, 2008, in response to the 2006 federal revision. The amendments clarify that electronically stored information is a type of business record.

Sources: Joint Procedure Committee Minutes of September 28-29, 2006, page 20-22; January 30-31, 2003, pages 13-15; September 28-29, 1995, page 14; November 7-8, 1991, page 5; October 25-26, 1990, pages 17-18; February 17-18, 1983, pages 12-14; October 30-31, 1980, pages 19-20; November 29-30, 1979, page 7; Fed.R.Civ.P. 33.

Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery),

N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), 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. 37 (Failure to Make Discovery - Sanctions); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure).

RULE 34. PRODUCTION OF DOCUMENTS AND THINGS AND ENTRY UPON LAND FOR INSPECTION AND OTHER PURPOSES

(a) Scope. Any party may serve on any other party a request

(1) to produce and permit the party making the request, or someone acting on the requestor's behalf, to inspect, ~~and~~ copy, test, or sample any designated documents or electronically stored information — ~~(~~including writings, drawings, graphs, charts, photographs, sound recordings, images ~~phono-records~~, and other data or data compilations stored in any medium from which information can be obtained~~;~~ — translated, if necessary, by the respondent ~~through detection devices~~ into reasonably usable form~~)~~, or to inspect, ~~and~~ copy, test, or sample any designated tangible things that constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served; or

(2) to permit entry upon designated land or other property in the possession or control of the party upon whom the request is served for the purpose of inspection and measuring, surveying, photographing, testing, or sampling the property or any designated object or operation thereon, within the scope of Rule 26(b).

(b) Procedure. The request, without leave of court, may be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request must set forth, either by individual item or by category, the items to be inspected and describe each with reasonable

particularity. The request must specify a reasonable time, place, and manner of making the inspection and performing the related acts. The request may specify the forms in which electronically stored information is to be produced.

The party upon whom the request is served shall serve a written response within 30 days after the service of the request, but a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. A shorter or longer time may be directed by the court or, in the absence of such an order, agreed to in writing by the parties, subject to Rule 29. The response must state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, including an objection to the requested form or forms for providing electronically stored information, ~~in which event~~ stating the reasons for objection ~~must be stated~~. If objection is made to part of an item or category, the part must be specified and inspection permitted to the remaining parts. If objection is made to the requested form or forms for producing electronically stored information—or if no form was specified in the request—the responding party must state the form or forms it intends to use. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

Unless the parties otherwise agree, or the court otherwise orders:

(i) ~~A~~ a party who produces documents for inspection 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 request:;

(ii) if a request does not specify the form or forms for producing electronically stored information, a responding party must produce the information in a form or forms in which it is ordinarily maintained or in a form or forms that are reasonably usable;

(iii) a party need not produce the same electronically stored information in more than one form.

(c) Persons not parties. A person not a party to the action may be compelled to produce documents and things or to submit to an inspection as provided in Rule 45.

EXPLANATORY NOTE

Rule 34 was amended, effective July 1, 1981; March 1, 1990; January 1, 1995; March 1, 1997; March 1, 2008.

~~The Joint Procedure Committee points out Vorachek v. Citizens State Bank, 421 N.W.2d 45 (N.D. 1988), holds an~~ An objection must be served within the time for serving a response or the objection is waived. Any extension must be in writing and should specify whether the extension includes responses, objections, or both.

Rule 34 was amended, effective March 1, 2008, in response to the 2006 federal revision. The amendments provide guidance regarding requests for electronically stored information.

Sources: Joint Procedure Committee Minutes of September 28-29, 2006, pages 20-22; January 25-26, 1996, page 6; September 28-29, 1995, page 14; April 20, 1989, page 2;

December 3, 1987, page 11; October 30-31, 1980, pages 20-22; November 29-30, 1979, page 7; N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure); ~~Rule~~ Fed.R.Civ.P. 34~~, FRCivP~~

Statutes Affected:

Superseded: N.D.R.C. 1943 § 31-0804.

Cross Reference: Rules 16 (Pre-Trial Procedure - Formulating Issues), 26 (General Provisions Governing Discovery), 29 (Stipulations Regarding Discovery Procedures), and 37 (Failure to Make Discovery - Sanctions), N.D.R.Civ.P.

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS

(a) Motion for order compelling discovery. A party, upon reasonable notice to other parties and all persons affected thereby, may apply for an order compelling discovery as follows:

(1) Appropriate court. An application for an order may be made to the court in which the action is pending or alternatively, on matters relating to a deposition, to the court in the district where the deposition is being taken.

(2) Motion. If a deponent fails to answer a question propounded or submitted under Rules 30 and 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer, or a designation, or an order compelling inspection in accordance with the request. The motion must include a certification that, in an effort to secure the information or material without court action, the movant made a good faith effort to confer or attempt to confer with the person or party that failed to make the discovery. While taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before applying for an order.

(3) Evasive or incomplete answer, or response. For purposes of this subdivision an evasive or incomplete answer, or response is to be treated as a failure to answer, or respond.

(4) Expenses and sanctions.

(A) If the motion is granted or if the requested discovery is provided after the motion was filed, the court shall, after affording an opportunity to be heard, require the party or deponent whose conduct necessitated the motion or the party or attorney advising the conduct, or both of them, to pay to the moving party the reasonable expenses incurred in making the motion, including attorney's fees, unless the court finds that the opposing party's response, or objection was substantially justified, or that other circumstances make an award of expenses unjust.

(B) If the motion is denied, the court may enter any protective order authorized under Rule 26(c) and shall, after affording an opportunity to be heard, require the moving party or the attorney filing the motion, or both of them, to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

(C) If the motion is granted in part and denied in part, the court may enter any protective order authorized under Rule 26(c) and may, after affording an opportunity to be heard, apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to comply with order.

(1) Sanctions by court in district where deposition is taken. If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the judicial district

in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) Sanctions by court in which action is pending. If a party or an officer, director, superintendent, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) or Rule 35, or if a party fails to obey an order entered under Rule 26(f), the court in which the action is pending may make such orders in regard to the failure that are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination;

(E) If a party has failed to comply with an order under Rule 35(a) requiring the party to produce another person for examination, such orders as are listed in paragraphs (A), (B),

and (C) unless the party failing to comply shows that that party is unable to produce the person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

(c) Expenses on failure to admit. If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, the requesting party may apply to the court for an order requiring the other party to pay the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that

(1) the request was held objectionable under Rule 36(a), or

(2) the admission sought was of no substantial importance, or

(3) the party failing to admit had reasonable ground to believe that the party might prevail on the matter, or

(4) there was other good reason for the failure to admit.

(d) Failure of party to attend at own deposition or serve answers to interrogatories or respond to request for inspection. If a party or an officer, director, superintendent, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on

behalf of a party fails:

(1) to appear before the officer who is to take the deposition, after being served with a proper notice;

(2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories;

(3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under subparagraphs (A), (B) and (C) of subdivision (b)(2). In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has a pending motion for a protective order as provided by Rule 26(c).

(e) ~~Abrogated.~~ Expenses against the state. Except to the extent permitted by statute, expenses and fees may not be awarded against the State of North Dakota under this rule.

(f) ~~Expenses against the state. Except to the extent permitted by statute, expenses and fees may not be awarded against the State of North Dakota under this rule.~~ Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions

under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

(g) Failure to participate in the framing of a discovery plan. If a party or a party's attorney fails to participate in good faith in the framing of a discovery plan by agreement as is required by Rule 26(f), the court may, after opportunity for hearing, require that party or attorney to pay to any other party the reasonable expenses, including attorney's fees, caused by the failure.

EXPLANATORY NOTE

Rule 37 was amended, effective July 1, 1981; March 1, 1990; January 1, 1995; March 1, 1997; March 1, 2004; March 1, 2008.

Paragraph (a)(2) was amended, effective March 1, 2004, to require a party moving for a discovery order to certify that a good faith effort was made to resolve the discovery dispute prior to seeking court intervention.

Rule 37 was amended, effective March 1, 2008, in response to the 2006 federal revision. A new subdivision (f) on electronically stored information was added and material dealing with expenses against the state was moved to subdivision (e).

Sources: Joint Procedure Committee Minutes of January 25, 2007, page 10; September 28-29, 2006, pages 22-25; January 30-31, 2003, pages 15-16; September 28-29, 1995, pages 15-16; January 27-28, 1994, pages 16-17; April 20, 1989, page 2; December 3, 1987, page 11; December 11-12, 1980, page 3; October 30-31, 1980, pages 22-26;

November 29-30, 1979, page 80; ~~Rule~~ Fed.R.Civ.P. 37~~, FRCivP~~.

Statutes Affected:

Superseded: N.D.R.C. 1943 §§ 31-0205, 31-0803.

Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions), N.D.R.Civ.P. 33 (Interrogatories to Parties), N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), N.D.R.Civ.P. 35 (Physical and Mental Examination of Persons), N.D.R.Civ.P. 36 (Requests for Admission) and N.D.R.Civ.P. 45 (Subpoena).

RULE 40. ASSIGNMENT OF CASES FOR TRIAL

(a) Continuous session of district court.

The district court is in continuous session in each county. Criminal and civil cases will be scheduled for trial in accordance with a calendaring procedure maintained and operated under the direction and supervision of the presiding judge of the district.

(b) [Deleted] ~~Note of issue and certificate of readiness.~~

~~(1) A party desiring to have an action placed on the calendar for trial shall prepare a certificate of readiness and note of issue and shall serve the same on counsel for all parties and file it, with proof of service, with the clerk of court within five days after such service. The certificate of readiness and note of issue shall certify, to the best knowledge and belief of the filing attorney, the following:~~

~~(A) That issues are joined and the case in all respects is ready for trial;~~

~~(B) That all discovery has been completed;~~

~~(C) That all pretrial motions have been disposed of;~~

~~(D) Sufficient time has elapsed to afford all parties reasonable opportunity to be ready for trial;~~

~~(E) There are no present prospects for settlement;~~

~~(F) Whether or not the case is for trial by jury and the size of the jury;~~

~~(G) That all pleadings of the filing attorney have been filed with the clerk of court;~~

~~(H) The estimated length of trial;~~

~~(f) The names and addresses of respective counsel.~~

~~Except as qualified in paragraph (2), the filing of a certificate of readiness and note of issue constitutes certification by all parties to the action that the case is ready for trial.~~

~~(2) If a party, other than the party filing the certificate of readiness, is not ready for trial, that party shall prepare a certificate of nonreadiness and shall serve the same on counsel for all parties and shall file it with the clerk of court within ten days after the date of service of the certificate of readiness. The certification of nonreadiness must set forth in what respects the case is not ready and must specify a time limit within which the case will be ready for trial.~~

~~(3) The case shall be placed on the trial calendar fourteen days after the filing of the certificate of readiness and note of issue, or on the date specified in the certificate of nonreadiness, whichever is later.~~

~~(4) Any dispute with respect to the certificate of readiness or the certificate of nonreadiness must be brought before the court by motion of a party or the court. The court may impose appropriate sanctions, including payment of the reasonable expense incurred in bringing the motion.~~

~~(5) If the trial judge issues a scheduling order in a case, the parties are not required to file a certificate of readiness and note of issue in order to have the case placed on calendar for trial.~~

(c) Trial dates.

All contested cases will be assigned trial dates by the trial judge under the direction

and supervision of the presiding judge of the district.

(d) Trial date continuances.

No continuance on trial dates will be given unless formally approved by the trial judge scheduled to hear the case. A request to continue a trial must be made within ten days after receipt of notice of trial given by the court. If unavoidable circumstances should arise, the trial judge may consider waiving the ten-day requirement.

(e) Untried cases.

Actions or proceedings that have been pending and filed in which there has been a want of prosecution for more than one year may be dismissed without prejudice by the court on its own motion upon notice or on motion of either party.

EXPLANATORY NOTE

Rule 40 was amended effective July 1, 1981; January 1, 1988; August 1, 2004; March 1, 2008.

Rule 40 has the same purpose as ~~Rule~~ Fed.R.Civ.P. 40~~, FRCivP, but differs completely as to content. Prior to being amended, effective July 1, 1981, this rule was identical to the federal rule~~.

Rule 40 was amended, effective March 1, 2008, to eliminate the note of issue and certificate of readiness requirement. Decisions on placement of cases on the trial calendar are made at Rule 16 scheduling conferences or as otherwise scheduled by the court.

Subdivision (a) provides for continuous session of district court, rather than

distinct "terms" of court. The presiding judge is to oversee the calendaring process.

~~A combined Note of Issue and Certificate of Readiness is required by subdivision (a), which also prescribes its contents. Fourteen days after this document is filed, the case is to be placed on the trial calendar, unless a Certificate of Nonreadiness has been filed by another party. This is a change from previous North Dakota practice, which only required the filing of a note of issue, not normally triggering placement on a trial calendar. A call of the calendar is no longer necessary to determine whether a case is ready for trial. The document should not be filed unless the filing party is ready to have the case placed on the trial calendar.~~

Subdivision (b) was amended, effective August 1, 2004, to add new language clarifying that filing a note of issue and certificate of readiness is not necessary when a scheduling order is issued.

Subdivision (e) provides for dismissal of untried cases after one year of inactivity, rather than after two years, as was the previous rule. Failure to file a Note of Issue and Certificate of Readiness within one year after the filing of the summons and complaint may also result in dismissal.

The rule was amended, effective January 1, 1988, to make the rule gender neutral.

~~The note of issue and certificate of readiness form relating to Rule 40, N.D.R.Civ.P., was reworded effective March 1, 1992, to make the form consistent with the rule.~~

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 14-15;

September 18-19, 2003, pages 11-18; April 24-25, 2003, pages 26-30; November 7-8, 1991, page 5; October 25-26, 1990, page 16; January 23, 1986, pages 9-12; September 18-19, 1980, pages 13-14; May 29-30, 1980, pages 1-2, 6-11; March 27-28, 1980, pages 3-4; January 17-18, 1980, page 3; November 29-30, 1979, pages 9-10; Rule 40, FRCivP.

Statutes Affected:

Superseded: N.D.R.C. 1943 §§ 28-1207, 28-1208, 28-1212.

Cross Reference: N.D.R.Civ.P. 16 (Pretrial Conferences; Scheduling; Management); N.D.R.Crim.P. 50 (Calendars).

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, testing, or sampling of designated books, documents, electronically stored information, 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, copying, testing or sampling may be joined with a command to appear at a trial or hearing or at a deposition, or may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(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.

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

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

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

(c) Protection of Person Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and

impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

~~(c)~~ (2) (A) A person commanded to produce and permit inspection and copying of designated electronically stored materials, books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production, inspection, ~~or~~ copying, testing, or sampling unless commanded to appear for a deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce, permit inspection, ~~or~~ copying, testing, or sampling before a trial or hearing may object in writing. The objection must be received by the party or attorney designated in the subpoena within ~~10~~ ten days after receipt of 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 objection is made, the party serving the subpoena is not entitled to production, inspection, ~~or~~ copying, testing, or sampling except upon order of the court by which the subpoena was issued. If objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, permit inspection, ~~or~~ copying, testing, or sampling, move at any time for an order to compel production, inspection, ~~or~~ copying, testing, or sampling. An order to compel production, inspection, ~~or~~ copying, testing, or sampling must protect any person who is not a party or an officer of a party from significant expense resulting from production, inspection, ~~or~~ copying, testing, or sampling.

(3) A resident of this state may be required by subpoena to attend a deposition only in the county where that person resides, is employed or transacts business in person, or at

such other convenient place as prescribed by order of court. A nonresident of this state may be required by subpoena to attend a deposition in any county of this state. A resident or nonresident may be required to attend a hearing or trial any place within this state.

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

(B) If a subpoena does not specify the form or forms for producing electronically stored information, a person responding to a subpoena must produce the information in a form or forms in which the person ordinarily maintains it or in a form or forms that are reasonably usable.

(C) A person responding to a subpoena need not produce the same electronically stored information in more than one form.

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

(2) (A) 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.

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

information must preserve the information until the claim is resolved.

(e) Contempt. Failure ~~by~~ of 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~~ nonparty 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, testing, or sampling 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, testing, or sampling]. 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; March 1, 2008.

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.

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

Subdivision (b) was amended, effective March 1, 2008, to eliminate the requirement for parties to serve a separate notice for production when commanding a person to attend a deposition to give testimony and produce documents or things.

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

SOURCES: Joint Procedure Committee Minutes of September 28-29, 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January 25-26, 1996,

page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987, pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P. 45.

STATUTES AFFECTED:

SUPERSEDED: N.D.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); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure).

RULE 50. JUDGMENT AS A MATTER OF LAW IN JURY TRIALS

(a) Judgment as a matter of law.

~~(1) If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim, or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.~~

~~(2) Motions for judgment as a matter of law may be made at any time before submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.~~

(1) In General. If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may:

(A) resolve the issue against the party; and

(B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.

(2) Motion. A motion for judgment as a matter of law may be made at any time before the case is submitted to the jury. The motion must specify the judgment sought and the law and facts that entitle the movant to the judgment.

(b) Renewing the motion ~~for judgment~~ after trial; alternative motion for a new trial. If the court does not grant a motion for judgment as a matter of law made ~~at the close of all the evidence~~ under subdivision (a), the court may later decide the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by serving and filing a motion not later than 15 days after notice of entry of judgment or—if the motion addresses a jury issue not decided by a verdict—no later than 15 days after the jury was discharged. ~~and~~ The movant may alternatively request a new trial or join a motion for a new trial under Rule 59.

In ruling on a renewed motion, the court may:

(1) if a verdict was returned:

(A) allow the judgment to stand,

(B) order a new trial, or

(C) direct entry of judgment as a matter of law; or

(2) if no verdict was returned:

(A) order a new trial

(B) direct entry of judgment as a matter of law.

(c) Granting renewed motion for judgment as a matter of law; Conditional rulings; New trial motion.

(1) If the renewed motion for judgment is granted, the court shall also rule on any motion for a new trial, by determining whether it should be granted if the judgment is thereafter vacated or reversed and specifying the grounds for granting or denying the motion

for the new trial. If the motion for a new trial is conditionally granted, the order does not affect the finality of the judgment. If the motion for a new trial has been conditionally granted and the judgment is reversed on appeal, the new trial must proceed unless the appellate court has otherwise ordered. If the motion for a new trial has been conditionally denied, the appellee on appeal may assert error in that denial, and if the judgment is reversed on appeal, subsequent proceedings must be in accordance with the order of the appellate court.

(2) A party against whom a judgment as a matter of law has been entered, must serve and file any motion for new trial under Rule 59 no later than 15 days after notice of entry of judgment.

(d) Same—Denial of motion for judgment as a matter of law. If the motion for judgment as a matter of law is denied, the party who prevailed on that motion may, as appellee, assert grounds entitling the party to a new trial in the event the appellate court concludes that the trial court erred in denying the motion for judgment. If the appellate court reverses the judgment, nothing in this rule precludes it from determining that the appellee is entitled to a new trial, or from directing the trial court to determine whether a new trial should be granted.

EXPLANATORY NOTE

Rule 50 was amended, effective January 1, 1979; September 1, 1983; March 1, 1990; March 1, 1994; March 1, 1997; March 1, 1998; March 1, 2008.

It is emphasized that unless counsel informs the court that a ruling on both motions for a new trial and judgment notwithstanding the verdict is to be made, it will be considered a waiver of whatever motion the court did not rule on. Both motions must be pursued in the trial court. ~~Anderson v. Kroh, 301 N.W.2d 359 (N.D. 1981).~~

Rule 50 was revised, effective March 1, 1994, to track the 1991 federal revision. The revision abandons the terminology "directed verdict" and "judgment notwithstanding the verdict." Instead, the terminology "judgment as a matter of law" is substituted. ~~In determining whether to grant judgment as a matter of law, the standard remains the same as the standard for determining whether a directed verdict or judgment notwithstanding the verdict should be granted. The standard was enunciated in Anderson v. Kroh, 301 N.W.2d 359 (N.D. 1981) as follows:~~

"When ruling on a motion for ~~a directed verdict or for a judgment notwithstanding the verdict~~ judgment as a matter of law, the court must decide whether the evidence is such that, without weighing the credibility of the witnesses or otherwise considering the weight of the evidence, a reasonable ~~men~~ person could reach but one conclusion as to the verdict, or, otherwise stated, whether the evidence, viewed most favorably to the party against whom the motion is made, and giving that party the benefit of all reasonable inferences from the evidence, compels a result which no reasonable person might differ.[22]

Under ~~revised~~ paragraph (a)(1) a party ~~no longer has~~ does not have to wait until the party with the burden of proof completes its case to move for dismissal. Either party may move for judgment as a matter of law anytime after the party with the burden of proof has

been fully heard on an issue.

Rule 50 was amended, effective March 1, 2008, to track the 2006 amendments to Fed.R.Civ.P. 50. Paragraph (a)(1) was reorganized to improve clarity and paragraph (a)(2) was amended to allow a motion for judgment as a matter of law to be made at any time before the case is submitted to the jury.

Subdivision (b) was amended, effective March 1, 2008, to allow a party to renew a motion for judgment as a matter of law post-verdict without first renewing the motion at the close of the evidence. Under the amended language, a party who makes a motion that complies with subdivision (a) is allowed to renew the motion after the verdict. A 15-day time limit for renewing a motion addressing a jury issue not decided by the verdict was also added to subdivision (b).

~~Paragraph (a)(2) retains the requirement that a motion for judgment be made prior to the close of trial, subject to renewal after a jury verdict has been rendered. The moving party must articulate the basis on which a judgment as a matter of law might be rendered. The purpose of these requirements is to allow the responding party a chance to cure any overlooked deficiency in proof if the trial court permits. The decision to reopen a case, and to admit additional evidence after a party has rested, is in the sound discretion of the trial court. Leno v. Ehli, 339 N.W.2d 92, 95 (N.D. 1983).~~

~~Amended subdivision (b) retains the concept of the former rule that the post-verdict motion is a renewal of an earlier motion made at the close of the evidence. A post-trial motion for judgment can be granted only on grounds advanced in the pre-verdict motion.~~

Sources: Joint Procedure Committee Minutes of September 28-29, 2006, pages 12-13; September 26-27, 1996, pages 10-12; April 25, 1996, pages 18-19; September 28-29, 1995, page 17; April 29-30, 1993, pages 9-10; January 28-29, 1993, page 8; April 20, 1989, page 2; December 3, 1987, page 11; September 30-October 1, 1982, pages 6-8; January 17-18, 1980, pages 3-4; November 29-30, 1979, page 13; May 25-26, 1978, pages 26-29; January 12-13, 1978, pages 11-12; September 15-16, 1977, pages 24-26; ~~Rule~~ Fed.R.Civ.P. 50; ~~FRCivP~~; Rules 50.02, 59.02 Minn. Rules of Civil Procedure.

Statutes Affected:

Superseded: N.D.R.C. 1943 § § 28-1509, 28-1510, and N.D.C.C. § 28-18-06.

Considered: N.D.C.C. § 28-27-29.1.

Cross Reference: N.D.R.Civ.P. 59 (New Trials—Amendment of Judgments).

FORM 20. MOTION FOR PRODUCTION OF DOCUMENTS, ETC. UNDER RULE 34

Plaintiff A.B. moves the court for an order requiring defendant C.D.

(1) To produce and to permit plaintiff to inspect, ~~and to~~ copy, test or sample each of the following documents or electronically stored information:

[Here list the documents and describe each of them.]

(2) To produce and permit plaintiff to inspect and to photograph each of the following objects:

[Here list the objects and describe each of them]

(3) To permit plaintiff to enter [here describe property to be entered] and to inspect and to photograph [here describe the portion of the real property and the objects to be inspected and photographed].

(4) To file a verified list of (a) any designated documents, papers, accounts, books, letters, photographs, sound recordings, images, electronically stored information, objects, or tangible things not privileged which are or have been in ~~his~~ the defendant's possession, custody, or control, relevant to the subject matter of the pending action, whether it relates to the claim or defense of the plaintiff or to the claim or defense of any other party, and (b) the identity and location of persons having knowledge of relevant facts.

Defendant C.D. has the possession, custody, or control of each of the foregoing specified documents, electronically stored information and objects and of the above

mentioned real estate. Each of them constitutes or contains evidence relevant and material to a matter involved in this action, as is more fully shown in Exhibit 1 hereto attached.

Defendant C.D. possesses information pertaining to the matters set forth in paragraph (4) above.

Signed: _____

Attorney for Plaintiff

Address: _____

NOTICE OF MOTION

[Contents the same as in Form 14]

EXHIBIT 1

STATE OF NORTH DAKOTA,

County of _____

A.B., being duly sworn says:

(1) [Here set forth all ~~that~~ plaintiff knows ~~which~~ that shows ~~that~~ defendant has the papers or objects in ~~his~~ the defendant's possession or control.]

(2) [Here set forth all ~~that~~ plaintiff knows ~~which~~ that shows ~~that~~ each of the above mentioned items is relevant to some issue in the action.]

[Jurat]

Signed: A.B.

RULE 17. SUBPOENA

(a) Content.

(1) A subpoena must state the court's name and the title of the action, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk or magistrate shall issue a signed blank subpoena, or a signed blank subpoena for the production of documentary evidence or objects, to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(2) The attorney for a party to any proceeding may issue a subpoena, or a subpoena for the production of documentary evidence or objects, in the court's name. A subpoena issued by an attorney has the same effect as a subpoena issued under Rule 17(a)(1). The subpoena must state the attorney's name, office address, and the party for whom the attorney appears.

(b) [Deleted]

(c) Producing documents and objects.

(1) In general.

A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or modifying the subpoena.

On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(d) Service.

A peace officer or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the prosecution or ~~a~~ an indigent defendant ~~unable to pay under Rule 17(b)~~ has requested the subpoena.

(e) Place of service.

(1) In North Dakota.

A subpoena requiring a witness to attend a hearing or trial may be served anywhere within North Dakota.

(2) Witness outside state.

Service on a witness outside this state may be made only as provided by law.

(f) Issuing a deposition; subpoena.

(1) Issuance.

An order to take a deposition authorizes the clerk of court or a magistrate to issue a subpoena for any witness named or described in the order.

(2) Place.

After considering the convenience of the witness and the parties, the court may

order-and the subpoena may require-the witness to appear anywhere the court designates.

(g) Contempt.

Failure by any witness without adequate excuse to obey a subpoena served upon that witness may be a contempt of the court from which the subpoena issued.

(h) Information not subject to subpoena.

No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 16 governs the production of a statement.

EXPLANATORY NOTE

Rule 17 was amended September 1, 1983; March 1, 1990; March 1, 2006; June 1, 2006; March 1, 2008.

Rule 17 follows Fed.R.Crim.P. 17 in substance and controls with respect to all subpoenas in criminal cases issued by the courts of this state.

Rule 17 is not limited to subpoena for the trial. A subpoena may be issued for a preliminary hearing, in aid of a grand jury investigation, for a deposition, or for a determination of an issue of fact raised by a pretrial motion. Rule 17 is also intended to obtain witnesses and documents for use as evidence, although it is not a discovery device.

Rule 17 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 (a)(1) follows Fed.R.Crim.P. 17(a) except that subpoenas may be issued

by the magistrate as well as the clerk of court. The fact that some of the lesser state courts are without the benefit of a clerk necessitates this requirement.

Paragraph (a)(2) was amended, effective September 1, 1983, to provide that an attorney for a party may issue subpoenas with the same effect as the clerk or magistrate.

~~Subdivision (b) follows Fed.R.Crim.P. 17(b). Subdivision (b) provides a means by which the defendant unable to pay witnesses' fees and travel costs may have persons subpoenaed. If a subpoena is issued under subdivision (b), the fees and costs are paid in the same manner as in the case of a witness subpoenaed by the prosecution.~~ Subdivision (b), which provided assistance for indigent defendants seeking to subpoena persons, was deleted, effective June 1, 2006. As of January 1, 2006, the North Dakota Commission on Legal Counsel for Indigents became responsible for providing defense services, including subpoenas, to indigent defendants.

Subdivision (c) follows Fed.R.Crim.P. 17(c) and authorizes issuance of a subpoena duces tecum. Rule 17 generally is available to any "party" and this is no less true of subdivision (c). Thus the prosecution as well as the defendant may use subdivision (c), subject to the limitations imposed by the Fourth and Fifth Amendments.

Subdivision (d) was amended, effective March 1, 2006, to simplify service instructions for a subpoena and to eliminate outmoded methods of service. Subdivision (d) was amended, effective March 1, 2008, to eliminate an obsolete cross-reference.

A subpoena will ordinarily be served by a peace officer although subdivision (d) permits service by any person who is not a party and who is 18 or more years old.

Service of a subpoena under Fed.R.Crim.P. 17 has been held effective only if the fee for one day's attendance and the mileage allowed by law are tendered to the witness when the subpoena is delivered. Fees and mileage need not be tendered if the subpoena is issued in behalf of the state or on behalf of a defendant unable to pay.

Subdivision (e) is an adaptation of the Colorado Rules of Criminal Procedure. Under N.D.C.C. ch. 31-03 (Means of Compelling Attendance of Witnesses), North Dakota has adopted a Uniform Act to secure the attendance of witnesses from another state in criminal proceedings. Under paragraph (e)(2) service of subpoenas on witnesses out-of-state is governed by N.D.C.C. ch. 31-03.

Subdivision (f) follows Fed.R.Crim.P. 17(f), with appropriate changes to satisfy the requirements of North Dakota. Paragraph (f)(1) provides that a court order for the taking of depositions gives authority to the clerk of court or magistrate to issue subpoenas for the persons named or described therein.

Paragraph (f)(2) provides the court with discretion in determining where the deposition is to be taken.

Subdivision (g) follows N.D.R.Civ.P. 45(e). This provision merely restates existing law.

Subdivision (h) was adopted, effective September 1, 1983, to provide that statements made by witnesses or prospective witnesses are not subject to subpoena under Rule 17 but are subject to production in accordance with Rule 16. This correlates to Rule 16's provisions relating to production of statements.

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 22-23; April 27-28, 2006, pages 2-5, 15-17; January 27-28, 2005, pages 13-14; April 20, 1989, page 4; December 3, 1987, page 15; November 18-19, 1982, pages 10-13; October 15-16, 1981, pages 6-10; October 12-13, 1978, page 8; June 26-27, 1972, pages 14-20; July 25-26, 1968, pages 6-10; Fed.R.Crim.P. 17.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-03-04, 31-03-07, 31-03-08, 31-03-09, 31-03-13, 31-06-07, 40-18-09.

Considered: N.D.C.C. §§ 29-10.1-19, 31-03-01, 31-03-15, 31-03-16, 31-03-17, 31-03-18, 31-03-25, 31-03-26, 31-03-27, 31-03-28, 31-03-29, 31-03-30, 31-03-31.

Cross Reference: N.D.R.Civ.P. 45. (Subpoena).

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

(a) Filing the notice of appeal.

(1) An appeal permitted by law as of right from a municipal court to the district court may be taken only by filing a notice of appeal with the municipal court clerk within the time allowed by Rule 37(b).

(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 grounds only for the district court to act as it considers appropriate, including dismissing the appeal.

(b) Time for filing a notice of appeal.

(1) A defendant's notice of appeal must be filed with the municipal court clerk within 30 days after the entry of the judgment or order being appealed.

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

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

(d) Effect of a motion on a notice of appeal.

(1) If a defendant timely makes any of the following motions under the North Dakota Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be

filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period ends later:

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

(B) for arrest of judgment under Rule 34.

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

(f) Content of the notice of appeal. The notice of appeal must:

(1) specify the party or parties taking the appeal;

(2) designate the verdict, judgment, order, or part thereof being appealed; and

(3) name the district court to which the appeal is taken.

(g) Serving the notice of appeal.

(1) The municipal court clerk must promptly serve notice of the filing of the notice of appeal by mailing or sending by third-party commercial carrier a copy of the notice of appeal to the clerk of district court and 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 municipal court clerk must note on each copy the date the notice of appeal was filed.

(2) The municipal court clerk's failure to serve a copy of the notice of appeal does not affect the validity of the appeal. The municipal court clerk 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.

(h) Transmittal to district court. Within five days after the notice of appeal is filed, the municipal court clerk, or the judge if there is no clerk, must transmit to the clerk of district court all documents filed in the action, which must be docketed by the clerk of district court without charge to the appellant.

(i) Designation of parties on appeal. A party appealing is the appellant and an adverse party is the appellee, but the title of the action is not changed as a consequence of the appeal.

(j) Effect and scope of appeal. A perfected appeal to the district court transfers the action for trial anew. An appeal from a judgment of conviction constitutes an appeal from any verdict of guilty upon which the judgment is rendered.

(k) Supervision in district court. The supervision and control of the proceedings on appeal will be in the district court from the time an appeal is taken except as otherwise provided in these rules. The district court, at any time after an appeal is taken, may hear a motion to dismiss the appeal or direct the municipal court to modify or vacate any order made by the municipal court or by any judge relating to the prosecution of the appeal, including any order fixing or denying bail.

(l) Summary Affirmance. If the appellant fails to appear at the trial anew, the district court must summarily affirm the judgment and enter it as a judgment of the district court unless the appellant on motion within five days after the date set for the trial anew shows good cause for failure to appear.

EXPLANATORY NOTE

Rule 37 was amended, effective September 1, 1983; March 1, 1986; January 1, 1995; March 1, 1999; March 1, 2003; March 1, 2006; March 1, 2008.

Rule 37 has no counterpart in the Federal Rules of Criminal Procedure. The requirement for a rule of procedure for criminal appeals is necessary because the North Dakota Rules of Appellate Procedure are limited in scope to appeals to the supreme court while the scope of criminal rules includes the municipal courts. The rule is intended to parallel as closely as possible the procedure of the appellate rules.

Rule 37 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) parallels N.D.R.App.P. 3(a).

Subdivision (b) parallels N.D.R.App.P. 4(b)(1).

The requirement for filing the notice of appeal with the municipal court clerk within 30 days of the entry of judgment or order being appealed is mandatory and jurisdictional. The mandatory and jurisdictional requirement is eased by subdivision (e) which permits the municipal court to extend the time for appeal upon a showing of excusable neglect or good cause. The provision in Rule 32 that requires the defendant to be advised of the right to appeal and the right of a person who is unable to pay the cost of appeal to have it provided

at public expense is a necessary part of a valid sentence and until it is given, the 30-day period for taking an appeal cannot begin to run because there is no valid sentence in existence.

Subdivision (d) is adapted from N.D.R.App.P. 4(b)(3), and addresses the effect of a motion for a new trial or arrest of judgment on a notice of appeal.

Subdivision (e) is adapted from N.D.R.App.P. 4(b)(4), and authorizes an extension of time to file a notice of appeal upon a finding of excusable neglect or good cause.

Subdivision (f) is adapted from the language of N.D.R.App.P. 3(c). A notice of appeal must (1) specify the parties taking the appeal, (2) designate the verdict, judgment or order or part thereof appealed from, and (3) name the court to which the appeal is taken. Under the first requirement, it is important that the notice specify by name the appellant or appellants. Failure of the notice to correctly designate the court to which the appeal is taken does not vitiate it. Misnomer is immaterial, at least if it is obvious to which district court the appeal must go. The requirement that the notice of appeal designate the judgment or part thereof being appealed was designed to simplify the taking of an appeal by requiring nothing more for its perfection than an identification of the judgment by the date of its entry.

Subdivision (g) is adapted from N.D.R.App.P. 3(d), and provides for service of the notice of appeal. Under this subdivision, the appellant is not obligated to serve the notice of appeal on other parties to the action. It is the duty of the municipal court clerk (or magistrate where there is no clerk) to serve notice of the filing of notice of appeal on the clerk of district court and each party's counsel of record, and note on each copy served the date on which the

notice of appeal was filed.

Subdivision (g) allows the clerk to send the notice of the filing of the notice of appeal via a commercial carrier as an alternative to mail.

Subdivision (h) establishes a five-day maximum time limit for the municipal court clerk, or judge where there is no clerk, to forward to the clerk of district court the file with all documents filed in the action.

Subdivision (i) provides the designation of parties on appeal. It makes explicit that the title of the action shall not be changed as a consequence of the appeal. The designation of the party who contends against the appeal as an appellee rather than respondent is intended to avoid confusion, especially in special proceedings.

Subdivision (j) defines the effect of appeal. This subdivision follows N.D.C.C. § 40-18-19 in providing for trial anew when an appeal is taken to the district court from the municipal court.

Subdivision (k) provides the appellee may obtain relief from the appeal by one of the methods stated. The provision contemplates the parties shall first apply to the municipal court for any relief regarding the appeal; however, once the appeal passes to the district court, the municipal court has no power to modify its judgment or dismiss the appeal.

Subdivision (l) was added, effective March 1, 2008, to require the court to summarily affirm the judgment when an appellant fails to appear at a requested trial anew unless the defendant can show good cause for the failure to appear.

It should be noted although the rule does not always explicitly say so, it is the intent

of this rule that the judge will perform the duties of the clerk where no clerk is appointed.

Sources: Joint Procedure Committee Minutes of September 28-29, 2006, pages 8-10; January 27-28, 2005, pages 32-33; April 26-27, 2001, pages 4-6; January 29-30, 1998, page 20; April 28-29, 1994, pages 6-7; January 27-28, 1994, page 10; September 23-24, 1993, page 10; November 29, 1984, page 20; February 17-18, 1983, pages 14-20; February 20-23, 1973, pages 5-8; December 11-15, 1972, pages 5-16; July 10-11, 1969, pages 4-6; May 15-16, 1969, pages 2-11; February 20-21, 1969, pages 15-17. See Also: N.D. Const. art. VI, § 8.

Statutes Affected:

Superseded: N.D.C.C. § § 29-28-04, 29-28-08, 29-28-09, 29-28-11, 33-12-35, 33-12-40.

Considered: N.D.C.C. § § 27-07-02, 27-07.1-18, 27-08-21, 28-27-06, 29-23-11, 29-28-02, 29-28-06, 29-28-07, 29-28-20, 29-28-21, 33-12-34, 33-12-41, 40-18-19.

Cross Reference: N.D.R.Crim.P. 32 (Sentencing and Judgment); N.D.R.Crim.P. 33 (New Trial); N.D.R.Crim.P. 34 (Arresting Judgment); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.App.P. 3 (Appeal as of Right - How Taken); N.D.R.App.P. 4 (Appeal—When Taken).

RULE 43. DEFENDANT'S PRESENCE

(a) When required. Unless this rule provides otherwise, the defendant must be present at:

(1) the initial appearance, the arraignment, and the plea;

(2) every trial stage, including jury impanelment and the return of the verdict; and

(3) sentencing.

Presence by interactive television is presence for the purposes of this rule.

(b) When not required. A defendant need not be present under any of the following circumstances:

(1) Misdemeanor Offense. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent, the court permits arraignment, plea, trial, and sentencing to occur in the defendant's absence.

(2) Conference or hearing on legal question. The proceeding involves only a conference or hearing on a question of law.

(3) Sentence correction. The proceeding involves the correction or reduction of sentence under Rule 35.

(c) Waiving continued presence. The further progress of the trial, including the return of the verdict and the imposition of sentence, may not be prevented and the defendant waives the right to be present if the defendant, initially present at trial or having pleaded guilty:

(1) is voluntarily absent after the trial has begun (whether or not the defendant has

been informed by the court of the obligation to remain during the trial);

(2) is voluntarily absent at the imposition of sentence; or

(3) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct that justifies the defendant's exclusion from the courtroom.

EXPLANATORY NOTE

Rule 43 was amended, effective January 1, 1980; March 1, 1990; March 1, 1998; March 1, 2004; March 1, 2006 ;March 1, 2008.

Although Rule 43 does not require the defendant's presence in all instances, the rule does not give a defendant the right to be absent. The court has discretion whether to require the presence of the defendant.

In a non-felony case, if the defendant pleads guilty without appearing in court, a written form must be used advising the defendant of his or her constitutional rights and creating a record showing that the plea was made voluntarily, knowingly, and understandingly.

Rule 37 provides for summary affirmance if the defendant does not appear at a trial anew.

Rule 43 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and

terminology consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 2004, in response to amendments to Rule 5 and Rule 10 allowing interactive television to be used for the initial appearance and arraignment. N.D. Sup. Ct. Admin. R. 52, which took effect June 1, 2005, governs proceedings conducted by interactive television.

Sources: Joint Procedure Committee Minutes of September 28-29, 2006, pages 8-10; January 27-28, 2005, pages 34-36; September 26-27, 2002, pages 13-14; January 30, 1997, pages 7-8; September 26-27, 1996, pages 8-10; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; December 7-8, 1978, pages 27-28; October 12-13, 1978, pages 43-44; December 11-15, 1972, pages 41-43; May 15-16, 1969, pages 11-13.

Statutes Affected:

Superseded: N.D.C.C. § § 29-12-12, 29-13-02, 29-14-21, 29-16-03, 29-16-04, 29-16-06, 29-22-11, 29-26-04, 33-12-23.

Considered: N.D.C.C. §§ 29-16-05, 29-26-11.

Cross Reference: N.D.R.Crim.P. 5 (Initial Appearance Before the Magistrate); N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 11 (Pleas); 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. Appendix Form 17 (Misdemeanor Petition to Enter Plea of Guilty); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

RULE 404. CHARACTER EVIDENCE NOT ADMISSIBLE TO PROVE CONDUCT, EXCEPTIONS: OTHER CRIMES

(a) Character evidence generally. Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:

(1) Character of accused. ~~Except as otherwise provided by statute evidence~~ Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;

(2) Character of victim. ~~Evidence~~ Subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;

(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.

(b) Other crimes, wrongs, or acts. Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it may be admissible for other purposes, such as proof of motive,

opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.

EXPLANATORY NOTE

Rule 404 was amended, effective March 1, 1990, March 1, 1994, March 1, 2008.

The general rule that character evidence may not be introduced to show that a person acted in conformity to character is compatible with present North Dakota case law. ~~See Thornburg v. Perleberg, 158 N.W.2d 188 (N.D. 1968).~~ Character evidence is not admissible when its purpose would be to prove circumstantially how a person acted on a particular occasion. Whenever the character of a person is in issue, as in a defamation case, this exclusion does not apply. ~~McCormick on Evidence, §§ 186, 187.~~

Subdivision (a)(1) allows the accused to offer circumstantial evidence of character. Traditionally, this has been allowed, for the objection to character evidence in general is not that it has no relevancy but that its probative value, when weighed against possible prejudice, does not warrant admission. If the accused offers such evidence, the issue of prejudice is no longer a factor. Subdivision (a)(1) was amended, effective March 1, 2008, to add clarifying language on victim character evidence.

Except when Rule 412 applies, ~~Subdivision~~ subdivision (a)(2) allows character evidence of the victim of a crime to be introduced by an accused and evidence of peacefulness of a homicide victim by the prosecution to rebut evidence that the victim was

the aggressor. ~~A significant exception has been enacted to this general rule by the North Dakota Legislature with its adoption of N.D.C.C. § 12.1-20-14, and N.D.C.C. § 12.1-20-15, relating to cases involving gross sexual imposition.~~

Subdivision (a)(3) provides that, in dealing with impeachment of a witness, Rules 607, 608, and 609 state the applicable rules. The present rule retains its force, and should be consulted whenever the witness is also a party whose actions are sought to be proved.

Subdivision (b) restates the general rule, but continues to provide that character evidence offered for other purposes, e.g., motive, intent, or identity, is admissible. But the mere labeling of such evidence does not automatically bring admission. ~~The North Dakota Supreme Court stated that "the mere invocation of an exception to the (character evidence) rule does not end inquiry, however. It only begins it." State v. Stevens, 238 N.W.2d 251, 257 (N.D. 1975).~~

~~In Stevens, the Supreme Court set forth criteria that should be considered whenever section (b) of this rule is invoked:~~

~~First, not all the purposes listed are of equal "weight." Citing McCormick on Evidence, § 190, p. 452, the court stated that "a much stricter showing of relevancy is required to prove identity or the doing of the criminal act by the accused, than when it is offered to prove knowledge, intent, or state of mind." Stevens, supra, at 257.~~

~~Second, the court required that such evidence be "clear and convincing."~~

~~Third, the court stated that "before such evidence may be considered at all, there must be proof of commission of the crime charged." Although there is some language in the~~

~~opinion which would suggest otherwise, this requirement means that, before the character evidence may be used for any purpose, independent evidence that the charged crime was committed must be present.~~

~~Finally, as a general proposition, the court stated that the question is "one of balancing the aims of full disclosure and fairness to the defendant where they are in conflict * * * . The problem is not one of pigeonholing, but of balancing, of discretion rather than following a rule." Stevens, supra, at 257, 258.~~

Rule 404 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Subdivision (b) was amended, effective March 1, 1994, to follow the 1991 federal amendment, by adding a pretrial notice requirement in criminal cases. However, unlike the federal rule, North Dakota's amended rule does not place the burden of requesting notice upon the accused. Because the notice requirement serves as a condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met. The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b).

Sources: Joint Procedure Committee Minutes~~:~~ of January 25, 2007, pages 10-11; September 28-29, 2006, pages 13-14; April 29-30, 1993, page 10; January 28-29, 1993, pages 11-12; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 20, 21. ~~Rule~~ Fed.R.Ev. 404~~, Federal Rules of Evidence~~; Rule 404, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-20-14, 12.1-20-15, 27-20-33, 27-20-52, 42-02-07.

Cross Reference: ~~Rules~~ N.D.R.Ev. 412 (Admissibility of Alleged Victim's Sexual Behavior or Alleged Sexual Predisposition in Criminal Proceeding), 607 (Who May Impeach), 608 (Evidence of Character and Conduct of Witness), and 609 (Impeachment by Evidence of Conviction of Crime)~~, N.D.R.Ev.,~~.

RULE 408. COMPROMISE AND OFFERS TO COMPROMISE

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:

(1) furnishing, offering, or promising to furnish~~,~~ = or ~~(2)~~ accepting, offering, or promising to accept~~,~~ = a valuable consideration in compromising or attempting to compromise ~~a~~ the claim; and ~~which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of~~

(2) conduct or statements made in compromise negotiations is likewise not admissible. Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required.

(b) Permitted uses. This rule does not require exclusion if the evidence is offered for ~~another purpose, such as~~ purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice ~~of a witness~~;; disproving a contention of undue delay;; ~~or~~ proving an effort to obstruct a criminal investigation or prosecution.

EXPLANATORY NOTE

Rule 408 was amended, effective March 1, 2008.

The policy underlying this rule is the furtherance of compromise and settlement of disputes among parties. The general rule as to compromise finds support in North Dakota case law ~~(Larson v. Quanrud, Brink & Reibold, 78 N.D. 70, 47 N.W.2d 743 (1951))~~ and similar objectives have been fostered in the North Dakota Rules of Civil Procedure and by statute. ~~Rule~~ N.D.R.Civ.P. 68~~, N.D.R. Civ. P.,~~ provides that an unaccepted offer of judgment is inadmissible in a proceeding except to determine costs. N.D.C.C. ch. 32-39 provides that a voluntary partial payment of a claim is inadmissible for the purpose of determining either the amount of a judgment or the liability of a party.

Admissions of independent fact or other evidence of statements or conduct disclosed in the course of a compromise negotiation are likewise protected by this rule. ~~This marks a departure from the common law, in general, and from North Dakota case law. Larson v. Quanrud, Brink & Reibold, supra.~~ It is thought that open and effective discussions of compromise may be held only if the parties know in advance that they will not jeopardize their case by fully discussing all aspects of a claim. This does not mean, however, that the mere recital of evidence during a compromise negotiation precludes the admission of that evidence. The rule "does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations."[22]

~~The purpose of the rule is accomplished by rendering inadmissible evidence of the liability of parties or validity of claims brought out in valid negotiations. Whenever the evidence is introduced for a purpose other than proving liability or validity, or when the claim is not really disputed (for example, when the intent is to persuade a creditor to accept~~

~~a sum which is less than an admittedly due amount) the rule does not apply.~~

Rule 408 was amended, effective March 1, 2008. Subdivision (a) was amended to prohibit the use of statements made in the course of settlement negotiations for impeachment of a witness through prior inconsistent statement or contradiction. A further amendment to subdivision (a) clarifies that a party cannot use its own statements and offers made in settlement negotiations to prove the validity, invalidity or amount of a claim.

Sources: Joint Procedure Committee Minutes~~:~~ of September 28-29, 2006, pages 14-16; April 8, 1976, page 23; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 408~~, Federal Rules of Evidence~~; Rule 408, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 11-26-07.

Considered: N.D.C.C. § 33-08-13.

~~Rules:~~

~~Considered: Rules~~ Cross Reference: N.D.R.Civ.P. 12 (Defenses and Objections–When and How Presented–By Pleading or Motion–Motion for Judgment on the Pleadings)~~;(j)~~; N.D.R.Civ.P. 68 (Offer of Settlement or Confession of Judgment. Tender)~~(b),~~ ~~N.D.R. Civ. P~~.

RULE 510. WAIVER OF PRIVILEGE BY VOLUNTARY DISCLOSURE

A person upon whom a privilege against disclosure is conferred by rule or by law waives the privilege if he or his predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged or if N.D.R.Civ.P. 26 (b)(6)(B) applies.

EXPLANATORY NOTE

Rule 510 was amended, effective March 1, 2008.

This rule merely states in express terms that which is inherent in the preceding rules of privilege.

The rules of privilege are designed to foster certain relationships or policies that are deemed important to our society. The rules seek to accomplish this end by enveloping selected communications with the necessary degree of confidentiality.

If the holder of a privilege voluntarily discloses that which is privileged, there remains no theoretical or practical basis for maintaining the privilege and thereby depriving the judicial system of what may be relevant evidence. The privilege, however, is not to be revoked automatically following any disclosure, however peripheral to the substance of the communications being protected. The disclosure must be of a "significant part of the privileged matter." The determination of what is significant must be made with a common sense approach. If the substance of the privileged material is disclosed, the privilege should be revoked. Otherwise, it should remain intact.

Rule 510 was amended, effective March 1, 2008, to recognize that N.D.R.Civ.P. 26(b)(2)(B)'s safe harbor provision protects claims of privilege under some circumstances when information is voluntarily produced in the course of discovery.

Sources: Joint Procedure Committee Minutes: of January 25, 2007, pages 9-10; January 29, 1976, page 11. Rule 510, Uniform Rules of Evidence (1974).

Statutes Affected:

Superseded: N.D.C.C. § 31-01-07.

RULE 606. COMPETENCY OF JUROR AS WITNESS

(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party must be afforded an opportunity to object out of the presence of the jury.

(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith. However, a juror may testify ~~on the questions~~ about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, ~~or~~ (3) whether the verdict of the jury was arrived at by chance, or (4) whether there was a mistake in entering the verdict onto the verdict form. ~~Nor may a~~ A juror's affidavit or evidence of any statement by the juror ~~concerning~~ may not be received on a matter about which the juror would be precluded from testifying ~~be received for these purposes~~.

EXPLANATORY NOTE

Rule 606 was amended, effective March 1, 1990, March 1, 2008.

Subdivision (a) prohibits a juror from testifying in a case in which that juror is sitting.

Many of the practical and theoretical problems that are present when a judge testifies are also present when a juror does so. The impartiality with which the trier of fact should consider evidence is immeasurably damaged whenever a juror presents evidence for one of the parties to a lawsuit. This rule represents a change from prior law which allowed a juror to testify (N.D.C.C. § 31-01-10), but will likely have little effect on practice, as the process of jury selection has kept out of the jury box those who possess information relative to the determination of a lawsuit.

Subdivision (b) comports with existing North Dakota law by prohibiting a juror from testifying as to the mental processes inherent in arriving at a verdict but allowing jurors to testify as to whether outside influences were brought to bear upon a juror, or whether the verdict was arrived at by chance. Subdivision (b) was amended, effective March 1, 2008, to allow juror testimony about mistakes in entering the verdict on the verdict form.

~~In Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964), the Supreme Court, relying on Rule 59(b)(2), N.D.R.Civ. P.,, stated that affidavits of jurors may be used to show that a verdict has been arrived at by chance, but not to show the mental processes of the jury in reaching their verdict. In James Turner & Sons v. Great N. Ry. Co., 67 N.D. 347, 272 N.W. 489 (1937), the Supreme Court stated that a juror may testify as to outside influences but not as to matters that inhere in the verdict.~~

The rationale of ~~these cases, and of~~ this rule~~,~~ is to further free deliberation in the jury room by protecting from disclosure the manner in which a verdict was reached, and to promote finality of verdicts. At the same time considerations much be given to the arrival

of a just result in each particular case. Where a verdict is reached because of extraneous, prejudicial information or outside influence, much of the reason for disallowing a juror to testify disappears, and the balance is weighted in favor of obtaining justice in the individual case. Justice also requires disclosure whenever a verdict is arrived at by chance, including a "quotient" verdict, in which the jurors agree in advance to be bound. Although the view has been criticized ~~(see Weinstein & Berger, 3 Weinstein's Evidence, Para 606(04) (1975))~~, it is felt that reaching a verdict by change is an extreme irregularity which replaces deliberation rather than being a part of it and, as such, should be disclosed.

Rule 606 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Sources: Joint Procedure Committee Minutes~~:~~of September 28-29, 2006, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, page 13; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 606~~, Federal Rules of Evidence~~; Rule 606, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-21-18, 31-01-10.

~~Rules:~~

~~Considered: Rule~~ Cross Reference: N.D.R.Civ.P. 59~~(b)(2), N.D.R. Civ. P~~ (New Trials–Amendment of Judgments).

RULE 609. IMPEACHMENT BY EVIDENCE OF CONVICTION OF CRIME

(a) General rule. For the purpose of attacking the ~~credibility~~ character for truthfulness of a witness,

(~~i~~1) evidence that a witness other than an accused has been convicted of a crime must be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime must be admitted if the court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused; and

(~~ii~~2) evidence that any witness has been convicted of a crime must be admitted ~~if it involved dishonesty or false statement~~, regardless of the punishment, if the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from any confinement imposed for that conviction, whichever is the later date unless the witness is still in confinement for that conviction.

(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction is vacated or has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been

convicted of a subsequent crime ~~which~~ that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. However, the court, in a criminal case, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.

EXPLANATORY NOTE

Rule 609 was amended, effective March 1, 1990, January 1, 1995, March 1, 2008.

Rule 609 is taken from the Uniform Rules of Evidence (1974) and has been modified only for the purpose of clarification. In subdivision (b), the phrase "unless the witness is still in confinement for that conviction" was added to make it clear that where there is no release the expiration of the ten-year period will not bring a confined witness under this section. Subdivision (c) was modified by adding the words "is vacated" in paragraph (1). This was done to assure that cases involving deferred imposition of sentences would be covered.

This rule varies from Federal Rule 609 in that the Federal rule gives a court discretion, in subdivision (b), to extend the ten-year period during which evidence of a conviction may be admitted. Under this rule, the court has no discretion in the matter.

~~The general rule stated in Rule 609 varies from North Dakota law as the rule allows~~

~~evidence of a conviction only if the crime is punishable by more than one year in prison or involves dishonesty or false statement. Under North Dakota case law, evidence of any criminal conviction, regardless of punishment, was admissible. State v. Moe, 151 N.W.2d 310 (N.D. 1967). A further distinction is found in the ten-year time limit for admissibility set by the Rule. North Dakota cases have established no express time limit. State v. Pfaffengut, 77 N.W.2d 521 (N.D. 1956).~~

~~This rule also varies from both Federal and Uniform Rule 609 by the omission of subdivision (c) which states:~~

~~"The pendency of an appeal therefrom does not render evidence of a conviction inadmissible. Evidence of the pendency of an appeal is admissible."~~

~~This is considered to be surplus language and not needed in our rule. The substance of subdivision (c) has actually been the law in North Dakota for many years. See State ex rel. Olson v. Langer, 65 N.D. 68, 256 N.W. 377 (N.D. 1934).~~

Rule 609 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Subdivision (a) was amended, effective January 1, 1995, to track the 1990 federal amendment.

Subdivision (a) was amended, effective March 1, 2008. The amendment states the circumstances under which evidence of a conviction of a crime involving dishonesty or false statement may be admitted.

Sources: Joint Procedure Committee Minutes: of September 28-29, 2006, pages 16-

18; September 23-24, 1993, page 21; November 7-8, 1991, pages 4-5; October 25-26, 1990, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; April 26-27, 1979, page 9; April 8, 1976, pages 28-29; October 1, 1975, page 5. ~~Rule~~ Fed.R.Ev. 609~~, Federal Rules of Evidence~~; Rule 609, SBAND proposal; Rule 609, Uniform Rules of Evidence (1974).

RULE 2.1. MENTAL HEALTH APPEALS UNDER N.D.C.C. CH. 25-03.1

(a) Filing notice of expedited appeal. An expedited appeal from an order under N.D.C.C. § 25-03.1-29 may be taken by filing a notice of appeal with the clerk of district court within 30 days after entry of the order.

(b) Content of notice of appeal. The notice of appeal must:

(1) specify the party or parties taking the appeal;

(2) designate the order being appealed;

(3) name the court to which the appeal is taken.

(c) Motion for temporary stay and specifications of error. Any motion for a temporary stay of the order appealed from while the appeal is pending must be served and filed with the notice of appeal along with specifications of error specifying the grounds for appeal. Any stay granted by the district court remains valid only if a temporary stay request is filed with the supreme court with the notice of appeal. Once the supreme court acts on the stay request, any district court stay terminates.

(d) Record on appeal. The record on appeal consists of the record required by Rule 10(a). A tape recording of the proceedings or an agreed statement of the case may substitute for the transcript.

(e) Briefs. Unless the appellant moves for a temporary stay of the order of the district court, the appellant's brief must be filed with the notice of appeal and served upon the opposing party at the time of filing. The appellee's brief must be served and filed no later

than 5 days after service of the appellant's brief. If the appellant moves for a temporary stay of the order of the district court, the appellant's brief must be served and filed no later than 3 days after the notice of appeal is filed and the appellee's brief must be served and filed no later than 3 days after service of the appellant's brief.

(f) Notice of appellant's presence at hearing. If the appellant intends to be present at the hearing, notice of the intention must accompany the notice of appeal. Any party may file a proposed interim order for issuance by the supreme court which will assure the appellant the opportunity to be present at the hearing on appeal while protecting the interest sought to be served by the order being appealed. The plans for implementing the proposed interim order must be stated with particularity.

(g) Motions. Any motion, other than a motion for temporary stay, must be filed within five days after service of the notice of appeal. Any party may file a response in opposition to a motion within five days after service of the motion.

(h) Application of other rules. To the extent they are not inconsistent with N.D.C.C. § 25-03.1-29 or this rule, all other rules of appellate procedure apply.

EXPLANATORY NOTE

Rule 2.1 was adopted, effective April 1, 1983; amended, effective March 1, 1998; March 1, 2003; March 1, 2008..

Rule 2.1 provides special procedures to accommodate the requirement in N.D.C.C. § 25-03.1-29 for a hearing within 14 days after the notice of appeal is filed in a mental health proceeding.

Rule 2.1 was amended, effective March 1, 2003. The language and organization of the rule were changed to make the rule more easily understandable and to make style and terminology consistent throughout the rules.

Subdivision (c) was amended, effective March 1, 2008, to make it clear that a party who seeks to stay an order that is appealed must request a temporary stay from the supreme court when the notice of appeal is filed. Under N.D.C.C. § 25-03.1-29, only the supreme court can stay an order once an appeal is commenced.

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 27-28; September 23-24, 1999, pages 9-10; September 26-27, 1996, page 18; February 17-18, 1983, pages 33-34.

Statutes Affected:

Considered: N.D.C.C. § 25-03.1-29.

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

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

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

(3) Effect of Motion on Notice of Appeal.

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

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

(ii) for arrest of judgment under Rule 34.

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

(C) A notice of appeal filed after the district court announces a decision, sentence, or

order, but before it disposes of any of the motions referred to in subparagraph (b)(3)(A), becomes effective upon the later of the following:

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

(ii) the entry of the judgment of conviction.

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

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

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

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

(c) Appeal in Contempt Case. A notice of appeal must be filed with the clerk of district court within 60 days after entry of the judgment or order being appealed. Upon a finding of excusable neglect or for good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal

for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

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

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

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

EXPLANATORY NOTE

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

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

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

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

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

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

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

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

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

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

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

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

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 27-20-56.

SUPERSEDED: N.D.C.C. § 28-27-04.

RULE 10. THE RECORD ON APPEAL

(a) Composition of record on appeal. The following items constitute the record on appeal:

(1) the original papers and exhibits filed in the district court;

(2) two copies of the transcript, if any; and

(3) a certified copy of the docket entries prepared by the clerk of district court.

(b) Order for transcript of proceeding.

(1) Appellant's duty to order. If an appeal is taken in a case in which an evidentiary hearing was held, the appellant must order a transcript of the proceedings as follows:

(A) two copies of the transcript must be ordered for the supreme court;

(B) one copy of the transcript must be ordered for each unrepresented party and each party separately represented;

(C) a complete transcript must be ordered, unless a stipulation is obtained from all affected parties specifying the portions that are not required for the purposes of the appeal;

(D) a transcript of any record of jury voir dire is not required, unless specifically requested by a party;

(E) the order for a transcript, and a copy of the stipulation of excluded portions, if applicable, must be filed with the clerk of district court with the notice of appeal.

(2) Information for order. An order for a transcript must include the following information:

(A) the caption of the case;

(B) the date or dates of trial;

(C) the number of copies required; and

(D) the names and addresses of the parties to be served with copies.

(3) Unreasonable refusal to stipulate. If a party affected by the appeal unreasonably refuses to stipulate to exclude from the transcript portions of the record not necessary to the resolution of the issues raised by the appellant, the party proposing the stipulation may apply to the district court for an order requiring the refusal party to pay for the unnecessary portions of the transcript and reasonable attorney's fees for making the application.

(4) Clerk of district court to transmit order. Within 3 days after an order for transcript is filed, the clerk must transmit the order to the person designated by the district court to prepare the transcript.

(c) Preparation of transcript.

(1) Time for furnishing transcript. Within 50 days after the order for transcript is filed with the clerk of district court, the person preparing the transcript must complete and file the transcript with the supreme court clerk unless an extension of time is received under subdivision (d).

(2) Submission of transcript.

(A) The person preparing the transcript must serve and file the transcript as follows:

(i) a copy of the transcript must be served on each party designated in the order for transcript;

(ii) proof of service of the transcript must be filed with the supreme court clerk;

(iii) two copies of the transcript must be filed with the supreme court clerk;

(iv) ~~a 3.5 inch computer diskette~~ an electronic copy of the transcript must be filed with, or the transcript must be electronically transmitted to, the supreme court clerk. All electronic transcripts must contain in a single file all the information contained in the paper transcript, including the cover, table of contents, and certifications, in the same order as in the paper transcript. The electronic transcript must include fixed line number and page numbers corresponding to those in the paper transcript.

(B) In an appeal of the determination of an administrative agency, the agency must file ~~a diskette~~ an electronic copy of the transcript or electronically transmit the transcript to the supreme court clerk unless the agency certifies the transcript was not prepared on a computer or word processor.

(3) Financial arrangements. The appellant or a party obligated under paragraph (b)(3) to pay transcription costs must provide advance payment for the estimated cost of preparing the transcript, provided:

- the person preparing the transcript serves a written estimate of the cost and a demand for payment on the appellant within 10 days after receipt of the order for transcript; or

- the person preparing the transcript serves a written estimate of the cost and a demand for payment on a party obligated by court order to pay transcription costs within 10 days after receipt of the order.

If the person preparing the transcript fails to serve a timely written estimate and a

timely demand for payment, the right to demand advance payment is waived. Advance payment is not required if transcription costs are to be paid by the state or an agency or subdivision of the state. If the appellant or obligated party fails to make the advance payment within 10 days after service of the demand, the person preparing the transcript may suspend preparation of the transcript until paid.

(d) Extension of time.

(1) Good cause. If the person preparing the transcript is unable to complete and file the transcript within 50 days after the order for transcript is filed, the district court for good cause shown may extend the time for completion of the transcript.

If preparation of the transcript has been suspended for failure of any party to make a timely advance payment upon demand, the district court for good cause shown by the party responsible for the delay, may extend the time for completion of the transcript, on such terms as the court may order.

(2) Request for extension. A request for an extension of time must be made within the time originally prescribed or within an extension previously granted for completion of the transcript. A district court may not extend the time for more than 90 days from the date when the first notice of appeal was filed. If the district court is without authority to grant the relief sought or has denied a request for an extension of time, the supreme court may on motion for good cause shown extend the time for completion of the transcript beyond the time allowed or fixed. If a request for an extension of time has been previously denied, the motion must set forth the denial and state the reasons for the denial, if any were given by the

district court.

(e) Form of transcript. Each transcript must conform to the requirements of Rule 31(b)(2) and 32 except as otherwise provided:

- lines must be numbered on the left margin;
- each page may not contain more than 27 lines or less than 25 lines;
- the left margin may not be more than 1 3/4 inches wide;
- the right margin may not be more than 3/8 inches wide;
- each question and answer must begin on a new line;
- an indentation for a new speaker or paragraph may not be more than 10 spaces from the left margin;
- each volume must be indexed as to every witness and exhibit;
- each page must be numbered consecutively;
- the accuracy of the transcript must be certified by the person preparing the transcript.

(f) Statement of evidence when proceedings not recorded or when transcript unavailable. If a transcript of a hearing or trail is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 10 days after being served. The statement and any objections or proposed amendments must then be submitted to the district court for settlement and approval. As settled and approved, the statement must be filed with the

supreme court clerk by the appellant within 60 days after the notice of appeal is filed.

(g) Agreed statement as record on appeal. In place of the record on appeal as defined in subdivision (a), the parties may prepare, sign, and submit to the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the supreme court's resolution of the issues. If the statement if truthful, it, - together with any additions that the district court may consider necessary to a full presentation of the issues on appeal - must be approved by the district court and must then be certified to the supreme court as the record on appeal. The clerk of district court must then send the statement to the supreme court within the time provided by Rule 11.

(h) Correction or modification of record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by the district court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record made by certified and forwarded;

- on stipulation of the parties; or

- by the district court before or after the record has been forwarded.

The supreme court, on proper suggestion or of its own initiative, may direct an omission or misstatement be corrected, and, if necessary, that a supplemental record be

certified and transmitted. All other questions as to the form and content of the record must be presented to the supreme court.

EXPLANATORY NOTE

Rule 10 was amended, effective 1978; March 1, 1986; January 1, 1995; March 1, 1998; March 1, 1999; March 1, 2001; technical amendments effective August 1, 2001; March 1, 2003; March 1, 2004; March 1, 2005; March 1, 2008.

Rule 10 was amended, effective January 1, 1995. The amendment allows a transcript to be prepared and certified from an electronic recording by someone other than the operator of recording equipment or a court reporter.

Rule 10 was amended, effective March 1, 2003. The language and organization of the rule were changed to make the rule more easily understandable and to make style and terminology consistent throughout the rules.

Subdivisions (a) and (c) were amended, effective March 1, 2005, to require only two copies of the transcript to be ordered and submitted to the supreme court.

Subdivision (b) was amended, effective March 1, 2004, to eliminate any requirement to obtain a transcript of the voir dire record, unless such a transcript is specifically requested by a party.

Subdivision (b) was amended, effective March 1, 2008, to require that a copy of the transcript be ordered for each unrepresented party.

Subdivision (c) was amended, effective March 1, 2008, to eliminate references to computer diskettes.

Sources: Joint Procedure Committee Minutes of January 25, 2007, page 16; January 30-31, 2003, pages 3-4; September 26-27, 2002, pages 14-15; April 26-27, 2001, pages 8-9; January 27-28, 2000, pages 9-12; September 23-24, 1999, pages 19-21; January 30, 1997, pages 9-10; September 26-27, 1996, page 18; April 28-29, 1994, pages 3-4; January 27-28, 1994, page 18; September 23-24, 1993, pages 20-21; March 28-29, 1985, pages 13-14; November 29, 1984, pages 5-6; May 25-26, 1978, pages 7-8; March 16-17, 1978, pages 1, 2, 9-13; January 12-13, 1978, pages 14-15; October 27-28, 1977, pages 2-3; September 15-16, 1977, pages 5-8, 16-18; June 2-3, 1977, pages 2-4. Fed.R.App.P. 10.

Statutes Affected:

Superseded: N.D.C.C. §§ 28-18-04, 28-18-05, 28-18-06, 28-18-07, 28-18-08, 28-27-07, 28-27-33, 29-23-01, 29-23-02, 29-23-03, 29-23-04, 29-23-08, 29-23-09.

Cross Reference: N.D.R.App.P. 3 (Appeal as of Right - How Taken), N.D.R.App.P. 7 (Bond for Costs on Appeal in Civil Cases), N.D.R.App.P. 11 (Transmission and Filing of the Record), and N.D.R.App.P. 12 (Docketing the Appeal).

RULE 14. ~~[RESERVED FOR FUTURE USE]~~ IDENTITY PROTECTION

(a) Form of Confidential References. In appellate briefs, at oral argument and in opinions, the following individuals may not be referred to by name but may be referred to by the individual's initials:

(1) the respondent in a mental health proceeding;

(2) the respondent and members of the respondent's family in a conservatorship or guardianship proceeding;

(3) the respondent in a juvenile proceeding;

(4) the child and parents in a proceeding to terminate parental rights;

(5) a minor child in a divorce, child custody, or child support case;

(6) a victim or alleged victim of a sexual offense.

(b) Modification of Electronic Opinions. Upon request, if the name of an individual eligible for protection under subdivision (a) appears in the electronic version of a specific appellate opinion, it must be replaced by the individual's initials and the opinion annotated with the words "Modified under N.D.R.App.P. 14."

EXPLANATORY NOTE

Rule 14 was adopted effective March 1, 2008.

This rule is not intended to create a separate cause of action.

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 28-29.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-34-02, 12.1-35-03, 14-15-16, 14-20-54, 25-03.1-43, 27-20-51.

RULE 25. FILING AND SERVICE

(a) Filing.

(1) Filing with clerk. A paper required or permitted to be filed in the supreme court must be filed with the supreme court clerk.

(2) Filing: Method and timeliness.

(A) In general. Filing may be accomplished by mail or delivery addressed to the clerk, but filing is not timely unless the clerk receives the papers within the time fixed for filing.

(B) Brief, appendix, transcript or petition for rehearing. A brief, appendix, transcript, or petition for rehearing is deemed filed on the day of mailing or deposit with a third-party commercial carrier.

(C) Electronic filing. Papers may be filed by electronic means to the extent provided and under procedures established in the court's administrative rules. A paper filed by electronic means in compliance with the court's administrative rules constitutes a written paper for the purpose of applying these rules.

(3) Filing motion with justice. If a motion requests relief that may be granted by a single justice, the justice may receive the motion for filing; the justice must note the filing date on the motion and give it to the clerk.

(b) Service of all paper required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a paper, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of service.

(1) Service may be any of the following:

(A) personal, including delivery to a clerk or a responsible person at the office of counsel;

(B) by mail; ~~or via a;~~

(C) by third-party commercial carrier. for delivery within three calendar days; or

(D) by electronic means.

(2) When reasonable, considering such factors as the immediacy of the relief sought, distance and cost, service on a party must be by a manner at least as expeditious as the manner used to file the paper with the court. If a party files a paper by electronic means, the party must serve the paper by electronic means unless the recipient of service cannot accept electronic service.

(3) ~~Personal service includes delivery of the copy to a clerk or other responsible person at the office of counsel.~~ Service by mail is complete upon mailing. Service via a third-party commercial carrier is complete upon deposit of the paper to be served with the commercial carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the paper was not received by the party served.

(d) Proof of service. A paper presented for filing must contain an acknowledgment of service by the person served or proof of service by the person who made service. Proof of service may appear on or be affixed to the paper filed. The clerk may permit a paper to be filed without acknowledgment or proof of service but must require acknowledgment or

proof of service to be filed promptly ~~thereafter~~.

EXPLANATORY NOTE

Rule 25 was amended, effective January 1, 1988; on an emergency basis, September 5, 1990; on an emergency basis, November 16, 1994; March 1, 1996; March 1, 1999; March 1, 2003; March 1, 2008.

This rule is derived from Fed.R.App.P. 25. Rule 25 was amended, effective March 1, 1999, to allow the use of a third-party commercial carrier as an alternative to the Postal Service. The phrase "commercial carrier" is not intended to encompass electronic delivery services.

Subdivision (a) provides papers are not ~~deemed~~ considered filed until they are received by the supreme court clerk. Briefs, appendices, transcripts, and petitions for rehearing are exceptions to this general rule.

Subparagraph (a)(2)(C), effective March 1, 2003, allows the court to accept papers filed by electronic means. Parties seeking to file papers by electronic means must consult ~~the court's administrative rules~~ N.D. Sup. Ct. Admin. Order 14 for electronic filing instructions.

Subdivision (c) was amended, effective March 1, 2008, to provide for service by electronic means. Parties seeking to serve papers by electronic means must consult N.D. Sup. Ct. Admin. Order 14 for electronic service instructions.

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

Rule 25 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 25. 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 25, 2007, page 17; April 25-26, 2002, pages 3-5; April 26-27, 2001, page 10; April 30-May 1, 1998, page 3; January 29-30, 1998, page 21; January 26-27, 1995, pages 6-7; September 29-30, 1994, page 12; February 19-20, 1987, pages 6-7; September 18-19, 1986, pages 14-15; May 25-26, 1978, page 10; March 16-17, 1978, pages 3-4. Fed.R.App.P. 25.

Statutes Affected:

Superseded: N.D.C.C. § 28-27-05.

Cross Reference: N.D.R.App.P. 10 (The Record on Appeal); N.D.R.App.P. 26(c) (Computing and Extending Time); N.D. Sup. Ct. Admin. Order 14 (Electronic Filing Pilot Project).

RULE 26. COMPUTING AND EXTENDING TIME

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

(1) Exclude the day of the act, event, or default that begins the period;

(2) Exclude intermediate Saturdays, Sundays, and legal holidays when the period is less than 11 days;

(3) Include the last day of the period unless it is a Saturday, Sunday, or legal holiday;

(4) As used in this rule, "legal holiday" means a day specified as a holiday in N.D.C.C. § 1-03-01.

(b) Extending time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. The court may not extend the time to file a notice of appeal, except as authorized by law.

(c) Additional time after service by mail or commercial carrier. When a party is required or permitted to act within a prescribed period after a paper is served ~~by mail or third-party commercial carrier~~ on that party, ~~3~~ three days must be added to the prescribed period unless the paper is delivered on the date of service stated in the proof of service. For purposes of this rule, a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

EXPLANATORY NOTE

Rule 26 was amended, effective January 1, 1988; March 1, 1999; March 1, 2001; March 1, 2003; March 1, 2008.

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 the time computations.

Under subdivision (b), amended effective March 1, 2003, any request for an extension of time should be made within the time originally prescribed or within an extension previously granted.

Subdivision (c) was amended, effective ~~March 1, 1999, to make the three-day extension for service by mail applicable when service is by commercial carrier. The requirement for a "third-party commercial carrier" means the carrier may not be a party to nor interested in the action, and it must be the regular business of the carrier to make deliveries for profit. A law firm may not act as or provide its own commercial carrier service with service complete upon deposit~~ March 1, 2008, to clarify that, unless a paper is delivered on the date of service as stated in the proof of service, three days are added to the prescribed period.

Rule 26 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 26. 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 25, 2007, pages 17-19;

September 27-28, 2001, pages 4-5; January 27-28, 2000, pages 16-17; January 29-30, 1998, page 21; February 19-20, 1987, page 7; September 18-19, 1986, page 15; May 25-26, 1978, pages 11-12. Fed.R.App.P. 26.

Cross Reference: N.D.R.App.P. 25 (Filing and Service); N.D. Sup. Ct. Admin. Order 14 (Electronic Filing Pilot Project).

RULE 28. BRIEFS

(a) Form of briefs. All briefs must comply with Rule 32.

(b) Appellant's brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

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

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

(3) in an application for the exercise of the original jurisdiction, a concise statement of the grounds on which the jurisdiction of the supreme court is invoked, including citations of authorities;

(4) a statement of the issues presented for review;

(5) a statement of the case briefly indicating the nature of the case, the course of the proceedings, and the disposition below;

(6) a statement of the facts relevant to the issues submitted for review, which identifies facts in dispute and includes appropriate references to the record (see Rule 28(f));

(7) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the

discussion of the issues);

(8) a short conclusion stating the precise relief sought.

(c) Appellee's brief. The appellee's brief must conform to the requirements of subdivision (b), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(d) Reply brief. The appellant may file a single brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities - cases (alphabetically arranged), statutes, and other authorities - with references to the pages of the reply brief where they are cited.

(e) References to parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the purchaser."

(f) References to the record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix

is prepared after the briefs are filed or if references are made in briefs to parts of the record not reproduced in the appendix, the references must be to the docket number of that part of the record. A party referring to evidence whose admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(g) Reproduction of statutes, rules, regulations, and other sources. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end of the brief.

(h) [Reserved].

(i) Briefs in a case involving a cross-appeal.

(1) An appellee and cross-appellant must file a single brief at the time the appellee's brief is due. This brief must contain the issues and argument involved in the cross-appeal as well as the answer to the appellant's brief.

(2) The appellant's answer to the cross-appeal must be included in the reply brief, but without duplication of statements, arguments, or authorities contained in the appellant's principal brief. To avoid duplication, references may be made to the appropriate portions of the appellant's principal brief.

(3) The cross-appellant may file a reply brief confined strictly to the arguments raised in the cross-appeal. This brief is due within 14 days after service of the appellant's reply brief; however, if there is less than 14 days before oral argument, the reply brief must be filed at least 3 days before argument.

(j) Briefs in a case involving multiple parties. Any number of parties may join in a single brief or may adopt by reference any part of another's brief. Parties may similarly join in reply briefs.

(k) Citation of supplemental authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed - or after oral argument but before decision - a party may promptly advise the court by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

(l) Requirements. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings, and free from burdensome, irrelevant or immaterial matters.

EXPLANATORY NOTE

Rule 28 was amended, effective March 1, 1986; January 1, 1988; March 1, 1994; March 1, 1996; March 1, 2003; March 1, 2008.

Under paragraph (b)(4), each legal issue should be stated as a question of law sufficiently specific to allow the court to understand the precise issue presented. Generalized statements such as, "Is the verdict supported by the evidence?" are not sufficient.

Under subdivision (f), references may be made to the docket number of parts of the record not reproduced as in the examples following: Answer, docket No. 2, p.7;

Motion for Judgment, docket No. 15, p.2; Transcript p.231.

Rule 28 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 28. 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. Substantive changes were made to conform this rule with the changes made in Rule 32.

Subdivision (a) was added to inform parties that all briefs must comply with Rule 32.

Subdivision (b);

Paragraphs (1) and (2) were amended, effective March 1, 2003, to separate the table of contents and the table of authorities into two distinct items in a brief.

Paragraphs (5) and (6) were amended, effective March 1, 2003, to require two separate statements - a statement of the case (the procedural history) and a statement of the facts.

Subdivision (c) was amended, effective March 1, 2003, to conform the appellee's brief with the appellant's brief, and to expand the items that need not be included in the appellee's brief.

Subdivision (h) was amended, effective March 1, 2003, to delete length limitations, which have been moved to Rule 32.

Subdivision (k) was added, effective March 1, 2003, to provide a means for parties to inform the court of authorities that come to a party's attention after a brief has been

filed or after oral argument.

Subdivision (l) was added, effective March 1, 2008, to explain requirements for briefs filed under Rule 28.

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 29-31; September 27-28, 2001, pages 7-9; April 27-28, 1995, pages 15-17; January 26-27, 1995, pages 6-7; September 29-30, 1994, pages 13-16; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 15-16; November 30, 1984, pages 32-33; October 19, 1984, pages 23-26; March 16-17, 1978, page 4; January 12-13, 1978, pages 15-18. Rule 28, Fed.R.App.P..

Statutes Affected:

Superseded: N.D.C.C. §§ 28-18-06, 28-18-09, 28-27-33, 29-23-01, 29-23-02, 29-23-03, 29-23-04, 29-23-08, and 29-23-09.

Cross Reference: N.D.R.App.P. 25 (Filing and Service), N.D.R.App.P. 30 (Appendix), N.D.R.App.P. 31 (Filing and Service of Briefs) and N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Papers).

RULE 31. SERVING AND FILING BRIEFS

(a) Time to serve and file a brief; Where filed. The appellant must serve and file a brief within 40 days after the date on which the transcript is filed but, if no transcript is ordered, within 40 days after the notice of appeal is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief; however, if there is less than 14 days before oral argument the reply brief must be filed at least 3 days before argument. All briefs must be filed with the supreme court clerk.

(b) Number of copies to be filed and served.

(1) Each brief must be served and filed as follows:

(A) one copy of each brief must be served on each unrepresented party and on counsel for each party separately represented;

(B) seven bound copies and an unbound original of each brief must be filed with the supreme court clerk;

(C) one electronic copy of each brief must be filed with ~~the supreme court clerk on a 3.5 inch diskette~~, or electronically transmitted to, the supreme court clerk~~;~~ unless the filing party certifies the brief was not prepared on a computer or word processor.

(2) All electronic copies of briefs ~~shall~~ must contain in a single file all information contained in the paper brief, including cover, table of contents, and certifications, in the same order as in the paper brief. ~~(A) A diskette~~ The electronic copy of a brief must be formatted

in WordPerfect; or, if WordPerfect is not available, Microsoft Word; or, if Microsoft Word is not available, ASCII; or other compatible electronic language authorized by the supreme court clerk.

~~(B) A diskette copy must contain a label indicating;~~

~~(i) the title and docket number of the case;~~

~~(ii) the name of the document contained on the diskette; and~~

~~(iii) the language format of the document.~~

(c) Consequence of failure to file. If an appellant fails to file a brief within the time provided by this rule or within ~~an~~ a time extended ~~time~~ by the court, the court on its own motion may dismiss the appeal or an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument.

EXPLANATORY NOTE

Rule 31 was amended, effective January 1, 1988; March 1, 1997; March 1, 1999; March 1, 2001; technical amendments effective August 1, 2001; March 1, 2003; March 1, 2008.

Rule 31 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 31. The language and organization of subdivisions (a) and (c) were changed to make the rule more easily understood and to make terminology and style consistent throughout the rules.

Subdivision (b) was amended, effective March 1, 2008, to require that a copy of each brief be served on each unrepresented party. The subdivision was also amended to update

requirements for filing an electronic copy with paper briefs. Information on electronic transmission of documents to the supreme court clerk can be found in N.D. Sup. Ct. Admin. Order 14.

Subdivision (c) was amended, effective March 1, 2008, to clarify extension and dismissal procedure.

Sources: Joint Procedure Committee Minutes of January 25, 2007, page 19; September 27-28, 2001, page 23; April 26-27, 2001, page 9; September 28-29, 1995, page 12; May 21-22, 1987, page 17; February 19-20, 1987, page 8; September 18-19, 1986, pages 2, 20; May 25-26, 1978, page 17; October 27-28, 1977, pages 6-7; September 15-16, 1977, pages 13-14. Fed.R.App.P. 31.

Cross Reference: N.D.R.App.P. 26(b) (Extending Time), N.D.R.App.P. 28 (Briefs), N.D.R.App.P. 30 (Appendix to the Briefs), ~~and~~ N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Papers), N.D. Sup. Ct. Admin. Order 14 (Electronic Filing Pilot Project).

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 ten characters per inch. The text, including quotations and footnotes, must be double-spaced with no more than 27 lines of type per page. Headings and footnotes must be in the same typeface as the text.

(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 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 81/2 by 11 inches in size. Documents of a size other than 81/2 by 11 inches may be included in the appendix but must be folded or placed in a file or folder within the 81/2 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 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; March 1, 2007; March 1, 2008.

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)(2) was amended, effective March 1, 2007, to specify the cover color for a petition for rehearing.

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) was amended, effective ~~March 1, 2003~~ March 1, 2008, ~~specifies~~ to transfer length requirements for petitions for rehearing to Rule 40.

SOURCES: Joint Procedure Committee Minutes of April 26-27, 2007, page 18; January 25, 2007, page 19; 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); N.D.R.App.P. 29 (Brief of an Amicus Curiae); N.D.R.App.P. 30 (Appendix to the Briefs); N.D.R.App.P. 40 (Petition for Rehearing).

RULE 40. PETITION FOR REHEARING

(a) Time to file; Content; Answer; Action by court if granted.

(1) Time. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request.

(4) Action by the court. If a petition for rehearing is granted the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission;

(C) issue any other appropriate order.

(b) Form of Petition; Length. A petition for rehearing must comply in form with ~~the requirements of~~ Rule 32. A petition for rehearing must contain all applicable items listed in Rule 28(b). Petitions for rehearing must comply with the following length requirements:

(1) 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.

(2) Page Limit for Monospaced Typeface. If monospaced typeface is used, a petition for rehearing may not exceed ten pages, excluding the table of contents, the table of citations, and any addendum.

(c) Service and filing. Copies of a petition for rehearing must be served and filed as prescribed by Rule 31(b).

EXPLANATORY NOTE

Rule 40 was amended, effective March 1, 2003; March 1, 2004; March 1, 2008.

This rule is derived from Fed.R.App.P. 40.

Subdivision (b) was amended, effective March 1, 2003, to specify that a petition for rehearing must comply with the ~~general~~ requirements of Rule 32. ~~Rule 32(c)(2) imposes specific requirement applicable to petitions for rehearing.~~

Subdivision (b) was amended, effective March 1, 2004, to specify that a petition for rehearing must contain the elements specified in Rule 28(b) that apply to the given petition. For example, a petition for rehearing that cites legal authorities must include a table of authorities as described in Rule 28(b)(2).

Subdivision (b) was amended, effective March 1, 2008, to include length requirements for a petition for rehearing.

Subdivision (c) was added, effective March 1, 2003, to clarify petition service and filing requirements.

Rule 40 was amended, effective March 1, 2003, in response to the December 1, 1998,

amendments to Fed.R.App.P. 40. 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 25, 2007, page 19; April 24-25, 2003, page 14; April 25-26, 2002, page 25; May 25-26, 1978, pages 19-20; March 16-17, 1978, pages 8-9. Fed.R.App.P. 40.

Statutes Affected:

Superseded: N.D.C.C. § 28-27-30.

Cross Reference: N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 31 (Filing and Service of Briefs); N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Papers).

RULE 44. CASE INVOLVING A CONSTITUTIONAL QUESTION WHEN THE STATE IS NOT A PARTY

If a party questions the constitutionality of a statute of the State of North Dakota in a proceeding in which the state or its agency, officer, or employee is not a party in an official capacity, the questioning party must give written notice to the attorney general immediately upon the filing of the record or as soon as the question is raised.

EXPLANATORY NOTE

Rule 44 was adopted, effective March 1, 2008.

Sources: Joint Procedure Committee Minutes of January 25, 2007, pages 19-20; Fed.R.App.P. 44.

Statutes Affected:

Considered: N.D.C.C. § 32-23-11.

RULE 8.3. CASE MANAGEMENT (DIVORCE CASES)

(a) Compulsory meeting.

Within 30 days after service of the complaint, the parties and their attorneys shall meet in person or by electronic means to prepare a joint informational statement (in the form shown in appendix C) and a preliminary property and debt listing. The complaint and joint informational statement must be filed no later than 5 days after the compulsory meeting. The parties shall exchange information and documentary evidence relating to the existence and valuation of assets and liabilities. At a minimum, the parties shall be prepared to exchange current paystubs, employment and income information, tax returns, preliminary pension information, and asset, debt and expense documentation. The parties shall determine at the meeting what additional information is necessary in order to complete the case. The parties shall decide at the meeting whether alternative dispute resolution methods are appropriate.

(b) Scheduling order.

Within 30 days after the informational statement is filed, the court shall issue its scheduling order. The court may issue the order after either a telephone or in-court scheduling conference, or without a conference or hearing if none is needed. The scheduling order may establish any of the following deadlines:

(1) Specific dates for the completion of discovery and other pretrial preparations;

(2) Specific dates for serving, filing, or hearing motions;

(3) Specific dates for completion of mediation/alternative dispute resolution;

(4) A specific date for the parties to complete parent/divorce education;

(5) A specific date for filing the property and debt listing;

(6) Specific dates for completion of custody/visitation evaluation;

(7) A specific date by which the parties will be prepared for the pretrial conference;

(8) A specific date by which the parties will be prepared for the trial~~, which once set will make the filing of a certificate of readiness and note of issue unnecessary~~; and

(9) A specific date for identification of witnesses and documents.

(c) Pretrial conferences.

(1) Each party shall complete a pretrial conference statement substantially in the form set forth in appendix D which must be served upon all parties and filed with the court at least 10 days prior to the date of the pretrial conference.

(2) Unless excused by the court for good cause, the parties and attorneys who will try the proceedings shall attend the pretrial conference, prepared to discuss settlement. If a stipulation is reduced to writing prior to the pretrial conference, the case may be heard as a default at the time scheduled for the conference. In that event, only one party need appear. If a party fails to appear at a pretrial conference, the court may dispose of the proceedings without further notice to that party.

(3) If the parties are unable to resolve the case, in whole or in part, at the pretrial conference, the court shall issue an order concerning any remaining discovery and motions, and identifying the contested issues for trial.

(4) Unless otherwise ordered, at least 10 days before trial, the parties shall file a joint property and debt substantially in the form set forth in appendix E. Each asset or liability must be numbered separately.

EXPLANATORY NOTE

Rule 8.3 was amended, effective March 1, 1986; August 1, 1996; March 1, 2008.

Paragraph (b)(8) was amended, March 1, 2008, to delete a reference to the note of issue and certificate of readiness.

Sources: Joint Procedure Committee Minutes of April 26-27, 2007, pages 14-15; January 25-26, 1996, pages 3-6; September 28-29, 1995, pages 3-11; June 22, 1984, page 10.

RULE 10.1. CONDUCT IN COURT

(a) Opening court. When the court is about to convene, appropriate court personnel shall, by a rap of the gavel, command attention and announce the approach of the judge. Everyone in the courtroom shall promptly and quietly rise and remain standing until appropriate court personnel, by proclamation, convenes the court and the judge is seated. Upon the close of the session, as announced by the judge, appropriate court personnel shall by a rap of the gavel command attention. Everyone in the courtroom shall promptly and quietly rise and remain standing until the judge has retired from the courtroom.

(b) Decorum.

(1) Anyone entering the courtroom while court is in session shall immediately be seated. Everyone shall behave in a quiet and orderly manner. No person may enter or leave the courtroom while the court is charging the jury, except in an emergency.

(2) Counsel shall stand while addressing the court, except when stating an objection. All statements and communications by counsel to the court must be clearly and audibly made from the counsel table. While the court is in session, counsel may not approach the bench for conversation without permission of the court.

(3) To the extent practicable, the examination of a witness must be conducted from the counsel table. Only one counsel for a party may examine any witness without permission of the court.

(4) Whenever practical and appropriate, a judge must be robed while presiding over

the trial of a case.

(5) During a court appearance, counsel or a court official shall refrain from wearing clothing suited primarily for sports or leisure time activities.

(c) Assignment of cases.

(1) Counsel shall observe the assignment of cases, and keep advised of the progress of business of the court, so as to be ready when a case is reached.

(2) No arrangement as to time or order of trial will be recognized unless approved by the court.

(d) Cameras, sound apparatus, and wireless communication devices prohibited. No camera, sound recorder, or other device, except one operated for an official purpose, by or under the direction of the court, may be used to photograph, record, or broadcast, a proceeding of the court, nor may those devices be brought in or allowed to remain in the courtroom while a proceeding is in progress. Unless the court permits otherwise, any wireless communication device in the courtroom must be turned off or muted. A juror may not possess any wireless communication device during deliberations.

(e) Arguments of counsel.

(1) One counsel per party. Unless otherwise permitted by the court, only one counsel appearing for a party may be allowed to argue any question to the court or jury.

(2) Unless otherwise permitted by the court, each party is limited to one hour of argument.

EXPLANATORY NOTE

Rule 10.1 was amended, effective March 1, 2001, March 1, 2008.

Subdivision (d) was amended, effective March 1, 2008, to prohibit juror possession of wireless devices during deliberation.

Sources: Joint Procedure Committee Minutes of September 28-29, 2006, pages 11-12; January 27-28, 2000, pages 17-18; June 21, 1984, pages 5-6.

Cross References: N.D. Sup. Ct. Admin. R. 21 (Electronic and Photographic Coverage of Court Proceedings).

ORDER 14. ELECTRONIC FILING PILOT PROJECT FOR THE SUPREME COURT

~~This order provides for electronic filing with the supreme court.~~

A. Electronic Filing.

1. Parties may electronically file documents with the supreme court. Documents filed electronically must be submitted by email to supclerkofcourt@ndcourts.gov.

2. A document filed electronically has the same legal effect as an original paper document.

3. The typed attorney or party name or facsimile signature on a document filed electronically has the same effect as an original manually affixed signature.

B. ~~Filing~~ Electronic Document Formats.

1. ~~Documents filed electronically may be submitted by email to supclerkofcourt@ndcourts.com. Emailed~~ All documents submitted to the court in electronic form must be in ~~portable document format (pdf) or~~ approved word processing format or portable document format (.pdf).

a. Approved word processing formats for documents ~~filed electronically~~ submitted in electronic form are WordPerfect, Word, and ASCII. Parties must obtain permission from the supreme court clerk in advance if they seek to submit documents in another word processing format.

b. All paragraphs must be numbered in ~~approved word processing format~~ documents submitted electronically. Reference to material in such documents must be to paragraph

number, not page number.

c. Hard page breaks must separate the cover, table of contents, table of cases, and body of approved word processing format briefs.

d. An appendix may be filed electronically in portable document format (.pdf) or by facsimile transmission. Except for limited excerpts showing a court's reasoning, district court transcripts that have been filed electronically with the supreme court may not be included in an appendix filed electronically.

2. Documents other than the appendix may be filed electronically with the supreme court clerk by facsimile only if e-mail submission is not possible. Documents filed by facsimile must be submitted to the supreme court clerk at 701-328-4480.

C. Time of filing.

1. A document in compliance with the Rules of Appellate Procedure and this order and submitted electronically to the supreme court clerk by 11:59 p.m. Bismarck time shall be considered filed on the date submitted.

2. Upon receiving ~~a~~ an electronic document ~~filed electronically~~, the supreme court clerk will issue an email confirmation that the document has been received.

3. A party filing a document electronically must pay any required filing fee.

4. A party filing electronically must pay for internal reproduction of the document by the supreme court.

a. No payment is required for motions and comments less than 20 pages in length, including appendices or attachments. A party electronically filing a motion or comment must

pay $.50 per page for each page in excess of 20 pages.

b. A party electronically filing any brief, whether in an appeal, request for supervision, or request for extraordinary writ, must pay $25. No payment is required for a reply brief or a petition for rehearing.

c. No payment is required for an appendix 100 pages or less in length. A party must pay $.50 per page for each appendix page in excess of 100 pages. The charges under this subparagraph apply to any appendix that is electronically filed, regardless of whether it is filed separately or with a brief, motion, or other request.

5. A party must pay all required fees and payments within five days of submitting a document filed electronically. If fees and payments are not paid within five days of submission, the document will be returned by the supreme court clerk and the party will be required to refile the document.

D. Electronic Service.

1. If a party files a document by electronic means, the party must serve the document by electronic means unless the recipient of service cannot accept documents served electronically.

2. If the recipient's e-mail address is published in the supreme court's online directory, a party may serve documents by electronic means at that e-mail address. A party may also contact the recipient and serve electronically documents at an e-mail address specified by the recipient. Attorneys may designate a law firm e-mail address as their e-mail address for the purpose of accepting electronic service.

3. Documents served electronically may be served by facsimile only if e-mail submission is not possible and if prior permission to serve by facsimile is granted by the recipient.

4. If a recipient cannot accept electronic service of a document, service under another means specified by N.D.R.App.P. 25(c) is required.

5. For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission.

E. Effective Date. This Order is effective December 1, 2004, and remains in effect until further order of the Court.

HISTORY: Adopted effective March 1, 2003; amended effective August 1, 2003; ~~further amended effective~~ December 1, 2004; March 1, 2008.

ORDER 16. ELECTRONIC FILING PILOT PROJECT FOR THE DISTRICT COURTS

A. Electronic Filing.

1. ~~Except for initial pleadings, parties~~ A party may electronically file documents in the district courts.

2. A document filed electronically has the same legal effect as a paper document.

3. The typed attorney, ~~or~~ party, notary public or other name or facsimile signature on a document filed electronically has the same effect as an original manually affixed signature.

B. Filing Formats. Documents filed electronically may be submitted by e-mail to the district court clerk. A directory of district court ~~clerk~~ e-mail addresses for electronic filing is available online at ~~the supreme court website~~ www.ndcourts.gov. E-mailed documents must be in portable document format (.pdf) or approved word processing format.

1. Approved word processing formats for documents filed electronically are WordPerfect, Word, and ASCII. Parties must obtain permission from the district court clerk in advance if they seek to submit documents in another word processing format.

2. All paragraphs must be numbered in ~~approved word processing format~~ documents filed electronically. Reference to material in such documents must be to paragraph number, not page number.

C. Time of Filing.

1. A document in compliance with the rules and submitted electronically to the district court clerk by 5:00 p.m. local time will be considered filed on the date submitted. A

court clerk by 5:00 p.m. local time will be considered filed on the date submitted. A document filed after 5:00 p.m. will be considered filed on the next business day.

2. Upon receiving a document filed electronically, the district court clerk will issue an e-mail confirmation that the document has been received.

3. A party filing a document electronically must pay any required filing fee.

4. A party filing electronically must pay a surcharge for internal reproduction of the document by the district court. No surcharge payment is required for documents less than 20 total pages in length. A party electronically filing a document must pay $.10 per page for each page in excess of 20 pages.

5. A party must pay all required fees within five days of submitting a document filed electronically. If fees are not paid within five days of submission, the document will be returned by the district court clerk and the party will be required to refile the document.

D. Electronic Service.

1. If a party files a document by electronic means, the party must serve the document by electronic means if the recipient consents to accept documents served electronically. Service by electronic means is not effective if the party making service learns that the attempted service did not reach the person to be served.

2. A party may designate an e-mail address as their e-mail address for the purpose of accepting electronic service.

3. If a recipient does not consent to accept electronic service of a document, service by another means specified in the rules is required.

4. For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission.

E. Effective Date. This Order is effective March 1, 2006, and remains in effect until further order of the Court. This Order was revised, effective March 1, 2008.