

20170045

State of North Dakota

JOINT PROCEDURE COMMITTEE

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CLERK OF SUPREME COURT
FEB 6 2017

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February 6, 2017

FILED
IN THE OFFICE OF THE
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FEB - 6 2017

STATE OF NORTH DAKOTA

Honorable Gerald W. VandeWalle, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Administrative Council Request for Amendments to North Dakota Court Rules

Dear Chief Justice:

In a letter dated December 27, 2016, the Administrative Council requested that the Joint Procedure Committee consider whether amendments to the rules may be needed in response to the Marsy's Law constitutional amendment, N.D. Const. art. I, § 25. The committee discussed the council's request at its January 26-27 meeting and developed several proposed amendments to the rules, which are explained below. Copies of the proposed amended rules are attached.

N.D.R.Crim.P. 15, Depositions: A new paragraph (a)(5) is proposed to provide that a victim may refuse to participate in a deposition requested by the defendant or the defendant's attorney. The right to refuse a deposition is granted by N.D. Const. art. I, § 25(1)(f).

N.D.R.Crim.P. 16, Discovery and Inspection: An amendment to subdivision (f) is proposed to bar a prosecutor from disclosing contact information of a victim if the victim has requested nondisclosure of this information under N.D. Const. art. I, § 25(1)(e). It is also proposed that the explanatory note be reorganized and flawed internal references in the rule text be corrected.

N.D.R.Crim.P. 32, Sentencing and Judgment: An amendment to subparagraph

(c)(4)(B) is proposed to allow the prosecutor to disclose to the victim, on request, any material from the presentence report disclosed to the defendant and the defendant's counsel. The right to this material is granted by N.D. Const. art. I, § 25(1)(l).

N.D.R.Juv.P. 4, Interested Persons: A new paragraph (3) is proposed to allow a victim, on request, to take part in a delinquency case. The right to participate in a delinquency case is granted by N.D. Const. art. I, § 25(1)(g) among other provisions.

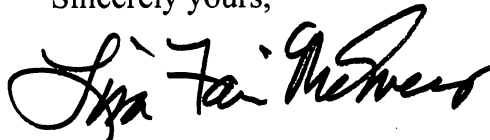
N.D.R.Juv.P. 12.1, Depositions: Amendments are proposed to paragraph (e)(1) to provide that a victim may refuse to participate in a deposition requested by a respondent or a respondent's attorney. The right to refuse a deposition is granted by N.D. Const. art. I, § 25(1)(f).

N.D.R.Ct. 3.4. Privacy Protection for Filings Made with the Court: Amendments are proposed to subdivision (a) to require, upon request of the victim, the redaction of all victim contact information from documents before they may be filed with the court in a criminal or delinquency case. This right is granted by N.D. Const. art. I, § 25(1)(e).

N.D. Sup. Ct. Admin. R. 41, Access to Court Records: A new paragraph 6(a)(6) is proposed to require, upon request of the victim, redaction of all victim contact information in a criminal court record. This right is granted by N.D. Const. art. I, § 25(1)(e). The Supreme Court's March 1, 2017, amendments are incorporated into the attached Rule 41 proposal.

The committee appreciates the Court's consideration of these proposals. Thank you for your attention to this matter.

Sincerely yours,

A handwritten signature in black ink, reading "Lisa Fair McEvers". The signature is fluid and cursive, with the first name "Lisa" being the most prominent.

Lisa Fair McEvers
Chair, Joint Procedure Committee

RULE 15. DEPOSITIONS

1 (a) When Taken. At any time after the defendant has appeared, any party
2 may take testimony of any person by deposition including audio-visual depositions
3 taken as provided in N.D.R.Civ.P. 30.1, except:

4 (1) the defendant may not be deposed unless the defendant consents and the
5 defendant's lawyer, if the defendant has one, is present or the defendant waives the
6 lawyer's presence;

7 (2) a discovery deposition may be taken after the time set by the court only
8 with leave of court;

9 (3) a deposition to perpetuate testimony may be taken only with leave of
10 court, which must be granted upon motion of any party if it appears that the
11 deponent may be able to give material testimony but may be unable to attend a trial
12 or hearing; and

13 (4) upon motion of a party or of the deponent and upon a showing that the
14 taking of the deposition does or will unreasonably annoy, embarrass, or oppress, or
15 cause undue burden or expense to, the deponent or a party, the court in which the
16 prosecution is pending or a court of the jurisdiction where the deposition is being
17 taken may order that the deposition not be taken or continued or may limit the
18 scope and manner of its taking. Upon demand of the objecting party or deponent,
19 the taking of the deposition may be suspended for the time necessary to make the

20 motion.; and

21 (5) a victim may refuse to participate in a deposition requested by the
22 defendant or the defendant's attorney.

23 Attendance of witnesses and production of documentary evidence and
24 objects may be compelled by subpoena under Rule 17.

25 (b) Witness Who Would Not Respond To Subpoena. If a party is granted
26 leave to take a deposition to perpetuate testimony, the court, upon motion of the
27 party and a showing of probable cause to believe that the deponent would not
28 respond to a subpoena, by order must direct a law enforcement officer to take the
29 deponent into custody and hold the deponent until the taking of the deposition
30 commences but not to exceed six hours and to keep the deponent in custody during
31 the taking of the deposition. If the motion is by the prosecuting attorney, the court,
32 upon further motion by the prosecuting attorney and a showing of probable cause
33 to believe the defendant would not otherwise attend the taking of the deposition,
34 may make the same order for the defendant.

35 (c) Notice Of Taking. The party at whose instance the deposition is to be
36 taken shall give all parties reasonable written notice of the name and address of
37 each person to be examined, the time and place for the deposition, and the manner
38 of recording. Upon motion of a party or of the deponent, the court may change the
39 time, place, or manner of record.

40 (d) How Taken. The deposition must be taken in the manner provided in

civil actions, except:

(1) if the deposition is taken at a place over which this state lacks jurisdiction, it may be taken instead in the manner provided by the law of that place;

(2) it must be recorded by the means specified in the notice; and

(3) upon motion of a party and a showing that a party or the deponent is engaging in serious misconduct at the taking of a deposition, the court by order may direct that the deposition's taking be continued in the presence of a designated officer, in which case the designated officer may preside over the remainder of the deposition's taking.

(e) Place Of Taking. The deposition must be taken in a building where the trial may be held, at a place agreed upon by the parties, or at a place designated by special or general order of the court. If the defendant is in custody or subject to terms of release that prohibit leaving the state and does not appear before the court and understandingly and voluntarily waives the right to be present, a deposition to perpetuate testimony must not be taken at a place which requires transporting the defendant within a jurisdiction that does not confer upon law enforcement officers of this state the right to transport prisoners within it.

(f) Presence Of Defendant.

(1) At Discovery Deposition. The defendant may be present at the taking of a discovery deposition, but if the defendant is in custody, the defendant may be

62 present only with leave of court.

63 (2) At Deposition To Perpetuate Testimony. The defendant must be present
64 at the taking of a deposition to perpetuate testimony, but if the defendant's counsel
65 is present at the taking:

66 (A) the court may excuse the defendant from being present if the defendant
67 appears before the court and understandingly and voluntarily waives the right to be
68 present;

69 (B) the taking of the deposition may continue if the defendant, present when
70 it commenced, leaves voluntarily; or

71 (C) if the deposition's taking is presided over by a judicial officer, the
72 judicial officer may direct that the deposition's taking or part of the deposition's
73 taking be conducted in the defendant's absence if the judicial officer has justifiably
74 excluded the defendant because of the defendant's disruptive conduct.

75 (3) Unexcused Absence. If the defendant is not present at the
76 commencement of the taking of a deposition to perpetuate testimony and the
77 defendant's absence has not been excused:

78 (A) its taking may proceed, in which case the deposition may be used only
79 as a discovery deposition; or

80 (B) if the deposition is taken at the instance of the prosecution, the
81 prosecuting attorney may direct that the commencement of its taking be postponed
82 until the defendant's attendance can be obtained, and the court, upon application of

83 the prosecuting attorney, by order may direct a law enforcement officer to take the
84 defendant into custody during the taking of the deposition.

85 (4) Taking Depositions Outside the United States Without the Defendant's
86 Presence. The deposition of a witness who is outside the United States may be
87 taken without the defendant's presence if the court makes case-specific findings of
88 all the following:

89 (A) the witness's testimony could provide substantial proof of a material
90 fact in a felony prosecution;

91 (B) there is a substantial likelihood that the witness's attendance at trial
92 cannot be obtained;

93 (C) the witness's presence for a deposition in the United States cannot be
94 obtained;

95 (D) the defendant cannot be present because:

96 (i) the country where the witness is located will not permit the defendant to
97 attend the deposition;

98 (ii) for an in-custody defendant, secure transportation and continuing
99 custody cannot be assured at the witness's location; or

100 (iii) for an out-of-custody defendant, no reasonable conditions will assure
101 an appearance at the deposition or at trial or sentencing; and

102 (E) the defendant can meaningfully participate in the deposition through
103 reasonable means.

104 (g) Payment Of Expenses. If the deposition is taken at the instance of the
105 prosecution, the court may, and in all cases where the defendant is unable to bear
106 the expense the court must, direct the state to pay the expense of taking the
107 deposition, including the reasonable expenses of travel and subsistence of defense
108 counsel and, if the deposition is to perpetuate testimony or if the court permits for
109 a discovery deposition, of the defendant in attending the deposition.

110 (h) Substantive Use On Grounds Of Unavailability. So far as otherwise
111 admissible under the rules of evidence, a deposition to perpetuate testimony may
112 be used as substantive evidence at the trial or upon any hearing if the deponent is
113 unavailable as defined in N.D.R.Ev. 804(a). A discovery deposition may then be so
114 used if the court determines that the use is fair in light of the nature and extent of
115 the total examination at the taking thereof, but it may be offered by the prosecution
116 only if the defendant was present at its taking. If only a part of a deposition is
117 offered in evidence by a party, an adverse party may require the offering of all of it
118 that is relevant to the part offered.

119 (i) Objections To Admissibility. Objections to receiving in evidence a
120 deposition or part of a deposition may be made as provided in civil actions.

121 (j) Deposition By Agreement Not Precluded. Nothing in this rule precludes
122 the taking of a deposition, orally or upon written questions, or the use of a
123 deposition, by agreement of the parties.

124 EXPLANATORY NOTE

Rule 15 was amended, effective January 1, 1980; March 1, 1990; March 1, 2006; March 1, 2016;_____.

Rule 15 is substantially the same as Rule 431, Uniform Rules of Criminal Procedure (1974). Former Rule 15, effective until January 1, 1980, was an adaptation of Fed.R.Crim.P. 15. The present rule provides for a greatly expanded use of depositions in criminal cases.

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

Rule 15 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) permits depositions to be taken to perpetuate testimony, as in the former rule, but also for discovery purposes, which was not previously provided for. Rather than requiring court approval of discovery depositions, this subdivision changes the emphasis by allowing them without court approval, subject to the right of a party or deponent to move under paragraph (4) to have a court order that the deposition be continued, not taken, or limited in scope or manner of taking. The court will set a time after which discovery depositions may not be taken without court permission. Leave of court is required for the taking of a deposition to perpetuate testimony.

Subdivision (a) was amended, effective March 1, 1990. The amendment was made to clarify the fact that audio-visual depositions may be taken under the rule. The amendment also provides that the method of taking audio-visual depositions is governed by N.D.R.Civ.P. 30.1.

Subdivision (a) was amended, effective _____, to add a new paragraph (a)(5) providing that a victim may refuse to participate in a deposition requested by the defendant or the defendant's attorney. This right is granted by N.D. Const. Art. I, § 25(1)(f). "Victim" is defined in N.D. Const. Art. I, § 25(4).

Subdivision (b) provides a method for securing the attendance of a deponent who would not respond to a subpoena. In addition, to ensure confrontation and the presence of the defendant required by subdivision (f)(2) to use the deposition at trial, the prosecuting attorney may move the court for an order to secure defendant's presence at the taking of a deposition.

Requirements for notice of the taking of a deposition are set forth in subdivision (c). The court may change the noticed time, place, or manner of recording upon motion of the deponent, as well as any party.

Subdivision (d) specifies that a deposition be taken in the same manner as in civil actions, with certain exceptions. Paragraph (1) covers depositions on enclaves over which the State of North Dakota lacks jurisdiction, such as Indian reservations, as well as depositions outside the physical boundaries of the state. Paragraph (2) allows depositions to be recorded by other than stenographic means,

167 without a court order. Provision is made in paragraph (3) for a court to designate
168 an official to preside over a deposition upon a showing of misconduct by a party or
169 the deponent.

170 The place of taking a deposition is governed by subdivision (e). Restriction
171 is placed on taking depositions outside of this state in situations where the
172 defendant may not travel or be transported to the proposed location, unless the
173 defendant waives the right to be present.

174 Subdivision (f) concerns the presence of the defendant at a deposition.
175 Distinction is made between a discovery deposition and one to perpetuate
176 testimony. The defendant is not required to be present at a discovery deposition,
177 but the defendant's presence may enable the prosecution to use the deposition as
178 substantive evidence at trial, as provided in subdivision (h). The taking of a
179 deposition to perpetuate testimony necessitates the defendant's presence, with four
180 exceptions: defendant is excused by the court upon an appearance and voluntary
181 waiver of the right to be present; defendant is voluntarily absent after start of
182 deposition; a judicial officer presiding over the deposition justifiably excludes the
183 defendant because of the defendant's disruptive conduct; or the court allows a
184 deposition to be taken outside the United States without the defendant's presence
185 after making case-specific findings. No warning is expressly required before
186 exclusion, as in Rule 43(b)(2). If the defendant is not present at a deposition to
187 perpetuate testimony under one of the above exceptions, the defendant's counsel

188 must be.

189 Paragraph (3) of subdivision (f) covers the situation when the defendant is
190 not present at the start of a deposition to perpetuate testimony and has not been
191 excused under paragraph (2). The taking may proceed as a discovery deposition or
192 the prosecuting attorney, if the prosecuting attorney is taking the deposition, may
193 postpone the taking and secure a court order to take the defendant into custody to
194 assure the defendant's presence, so that the deposition will have the greater
195 admissibility of a perpetuation deposition.

196 Paragraph (f)(4) was adopted, effective March 1, 2016, to allow a
197 deposition to be taken outside the United States without the defendant's presence
198 in certain specified circumstances. The provision was based on Fed.R.Crim.P.
199 15(c)(3).

200 SOURCES: Joint Procedure Committee Minutes of January 26-27, 2017,
201 pages ____; April 23-24, 2015, pages 26-27; January 27-28, 2005, page 12; April
202 20, 1989, pages 4-5; March 24-25, 1988, pages 6-7; December 3, 1987, pages 9-10
203 and 15; January 25-26, 1979, pages 5-7; December 7-8, 1978, pages 33-37;
204 October 12-13, 1978, page 3; April 2- 26, 1973, pages 9-10; June 26-27, 1972,
205 page 3; December 11-12, 1968, pages 2-24; September 26-27, 1968, pages 2-6;
206 Rule 431, Uniform Rules of Criminal Procedure (1974).

207 STATUTES AFFECTED:

208 SUPERSEDED: N.D.C.C. ch. 31-06.

209 CONSIDERED: N.D. Const. Art. I, § 25; N.D.C.C. ch. 31-04.

210 CROSS REFERENCE: N.D.R.Crim.P. 17 (Subpoena); N.D.R.Crim.P. 43

211 (Defendant's Presence); N.D.R.Civ.P. 30.1 (Uniform Audio-Visual Deposition

212 Rule); N.D.R.Ev. 804 (Hearsay Exceptions; Declarant Unavailable).

RULE 16. DISCOVERY AND INSPECTION

1 (a) Disclosure of Evidence by Prosecuting Attorney.

2 (1) Information Subject to Disclosure.

3 (A) Statement of Defendant. Upon a defendant's written request, the
4 prosecuting attorney must disclose to the defendant and make available for
5 inspection, copying, or photographing all of the following:

6 (i) any relevant written or recorded statement by the defendant, if:

7 —the statement is within the prosecution's possession, custody, or control;

8 and

9 —the prosecuting attorney knows—or through due diligence could
10 know—that the statement exists;

11 (ii) the portion of any written record containing the substance of any
12 relevant oral statement made before or after arrest if the defendant made the
13 statement in response to interrogation by a person the defendant knew was a
14 government agent;

15 (iii) the defendant's recorded testimony before a grand jury relating to the
16 charged offense; and

17 (iv) the substance of any other oral statement made by the defendant, before
18 or after arrest, in response to interrogation by a person the defendant knew was a
19 government agent.

20 (B) Organizational Defendant. Upon a defendant's request, if the defendant
21 is an organization such as a corporation, partnership, association, or labor union,
22 the prosecution must disclose to the defendant any statements described in Rule
23 16(a)(1)(A) if the prosecution contends that the person making the statement:

24 (i) was legally able to bind the defendant regarding the subject of the
25 statement because of that person's position as the defendant's director, officer,
26 employee, or agent; or

27 (ii) was personally involved in the alleged conduct constituting the offense
28 and was legally able to bind the defendant regarding that conduct because of that
29 person's position as the defendant's director, officer, employee, or agent.

30 (C) Defendant's Previous Record. Upon a defendant's written request, the
31 prosecution must furnish the defendant with a copy of the defendant's prior
32 criminal record, if any, that is within the prosecution's possession, custody, or
33 control if the prosecuting attorney knows—or through due diligence could
34 know—that the record exists.

35 (D) Documents and Objects. Upon a defendant's written request, the
36 prosecuting attorney must permit the defendant to inspect and to copy or
37 photograph books, papers, documents, data, photographs, tangible objects,
38 buildings, or places, or copies or portions of any of these items, if the item is
39 within the prosecution's possession, custody, or control, and:

40 (i) the item is material to preparing the defense;

41 (ii) the prosecution intends to use the item in its case-in-chief at trial; or

42 (iii) the item was obtained from or belongs to the defendant.

43 (E) Reports of Examinations and Tests. Upon a defendant's written request,
44 the prosecuting attorney must permit a defendant to inspect and to copy or
45 photograph the results or reports of any physical or mental examinations, and of
46 any scientific tests or experiments if:

47 (i) the item is within the prosecution's possession, custody, or control;

48 (ii) the prosecuting attorney knows—or through due diligence could
49 know—that the item exists; and

50 (iii) the item is material to preparing the defense or the prosecution intends
51 to use the item in its case-in-chief at the trial.

52 (F) Expert Witnesses. Upon a defendant's written request, the prosecution
53 must give to the defendant a written summary of any testimony that the
54 prosecution intends to use under N.D.R.Ev. 702, 703, or 705 during its
55 case-in-chief at trial. If the prosecution requests discovery under Rule
56 16(b)(1)(C)(ii) and the defendant complies, the prosecution must, upon the
57 defendant's written request, give to the defendant a written summary of testimony
58 that the government intends to use under N.D.R.Ev. 702, 703, or 705 as evidence
59 at trial on the issue of the defendant's mental condition. Expert witness summaries
60 must describe the witness's opinions, the bases and reasons for those opinions, and
61 the witness's qualifications.

(2) Information Not Subject to Disclosure. Except as Rule 16(a)(1) provides otherwise, this rule does not authorize the discovery or inspection of reports, memoranda, or other internal prosecution documents made by an attorney for the prosecution or other prosecution agent in connection with investigating or prosecuting the case. Nor does this rule authorize the discovery or inspection of statements made by prosecution witnesses or prospective prosecution witnesses (other than the defendant) to agents of the prosecution except as provided in Rule 16 (f).

(b) Defendant's Disclosure.

(1) Information Subject to Disclosure.

(A) Documents and Objects. If a defendant, in writing, requests disclosure under Rule 16 (a)(1)(~~C~~) or (D), and the prosecution complies, then the defendant, upon written request of the prosecution, must permit the prosecution to inspect and to copy or photograph books, papers, documents, data, photographs, tangible objects, buildings or places, or copies or portions of any of these items if:

(i) the item is within the defendant's possession, custody, or control: and

(ii) the defendant intends to use the item in the defendant's case-in-chief at trial.

(B) Reports of Examinations and Tests. If a defendant, in writing, requests disclosure under Rule 16(a)(1)(~~C~~) or (~~D~~) (E) and the prosecution complies, the defendant, upon written request of the prosecution, must permit the prosecution to

83 inspect and to copy or photograph the results or reports of any physical or mental
84 examination and of any scientific test or experiment if:

85 (i) the item is within the defendant's possession, custody, or control; and

86 (ii) the defendant intends to use the item in the defendant's case-in-chief at
87 trial or intends to call the witness who prepared the report and the report relates to
88 the witness's testimony.

89 (C) Expert Witnesses. The defendant must, upon written request of the
90 prosecution, give to the prosecution a written statement of any testimony that the
91 defendant intends to use under N.D.R.Ev. 702, 703, or 705 as evidence at trial, if:

92 (i) the defendant requests disclosure under Rule 16(a)(1)(E) and the
93 prosecution complies; or

94 (ii) the defendant has given notice under Rule 12.2(b) of an intent to present
95 expert testimony on the defendant's mental condition.

96 This summary must describe the witness's opinions, the bases and reasons
97 for these opinions, and the witness's qualifications.

98 (2) Information not Subject to Disclosure. Except for scientific or medical
99 reports, Rule 16(b) does not authorize the discovery or inspection of reports,
100 memoranda, or other documents made by the defendant or the defendant's attorney
101 or agent during the case's investigation or defense or of statements made to the
102 defendant, or the defendant's attorney or agent, by the defendant, a prosecution or
103 defense witness, or a prospective prosecution or defense witness.

(c) Continuing Duty to Disclose. A party who discovers additional evidence or material before or during trial must promptly disclose its existence to the other party or the court if:

(1) the evidence or material is subject to discovery or inspection under this rule; and

(2) the other party previously requested, or the court ordered, its production.

(d) Regulating Discovery.

(1) Protective and Modifying Orders. At any time the court may, for good cause, deny, restrict, or defer discovery or inspection, or grant other appropriate relief. Upon motion, the court may permit a party to show good cause by a written statement that the court will inspect in camera. If relief is granted following a showing in camera, the court must preserve the entire text of the party's statement under seal.

(2) Failure to Comply. If a party fails to comply with this rule or with an order issued under this rule, the court may:

(i) order that party to permit the discovery or inspection: specify its time, place and manner; and prescribe other just terms and conditions;

(ii) grant a continuance ;

(iii) prohibit that party from introducing the undisclosed evidence;

(iv) relieve the requesting party from making a disclosure required by this rule; or

(v) enter any other order that is just under the circumstances.

(e) Alibi Witnesses. Discovery of alibi witnesses is governed by Rule 12.1.

(f) Demands for Production of Names, Addresses, and Statements of Witnesses; Statements of Codefendants; Statements of Other Persons.

(1) Names, Addresses, and Statements of Prosecution Witnesses. Upon a defendant's written request, the prosecution must furnish the defendant:

(A) a written list of the names and addresses of all prosecution witnesses whom the prosecution intends to call during its case-in-chief;

(B) any statements made by the listed prosecution witnesses; and

(C) any records of prior criminal convictions of the listed prosecution witnesses that the prosecuting attorney knows—or by the exercise of due diligence could know—to exist.

A prosecutor may not disclose victim contact information, including the address of a victim, if the victim has requested nondisclosure. If a defendant makes a written request for discovery of the names, addresses, and statements of witnesses, the prosecuting attorney must be allowed to perpetuate the testimony of those witnesses under Rule 15.

(2) Statements of Codefendants. Upon a defendant's written request the prosecution must permit the defendant to inspect and to copy or photograph any relevant written or recorded confession, admission, or statement of a codefendant, or copies of any of these items if:

146 (A) the item is within the prosecution's possession, custody, or control; and

147 (B) the prosecuting attorney knows—or through due diligence could

148 know—that the item exists.(3) Statements of Other Persons. Upon a defendant's

149 written request, the prosecution must permit the defendant to inspect and to copy

150 or photograph any relevant written or recorded statement of any person if:

151 (A) the statement is within the prosecution's possession, custody, or control;

152 (B) the prosecuting attorney knows—or through the exercise of due

153 diligence could know—that the statement exists; and

154 (C) the statement is not available to the defendant under Rule 16(a) or

155 16(f)(1) and (2).

156 (4) The term "statement," as used in Rule 16(f) means:

157 (A) a written statement made by the witness, codefendant, or other person

158 and signed or otherwise adopted by the declarant; or

159 (B) a stenographic, mechanical, electronic, or other record, or a

160 transcription of a record, which is a substantially verbatim recital of an oral

161 statement made by the witness, codefendant, or other person to an agent of the

162 prosecution and recorded contemporaneously with the making of the oral

163 statement.

164 EXPLANATORY NOTE

165 Rule 16 was amended, effective September 1, 1983; March 1, 1990; March

166 1, 1994; March 1, 1997; March 1, 2006;_____.

167 Prior to the adoption of this rule, discovery proceeded on an informal basis.
168 The only requirement placed upon the prosecutor was the constitutional imperative
169 that the suppression by the prosecution of evidence favorable to an accused upon
170 request violates due process where the evidence is material either to the guilt or
171 punishment, irrespective of the good faith or bad faith of the prosecution.

172 While the rule, as amended, provides greater discovery, it is intended to
173 prescribe only the minimum amount of discovery to which the parties are entitled.
174 It is not intended to limit the judge's discretion to order broader discovery in
175 appropriate cases. Nor is it intended to prevent the voluntary disclosure of other
176 evidence or material by the parties at any time.

177 Rule 16 was amended, effective March 1, 2006, in response to the
178 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
179 language and organization of the rule were changed to make the rule more easily
180 understood and to make style and terminology consistent throughout the rules.

181 Subdivision (a)(1)(A) was amended, effective March 1, 1994, in response to
182 the 1991 federal amendment. The amendment to North Dakota's rule requires the
183 prosecution, upon written request, to disclose that portion of any written record
184 containing the substance of any oral statement made by the defendant in response
185 to interrogation by any person then known to the defendant to be an agent of the
186 government. The amendment also requires the prosecution, upon written request,
187 to disclose the substance of any oral statement made by the defendant in response

188 to interrogation by any person then known by the defendant to be an agent of the
189 government.

190 Unlike the federal rule, North Dakota's rule does not allow the government
191 to assess whether a written record containing the substance of an oral statement, or
192 the substance of an oral statement, is relevant. The written record containing the
193 substance of any oral statement, or the substance of any oral statement, must be
194 disclosed regardless of whether the prosecution considers the oral statement
195 relevant, and regardless of whether the prosecution intends to use the oral
196 statement.

197 Subparagraphs (a)(1)(E) and (b)(1)(C) were adopted, effective March 1,
198 2006. These provisions set conditions for reciprocal disclosure by the prosecution
199 and defendant of proposed expert witness testimony.

200 Subdivision (f) was adopted, effective September 1, 1983. The provisions
201 were drawn from Rules 421 and 422, Uniform Rules of Criminal Procedure
202 (1974); Standard 11-2.1, American Bar Association Standards for Criminal Justice
203 (2d ed. 1980); and Fed.R.Crim.P. 16's provision requiring disclosure of expert
204 witness information.

205 Subdivision (f) does not require, as did former subdivision (i), that the
206 person whose statement is produced must first have testified on direct examination.
207 It is intended that the listed statements be discoverable at any point in the
208 proceedings.

209 Subdivision (f) was amended, effective _____, to bar a
210 prosecutor from disclosing contact information of a victim if the victim has
211 requested nondisclosure under N.D. Const. Art. I, § 25(1)(e). “Victim” is defined
212 in N.D. Const. Art. I, § 25(4).

213 ~~Subdivision (a)(1)(A) was amended, effective March 1, 1994, in response to~~
214 ~~the 1991 federal amendment. The amendment to North Dakota's rule requires the~~
215 ~~prosecution, upon written request, to disclose that portion of any written record~~
216 ~~containing the substance of any oral statement made by the defendant in response~~
217 ~~to interrogation by any person then known to the defendant to be an agent of the~~
218 ~~government. The amendment also requires the prosecution, upon written request,~~
219 ~~to disclose the substance of any oral statement made by the defendant in response~~
220 ~~to interrogation by any person then known by the defendant to be an agent of the~~
221 ~~government.~~

222 ~~Unlike the federal rule, North Dakota's rule does not allow the government~~
223 ~~to assess whether a written record containing the substance of an oral statement, or~~
224 ~~the substance of an oral statement, is relevant. The written record containing the~~
225 ~~substance of any oral statement, or the substance of any oral statement, must be~~
226 ~~disclosed regardless of whether the prosecution considers the oral statement~~
227 ~~relevant, and regardless of whether the prosecution intends to use the oral~~
228 ~~statement.~~

229 ~~Subparagraphs (a)(1)(E) and (b)(1)(C) were adopted, effective March 1,~~

2006. These provisions set conditions for reciprocal disclosure by the prosecution
and defendant of proposed expert witness testimony.

SOURCES: Joint Procedure Committee Minutes of January 26-27, 2017,
pages ____; January 27-28, 2005, pages 12-13; April 25, 1996, page 15; January
25-26, 1996, pages 22-23; April 27-28, 1995, pages 2-3; September 29-30, 1994,
pages 7-9; April 28-29, 1994, pages 12-14; April 29-30, 1993, pages 10-11;
January 28-29, 1993, pages 12-13; April 20, 1989, page 4; December 3, 1987, page
15; February 17-18, 1983, pages 5-11; November 18-19, 1982, pages 5-10;
September 30-October 1, 1982, pages 3-6; April 15-16, 1982, page 1; December
7-8, 1978, pages 9-13; October 12-13, 1978, pages 3-8; September 27, 1974, page
4; October 17-20, 1972, pages 1-2; June 26-27, 1972, pages 9-14; December
11-12, 1968, pages 4-13; Fed.R.Crim.P. 16.

STATUTES AFFECTED: ~~None~~.

CONSIDERED: N.D. Const. Art. I, § 25.

CROSS REFERENCE: N.D.R.Crim.P. 12.1 (Notice of Alibi Defense);
N.D.R.Crim.P. 17.1 (Omnibus Hearing and Pretrial Conference); N.D.R.Ev. 612
(Writing or Object Used to Refresh Memory); N.D.R.Ev. 702 (Testimony by
Experts); N.D.R.Ev. 703 (Bases of Opinion Testimony by Experts); N.D.R.Ev. 705
(Disclosure of Facts or Data Underlying Expert Opinion). See also: N.D.C.C. ch.
29-10.1 (Grand Jury); N.D.C.C. ch.29-10.2 (State Grand Jury).

RULE 32. SENTENCING AND JUDGMENT

(a) Sentence.

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

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

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

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

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

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

(3) Notification of Right to Appeal. After imposing sentence in a case that has gone to trial, the court must advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to

20 apply for appointment of counsel for purposes of appeal. The court is under no
21 duty to advise the defendant of any right of appeal when sentence is imposed
22 following a plea of guilty.

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

27 (c) Presentence Investigation.

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

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

35 (3) Report.

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

39 (i) family, educational, and social history;

40 (ii) employment history and financial condition;

41 (iii) circumstances affecting the defendant's behavior that may be helpful in
42 imposing sentence or in the correctional treatment of the defendant; and

43 (iv) any information required by the court.

44 (B) Information Excluded from Report. The following types of information
45 may not be included in a presentence report, but may be submitted to the court as
46 an addendum to the report:

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

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

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

53 (iv) any victim impact statement; or

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

58 (4) Disclosure of Presentence Report.

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

62 (B) Disclosure to Defendant. If the court allows the defendant to examine
63 any part of the presentence report or any addendum, this disclosure must be made
64 at least 14 days before sentence is imposed, unless the defendant waives the
65 14-day requirement. The court must provide the defendant and the defendant's
66 counsel a copy of the disclosed material and give them an opportunity to comment.
67 The court may allow the defendant and the defendant's counsel to introduce
68 testimony or other information relating to any alleged factual inaccuracy in the
69 disclosed material. Any material disclosed to the defendant and the defendant's
70 counsel must also be disclosed to the prosecuting attorney who must disclose it to
71 the victim if requested to do so. Material from a presentence report and any
72 addendum disclosed under this provision must remain confidential and may not be
73 read or copied by anyone else except as allowed by Rule 32(c) or federal law.

74 (C) Disclosure to Attorney General. The court may disclose the presentence
75 report and any addendum to the Attorney General or the Attorney General's
76 designee only for purposes of the individual risk assessment required by N.D.C.C.
77 § 12.1-32-15 (12) and (13). A presentence report and addendum disclosed to the
78 Attorney General or the Attorney General's designee must remain confidential and
79 may not be read or copied by anyone else except as allowed by Rule 32(c) or
80 federal law.

81 (D) Disclosure to Department of Corrections and Rehabilitation. The
82 presentence report and any addendum is available to the Department of

83 Corrections and Rehabilitation for use in providing assessment and treatment
84 services to the person when in the Department's custody, on parole from the
85 Department, or under the supervision and management of the Department. The
86 Department may share the presentence report and any addendum with a public
87 treatment or transition facility or licensed private treatment or transition facility
88 providing assessment and treatment services to the person when in the
89 Department's custody, on parole from the Department, or under the supervision
90 and management of the Department. The Department may share the presentence
91 report and any addendum with the compact administrator of a supervising state in
92 accordance with the Interstate Compact for Adult Offender Supervision, N.D.C.C.
93 ch. 12-65. A presentence report and any addendum disclosed under this provision
94 must remain confidential and may not be read or copied by anyone else except as
95 allowed by Rule 32(c) or federal law.

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

103 (F) Defendant's Comments. If the comments of the defendant and the

defendant's counsel, or testimony or other information introduced by them, allege any factual inaccuracy in the presentence report or any addendum, or in any of the information summarized, the court, for each matter controverted, must:

(i) make a finding on the allegation, or

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

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

(d) [Transferred]

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

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

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

125 pending the hearing.

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

130 (3) Hearing.

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

132 (i) the probationer present;

133 (ii) a prior written notice of the alleged violation given to the probationer;

134 and

135 (iii) representation by retained or appointed counsel unless waived.

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

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

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

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

144 A record of the proceedings must be made.

145 EXPLANATORY NOTE

Rule 32 was amended, effective January 1, 1980; March 1, 1986; March 1, 1990; March 1, 1992, on an emergency basis; July 14, 1993; March 1, 1999; October 31, 2001, on an emergency basis; April 1, 2002; March 1, 2006; March 1, 2007; March 1, 2008; March 1, 2010; March 1, 2011;_____.

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

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

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

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

167 and federal statutes, rules and regulations governing drug and alcohol records, and
168 private medical information.

169 Paragraph (c)(4) was amended, effective March 1, 2008, to allow disclosure
170 of the presentence report and any addendum to the Department of Corrections and
171 Rehabilitation or its designees so that the Department can obtain assessment and
172 treatment services. Disclosure to the Department or its designees must comply with
173 all applicable state and federal statutes, rules and regulations governing drug and
174 alcohol records, and private medical information.

175 Subparagraph (c)(4)(B) was amended, effective March 1, 2011, to change
176 the time to disclose a presentence report from 10 to 14 days before sentence is
177 imposed.

178 Subparagraph (c)(4)(B) was amended, effective _____, to allow
179 the prosecutor to disclose to the victim, on request, any material from the
180 presentence report disclosed to the defendant and the defendant's counsel.
181 “Victim” is defined in N.D. Const. Art. I, § 25(4).

182 Subdivision (d) on withdrawal of guilty pleas was transferred to Rule 11
183 effective March 1, 2010.

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

Paragraph (f)(3) is adapted in part from the A.B.A. Standards for Criminal Justice, Standards Relating to Probation, § 5.4 at 65 (Approved Draft, 1970). Paragraph (f)(3) was amended, effective, March 1, 2007, to clarify that a probationer must be given the opportunity to make a statement and present mitigating information at a revocation hearing.

SOURCES: Joint Procedure Committee Minutes of January 26-27, 2017, pages ____; April 29-30, 2010, page 20; January 29-30, 2009, pages 11-13, 19-20; January 24, 2008; January 26, 2006, page 9; April 28-29, 2005, pages 3-5; January 27-28, 2005, pages 28-29; January 24-25, 2002, pages 9-14; January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30, 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6; December 7-8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15, 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February 20-21, 1969, pages 5-14; Fed.R.Crim.P. 32.

STATUTES AFFECTED:

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

CONSIDERED: N.D. Const. Art. I, § 25; N.D.C.C. §§ 1-01-41, 12-53-03, 12-53-04, 12-53-05, 12-53-06, 12-53-10, 12-53-11, 12-53-12, 12-53-13, 12-53-14,

209 12-53-17, 12-53-20, 12-55-30, 29-26-03, 29-26-11, 29-26-12, 29-26-13, 29-26-14,
210 29-26-16, 29-26-17, 29-26-18, 29-26-20, 29-26-23, 33-12-28.

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

RULE 4. INTERESTED PERSONS

Persons who may participate in a juvenile matter include:

(1) the parties as defined in Rule 3(b);

(2) the child's guardian ad litem;

(3) the victim in a delinquency case, if requested by the victim;

~~(3)~~ (4) in the case of an Indian child, the child's Indian custodian and Indian tribe through the tribal representative;

~~(4)~~ (5) in the case of a foster child, the child's foster parents, pre-adoptive parents and relatives providing care for the child;

~~(5)~~ (6) any other person who is named by the court to be important to a resolution that is in the best interests of the child.

EXPLANATORY NOTE

Rule 4 was adopted effective March 1, 2010. In these rules, the term "guardian ad litem" includes lay and attorney guardians ad litem. Amended effective_____.

Paragraph (3) was added, effective_____, to allow a victim, on request, to take part in a delinquency case. "Victim" is defined in N.D. Const. Art. I, § 25(4).

SOURCES: Juvenile Policy Board Minutes of February 20, 2009; December 5, 2008; August 8, 2008; May 9, 2008; February 29, 2008; September

20 21, 2007; April 20, 2007. Joint Procedure Committee Minutes of

21 January 26-27, 2017, pages_____; May 21-22, 2009.

22 STATUTES AFFECTED:

23 CONSIDERED: N.D. Const. Art. I, § 25; N.D.C.C. ch. 12.1-35.

24 CROSS REFERENCE: N.D.R.Juv.P. 3 (Contents of Petition); ~~N.D.C.C. ch.~~

25 ~~12.1-35 (Child Victim and Witness Fair Treatment Standards).~~

RULE 12.1 DEPOSITIONS

1 (a) Agreement of Parties. Upon agreement of the parties, a deposition may
2 be taken on oral examination.

3 (b) Order of Court. Following the initial appearance, any party may move
4 the court to order the testimony of any other person or party be taken by deposition
5 on oral examination, if:

6 (1) there is a reasonable probability that the witness will be unable to be
7 present or to testify at the hearing because of the witness' existing physical or
8 mental illness, infirmity, or death;

9 (2) the party taking the deposition cannot procure the attendance of the
10 witness at a hearing by a subpoena, order of the court, or other reasonable means;
11 or

12 (3) on a showing that the information sought cannot be obtained by other
13 means.

14 (c) Subpoena. Attendance of witnesses at oral deposition may be compelled
15 by subpoena as provided by Rule 13. Attendance of parties at oral deposition must
16 be ordered by the court when the court grants a motion under subdivision (b) and
17 must be procured through service of the order and a notice of the time and place of
18 the taking of the deposition on the party.

19 (d) Notice, Oath and Record.

20 (1) Notice. A party taking a deposition must give reasonable notice in
21 writing to each party to the action. The notice must state the time and place for
22 taking the deposition and the name and address of each person to be examined, if
23 known, and, if the name is not known, a general description sufficient to identify
24 the person or the particular class or group to which the person belongs.

25 (2) Oath and Record. The officer before whom the deposition is to be taken
26 must put the witness on oath and personally, or by someone acting under the
27 officer's direction and in the officer's presence, must record the testimony of the
28 witness. The testimony must be taken stenographically or recorded by audio-visual
29 means or any other means ordered. If requested by one of the parties, the testimony
30 must be transcribed. The court may order the cost of transcription paid by one or
31 some of, or apportioned among, the parties.

32 (e) Scope and Manner of Examination; Objections; Motion to Terminate or
33 Limit.

34 (1) ~~Consent Required~~ Participation.

35 (A) In no event shall the deposition of a child who is charged with an
36 offense be taken without the child's consent.

37 (B) A victim may refuse to participate in a deposition requested by a
38 respondent or a respondent's attorney.

39 (2) Scope and Manner of Taking. The scope and manner of examination
40 and cross examination in the taking of a deposition to be used at the hearing must

41 be the same as that allowed at the hearing.

42 (3) Objections. All objections made at the time of the examination to the
43 qualifications of the person taking the deposition, or to the manner of taking it, or
44 to the evidence presented or to the conduct of any person present at the depositions
45 and any other objection to the proceedings must be recorded by the officer before
46 whom the deposition is taken. Evidence objected to must be taken subject to the
47 objections unless the objection is based on the witness's use of the Fifth
48 Amendment.

49 (4) Motion to Terminate or Limit Examination. At any time during the
50 taking of the deposition, on motion of a party or of the deponent and upon a
51 showing that the examination is being conducted in bad faith or in such manner as
52 unreasonably to annoy, embarrass, or oppress the deponent or party, the court in
53 which the action is pending or the court in the district where the deposition is
54 being taken may order the officer conducting the examination to cease from taking
55 the deposition, or may limit the scope and manner of the taking of the deposition
56 by ordering as follows:

57 (A) that certain matters not be inquired into or that the scope of examination
58 be limited to certain matters, or

59 (B) that the examination be conducted with no one present except persons
60 designated by the court.

61 (f) Transcription, Certification and Filing. When the testimony is fully

transcribed, the officer must certify on the deposition the witness was duly sworn and the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer must securely seal the deposition in an envelope endorsed with the title of the case and marked "Deposition of (here insert name of witness)" and must promptly deliver or send the transcript by registered or certified mail or a traceable third-party commercial delivery service to the party noticing the deposition, who must be identified on the record. Upon the request of a party, documents and other things produced during the examination of a witness, or copies thereof, must be marked for identification and annexed as exhibits to the deposition, and may be inspected and copied by any party. The exhibits may then be used in the same manner as if annexed to the deposition.

(g) Failure to Appear. If a party giving notice of the taking of a deposition fails to attend and proceed therewith and another party attends in person or by attorney pursuant to the notice, the court may order the party giving the notice to pay to the other party the reasonable expenses incurred by that party and that party's attorney in attending, including reasonable attorney's fees.

EXPLANATORY NOTE

Rule 12.1 was adopted effective March 1, 2010. Amended
effective_____.

Paragraph (e)(1) was amended, effective_____, to provide
that a victim may refuse to participate in a deposition requested by a respondent or

83 a respondent's attorney. This right is granted by N.D. Const. Art. I, § 25(1)(f).

84 "Victim" is defined in N.D. Const. Art. I, § 25(4).

85 SOURCES: Joint Procedure Committee Minutes of January 26-27, 2017,

86 pages; Minn. R. Juv. Prot. P. 17.04(b), Minn. R. Juv. Del. P. 10.07,

87 N.D.R.Civ.P. 30.

88 STATUTES AFFECTED:

89 CONSIDERED: N.D. Const. Art. I, § 25.

RULE 3.4. PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT

(a) Redacted Filings.

(1) In General. Unless the court orders otherwise, in an electronic or paper filing with the court that contains an individual's social-security number, taxpayer-identification number, or birth date, the name of an individual known to be a minor, a financial-account number, a party or nonparty making the filing must include only:

(1) (A) the last four digits of the social-security number and taxpayer-identification number;

(2) (B) the year of the individual's birth;

(3) (C) the minor's initials; and

(4) (D) the last four digits of the financial-account number.

(2) Victim Information. If a victim requests, all victim contact information must be redacted from documents to be filed with the court in a criminal or delinquency case.

(b) Responsibility of Party or Nonparty to Redact. A party or nonparty making a filing with the court is solely responsible for ensuring that protected information does not appear on the filing.

(c) Exemptions from the Redaction Requirement.

The redaction requirement does not apply to the following:

20 (1) a financial-account number or real property address that identifies the
21 property allegedly subject to forfeiture in a forfeiture proceeding;

22 (2) the record of an administrative or agency proceeding;

23 (3) the record of a court or tribunal, if that record was not subject to the
24 redaction requirement when originally filed;

25 (4) a filing covered by Rule 3.4 (d);

26 (5) a court filing that is related to a criminal matter and that is prepared
27 before the filing of a criminal charge or is not filed as part of any docketed
28 criminal case;

29 (6) an arrest or search warrant;

30 (7) a charging document and an affidavit filed in support of a charging
31 document;

32 (8) the name of an individual known to be a minor when the minor is a
33 party, and there is no statute, regulation or rule mandating nondisclosure; and

34 (9) a defendant's date of birth in a court filing that is related to criminal
35 matters, non-criminal motor vehicle and game and fish matters, and infractions.

36 (d) Filings Made Under Seal. The court may order that a filing be made
37 under seal without redaction. The court may later unseal the filing or order the
38 person who made the filing to file a redacted version for the public record.

39 (e) Protective Orders. For good cause, the court may by order in a case:

40 (1) require redaction of additional information; or

41 (2) limit or prohibit a nonparty's remote electronic access to a document
42 filed with the court.

43 (f) Filing a Confidential Information Form.

44 (1) In General. A filing that contains redacted information must be filed
45 together with a confidential information form (shown in Appendix H) that
46 identifies each item of redacted information and specifies an appropriate identifier
47 that uniquely corresponds to each item listed. The form will be confidential except
48 as to the parties or as the court may direct. Any reference in the case to a listed
49 identifier will be construed to refer to the corresponding item of information.

50 (2) Defendant Information. In a criminal case, the prosecutor must file a
51 confidential information form that includes, when known, the defendant's social
52 security number.

53 (g) Non-conforming Documents.

54 (1) Waiver. A person waives the protection of Rule 3.4 (a) as to the person's
55 own information by filing it without redaction and not under seal.

56 (2) Sanctions. If a party fails to comply with this rule, the court on motion
57 of another party or its own motion, may order the pleading or other document to be
58 returned to the party for reformation prior to filing, with an extension of any
59 deadline to complete the filing. If the document has been filed, and an order to
60 reform is not obeyed, the court may order the document stricken.

61 EXPLANATORY NOTE

62 Rule 3.4 was adopted effective March 1, 2009. Rule 3.4 was amended,
63 effective March 15, 2009; March 1, 2010;_____.

64 Parties should limit the amount of protected information they include in
65 court filings. This rule requires parties to redact protected information when its
66 inclusion in a filing cannot be avoided.

67 This rule's redaction requirements are intended to exclude protected
68 information from public disclosure. Unless a document is also placed in a
69 non-restricted file, redaction of documents filed in cases that are confidential by
70 law or rule is not required.

71 The term "financial-account number" includes any credit, debit or electronic
72 fund transfer card numbers, and any other financial account number.

73 Documents containing redacted protected information must be filed
74 together with a confidential information form under subdivision (f) when a party is
75 required by statute, policy or rule to include the protected information in the
76 document. For example, N.D.C.C. § 14-05-02.1 requires a divorce decree to
77 contain the social security numbers of the parties to the divorce. Under subdivision
78 (f), a party to a divorce case may comply with this statute and the redaction
79 requirements of this rule by filing a confidential information form and a redacted
80 version of the decree in the public part of the file.

81 Subdivision (a) was amended, effective March 1, 2010, to eliminate the
82 requirement to redact addresses in criminal matters.

83 Subdivision (a) was amended, effective _____, to require, upon
84 request of the victim, the redaction of all victim contact information from
85 documents before they may be filed with the court in a criminal or delinquency
86 case. This right is granted by N.D. Const. Art. I, § 25(1)(e). “Victim” is defined in
87 N.D. Const. Art. I, § 25(4).

88 Subdivision (b) was adopted, effective March 1, 2010, to indicate it is the
89 responsibility of a party or nonparty making a court filing to refrain from including
90 protected information in the filing.

91 The clerk of court is not required to review a document filed with the court
92 for compliance with this rule.

93 Subdivision (c), formerly subdivision (b), was amended, effective March 1,
94 2010, to add a redaction exemption for the name of a minor when the minor is a
95 party and there is no statute, regulation or rule mandating nondisclosure of the
96 minor's name.

97 Subdivision (c), formerly subdivision (b), was amended, effective March 1,
98 2010, to add a redaction exemption for a defendant's date of birth in a court filing
99 that is related to criminal matters, non-criminal motor vehicle and game and fish
100 matters, and infractions.

101 Subdivision (f) was amended, effective March 1, 2010, to require that
102 state's attorneys file confidential information forms containing certain defendant
103 information when known.

Subdivision (g) was amended, effective March 1, 2010, to allow courts to order reformation of documents not in conformity with this rule prior to filing.

Sources: Joint Procedure Committee Minutes of January 26-27, 2017, pages____; September 24-25, 2009, pages 3-7; May 21-22, 2009, pages 28-44; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31.

Statutes Affected:

Considered: N.D. Const. Art. I, § 25; N.D.C.C. § 14-05-02.1

Cross Reference: N.D.R.Ct. 3.1 (Pleadings); N.D.Sup.Ct.Admin.R. 41 (Access to Judicial Records).

RULE 41. ACCESS TO COURT RECORDS

Section 1. Purpose.

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

Section 2. Definitions.

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

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

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

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

(b) "Court record" does not include:

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

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

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

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

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

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

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

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

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

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

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

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

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

41 Section 3. General Access Rule.

42 (a) Public Access to Court Records.

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

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

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

51 (b) When Court Records May Be Accessed.

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

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

62 writing if desired by the requestor.

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

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

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

75 Section 4. Methods of Access to Court Records.

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

77 (1) Request for Access. Any person desiring to inspect, examine, or copy a
78 court record must make an oral or written request to the clerk of court. If the
79 request is oral, the clerk may require a written request if the clerk determines that
80 the disclosure of the record is questionable or the request is so involved or lengthy
81 as to need further definition. The request must clearly identify the record requested
82 so that the clerk can locate the record without doing extensive research.

Continuing requests for a document not yet in existence may not be considered.

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

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

(b) Remote Access to Court Records.

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

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

(B) listings of new case filings, including the names of the parties;
(C) register of actions showing what documents have been filed in a case;
(D) calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing; and

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

(2) Access Regulation.

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

(B) Attorneys licensed in North Dakota may remotely access court records through the secure public access system.

(C) A record of a closed criminal case for which there is no conviction may not be remotely accessed through a name search except through the secure public access system.

(c) Requests for Bulk Distribution of Court Records.

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

(2) A request for bulk distribution of information not publicly accessible

can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes when the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the release of information under this subsection the requestor must comply with the provisions of Section 6.

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

(d) Access to Compiled Information From Court Records.

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

(2) Requesting compiled restricted information.

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

purposes.

(B) The request must:

(i) identify what information is sought,

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

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

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

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

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

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

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

The court may make such additional orders as may be needed to protect

information to which access has been restricted or prohibited.

Section 5. Court Records Excluded From Public Access.

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

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

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

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

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

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

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

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

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

188 (7) names of qualified or summoned jurors and contents of jury
189 qualification forms if disclosure is prohibited or restricted by order of the court;
190 (8) records of voir dire of jurors, unless disclosure is permitted by court
191 order or rule;
192 (9) records of deferred impositions of sentences resulting in dismissal;
193 (10) records of a case in which the magistrate finds no probable cause for
194 the issuance of a complaint;
195 (11) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected
196 information:
197 (A) except for the last four digits, social security numbers, taxpayer
198 identification numbers, and financial account numbers,
199 (B) except for the year, birth dates, and
200 (C) except for the initials, the name of an individual known to be a minor,
201 unless the minor is a party, and there is no statute, regulation, or rule mandating
202 nondisclosure;
203 (12) judge and court personnel work material, including personal calendars,
204 communications from law clerks, bench memoranda, notes, work in progress, draft
205 documents and non-finalized documents;
206 (13) party, witness and crime victim contact information gathered and
207 recorded by the court for administrative purposes, including telephone numbers
208 and e-mail, street and postal addresses;

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

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

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

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

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

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

(a) Request to Prohibit Access.

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

(2) The court must decide whether there are sufficient grounds to overcome the presumption of openness of court records and prohibit access according to

applicable constitutional, statutory and case law.

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

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

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

(6) If a victim requests, all victim contact information in a criminal court record must be redacted;

~~(6)~~ (7) If the court concludes, after conducting the balancing analysis and making findings as required by paragraphs (1) through (5), that the interest of justice will be served, it may prohibit public Internet access to an individual defendant's electronic court record in a criminal case:

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

(B) if the defendant is acquitted.

If the court grants a request to prohibit public Internet access to an

251 electronic court record in a criminal case, the search result for the record must
252 display the words "Internet Access Prohibited under N.D.Sup.Ct. Admin.R 41."

253 (b) Request to Obtain Access.

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

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

263 (c) Form of Request.

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

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

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

271 Section 7. Obligations Of Vendors Providing Information Technology

Support To A Court To Maintain Court Records.

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

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

EXPLANATORY NOTE

Adopted on an emergency basis effective October 1, 1996; Amended and adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1, 2009; March 15, 2009; March 1, 2010; March 1, 2012; March 1, 2015; March 1, 2016; March 1, 2017; _____. Appendix amended effective August 1, 2001, to reflect the name change of State Bar Board to State Board of Law Examiners.

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

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

293 N.D.R.Ct. 3.4.

294 Section 4(b) was amended, effective March 1, 2017, to allow the Supreme
295 Court to enact and implement policies to regulate remote access to court records,
296 to allow attorneys to remotely access court records through the secure public
297 access system, and to limit remote access by name search to pre-conviction records
298 in criminal cases.

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

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

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

313 Section 5(b)(8) was amended, effective March 1, 2010, to incorporate the

314 exemptions from redaction contained in N.D.R.Ct. 3.4(b). A document containing
315 protected information that is exempt from redaction under N.D.R.Ct. 3.4(b) is
316 accessible to the public.

317 Section 5(b)(10) was added, effective March 1, 2017, to exclude cases in
318 which a magistrate finds no probable cause for the issuance of a complaint from
319 public access.

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

323 Section 5(b)(13) was added, effective March 1, 2017, to exclude
324 information about patrons of the North Dakota Legal Self Help Center from public
325 access.

326 Section 6(a)(6) was added, effective _____, to require, upon
327 request of the victim, redaction of all victim contact information in a criminal court
328 record. This right is granted by N.D. Const. Art. I, § 25(1)(e). “Victim” is defined
329 in N.D. Const. Art. I, § 25(4).

330 Section 6(a)(~~6~~) (7) was added, effective March 1, 2012, to provide a method
331 for the court to prohibit public Internet access to an electronic case record when
332 charges against a defendant are dismissed or the defendant is acquitted. A request
333 under Section 6(a)(1) is required before the court can act to prohibit access under
334 Section 6(a)(6).

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

Joint Procedure Committee Minutes of January 26-27, 2017, pages _____; September 29-30, 2016, pages 6-9, 28-29; May 12-13, 2016, pages 22-25; January 28-29, 2016, pages 2-7; September 24-25, 2015, pages 15-16, 20-21; April 23-24, 2015, pages 8-10; April 24-25, 2014, page 27; April 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009, pages 28-44; January 29-30, 2009, pages 3-4; September 25, 2008, pages 2-6; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13, January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12. Court Technology Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003; Conference of Chief Justices/Conference of State Court Administrators: Guidelines for Public Access to Court Records.

Statutes Affected:

Considered: N.D. Const. Art. I, § 25.

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