IN THE SUPREME COURT
STATE OF NORTH DAKOTA

NOTICE OF COMMENT

Supreme Court No. 20190177

Proposed Amendments to Rule 11, North Dakota Rules of Civil Procedure, and Rules 3, 4 and 41, North Dakota Rules of Criminal Procedure, in Response to the Uniform Domestic Declarations Act

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[¶ 1] On June 6, 2019, the Joint Procedure Committee filed a petition to amend North Dakota Rules of Civil Procedure 11 and North Dakota Rules of Criminal Procedure 3, 4, and 41 in response to the Uniform Domestic Declarations Act. After review, the Court amended North Dakota Rules of Criminal Procedure 3, 4, and 41, and these amended rules, as well as North Dakota Rules of Civil Procedure 11, are available for review and comment at https://www.ndcourts.gov/supreme-court/dockets/20190177 and are attached. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposed rules. The Court considered the matter, and

[¶ 2] **ORDERED**, any person wishing to comment on the proposed rules may do so in writing by **Monday, August 12, 2019.** Written comments may be electronically filed through the North Dakota Supreme Court Portal at https://scefile.ndcourts.gov/ or e-mailed to Penny Miller, Clerk of the Supreme Court, at supclerkofcourt@ndcourts.gov. Mailed comments may be addressed to 600 E. Boulevard Ave., Bismarck, ND 58505-0530.

[¶ 3] The Supreme Court of the State of North Dakota convened the 10th day of July, 2019, with the Honorable Gerald W. VandeWalle, Chief Justice, the Honorable Daniel J. Crothers and the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, and the Honorable Jon J. Jensen, Justices, directing the Clerk of the Supreme Court to enter the above order.

Penny Miller
Clerk
North Dakota Supreme Court

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS

(a) Signature.

(1) In General. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name or by a party personally if the party is self-represented. The paper must state the signer's address, electronic mail address for electronic service, and telephone number. If the signer is an attorney, the paper must contain the attorney's State Board of Law Examiners identification number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(2) Notarization Not Required. Unless specifically required by court rule, a document filed with the court in a civil action is not required to be notarized. When any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, subscribed by the maker as true under penalty of perjury, and dated, in substantially the form set out at N.D.C.C. § 31-15-05. ~~following form: "I declare (or certify, verify, or state) under penalty of perjury that the~~

~~foregoing is true and correct." In addition to the signature, the date of signing and the county and state where the document was signed shall be noted on the document.~~

(b) Representations to the Court. By presenting to the court a pleading, written motion, or other paper, whether by signing, filing, submitting, or later advocating it, an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In General. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for Sanctions. A motion for sanctions must be made separately from

any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion, brief, and other supporting papers must be served under Rule 5, but must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. The respondent must have 10 days after a motion for sanctions is filed to serve and file an answer brief and other supporting papers. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the Court's Initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a Sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on Monetary Sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or

whose attorneys are, to be sanctioned.

(d) Inapplicability to Discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

(e) Limited Representation.

(1) Preparation of Pleadings. An attorney who complies with Rule 1.2 of the N.D. Rules of Prof. Conduct, may prepare pleadings, briefs, and other documents to be filed with the court by a self-represented party. The attorney's preparation of pleadings, briefs, or other documents does not constitute an appearance by the attorney in the case and no notice under Rule 11(e)(2) is required. Any filing prepared under this paragraph must be signed by the party designated as "self-represented."

(2) Limited Appearance.

(A) In General. An attorney who complies with Rule 1.2 of the N.D. Rules of Prof. Conduct, may make a "limited appearance" on behalf of an otherwise self-represented party involved in a proceeding to which these rules apply.

(B) Notice. An attorney who makes a limited appearance on behalf of an otherwise self-represented party must serve a notice of limited appearance on each party involved in the matter. The notice must state precisely the scope of the limited appearance. An attorney who seeks to act beyond the stated scope of the limited appearance must serve an amended notice of limited appearance. Upon completion of the limited appearance, the attorney must file and serve a "Certificate of Completion of Limited Appearance" as required by N.D.R.Ct. 11.2(d).

(C) Filing. If the action is filed, the party who received assistance of an attorney on

a limited basis must file the notice of limited appearance with the court.

(3) Scope of Rule. The requirements of this rule apply to every pleading, written motion and other paper signed by an attorney acting within the scope of a limited representation.

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997; August 1, 2001; March 1, 2009; March 1, 2011; March 1, 2014; August 1, 2016; March 1, 2018;_____.

Rule 11 governs to the extent Rule 11 and N.D.R.Ct. 3.2, conflict.

Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Fed.R.Civ.P. 11. North Dakota's rule differs from the federal rule in the following respects: 1) North Dakota's rule requires attorneys to cite their State Board of Law Examiners identification number when signing papers; and 2) North Dakota's rule does not require allegations or denials to be specifically identified when immediate evidentiary support is lacking.

Subdivision (a) was amended, effective March 1, 2014, to specify that the e-mail address required in documents signed by an attorney or party is the signer's e-mail address for electronic service.

Subdivision (a) was amended, effective March 1, 2018, to state that notarization is not generally required for documents filed in civil actions and to provide a method for using unsworn statements made under a penalty of perjury.

Subdivision (a) was amended, effective_____, to remove language

specifying the form of an unsworn declaration. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

Subdivision (e) was added, effective March 1, 2009, to permit an attorney to file a notice of limited representation indicating an intent to represent a party for one or more matters in a case, but not for all matters. An attorney must also serve a notice of termination of limited representation when the attorney's involvement ends. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to assist an otherwise self-represented party on a limited basis without undertaking full representation of the party. Under N.D.R. Prof. Conduct 1.2 (c) a lawyer may limit the scope of the representation if a client consents after consultation.

Subdivision (e) was amended, effective August 1, 2016, to add new paragraphs (1) and (2) providing additional details on the services an attorney may perform while assisting a self-represented party on a limited basis and indicating when notice of these services must be provided to other parties and the court. The new paragraphs are based on language from Neb. R. Prof. Conduct 3-501.2.

Rule 11 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of April 26, 2019, pages ___; September 29-30, 2016, pages 20-22; September 24-25, 2015, pages 2-11; April 23-24, 2015, pages 16-25; January 29-30, 2015, page 22; April 25-26, 2013, page 16; September

24-25, 2009, pages 13-14; January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-26; September 28-29, 1995, pages 2-3; April 27-28, 1995, pages 3-4; January 26-27, 1995, pages 8-10; September 29-30, 1994, pages 24-26; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 25-26; January 20, 1984, pages 16-18; September 20-21, 1979, page 7; Fed.R.Civ.P. 11.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. ch. 31-15.

CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers); N.D.R.Ct. 11.1 (Nonresident Attorneys); N.D.R.Ct. 11.2 (Withdrawal of Attorneys); N.D.R. Prof. Conduct 1.2 (Scope of Representation); N.D.C.C. §§ 28-26-01 (Attorney's Fees by Agreement-Exceptions-Awarding Costs and Attorney's Fees to Prevailing Party), and 28-26-31 (Pleadings Not Made in Good Faith).

[ALTERNATE DRAFT]

RULE 3. THE COMPLAINT

(a) General. The complaint is a written statement of the essential facts constituting the elements of the offense charged. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state, or ~~if made by a licensed peace officer,~~ must contain a written declaration that it is made and subscribed under penalty of perjury, and be presented to a magistrate. The complaint may be presented as provided in Rule 4.1.

(b) Magistrate Review. The magistrate may examine on oath the complainant and other witnesses and receive any affidavit filed with the complaint. If the magistrate examines the complainant or other witnesses on oath, the magistrate shall cause their statements to be reduced to writing and subscribed by the persons making them or to be recorded.

(c) Amendment. The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If the prosecuting attorney chooses not to pursue a charge contained in the initial complaint, a dismissal of that charge must be stated on the amended complaint.

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007; August 1, 2011; March 1, 2013; March 1, 2016; March 1,

2017;_____.

Subdivision (a) was amended, effective January 1, 1995, to allow a complaint to be subscribed and sworn to outside the presence of a magistrate. An effect of this amendment is to allow facsimile transmission of the complaint. For a listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The amendment does not preclude a magistrate from examining a complainant or other witnesses under oath when making the probable cause determination.

Subdivision (a) was amended, effective March 1, 1996, to clarify that the complaint is the initial document for charging a person with a misdemeanor or felony.

Subdivision (a) was amended, effective March 1, 2007, to specify that the complaint must contain a statement of the facts that establish the elements of the offense charged.

Subdivision (a) was amended, effective August 1, 2011, to eliminate language about the complaint being the initial charging document for all criminal offenses. N.D.C.C. § 29-04-05 was amended in 2011 to specify that ?A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned.?

Subdivision (a) was amended, effective March 1, 2013, to allow the complaint to be presented to the magistrate by telephone or other reliable electronic means under Rule 4.1.

Subdivision (a) was amended, March 1, 2017, to allow a licensed peace officer to make a complaint in a written declaration that it is made and subscribed under penalty of

perjury. This amendment facilitates submission of electronic documents to establish the grounds for a complaint. Any electronic signature on a document submitted under this rule by a licensed peace officer is considered to be that of the officer.

Subdivision (a) was amended, effective_____, to remove language limiting the use of unsworn declarations to peace officers. N.D.C.C. ch. 31-15 allows anyone to make an unsworn declaration that has the same effect as a sworn declaration. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

Subdivision (c) is similar to Rule 7(e).

Subdivision (c) was amended, effective March 1, 2016, to require a written dismissal to be stated on the amended complaint if the prosecuting attorney chooses not to pursue charges raised in the initial complaint.

Rule 3 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of April 26, 2019, pages___; September 24-25, 2015, pages 14-15, 29;January 26-27, 2012, page 25; April 28-29, 2011, pages 17-18; April 24-25, 2003, pages 25-26; January 26-27, 1995, pages 3-5; April 28-29, 1994, pages 20-22; January 27-29, 1972, pages 4-7 September 27-28, 1968, pages 1-2; November 17-18, 1967, page 2.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-01-13(1), 29-05-01 to the extent that it requires a

complaint to be sworn, 29-05-02 to the extent that it requires a complaint to be subscribed and sworn to before a magistrate, 29-05-03, 33-12-03, 33-12-04, 33-12-05, 33-12-16, 33-12-25.

CONSIDERED: N.D.C.C. ch. 31-15, §§ 29-04-05, 12-01-04(12), 29-01-14, 29-02-06, 29-02-07, 29-04-05, 29-05-01, 29-05-05.

CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 7 (The Indictment and the Information).

[ALTERNATE DRAFT]

RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance.

(1) Warrant. If it appears from the complaint~~,~~ or from an affidavit filed with the complaint, or from a written declaration made and subscribed under penalty of perjury ~~by a licensed peace officer~~, that there is probable cause to believe that a criminal offense has been committed by the defendant, the magistrate must issue an arrest warrant to an officer authorized by law to execute it. [Except as provided in subdivision (a)(2).] The finding of probable cause must be based upon evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the magistrate may examine under oath the complainant and any other witnesses produced, in which case the proceedings must be recorded. A magistrate who has not been admitted to practice law in this state may not issue a warrant until the complaint has been approved by the prosecuting attorney. If it appears to the magistrate from the complaint or other written evidence that the accused is likely to abscond before the prosecuting attorney can approve the complaint, and the magistrate so certifies on the complaint, the magistrate may issue a warrant without approval of the prosecuting attorney.

(2) Summons. The magistrate may issue a summons in lieu of a warrant if the magistrate has reason to believe that the defendant will appear in response to it or if the

defendant is a corporation.

(3) Failure of Defendant to Appear After Summons. If a defendant fails to appear in response to a summons or there is reasonable cause to believe that the defendant will fail to appear, a magistrate must issue an arrest warrant. If a defendant corporation fails to appear in response to a summons, a magistrate who is empowered to try the offense for which the summons was issued must enter a plea of not guilty and may proceed to trial and judgment without further process; a magistrate who is not so empowered must proceed as though the defendant had appeared.

(4) Additional Warrants or Summonses. A magistrate may issue more than one warrant or summons on the same complaint.

(5) Warrant or Summons by Telephone or Other Reliable Electronic Means. In accordance with Rule 4.1, the magistrate may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

(b) Form.

(1) Warrant. A warrant must:

(A) be in writing, in the name of the State of North Dakota;

(B) be signed by the issuing magistrate with the title of the magistrate's office;

(C) state the date of issuance and the municipality or county where issued;

(D) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(E) describe the offense charged against the defendant; and

(F) command the defendant be arrested and brought before the nearest available

magistrate.

The warrant may also have endorsed upon it the recommended or acceptable amount of bail if the offense is bailable.

(2) Summons. A summons must be in the same form as the warrant except that it must require the defendant to appear before a magistrate at a stated time and place and must inform the defendant that if the defendant fails to appear, an arrest warrant will issue.

(c) Execution; Service.

(1) Execution of Warrant. The warrant is directed to all peace officers of this state and may be executed only by a peace officer. It is executed by the arrest of the defendant and may be executed in any county of the state by any peace officer of this state. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant immediately upon request. If the officer does not possess the warrant at the time of the arrest, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request must show the original or a duplicate original warrant or a copy to the defendant as soon as possible.

(2) Service of Summons. The summons must be served in the manner provided for service of a summons in a civil action. Any person authorized to serve a summons in a civil action may serve a summons.

(d) Return.

(1) After executing a warrant, the officer must return it to the magistrate before whom the defendant is brought in accordance with Rule 5. The officer may do so by

reliable electronic means. At the request of the prosecuting attorney, an unexecuted warrant must be returned to and canceled by the magistrate who issued it.

(2) The person to whom a summons is delivered for service must return it to the magistrate before whom the summons is returnable on or before the return day.

(3) At the request of the prosecuting attorney made while a complaint is pending, a magistrate may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to a peace officer for execution or service.

(e) Defective Warrant or Summons; Amendment. No person arrested under a warrant or appearing in response to a summons may be discharged from custody or dismissed because of any informality in the warrant or summons, but the warrant or summons may be amended to remedy the informality.

EXPLANATORY NOTE

Rule 4 was amended, effective March 1, 2006; March 1, 2013; March 1, 2017;_____.

Subdivision (a) is derived from the Fed.R.Crim.P. 4. The most important aspect of subdivision (a) is the provision that a warrant for arrest may issue under this rule only if it appears from the complaint, from an examination under oath, or from any affidavit filed with the complaint, that there is probable cause for the magistrate to believe that a criminal offense has been committed by the defendant.

Subdivision (a) was amended, effective March 1, 2017, to allow a magistrate, in determining probable cause, to rely on a written declaration made and subscribed under penalty of perjury by a licensed peace officer. This amendment facilitates submission of

electronic documents to establish the grounds for a warrant or summons. Any electronic signature on a document submitted under this rule by a licensed peace officer is considered to be that of the officer.

Subdivision (a) was amended, effective_____, to remove language limiting the use of unsworn declarations to peace officers. N.D.C.C. ch. 31-15 allows anyone to make an unsworn declaration that has the same effect as a sworn declaration. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

Subdivision (a) further provides that a warrant or summons may issue on the basis of hearsay evidence provided the magistrate has adequate reason to believe that the hearsay information is both credible (truthful) and reliable (accurate). These provisions are deemed to be declaratory of existing law. The probable-cause provision must be read in light of the Fourth Amendment. The provision for hearsay merely prescribes the standard of credibility and reliability. It does not attempt to identify the situations in which evidence in the complaint is in fact adequate to meet the twin tests of credibility and reliability. This is an issue which must be dealt with on a case-to-case basis, taking into account the unlimited variations and sources of information and the opportunity of the informant to perceive accurately the factual data which the informant furnishes.

Subdivision (a) makes clear that the magistrate may require the complainant to appear personally and may examine the complainant or witnesses to determine whether probable cause exists. If the magistrate does hear from the complainant or witnesses, the testimony must be recorded. This is to insure that there exists an adequate basis for reviewing the propriety of the issuance of the warrant, if, for example, its issuance should

be attacked upon a subsequent motion to suppress evidence seized incident to the arrest. Subdivision (a) is also intended to make it possible for the magistrate to issue a summons in lieu of an arrest warrant even though not requested to do so by the prosecuting attorney.

Subdivision (a) also provides that where the magistrate is someone other than a person admitted to practice law in this state, the magistrate shall not issue a warrant until the complaint has been approved by the prosecuting attorney. This provision is intended to guard against non-law-trained magistrates, who because of their lack of legal expertise may have a problem with the requirement of probable cause. Subdivision (a), however, does provide that a warrant may be issued by such magistrate without the approval of the prosecuting attorney where the magistrate reasonably believes that the accused is likely to abscond the jurisdiction before the prosecuting attorney can approve the complaint, provided the magistrate so certifies on the complaint.

Paragraph (a)(2) provides the magistrate with some latitude in the exercise of discretion to issue the summons in cases where the magistrate reasonably believes that the defendant will appear in response to the summons. Paragraph (a)(2) also provides for the magistrate to issue a summons rather than a warrant where the defendant is a corporation. It provides that a summons will issue to a corporate defendant because as a practical matter it is not literally possible to make an arrest. Furthermore, the probability is that the corporation will appear and that the crime is not one of violence.

Paragraph (a)(3) provides a remedy in cases where the defendant fails to answer the summons. It follows the provisions of both Fed.R.Crim.P. 4 (a) and the Model Code

of Pre-Arraignment Procedure. This paragraph also provides for anticipatory remedy where there is failure of the summonee to appear.

Paragraph (a)(4) provides for the issuance of more than one warrant or summons on the same complaint. The provision for issuance of additional warrants on the same complaint embodies the practice provided in Fed.R.Crim.P. 4(a). When a complaint names several defendants, it may be desirable to issue separate warrants to each defendant in order to facilitate service and return, especially if the defendants are apprehended at different times and places.

Paragraph (a)(5) was added, effective March 1, 2013, to allow the magistrate to issue a warrant or summons based on information communicated by telephone or other reliable electronic means under the procedure set out in Rule 4.1.

Paragraph (b)(1) describes the form of the warrant. This paragraph requires that the warrant be in writing, that it be in the name of the State of North Dakota, and that it be signed by the issuing magistrate with the title of the magistrate's office. This differs from Fed.R.Crim.P. 4(b), in that the federal rule does not provide for the warrant to be in writing nor does it provide that it be in the name of the jurisdiction. The federal rule further differs in that it does not require that the signature of the issuing officer bear that officer's title, nor does it state the date when issued and the municipality or county where issued. The provision for the issuance of a warrant contemplates that the warrant will be issued in counties other than where the offense occurred.

The provision that the warrant be in the name of the State of North Dakota or in the name of a municipality, if the violation of a municipal ordinance is charged, is consistent with

these rules in providing for the issuance of a warrant for violations of municipal ordinances which are deemed criminal in nature. The provision for description of the offense charged satisfies the constitutional requirement that notice be given to the defendant of the offense charged.

The final provision of paragraph (b)(1) indicates that bail may be endorsed upon the warrant. The provision that a recommendation of an amount of bail acceptable be included in the warrant reflects the notion that the magistrate issuing the warrant is in a better position to determine the bail requirement than would be the nearest available magistrate to whom the defendant is brought, if not the issuing magistrate. The requirement that upon arrest the defendant be brought before the nearest available magistrate is adapted from the criminal rules of Alaska.

Paragraph (b)(2) provides that a summons will be in the same form as a warrant (in writing signed by the magistrate who issued it, etc.) and that it contain a warning that failure to respond to it will establish grounds for the issuance of a warrant.

Subdivision (c) directs that the warrant shall be directed to all peace officers of this State and further provides for its execution. The provision that the arresting officer need not have the warrant in possession at the time of the arrest is rendered necessary by the fact that a fugitive may be discovered and apprehended by any officer. It is impossible for a warrant to be in the possession of every officer who is searching for a fugitive or who unexpectedly might be in a position to apprehend a fugitive.

Paragraph (c)(2) provides for service of summons in substantially the same manner as civil actions under N.D.R.Civ.P. 4. This rule provides essentially the same

requirements as Fed.R.Civ.P. 4(c)(1). Provisions for ease of service in the case of a summons reflect the fact that the individual's right to remain at liberty is not infringed.

Subdivision (d) governs the return of the warrant or summons and is essentially the same as Fed.R.Crim.P. 4(c)(4). The return is not conclusive and an error in the return does not void the warrant, where no one was misled thereby, and facts stated in the return will not be accepted where testimony shows them to be untrue. This subdivision provides that in the case of an unexecuted warrant and upon request of the prosecuting attorney, the warrant shall be returned to the magistrate who issued it for cancellation. It further provides that a person to whom the summons was delivered shall appear on or before the return date stated on the face of the summons. Finally, subdivision (d) permits reissuance, upon request of the prosecuting attorney, of warrants which have been initially returned unexecuted but which have not been canceled, to be delivered to a peace officer for execution or service.

Subdivision (d) was amended, effective March 1, 2013, to allow the officer to return the warrant to the magistrate by reliable electronic means.

Subdivision (e) provides a remedy in cases where the warrant or summons is defective. It permits the prosecution to cure a defect which is deemed an informality in the warrant. There shall, however, be dismissal where the warrant is not sufficient on its face.

Rule 4 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and

terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of April 26, 2019, pages___; September 24-25, 2015, page 28; January 26-27, 2012, page 25-26; January 29-30, 2004, pages 21-22; January 27-29, 1972, pages 7-17; November 20-21, 1969, pages 15-16; May 3-4, 1968, pages 3-4; January 26-27, 1968, pages 4-7; Fed.R.Crim.P. 4.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-05-06, 29-05-07, 29-05-08, 29-05-09, 29-05-28, 29-05-29, 29-05-30, 33-12-06, 40-18-07, 40-18-08.

CONSIDERED: N.D.C.C. ch. 31-15; N.D.C.C. §§ 29-05-10, 29-05-23, 29-05-24, 29-05-25, 29-05-26, 29-05-27, 29-05-31, 40-11-11, 40-18-18.

CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction—Process—Service); N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means).

[ALTERNATE DRAFT]

RULE 41. SEARCH AND SEIZURE

(a) In General

(1) Definition. A search warrant is an order in writing, made in the name of the state, signed by the magistrate, directed to a peace officer, commanding the peace officer to search for property, evidence or a person.

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

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

(1) property that constitutes evidence of a crime;

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

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

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

(c) Issuing the Warrant.

(1) Warrant on Affidavit or Sworn Recorded Testimony.

(A) In General. A warrant other than a warrant on oral testimony under Rule 41

(c)(2) may issue only when the grounds for issuing the warrant are established in:

(i) a written declaration ~~by a licensed peace officer~~ made and subscribed under penalty of perjury, or

(ii) an affidavit or affidavits sworn to or sworn recorded testimony taken before a state or federal magistrate.

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

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

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

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

federal magistrate to whom it must be returned.

(2) Warrant by Telephonic or Other Reliable Electronic Means. In accordance with Rule 4.1, the magistrate may issue a warrant based on information communicated by telephone or other reliable electronic means.

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

(d) Execution and Return With Inventory.

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

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

electronically stored information that was seized or copied.

(3) Receipt. The officer taking property or evidence under the warrant must:

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

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

(C) preserve the property or evidence taken until the court directs its proper disposition.

(4) Return. The officer executing the warrant must promptly return it—together with a copy of the inventory—to the magistrate designated on the warrant. The officer may do so by reliable electronic means. The magistrate on request must give a copy of the inventory to the person from whom, or from whose premises, the property or evidence was taken and to the applicant for the warrant.

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

suppress under Rule 12.

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

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

(h) Scope and Definitions.

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

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

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

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

EXPLANATORY NOTE

Rule 41 was amended, effective September 1, 1983; March 1, 1990; March 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1, 2013; December 15, 2016;_____.

Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement the provisions of Article I, Section 8, of the North Dakota Constitution and the Fourth Amendment to the United States Constitution, which guarantee, "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and

seizures shall not be violated; and no warrant shall issue but upon probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized." To implement this constitutional protection, an illegal search and seizure will bar the use of such evidence in a criminal prosecution. The suppression sanction is imposed in order to discourage abuses of power by law enforcement officials in conducting searches and seizures.

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

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

Subdivision (a) was amended, effective December 15, 2016, to add language defining a search warrant.

Subdivision (b) describes the property, evidence or persons which may be seized

with a lawfully issued search warrant. Issuance of a search warrant to search for items of solely evidential value is authorized. There is no intention to limit the protection of the Fifth Amendment against compulsory self-incrimination, so items that are solely "testimonial" or "communicative" in nature might well be inadmissible on those grounds.

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

Paragraph (c)(1) was amended, effective December 15, 2016, to allow grounds for issuance of a search warrant to be established in a written declaration by a licensed peace officer made and subscribed under penalty of perjury. This amendment facilitates submission of electronic documents to establish the grounds for search warrants. Any electronic signature on a document submitted under this rule by a licensed peace officer is considered to be that of the officer.

Paragraph (c)(1) was amended, effective_____, to remove language limiting the use of unsworn declarations to peace officers. N.D.C.C. ch. 31-15 allows anyone to make an unsworn declaration that has the same effect as a sworn declaration. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

The provision for examination of the affiant before the magistrate is intended to assure the magistrate an opportunity to make a careful decision as to whether there is probable cause based on legally obtained evidence. The requirement that the testimony be

recorded is to insure an adequate basis for determining the sufficiency of the evidentiary grounds for the issuance of the search warrant if a motion to suppress is later filed.

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

Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a warrant based on information communicated by telephone or other reliable electronic means under the procedure set out in Rule 4.1.

Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective March 1, 2012, to provide guidelines for warrants authorizing the seizure of electronic storage media and electronically stored information and for the inventory of seized electronic material. The amendments were based on the December 1, 2009, amendments to Fed.R.Crim.P. 41.

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

Paragraph (d)(3) was amended, effective December 15, 2016, to require the officer

taking property or evidence under a warrant to preserve it until the court directs its disposition.

Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer to make a return by reliable electronic means.

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

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

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

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

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

SOURCES: Joint Procedure Committee Minutes of April 26, 2019, pages ; September 29-30, 2016, pages 2-5; January 26-27, 2012, pages 26-27; April 28-29, 2011, page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26; April 28-29, 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29, 1994, pages 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4;December 3, 1987, page 15; October 15-16, 1981, pages 12-15; December 7-8, 1978, pages 23-26; October 12-13, 1978, pages 15-19; April 24-26, 1973, page 14; December 11-15, 1972, pages 31-37; November 18-20, 1971, pages 3-9; September 16-18, 1971, pages 11-32; March 12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May 15-16, 1969, pages 21-23; Fed.R.Crim.P. 41.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-29-01, 29-29-02, 29-29-03, 29-29-04, 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14, 29-29-15, 29-29-16, 29-29-17.

CONSIDERED: N.D.C.C. ch. 31-15; N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3), 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.

N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and Pretrial Conference); N.D.R.Ct. 2.2(Facsimile Transmission); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).