

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20200229

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

[¶1] On August 27, 2020, the Joint Procedure Committee submitted proposed amendments to the North Dakota Rules of Civil Procedure, North Dakota Rules of Criminal Procedure, North Dakota Rules of Evidence, North Dakota Rules of Appellate Procedure, North Dakota Rules of Court, North Dakota Supreme Court Administrative Rules, and North Dakota Rules of Juvenile Procedure. On November 25, 2020, the Court adopted certain rules, denied amendments to one rule, and remanded N.D.R.Civ.P. 54, N.D.R.Crim.P. 32.1, and N.D.R.Ct. 3.2, and N.D.R.App.P. 34 to the Joint Procedure Committee for further review.

[¶2] On March 22, 2021 and May 10, 2021, the Joint Procedure Committee submitted proposed amendments to the remanded rules. The Committee also recommended amendments to N.D.R.Civ.P. 55. The proposals are available at <https://www.ndcourts.gov/supreme-court/dockets/20200229>. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal.

[¶3] IT IS HEREBY ORDERED that the amendments to North Dakota Rules of Civil Procedure 54, North Dakota Rules of Civil Procedure 55, and North Dakota Rules of Criminal Procedure 32.1 are ADOPTED effective August 1, 2021.

[¶4] IT IS HEREBY FURTHER ORDERED that as further amended by the Court, the amendments to North Dakota Rule of Appellate Procedure 34, are ADOPTED effective August 1, 2021.

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

Dated: May 20, 2021

/s/ Petra H. Mandigo Hulm
Clerk
North Dakota Supreme Court

RULE 54. JUDGMENT; COSTS

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

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

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

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

30.1-19.

(e) Costs and Disbursements; Objections; Attorneys' Fees.

(1) Costs and Disbursements. Costs and disbursements must be allowed as provided by statute.

(A) A party awarded costs and disbursements must ~~submit~~ serve and file a detailed, verified statement ~~to the clerk~~ of costs and disbursements within 30 days after entry of an order for judgment. ~~Upon receipt of the statement, the clerk must allow those costs and disbursements and insert them in the judgment. A copy of the statement must accompany the notice of entry of judgment.~~

(2 B) ~~Objections to Costs~~. Objections must be served and filed ~~with the clerk~~ within 14 days after ~~notice of entry of judgment~~ service of the statement or ~~within a longer time fixed by court order within the 14 days~~ such other time as the court, in its discretion, may allow. The grounds for objections must be specified.

(C) If objections are filed, the clerk must promptly submit them to the judge who ~~ordered the~~ issued the order for judgment. ~~The court by ex parte order must fix a time for hearing the objections. Unless otherwise directed by the court, the parties may waive the right to a hearing and submit written argument instead within a time specified by the court.~~ A party may request a hearing on objections within seven days of filing of the objections and must secure a time for hearing and serve notice upon all parties. A timely request for hearing must be granted.

(D) If no objections are filed within the time designated under this rule, the clerk

43 must allow the costs and disbursements included in the statement and insert them in the
44 judgment. If the court determines costs and disbursements under this rule, the clerk must
45 insert them in the judgment.

46 (3 2) Attorneys' Fees. A claim for attorneys' fees and related nontaxable expenses
47 not determined by the judgment must be made by motion.

48 (A) The motion must be served and filed within 21 days after notice of entry of
49 judgment.

50 (B) The motion must:

51 (i) specify the judgment and the statute, rule, or other grounds entitling the movant
52 to the award;

53 (ii) state the amount sought or provide a fair estimate of it; and

54 (iii) disclose, if the court so orders, the terms of any agreement about fees for the
55 services for which the claim is made.

56 (C) The trial court may decide the motion even after an appeal is filed.

57 EXPLANATORY NOTE

58 Rule 54 was amended, effective January 1, 1980; September 1, 1983; March 1,
59 1990; March 1, 1997; March 1, 1998; March 1, 2011; March 1, 2012;_____.

60 Under subdivision (b), entry of a final judgment adjudicating fewer than all of the
61 claims of all of the parties is permitted only in the infrequent harsh case involving
62 unusual circumstances where failure to allow an immediate appeal would create
63 demonstrated prejudice or hardship. The party requesting entry of judgment under

subdivision (b) carries the burden of establishing that unusual and compelling or out-of-the-ordinary circumstances exist and that prejudice or hardship will result if entry of judgment is denied. The district court must weigh the overall policy prohibiting piecemeal appeals against the exigencies of the case and must delineate the unusual or compelling circumstances justifying order of entry of judgment. If the district court does not enter judgment under Rule 54(b), a partial summary judgment adjudicating fewer than all of the claims of all of the parties is not a final judgment and is not immediately appealable. A party seeking to appeal must wait until the end of the case, when all claims have been resolved and final judgment has been entered, before filing an appeal.

Subdivision (e) was amended, effective _____, to provide a procedure for objections to be heard before costs and disbursements are inserted in the judgment and to include content requirements for motions seeking attorney fees.

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

Paragraph (e)(3 2) was amended, effective March 1, 2011, to increase the time to make a claim for attorneys' fees from 15 to 21 days after notice of entry of judgment.

Rule 54 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

85 SOURCES: Joint Procedure Committee Minutes of _____: January
86 28, 2021, pages 2-6; September 26, 2019, pages 6-12; April 26, 2019, pages 5-7; April
87 28-29, 2011, page 13; April 29-30, 2010, page 14; September 24-25, 2009, page 23;
88 January 30, 1997, page 8; January 25-26, 1996, pages 7-10; September 28-29, 1995, page
89 18; April 20, 1989, page 2; December 3, 1987, page 11; November 29, 1984, page 18;
90 September 30-October 1, 1982, pages 1-3; November 29-30, 1979, page 14; April 26-27,
91 1979, pages 19-20; Fed.R.Civ.P. 54.

92 CROSS REFERENCE: Rules N.D.R.Civ.P. 8 (General Rules of Pleadings),
93 N.D.R.Civ.P. 52 (Findings By the Court), N.D.R.Civ.P. 58 (Entry of Judgment),
94 N.D.R.Civ.P. 59 (New Trials-Amendment of Judgments) and N.D.R.Civ.P. 77 (District
95 Courts and Clerks), ~~N.D.R.Civ.P.~~; Rule N.D.R.App.P. 3 (Appeal as of Right-How
96 Taken), ~~N.D.R.App.P.~~. See also, Rules N.D.R.Civ.P. 20 (Permissive Joinder of Parties)
97 and N.D.R.Civ.P. 21 (Misjoinder and Non-Joinder of Parties), ~~N.D.R.Civ.P.~~.

RULE 55. DEFAULT; DEFAULT JUDGMENT

(a) Entry. If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear and the failure is shown by declaration or otherwise, the court may direct the clerk to enter an appropriate default judgment in favor of the plaintiff and against the defendant as follows:

(1) If the plaintiff's claim against a defendant is for a sum certain or a sum that can be made certain by computation, the court, on a declaration of the amount due and on production of the written instrument, if any, on which the claim is based, may direct the entry of judgment for the amount due plus costs and disbursements.

(2) In all other cases, the court, before directing the entry of judgment, must require the necessary proof to enable it to determine and grant any relief to the plaintiff. To this end, the court may:

(A) Hear evidence and assess damages;

(B) Direct a reference for an accounting or for taking testimony or for a determination of the facts; or

(C) Submit any issue of fact to a jury.

(3) A default judgment may be entered against a minor or incompetent person only if represented by a general guardian or other representative who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with a motion for judgment. Notice must be

served with the motion and must comply with N.D.R.Ct. 3.2(a).

(4) When service of the summons has been made by published notice, or by delivery of a copy outside the state, default judgment must not be entered until the plaintiff, if required by the court, has filed a court-approved bond that conforms to a court order regarding the restitution of property obtained from the judgment if a defense is later permitted and sustained. A bond is not required in actions involving the title to real estate or to foreclose mortgages or other liens.

(b) Judgment Against the State. A default judgment may be entered against the state, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

EXPLANATORY NOTE

Rule 55 was amended, effective March 1, 1990; March 1, 2003; March 1, 2011; March 1, 2021;_____. The explanatory note was amended, effective March 1, 2017.

Rule 55 is derived from Fed.R.Civ.P. 55, with several changes.

The federal rule contains a two-step process: entry of default and then entry of judgment. The first step is not specifically required in this rule. Subdivision (a) is a combination of the first two subdivisions of the federal rule, but specifies that the clerk cannot enter a default judgment without being directed to do so by the court, unlike the federal rule where the clerk can enter judgment in certain cases without court direction. Paragraph (2) authorizes the court to require proof before directing the default judgment.

Paragraph (4), derived partly from N.D.R.C. § 28-0906 (1943), authorizes the court to require a bond before judgment is entered when service of the summons has been made by publication or delivery out of the state, with certain exceptions.

Paragraph (a)(1) was amended, effective _____, to allow the court to direct the entry of judgment for the amount due plus costs and disbursements.

Former subdivision (b) was deleted from the rule effective March 1, 2011. The subdivision included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary; Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Subdivision (b) is identical to subdivision (d) of the federal rule, with the substitution of the state for United States.

The federal provision [subdivision (c)] for setting aside default was not adopted. See Rule 60(b) regarding relief from a judgment or order.

The operation of this rule is also directly affected by the Servicemember's Civil Relief Act, 50 U.S.C. §§ 3901, et seq. Section 3931 imposes specific requirements that must be fulfilled before a default judgment can be ordered or entered. If a default judgment is entered against a person in military service without compliance with the requirements of § 3931, the judgment may be vacated.

Rule 55 was amended, effective March 1, 1990. The amendments were technical

64 in nature and no substantive change was intended.

65 Rule 55 was amended, effective March 1, 2003. Paragraph (a)(3) was changed to
66 substitute the term "motion" for the term "application" and to require that a motion for a
67 default judgment must comply with N.D.R.Ct. 3.2(a).

68 Rule 55 was amended, effective March 1, 2011, in response to the December 1,
69 2007, revision of the Federal Rules of Civil Procedure. The language and organization of
70 the rule were changed to make the rule more easily understood and to make style and
71 terminology consistent throughout the rules.

72 Rule 55 was amended, effective March 1, 2021, to delete the term "affidavit" and
73 replace it with "declaration." This amendment was made in response to N.D.C.C. ch. 31-
74 15, which allows anyone to make an unsworn declaration that has the same effect as a
75 sworn declaration, such as an affidavit. N.D.C.C. § 31-15-05 provides the required form
76 for an unsworn declaration.

77 SOURCES: Joint Procedure Committee Minutes of _____; January
78 30, 2020, page 25; January 28-29, 2016, page 22; September 24-25, 2009, page 23;
79 September 27-28, 2001, pages 15-17; April 20, 1989, page 2; December 3, 1987, page 11;
80 November 29-30, 1979, page 15; Fed.R.Civ.P. 55. 55.

81 STATUTES AFFECTED:

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

83 CROSS REFERENCE: N.D.R.Civ.P. 5(a) (Service—When Required),
84 N.D.R.Civ.P. 6(d) (Motions), N.D.R.Civ.P. 7(b) (Motions and Other Papers),

85 N.D.R.Civ.P. 11. (Signing of Pleadings, Motions and Other Papers; Representations to
86 Court; Sanctions), N.D.R.Civ.P. 37(Failure to Make Discovery Sanctions), N.D.R.Civ.P.
87 54 (Judgment Costs), and N.D.R.Civ.P. 60 (Relief from Judgment or Order).

RULE 32.1. DEFERRED IMPOSITION OF SENTENCE

An order deferring imposition of sentence must require that, 61 days after expiration or termination of probation:

- (a) the defendant's guilty plea be withdrawn, or the guilty verdict be set aside;
- (b) the case be dismissed; and
- (c) the file be sealed.

The court may, by order, modify an order deferring imposition of sentence if a petition for revocation is filed no later than 60 days after expiration or termination of probation or if there is an outstanding bench warrant in the matter for which imposition of sentence was deferred.

EXPLANATORY NOTE

Rule 32.1 was amended, effective March 1, 2006; March 1, 2012; March 1, 2019; August 1, 2021.

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

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

An order deferring imposition of sentence is not a judgment. However, for purpose

of appeal, an order deferring imposition of sentence is equivalent to a judgment under N.D.R.Crim.P. 32(b).

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

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

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

Rule 32.1 was amended, effective August 1, 2021, to clarify that a petition seeking revocation of probation or modification of an order deferring imposition of sentence must be filed no later than 60 days after expiration or termination.

Rule 32.1 was amended, effective March 1, 2019, to delete language that made the rule applicable only in misdemeanor and infraction cases. Under the amendment, the rule applies in all cases in which an order deferring imposition of sentence was entered.

SOURCES: Joint Procedure Committee Minutes of January 28, 2021, pages 6-10; September 26, 2019, pages 19-20; April 27, 2018, pages 6-7; September 23-24, 2010, pages 23-24; January 27-28, 2005, page 29; January 29-30, 1998, pages 14-17; September 25-26, 1997, pages 8-10.

STATUTES AFFECTED:

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

46 CROSS REFERENCE: N.D.R.Crim.P. Form 8 (Order Deferring Imposition of

47 Sentence).

RULE 34. ORAL ARGUMENT

(a) Request for Oral Argument.

(1) Oral argument generally will be scheduled unless:

(a) a party has failed to file a timely brief;

(b) a party has challenged the sufficiency of the findings of fact or the adequacy of the evidence supporting a finding of fact but has failed to provide the court with the related transcripts;

(c) no request for oral argument has been made by any party as required by Rule 28(h);

(d) the parties have agreed to waive oral argument; or

(e) the court, in the exercise of its discretion, determines oral argument is unnecessary.

(2) Notice. The clerk of the supreme court must advise all parties whether oral argument will be scheduled and, if so, the date, time, and place for argument.

(3) Participation in Oral Argument. If oral argument is scheduled, a party that did not request oral argument in a principal brief must provide notice of an intent to participate. The notice must be served and filed within five days of service of the notice of oral argument under this rule.

(b) Time Allowed for Argument; Postponement. Regardless of the number of counsel on each side, the appellant will be allowed 30 minutes and the appellee will be allowed 20 minutes to present argument. The appellant may reserve up to 10 minutes for

23 rebuttal by notifying the clerk of court immediately prior to argument. Arguments on
24 motions will be granted only in extraordinary circumstances. A motion to postpone the
25 argument or to allow longer argument must be filed reasonably in advance of the hearing
26 date. A party is not obliged to use all of the time allowed, and the court may terminate the
27 argument at any time.

28 (c) Order and Content of Argument. The appellant opens and may reserve time to
29 conclude the argument. The opening argument may include a fair statement of the case.
30 Counsel must not read at length from briefs, records, or authorities.

31 (d) Cross-Appeals and Separate Appeals. Unless the court directs otherwise, a
32 cross-appeal or separate appeal must be argued when the initial appeal is argued. Parties
33 should not duplicate arguments.

34 (e) Nonappearance of a Party. If oral argument is scheduled and the appellee fails
35 to appear, the court must hear appellant's argument. If the appellant fails to appear the
36 court may hear the appellee's argument. If neither party appears, the case will be decided
37 on the briefs, unless the court orders otherwise.

38 (f) Submission on Briefs. If no oral argument is scheduled under Rule 34(a)(1), the
39 case will be submitted to the court on the briefs, unless the court directs otherwise.

40 EXPLANATORY NOTE

41 Rule 34 was amended, effective July 1, 1981; January 1, 1988; March 1, 1994;
42 March 1, 1997; March 1, 2003; October 1, 2014; March 1, 2019; August 1, 2021.

43 Under subdivision (b), in the case of multiple appellants or appellees, each side
44 must divide the time accorded unless additional time has been requested and granted. The

omission of subdivision (g) of the Federal Rule is not intended to prevent the use of any exhibits at oral argument.

Rule 34 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 34. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 2003, to make clear that the court has discretion to determine whether oral argument should or should not be permitted.

Subdivision (a) was amended, effective March 1, 2019, to outline when oral argument will or will not be scheduled.

Subdivision (a) was amended, effective August 1, 2021, to clarify the steps that a party that did not make an initial request for oral argument must take before being allowed to participate in oral argument.

Subdivision (b) was amended, effective August 1, 2021, to allow the appellant to reserve up to 10 minutes for rebuttal by notifying the clerk of court immediately prior to argument.

Rule 34 was amended, effective October 1, 2014, to replace “supreme court clerk” with “clerk of the supreme court.”

SOURCES: Joint Procedure Committee Minutes of January 28, 2021, pages 10-13; January 30, 2020, pages 25-27; April 25-26, 2002, pages 12-13; January 24-25, 2002, pages 19-21; September 28-29, 1995, page 13; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 20-21; April 26, 1984, page 30;

67 January 12-13, 1978, pages 22-23. Fed.R.App.P. 34.

68 STATUTES AFFECTED:

69 SUPERSEDED: N.D.C.C. §§ 28-31-04, 28-31-05, 29-28-23, 29-28-24, and
70 29-28-25.

71 CROSS REFERENCE: N.D.R.App.P. 28~~(h)~~ ~~(Cross=Appeals)~~ (Briefs).