

IN THE SUPREME COURT  
STATE OF NORTH DAKOTA

**NOTICE OF COMMENT**

Supreme Court No. 20220225

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

[¶1] On July 27, 2022, the Joint Procedure Committee submitted proposed amendments to North Dakota Rules of Civil Procedure 62, North Dakota Rules of Criminal Procedure 11, 43, and Form 9 – Appendix “A”, North Dakota Rules of Appellate Procedure 5, North Dakota Rules of Juvenile Procedure 14 and 16, North Dakota Rules of Evidence 412, North Dakota Rules of Court 3.4, and North Dakota Supreme Court Administrative Rules 39 and 40. The proposal is available at <https://www.ndcourts.gov/supreme-court/dockets/20220225>. 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.

[¶2] **IT IS ORDERED**, any person wishing to comment on the proposals may do so by email to Petra H. Mandigo Hulm, Clerk of the Supreme Court, at [supclerkofcourt@ndcourts.gov](mailto:supclerkofcourt@ndcourts.gov) or in writing addressed to 600 E. Boulevard Ave., Bismarck, ND 58505-0530, no later than **October 9, 2022**.

[¶3] The Supreme Court of the State of North Dakota convened 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.

[¶4] Dated: August 25, 2022

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

# **SYNOPSIS OF PROPOSED AMENDMENTS**

## **A. North Dakota Rules of Civil Procedure**

### **Rule 62 - Stay of Proceedings to Enforce a Judgment**

Amendment is proposed to provide for a stay of execution on a default judgment and proceedings to enforce it until 30 days have passed after its entry.

## **B. North Dakota Rules of Criminal Procedure**

### **Rule 11 - Pleas**

Amendment is proposed to allow waiver of a defendant's in-person acknowledgment when the court has approved waiver of the defendant's presence under Rule 43(b).

### **Rule 43 - Defendant's Presence**

Amendment is proposed to allow a represented defendant in a Class C felony case to waive presence for entry of a guilty plea or sentencing.

### **Form 9 - Appendix "A" Conditions for Sentence to Probation, Deferred or Suspended Sentence**

Amendment is proposed to simplify the language and organization of the form consistent with previous amendments to Form 9A.

## **C. North Dakota Rules of Appellate Procedure**

### **Rule 5 - Post-Judgment Mediation**

Amendment is proposed to require the mediation decision summary to be filed with the Supreme Court in all cases.

## D. North Dakota Rules of Juvenile Procedure

### Rule 14 - Motions

Amendment is proposed to replace the term “oral argument” with “hearing” and to require the hearing request to indicate whether the hearing will be for presenting evidence, oral argument, or both.

### Rule 16 - Modification and Vacation of Orders

Amendment is proposed to replace the term “oral argument” with “hearing” throughout the rule.

## E. North Dakota Rules of Evidence

### Rule 412 - Sex-Offense Cases: The Victim’s Sexual Behavior or Predisposition

Amendment is proposed to require the court in a criminal case to find on the record an overriding interest for courtroom closure before conducting an in camera hearing in chambers or a closed courtroom.

## F. North Dakota Rules of Court

### Rule 3.4 - Privacy Protection for Filings Made With the Court

Amendment is proposed to add a definitions section to the rule, to consolidate the rule’s provisions relating to redaction, and to clarify the process for protecting a filing from public access.

## G. North Dakota Supreme Court Administrative Rules

### Rule 39 - Recording District Court Trials and Proceedings, and Preparing Transcripts

Amendment is proposed to clarify responsibilities for recording trials and proceedings and preserving the record.

### Rule 40 - Access to Recordings of Proceedings in District Court

Amendment is proposed to explain how access to recordings of trials and proceedings may be obtained and to incorporate content from Trial Court Administration Policy 503 on accessing audio recordings.

RULE 62. STAY OF PROCEEDINGS TO ENFORCE A JUDGMENT.

(a) Automatic Stay. Except as provided in Rule 62(c) and (d), execution on a judgment and proceedings to enforce it are stayed for 30 days after filing notice of ~~its~~ entry of judgment or entry of default judgment unless the court orders otherwise.

(b) Stay by Bond or Other Security. At any time after judgment is entered, a party may obtain a stay by providing a bond or other security. The stay takes effect when the court approves the bond or other security and remains in effect for the time specified in the bond or other security.

(c) Stay of an Injunction or Receivership. Unless the court orders otherwise, the following are not stayed after being entered, even if an appeal is taken:

(1) an interlocutory or final judgment in an action for an injunction or receivership;  
or

(2) a judgment or order that directs an accounting.

(d) Injunction Pending an Appeal. While an appeal is pending from an interlocutory order or final judgment that grants, continues, modifies, refuses, dissolves, or refuses to dissolve or modify an injunction, the court may suspend, modify, restore, or grant an injunction on terms for bond or other terms that secure the opposing party's rights.

(e) Stay Without Bond on an Appeal by the State, Its Officers, or Its Agencies. The court must not require a bond, obligation, or other security from the appellant when

granting a stay on an appeal by the State, its officers, or its agencies or on an appeal directed by an agency or subdivision of the state government.

(f) Undertaking to Stay Execution for Delivery of Personal Property on Appeal. If the judgment directs the assignment or delivery of documents or personal property, its execution is not stayed on appeal unless:

(1) the matters required to be assigned or delivered are brought into court or are placed in the custody of a court-appointed officer or receiver; or

(2) an undertaking is entered into on behalf of the appellant by at least two sureties, for a sum as directed by the court, providing that the appellant will obey the order of the appellate court on appeal.

(g) To Stay Execution of Conveyance or Instrument on Appeal. If the judgment directs the execution of a conveyance or other instrument, its execution is not stayed on appeal, unless the instrument has been executed and deposited with the clerk with whom the judgment was entered to abide the appellate court's judgment.

(h) Undertaking to Stay Execution for the Sale or Delivery of Real Property on Appeal. If the judgment directs the sale or delivery of possession of real property, its execution is not stayed on appeal unless an undertaking is executed on behalf of the appellant by at least two sureties, for a sum as directed by the court. The undertaking must provide that during the possession of the property, the appellant:

(1) will not commit or allow to be committed any waste on the property; and

(2) if the judgment is affirmed, will pay the value of the use and occupation of the

property from the time of the appeal until the delivery of possession under the judgment.

(i) Undertaking to Stay Abatement of Nuisance on Appeal. If the judgment directs the abatement or restraint of the continuance of a public or private nuisance, its execution is not stayed on appeal unless an undertaking is entered into on behalf of the appellant by at least two sureties, for a sum as directed by the court, providing that the appellant will pay all damages that the opposing party may sustain by the continuance of the nuisance.

(j) Undertaking to Stay Other Executions on Appeal. If the judgment directs the performing of a particular act and there is no statutory provision regarding the undertaking to be given on appeal, its execution is not stayed on appeal unless an undertaking is executed on behalf of the appellant by at least two sureties, for a sum as directed by the court. The undertaking must provide that the appellant will pay all damages sustained by the opposing party by not performing the particular act directed to be done by the judgment and as further provided by the court.

(k) To Stay Intermediate Orders on Appeal. Unless otherwise directed by the court, the execution or performance of an order must not be delayed on appeal. If required, an undertaking must be executed on behalf of the appellant by at least two sureties in an amount and under terms as directed by the court. The terms of the undertaking must be in accordance with the order, and when applicable, must correspond to the provisions of these rules regarding appeals from judgments and no appeal from judgments. The provisions must be made in all cases that will properly protect the respondent.

An appeal from an intermediate order before judgment does not stay proceedings

64 unless the court orders otherwise.

65 (l) Appellate Court's Power Not Limited. While an appeal is pending, this rule  
66 does not limit the power of the appellate court or one of its judges or justices to:

67 (1) stay proceedings; or

68 (2) suspend, modify, restore, or grant an injunction; or

69 (3) issue an order to preserve the status quo or the effectiveness of the judgment to  
70 be entered.

71 (m) Stay With Multiple Claims or Parties. A court may stay the enforcement of a  
72 final judgment entered under Rule 54(b) until it enters a later judgment or judgments, and  
73 may prescribe terms necessary to secure the benefit of the stayed judgment for the party in  
74 whose favor it was entered.

75 (n) Order Staying Proceedings. The court may not order a stay of proceedings  
76 more than 21 days except to stay proceedings under an order or judgment appealed from  
77 or on previous notice to the opposing party.

#### 78 EXPLANATORY NOTE

79 Rule 62 was amended, effective September 1, 1983; March 1, 2011: March 1,  
80 2021\_\_\_\_\_.

81 Rule 62 is derived from Fed.R.Civ.P. 62, with several added provisions.

82 Subsection (a) was amended, effective September 1, 1983, to provide that no  
83 execution shall issue upon a judgment nor shall proceedings be taken for its enforcement  
84 until the expiration of 10 days after “notice of” its entry, rather than its entry except in a

85 default judgment the time begins to run from the date of entry. Federal subdivision (f),  
86 concerning a stay according to state law, was deleted. In its place, subdivisions (f), (g),  
87 (h), (i), (j), and (k), derived from Sections 28-2712 through 28-2717, NDRC 1943, were  
88 inserted. These contain mostly provisions requiring an undertaking to stay certain  
89 proceedings. Subdivisions (l) and (m) are identical to subdivisions (g) and (h) in the  
90 federal rule. Subdivision (n), taken from Section 28-2807, NDRC 1943, was added  
91 setting a time limit on how long an order may be made effective.

92 Subdivision (a) was amended, effective March 1, 2011, to increase the time of the  
93 automatic stay from 10 to 14 days.

94 Subdivision (a) was amended, effective March 1, 2021, to increase the time of the  
95 automatic stay from 14 to 30 days. Former subdivision (b) on stay pending disposition of  
96 a motion was deleted as unnecessary given the increased period of the automatic stay.

97 Subdivision (a) was amended, effective \_\_\_\_\_, to stay execution  
98 on a default judgment and proceedings to enforce it until 30 days have passed after its  
99 entry.

100 A new subdivision (b) was added, effective March 1, 2021, expanding the  
101 circumstances under which a stay by bond may be obtained. Former subdivision (d) was  
102 deleted as unnecessary given the expansion of the stay by bond under subdivision (b).

103 A new subdivision (c) was added, effective March 1, 2021, to contain language on  
104 stay of an injunction, receivership or accounting previously found in subdivision (a).  
105 Former subdivision (c) was renumbered as subdivision (d).



Subdivision (n) was amended, effective March 1, 2011, to increase the time for an order staying proceedings from 20 to 21 days.

Rule 62 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 January 27, 2022, page 17; September 26, 2019, page 23; April 29-30, 2010, page 16; January 28-29, 2010, page 12; September 30-October 1, 1982, pages 6 and 12-15; November 29-30, 1979, page 19; Fed.R.Civ.P. 62.

CROSS REFERENCE: N.D.R.Civ.P. 50 (Motion for a Directed Verdict), N.D.R.Civ.P. 52 (Findings by the Court), N.D.R.Civ.P. 54 (Judgment Costs), N.D.R.Civ.P. 59 (New Trials Amendment of Judgments), and N.D.R.Civ.P. 60 (Relief from Judgment or Order); N.D.R.App.P. 8 (Stay or Injunction Pending Appeal).

RULE 11. PLEAS

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty or guilty.

(2) Conditional Plea. With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. The defendant, any defendant's attorney, and the prosecuting attorney must consent in writing to a conditional plea filed with the court. If the court accepts the conditional plea, it must enter an order. The resulting judgment must specify it is conditional. A defendant who prevails on appeal must be allowed to withdraw the plea.

(3) Failure to Enter a Plea. If a defendant refuses to enter a plea, the court must enter a plea of not guilty.

(b) Advice to Defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the

proceeding and, if necessary, the right to have the counsel provided under Rule 44;

(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;

(F) the nature of each charge to which the defendant is pleading;

(G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;

(H) any mandatory minimum penalty;

(I) the court's authority to order restitution; and

(J) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

(2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court, unless the defendant's presence is not required under Rule 43(b)(2) or (c), and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant's willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney.

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

43 (4) Acknowledgment by Defendant. ~~Before~~ Except when a court has approved  
44 waiver of the defendant's personal appearance under Rule 43(b), before entering  
45 judgment on a guilty plea, the court must determine that the defendant either:

46 (A) acknowledges facts exist that support the guilty plea; or

47 (B) while maintaining innocence, acknowledges that the guilty plea is knowingly,  
48 voluntarily and intelligently made by the defendant and that evidence exists from which  
49 the trier of fact could reasonably conclude that the defendant committed the crime.

50 (c) Plea Agreement Procedure.

51 (1) In General. The prosecuting attorney and the defendant's attorney, or the  
52 defendant when acting pro se, may discuss and reach a plea agreement. The court must  
53 not participate in these discussions. If the defendant pleads guilty to either a charged  
54 offense or a lesser or related offense, the plea agreement may specify that the prosecuting  
55 attorney will:

56 (A) not bring, or will move to dismiss, other charges;

57 (B) recommend, or agree not to oppose the defendant's request, that a particular  
58 sentence is appropriate; or

59 (C) agree that a specific sentence or sentencing range is the appropriate disposition  
60 of the case.

61 (2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in  
62 open court when the plea is offered, unless the court for good cause allows the parties to  
63 disclose the plea agreement in camera.

64 (3) Judicial Consideration of a Plea Agreement.

65 (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or  
66 (C), the court may accept the agreement, reject it, or defer a decision until the court has  
67 reviewed the presentence report.

68 (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B),  
69 the court must advise the defendant that the defendant has no right to withdraw the plea if  
70 the court does not follow the recommendation or request.

71 (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must  
72 inform the defendant that, to the extent the plea agreement is of the type specified in Rule  
73 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

74 (5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing  
75 provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the  
76 following on the record and in open court:

77 (A) inform the parties that the court rejects the plea agreement;

78 (B) advise the defendant personally that the court is not required to follow the plea  
79 agreement and give the defendant an opportunity to withdraw the plea; and

80 (C) advise the defendant personally that if the plea is not withdrawn, the court may  
81 dispose of the case less favorably toward the defendant than the plea agreement  
82 contemplated.

83 (6) Time of Plea Agreement Procedure. Except for good cause shown, notification  
84 to the court of the existence of a plea agreement must be given at the arraignment or at

such other time, prior to trial, as may be fixed by the court.

(d) Withdrawing a Guilty Plea.

(1) In General. A defendant may withdraw a plea of guilty:

(A) before the court accepts the plea, for any reason or no reason; or

(B) after the court accepts the plea, but before it imposes sentence if:

(i) the court rejects a plea agreement under Rule 11(c)(5); or

(ii) the defendant can show a fair and just reason for the withdrawal.

(2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court has imposed sentence.

(3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced by reliance on the defendant's plea, the court may deny a plea withdrawal request.

(e) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by N.D.R.Ev. 410.

(f) Recording the Proceedings. A verbatim record of the proceedings at which the defendant enters a plea must be made. If there is a plea of guilty, the record must include the court's inquiries and advice to the defendant required under Rule 11(b) and (c).

(g) Defendant's Presence at Plea Proceeding. A plea of guilty may be made only by the defendant, in open court, unless the defendant is a corporation, in which case it may

106 be made by counsel; or ~~in a non-felony case~~, the defendant may petition to enter a plea of  
107 guilty as provided in Rule 43(b).

#### 108 EXPLANATORY NOTE

109 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996;  
110 March 1, 2006; June 1, 2006; March 1, 2010; March 1, 2016; March 1, 2017; March 1,  
111 2019; \_\_\_\_\_. The explanatory note was amended, effective March 1, 2022.

112 Rule 11 is similar to Fed.R.Crim.P. 11. The rule is designed to accomplish a  
113 number of objectives: (1) it prescribes the advice that the court must give to ensure the  
114 defendant who pleads guilty has made an informed plea; and (2) it provides for a plea  
115 agreement procedure designed to give recognition to the propriety of plea discussions  
116 between counsel, to bring the existence of a plea agreement out in open court, and to  
117 provide methods for court acceptance or rejection of the plea agreement.

118 Rule 11 was amended, effective March 1, 2006, in response to the December 1,  
119 2002, revision of the Federal Rules of Criminal Procedure. The language and  
120 organization of the rule were changed to make the rule more easily understood and to  
121 make style and terminology consistent throughout the rules.

122 Subdivision (a) provides for the various alternative pleas which the defendant may  
123 enter. This subdivision does not permit a defendant to enter a plea of nolo contendere and  
124 differs from the federal rule in that respect.

125 Paragraph (a)(2) was adopted effective March 1, 1986. This provision allows the  
126 defendant, with the approval of the court and the consent of the prosecuting attorney, to

enter a conditional plea of guilty and reserve in writing the right, on appeal of the adverse determination of any specified pretrial motion. The conditional plea procedure is intended to conserve prosecutorial and judicial resources and advance speedy trial objectives by avoiding the necessity of a trial simply to preserve pretrial issues for appellate review.

Paragraph (a)(2) was amended, effective March 1, 2017, to clarify the procedure for entering a conditional plea of guilty.

Subdivision (b) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The court is required to determine that a plea is made with an understanding of the nature of the charge and the consequences of the plea. Subdivision (b) also establishes the requirement that the court address the defendant personally.

Paragraph (b)(1) requires the court to determine if the defendant understands the nature of the charge and requires the court to inform the defendant of and determine that the defendant understands the mandatory minimum punishment, if any, and the maximum possible punishment. The objective is to insure that the defendant knows what minimum sentence the judge MUST impose and the maximum sentence the judge MAY impose and, further, to explain the consecutive sentencing possibilities when the defendant pleads to more than one offense. This provision is included so that the judicial warning effectively serves to overcome subsequent objections by the defendant that the defendant's counsel gave the defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the defendant waives by a plea of guilty and ensures a



148 knowing and intelligent waiver of counsel is made. A similar requirement is found in  
149 Rule 5(b) governing the initial appearance.

150 Paragraph (b)(1) was amended, effective June 1, 2006, to remove a reference to  
151 court appointment of counsel for indigents. Courts ceased appointing counsel for  
152 indigents on January 1, 2006, when the North Dakota Commission on Legal Counsel for  
153 Indigents became responsible for defense of indigents.

154 Paragraph (b)(1) was amended, effective March 1, 2016, to include a new  
155 subparagraph (J) requiring the court to include a general statement that there may be  
156 immigration consequences of conviction in the advice provided to the defendant before  
157 the court accepts a plea of guilty or nolo contendere. The amendment, which is based on  
158 an amendment to Fed.R.Crim.P. 11, mandates a generic warning, not specific advice  
159 concerning the defendant's individual situation.

160 Paragraph (b)(2) requires the court to determine that a plea of guilty is voluntary  
161 before accepting it. Paragraph (b)(2), together with subdivision (c), affords the court an  
162 adequate basis for rejecting an improper plea agreement induced by threats or  
163 inappropriate promises. The rule specifies that the court personally address the defendant  
164 in determining the voluntariness of the plea.

165 Paragraph (b)(2) was amended, effective March 1, 2019, to reference Rule  
166 43(b)(2), which allows misdemeanor defendants to be absent from a plea proceeding.

167 Paragraph (b)(3) requires that the court not enter judgment on a plea of guilty  
168 without making an inquiry to ensure that there is a factual basis for the plea.

Paragraph (b)(4) was added to the rule, effective March 1, 2014, and requires the court to obtain an acknowledgment from the defendant on whether the defendant is admitting guilt, or instead is maintaining innocence but pleading guilty because evidence exists from which the trier of fact could reasonably conclude the defendant committed the crime.

Paragraph (b)(4) was amended, effective \_\_\_\_\_, to allow waiver of a defendant's in-person acknowledgment when the court has approved waiver of the defendant's presence under Rule 43(b).

Subdivision (c) provides for a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements, provided they are disclosed in open court and subject to acceptance or rejection by the trial judge. It is believed that where the defendant by the defendant's plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. The procedure described in subdivision (c) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Paragraph (c)(1) specifies that both the attorney for the prosecution and the attorney for the defense, or the defendant when acting pro se, participate in plea discussions. It also makes clear that there are three possible concessions that may be made in a plea agreement: first, the charge may be reduced to a lesser or related offense;

190 second, the attorney for the prosecution may agree not to recommend or not oppose the  
191 imposition of a particular sentence; or third, the attorney for the prosecution may promise  
192 to move for a dismissal of other charges. The court is not permitted to participate in plea  
193 discussions because of the possibility that the defendant would believe that the defendant  
194 would not receive a fair trial, if no agreement had been reached or the court rejected the  
195 agreement, and a subsequent trial ensued before the same judge.

196 Paragraph (c)(2) provides that the parties must disclose any plea agreement in open  
197 court or, for good cause, in camera. Paragraph (c)(3) gives the court, upon notice of the  
198 plea agreement, the option of accepting or rejecting the agreement or deferring its  
199 decision until receipt of the presentence report. The court must inform the defendant that  
200 it may choose not to accept a sentence recommendation made as part of a plea agreement.  
201 Decisions on plea agreements are left to the discretion of the individual trial judge.

202 Paragraph (c)(4) requires the court, if it accepts the plea agreement, to inform the  
203 defendant that it will embody in the judgment and sentence the disposition provided in the  
204 plea agreement, or one more favorable to the defendant. This provision serves the dual  
205 purpose of informing the defendant immediately that the agreement will be implemented.

206 Paragraph (c)(5) requires the court, on the record, upon its rejection of the plea  
207 agreement, to inform the defendant of this fact and to advise the defendant personally, in  
208 open court, or for good cause, in camera, that the court is not bound by the plea  
209 agreement. The defendant must be afforded an opportunity to withdraw the defendant's  
210 plea and must be advised that if the defendant persists in the defendant's guilty plea, the

211 disposition of the case may be less favorable to the defendant than contemplated by the  
212 plea agreement.

213 Paragraph (c)(6) requires that the court be notified of the existence of a plea  
214 agreement at the arraignment or at another time prior to trial fixed by the court unless it  
215 can be shown that for good cause this was not done. Having a plea entered at this stage  
216 provides a reasonable time for the defendant to consult with counsel and for counsel to  
217 complete any plea discussions with the attorney for the prosecution. The objective of the  
218 provision is to make clear that the court has authority to require a plea agreement to be  
219 disclosed sufficiently in advance of trial so as not to interfere with the efficient  
220 scheduling of criminal cases.

221 A new subdivision (d) on plea withdrawal was transferred to Rule 11 from Rule 32  
222 effective March 1, 2010.

223 Subdivision (e) makes it clear that N.D.R.Ev. 410 governs the admissibility of plea  
224 discussions.

225 Subdivision (f) requires that a verbatim record be kept of the proceedings. The  
226 record is important in the event of a post-conviction attack.

227 Subdivision (g) was amended, effective March 1, 1996, to reference Rule 43(c)  
228 \_\_\_\_\_, to clarify that a defendant's presence at a plea proceeding may be waived  
229 as allowed by Rule 43(b). ~~In a non-felony case, if~~ If the defendant wants to plead guilty  
230 without appearing in court, a written form must be used which advises the defendant of  
231 his or her constitutional rights and creates a record showing that the plea was made

voluntarily, knowingly, and understandingly. See Appendix Form 17. A court may accept a guilty plea via contemporaneous audio or audiovisual transmission by reliable electronic means using the procedure set out in N.D. Sup. Ct. Admin. Rule 52.

Rule 11 does not include a subdivision entitled harmless error and differs from the 1983 amendment to Fed.R.Crim.P. 11(h) in that respect. Rule 52(a), Harmless Error, is intended to have general application to all the criminal rules of procedure.

SOURCES: Joint Procedure Committee Minutes of September 30, 2021, pages 10-12; January 25, 2018, page 8; January 28-29, 2016, page 7; April 23-24, 2015, page 14; January 29-30, 2015, page 23; January 31-February 1, 2013, page 12; September 27, 2012, pages 18-21; January 29-30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005, pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26, 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17, 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973, pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20, 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23,

253 29-14-24, 29-14-26, 29-14-27, 29-16-01, 29-21-16, 29-22-33, 33-12-17, 33-12-18.

254 CONSIDERED: N.D.C.C. § 31-13-03.

255 CROSS REFERENCE: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P.

256 44 (Right to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo

257 Contendere; Withdrawn Plea of Guilty); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous

258 Transmission by Reliable Electronic Means).

RULE 43. DEFENDANT'S PRESENCE

(a) When Required.

(1) In General. Unless this rule provides otherwise, the defendant must be present at:

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

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

(C) sentencing.

(2) Reliable Electronic Means. Presence permitted by contemporaneous audio or audiovisual transmission by reliable electronic means is presence for the purposes of this rule.

(3) Jury Question.

(A) In General. If, after beginning deliberations, the members of the jury request information on a point of law or request to have testimony read or played back to them, they must be brought into the courtroom. The court's response must be provided in the presence of counsel and the defendant.

(B) Agreed Manner of Response. In the alternative, after consultation with counsel in the presence of the defendant, the court may respond to a jury's question or request for testimony in a manner other than in open court if agreed to by counsel and the defendant.

(b) When Not Required. If the court permits, a defendant need not be present under any of the following circumstances:

(1) Felony Offense.

(A) The offense is punishable by imprisonment for more than one year, and with a represented defendant's written consent, and written acknowledgment that the defendant was advised of the rights listed in Rules 5(b)(1) and (2) and 5(c), the preliminary hearing, the arraignment, and entry of a not guilty plea may occur in the defendant's absence.

(B) The offense is classified as a C felony under N.D.C.C. § 12.1-32-01(4), and with a represented defendant's written consent and written acknowledgment that the defendant was advised of the rights listed in Rules 5(b)(1) and (2) and 11(b), entry of a guilty plea or sentencing may occur in the defendant's absence.

(2) Misdemeanor Offense or Infraction. The offense is punishable by fine or by imprisonment for not more than one year, or both, and with the defendant's written consent and written acknowledgment that the defendant was advised of the rights listed in Rules 5(b)(1) and (3) and 11(b), the arraignment, plea, trial, or sentencing may occur in the defendant's absence.

(3) Conference or Hearing on Legal Question. The proceeding involves only a conference or hearing on a question of law.

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

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



pleaded guilty:

(1) is voluntarily absent after the trial has begun (whether or not the defendant has been informed by the court of the obligation to remain during the trial);

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

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

#### EXPLANATORY NOTE

Rule 43 was amended, effective January 1, 1980; March 1, 1990; March 1, 1998; March 1, 2004; March 1, 2006; March 1, 2008; March 1, 2010; March 1, 2015; October 1, 2016;\_\_\_\_\_.

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

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

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

Rule 43 was amended, effective March 1, 2006, in response to the December 1,

2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 2004, in response to amendments to Rule 5 and Rule 10 allowing interactive television to be used for the initial appearance and arraignment.

Subdivision (a) was amended, effective March 1, 2010, to explain requirements for the consideration of questions submitted by the jury after deliberations begin.

Subdivision (a) was amended, effective March 1, 2015, to allow a defendant to be present by contemporaneous audio or audiovisual transmission using reliable electronic means. Any appearance by a defendant by electronic means must be consistent with the standards set by N.D. Sup. Ct. Admin. R. 52, which governs the use of contemporaneous transmission by reliable electronic means in court proceedings.

Subdivision (b) was amended, effective March 1, 2015, to allow a represented defendant in a felony case to waive presence at the preliminary hearing and submit a not guilty plea in writing.

Subdivision (b) was amended, effective October 1, 2016, to clarify that a represented defendant in a felony case may waive presence at the arraignment in writing and to require all defendants seeking waiver of presence to acknowledge in writing that they were advised of their rights.

Subdivision (b) was amended, effective \_\_\_\_\_, to allow a

85 represented defendant in a Class C felony case to waive presence for entry of a guilty plea  
86 or sentencing.

87 SOURCES: Joint Procedure Committee Minutes of September 30, 2021, pages 10-  
88 12; April 29, 2021, pages 13-15; May 12-13, 2016, pages 2-10; January 28-29, 2016, page  
89 7; September 24-25, 2015, pages 21-23; April 24-25, 2014, pages 12-15; May 21-22,  
90 2009, pages 10-11; January 29-30, 2009, pages 13-17; September 28-29, 2006, pages  
91 8-10; January 27-28, 2005, pages 34-36; September 26-27, 2002, pages 13-14; January  
92 30, 1997, pages 7-8; September 26-27, 1996, pages 8-10; January 26-27, 1995, pages 5-6;  
93 September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page  
94 4; December 3, 1987, page 15; December 7-8, 1978, pages 27-28; October 12-13, 1978,  
95 pages 43-44; December 11-15, 1972, pages 41-43; May 15-16, 1969, pages 11-13.

96 STATUTES AFFECTED:

97 SUPERSEDED: N.D.C.C. §§ 29-12-12, 29-13-02, 29-14-21, 29-16-03, 29-16-04,  
98 29-16-06, 29-22-05, 29-22-11, 29-26-04, 33-12-23.

99 CONSIDERED: N.D.C.C. §§ 12.1-32-01, 29-16-05, 29-26-11.

100 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the  
101 Magistrate); N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 11 (Pleas); N.D.R.Crim.P.  
102 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 37 (Appeal as of Right to District  
103 Court; How Taken); N.D.R.Crim.P. Appendix Form 17 (Misdemeanor Petition to Enter  
104 Plea of Guilty); N.D.R.Crim.P. Appendix Form 18 (Petition to Waive Preliminary  
105 Hearing and Arraignment in a Felony Case); N.D. Sup. Ct. Admin. R. 52

106 (Contemporaneous Transmission by Reliable Electronic Means).

FORM 9. APPENDIX "A"

CONDITIONS FOR SENTENCE TO PROBATION, DEFERRED

OR SUSPENDED SENTENCE IN THE CASE OF

State vs. \_\_\_\_\_

Criminal Case No. \_\_\_\_\_ -- \_\_\_\_\_ County

By Order of the Court:

~~\_\_\_\_\_ 1. You must not violate any federal, tribal, state, county or municipal criminal law or ordinance during the period of probation.~~

~~\_\_\_\_\_ ( ) 2. You must not own, purchase, borrow, possess, use or carry any type of firearm, destructive device or dangerous weapon while on probation.~~

~~\_\_\_\_\_ 3. You must not willfully defraud a urine test administered as a condition of probation.~~

~~\_\_\_\_\_ ( ) 4. You must continue your present employment or seek and maintain suitable employment; you may pursue a vocational or educational course of study that will lead to future or better employment.~~

~~\_\_\_\_\_ ( ) 5. You must not use or possess any alcoholic beverage, or enter any liquor, beer or wine establishment during the period of time you are under probation supervision, unless otherwise authorized by your parole/probation officer.~~

~~\_\_\_\_\_ ( ) 6. You must refrain from excessive use of alcohol. Any excessive use of alcohol or controlled substances will give your parole/probation officer the right to~~

require you to undergo an outpatient evaluation and abide by the recommendations of the evaluator. Excessive use of alcohol is presumed if you have an alcohol concentration of \_\_\_\_ percent or higher.

\_\_\_\_ ( ) 7. You must not use or possess any non-prescribed controlled substance while on probation supervision. You must not knowingly associate with users or traffickers in narcotics, marijuana, or other controlled substances.

\_\_\_\_ ( ) 8. You must not associate with any known felons without prior permission from your parole/probation officer.

\_\_\_\_ ( ) 9. You must not possess or use any type of surveillance equipment such as audio, video, and motion detectors, scanners or any type of surveillance or counter surveillance equipment without prior written permission from your parole/probation officer.

\_\_\_\_ ( ) 10. You must inform your parole/probation officer in the manner that they direct of any changes in your place of residence and employment, and other pertinent activities. You must answer truthfully all reasonable inquiries by the parole/probation officer and report to them as directed. This information must be furnished to the parole/probation officer by written report, telephone, or a personal visit to their office. Your parole/probation officer may visit your residence or place of employment at reasonable hours. You must report within twenty-four hours to: \_\_\_\_\_.

\_\_\_\_ ( ) 11. You must submit your person, place of residence and vehicle, or any other property to which you may have access, to search and seizure at any time of day or

night by a parole/probation officer, with or without a search warrant.

\_\_\_\_\_( ) 12. You must waive extradition to the State of North Dakota from any jurisdiction in or outside the United States where you may be found, and you agree not to contest any effort by any jurisdiction to return you to the State of North Dakota while this probation is in effect.

\_\_\_\_\_( ) 13. You must support your dependents.

\_\_\_\_\_( ) 14. You must regularly attend weekly self-help groups such as Alcoholic Anonymous/Narcotics Anonymous, Gamblers Anonymous, Sex Addicts Anonymous, Sexaholics Anonymous or equivalent non-faith-based alternative as approved by the court.

\_\_\_\_\_( ) 15. You must submit to a medical examination or other reasonable testing to include breath, blood, saliva or urine samples for the purpose of determining the use of alcohol or controlled substances whenever requested by any parole/probation officer. You must not use any adulterants that may affect the results of a breath, blood, saliva, or urine test.

\_\_\_\_\_( ) 16. You must receive a chemical dependency/addiction evaluation and comply with all treatment recommendations, subject to your right to a hearing before the court if you disagree with any treatment recommendation.

\_\_\_\_\_( ) 17. You must pay the following monetary obligations to the clerk of court in the total amount of \$\_\_\_\_\_. The total amount of the obligation must be paid prior to the end of probation:

64 ~~\_\_\_\_\_ a. Fines in the amount of \$\_\_\_\_\_;~~

65 ~~\_\_\_\_\_ b. Appointed attorney fees in the amount of \$\_\_\_\_\_;~~

66 ~~\_\_\_\_\_ c. Court administration fees and facility improvement fee in the amount of \$\_\_\_\_\_;~~

67 ~~\_\_\_\_\_ d. Community service fees in the amount of \$\_\_\_\_\_;~~

68 ~~\_\_\_\_\_ e. Victim assistance fees in the amount of \$\_\_\_\_\_;~~

69 ~~\_\_\_\_\_ f. Other in the amount of \$\_\_\_\_\_.~~

70 ~~\_\_\_\_\_ (\_\_\_\_\_) 18. You must pay restitution in the amount of \$ \_\_\_\_\_ as ordered by the court~~

71 ~~under N.D.C.C. § 12.1-32-08.~~

72 ~~\_\_\_\_\_ (\_\_\_\_\_) 19. You must pay a supervision fee in the amount of \$ \_\_\_\_\_ each month to the~~

73 ~~North Dakota Division of Parole and Probation, also known as the Division of Field~~

74 ~~Services, as required by N.D.C.C. § 12.1-32-07(2).~~

75 ~~\_\_\_\_\_ (\_\_\_\_\_) 20. You must pay the amount of \$ \_\_\_\_\_ to the North Dakota Division of~~

76 ~~Parole and Probation, also known as the Division of Field Services, as required by~~

77 ~~N.D.C.C. § 12.1-32-02(10) and (11), for preparation of the presentence investigation~~

78 ~~report.~~

79 ~~\_\_\_\_\_ (\_\_\_\_\_) 21. You must undergo various agreed-to community constraints as~~

80 ~~intermediate measures of the Department of Corrections and Rehabilitation to avoid~~

81 ~~revocation under N.D.C.C. § 12.1-32-07(3).~~

82 ~~\_\_\_\_\_ (\_\_\_\_\_) 22. You must submit to fingerprinting at the direction of your~~

83 ~~parole/probation officer.~~

84 ~~\_\_\_\_\_ (\_\_\_\_\_) 23. You must not telephone or write to the victim(s), or contact the victim(s)~~



through third parties or be within \_\_\_\_ yards of the victim(s) without written permission of your parole/probation officer.

\_\_\_\_ ( ) 24. You must not enter onto the premises, travel past, or loiter near where the victim(s) resides without written permission of your parole/probation officer.

\_\_\_\_ ( ) 25. You must provide a sample of blood or other body fluid for DNA law enforcement identification purposes and inclusion in law enforcement identification databases as required by N.D.C.C. ch. 31-13. You must pay the cost of the collection and processing of the DNA sample.

\_\_\_\_ ( ) 26. You must attend, participate in, and successfully complete a cognitive restructuring program.

\_\_\_\_ ( ) 27. You must submit to placement on and compliance with an electronic surveillance or monitoring system. You must not tamper with, damage, destroy or remove any of this equipment. You must be within the range of this equipment for monitoring, reporting or surveillance purposes. You must reimburse the North Dakota Department of Corrections and Rehabilitation for the actual cost of replacement for any tampered with, damaged, destroyed, lost, or misplaced equipment.

\_\_\_\_ ( ) 28. You must perform \_\_\_\_ hours of community service to be completed as follows: \_\_\_\_\_.

\_\_\_\_ ( ) 29. You must not leave the State of North Dakota without permission of your probation officer.

\_\_\_\_ ( ) 30. Other: \_\_\_\_\_.

~~The following are sex offender conditions:~~

~~——— ( ) 31. You must attend, participate in, cooperate with and successfully follow and complete all sex offender treatment program rules and requirements and admit responsibility for your offense(s) as part of the treatment requirements. You must attend aftercare if recommended by the parole/probation officer or treatment staff.~~

~~——— ( ) 32. Registration:~~

~~——— a. You must register as a sex offender or a felony offender against children within three days after the date of your criminal judgment or your release from custody.~~

~~——— b. You must register with the chief of police in the city or sheriff of the county where you live and inform them in writing where you live, where you work and where you go to school.~~

~~——— c. If you work or go to school in a different city or county or state from where you live, you must also register with the chief of police in the city or sheriff of that county.~~

~~——— d. If you plan to change your name, you must inform in writing the police or sheriff at least 10 days before the change. When your name change takes effect, you must inform in writing the police or sheriff within three days.~~

~~——— e. While on probation, if you change your vehicle information, e-mail address, or online name, you must tell the police or sheriff within three days after the change.~~

~~——— f. If you plan to change your school, or job, or to move, you must inform in writing the police or sheriff in the city or county where you are currently registered at least 10 days before the change.~~

~~g. After you change your school or job, or after you move, you must register with the police or sheriff in the new city or county where you go to school, work, or live. You must do this within three days after the change.~~

~~( ) 33. You must not initiate, establish or maintain contact, directly or indirectly, with any child under the age of 18, or attempt to do so, except under circumstances approved in advance and in writing by your parole/probation officer.~~

~~( ) 34. You must reside only at a place of residence approved by your parole/probation officer. You must not move from your place of residence or sleep elsewhere overnight without your parole/probation officer's knowledge and permission and those with whom you reside must know that you are a sex offender.~~

~~( ) 35. You must maintain employment at only such places as are approved by your parole/probation officer. You must not work outside the State of North Dakota or leave the State of North Dakota without permission under the Interstate Compact for the Supervision of Adult Offenders.~~

~~( ) 36. You must not go to or loiter near schoolyards, parks, playgrounds, arcades, or other places primarily used or visited by minors.~~

~~( ) 37. You must not obtain employment with any agency or place of business that provides services for the care or custody of minors and you must not operate a business that provides such services without written permission of your parole/probation officer.~~

~~( ) 38. You must not purchase, possess, or use sexually stimulating materials of~~

any kind or use 900 telephone numbers.

\_\_\_\_ ( ) 39. You must not subscribe to any Internet service provider, by modem, LAN, DSL or any other manner. You must not use another person's Internet or use Internet through any commercial venue until and unless approved in writing by your parole/probation officer.

\_\_\_\_ ( ) 40. You must not possess children's items, including, but not limited to, children's clothing, toys, games, pictures and books, without written permission from your parole/probation officer.

\_\_\_\_ ( ) 41. You must not date or socialize with anybody who has children under the age of 18 without written permission of your parole/probation officer.

\_\_\_\_ ( ) 42. You must notify your parole/probation officer of any new and existing romantic or sexual relationships in which you may be involved.

\_\_\_\_ ( ) 43. You must submit to any program of psychiatric, psychological or physiological assessment approved by the court.

\_\_\_\_ ( ) 44. You must be financially responsible for all costs related to assessments, polygraphs and any treatment programming ordered by the court.

\_\_\_\_ ( ) 45. Employment: You may travel to \_\_\_\_\_ each day for employment, provided the employment is regular and the employer requires you to work in \_\_\_\_\_. You must be in \_\_\_\_\_ only for employment purposes during scheduled working hours and you must return to \_\_\_\_\_ immediately after the completion of work each day. You must not be in or remain in \_\_\_\_\_ for any

~~purpose except for employment and to travel to and from employment. You must register as a sex offender in \_\_\_\_\_.~~

~~\_\_\_\_ ( ) 46. Visitation. You may travel to \_\_\_\_\_ for visitation with \_\_\_\_\_, provided that there are no minor children in the \_\_\_\_\_ household at the time of visitation. You must be in \_\_\_\_\_ only for visitation purposes and may on be at \_\_\_\_\_ residence and you must return to \_\_\_\_\_ immediately after completion of visitation. You must not be in or remain in \_\_\_\_\_ for any purpose except for visitation. You must register as a sex offender in \_\_\_\_\_.~~

~~\_\_\_\_ ( ) 47. Other: \_\_\_\_\_.~~

~~Dated (Month) (Day), (Year): \_\_\_\_\_.~~

~~BY THE COURT,~~

~~\_\_\_\_\_.~~

~~JUDGE~~

~~The above conditions of probation have been read and explained to me and I fully understand each one. I must follow the conditions that the Court has listed or checked; and I understand that failure to follow any one or more of those conditions may result in a revocation of the probation and that the Court may re-sentence me to any sentence that was available to the Court at the time of the initial sentencing. I acknowledge receipt of a copy of the Judgment.~~

~~Dated (Month) (Day), (Year): \_\_\_\_\_.~~

189 \_\_\_\_\_.

190 Probationer

191 ~~The probation conditions have been read and explained to my client by the Court. I attest~~  
192 ~~that my client has stated that he/she understands each one of the court ordered probation~~  
193 ~~conditions.~~

194 ~~Dated (Month) (Day), (Year).~~

195 \_\_\_\_\_.

196 ~~Defense Attorney~~

197 ~~Original to Court file~~

198 ~~\_\_\_ 1 Certified copy to Warden/Superintendent of NDSP, TRCU, MRCC--if~~  
199 ~~imprisonment is ordered~~

200 ~~\_\_\_ 1 Certified copy to Sheriff/Jail Administrator--if county imprisonment is ordered~~

201 ~~\_\_\_ 1 Copy to Defendant~~

202 ~~\_\_\_ 1 Copy to State's Attorney~~

203 ~~\_\_\_ 1 Copy to Local Probation Officer--if on supervised probation~~

204 While you are on probation, you must not:

205 (     ) 1. Violate any criminal law or ordinance. This includes any violation of a  
206 federal, tribal, state, county or municipal criminal law or ordinance.

207 (     ) 2. Use or possess any type of firearm, destructive device or dangerous  
208 weapon.

(     ) 3a. Use or possess any alcoholic beverage or enter any place licensed to sell or serve alcoholic beverages.

(     ) 3b. Use alcohol to excess. Excessive use of alcohol is presumed if you have an alcohol concentration of     percent or greater.

(     ) 4. Use or possess a controlled substance that has not been prescribed for you or mis-use any controlled substance that has been prescribed for you.

(     ) 5. Use or possess surveillance equipment or counter surveillance equipment.

(     ) 6. Have any contact with     . This includes telephone, written, and electronic communication and contact through other people.

(     ) 7. Come within     yards of     or (his) (her) residence.

(     ) 8. Willfully defraud a urine test administered as a condition of probation.

While you are on probation, you must:

(     ) 9. Report to the probation office within 24 hours of sentencing or release from custody.

(     ) 10. Stay in regular contact with your probation officer as you are instructed by the probation officer. You must have the approval of your probation officer before you change your address. You must inform your probation officer of any change of employment, or telephone number. You must be truthful with your probation officer.

(     ) 11. Allow your probation officer to visit your residence or place of employment.

230            (     ) 12. Allow your probation officer or other probation officers to search your  
231 person, place of residence, vehicle, or other property you have control over at any time of  
232 the day or night even if the probation officer doesn't have a search warrant. Your  
233 probation officer may request assistance of law enforcement officers to conduct a search.

234            (     ) 13. Continue with your present employment or seek and maintain suitable  
235 employment. You may attend school or training that will help you find better  
236 employment.

237            (     ) 14. Allow medical examination or other testing for the purpose of  
238 determining if you have used alcohol or controlled substances. This includes testing of  
239 breath, blood, saliva, urine or sweat.

240            (     ) 15. Have a chemical addiction evaluation or other diagnostic evaluation and  
241 follow any treatment recommendations. You may ask for a hearing if you disagree with  
242 treatment recommendations.

243            (     ) 16. Waive extradition to North Dakota if you are arrested outside of North  
244 Dakota.

245            (     ) 17. Provide support for your dependents.

246            (     ) 18. Pay the following:

247            a. Fine:     ;

248            b. Court-appointed attorney fees:     ;

249            c. Court fees :     ;

250            d. Restitution:     ;



251            e. Victim assistance fees : \_\_\_\_\_;

252            f. Other : \_\_\_\_\_.

253            ( \_\_\_\_\_ ) 19. Pay a monthly supervision fee in the amount of \$ 55 for probation  
254 supervision.

255            ( \_\_\_\_\_ ) 20. Pay \$ 50 for preparation of the pre-sentence investigative report.

256            ( \_\_\_\_\_ ) 21. Be fingerprinted.

257            ( \_\_\_\_\_ ) 22. Provide a sample of blood or other body fluid for DNA law  
258 enforcement purposes and pay the cost of collecting and processing the DNA sample.

259            ( \_\_\_\_\_ ) 23. Successfully complete:

260            a. A cognitive restructuring program if your probation officer asks you to do  
261 so.

262            b. Domestic violence offender treatment.

263            c. An anger management program.

264            d. \_\_\_\_\_ hours of community service.

265            ( \_\_\_\_\_ ) 24. Participate in electronic monitoring and follow all of the rules of the  
266 electronic monitoring system as required by your probation officer.

267            ( \_\_\_\_\_ ) 25. Complete any intermediate condition which you agree to complete to  
268 avoid revocation of probation.

269            While on probation you must have the written approval from your probation  
270 officer before you:

271            ( \_\_\_\_\_ ) 26.

272           a. Associate with anyone you know to be a felon.

273           b. Associate with known drug users or traffickers.

274           c. leave North Dakota.

275           (     ) 27. Other conditions of probation: \_\_\_\_\_.

276           The following are sex offender conditions.

277           While you are on probation, you must:

278           (     ) 28. Attend, participate in, cooperate with and successfully follow and

279 complete all sex offender treatment program rules and requirements and admit

280 responsibility for your offense(s) as part of the treatment requirements. This includes

281 attending aftercare if recommended by the parole/probation officer or treatment staff.

282           (     ) 29. Submit to any program of psychiatric, psychological or physiological

283 assessment approved by the court and be financially responsible for all costs related to

284 any assessments, polygraphs and treatment programming ordered by the court.

285           (     ) 30.

286           a. Register as a sex offender or an offender against children within three days after

287 the date of your criminal judgment or your release from custody.

288           b. Register with the chief of police in the city or sheriff of the county where you

289 live and inform them in writing where you live, where you work and where you go to

290 school.

291           c. If you work or go to school in a different city or county or state from where you

292 live, register with the chief of police in the city or sheriff of that county.

293 d. If you plan to change your name, inform the police or sheriff in writing at least  
294 10 days before the change. When your name change takes effect, inform the police or  
295 sheriff in writing within three days.

296 e. If you change your vehicle information, e-mail address, or online name while on  
297 probation, tell the police or sheriff within three days after the change.

298 f. If you plan to change your school, or job, or to move, inform the police or sheriff  
299 in the city or county where you are currently registered in writing at least 10 days before  
300 the change.

301 g. If you change your school or job, or if you move, register with the police or  
302 sheriff in the new city or county where you go to school, work, or live within three days  
303 after the change.

304 ( ) 31. Reside only at a place of residence approved by your parole/probation  
305 officer.

306 ( ) 32. Maintain employment at only such places as are approved by your  
307 parole/probation officer.

308 ( ) 33. Notify your parole/probation officer of any new and existing romantic or  
309 sexual relationships in which you may be involved.

310 While you are on probation, you must not:

311 ( ) 34. Initiate, establish or maintain contact, directly or indirectly, with any  
312 child under the age of 18, or attempt to do so, except under circumstances approved in  
313 advance and in writing by your parole/probation officer.

(    ) 35. Go to or loiter near schoolyards, parks, playgrounds, arcades, or other places primarily used or visited by minors.

(    ) 36. Purchase, possess, or use sexually stimulating materials of any kind or use 900 telephone numbers.

(    ) 37. Subscribe to any Internet service provider, by modem, LAN, DSL or any other manner or use another person's Internet or use Internet through any commercial venue until and unless approved in writing by your parole/probation officer.

(    ) 38. Possess children's items, including, but not limited to, children's clothing, toys, games, pictures and books, without written permission from your parole/probation officer.

(    ) 39. Date or socialize with anybody who has children under the age of 18 without written permission of your parole/probation officer.

(    ) 40. Obtain employment with any agency or place of business that provides services for the care or custody of minors and you must not operate a business that provides such services without written permission of your parole/probation officer.

(    ) 41. Work outside the State of North Dakota or leave the State of North Dakota without permission under the Interstate Compact for the Supervision of Adult Offenders.

(    ) 42. Move from your place of residence or sleep elsewhere overnight without your parole/probation officer's knowledge and permission and without informing those with whom you reside that you are a sex offender.

Detailed Employment and Visitation Conditions for Sex Offenders:

(     ) 43. You may travel to \_\_\_\_\_ each day for employment, provided the employment is regular and the employer requires you to work in \_\_\_\_\_. You may be in \_\_\_\_\_ only for employment purposes during scheduled working hours and you must return to \_\_\_\_\_ immediately after the completion of work each day. You may not be in or remain in \_\_\_\_\_ for any purpose except for employment and to travel to and from employment. You must register as a sex offender in \_\_\_\_\_.

(     ) 44. You may travel to \_\_\_\_\_ for visitation with \_\_\_\_\_, provided that there are no minor children in the \_\_\_\_\_ household at the time of visitation. You may be in \_\_\_\_\_ only for visitation purposes and may on be at \_\_\_\_\_ residence and you must return to \_\_\_\_\_ immediately after completion of visitation. You may not be in or remain in \_\_\_\_\_ for any purpose except for visitation. You must register as a sex offender in \_\_\_\_\_.

(     ) 45. Other sex offender conditions \_\_\_\_\_.

BY THE COURT,

Date:

\_\_\_\_\_.

JUDGE

The conditions of probation have been explained to me. I agree to follow the conditions

354 which are listed and checked. I know that if I don't follow the conditions of probation, my  
355 probation may be revoked and I could be re-sentenced to any sentence which could have  
356 been imposed at the time I was sentenced.

357 Date:

358 \_\_\_\_\_

359 Probationer

360 The conditions of probation have been explained to my client by the Judge. My client has  
361 indicated (he)(she) understands the conditions of probation.

362 Date:

363 \_\_\_\_\_.

364 Defense Attorney

RULE 5. POST-JUDGMENT MEDIATION

(a) Purpose.

(1) The purpose of post-judgment mediation is to improve the lives of families who appear before the courts by trying to resolve disputes through mediation in order to minimize family conflict, encourage shared decision-making, and support healthy relationships and communication among family members.

(2) The objectives of post-judgment mediation are to:

(A) support improved family decision-making and to promote agreement and compromise instead of further litigation and competition;

(B) improve access to mediation by providing funding;

(C) improve post-litigation family problem-solving and communication capacities by reestablishing communication through mediation;

(D) decrease litigation costs for litigants;

(E) create incentives to pursue mediation including flexibility to negotiate critical issues without judicial intervention;

(F) determine best practices for family mediation in North Dakota;

(G) improve rural access to post-litigation mediation services, as well as access by underprivileged and minority persons;

(H) work with the domestic violence services community in order to assess risk and provide services where appropriate; and to ensure proper protections are put in place

and mediators are well-trained in signposts, risks, and exit planning strategies;

(I) reduce post-judgment litigation and conflict in family cases; and

(J) help the public, judiciary, and bar become more aware of the benefits and nature of the mediation process.

(b) Program Management. The family mediation program administrator will manage and oversee the operation of the program under the supervision of the ~~Supreme Court~~ supreme court.

(c) Research and Evaluation. The program will include evaluation components.

(d) Mediation Process.

(1) Request for Mediation. Any party contemplating an appeal may forward a request for post-judgment mediation to the program administrator no later than 60 days after the service of notice of entry of judgment or order, or seven days after service of the notice of appeal, in any eligible case. The request must be simultaneously served on every party under N.D.R.App.P. 25. The time for filing a notice of appeal under N.D.R.App.P. 4 is not affected by any request or assignment for mediation.

(2) Eligible Cases. Only judgments and orders that are final and appealable to the ~~Supreme Court~~ supreme court in the following types of cases are eligible for participation in post-judgment mediation:

(A) divorce cases involving property or spousal support;

(B) any case involving parenting rights, except for termination of parental rights cases;



43 (C) any case involving residential responsibilities or support of minor children;

44 (D) any case involving grandparent visitation; and

45 (E) any case under the Uniform Probate Code or the Uniform Trust Code.

46 (3) Exemption from Mediation. Any party may request referral of an eligible case  
47 to post-judgment mediation. Referral must be granted unless a party requests an order  
48 from the court exempting the case from post-judgment mediation by filing a motion and a  
49 declaration with the clerk of the supreme court within seven days of service of the  
50 mediation request. The court may exempt the case if:

51 (A) the issues raised are limited to a question of law; or

52 (B) prior post-judgment mediation has been attempted and the issues are  
53 substantially similar; or

54 (C) other good cause is shown.

55 (4) Exclusion from Mediation. The program administrator may not refer  
56 proceedings where a current domestic violence protection order or other order for  
57 protection between the parties exists. In these cases, the court may not proceed with  
58 mediation except in unusual cases where:

59 (A) mediation is requested by the victim of the domestic violence or sexual abuse,  
60 and an exception to the order of protection is made by the court;

61 (B) the mediation is provided by a mediator trained to address the needs and safety  
62 of victims where domestic violence is at issue;

63 (C) the victim of domestic violence is provided the opportunity for separate

meetings during the mediation, and to mediate using separate rooms;

(D) the mediation takes place in a courthouse or other building where security measures are in place; and

(E) the victim has an attorney or other advocate or support person of their choice in the mediation.

The Rule 5 (d)(4) exclusion and exceptions are intended to comply with the N.D.C.C. § 14-09.1-02 standards for family mediation.

(5) Screening and Assignment of Mediator. On receipt of a request for post-judgment mediation, the program administrator must determine whether a case meets the requirements for eligibility and appropriateness for mediation. Once a case has been approved for post-judgment mediation, the program administrator must assign a mediator eligible under Rule 5(e). The program administrator must send a notice of mediation to counsel, any unrepresented party, and the clerk of the supreme court. The notice of mediation must identify the mediator who has been assigned, and a deadline for completion of the mediation. The mediation must be completed within 45 days of the assignment of a post-judgment mediator.

(6) Ordering of Transcript and Filing of Briefs. To expedite the mediation process and spare the parties as much initial expense as possible, the ordering of the transcript in cases assigned for mediation is extended to 21 days after the filing of the notice of appeal. The time for filing briefs is not automatically tolled pending mediation. In cases in which mediation has been requested, any motions for enlargement of time for briefs must be

85 filed with the clerk of the supreme court under Rule 26(b).

86 (7) Mediation Orientation. The post-judgment mediation program will provide up  
87 to six hours of combined pre-mediation orientations and mediation. Mediators will be  
88 compensated at a rate set annually by the state court administrator. The post-judgment  
89 mediation program requires the parties to individually attend a pre-mediation orientation  
90 and screening with a designated mediator, and at least one joint mediation session. The  
91 program will provide up to six hours of mediation without charge to the parties. Should  
92 the parties require additional sessions, they may purchase mediation from the mediator.  
93 Parties may also apply to the program administrator for additional mediation sessions and  
94 may apply for a fee waiver or sliding scale fee should they qualify based on economic  
95 factors. The program administrator will determine whether a party is eligible for a fee  
96 waiver or fee reduction based on party income according to a schedule adopted by the  
97 ~~Supreme Court~~ supreme court. If the parties qualify for a fee reduction and have been  
98 approved for additional mediation, any “gap” between the set rate and their ability to pay  
99 will be paid to the mediator by the court under this program.

100 (8) Mediation Statement. On request of the mediator, the parties should each  
101 supply to the mediator, at least two days before the scheduled conference, a mediation  
102 statement no more than four pages in length. The statement should include:

103 (A) a brief history of the litigation;

104 (B) a brief statement of facts;

105 (C) the history of any efforts to settle the case, including any offers or demands;

(D) a summary of the parties' legal positions;

(E) the present posture of the case, including any related litigation; and

(F) any proposals for settlement.

The mediation statement may not be filed in the office of the clerk of the supreme court. Mediation by telephone or other electronic means may be used if all parties and the mediator agree.

(e) Selection of Mediators.

(1) Eligibility. Any lawyer qualified as a post-judgment mediator under N.D.R.Ct. 8.9 may apply to be added to the roster of post-judgment mediators and will be approved by the program administrator. Mediators must carry malpractice insurance that covers their mediation practice.

(2) Mediation Assignment. Mediators will be assigned cases by the program administrator and will manage cases assigned to them from orientation and screening through conclusion of mediation.

(3) Conflicts of Interest and Bias. A mediator may not be removed unless the mediator and/or the parties' petition the program administrator based on bias or conflicts of interest. Parties and attorneys may not request a change of mediator unless they present clear evidence of bias or conflict of interest.

~~(f) Mediation Outcome. Within seven days after completion of the mediation decision summary in appeals settled in whole or in part under Rule 5, the parties must file a copy of the decision summary and a request for the Supreme Court to take appropriate~~

127 ~~action, such as dismissal of the appeal under Rule 43 or remand to the district court. If a~~  
128 ~~matter is remanded, the parties must file the appropriate documents with the district court~~  
129 ~~to obtain an amended judgment, which must incorporate all terms of the decision~~  
130 ~~summary. On entry of an amended judgment, the parties must request the Supreme Court~~  
131 ~~to enter an appropriate order. In appeals not settled and terminated from mediation,~~  
132 ~~briefing and oral argument will proceed under the rules. In cases settled by post-judgment~~  
133 ~~mediation prior to the filing of a notice of appeal, the requesting party is responsible for~~  
134 ~~obtaining an amended judgment incorporating all terms of the decision summary from the~~  
135 ~~district court.~~

136 (g) Closing.

137 (1) Mediation Decision Summary. At the close of every mediation case, the  
138 mediator and parties must create a written decision summary for the parties that notes any  
139 and all agreements made and uses the parties' own language. The parties will have seven  
140 days to reconsider the decisions made in mediation. If neither party files a written request  
141 to reconsider within seven days, the mediator must immediately send a copy of the  
142 decision summary to the parties and their attorneys, along with the Mediation Case  
143 Closing Form. (N.D.R.Ct. Appendix I, Form G).

144 (2) Mediation Outcome. After completion of the mediation decision summary, the  
145 parties must file a copy with the supreme court. If the appeal is settled in whole or in part  
146 under Rule 5, the parties must file a request for the supreme court to take appropriate  
147 action, such as dismissal of the appeal under Rule 43 or remand to the district court. If a

148 matter is remanded, the parties must file the appropriate documents with the district court  
149 to obtain an amended judgment, which must incorporate all terms of the decision  
150 summary. On entry of an amended judgment, the parties must request the supreme court  
151 to enter an appropriate order. In appeals not settled and terminated from mediation,  
152 briefing and oral argument will proceed under the rules. In cases settled by post-judgment  
153 mediation prior to the filing of a notice of appeal, the requesting party is responsible for  
154 obtaining an amended judgment incorporating all terms of the decision summary from the  
155 district court.

156 (2) Evaluation. At the close of every mediation case, the mediator and the parties  
157 must complete the required evaluation forms and the mediator must submit those to the  
158 program administrator along with closing form, and the mediator's invoice form. The  
159 mediator is responsible for collecting fees from the parties if appropriate.

160 (3) Case Closing/Notification. The mediator must notify program administrator  
161 when a mediation case has concluded for any reason, and offer the following reasons:

162 (A) agreement has been reached in whole or part; or

163 (B) the parties were unable to reach agreement.

164 (h) Confidentiality. Statements and comments made during mediation conferences  
165 and in related discussions, and any record of those statements, are confidential and may  
166 not be disclosed by anyone (including the program administrator, counsel, or the parties;  
167 and their agents or employees) to anyone not participating in the post-judgment mediation  
168 process. Mediators may not be called as witnesses, and the information and records of the

169 program administrator may not be disclosed to judges, staff, or employees of any court.

170 [Insert Poverty Guidelines Chart here]

171 EXPLANATORY NOTE

172 Rule 5 was adopted, effective January 1, 2014; amended effective Oct 1, 2014;  
173 March 1, 2017; March 1, 2021;\_\_\_\_\_.

174 Rule 5 was amended, effective Oct 1, 2014, to replace “supreme court clerk” with  
175 “clerk of the supreme court” and “paper” with “document.”

176 Rule 5 was amended, effective March 1, 2021, to delete the term “affidavit” and  
177 replace it with “declaration.” This amendment was made in response to N.D.C.C. ch.  
178 31-15, which allows anyone to make an unsworn declaration that has the same effect as a  
179 sworn declaration, such as an affidavit. N.D.C.C. § 31-15-05 provides the required form  
180 for an unsworn declaration.

181 Paragraph (d)(2) was amended, effective March 1, 2017, to clarify that ~~Supreme~~  
182 ~~Court~~ supreme court judgments are not eligible for post-judgment mediation.

183 Subdivision (f) was amended, effective \_\_\_\_\_, to require the mediation  
184 decision summary to be filed with the supreme court in all cases.

185 SOURCES: Joint Procedure Committee Minutes of September 30, 2021, pages 12-  
186 13; April 24, 2020, pages 4-5; September 24-25, 2016, page 24; January 31-February 1,  
187 2013, pages 5-10; Joint Alternative Dispute Resolution Committee Minutes of June 25,  
188 2012; October 25, 2011; September 7, 2011; June 29, 2011; June 10, 2011; December 9,  
189 2010.

190           STATUTES AFFECTED:

191           CONSIDERED: N.D.C.C. ch. 31-15, § 14-09.1-02.

192           CROSS REFERENCE: N.D.R.App.P. 26 (Computing and Extending Time),

193   N.D.R.App.P. 43 (Substitution of Parties); N.D.R.Ct. 8.1 (Family Mediation Program),

194   N.D.R.Ct. 8.9 (Roster of Alternative Dispute Resolution Neutrals).



RULE 14. MOTIONS

(a) In General.

(1) Requirements. Every motion must be in writing, state with particularity the grounds, be signed by the person making the motion and filed with the court unless it is made in court and on the record.

(2) Motions Allowed.

(A) A party may raise by motion any defense, objection, or request that the court can determine without an adjudication of the general issue.

(B) A party may bring a motion to dismiss the petition upon any of the following grounds:

- (i) lack of jurisdiction over the subject matter;
- (ii) lack of jurisdiction over the child; or
- (iii) failure of the petition to state facts which, if proven, establish a prima facie case to support the grounds set forth in the petition.

(C) A party may move to modify or vacate an order under Rule 16.

(b) Submission of Motion and Response; Request for ~~Oral Argument~~ Hearing.

(1) How Made. Every written motion along with notice of motion and any supporting briefs and declarations must be served by the moving party under Rule 7. A written motion is considered submitted to the court unless a party requests ~~oral argument~~ a hearing.

22 (2) Request for ~~Oral Argument~~ Hearing. ~~Requests for oral argument~~ A request for  
23 a hearing may be submitted in the notice of motion or the response to motion. The request  
24 must indicate whether the hearing is for presenting evidence, oral argument, or both. A  
25 timely request for ~~oral argument~~ a hearing must be granted. The party requesting ~~oral~~  
26 ~~argument~~ a hearing must secure a time for the ~~oral argument~~ hearing and serve notice on  
27 all parties.

28 (2) Time. A written motion, along with any supporting briefs and declarations,  
29 must be served at least three days before ~~oral argument~~ the hearing unless the court for  
30 good cause shown permits a motion to be made and served less than three days before  
31 ~~oral argument~~ the hearing. If ~~oral argument~~ a hearing is requested and scheduled, any  
32 response must be served at least 24 hours prior to ~~oral argument~~ the hearing. If ~~oral~~  
33 ~~argument~~ a hearing is not requested by the movant, a response and any request for ~~oral~~  
34 ~~argument~~ a hearing must be served by the respondent within three days of service of the  
35 motion. The filing and service of a motion does not extend the time requirements for  
36 resolution of the matter.

37 (c) Motion Deadline. The court may set a deadline for the parties to make motions  
38 and may also set a time for ~~oral arguments~~ hearings.

39 (d) Ruling on a Motion. The court must decide every motion before adjudication of  
40 the matter unless it finds good cause to defer a ruling. The court must not defer ruling on  
41 a motion if the deferral will adversely affect a party's rights. When factual issues are  
42 involved in deciding a motion, the court must state its essential findings on the record.

(e) Recording the Proceedings. A verbatim record must be made of all proceedings at oral arguments, including any findings of fact and conclusions of law made orally by the court.

#### EXPLANATORY NOTE

Rule 14 was adopted effective March 1, 2010. Amended effective March 1, 2021;\_\_\_\_\_.

This rule governs motion practice in juvenile court.

~~This rule~~ Rule 14 was amended, effective March 1, 2021, and \_\_\_\_\_, to clarify the procedure for submitting a motion and requesting ~~oral argument~~ a hearing.

~~This rule~~ Rule 14 was amended, effective March 1, 2021, to delete the term “affidavit” and replace it with “declaration.” This amendment was made in response to N.D.C.C. ch. 31-15, which allows anyone to make an unsworn declaration that has the same effect as a sworn declaration, such as an affidavit. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

Rule 14 was amended, effective \_\_\_\_\_, to replace the term “oral argument” with “hearing” and to require the hearing request to indicate whether the hearing will be for presenting evidence, oral argument, or both.

SOURCES: Juvenile Policy Board Minutes of March 25, 2022; February 20, 2009; December 5, 2008; August 8, 2008; May 9, 2008; February 29, 2008; September 21, 2007; April 20, 2007. Joint Procedure Committee Minutes of April 24, 2020, pages 8-9; April 29, 2022, page 12.

64           STATUTES AFFECTED:

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

66           CROSS REFERENCE: N.D.R.Juv.P. 1 (Scope and Purpose); N.D.R.Juv.P. 7  
67   (Service After Summons); N.D.R.Juv.P. 16 (Modification and Vacation of Orders).

RULE 16. MODIFICATION AND VACATION OF ORDERS

(a) Mandatory Vacation of Order. An order of the court must be set aside if:

- (1) it appears it was obtained by fraud or mistake;
- (2) the court lacked jurisdiction over a necessary party or of the subject matter; or
- (3) newly discovered evidence so requires.

(b) Discretionary Modification.

(1) Except an order terminating parental rights, or an order of dismissal, an order of the court may also be changed, modified, or vacated on the ground that changed circumstances so require in the best interest of the child.

(2) An order terminating parental rights and the parent and child relationship may be vacated by the court on motion of the parent if the child is not placed for adoption and the person having custody of the child consents in writing to the vacation of the decree.

(3) An order granting probation to a child found to be delinquent may be reviewed on the ground that the conditions of probation have not been observed.

(c) Motion for Relief. Any party to the proceeding, the director of juvenile court or other person having supervision or legal custody of or an interest in the child may move the court for the relief provided in this rule. The motion must set forth in concise language the grounds on which relief is requested.

(d) Notice. Reasonable notice and an opportunity to be heard must be given to the child and the parent, guardian, or other custodian before the court may extend the

duration of:

(1) an order committing a delinquent child to the division of juvenile services;

(2) an order placing a child in foster care; or

(3) an order placing a child in detention or protective care.

(e) ~~Oral Argument~~ Hearing. After the motion is filed, the court must grant a request for ~~oral argument~~ a hearing and require notice to be served on the parties. After ~~oral argument~~ the hearing, which may be informal, the court may deny or grant relief as the evidence warrants.

#### EXPLANATORY NOTE

Rule 16 was adopted effective March 1, 2010. Amended effective March 1, 2021;  
~~amended effective;~~ July 1, 2021;\_\_\_\_\_.

Rule 16 was amended, effective March 1, 2021, to clarify that the court must grant a request for ~~oral argument~~ a hearing and require notice to be served.

Rule 16 was amended, effective July 1, 2021, to update terminology and statutory references consistent with the July 1, 2021, amendments to the Juvenile Court Act, N.D.C.C. chs. 27-20.2, 27- 20.3, and 27-20.4.

Rule 16 was amended, effective \_\_\_\_\_, to replace the term “oral argument” with “hearing” throughout the rule.

SOURCES: Juvenile Policy Board Minutes of March 25, 2022; June 11, 2021; February 20, 2009; December 5, 2008; August 8, 2008; May 9, 2008; February 29, 2008; September 21, 2007; April 20, 2007. Joint Procedure Committee Minutes of April 29,

43      2022, page 12; April 24, 2020, pages 8-9.

44              CROSS REFERENCE: N.D.R.Juv.P. 14 (Motions).

RULE 412. SEX-OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR  
PREDISPOSITION

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

- (1) evidence offered to prove that a victim engaged in other sexual behavior; or
- (2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition, if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.



(c) Procedure to Determine Admissibility.

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

(2) Hearing. ~~Before~~ In a civil case, before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. In a criminal case, the court may conduct an in camera hearing for a compelling reason only after applying and announcing on the record the factors establishing the overriding interest for courtroom closure. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of “Victim.” In this rule, “victim” includes an alleged victim.

#### EXPLANATORY NOTE

Rule 412 was adopted, effective March 1, 1998. Rule 412 was amended, effective March 1, 2014;\_\_\_\_\_.

Rule 412 is derived from Fed.R.Ev. 412. As explained in the federal advisory committee notes, the rule is designed to safeguard a victim from invasion of privacy,

43 potential embarrassment and sexual stereotyping associated with public disclosure of  
44 intimate sexual details and the infusion of sexual innuendo into the fact finding process.  
45 By affording victims protection in most instances, the rule also encourages victims of  
46 sexual misconduct to institute and to participate in legal proceedings against alleged  
47 offenders.

48 Paragraph (b)(2) was added, effective March 1, 2014, to establish a standard for  
49 the admission of sexual behavior evidence in civil cases.

50 Paragraph (c)(2) was amended, effective \_\_\_\_\_, to require the  
51 court in a criminal case to find on the record an overriding interest for courtroom closure  
52 before conducting an in camera hearing in chambers or a closed courtroom. The court  
53 must apply the the four factor pre-closure analysis required by Waller v. Georgia, 467  
54 U.S. 39, 48 (1984) before making such a finding. See State v. Martinez, 2021 ND 42.

55 Subdivision (d) was added, effective March 1, 2014, to clarify that the definition  
56 of “victim” includes “alleged victim.”

57 Rule 412 was amended, effective March 1, 2014, in response to the December 1,  
58 2011, revision of the Federal Rules of Evidence. The language and organization of the  
59 rule were changed to make the rule more easily understood and to make style and  
60 terminology consistent throughout the rules.

61 SOURCES: Joint Procedure Committee Minutes of April 29, 2022, pages 9-12;  
62 April 26-27, 2012, pages 20-21; September 26-27, 1996, pages 2-5; April 25, 1996, pages  
63 12-15. Fed.R.Ev. 412.

64           STATUTES AFFECTED:

65           SUPERSEDED: N.D.C.C. §§ 12.1-20-14, 12.1-20-15, 12.1-20-15.1.

RULE 3.4. PRIVACY PROTECTION FOR FILINGS MADE WITH THE COURT

(a) Definitions.

(1) “Confidential” means information in a court record as described in Rule 3.4(b)(1) or (2) or as ordered by the court, which is protected from public access but remains accessible to the court and the parties.

(2) “Redact” means to remove confidential information from a court record to protect it.

(3) “Sealed” means court records that are protected from public access, party access and access by unauthorized court personnel.

(b) Redacted Filings.

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

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

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

(C) the minor's initials, unless the minor is a party to the action and there is no statute or regulation mandating nondisclosure; and

(D) the last four digits of the financial-account number; and

~~(2E) Victim Information. If~~ 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 2)~~ 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 3)~~ Exemptions from ~~the~~ Redaction Requirement. The redaction requirement does not apply to the following:

~~(1 A) a financial-account number or real property address that identifies the property allegedly subject to forfeiture in a forfeiture proceeding~~ any case record not accessible to the public under N.D. Sup. Ct. Admin. R. 41(5)(e)(3);

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

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

~~(4 D)~~ a filing covered by Rule 3.4 ~~(d c)~~;

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

~~(6) an arrest or search warrant;~~

~~(7) a charging document and a declaration filed in support of a charging document;~~

~~(8) the name of an individual known to be a minor when the minor is a party, and~~

~~there is no statute, regulation or rule mandating nondisclosure; and~~

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

~~(d c)~~  Filings Made Under Seal Procedure to Protect from Public Access.

(1) Parties may not seal otherwise public documents by consent or by labeling them “sealed” or “confidential”.

(2) Motion. A party may move that a filing be designated “confidential” or “sealed.” In its motion, the party must show that protection of the filing is justified under the factors listed in N.D. Sup. Ct. Admin. R. 41(5)(f). A motion to protect a filing from public access, and any supporting documents, must be filed as “sealed” until the court makes its ruling. A court record may not be sealed under these rules when reasonable redaction will adequately resolve the issues and protect the parties.

(3) The Court Order. On motion, or on its own, the court may order that a filing be made under seal without redaction designated “confidential” or “sealed.” The court may later unseal order that the filing be made public or order the person who made the filing to file a redacted version for the public record.

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

~~(1) require redaction of additional information; or~~

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

(f d) Filing a Confidential Information Form.

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

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

(g e) Non-conforming Documents.

(1) Waiver. A person waives the protection of Rule 3.4 ~~(a)~~ as to the person's own information by filing it without redaction ~~and not under seal~~ or without moving that the information be otherwise protected from public access.

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

#### EXPLANATORY NOTE

Rule 3.4 was adopted effective March 1, 2009. Rule 3.4 was amended, effective March 15, 2009; March 1, 2010; May 1, 2017; March 1, 2021; \_\_\_\_\_.

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

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

~~The term "financial account number" includes any credit, debit or electronic fund transfer card numbers, and any other financial account number.~~ Documents containing redacted protected information must be filed together with a confidential information form under subdivision (f d) when a party is required by statute, policy or rule to include the protected information in the document. For example, N.D.C.C. § 14-05-02.1 requires a divorce decree to contain the social security numbers of the parties to the divorce. Under subdivision (f d) , a party to a divorce case may comply with this statute and the redaction requirements of this rule by filing a confidential information form and a redacted version of the decree in the public part of the file.

A new subdivision (a) was adopted, effective \_\_\_\_\_, to add a definitions section to the rule.

A new subdivision (b) was adopted, effective \_\_\_\_\_, to consolidate the rule's provisions relating to redaction.

~~Subdivision (a)~~ Paragraph (b)(1), formerly paragraph (a)(1), was amended, effective March 1, 2010, to eliminate the requirement to redact addresses in criminal



106 matters.

107 ~~Subdivision (a)~~ Subparagraph (b)(1)(E), formerly paragraph (a)(2), was amended  
108 adopted, effective May 1, 2017, to require, upon request of the victim, the redaction of all  
109 victim contact information from documents before they may be filed with the court in a  
110 criminal or delinquency case. This right is granted by N.D. Const. Art. I, § 25(1)(e).  
111 “Victim” is defined in N.D. Const. Art. I, § 25(4).

112 ~~Subdivision (b)~~ Paragraph (b)(2), formerly subdivision (b), was adopted, effective  
113 March 1, 2010, to indicate it is the responsibility of a party or nonparty making a court  
114 filing to refrain from including protected information in the filing. The clerk of court is  
115 not required to review a document filed with the court for compliance with this rule.

116 ~~Subdivision (c), formerly subdivision (b)~~ Paragraph (b)(3), formerly subdivision  
117 (c), was amended, effective March 1, 2010, to add a redaction exemption for the name of  
118 a minor when the minor is a party and there is no statute, regulation or rule mandating  
119 nondisclosure of the minor's name.

120 ~~Subdivision (c), formerly subdivision (b)~~ Subparagraph (b)(3)(E), formerly  
121 subdivision (c), was amended, effective March 1, 2010, to add a redaction exemption for  
122 a defendant's date of birth in a court filing that is related to criminal matters, non-criminal  
123 motor vehicle and game and fish matters, and infractions.

124 A new subdivision (c) was adopted, effective \_\_\_\_\_, to clarify the process  
125 for protecting a filing from public access.

126 ~~Subdivision (f)~~ Subdivision (d), formerly subdivision (f), was amended, effective

March 1, 2010, to require that state's attorneys file confidential information forms containing certain defendant information when known.

~~Subdivision (g)~~ Subdivision (e), formerly 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.

Rule 3.4 was amended, effective March 1, 2021, to delete the term “affidavit” and replace it with “declaration.” This amendment was made in response to N.D.C.C. ch. 31-15, which allows anyone to make an unsworn declaration that has the same effect as a sworn declaration, such as an affidavit. N.D.C.C. § 31-15-05 provides the required form for an unsworn declaration.

SOURCES: Joint Procedure Committee Minutes of September 30, 2021, page 10; April 29, 2021, pages 2-4; January 28, 2021, pages 19-20; April 24, 2020, pages 4-5; January 26-27, 2017, page 22; 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. ch. 31-15, § 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 39. RECORDING DISTRICT COURT TRIALS AND PROCEEDINGS, AND  
PREPARING TRANSCRIPTS

Section 1. Authority. Under N.D. Const. art. VI, § 3, the supreme court has the authority to establish policies and procedures to be followed by all courts of the state. The court also has specific authority to establish policies relating to personnel under N.D.C.C. § 27-02-05.1 and relating to court records under N.D.C.C. § 27-02-05.2.

Section 2. Preserving the Record. Except in small claims court cases under N.D.C.C. ch. 27-08.1 and in traffic cases under N.D.C.C. § 39-06.1-03, the record of testimony and proceedings of the district court must be preserved using audio-recording ~~devices~~ software, video-recording ~~devices~~ software, or stenographic shorthand notes. All electronic recording ~~devices~~ software must meet the minimum specifications established in administrative policies.

Section 3. Filing. The ~~operator of the recording device or~~ court reporter must file ~~the original recording or~~ all shorthand notes of the proceeding with the clerk of district court at the conclusion of the trial or proceeding or as soon after as is practical. All audio recordings and annotations or tags must be maintained in the electronic recording software.

~~The date(s) and case number(s) must be indicated on the recording or shorthand notes in such a manner that the clerk may establish an index and filing system.~~

Section 4. Access to Originals.

(a) Employees. An employee of the district court, or other individual under contract with the court, who is charged with preparing the transcript may ~~withdraw the original recording~~ access audio recordings or shorthand notes for a reasonable period of time for the purpose of preparing the transcript. ~~The clerk must indicate any withdrawal in the case file.~~ All audio recordings maintained in the electronic recording software may be accessed through the electronic recording software or a recording may be replicated.

(b) Non-Employees.

(1) If the ~~court reporter~~ court staff who attended the proceeding is not able to prepare the transcript, the court may order that another person be allowed to ~~withdraw the original~~ access the shorthand notes or audio recording.

(2) If the proceeding was recorded electronically, a copy of the original recording will be forwarded for transcription.

#### Section 5. Transcript - Duty to Prepare.

(a) Court Reporter. ~~The court reporter of any district court in which a criminal or civil action or proceeding has been tried~~ Court staff must prepare a transcript of the original shorthand notes of the action or proceeding, or of any part, upon receiving an order from the court or an order for transcript from the clerk of district court and upon payment of fees as ~~provided by court rule or when requested to do so by any party with the approval of the presiding judge and upon payment of fees as provided by court rule.~~

(b) Electronic Recordings. Each district must establish procedures to ensure that transcripts of proceedings which are recorded electronically are prepared in accordance

with time lines established in the North Dakota Rules of Appellate Procedure.

Section 6. Criminal Action Prepared at State Expense. A judge of a district court in which a criminal action or proceeding has been tried, on the judge's own motion or on application of the defendant or the state's attorney of the county, may order a transcript of the action or proceeding, or of any part, to be made at state expense whenever there is reasonable cause.

Section 7. Form of Transcript. The transcript must be prepared in the form prescribed by N.D.R.App.P. 10.

Section 8. Certification. The transcript must be certified by the person preparing the transcript in accordance with N.D.R.App.P. 10.

Section 9. Fees.

(a) Individuals Employed by the Judiciary. ~~Court reporters and other individuals employed by the judiciary to make the record~~ staff must receive a transcript preparation fee as established by administrative policy.

(b) Non-Judicial Employees. If the transcript is prepared by an individual who is not a judicial employee, payment will be made directly to the preparer, at a rate not to exceed administrative policy, and in accordance with N.D.R.App.P. 10.

(c) Originals and Copies. The original shorthand notes or audio recording of the proceeding are the property of the state of North Dakota ~~and must be filed with the clerk of court~~. The transcript is the property of the state of North Dakota after it has been filed with the clerk of district court ~~or clerk of the supreme court~~.

EXPLANATORY NOTE

Administrative Rule 39 was adopted, effective March 1, 1995; amended effective July 1, 1997; March 1, 1998; December 1, 2019; August 11, 2021;\_\_\_\_\_.

SOURCES: Joint Procedure Committee Minutes of January 27, 2022, pages 2-4;  
September 30, 2021, pages 14-15; January 30, 1997, pages 9-10.

CROSS REFERENCE: N.D.R.App.P. 10 (The Record on Appeal).

RULE 40. ACCESS TO RECORDINGS OF PROCEEDINGS IN DISTRICT COURT.

Section 1. Authority. Under N.D. Const. Art. VI, § 3, the supreme court has the authority to establish policies and procedures to be followed by all courts of the state. The court also has specific authority to establish policies relating to court records under N.D.C.C. § 27-02-05.2.

Section 2. Access to Audio Recording--Copies--On-Site Access.

(a) ~~The following persons~~ Parties ~~have~~ may ~~access to and may~~ or obtain copies of a an audio recording of a trial court proceedings: proceeding without charge, unless access is restricted by order of the court.

~~(1) parties to an action and their attorneys, if any, unless access is restricted by order of the court; and~~

~~(2) federal, state, and local officials, or their agents, examining the recording in the exercise of their official duties and powers.~~

(b) ~~Copies of a recording of trial court proceedings made under this rule may be purchased by the public unless the proceeding is closed or confidential, or the judge has ordered that~~ A non-party may request a copy of an audio recording of a court proceeding by submitting a request in writing to the judge who presided over the proceeding or the judge's designee. If the proceeding was closed or confidential, no recording will be provided. The judge may restrict access to all or part of the a recording not be available because of a public proceeding if:

(1) it would materially interfere with a party's right to fair trial;

(2) a witness or party has objected and shown good cause why it should not be available;

(3) it includes testimony of an adult victim or witness in a prosecution under N.D.C.C. ch. 12.1-20 or for charges in which an offense under that chapter is an included offense or an essential element of the charge, unless the victim or witness consents;

(4) it includes testimony of a juvenile victim or witness in a proceeding in which illegal sexual activity is an element of the evidence;

(5) it includes testimony of undercover agents or relocated witnesses; or

(6) it includes by testimony or other comment information protected under N.D.R.Ct. 3.4 (a).

(c) A person seeking to limit access to or availability of ~~a~~ an audio recording under subsection 2(b)(1) or ~~(b)~~(2) must submit a written motion to the court. The person must give notice of the motion to all parties to the proceedings. The court may require the person to give notice of the motion to any other persons or entities identified in the recording.

(d) If suitable, supervised accommodations are available, a ~~member of the public~~ non-party requesting access to a an audio recording of a trial court ~~proceedings~~ proceeding may listen to the recording in a dedicated area, unless access is restricted by order of the court. The ~~recording listener~~ may not ~~be copied or recorded~~ record or copy the recording by any electronic or other means.



(e) ~~The administrative council must establish procedures to ensure appropriate access to recordings.~~ Each district will establish procedures to ensure timely production of audio recordings upon request of parties or non-parties.

(f) The state court administrator will establish reasonable fees and payment methods for producing an audio recording of a court proceeding for a non-party. The fee must be paid in advance.

(f g) Video or electronic media coverage, if granted, is governed by N.D.Sup.Ct.Admin.R. 21.

Section 3. Status of Recording. Unless otherwise provided by court rule, the transcript of the proceeding, and not a an audio recording provided under this rule, is the official record of the proceeding.

#### EXPLANATORY NOTE

Adopted effective January 17, 1996, subject to comment; final adoption effective March 6, 1996; amended effective January 1, 1997; October 1, 2016; August 11, 2021;\_\_\_\_\_.

SOURCES: Joint Procedure Committee Minutes of January 27, 2022, pages 17-19.