AGENDA

JOINT PROCEDURE COMMITTEE

April 25-26, 2013
Fargo, N.D.

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JUSTICES OF THE NORTH DAKOTA
SUPREME COURT

Chief Justice
Gerald W. VandeWalle

Justices
Dale V. Sandstrom
Mary Muehlen Maring
Carol Ronning Kapsner
Daniel J. Crothers

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William A. Herauf, District Judge
Debbie Gordon Kleven, District Judge
Steven L. Marquart, District Judge
Steven McCullough, District Judge
William W. McLees, District Judge
Thomas E. Merrick, District Judge
David E. Reich, District Judge

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Joanne Hager Ottmar
Bruce D. Quick
Kent A. Reierson

Staff Attorney
Michael Hagburg

MINUTES OF MEETING

Joint Procedure Committee
January 31-February 1, 2013

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CALL TO ORDER

The meeting was called to order at 1:00 p.m., on January 31, 2013, by the Chair, Justice Mary Muehlen Maring.

ATTENDANCE

Present:
Justice Mary Muehlen Maring, Chair
Honorable John Greenwood
Honorable Steven L. Marquart
Honorable Steven McCullough

Honorable William McLees
Honorable Thomas E. Merrick
Honorable David E. Reich
Mr. Bradley Beehler
Mr. Larry L. Boschee
Mr. Daniel Dunn
Prof. Margaret Moore Jackson
Mr. Lonnie Olson
Ms. Joanne Hager Ottmar (Thursday only)
Mr. Bruce D. Quick (Friday only)
Mr. Kent Reierson

Absent:
Honorable Laurie Fontaine
Honorable William A. Herauf
Honorable Debbie Kleven
Mr. Robert Hoy
Mr. Richard H. McGee

Staff:
Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

The Chair discussed the schedule for the meeting and introduced a visitor, Lindsay Harris, the Chair's law clerk.

APPROVAL OF MINUTES

Judge Marquart MOVED to approve the minutes. Judge Reich seconded. The motion to approve the minutes CARRIED.

RULE 3.5, N.D.R.Ct., ELECTRONIC FILING IN THE DISTRICT COURTS; RULE 5, N.D.R.Civ.P., SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS (PAGES 303-325 OF THE AGENDA MATERIAL)

Staff reported that the committee discussed N.D. Sup. Ct. Admin. Order 16 on electronic filing at the September meeting and made several suggestions for amendment. The Supreme Court referred the committee's suggestions to the Court Technology

Committee, which made further suggestions. The Court approved amendments to the order, and accepted the committee's proposal that the order be converted into N.D.R.Ct. 3.5, and the new rule took effect January 15.

Staff said that in the interim since the September meeting, the committee had received additional suggestions for amendment of the electronic filing rule and of N.D.R.Civ.P. 5. In particular, attorney Rob Pagel suggested that amendments to Rule 5 were needed to make it clear that service through Odyssey® under Rule 3.5 is adequate service under Rule 5. Staff presented proposed amendments to Rule 3.5 and Rule 5 to the committee.

Judge McCullough MOVED to approve the proposed amendments to Rule 3.5. Ms. Ottmar seconded.

A member asked about the source of the proposed new language on page 305 at line 9. Staff said the language came from Rule 5. A member asked whether "give notice" was an appropriate instruction. The member said that "serve notice" was preferable language. A member suggested that it would also be useful to add language making it clear that notice could be served on a party's attorney, if the party was represented.

Mr. Beehler MOVED to amend the sentence on page 305 at line 9 to read: "A party who files a complaint in a civil case must serve notice of filing on the other parties or their attorneys." Mr. Dunn seconded. Motion CARRIED.

A member pointed out that language on page 307, lines 46-47, will be obsolete once mandatory e-service goes into effect on April 1. A member said that retaining the language could cause confusion, because it suggests that permission is needed to e-serve a document. Staff said that the Court decided to retain the language in its last revision of the rule because consent will continue to be required for e-service until April 1.

Judge McCullough MOVED to delete the language on page 307 at lines 46-47. Mr. Boschee seconded. Motion CARRIED.

A member observed the use of the phrase "after April 1, 2013" throughout the rule. The member said that this terminology would not be needed after the e-filing and e-service requirements went into effect on April 1.

Mr. Boschee MOVED to amend line 6 and 7 on page 305 and line 47 and 54 on page 307 to replace "after" with "effective." Mr. Olson seconded. Motion CARRIED.

Committee members discussed attorney Michael McIntee's suggestion that the

language on page 306, lines 27-28, be amended to discourage last minute e-filing and e-service. The consensus of the committee was that, because an e-served document is treated as if it were mailed on the day it was served with three days being added to any response period, a party or attorney who receives a "last minute" filing is protected from any unfair contraction of the response period.

The motion to adopt the amendments to Rule 3.5 CARRIED.

Ms. Ottmar MOVED to adopt the proposed amendments to Rule 5. Judge Marquart seconded.

The Chair explained that attorney Rod Pagel had suggested that Rule 5 should be amended to make it clear that service through Odyssey® under Rule 3.5 is adequate and appropriate service. The Chair pointed out to the committee that, under its current structure, Rule 5 seems to allow an array of service methods to be used. The Chair said that the rule seemed to need a significant amount of restructuring to clarify that electronic service will be the primary means of service for any document that is filed.

Committee members discussed ways the rule could be restructured. A member said that the proposed reference to Rule 3.5 on page 310-311, lines 42-43, was necessary but only the beginning of the changes that needed to be made to Rule 5(b)(2). A member suggested that the language at page 310, line 28, should be changed to indicate that electronic service is required for any document that is filed, but that all the listed service methods are acceptable for documents that are served but not filed, such as discovery documents.

A member said that a listing of the people excepted from e-service should be added to Rule 5 so that people referring to the rule should not have to look up Rule 3.5 in order to know who may be served by a different method. A member said the language on exceptions should spell out the categories of people excepted: self-represented parties and prisoners. A member said that people who have not been granted access to the Odyssey® system, such as out-of-state attorneys, should also be excepted and allowed to file using the other means in Rule 5.

A member asked what method an attorney would be use when required to serve clients, for example when a change of judge is demanded. The member said that e-service would not be appropriate when serving clients. The member suggested that an exception from e-service be added to the rule for circumstances when a rule or statute requires attorneys to serve their own clients.

A member said that the use of the term "paper" in the rule was likely to cause

confusion once e-service becomes mandatory. The member suggested that the term "document" be used instead and that use of the term "paper" be reserved for situations when service of an actual paper documents is allowed.

A member said that Rule 5(d)(1) on page 311 at lines 57-58 should be amended to include language indicating that documents filed with the clerk must be filed electronically through the Odyssey® system.

A member suggested that the language on page 312, lines 65-66, should be changed to correspond to the committee's amendments of the similar language in Rule 3.5.

By unanimous consent, the committee agreed that the motion to amend Rule 5 should be TABLED until Friday and that staff should be instructed to redraft the proposal to incorporated the suggestions discussed by the committee.

RULE 5, N.D.R.App.P., APPELLATE MEDIATION PROGRAM; RULE 8.9, N.D.R.Ct., ROSTER OF ALTERNATIVE DISPUTE RESOLUTION NEUTRALS (PAGES 279-302 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court referred Rule 5, Rule 8.9 and the appellate mediation protocol to the committee for review and comment. Staff said the Court wanted the committee to examine the proposals and make comments and suggestions for improvement. Staff said the proposals were developed by the Joint Alternative Dispute Resolution Committee.

Ms. Ottmar MOVED to adopt proposed new Rule 5. Judge Marquart seconded.

Two members of the committee who had worked on the drafting of the Rule 5 appellate mediation proposal explained that the purpose of the new rule was to resolve issues remaining between parties after district court judgments in family law and probate matters. The members said that both family law and probate appeals often involved disputes between family members that were amenable to resolution through mediation.

A member said that the rule allowed cases to be mediated before filing of the notice of appeal. The member said if the case gets settled before the notice of appeal is filed, it is not appellate mediation. The member suggested that perhaps "post trial mediation" would be a better name for the rule.

A member questioned the Rule 5(b) provision that allows mediation to take place on request of one party without prior consent of the opposing party.

Mr. Boschee MOVED to amend the proposal at lines 9-11 on page 281 to require all parties to consent to appellate mediation. Mr. Reierson seconded.

A member said it was unfair to allow mediation to take place over the objections of one party. A member responded that the rule allows a party opposed to mediation to argue for an exemption from mediation. A member said that the possibility of resolution through mediation should not be subject to veto by an intransigent party.

The motion FAILED.

A member questioned whether the rule should extend to probate cases. The member said that probate cases are much more complicated than family law cases, both in terms of the law that applies and the documents and other evidence that forms the basis of the case. The member said that probate cases are more likely to hinge on mixed questions of law and fact rather than on resolvable disputes between individuals.

Judge McCullough MOVED to delete line 8 on page 281 to eliminate the option for mediating cases under the Uniform Probate Code and the Uniform Trust Code. Mr. Reierson seconded.

A member said that, while probate disputes can be complicated, they often flow from disagreements between family members that can be resolved through mediation. A member said that it is appropriate to offer the possibility of mediation in appeals of probate and trust actions.

The motion FAILED.

A member said that the courts have been seeing far fewer contested family court cases since family court mediation has been put in place. The member said the program had been very successful: even if all issues are not decided through mediation, the number of issues the court must deal with is reduced substantially. The member said that adopting an appellate mediation program might bring additional positive results and reduce the workload of the courts.

The motion to recommend approval to the Supreme Court Rule 5 CARRIED.

Judge Marquart MOVED to adopt the proposed amendments to Rule 8.9. Judge McLees seconded.

A member asked whether retired, non-licensed attorneys should be allowed to serve as appellate mediators under Rule 8.9. A member said that retired attorneys are allowed to provide services to legal assistance agencies under some circumstances. A member said that at least two retired judges provide such services.

A member pointed out that the rule requires appellate mediators to take substantial hours of continuing legal education. The member asked why a retired attorneys who wanted to be mediators could not keep up their licenses, given the rule's substantial education requirements. A member said that the retired attorneys would also need malpractice coverage, which the courts could not provide.

A member said that retired attorneys who donate services to legal assistance are required to work under the supervision of licensed attorneys. A member said the licensure requirement should be kept part of the rule.

The motion to recommend approval to the Supreme Court of the amendments to Rule 8.9 CARRIED.

Judge McLees MOVED to recommend approval of Appendix B, the Appellate Mediation Protocol. Judge Marquart seconded.

The Chair said that the committee needed to discuss how appellate mediation should be concluded and what documents the parties will need to submit to the courts.

A member said that, under the protocol, parties would sign a stipulation and ask the court to enter an appropriate order. A member said it was unclear which court this request would be directed, the Supreme Court or the district court. A member said that if the case was mediated and settled before the notice of appeal was filed, the district court would be responsible to issue the "appropriate order."

A member said that if a case is partially settled after the notice of appeal is filed, the Supreme Court could issue an order to the district court directing the appropriate action, such as issuance of an amended judgment.

The Chair suggested that the mediation outcome paragraph needed to be broken down to account for parties who settle before the notice of appeal and parties who settle afterwards, and further for parties who settle all issues and parties who settle only some issues. A member agreed that the procedure needed to be clearer. The Chair also suggested that the mediation outcome statement needs to be made part of a formal court document so that the Supreme Court and the district court can see the details of the agreement, if necessary. The

Chair said that, under the existing protocol, the parties would ask that the appeal be dismissed, an amended judgment would be entered at the district court, and no one would see the agreement.

A member said that if a notice of appeal is filed, the protocol requires a stipulation to later be filed if the matter is resolved. A member said there is no requirement that the stipulation contain the agreement; instead, it needs only to state the issues that have been resolved. A member said it would be simpler if the rule required mediation to be completed in the time window before the notice of appeal is required to be filed. The member said any issues about which court has jurisdiction would then be avoided.

A member said that the ADR committee had discussed having the post-judgment mediation take place before the notice of appeal, but that the committee had objected to there being any suspension of any post-judgment time periods. The committee did not feel there was enough time for mediation, and an appeal if mediation failed, if the time deadlines were not suspended. A member said that some parties use filing a notice of appeal for leverage, and that the filing of the notice of appeal should not eliminate the chance of post-judgment mediation.

A member said there were three scenarios that could arise during post-judgment mediation: all issues could be resolved, some issues could be resolved, or no issues resolved. The member said the most important thing to the Supreme Court would be the remaining issues on appeal. The member said it was not necessary that the matter come back down to the district court immediately after the mediation for entry of an amended judgment, as long as it was clear which issues the parties needed the Supreme Court to address. Alternatively, the member suggested that the Supreme Court could retain jurisdiction while the agreement was sent down to the district court for an amended judgment.

Staff suggested that the committee decide how it would prefer the issue to be handled so that staff could work with the Supreme Court clerk to draft appropriate language for inclusion in the protocol.

A member said that the parties should be required to submit a stipulation to the Supreme Court that lists the issues that have been resolved and the issues that remain. The member said this approach would allow the appellate process to continue without interruption. The member said that the district court could then prepare an amended judgment incorporating the parties' agreement and any additional decisions by the Supreme Court.

A member said the alternative would be to have the parties send any agreement to the

district court, have the district court enter an amended judgment, and have this judgment returned to the Supreme Court, while the Court retained jurisdiction over the matter. The drawback to this approach would be that the district court might have to do a second amended judgment after the Supreme Court decision. On the other hand, the parties would have a judgment in hand if any problems arose involving the issues decided in the mediation.

A member said it would be important for the Court to require the return of the amended judgment within a defined period so as not to delay the appeal. A member said it would also be important for the rule to define that the appeal would continue from the amended judgment.

A member asked what percentage of cases are settled in full under the current pre-judgment family law mediation program. A member responded approximately 70-75 percent. A member responded, therefore, that there would likely be an extremely limited number of cases likely to be subject to post-judgment mediation.

By unanimous consent, the committee instructed staff to work with the Supreme Court clerk to prepare appropriate language for the rule and protocol to address the issue of stipulations and amended judgments to close or partially resolve an appeal.

A member asked about language in the protocol at page 298, line 75, that specifies compensation for appellate mediators. The member suggested that the specific payment amount be deleted and that language indicating that mediators will be compensated at a rate specified by the Supreme Court be substituted. The member said that otherwise, the protocol would need to be amended periodically.

A member said the amount was determined by the ADR committee when it drafted the rule. A member said that the district court mediation rule states that payment will be at an amount established by the Supreme Court. A member said that the appellate protocol should contain similar language.

The Chair pointed out the mediation protocol time lines listed on page 301. A member said that the five day time line for preparing the stipulation on page 301, line 130, seemed too short and that 10 days would be more appropriate.

A member suggested that calling mediation under proposed Rule 5 "post-judgment mediation" rather than "appellate mediation" would be better because parties do not need to be involved in the appeal process to commence mediation under the proposed rule. A member pointed out that parties do have to be within the time frame for filing a notice of appeal to be eligible for mediation under the proposed rule. A member said it would be more

accurate to call Rule 5 mediation "post-judgment mediation" because some parties might think that it is necessary to file an appeal to take part in it.

By unanimous consent, the committee instructed staff to convey the committee's comments on Rule 5, Rule 8.9 and the appellate mediation protocol to the Court.

RULE 8.2, N.D.R.Ct., INTERIM ORDERS IN DOMESTIC RELATIONS CASES (PAGES 326-332 OF THE AGENDA MATERIAL)

Staff informed the committee that attorney Michael McIntee had requested that Rule 8.2 be amended to allow parties to be cross-examined at hearings regardless of whether notice has been given on intent to cross-examine. Mr. McIntee said that the rule's notice of cross-examination requirement that makes sense for non-party affiants, who would have no reason to attend the hearing absent notice, but that it does not make sense to apply the requirement to parties who will be at the hearing.

Ms. Ottmar MOVED to approve the proposed amendments to Rule 8.2. Prof. Moore Jackson seconded.

A member asked whether a party can file an affidavit in an interim order case. Members replied that the rule requires evidence to be presented by affidavit.

Mr. Boschee MOVED to amend lines 72-73 on page 330 to replace the proposed amendment with: "A party may always cross-examine an opposing party who has appeared." Judge Merrick seconded.

A member said the proposal would give motivation for a party not to appear. The member said there is no reason not to give a party notice of intent to cross examine as would be done any other witness.

A member suggested that the intended result could be achieved with a small addition to the rule's existing language by requiring notice only to non-party affiants. The member said the notice requirement is important for non-party affiants but not for parties, who are going to be at the hearing.

A member pointed out that the rule allows the court to "otherwise order" evidence to be presented in a form other than an affidavit. The member said affidavits often do not provide much evidence for the court to work with and live testimony from the parties at the hearing needs to be taken.

The motion FAILED.

Judge Reich MOVED to amend the proposal at line 70 on page 330 to read "a non-party affiant" and to delete lines 72-73. Judge McCullough seconded. Motion CARRIED.

The motion to recommend approval to the Supreme Court of the proposed amendments to Rule 8.2 CARRIED.

RULE 8.3, N.D.R.Ct., CASE MANAGEMENT (DIVORCE CASES) (PAGES 333-336 OF THE AGENDA MATERIAL)

Staff informed the committee that attorney Michael McIntee had requested that Rule 8.3 be amended to require the plaintiff to prepare a draft property and debt listing and to provide it to the defendant at least 21 days before the hearing. In the alternative, Mr. McIntee suggested that some mechanism be imposed that would require the parties to work together on the document in the 30 days before the 14 day deadline for submission. Staff presented the committee with a rule proposal based on Mr. McIntee's suggestions.

Judge McLees MOVED to approve the proposed amendments to Rule 8.3. Judge Marquart seconded.

A member said the proposal places all the burden on the plaintiff to prepare the property and debt listing and this is not fair. The member said it is preferable to have the listing prepared jointly and that it is the way it has always been done. The member said that sometimes the parties do not work together and each party submits a separate listing and the court has to figure out which one to use. The member said this is not the best approach, but it is more likely to happen if the proposal is accepted.

A member said that ending up with dueling property and debt listings is common. The member said that some change to the rule to force the parties to work together would be welcome. A member said that the rule already requires the parties to meet together to prepare a joint informational statement and a preliminary property and debt listing.

A member said the parties are unlikely ever to completely agree on the content of a property and debt listing. The member said the important thing is to have something on paper submitted to the court by the 14 day pre-trial deadline. The member said that one district had modified its form scheduling order to remove the trial from the calendar if the joint order is not submitted by the deadline—the member said this provides the parties an incentive to submit the order on time.

A member said the parties in divorce cases are often late filing documents and the only way to make sure deadlines are fulfilled is to order the parties to file by the deadline. A member said the important thing with the property and debt listing is to have something down by the 14-day deadline so the parties know what their respective positions are. The member said otherwise, if the parties do not submit the required documents until trial, the trial turns into a discovery deposition and a waste of time.

A member said the rule already imposes a meeting requirement and firm deadlines and the solution is to enforce these requirements.

The motion to recommend approval to the Supreme Court of the proposed amendments to Rule 8.3 FAILED.

RULE 4, N.D.R.Civ.P., PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE (PAGES 30-52 OF THE AGENDA MATERIAL)

Staff reviewed the committee's September discussion of Judge David Nelson's proposal to include the substance of N.D.C.C. § 39-01-11 in Rule 4. Staff presented the committee with proposed amendments to the Rule 4 explanatory note listing and discussing N.D.C.C. § 39-01-11 and other substituted service statutes.

Judge McLees MOVED to approve the proposed amendments to the Rule 4 explanatory note. Judge Marquart seconded.

Members asked whether the proposed list contained all the substituted service statutes. Staff said that the list was not intended to be all-inclusive. The Chair said there might be additional statutes in the probate area that could be included. A member suggested the term "for example" could be included in the note.

Prof. Moore Jackson MOVED to add the words "Examples of" prior to "service" at line 336 on page 46. Judge Marquart seconded. Motion CARRIED.

The motion to recommend approval to the Supreme Court of the proposed amendments CARRIED.

RULE 43, N.D.R.Civ.P., EVIDENCE; RULE 28, N.D.R.Crim.P., INTERPRETERS; RULE 6.10, N.D.R.Ct., COURTROOM OATHS (PAGES 108-125 OF THE AGENDA MATERIAL)

Staff reviewed the committee's discussion of N.D.R.Ev 604 (Interpreters) at the April

and September meetings and how the committee had agreed that some of the state's interpreter statutes were outmoded. Staff presented the committee with proposed amendments to N.D.R.Civ.P. 43, N.D.R.Crim.P. 28, and N.D.R.Ct. 6.10 designed to supersede N.D.C.C. §§ 31-01-11 and 31-01-12.

Mr. McCullough MOVED to approve the proposed amendments to Rule 43. Judge Marquart seconded.

A member said that the language on page 110, lines 13-14, allowing fees for interpreters to be taxed as costs raised concerns. The member said that as to disabled people, particularly deaf people, the Americans with Disabilities Act would prohibit taxing interpreter fees as costs. The member said that it is good that the proposed language was the same as the federal language, but that the issue of taxing costs against the disabled needs to be addressed, possibly in the explanatory note.

A member said that at a recent conference, attendees were warned that the federal government views non-accommodation of the inability to speak English as national origin discrimination under Title VI of the U.S. Code. The member said that the federal government has been investigating states with inadequate interpreter services in their courts.

A member said that courts probably would never tax a party for interpreter services except under special circumstances such as when a party wanted its own interpreter rather than the interpreter provided by the court. The member said that a court who attempted to tax interpreter fees under normal circumstances could prompt a discrimination complaint or a federal investigation.

A member asked if a prevailing party, who is also a language-impaired party, can tax its interpreter costs against the losing party. A member replied that such taxation possibly may be valid, but the troubling issue is whether the proposed language would allow the court to tax costs that the court itself incurred to retain an interpreter.

A member suggested that the matter be explained in the comment. A member commented that it would be preferable to retain the federal-based language in the rule.

Mr. Boschee MOVED that staff prepare language for the explanatory note to point out the issues involved in taxing interpreter costs when a disabled person is involved in a case and to list some examples of statutes that bear on the issue. Prof. Moore Jackson seconded.

A member asked whether taxation of costs would be legitimate when the interpreter is provided to assist a witness rather than a party. A member replied that the option to tax

costs should be removed from the rule entirely because providing an interpreter when one is needed should simply be a cost of doing business for the courts. A member said that when it is a witness who needs an interpreter, it would be legitimate to tax the cost to the parties unless they were indigent.

A member asked where the money for interpreters comes from. A member replied that, on the criminal side, the courts have an interpreter budget. A member said that on the civil side, parties sometimes hire interpreters on their own as part of the process of gathering facts. The member said that if the party who hires an interpreter prevails, they should be able to recover their costs.

A member said that the proposed language allowing taxation of costs was discretionary. A member said that when costs are taxed in a civil case no discrimination issues are involved, except for taxation against a disabled person. A member said that when an interpreter is not provided by the courts, it raises a federal law access to justice issue that can subject a state court system to investigation and audits. A member replied there is no mechanism for state funding of interpreters in most civil cases. A member said that a person who is involved in a court action and denied an interpreter can make a complaint to the Department of Justice and that the department can investigate to see if access to justice has been denied.

Motion CARRIED.

Ms. Ottmar MOVED to table the rule until the April meeting. Judge Marquart seconded. Motion CARRIED.

Judge McLees MOVED to approve the proposed amendments to Rule 28. Prof. Moore Jackson seconded.

The Chair asked why the rule did not mirror the language proposed for Rule 43. Staff said the language in Rule 28 was the same as the federal criminal rule, which also did not mirror the federal civil rule.

A member said that Rule 28 is not the same as Rule 43 because it recognizes that interpreters must be provided by the courts in a criminal case. The member said the language of the civil rule assumes that parties will play some role in paying for their own interpreters.

A member said that the rule language on paying for interpreters indicates that payment will be "by law or as the court directs." The member said that this language could also run afoul of discrimination law. Staff said that the federal rule language said the interpreter

would be paid for by law or by the government, but the committee did not choose to include that language when the rule was last amended.

Mr. Boschee MOVED to table Rule 28 until the April meeting. Judge McCullough seconded. Motion CARRIED.

Judge Marquart MOVED to approve the proposed amendments to Rule 6.10. Judge Reich seconded. Motion CARRIED.

The asked the committee to look at the text of N.D.C.C. § 31-01-11 because the proposed changes to Rule 43 and Rule 28, now tabled, would have superseded this rule. Staff asked the committee whether it wanted to retain any of the language or ideas in the statute in the rules. A member said that courts have some trouble finding interpreters but that no court would ever just subpoena one as allowed by the statute. The consensus of the committee was that the statute's language should not be added to the rules.

The meeting recessed at 4:40 p.m., on January 31, 2013.

April 27, 2012 - Friday

The meeting was called to order at approximately 9:00 a.m., by Justice Mary Muehlen Maring, Chair.

RULE 3.5, N.D.R.Ct., ELECTRONIC FILING IN THE DISTRICT COURTS; RULE 5, N.D.R.Civ.P., SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS (PAGES 303-325 OF THE AGENDA MATERIAL)

Staff presented the committee proposed amendments to Rule 5 based on the committee's directions made at the Thursday session.

Judge Marquart MOVED to approve the proposed amendments to Rule 5. Judge McLees seconded.

A member questioned the organization of subdivision (b) of the rule. The member said that one paragraph talks about upon which persons service must be made, then there is discussion of manner of service, and then persons who are exempt, and then more manners of service. The member said that keeping all the persons together and keeping all the manners together would be a better approach.

A member said the listing of exemptions, while referring to persons, was actually a

manner of service section because it stated the manner of service for given types of persons. A member said the proposal contained all the necessary provisions, but the organization of the (b) subdivision was simply muddled.

A member said one solution would be to move the exempt persons paragraph so it followed the attorney service paragraph—then all the people would be together. A member said that instead of moving the exempt persons paragraph up, the attorney service provision should be moved down and the electronic service provision should be the first paragraph of subdivision (b)—then how to serve would be first, and persons to serve next.

Judge Greenwood MOVED to amend the proposal by moving the electronic service provision to the beginning of subdivision (b) and placing the attorney service and exempt from service paragraphs together. Judge McCullough seconded.

A member asked whether the language regarding attempted electronic service was clear. The member suggested that the language should indicate that service is not effective if the document did not reach the person to be served.

By unanimous consent, the pending motion was amended to rephrase the second sentence of (b)(1) as follows: "Service is complete on transmission, but is not effective if the serving party learns through any means that the document did not reach the person to be served."

Mr. Boschee MOVED to amend the pending motion to add the word "electronic" to the beginning of the second sentence of (b)(1). Judge McLees seconded. Motion CARRIED.

The motion, as amended, CARRIED.

The motion to recommend approval to the Supreme Court of the proposed amendments to Rule 5 CARRIED.

Staff explained that the committee had approved amendments to Rule 3.5 at the Thursday session, but then had added further elements to Rule 5 that had not been added to Rule 3.5. Staff said that it had redrafted Rule 3.5 to add the additional elements the committee approved for Rule 5.

Judge McCullough MOVED to approve the proposed amendments to Rule 3.5. Judge Reich seconded.

Judge McCullough MOVED to amend paragraph (e)(2) as follows: "Electronic service of a document is not effective if the party making service learns through any means that the document did not reach the person to be served." Judge McLees seconded.

A member said the proposed amendment would make Rule 3.5 consistent with the committee's amendments to Rule 5.

Motion CARRIED.

The motion to recommend approval to the Supreme Court of the proposed amendments to Rule 3.5 CARRIED.

Staff explained that it had prepared a certificate of service form and a notice of filing form to assist parties who file documents electronically. Staff said the proposed certificate of service form was based on the form used by the federal district court.

Mr. Quick MOVED to approve the proposed forms. Judge McCullough seconded.

A member questioned whether the certificate of service form requested enough information from the serving person. The member suggested that a mailing address also be provided.

By unanimous consent, a mailing address was added to the certificate of service form.

A member asked whether the certificate of service form needed a spot for notarization. Staff said that the form was intended for attorneys to use under Rule 5. A member observed that the form was not an affidavit of service and could only be used by attorneys or court staff.

A member asked if Rule 5 should be amended to allow attorney staff, who typically would be doing the actual electronic filing, to use the certificate. A member said that when attorney staff serves a document, an affidavit of service is prepared. A member said that non-attorneys do not have licenses they can lose due to a faulty certificate of service. A member said that when certificates of service could be done as part of the same document, they were more convenient than an affidavit of service. Now, because a separate certificate of service is required when filing and serving through Odyssey®, it is equally convenient to do the affidavit of service.

A member said that when an office only has a single staff person, who is also the single notary, it is not convenient for the staff member to do the affidavit of service. A

member said that the attorney could just sign an certificate of service in such a case. A member said it is important that a non-attorney do an affidavit because there is a penalty if they swear falsely, just as there is a penalty for an attorney (loss of license) if a certificate is improper.

A member said that other jurisdictions have allowed non-attorneys to provide certificates of service supported by an unsworn statement made under penalty of perjury.

A member pointed out that Rule 11 requires mailing address, email address, telephone number and attorney ID number on forms signed by an attorney. By unanimous consent, these items were added to the proposed forms.

Staff said that the Secretary of State had established guidelines for electronic notarization and that wholly electronic notarized forms could be produced under the guidelines.

The motion to recommend approval to the Supreme Court of the proposed forms CARRIED.

Judge McCullough MOVED to send the proposed amendments to Rule 5 and Rule 3.5, and the proposed new forms, to the Supreme Court immediately. Judge McLees seconded. Motion CARRIED.

RULE 11, N.D.R.Crim.P., PLEAS (PAGES 53-107 OF THE AGENDA MATERIAL)

Staff reviewed the committee's actions at the September meeting, when it had addressed proposed amendments to Rule 11 that would require defendants to acknowledge their understanding that an "Alford" guilty plea can be valid even if they do not admit guilt. The committee had tabled the proposal after making multiple amendments. Staff also presented the committee with an alternative proposal that would allow nolo contendere pleas in North Dakota.

Judge McCullough MOVED to remove the proposal from the table. Mr Quick seconded.

Prior to the meeting, a member emailed criminal defense attorneys for their reactions to the proposals. The member said that there was no support for adopting the nolo contendere plea. A member said the state's attorneys had reacted similarly to the proposals. The member said that one question raised about the proposal was on the requirement that the defendant acknowledge the plea was in the defendant's best interests. The member said that

the "best interest" language was not in the case law and that it was an undefinable standard. The member said that "voluntarily, knowingly and understandably" are the requirements that should apply.

Mr. Olson MOVED to amend Rule 11 proposal language on page 56 at lines 40-41 to replace the "defendant's best interest" language with "knowingly and voluntarily made by the defendant." Mr. Boschee seconded.

A member asked whether "intelligently" also needed to be included in the motion language. A member replied that in State v. McKay, the items required were that the plea be knowingly and voluntarily given and that there be a factual basis for the plea. The member said Alford talked about a "voluntarily and intelligent" choice.

By unanimous consent, the motion was amended to add "intelligently."

The motion as amended CARRIED.

A member said that the language requiring that "evidence exists from which it can be concluded" the defendant committed the crime should require that "a trier of fact could conclude" instead. A member replied that such a change would be contrary to the traditional Anders standard under which the defendant would only need to acknowledge the existence of some evidence, not of weighty evidence that could convince a trier of fact. The member said the defendant needed only to agree that there is evidence out there, the defendant does not have to admit there is enough evidence to convict.

A member said that the Anders plea procedure had evolved. First, it was not used at all. Then, after it was accepted, the prosecutor was required to call in witnesses to testify about the evidence against the defendant. Now, there are no witnesses and the prosecutor recites the evidence. The member said that defense attorneys do not like having shortcuts in the procedure, because the end result is that a defendant who maintains innocence is allowed to plead guilty. The member said it is in the defense attorney's best interest that the court make extensive queries about the evidence and about the defendant's understanding of the plea.

Judge McLees MOVED to amend the proposed Rule 11 language on page 56, lines 40-41, to include the language "and evidence exists from which the trier of fact could reasonably conclude the defendant committed the crime." Mr. Quick seconded.

A member wondered whether "factual basis" should be used in the proposed amendment for the sake of consistency within the rule. A member replied that the proposed

language implies that a factual basis exists. A member said that when the court queries a defendant about the existence of a factual basis, the court is trying to determine whether evidence exists from which the trier of fact could conclude the defendant committed a crime.

A member said that with the proposed amendment, only a subtle difference would exist between the "normal" guilty plea during which the defendant is required to acknowledge facts that support the plea, and the Anders plea. The member said that the defendant's acknowledgment that the plea is in the defendant's best interests seems to be the essence of an Anders plea. A member said the key difference is that, even though required to acknowledge facts, the defendant is allowed to maintain innocence.

A member said that the "voluntary" component of the plea is already covered by paragraph (2) of the rule.

A member asked whether the proposed new acknowledgment requirement was going to change anything that judges had been doing in their plea proceedings. A member said many judges also ask defendants these questions. A member said that often, when trying to obtain a factual basis, a defendant will indicate that the prosecution's recitation does not tell how things actually happened. A member said judges have to work with all the material provided during the plea proceeding.

A member said unrepresented defendants are the most difficult situation: they do not want to admit any facts, but they want to get out of jail and go to work. The court can refuse to accept a plea, but the defendant is then likely to be educated while in jail on how to properly respond to the court, and then make a guilty plea the court can accept.

Motion CARRIED.

Judge McLees MOVED to amend the proposed Rule 11 language on page 56, line 38, to read: "acknowledges facts exist that support the guilty plea." Mr. Quick seconded. Motion CARRIED.

A member said that the language of paragraph 4(B) had become garbled in the course of amendments and needed some repair.

Judge McCullough MOVED to amend the paragraph 4(B) language on page 56, lines 39-41, to read: "while maintaining innocence, acknowledges that the guilty plea is knowingly, voluntarily and intelligently made by the defendant and that evidence exists from which the trier of fact could reasonably conclude that the defendant committed the crime." Judge McLees seconded. Motion CARRIED.

A member wondered how a defendant could acknowledge that a plea is intelligently made. The member said the defendant could acknowledge the plea was voluntary and knowing, but intelligent is a different matter. A member replied that intelligent relates to the best interest issue. A member said that courts have required that any guilty plea be intelligently made, including Alford.

The motion to approve the amendments to Rule 11 CARRIED.

RULE 707, N.D.R.Ev., ANALYTICAL REPORT ADMISSION; CONFRONTATION (PAGES 126-146 OF THE AGENDA MATERIAL)

Staff explained that the committee had discussed Rule 707 at the April and September meetings. In September, it decided to table the rule to see whether the Supreme Court would provide additional insight on the interpretation of the rule's terms. Staff presented the committee with a summary of the most recent decision in a North Dakota case and proposed amendments to the rule.

Mr. Quick MOVED to approve the proposed amendments. Mr. Dunn seconded.

A member said that the proposed change to the timelines in the rule was unrealistic. The member said that analytical reports will not be back from the state laboratory by 30 days after the initial appearance, the deadline in the proposal. The member said the initial appearance is basically the starting point of the case and 30 days later is too early for analytical reports to be ready. A member said that 100 days is a typical wait time for a drug report.

Judge McCullough MOVED to amend lines 7-8 on page 128 to change the deadline to run from "defendant's arraignment." Mr. Quick seconded.

A member said that in felony cases the arraignment is held in tandem with the preliminary hearing and that when a lab report is at issue, the preliminary hearing is continued until after the lab report is received.

A member said the concerns that led to the proposal to tighten the deadlines stemmed from DUI cases, not felony drug cases. A member said an arraignment in a misdemeanor DUI case would take place after the initial appearance, so having the deadline run from the arraignment would not be a change in these cases. A member said the breath test in a DUI case is done immediately and urine tests are also completed quickly so the 30-day time frame would be adequate in most DUI cases.

A member asked what would happen if the test was not back by the deadline. A member replied that a motion to extend the period would need to be made.

A member said a concern about starting the clock at the arraignment is that most defendants plead not guilty at the initial appearance, so there is no signal to the prosecution to prepare the necessary paperwork stating its intent to introduce the report. A member replied that most larger jurisdictions provide the notice of intent when they provide discovery to the defendant. The defense then files standard paperwork requesting production of a witness to testify on the report. The member said this paperwork is filed regardless of whether the test has come back yet.

Motion CARRIED.

The Chair pointed out that the proposed amendments removed language referring to the name and job title of the person requested to testify. The Chair said that not requiring the name or job title might allow defendants too much latitude in requesting a witness.

Prof. Moore Jackson MOVED to amend line 11 of page 128 to add the language: "identify by name or job title." Judge McLees seconded. Motion CARRIED.

Judge McCullough MOVED to add a new subdivision (c) as follows: "The court may extend any of the deadlines contained in this rule on a showing of good cause." Judge McLees seconded.

A member said that the timelines in the rule were short and that the parties should be able to get relief when appropriate.

Motion CARRIED.

The Chair pointed out language on page 128, line 9, that gave a deadline for the defendant to object to the report. The Chair asked whether the deadline should run from service of the copy of the report.

Judge McCullough MOVED to amend the language on page 128, line 9, to replace "receiving the" with "service of a." Prof. Moore Jackson seconded. Motion CARRIED.

A member said that the way the process would work under the proposed amendments would be: within 30 days of the arraignment, the state would serve the report on the defendant; the defendant would then have 30 days to make objections and request production of a witness. The member said this all seemed to happen early on in the process, and that

because of the earliness, it seemed more likely that an objection would be made in every case and the state would need to track down and subpoena a witness in every case. The member asked whether this would create more continuances and more witness scheduling conflicts. The member said that many cases plead out as trial approaches, and with the proposed early deadlines, many witnesses would be scheduled to testify and then would no longer be needed.

A member said prosecutors would prefer not to schedule witnesses and send out subpoenas until shortly before trial because they prefer negotiation. The member said the early time lines leave more room for game playing by the defense, and might lead to wasted effort by the prosecution in tying up witnesses for trial. A member said that the previous deadlines were a trap for the unwary prosecutor because they could easily be missed in the run up to trial. The member said that taking care of everything early may be easier with the deadlines tied to the arraignment.

A member said that judges will have to work with the prosecution and defense in granting continuances to account for witness availability if cases go trial. The member said the staff at the state laboratory would be under a lot of pressure to be ready for trials that could end up not taking place.

By unanimous consent, the new subdivision (c) was titled "Extension."

The motion to approve the proposed amendments to Rule 707 CARRIED.

RULE 803, N.D.R.Ev., HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL; RULE 902, N.D.R.EV., SELF AUTHENTICATION (PAGES 147-200 OF THE AGENDA MATERIAL)

Staff explained that the committee had discussed proposed amendments to Rules 803 and 902 at the September meeting and had a lengthy discussion about what kind of certification is required to be consistent with proposed new provisions in Rule 803(6) and Rule 902(11) and (12). Staff presented the committee proposed amendments to the rules that would require a certificate to be "in the form of an affidavit or an unsworn declaration made under penalty of perjury." Staff informed the committee that the legislature had taken up a bill to allow unsworn certificates made under penalty of perjury and presented the committee a copy of the bill.

Judge McCullough MOVED to remove Rule 803 from the table. Judge Reich seconded.

Judge McCullough MOVED to remove Rule 902 from the table. Mr. Quick seconded.

The Chair explained that the State Bar Association of North Dakota had opposed the unsworn statements bill. The Chair said it had received a do not pass from the judiciary committee. The Chair said that SBAND had maintained that the bill infringed on the authority of the Supreme Court to promulgate rules of evidence. The Chair pointed out that N.D.C.C. ch. 31-14 already allowed unsworn "affidavits" from foreign countries that do not have notaries. SBAND also suggested that unsworn foreign statements should be addressed in the Rule of Evidence.

A member said that it might be advisable to table the rules pending action by the legislature. A member said that if the legislature does approve the pending bill, it might be necessary for the Court to act to supersede it.

A member said that the line between substantive and procedural statutes was not always clear. The member asked whether this issue had been addressed by the Uniform Law Commissioners or the federal rule drafting committees. Staff explained that under the North Dakota Constitution, the Supreme Court had ultimate authority to make procedural rules, while under other systems, such as the federal system, the legislature must approve rules promulgated by the courts.

Mr. Boschee MOVED to table Rules 803 and 902 until the April meeting. Judge Reich seconded. Motion CARRIED.

RULE 45, N.D.R.Civ.P., SUBPOENA (PAGES 201-220 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court requested the committee to discuss whether metadata language similar to that recently included in Rule 26 should be added to Rule 45. Staff presented the committee with a proposed amendment including metadata language in Rule 45.

Judge Marquart MOVED to approve the proposed amendments. Judge Reich seconded.

A member asked whether there was a program that would scrub documents to allow the basic metadata mentioned by the rule to be preserved but delete the rest.

A member said that with a subpoena, you are dealing with a non-party and it is best with a non-party to tread very lightly in requiring them to take extra measures when producing data. The member said when a non-party is forced to do more than simply produce the requested material, it creates problems. The member said that a party should certainly be required to produce basic metadata if requested, but it is different extracting it

from a non-party.

A member observed that the proposed language tracks language that is already in Rule 26, which applies to discovery among parties. A member replied that the rules should not put burdens on non-parties requested to produce material. The member said, however, that it was not possible to say how heavy a burden producing basic metadata might be.

A member said that providing basic metadata should not be a burden because it is a part of every electronic document. The member said that any burden would be encountered in removing other metadata.

The Chair pointed out that Rule 45 lacks a definition of "electronically stored information" so it is not clear how much, if any, metadata can be obtained through subpoena. A member said this could lead to disputes in court with one side claiming no metadata was discoverable and the other side seeking all metadata. A member said if the proposed language allowing discovery of basic metadata is not added, the rule could be considered ambiguous.

A member said the proposed language attempts to find a middle ground: it states that some metadata is discoverable and requires additional steps if more metadata is to be obtained. A member said most metadata date disputes that have made it to court so far involve one side seeking basic metadata from the other.

A member said there is a cost issue involved and one that would impact non-parties. In order to provide the required metadata and protect other metadata, a subpoenaed person would need to have an expert extract the other metadata from the electronic document before production. A member responded this is better than a "wild west" situation where no one knows what metadata is discoverable under the rule. A member said a non-party could object to production if it turned out to be overly costly to provide the basic metadata.

A member said the proposed language created a "safe harbor" that shows what metadata can be obtained without court involvement.

The motion to approve the proposed amendments to Rule 45 CARRIED.

RULE 65, N.D.R.Civ.P., INJUNCTIONS (PAGES 221-236 OF THE AGENDA MATERIAL)

Staff explained that committee member Larry Boschee had reviewed the extensive rewrite of Rule 65 and had suggestions for amendments to clarify that the rule applies to

permanent injunctions in addition to temporary restraining orders and preliminary injunctions. Staff presented Mr. Boschee's proposed amendments to Rule 65.

Mr. Boschee MOVED to approve the proposed amendments to Rule 65. Judge Reich seconded.

A member explained that the proposed changes would make the rule consistent with the federal rule. The member said the federal rule applies to permanent injunctions as well as temporary restraining orders and preliminary injunctions. The member said that, under the proposal, all types of injunctions must state their terms specifically and define what is being restrained, and all will bind the defined classes of people. The member said that if a trial court follows the rule's procedure for non-permanent injunctions, the proposed amendments allow the court to follow the same procedure for a permanent injunction.

The motion to recommend approval to the Supreme Court of the proposed amendments to Rule 65 CARRIED.

RULE 68, N.D.R.Civ.P., OFFER OF SETTLEMENT OR CONFESSION OF JUDGMENT; TENDER (PAGES 237-278 OF THE AGENDA MATERIAL)

Staff explained that attorney Steven Leibel had requested the committee to consider amendments to Rule 68 that would encourage plaintiffs to make offers of settlement by making it possible for them to receive double costs if the defendant rejects the offer and the plaintiff later obtains a more favorable result at trial. Staff presented the committee with proposed amendments to Rule 68 incorporating Mr. Leibel's suggestions.

Judge McCullough MOVED to approve the proposed amendments to Rule 68. Prof. Moore Jackson seconded.

A member said that the committee should look at the Minnesota approach instead of the New Mexico approach. The member said that the effect of an unaccepted offer, for example, is addressed more clearly under the Minnesota rule and that Minnesota provides more answers to questions that regularly come up in Rule 68 practice, like what is being offered, what is being accepted, what will the effect of non-acceptance be, what costs are recoverable, etc. The member said that Minnesota had done a better job of reducing uncertainty and encouraging settlements under the rule.

A member said that being able to recover double costs could encourage plaintiffs to make Rule 68 offers, which would put pressure on both parties to be reasonable and realistic as soon as possible during the course of negotiations. The member said it would be another

tool that would help the parties to engage in settlement negotiations as early as possible. The member said the Minnesota approach is very specific and has been followed for a long time so it would be useful to look at the Minnesota approach.

A member said that the proposed rule amendment was unnecessary and was not fair to defendants. The member said most civil cases are already settling and more encouragement of settlement is unneeded. The member said it was a rare civil case that made it to trial. The member said that Rule 68 already provided a disincentive for defendants to reject Rule 68 offers, because when an offer is rejected it is mandatory that costs be imposed. The member said there is a distinction between when a plaintiff must pay costs and when a defendant must pay costs: when a defendant must pay costs it is out of pocket and in addition to the judgment, prejudgment interest, post judgment interest, and any bond if an appeal is contemplated. When a plaintiff is required to pay costs, it comes out of the amount the plaintiff collects.

A member said that costs can be substantial in complex cases. The member said the New Mexico Law Review articles pointed out that in products liability, costs are typically in the $200,000-$400,000 range. The member said not all defendants are insured, especially in business litigation, and any cost would come out of the defendant's own wallet. The member said that 120 days after starting the lawsuit is not an adequate time in all cases for a defendant to properly evaluate their exposure. The member said in many cases, it is not until depositions of expert witnesses take place before the defendant can figure out what the real risk is. The member said it is at this point where the bulk of the costs are incurred, and if these costs are doubled it could be quite a sizable amount. The member said that, except for Minnesota and New Mexico, the majority of the states do not take the double cost approach.

A member said that it is best if parties solve their own disputes and give them tools to do this. The member said making a Rule 68 offer now puts pressure on the plaintiff and that it is reasonable to give plaintiffs an incentive to make an early Rule 68 offer to put pressure on the defendant. The member said it makes sense to have both parties facing risk as they evaluate settlement offers.

A member said North Dakota already has a Rule 68 and that plaintiffs are allowed to make offers under the rule. The member said the best approach would be to try to make the rule more clear so its use could be more effective.

A member who practices in both North Dakota and Minnesota commented that the possibility of paying double costs under the Minnesota rule has not affected settlements because defendants know they are going to have to pay costs regardless if they lose.

The Chair asked whether any attorneys who practiced in Minnesota had experience with that state's "damages only" rule provision. A member said the rule has been around for a long time and the practical impact is that attorneys must be careful to use the correct "total obligation" language when they make Rule 68 offers.

A member said on the North Dakota side, parties facing a Rule 68 offer are left having to analyze whether the offer is for damages only or the total obligation because it often is not specified in the offer. The member said the North Dakota approach is very uncertain. A member said that many attorneys make very specific offers in North Dakota. A member said that the party making the response to the offer can ensure that specifics are included.

A member said that the issue of whether the rule could be improved to require more specific offers is not on the table because it is not part of the proposed amendments. The member said this could be a topic for a future meeting.

Prof. Moore Jackson MOVED to have staff prepare amendments to Rule 68 to incorporate more specific provisions regarding the content of offers. Mr. Dunn seconded. Motion CARRIED.

A member said there are some situations, such as when an insured is involved in a dispute with their insurer over an uninsured motorist claim, when the company can bring declaratory judgment action and become the plaintiff. Then the double costs provision would work against the insured and there can be a race to the courthouse to become the plaintiff. The member said this is another reason not to adopt the double costs provision.

A member said there still is cause to be concerned about the unequal treatment between plaintiffs and defendants. A member said it is not necessarily true that defendants unreasonably refuse to settle. A member said plaintiffs sometimes refuse to settle when liability is clear, and can allow costs to accumulate because they know these are recoverable. The member said that one of the main reasons not to allow double costs is because expert fees are included in costs and the rates experts charge can be outlandish.

A member observed that expert fees are not recoverable in federal cases. A member replied that expert fees are recoverable in North Dakota by statute, and the committee does not have the power to nullify the statute. A member said the statute allows recovery of "reasonable" expert fees, it is not carte blanche. The member said the court can disallow excess expert fees.

The motion to approve the proposed amendments to Rule 68 FAILED.

RULE 13, N.D. Sup. Ct. Admin. R., JUDICIAL REFEREES (PAGES 337-353 OF THE AGENDA MATERIAL)

Staff explained that Judge Reich had requested that the committee discuss whether referee proceedings under Rule 13 should be recorded and subject to district court review when the referee is overseeing a small claims court or non-criminal traffic case. Staff presented proposed amendments to Rule 13.

Judge Marquart MOVED to approve the proposed amendments to Rule 13. Judge McLees seconded.

A member said the problem that led to the proposal is the conflict between the rule provisions allowing review and requiring recording of referee proceedings and the fact that small claims court and traffic court are not courts of record.

The Chair said that the rule specifically sets out the duties and authority of a judicial referee and the duties and authority of a referee serving as a magistrate, but neither the small claims or traffic court roles, or the statutory chapters governing these roles, is listed in the rule.

Judge McCullough MOVED to add a reference to N.D.C.C. ch. 27-08.1 on page 340, line 29, and to N.D.C.C. § 39-06.1-03 on page 340, line 35. Mr. Quick seconded. Motion CARRIED.

A member asked whether the purpose of the proposed change was to make the rule consistent with the statutes, which do not make small claims or traffic court of record. The member suggested the rule proposal needed additional amendments to accomplish this.

Judge Marquart MOVED to amend on page 341, line 56, to add language to the clause as follows: "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, proceedings must be heard on the record." Mr. Beehler seconded. Motion CARRIED.

A member said that if referees are conducting small claims and traffic court proceedings, it is important that the presiding judge's order on referee authority specifically references these.

The motion to recommend approval to the Supreme Court of the proposed amendments to Rule 13 CARRIED.

RULE 8.1, N.D.R.Ct., UNIFORM COLLABORATIVE LAW RULE (PAGES 354-408 OF THE AGENDA MATERIAL)

Staff explained that Judge Gail Hagerty had requested the committee consider adoption of the Uniform Collaborative Law Rule in North Dakota. Staff presented proposed new Rule 8.1 containing the text of the uniform rule to the committee.

Judge McCullough MOVED to table the proposed new rule until the April meeting. Prof. Moore Jackson seconded. Motion CARRIED.

The meeting adjourned at approximately 11:45 a.m. on February 1, 2013.

Michael J. Hagburg

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 41, N.D. Sup. Ct. Admin. R., Access to Court Records

In 2011, the committee proposed an amendment to N.D. Sup. Ct. Admin. R. 41 that would have allowed a criminal defendant to obtain restrictions on public access to the defendant's online case record if the charges against the defendant had been dismissed or if the defendant has been acquitted. This proposal was prompted by complaints expressed by former defendants who had not been convicted of the charges against them that they were being harmed because these charges remained on public display indefinitely on the Internet.

In addition to proposing this amendment, the committee also outlined criticism of the way that information about disposition of a criminal offense was displayed on the District Court Search website. People searching for information were provided a page that listed the person's name, the offense charged, and whether the case was open or closed: searchers needed to continue to an additional page to see the offense disposition.

The Supreme Court adopted the committee's proposed amendment with some modifications and it responded to the committee's criticism of the search information display by instructing the Court Technology Committee to address the issue. The attached letter describes the technology committee's work and how it resolved the issue. In brief, the display on the search result page will still display the charge, but it will provide better information on the disposition of the case and will indicate if the charge was dismissed or if the defendant was acquitted.

State of North Dakota
SUPREME COURT

CHAMBERS OF
DALE V. SANDSTROM
JUSTICE

STATE CAPITOL
BISMARCK, NORTH DAKOTA 58505
(701) 328-4212

February 28, 2013

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

Re: Criminal Case Status on District Court Public Search Site

Dear Chief Justice VandeWalle:

In 2011, the Joint Procedure Committee proposed an amendment to N.D. Sup. Ct. Admin. R. 41 that would have allowed a criminal defendant to obtain restrictions on public access to the defendant's online case record if the charges against the defendant have been dismissed or if the defendant has been acquitted. The impetus for this proposal was a concern that former defendants who had not been convicted of the charges against them were being harmed because these charges remained on public display indefinitely on the Internet. In addition, the committee was critical of the way district court criminal records search results were displayed: on the first page of the result, only the initial charge and the case status, open or closed, were listed. Searchers were required to continue to the second page to find the actual disposition of the case.

The Court found the committee's proposed rule amendments too broad and approved instead a change to Administrative Rule 41 that imposed a strict balancing test and required a showing that the interests of justice would be served before a defendant could obtain public access restrictions. The Court responded to the committee's concerns about the manner in which criminal records were displayed on the district court search site by instructing the Court Technology Committee to investigate whether the first page of the display could be changed to more accurately reflect the disposition of criminal charges.

The Court Technology Committee consulted with Tyler Technology and found that, while future versions of Odyssey will offer more flexibility on the search results page, the current display is essentially fixed. The committee discussed whether the charge level displayed on the results page could be updated as the case progressed to reflect charge reductions and plea agreements. The committee agreed this might make the display more

accurate, but making this change would have required clerks to continually amend charges that had been put into the system, which would have affected judicial workload and case management reporting.

The Court Technology Committee instructed the Odyssey working group to analyze the problem. The working group concluded that the charge listed on the search result page should reflect the charge that was originally brought against the defendant. The working group found, however, that the case status field of the search result page could be adjusted to reflect the ultimate disposition of a case. The working group devised a list of 16 case status types to supplement the three that had most been used previously: open, closed and inactive. The group proposed that if charges are dismissed, the case status would be listed as "Closed Dismissed," and if a defendant is acquitted, the case status would be "Closed Not Guilty." New case statuses, such as "Closed as Misdemeanor" and "Closed Non Criminal," would be used if charges are reduced in the course of a case.

At its February 8 meeting, the Court Technology Committee examined the working group's proposed solution to the criminal records search result display issue raised by the Joint Procedure Committee and the Court. The committee decided this solution should be implemented immediately. The committee believes this solution will allow the criminal records search display page to accurately reflect both the charge brought against a defendant and the disposition of that charge.

Thank you for giving the Court Technology Committee the opportunity to address this issue.

Sincerely yours,

Dale V. Sandstrom
Chair, Court Technology Committee

cc: Justice Mary Maring, Chair, Joint Procedure Committee

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 3.5, N.D.R.Ct., Electronic Filing in the District Courts

At the January meeting, the committee proposed amendments to Rule 3.5 and to N.D.R.Civ.P. 5 related to electronic filing. The Supreme Court adopted amendments to Rule 5 effective April 1 and amendments to Rule 3.5, and additional amendments to N.D.R.Ct. 3.1 and Admission to Practice Rule 1, effective April 15.

The court is seeking comment on the amendments to Rule 3.1 and 3.5, which are attached. In Rule 3.1, the court added a requirement that a filer provide an e-mail address for service on filed documents.

The amendments to Rule 3.5 were more extensive: in addition to approving the committee's amendments, the Court provided a detailed standard for when an attorney can obtain an exemption from e-filing or e-service, more details on the e-mail address an attorney is required to provide for e-service, and details on the consequences if an attorney fails to provide an address for e-service or fails to attend to e-served documents.

The committee may wish to consider whether it desires to provide comments to the Court on the amendments to Rule 3.1 and Rule 3.5 or to suggest that these rules should be amended further.

There is one issue that the Court's amendments to Rule 3.5 did not address. Under the rule, the e-filing requirement is triggered by the fact that a document is being filed, not by who the filer is or whether they are a party to the case. So, when a non-party is required

to file a document with the courts, that document must be e-filed. Consequently, sheriffs, guardians ad litem, parenting investigators, medical treatment providers, and many other categories of people that the court needs documents and information from are required to e-file. Many of these people are not enthusiastic about e-filing and their documents are currently making it into the filing system through workarounds, such as bringing the paper document to the juvenile court staff or the state's attorney's staff for scanning and filing by them. At least one sheriff has flatly refused to e-file. The committee may want to discuss whether the e-filing requirement should continue to apply to non-parties.

In its amendments to Rule 3.5 the court created a slight disconnect with the newly amended material in N.D.R.Civ.P. 5. Proposed amendments to Rule 5 to correct this issue are attached.

In its amendments to Rule 3.1, the Court requires the attorneys to provide their e-mail address for e-service in filed documents. This language was based on the language in N.D.R.Civ.P. 11. In Rule 3.1, however, the court specifies that the e-mail address provided must be the e-mail address for e-service. Proposed amendments to Rule 11 that also make this specification are attached.

RULE 3.5. ELECTRONIC FILING IN THE DISTRICT COURTS

(a) Electronic filing.

(1) Documents filed electronically in the district courts must be submitted through the Odyssey(R) electronic filing system.

(2) ~~After April 1, 2013, all~~ All documents filed after the initiating pleadings must be filed electronically except for documents filed by self-represented litigants and prisoners. After June 1, 2013, initiating pleadings must be filed electronically in civil, non-juvenile, cases. A party who files a complaint in a civil case must electronically serve notice of filing on the other parties or their attorneys.

(3) On a showing of ~~good cause~~ exceptional circumstances in a particular case, an attorney may be granted leave of court to file paper documents. Original wills, codicils and other documents of independent legal significance may be filed as paper documents. Colored or shaded documents may be filed as paper documents if necessary to ensure legibility.

(4) A document filed electronically has the same legal effect as a paper document.

(5) Any signature on a document filed electronically is considered that of the officer of the court or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court must strike the filing.

(b) Filing formats.

(1) Approved formats for documents filed electronically are WordPerfect (.wpd), Word (.doc or.docx), Tagged Image File (.tif), Portable Document File (.pdf) and ASCII

(.txt).

(2) All paragraphs must be numbered in documents filed electronically. Reference to material in such documents must be to paragraph number, not page number. Paragraph numbering is not required in exhibits, documents prepared before the action was commenced, or in documents not prepared by the parties or court.

(c) Time of filing.

(1) A document in compliance with the rules and submitted electronically to the district court clerk by 11:59 p.m. local time is considered filed on the date submitted.

(2) After reviewing an electronically filed document, the district court clerk must inform the filer, through an e-mail generated by the Odyssey(R) system, whether the document has been accepted or rejected.

(3) If a document submitted for electronic filing is rejected, the time for filing is tolled from the time of submission to the time the e-mail generated by the Odyssey(R) system notifying the filer of rejection is sent. The document will be considered timely filed if resubmitted within three days after the notice of rejection. A party seeking to take advantage of this tolling provision must file and serve a separate document providing notice that the rejected document is being resubmitted under N.D.R.Ct. 3.5(c)(3).

(4) Any required filing fee must be paid by credit card or debit card at the time the document is filed.

(d) Confidentiality. In documents prepared for filing with the court, information that would otherwise be included in the document but required by N.D.R.Ct. 3.4 to be redacted

in court documents must be separately filed in a reference sheet (confidential information form, see appendix) and may be included in those documents only by reference. Any document not complying with this order is subject to N.D.R.Ct. 3.4(g).

(e) Electronic service.

(1) ~~A party who files a document electronically must serve the document by electronic means if the recipient consents to accept documents served electronically. After April 1, 2013, all~~ All documents filed electronically after the initiating pleadings must be served electronically through the Odyssey® system except for documents served on or by self-represented litigants and prisoners. On a showing of ~~good cause~~ exceptional circumstances in a particular case, an attorney may be granted leave of court to serve paper documents or to be exempt from receiving electronic service. Attorneys who are required by rule or statute to serve documents on their own clients may serve paper documents.

(2) ~~Electronic~~ Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service of a document is not effective if the party making service learns through any means that the ~~attempted service~~ document did not reach the person to be served.

(3) ~~After April 1, 2013, any party not exempt from electronic filing must designate~~ All attorneys must provide an e-mail address to the State Board of Law Examiners for accepting electronic service. This email address will be posted on the North Dakota Supreme Court website.

(4) For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission. If an attorney who is not exempt from

electronic service fails to provide an e-mail address for service or fails to accept or open electronically served e-mail, the server's attempt at electronic service constitutes delivery. Service made impossible due to an attorney's failure to provide an e-mail address must be shown by an affidavit or certificate of attempted service.

(f) Technical issues; Relief. On a showing of good cause, the court may grant appropriate relief if electronic filing or electronic service was not competed due to technical problems.

EXPLANATORY NOTE

Adopted effective January 15, 2013; amended effective April 15, 2013.

Rule 3.5 was originally adopted as N.D.Sup.Ct.Admin.O. 16 on March 1, 2006. Order 16 was later amended, effective March 1, 2008; March 1, 2009; August 1, 2010; March 1, 2011; and July 1, 2012.

Order 16 was amended, effective July 1, 2012, to incorporate the provisions of the Order 16 Addendum (Filing in the District Court where Odyssey(R) Electronic Filing is Available) and N.D.Sup.Ct.Admin.O. 18 (Filing in Counties Using the Odyssey(R) Case Management System). The Order 16 Addendum and Order 18 were repealed, effective July 1, 2012.

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, pages 2-5, 15-18; September 27, 2012, pages 14-21; April 29-30, 2010, page 21; April 24-25, 2008, pages 12-16; October 11-12, 2007, pages 3-5; April 26-27, 2007, pages 16-18; January 25, 2007, pages 15-16; Sept 23-24, 2004, pages 18-27.

Cross References: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court); N.D. Admission to Practice R. 1 (General Requirements for Admission).

RULE 3.1. PLEADINGS

(a) Legibility and Numbering. All pleadings and other documents must be typewritten, printed, or reproduced and easily readable. Each sheet must be separately numbered. Pleadings and other documents filed with the court, except as otherwise permitted by the court, must be prepared on 81/2 x 11 inch white paper.

(b) Signature. All pleadings and other documents of a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name and contain the attorney's address, telephone number, e-mail address for electronic service, and State Board of Law Examiners identification number. All pleadings and other documents of a party who is not represented by an attorney must be signed by the party and contain the party's address and telephone number.

(c) Spacing and Names. Writing must appear on one side of the sheet only and must be double-spaced, except for quoted material. Names must be typed or printed beneath all signatures.

(d) Binding. All pleadings or other documents in an action or proceeding must be filed by the clerk flat and unfolded and each set of papers firmly fastened together.

(e) Filing of Documents. A party seeking to file a pleading or other document must submit it to the clerk. The first submitted version of a pleading or document will be treated as the original unless otherwise ordered by the court. A party need only file the original demand for change of judge.

(f) Lost Papers. If any original document is lost or withheld by any person, the court may authorize a copy to be filed.

(g) File Numbers. The clerk, at the time of the filing of a case and at the time of the filing of any responsive pleading, must assign a file number to the case and immediately notify the attorney of record of the assigned file number. Thereafter, all documents and pleadings to be filed must bear the assigned file number on the front or title page in the upper right hand portion of the document to be filed.

(h) Proof of Service Required. Proof of service must accompany pleadings and documents submitted to the clerk for filing, unless a rule or statute requires a document to be filed before it is served.

(i) Privacy Protection. Parties must follow privacy protection instructions in N.D.R.Ct. 3.4 when making filings with the court. Court personnel have no duty to review documents for compliance with N.D.R.Ct. 3.4.

(j) Non-Conforming Documents.

(1) Documents and pleadings that do not conform to this rule may not be filed.

(2) If a non-conforming document is filed by mistake, the court on motion or on its own may order the pleading or other document reformed. If the order is not obeyed, the court may order the document stricken and its service to be of no effect.

EXPLANATORY NOTE

Rule 3.1 was amended, effective January 1, 1988; March 1, 1996; March 1, 1999; August 1, 2001; March 1, 2005; March 1, 2007; March 1, 2009; May 1, 2012; March 1,

2013; April 15, 2013.

Rule 3.1 was reorganized, effective May 1, 2012, to make it clear that all documents presented for filing must conform to all applicable requirements of the rule.

A new subdivision (b) was added, effective March 1, 1996, which contains signature requirements. The letter designation of each existing subdivision was amended accordingly.

Subdivision (b) was amended, effective April 15, 2013, to require the e-mail address for electronic service under Rule 3.5 to be provided in filed documents.

A new subdivision (e) was added, effective March 1, 2005, to clarify that documents must be filed with the clerk. Submitting a document to a judge or to court personnel other than the clerk does not constitute filing. The first version of a given document submitted to the clerk, regardless of what form it is in, will be filed and treated as the original. A party seeking to correct the original or have another document treated as the original must obtain an order from the court.

Subdivision (e) was amended, effective May 1, 2012, to specify that a party making a demand for change of judge may file only one original. This provision supersedes the requirement in N.D.C.C. 29-15-21 that a demand for change of judge be filed in triplicate.

Subdivision (h) was amended, effective March 1, 2013, to clarify that, unless a rule or statute requires a document to be filed before it is served, proof of service must accompany any document submitted for filing.

Subdivision (i) was amended, effective March 1, 2007, to specify that court personnel have no duty to review documents for compliance with privacy protection rules.

Subdivision (i) was amended, effective March 1, 2009, to reflect the transfer of document privacy protection requirements to N.D.R.Ct. 3.4.

Sources: Joint Procedure Committee Minutes of September 27, 2012, page 14; January 26-27, pages 16-17; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages 16-17; September 23-24, 2004, pages 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12; January 29-30, 1998, page 22; September 29-30, 1994, pages 6-7.

Statutes Affected: Superseded: N.D.C.C. § 29-15-21 (in part).

Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers); N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other Papers; Representations to Court; Sanctions); N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court); N.D.R.Ct. 3.5 (Electronic Filing in the District Courts); N.D.Sup.Ct.Admin.R. 41 (Access to Judicial Records).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS

(a) Service – When required.

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

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

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

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

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

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

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

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

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

it was seized.

(b) Service -- How made.

(1) Service in general. A document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5. Electronic service is complete on transmission~~, but is not~~. Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service is not effective if the serving party learns through any means that the document did not reach the person to be served.

(2) Persons Served.

(A) Service on a Party Represented by an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. If an attorney is providing limited representation under Rule 11(e), service must be made on the party and on the attorney for matters within the scope of the limited representation.

(B) Persons Exempt from Electronic Service. Persons who are exempt from electronic service and filing under N.D.R.Ct. 3.5 must serve documents under Rule 5(b)(3).

(3) Other Service. A document that is not required to be filed, or that will be served on a person exempt from electronic service, is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge, or, if no one is in charge, leaving it in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed at the person's dwelling or usual place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address, in which event service is complete upon mailing;

(D) sending it by a third-party commercial carrier to the person's last known address, in which event service is complete upon deposit of the document to be served with the commercial carrier;

(E) if no address is known, on order of the court by leaving it with the clerk of the court;

(F) sending it by electronic means if the person consented in writing, in which event service is complete on transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(G) delivering it by any other means that the person consented to in writing.

(c) Serving numerous defendants.

(1) In general. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) In general. Unless a statute, court rule, or court order provides otherwise, all documents in an action must be filed with the clerk electronically, through the Odyssey® system.

(2) Initiating pleading.

(A) The Summons and Complaint.

(i) The summons and complaint, or other initiating pleading, must be filed before a subpoena may be issued. Unless otherwise authorized by rule or statute, a party seeking to file an initiating pleading must provide proof that the pleading was served under Rule 4. The proof of service must be filed with the initiating pleading.

(ii) A party who files a complaint or other initiating pleading must serve notice of filing on the other parties.

(iii) The defendant may demand that the plaintiff file the complaint.

– Service of the demand must be made under Rule 5(b) on the plaintiff's attorney or under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney.

– In cases with multiple defendants, service of a demand by one defendant is effective for all the defendants.

– If the plaintiff does not file the complaint within 20 days after service of the demand, service of the summons is void.

– The demand must contain notice that if the complaint is not filed within 20 days, service of the summons will be void, unless, after motion made within 60 days after service of the demand for filing, the court finds excusable neglect.

(iv) The defendant may file the summons and complaint, and the costs incurred on behalf of the plaintiff may be taxed as provided in Rule 54(e).

(B) The Answer. Within a reasonable time after service of the notice of filing the complaint or initiating pleading, the defendant or respondent must file the answer and notify the plaintiff of the filing.

(3) Discovery materials. A party must not file discovery materials with the clerk unless:

(A) the materials are being submitted to the court for disposition of a pending motion;

(B) the court orders them to be filed; or

(C) a party certifies that the filing is necessary for safekeeping of the documents or exhibits pending case completion, in which event the party must state the reasons safekeeping is necessary.

(4) Return of discovery materials.

(A) The clerk shall return the following documents to the filing party upon final disposition of an appeal or, if no appeal is filed, upon expiration of the time for appeal:

(i) depositions;

(ii) interrogatories;

(iii) requests for admission;

(iv) requests for interrogatories;

(v) requests for production of documents; and

(vi) answers and responses to the above documents.

(B) If the filing party does not claim a filed document within 60 days after notification to do so, the clerk may dispose of the document as directed by court order.

(C) The clerk must take a receipt for all documents returned.

(5) Documents to be used on hearing. Unless otherwise directed by the court, all affidavits, notices, and other document designed to be used on the hearing of a motion or order to show cause must be filed at least 24 hours before the hearing.

(6) Failure to comply. If a party fails to comply with this subdivision, the court, on motion of any party or its own motion, may order the document to be filed. If the order is not obeyed, the court may order them to be regarded as stricken and their service to be ineffective.

(7) Rejection. Except as otherwise provided under Rules 13, 14, or 15, the clerk must reject for filing any document that adds a party to an action or proceeding without a court order. The clerk must endorse on the document a notation that it is rejected for filing under this rule and return the document to the person who tendered it for filing.

(e) Removal of pleadings for service. Upon a filing party's request, an original pleading or ~~paper~~ document in any civil action, which by law is required to be filed in the clerk of court's office where the action is pending, may be removed from the files for the purpose of serving it either inside or outside the state but must be returned without delay.

(f) Proof of service. Proof of service under this rule is made as provided in Rule 4 or by an attorney's or court personnel's certificate showing that service was made under subdivision (b).

EXPLANATORY NOTE

Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988; March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995; March 1, 1998; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2009; March 1, 2011; March 1, 2013; April 1, 2013;_____.

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

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

Paragraph (b)(1) was amended, effective March 1, 2009, to make it clear that, when an attorney has served notice of limited representation under Rule 11(e), service of documents on the attorney is not required except for documents within the scope of the limited representation. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to assist otherwise self-represented parties on a limited basis without undertaking full representation of the party.

Paragraph (b)(2) was amended, effective April 1, 2013, to specify that electronic

service through the Odyssey® system under the procedure specified in N.D.R.Ct. 3.5 is required for most documents that will be filed with the court.

Paragraph (b)(3) was amended, effective March 1, 2009, to provide for service by electronic means and to improve organization. Parties seeking to serve documents by electronic means must consult N.D.R.Ct. 3.5 for electronic service instructions.

Paragraph (b)(3) was amended, effective April 1, 2013, to specify that the other means of service listed in the paragraph apply only when the document served is not required to be filed or when it will be served on a person exempt from electronic service.

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

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

Paragraph (d)(1) was amended, effective April 1, 2013, to specify that filing must be accomplished electronically through the Odyssey® system unless a statute, rule or order provides otherwise.

Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to require that proof

of service be provided and filed by a party seeking to file an initiating pleading. Under Rule 3, an action is commenced on service of the initiating pleading, not on filing. Unless a rule specifically provides otherwise, service under Rule 4 must be accomplished before any pleadings in an action may be filed.

Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to include language allowing the defendant to demand filing of the complaint or to file the complaint itself. This language was transferred from Rule 4.

Subparagraph (d)(2)(A) was amended, effective April 1, 2013, to clarify that any party who files a complaint or other initiating pleading must serve notice on the other parties in the matter. Service of the summons must be made under Rule 4.

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

Rule 5 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.

Rule 5 was amended, effective April 1, 2013, to replace the term "paper" with "document" throughout the rule.

Sources: Joint Procedure Committee Minutes of _____; January 31-February 1, 2013, pages 2-5, 15-18; January 26-27, 2012, pages 13-16; September 24-25,

2009, pages 12-13; April 24-25, 2008, pages 18-21; January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-27; April 26-27, 2007, pages 19-22; September 27-28, 2001, pages 11-12; April 30-May 1, 1998, page 3; January 29-30, 1998, page 18; September 26-27, 1996, pages 16-17, 20; September 23-24, 1993, pages 19-20; April 29-30, 1993, pages 20-21; November 7-8, 1991, page 3; October 25-26, 1990, pages 10-12; April 20, 1989, page 2; December 3, 1987, page 11; May 21-22, 1987, pages 17-18; February 19-20, 1987, page 4; September 18-19, 1986, page 8; November 30, 1984, pages 26-27; October 18, 1984, pages 8-11; November 29-30, 1979, page 2; September 20-21, 1979, pages 4-5; Fed.R.Civ.P. 5.

Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction -- Process -- Service), N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 77 (District Courts and Clerks); N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.Ct. 3.1 (Pleadings); N.D.R.Ct. 3.5 (Electronic Filing in the District Courts); N.D.R.Ct. 6.4 (Exhibits), N.D.R.Ct. 7.1 (Judgments, Orders and Decrees).

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

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

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

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

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

(3) the factual contentions have evidentiary support or will likely have evidentiary

support after a reasonable opportunity for further investigation or discovery; and

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

(c) Sanctions.

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

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

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

(4) Nature of a sanction. A sanction imposed under this rule must be limited to what

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

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

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

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

(6) Requirements for an order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

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

(e) Limited representation.

(1) Notice. An attorney who assists an otherwise self-represented party on a limited basis must serve a notice of limited representation on each party involved in the matter. The notice must state precisely the scope of the limited representation. An attorney who seeks to act beyond the stated scope of the limited representation must serve an amended notice of limited representation. The attorney must also serve a notice of termination of limited

representation on each party involved in the matter.

(2) Filing. If the action is filed, the party who received assistance of an attorney on a limited basis must file the notice of limited representation with the court.

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

EXPLANATORY NOTE

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

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

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

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

Subdivision (e) was added, effective March 1, 2009, to permit an attorney to file a notice of limited representation indicating an intent to represent a party for one or more

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

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

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

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

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 3, 2013

RE: Rule 43, N.D.R.Civ.P., Evidence; Rule 28, N.D.R.Crim.P., Interpreters

At the January meeting, the committee discussed proposed amendments to Rule 43 and Rule 28 designed to wholly supersede N.D.C.C. §§ 31-01-11 and 31-01-12. The main rule text change proposed was adding a section on interpreters, based on the federal language, to Rule 43.

During the discussion of the rules, the committee pointed out problematic language in the proposed amendments to Rule 43 and in the existing text of Rule 28. Committee member suggested that the problematic language was not consistent with federal standards because it could be read to suggest that a disabled person could be taxed with the costs associated with hiring an interpreter or that costs might be a consideration in deciding whether to provide interpretive services. The committee decided to table the proposals pending further review of the rule language.

During the interim between meetings, Chief Justice VandeWalle and State Court Administrator Sally Holewa reviewed the challenged language and agreed that it was problematic. They pointed to an Aug. 16, 2010, letter from the Department of Justice and to the ABA Standards for Language Access in the Courts as resources providing guidance for drafting appropriate rules for interpreters. A copy of the letter and of the "black letter" portion of the ABA standards are attached.

Proposed amendments to Rule 43 and Rules 28 are attached. The amendment language is derived from ABA Standard 4, Interpreter Services in Legal Proceedings.

RULE 43. EVIDENCE

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a statute, the Rules of Evidence, these rules, or other court rules provide otherwise. For good cause, or on agreement of the parties, and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. A party must give notice if a witness is unable to testify orally or if testimony by contemporaneous transmission may be necessary.

(b) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(c) Interpreter. If a person with limited English proficiency or a deaf person is involved in a proceeding as a party, witness, person with legal decision-making authority, or person with a significant interest in the matter, the court must assign an interpreter.

EXPLANATORY NOTE

Rule 43 was amended, effective 1976; January 1, 1980; March 1, 1999; March 1, 2011;_____.

Subdivision (a) was amended, effective March 1, 1999, to follow the 1996 federal amendment. See 1996 Advisory Committee Note, Fed.R.Civ.P. 43. The requirement for testimony to be taken orally is deleted.

Former subdivision (b) on scope of examination and cross-examination was deleted, effective March 1, 2011. These topics are covered in the Rules of Evidence. The federal rule contains a

subdivision entitled "Affirmation Instead of an Oath." Affirmations and oaths are governed by N.D.R.Ct. 6.10 (Courtroom Oaths).

~~The federal rule contains a subdivision (f) governing the appointment of interpreters. This is not needed in these rules, as it is adequately covered in N.D.C.C. § 31-01-11.~~

Subdivision (c) on interpreters was added, effective _____. It is intended to to reflect the American Bar Association Standards for Language Access in Courts. N.D.Sup.Ct.Admin.R. 50 provides guidance on interpreter qualifications and requirements.

Rule 43 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 31-February 1, 2013, pages 12-15; January 29-30, 2009, pages 34-35; January 29-30, 1998, pages 11-13; September 25-26, 1997, pages 10-11; November 29-30, 1979, page 16; April 26-27, 1979, pages 17-18; September 23-24, 1976, page 79; June 3-4, 1976, pages 16-18; ~~Rule~~ Fed.R.Civ.P. 43~~; FRCivP~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-12.

Considered: N.D.C.C. ch. 28-33; § 31-01-11.

Cross Reference: N.D.R.Ev. 101 (Scope), N.D.R.Ev. 103 (Rules on Evidence), N.D.R.Ev. 104 (Preliminary Questions), N.D.R.Ev. 603 (Oath or Affirmation), N.D.R.Ev. 604 (Interpreters), N.D.R.Ev. 607 (Who May Impeach), and N.D.R.Ev. 611 (Mode and Order of Interrogation and Presentation); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D.Sup.Ct.Admin.R. 50 (Court Interpreter Qualifications and Procedures).

RULE 28. INTERPRETERS

~~The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or as the court directs.~~

If a person with limited English proficiency or a deaf person is involved in a proceeding as a defendant, witness, person with legal decision-making authority, or person with a significant interest in the matter, the court must assign an interpreter.

EXPLANATORY NOTE

Rule 28 was amended, effective March 1, 2006;_____.

~~Rule 28 is an adaptation of F.R.Crim.P. 28. It differs from the federal rule by providing that compensation for interpreters may be paid out of funds as provided by state law or as the court directs.~~

Rule 28 was amended, effective_____, to reflect the American Bar Association Standards for Language Access in Courts.

Former subdivision (a) provided for the appointment of expert witnesses. This provision was deleted, effective March 1, 2006, because N.D.R.Ev. 706 covers the topic of court-appointed expert witnesses in detail.

Rule 28 is consistent with existing state law, N.D.C.C. § 31-01-11, which authorizes the court to appoint ~~and provide for the compensation of~~ interpreters. Rule 28 permits the court to appoint interpreters in ~~all~~ appropriate circumstances. The purpose of the rule is to assist non-English-speaking or deaf defendants, witnesses, persons with legal decision-

making authority, or persons with significant interest in the matter in understanding the proceedings or in communicating with assigned counsel. N.D.Sup.Ct.Admin.R. 50 provides guidance on interpreter qualifications and requirements.

Rule 28 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of _____; January 31-February 1, 2013, pages 12-15; January 27-28, 2005, pages 22-23; October 17-20, 1972, pages 32-33; February 20-21, 1969, pages 4-5; Fed.R.Crim.P. 28.

Statutes Affected:

Superseded ~~for criminal process only~~: N.D.C.C. § 31-01-11; 31-01-12

Considered: N.D.C.C. §§ 28-26-06, ~~31-01-11,~~ ch. ~~29-20~~ 28-33.

Cross References: N.D.R.Ev. 604 (Interpreters); N.D.R.Ev. 706 (Court Appointed Experts); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D. Sup. Ct. Admin. R. 50 (Court Interpreter Qualifications and Procedures).

U. S. Department of Justice

Civil Rights Division

Assistant Attorney General *Washington, D.C. 20530*

August 16, 2010

Dear Chief Justice/State Court Administrator:

In the past decade, increasing numbers of state court systems have sought to improve their capacity to handle cases and other matters involving parties or witnesses who are limited English proficient (LEP). In some instances the progress has been laudable and reflects increased recognition that language access costs must be treated as essential to sound court management. However, the Department of Justice (DOJ) continues to encounter state court language access policies or practices that are inconsistent with federal civil rights requirements. Through this letter, DOJ intends to provide greater clarity regarding the requirement that courts receiving federal financial assistance provide meaningful access for LEP individuals.

Dispensing justice fairly, efficiently, and accurately is a cornerstone of the judiciary. Policies and practices that deny LEP persons meaningful access to the courts undermine that cornerstone. They may also place state courts in violation of long-standing civil rights requirements. Title VI of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000d *et seq.* (Title VI), and the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 42 U.S.C. § 3789d(c) (Safe Streets Act), both prohibit national origin discrimination by recipients of federal financial assistance. Title VI and Safe Streets Act regulations further prohibit recipients from administering programs in a manner that has the effect of subjecting individuals to discrimination based on their national origin. *See* 28 C.F.R. §§ 42.104(b)(2), 42.203(e).

The Supreme Court has held that failing to take reasonable steps to ensure meaningful access for LEP persons is a form of national origin discrimination prohibited by Title VI regulations. *See Lau v. Nichols*, 414 U.S. 563 (1974). Executive Order 13166, which was issued in 2000, further emphasized the point by directing federal agencies to publish LEP guidance for their financial assistance recipients, consistent with initial general guidance from DOJ. *See* 65 Fed. Reg. 50,121 (Aug. 16, 2000). In 2002, DOJ issued final Guidance to Federal Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 67 Fed. Reg. 41,455 (June 18, 2002) (DOJ Guidance). The DOJ Guidance and subsequent technical assistance letters from the Civil Rights Division explained that court systems receiving federal financial assistance, either directly or indirectly, must provide meaningful access to LEP persons in order to comply with Title VI, the Safe Streets Act, and their implementing regulations. The federal requirement to provide language assistance to LEP individuals applies notwithstanding conflicting state or local laws or court rules.

Despite efforts to bring courts into compliance, some state court system policies and practices significantly and unreasonably impede, hinder, or restrict participation in court proceedings and access to court operations based upon a person's English language ability. Examples of particular concern include the following:

1. Limiting the types of proceedings for which qualified interpreter services are provided by the court. Some courts only provide competent interpreter assistance in limited categories of cases, such as in criminal, termination of parental rights, or domestic violence proceedings. DOJ, however, views access to *all* court proceedings as critical. The DOJ Guidance refers to the importance of meaningful access to courts and courtrooms, without distinguishing among civil, criminal, or administrative matters. *See* DOJ Guidance, 67 Fed. Reg. at 41,462. It states that "every effort should be taken to ensure competent interpretation for LEP individuals during *all* hearings, trials, and motions," *id.* at 41,471 (emphasis added), including administrative court proceedings. *Id.* at 41,459, n.5.

Courts should also provide language assistance to non-party LEP individuals whose presence or participation in a court matter is necessary or appropriate, including parents and guardians of minor victims of crime or of juveniles and family members involved in delinquency proceedings. Proceedings handled by officials such as magistrates, masters, commissioners, hearing officers, arbitrators, mediators, and other decision-makers should also include professional interpreter coverage. DOJ expects that meaningful access will be provided to LEP persons in all court and court-annexed proceedings, whether civil, criminal, or administrative including those presided over by non-judges.

2. Charging interpreter costs to one or more parties. Many courts that ostensibly provide qualified interpreters for covered court proceedings require or authorize one or more of the persons involved in the case to be charged with the cost of the interpreter. Although the rules or practices vary, and may exempt indigent parties, their common impact is either to subject some individuals to a surcharge based upon a party's or witness' English language proficiency, or to discourage parties from requesting or using a competent interpreter. Title VI and its regulations prohibit practices that have the effect of charging parties, impairing their participation in proceedings, or limiting presentation of witnesses based upon national origin. As such, the DOJ Guidance makes clear that court proceedings are among the most important activities conducted by recipients of federal funds, and emphasizes the need to provide interpretation free of cost. Courts that charge interpreter costs to the parties may be arranging for an interpreter's presence, but they are not "providing" the interpreter. DOJ expects that, when meaningful access requires interpretation, courts will provide interpreters at no cost to the persons involved.

3. Restricting language services to courtrooms. Some states provide language assistance only for courtroom proceedings, but the meaningful access requirement extends to court functions that are conducted outside the courtroom as well. Examples of such court-managed offices, operations, and programs can include information counters; intake or filing offices; cashiers; records rooms; sheriff's offices; probation and parole offices; alternative dispute resolution programs; *pro se* clinics; criminal diversion programs; anger management classes; detention facilities; and other similar offices, operations, and programs. Access to these points of public contact is essential to the fair administration of justice, especially for unrepresented LEP persons. DOJ expects courts to provide meaningful access for LEP persons to such court operated or managed points of public contact in the judicial process, whether the contact at issue occurs inside or outside the courtroom.

4. Failing to ensure effective communication with court-appointed or supervised personnel. Some recipient court systems have failed to ensure that LEP persons are able to communicate effectively with a variety of individuals involved in a case under a court appointment or order. Criminal defense counsel, child advocates or guardians *ad litem*, court psychologists, probation officers, doctors, trustees, and other such individuals who are employed, paid, or supervised by the courts, and who are required to communicate with LEP parties or other individuals as part of their case-related functions, must possess demonstrated bilingual skills or have support from professional interpreters. In order for a court to provide meaningful access to LEP persons, it must ensure language access in all such operations and encounters with professionals.

DOJ continues to interpret Title VI and the Title VI regulations to prohibit, in most circumstances, the practices described above. Nevertheless, DOJ has observed that some court systems continue to operate in apparent violation of federal law. Most court systems have long accepted their legal duty under the Americans with Disabilities Act (ADA) to provide auxiliary aids and services to persons with disabilities, and would not consciously engage in the practices highlighted in this letter in providing an accommodation to a person with a disability. While ADA and Title VI requirements are not the same, existing ADA plans and policy for sign language interpreting may provide an effective template for managing interpreting and translating needs for some state courts.

Language services expenses should be treated as a basic and essential operating expense, not as an ancillary cost. Court systems have many operating expenses – judges and staff, buildings, utilities, security, filing, data and records systems, insurance, research, and printing costs, to name a few. Court systems in every part of the country serve populations of LEP individuals and most jurisdictions, if not all, have encountered substantial increases in the number of LEP parties and witnesses and the diversity of languages they speak. Budgeting adequate funds to ensure language access is fundamental to the business of the courts.

We recognize that most state and local courts are struggling with unusual budgetary constraints that have slowed the pace of progress in this area. The DOJ Guidance acknowledges that recipients can consider the costs of the services and the resources available to the court as part of the determination of what language assistance is reasonably required in order to provide meaningful LEP access. *See id.* at 41,460. Fiscal pressures, however, do not provide an exemption from civil rights requirements. In considering a system's compliance with language access standards in light of limited resources, DOJ will consider all of the facts and circumstances of a particular court system. Factors to review may include, but are not limited to, the following:

- The extent to which current language access deficiencies reflect the impact of the fiscal crisis as demonstrated by previous success in providing meaningful access;
- The extent to which other essential court operations are being restricted or defunded;
- The extent to which the court system has secured additional revenues from fees, fines, grants, or other sources, and has increased efficiency through collaboration, technology, or other means;
- Whether the court system has adopted an implementation plan to move promptly towards full compliance; and
- The nature and significance of the adverse impact on LEP persons affected by the existing language access deficiencies.

DOJ acknowledges that it takes time to create systems that ensure competent interpretation in all court proceedings and to build a qualified interpreter corps. Yet nearly a decade has passed since the issuance of Executive Order 13166 and publication of initial general guidance clarifying language access requirements for recipients. Reasonable efforts by now should have resulted in significant and continuing improvements for all recipients. With this passage of time, the need to show progress in providing all LEP persons with meaningful access has increased. DOJ expects that courts that have done well will continue to make progress toward full compliance in policy and practice. At the same time, we expect that court recipients that are furthest behind will take significant steps in order to move promptly toward compliance.

The DOJ guidance encourages recipients to develop and maintain a periodically-updated written plan on language assistance for LEP persons as an appropriate and cost-effective means of documenting compliance and providing a framework for the provision of timely and reasonable language assistance. Such written plans can provide additional benefits to recipients' managers in the areas of training, administrating, planning, and budgeting. The DOJ Guidance goes on to note that these benefits should lead most recipients to document in a written LEP plan their language assistance services, and how staff and LEP persons can access those services. In court systems, we have found that meaningful access inside the courtroom is most effectively implemented in states that have adopted a court rule, statute, or administrative order providing for universal, free, and qualified court interpreting. In addition, state court systems that have strong leadership and a designated coordinator of language services in the office of the court administrator, and that have identified personnel in charge of ensuring language access in each courthouse, will more likely be able to provide effective and consistent language access for LEP

individuals. Enclosed, for illustrative purposes only, are copies of Administrative Order JB-06-3 of the Supreme Judicial Court of Maine, together with the September 2008 Memorandum of Understanding between that court and DOJ. Also enclosed for your information is a copy of "Chapter 5: Tips and Tools Specific to Courts" from DOJ, *Executive Order 13166 Limited English Proficiency Document: Tips and Tools from the Field* (2004).

The Office of Justice Programs provides Justice Assistance Grant funds to the states to be used for state and local initiatives, technical assistance, training, personnel, equipment, supplies, contractual support, and criminal justice information systems that will improve or enhance criminal justice programs including prosecution and court programs. Funding language services in the courts is a permissible use of these funds.

DOJ has an abiding interest in securing state and local court system compliance with the language access requirements of Title VI and the Safe Streets Act and will continue to review courts for compliance and to investigate complaints. The Civil Rights Division also welcomes requests for technical assistance from state courts and can provide training for court personnel. Should you have any questions, please contact Mark J. Kappelhoff, Acting Chief, Federal Coordination and Compliance Section (formally known as Coordination and Review Section) at (202) 307-2222.

Sincerely,

Thomas E. Perez
Assistant Attorney General

Enclosures

Black Letter Standards

STANDARD 1: FUNDAMENTAL PRINCIPLES

As a fundamental principle of law, fairness, and access to justice, and to promote the integrity and accuracy of judicial proceedings, courts should develop and implement an enforceable system of language access services, so that persons needing to access the court are able to do so in a language they understand, and are able to be understood by the court.

STANDARD 2: MEANINGFUL ACCESS

Courts should ensure that persons with limited English proficiency have meaningful access to all the services, including language access services, provided by the court.

2.1 Courts should promulgate, or support the promulgation of, rules that are enforceable in proceedings and binding upon staff, to implement these Standards.

2.2 Courts should provide notice of the availability of language access services to all persons in a language that they understand.

2.3 Courts should provide language access services without charge, and may assess or recoup the cost of such services only in a manner that is consistent with principles of fairness, access to justice and integrity of the judicial process, and that comports with legal requirements.

2.4 Courts should provide language access services in a timely manner.

STANDARD 3: IDENTIFYING LEP PERSONS

Courts should develop procedures to gather comprehensive data on language access needs, identify persons in need of services, and document the need in court records.

3.1 Courts should gather comprehensive language access data as well as individualized language access data at the earliest point of contact.

3.2 Courts should ensure that persons with limited English proficiency may self-identify as needing language access services.

3.3 Courts should establish a process that places an affirmative duty on judges and court personnel to provide language access services if they or the finder of fact may be unable to understand a person or if it appears that the person is not fluent in English.

STANDARD 4: INTERPRETER SERVICES IN LEGAL PROCEEDINGS

Courts should provide competent interpreter services throughout all legal proceedings to persons with limited English proficiency.

4.1 Courts should provide interpreters in legal proceedings conducted within courts and court-annexed proceedings.

4.2 Courts should provide interpreter services to persons with limited English proficiency who are in court as litigants, witnesses, persons with legal decision-making authority, and persons with a significant interest in the matter.

4.3 Courts should provide the most competent interpreter services in a manner that is best suited to the nature of the proceeding.

4.4 Courts should provide interpreter services that are consistent with interpreter codes of professional conduct.

STANDARD 5: LANGUAGE ACCESS IN COURT SERVICES

Courts should provide appropriate language access services to persons with limited English proficiency in all court services with public contact, including court-managed offices, operations, and programs.

5.1 Courts should provide language access services for the full range of court services.

5.2 Courts should determine the most appropriate manner for providing language access for services and programs with public contact and should utilize translated brochures, forms, signs, tape and video recordings, bilingual staff and interpreters, in combination with appropriate technologies.

STANDARD 6: LANGUAGE ACCESS IN COURT-MANDATED AND OFFERED SERVICES

Courts should ensure that persons with limited English proficiency have access to court-mandated services, court-offered alternative services and programs, and court-appointed professionals, to the same extent as persons who are proficient in English.

6.1 Courts should require that language access services are provided to persons with limited English proficiency who are obligated to participate in criminal court-mandated programs, are eligible for al-

ternative adjudication, sentencing, and other optional programs, or who need to access services in order to comply with court orders.

6.2 Courts should require that language access services are provided to persons with limited English proficiency who are ordered to participate in civil court-mandated services or who are otherwise eligible for court-offered programs.

6.3 Courts should require that language access services are provided for all court-appointed or supervised professionals in their interactions with persons with limited English proficiency.

6.4 Courts should require the use of the most appropriate manner for providing language access for the services and programs covered by this Standard and should promote the use of translated signs, brochures, documents, audio and video recordings, bilingual staff, and interpreters.

STANDARD 7: TRANSLATION

Courts should establish a process for providing access to translated written information to persons with limited English proficiency to ensure meaningful access to all court services.

7.1 Courts should establish a system for prioritizing and translating documents that determines which documents should be translated, selects the languages for translation, includes alternative measures for illiterate and low literacy individuals, and provides a mechanism for regular review of translation priorities.

7.2 To ensure quality in translated documents, courts should establish a translation protocol that includes: review of the document prior to translation for uniformity and plain English usage; selection of translation technology, document formats, and glossaries; and, utilization of both a primary translator and a reviewing translator.

STANDARD 8: QUALIFICATIONS OF LANGUAGE ACCESS PROVIDERS

The court system and individual courts should ensure that interpreters, bilingual staff, and translators used in legal proceedings and in courthouse, court-mandated and court-offered services, are qualified to provide services.

8.1 Courts should ensure that all interpreters providing services to persons with limited English proficiency are competent. Competency includes language fluency, interpreting skills, familiarity with technical terms and courtroom culture and knowledge of codes of pro-

fessional conduct for court interpreters.

8.2 Courts should ensure that bilingual staff used to provide information directly to persons with limited English proficiency are competent in the language(s) in which they communicate.

8.3 Courts should ensure that translators are competent in the languages which they translate.

8.4 Courts should establish or participate in a comprehensive system for credentialing interpreters, bilingual staff, and translators that includes pre-screening, ethics training, an orientation program, continuing education, and a system to voir dire language services providers' qualifications in all settings for which they are used.

STANDARD 9: TRAINING

The court system and individual courts should provide all judges, court personnel, and court-appointed professionals with training on the following: legal requirements for language access; court policies and rules; language services provider qualifications; ethics; effective techniques for working with language services providers; appropriate use of translated materials; and cultural competency.

STANDARD 10: STATE-WIDE COORDINATION

Each court system should establish a Language Access Services Office to coordinate and facilitate the provision of language access services.

10.1 The office should provide, facilitate, and coordinate state-wide communication regarding the need for and availability of language access services.

10.2 The office should coordinate and facilitate the development of necessary rules and procedures to implement language access services.

10.3 The office should monitor compliance with rules, policies and procedures for providing language access services.

10.4 The office should ensure the statewide development of resources to provide language access.

10.5 The office should coordinate the credentialing, recruitment, and monitoring of language services providers to ensure that interpreters, bilingual staff, and translators possess adequate skills for the setting in which they will be providing services.

10.6 The office should coordinate and facilitate the education and training of providers, judicial officers, court personnel, and the general public on the components of Standard 9.

FEDERAL RULES OF CIVIL PROCEDURE
TITLE VI. TRIALS

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

HISTORY:
(Amended July 1, 1966; July 1, 1975; Aug. 1, 1987; Dec. 1, 1996.)
(As amended Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. *Subdivision (a).* The first sentence is a restatement of the substance of USC, Title 28, former § 635 (Proof in common-law actions), formerly § 637 (now §§ 2072, 2073) (Proof in equity and admiralty), and former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). This rule abolishes in patent and trademark actions, the practice under former Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify USC, Title 28, formerly § 725 (now § 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure, *45 Yale LJ 622 (1936),* and Same; 2, *47 Yale LJ 195 (1937).* The last sentence modifies to the extent indicated *USC, Title 28, § 631* (Competency of witnesses governed by State laws).

Subdivision (b). See 4 Wigmore on Evidence (2d ed, 1923) §§ 1885 et seq.

Subdivision (c). See former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v Lochren, 143 Fed 211* (CCA8th, 1906). See also *Blease v Garlington, 92 US 1, 23 L Ed 521 (1876); Nelson v United States, 201 US 92, 114, 26 S Ct 358, 50 L Ed 673 (1906); Unkle v Wills, 281 Fed 29* (CCA8th, 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Subdivision (d). See former Equity Rule 78 (Affirmation in Lieu of Oath) and *USC, Title 1, § 1* (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Supplementary note of Advisory Committee regarding Rules 43 and 44. These rules have been criticized and suggested improvements offered by commentators. 1 Wigmore on Evidence, 3d ed 1940, 200-204; Green, the Admissibility of Evidence Under the Federal Rules, 1941, *55 Harv L Rev 197.* Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v United States, CCA2d, 1941, 117 F2d 387,* cert den 1941, *313 US 587, 85 L Ed 1542, 61 S Ct 1120; Mosson v Liberty Fast Freight Co. CCA2d, 1942, 124 F2d 448; Hartford Accident & Indemnity Co. v Olivier, CCA5th, 1941, 123 F2d 709; Anzano v Metropolitan Life Ins. Co. of New York, CCA3d, 1941, 118 F2d 430; Franzen v E. I. DuPont De Nemours & Co. CCA3d, 1944, 146 F2d 837; Fakouri v Cadais, CCA5th, 1945, 147 F2d 667; In re C. & P. Co. SD Cal 1945, 63 F Supp 400, 408.* But cf. *United States v Aluminum Co. of America, SD NY 1938, 1 Fed Rules Serv 43a.*3, Case 1; Note, 1946, *46 Col L Rev 267.* While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for

the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See *Armstrong, Proposed Amendments to Federal Rules of Civil Procedure, 4 FRD 124, 137-138.*

Notes of Advisory Committee on 1966 amendments. This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of *Rule 28 of the Federal Rules of Criminal Procedure.*

Notes of Advisory Committee on 1975 amendments. Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 607, and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (c). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

Effective date of 1975 amendments. Act Jan. 2, 1975, P.L. 93-595, 88 Stat. 1926, provided in § 3 that the amendment of Rule 43 "shall take effect on the one hundred and eightieth day beginning after the date of enactment of this Act.".

Notes of Advisory Committee on 1987 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1996 amendments. Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange

a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Notes of Advisory Committee on 2007 amendments. The language of Rule 43 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

FEDERAL RULES OF CRIMINAL PROCEDURE
TITLE VI. TRIAL

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USCS Fed Rules Crim Proc R 28

Review Court Orders which may amend this Rule.

Rule 28. Interpreters

The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or by the government, as the court may direct.

HISTORY:
(Amended July 1, 1966; Jan. 2, 1975, P.L. 93-595, § 3, 88 Stat. 1949; July 1, 1975.)
(As amended Dec. 1, 2002.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. The power of the court to call its own witnesses, though rarely invoked, is recognized in the Federal courts, *Young v. United States (1939, CA5 Tex.) 107 F.2d 490; Litsinger v. United States (1930, CA7 Ill.) 44 F.2d 45.* This rule provides a procedure whereby the court may, if it chooses, exercise this power in connection with expert witnesses. This rule is based, in part, on the Uniform Expert Testimony Act, drafted by the Commissioners on Uniform State Laws, *Hand Book of the National Conference of Commissioners on Uniform State Laws* (1937), 337; see, also, Wigmore--Evidence, 3d Ed., sec. 563; A.L.I. Code of Criminal Procedure, secs. 307-309; National Commission on Law of Observance and Enforcement--*Report on Criminal Procedure,* 37. Similar provisions are found in the statutes of a number of States: Wisconsin--Wis.Stat. (1941), sec. 357.12; Indiana--Ind.Stat.Ann. (Burns, 1933), sec. 9-1702; California--Cal.Pen.Code (Deering, 1941), sec. 1027.

Notes of Advisory Committee on 1966 amendments. Subdivision (a). The original rule is made a separate subdivision. The amendment permits the court to inform the witness of his duties in writing since it often constitutes an unnecessary inconvenience and expense to require the witness to appear in court for such purpose.

Subdivision (b). This new subdivision authorizes the court to appoint and provide for the compensation of interpreters. General language is used to give discretion to the court to appoint interpreters in all appropriate situations. Interpreters may be needed to interpret the testimony of non-English speaking witnesses or to assist non-English speaking defendants in understanding the proceedings or in communicating with assigned counsel. Interpreters may also be needed where a witness or a defendant is deaf.

Notes of Advisory Committee on 1972 amendments. Subdivision (a). This subdivision is stricken, since the subject of court-appointed expert witnesses is covered in Evidence Rule 706 in detail.

Subdivision (b). The provisions of subdivision (b) are retained. Although Evidence Rule 703 specifies the qualifications of interpreters and the form of oath to be administered to them, it does not cover their appointment or compensation.

Effective date of amendment proposed by United States Supreme Court Order of November 20, 1972. As to the effective date of amendment proposed by United States Supreme Court Order of Nov. 20, 1972, see Act Jan. 2, 1975, P.L. 93-595, § 3, 88 Stat. 1959, which appears as a note to Rule 26.

Notes of Advisory Committee on 2002 amendments. The language of Rule 28 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 50. Court Interpreter Qualifications and Procedures

Section 1. Policy.

The Judicial System's policy is to ensure that adequate court interpreter services are provided for those persons who are unable to readily understand or communicate in the English language because of a disability or a non-English speaking background. This rule establishes court interpreter qualifications and general procedures to assist in ensuring that effective interpreter services are provided.

Section 2. Court Interpreter qualifications.

Except as otherwise provided in this rule, in order to provide court interpreter services in a judicial proceeding as required by statute, rule, or order of the court, a person must have the following qualifications:

A. If providing interpreter services for a person who is deaf or hearing impaired, certification by the Registry of Interpreters for the Deaf, certification by the National or North Dakota Association for the Deaf, or approval by the superintendent for the state school for the deaf.

B. If providing interpreter services for a non-English speaking person, certification by a recognized interpreter certification program in another jurisdiction and presence on a statewide roster of interpreters, if any, maintained by that jurisdiction.

Section 3. Qualifications Exception.

If a court interpreter satisfying the requirements of Section 2 is not available, a court may obtain the services of any other interpreter whose actual qualifications have been determined by examination or other appropriate means. For purposes of this section, "actual qualifications" means the ability to readily communicate with a non-English speaking person and orally transfer the meaning of statements to and from English and the language spoken by the non-English speaking person, or the ability to interpret communicate with a hearing-impaired or otherwise disabled person, the proceedings, and accurately repeat and interpret the statements of the hearing-impaired or otherwise disabled person.

Section 4. General Procedures -- Requirements.

A. *Interpreter Oath.* Before commencing duties, an interpreter shall take an oath that the interpreter will make a true, complete, and impartial interpretation in an understandable manner to the person requiring interpretation services and that the interpreter will truly, completely, and impartially repeat the statements of the person to the best of the interpreter's skills and judgment.

B. *Conflicts of Interest - Bias.* An interpreter shall disclose to the court any actual or perceived conflicts of interest that may impair the interpreter's ability to adequately interpret the proceedings. An interpreter shall be impartial and unbiased and shall refrain from conduct that may give the appearance of bias.

C. *Objection to Interpreter.* An objection regarding any circumstances that may render an interpreter unqualified to interpret in the proceeding must be made in a timely manner. The court shall consider the objection and make a ruling on the record.

D. *Method of Interpretation.* As the circumstances require, the court shall consult with the interpreter and the parties regarding the method of interpretation to be used to ensure that a complete and accurate interpretation of the testimony of a witness or party is obtained.

E. *Recording of Proceeding.* The court on its own motion or on the motion of a party may order that the testimony of the person for whom interpretation services are provided and the interpretation be recorded for use in verifying the official transcript of the proceeding. If an interpretation error is believed to have occurred based on review of the recording, a party may file a motion requesting that the court direct that the official transcript be amended.

F. *Additional Interpreter.* As circumstances may require, the court may provide an additional interpreter to afford relief and reduce fatigue if the time period of interpretation exceeds [2] continuous hours.

G. *Removal of Interpreter.* The court may remove an interpreter if the interpreter:

(1) is unable to adequately interpret the proceedings;

(2) knowingly makes a false interpretation;

(3) knowingly discloses confidential or privileged information obtained while serving as an interpreter;

(4) knowingly fails to disclose a conflict of interest that impairs the ability to provide complete and accurate interpretation; or

(5) fails to appear as scheduled without good cause.

Section 5. Effective Date.

This rule is effective March 1, 2005.

HISTORY: Adopted effective February 9, 2005.

31-01-11. Interpreter for witness - When required - How subpoenaed - Oath or affirmation.

When a witness does not understand the English language or speak the English language, or is deaf or unable to talk, an interpreter must be sworn to interpret for the witness. Any person who is a qualified interpreter may be subpoenaed by any court or judge to appear before such court or judge to act as an interpreter in any action or proceeding. The subpoena must be served and returned in like manner as a subpoena for a witness. Any person so subpoenaed who fails to attend at the time and place named in the subpoena is guilty of contempt. The oath or affirmation of the interpreter shall be as follows:

You do solemnly swear [affirm] that you will justly, truly, and impartially interpret to the witness, _____, the oath [affirmation] about to be administered to the witness; and the questions which may be asked the witness, and the answers that the witness shall give to such questions, relative to the cause now under consideration before this court (or officer). So help you God.

Any interpreter who has conscientious scruples as to taking the oath above described shall be allowed to make affirmations, substituting for the words "So help you God" at the end of the oath

the following:

This you do affirm under the pains and penalties of perjury.

31-01-12. Fees for interpreters.

Interpreters may be allowed such compensation for their services as the court shall certify to be reasonable and just, to be paid and collected as other costs, but the same shall not exceed five dollars per day.

CHAPTER 28-33
INTERPRETERS FOR DEAF PERSONS

28-33-01. Definitions.

In this chapter, unless the context or subject matter otherwise requires:

1. "Appointing authority" means the presiding judge of any court, the chairman of any board, commission, or authority, and the director or commissioner of any department or agency before which a qualified interpreter is required pursuant to this chapter.
2. "Deaf person" means any person whose hearing is totally impaired or whose hearing is so seriously impaired as to prohibit the person from understanding voice communication, or the English language including, but not limited to, a person who is deaf, mute, deaf-mute, or deaf-blind.
3. "Principal party in interest" means a person in any proceeding in which that person is a named party or a person with respect to whom the decision or action which may be taken in any proceeding directly affects.
4. "Qualified interpreter" means an interpreter certified by the national registry of interpreters for the deaf or North Dakota association for the deaf, or an interpreter who has been approved by the superintendent of the school for the deaf, or, in the event such an interpreter is not available, any other interpreter whose actual qualifications have otherwise been appropriately determined.

28-33-02. Interpreter required.

1. At all stages of any judicial or administrative proceedings in which a deaf person is a principal party in interest, the appointing authority shall appoint a qualified interpreter to interpret or to translate the proceedings to the deaf person and to interpret or translate the person's testimony.
2. Immediately after a deaf person is arrested for any alleged violation of criminal law and penalty may include imprisonment or a fine in excess of one hundred dollars, or both, an interpreter must be appointed. No attempt to interrogate or take a statement from such person may be permitted until a qualified interpreter is appointed for the deaf person and then only through the use of the interpreter.
3. Whenever any deaf person is a party to any proceedings involving, or is receiving any services from, any agency under the authority of the state or any political subdivision, the agency shall inform the deaf person of that person's right to a qualified interpreter to interpret or translate the action of any personnel providing such service and to assist the deaf person in communicating with each other person. The interpreter must be appointed, at the expense of the agency, upon the request of the deaf person or the deaf person's parent or guardian, if the deaf person is a minor.

28-33-03. Proof of disability.

An appointing authority may require a person requesting the appointment of an interpreter to furnish reasonable proof of the person's disability when the appointing authority has reason to believe that the person is not so disabled. In no event is a failure of a party or witness to request an interpreter to be deemed a waiver of the right.

28-33-04. Oath of interpreter.

Every interpreter appointed pursuant to the provisions of this chapter shall take an oath that the interpreter will make a true interpretation in an understandable manner to the person for whom the interpreter is appointed and that the interpreter will repeat the statements of such person in the English language to the best of the interpreter's skill and judgment.

28-33-05. Compensation.

An interpreter appointed under this chapter must be compensated by the appointing authority at a reasonable rate determined by the authority, including travel expenses. This section does not prevent any state department, board, commission, agency, or licensing

authority or any political subdivision of the state from employing an interpreter on a full-time basis or under contract.

28-33-06. Privileged communications.

Whenever a deaf person communicates through an interpreter to any person under such circumstances that the communication would be privileged and the deaf person could not be compelled to testify as to the communications, the privilege applies to the interpreter as well.

28-33-07. Visual recording.

In any judicial proceeding, the appointing authority, on the appointing authority's own motion or on the motion of a party to the proceedings, may order that the testimony of the deaf person and the interpretation thereof be visually recorded for use in verification of the official transcript of the proceedings.

28-33-08. Coordination of interpreter requests.

1. Whenever an appointing authority receives a valid request for the services of an interpreter or on the appointing authority's own motion, the authority shall request the superintendent of the school for the deaf to furnish the authority with a list of sources of qualified interpreters at the time and place specified by the authority.
2. When requested by an appointing authority to provide assistance in providing an interpreter, the national registry of interpreters for the deaf or the North Dakota association of the deaf or the superintendent of the North Dakota school for the deaf shall supply a list of sources and do everything necessary to assist the appointing authority in obtaining a qualified interpreter; providing, however, if the choice of qualified interpreter does not meet the needs of the deaf person, the appointing authority shall appoint another qualified interpreter.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 3, 2013

RE: Rule 803, N.D.R.Ev., Hearsay Exceptions; Availability of Declarant Immaterial; Rule 902, N.D.R.Ev., Self Authentication

The committee discussed proposed amendments to Rules 803 and 902 at the September meeting. The committee had a lengthy discussion about what kind of certification is required to be consistent with proposed new provisions in Rule 803(6) and Rule 902(11) and (12). The committee briefly returned to these rules at the January meeting, but decided to table them because the legislature was considering a measure that would have allowed unsworn declarations to be used like affidavits, in a manner similar to that allowed under Fed.R.Civ.P. 803 and 902.

The bill containing the unsworn declarations measure, H.B. 1406, was voted down in the North Dakota House on Feb. 1.

Weinstein's Federal Evidence § 902.13 discusses the certification language in Fed.R.Ev. 902(11) and (12). A copy is attached. Weinstein suggests that the intent of the amendments was to allow foundation for a document under the business records exception to Rule 803 to be established by a certificate rather than live testimony. What form the certificate was to take was not detailed in the rule – the essential element, however, was that it be made under penalty of perjury so it would be an adequate substitute for live testimony. A notice requirement was also made part of the rule so the opposing party could challenge the certificate if necessary.

Much of the discussion at the September meeting centered on language in the

proposal, based on the federal rule, that would allow any sort of certificate in compliance with a state statute or rule to be used. The committee located a certificate statute, N.D.C.C. § 31-04-10 (Form and contents of certificate for certifying copies to be used as evidence), and discussed whether documents certified under the statute would satisfy the Rule 902 certificate requirement. A copy of N.D.C.C. ch. 31-04 is attached. Some members argued that allowing certification under the statute would not be consistent with the intent of the rule because the statute did not require that all the elements of the business records exception be certified and it did not require the certificate to be made under penalty of perjury.

The proposed language of Rule 902 (11) and (12) specifically requires all the elements of the business records exception to be satisfied under the certification. Further, the notes to the federal rules indicate that some sort of declaration made under penalty of perjury, in a form similar to the declaration set out in 28 U.S.C. § 1746, is required for the certificate. A copy of this statute is attached.

Staff has prepared revised amendments to Rule 902(11) and (12) that would require the certificate to be "in the form of an affidavit or an unsworn declaration made under penalty of perjury." The revised proposals are attached.

RULE 803. ~~HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL~~ EXCEPTIONS TO THE RULE AGAINST HEARSAY – REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

~~The following are not excluded by the hearsay rule, even though the declarant is available as a witness:~~

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

~~(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.~~

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

~~(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.~~

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

~~(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to~~

~~the execution, identification, or terms of declarant's will.~~

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

~~(4) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.~~

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for, and is reasonably pertinent to, medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

~~(5) Recorded recollection. A memorandum or record concerning matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.~~

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

~~(6) Records of regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.~~

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by, or from information transmitted by, someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business,

organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12); and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

~~(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate lack of trustworthiness.~~

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

~~(8) Public records and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (i) the activities of the office or agency, or (ii) matters observed pursuant to duty imposed by law as to which matters there was a duty~~

~~to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (iii) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. However, factual findings may not be admitted under this exception unless the proponent furnishes to the party against whom they are offered a copy of the factual findings, or portion thereof as relates to the controversy, sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to prepare. The adverse party may cross-examine under oath any person making the report or factual findings or any person furnishing information contained therein, but the lack of availability of that testimony does not affect admissibility of the report or factual findings unless, in the opinion of the court, the adverse party would be prejudiced unfairly.~~

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

Before offering factual findings in evidence under this exception, a party must provide the opposing party a copy of the findings, or the portion that relates to the controversy. The opposing party may cross-examine under oath the person who prepared a record, statement or factual findings submitted under this exception, or any person furnishing information recorded in the record, statement or findings. If the person is unavailable for cross-examination, the record, statement, or findings may be admitted under this exception unless the court decides the opposing party would be prejudiced unfairly.

~~(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report was made to a public office under requirements of law.~~

(9) Public Records of Vital Statistics. A record of a birth, fetal death, death, or marriage, if reported to a public office in accordance with a legal duty.

~~(10) Absence of public record or entry. To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.~~

(10) Absence of a Public Record. Testimony, or a certification under Rule 902, that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

~~(11) Records of religious organizations. Statements of births, marriages, divorces, deaths, parentages, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.~~

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

~~(12) Marriage, baptismal, and similar certificates. Statements of fact, contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a religious organization or by law to perform the act certified, and purported to have been issued at the time of the act or within a reasonable time thereafter.~~

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

~~(13) Family records. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.~~

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

~~(14) Records of documents affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of the public office and an applicable statute authorizes the recording of documents of that kind in that office.~~

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

~~(15) Statements in documents affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was~~

~~relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.~~

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose, unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

~~(16) Statements in ancient documents. Statements in a document in existence twenty years or more the authenticity of which is established.~~

(16) Statements in Ancient Documents. A statement in a document that is at least 20 years old and whose authenticity is established.

~~(17) Market reports, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.~~

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

~~(18) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the~~

~~witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.~~

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

~~(19) Reputation concerning personal or family history. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, parentage, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.~~

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage, or among a person's associates or in the community, concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

~~(20) Reputation concerning boundaries or general history. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the~~

~~community, and reputation as to events of general history important to the community or State or nation in which located.~~

(20) Reputation Concerning Boundaries or General History. A reputation in a community, arising before the controversy, concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

~~(21) Reputation as to character. Reputation of a person's character among associates or in the community.~~

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

~~(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against people other than the accused. The pendency of an appeal or post-conviction proceeding may be shown but does not affect admissibility.~~

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal or post-conviction proceeding may be shown but does not affect admissibility.

~~(23) Judgment as to personal, family, or general history, or boundaries. Judgments as matters of proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence reputation.~~

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) Child's statement about sexual abuse. ~~An out-of-court~~ A statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child ~~is admissible as evidence (when not otherwise admissible under another hearsay exception)~~ if:

~~(a) The~~ (A) the trial court finds, after hearing ~~upon~~ on notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

~~(b) The~~ (B) the child either:

(i) ~~Testifies~~ testifies at the ~~proceedings~~ trial; or

(ii) ~~Is~~ is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(25) [Other Exceptions.] [Transferred to Rule 807]

EXPLANATORY NOTE

Rule 803 was amended, effective March 1, 1990; March 1, 2000;_____.

Rule 803 is ~~an adoption of Rule 803 of the Federal Rules of Evidence~~ is based on Fed.R.Ev. 803.

The last two sentences in ~~803(8)~~ paragraph (8) ~~are~~ were derived from N.D.C.C. §§ 31-09-11 and 31-09-12, which ~~are~~ were superseded by these rules.

The excepted situations listed in this rule traditionally have been deemed to have circumstantial guarantees of trustworthiness which render hearsay evidence reliable and admissible, even though the declarant may be available to testify.

~~The first three exceptions listed comprise what has been loosely termed the "res gestae" exception. That phrase is not used in this rule. The use of the specific exceptions, rather than the vague and elusive "res gestae" is felt to depict a clearer picture of which statements are within the exception, and the justification for their admissibility.~~

~~Subdivision~~ Paragraph (22) provides in certain instances, evidence of a previous final judgment comes within a hearsay exception. The ~~subdivision~~ paragraph differs from its federal counterpart. The federal exception for pleas of nolo contendere has been deleted as that plea is not used in the ~~State~~ state courts of North Dakota. ~~Rules 11 and 12, NDRCrimP.~~ The ~~subdivision~~ paragraph also was changed by adding post-conviction proceedings, like

appeals, do not affect the admissibility of previous convictions.

It should also be noted these exceptions remove only the hearsay objection to evidence. Evidence of a past conviction sought to be introduced under paragraph (22) ~~sought to be introduced~~ must also meet the requirements of Rule 609~~, NDREv~~.

Rule 803 was amended, effective March 1, 1990, to provide a hearsay exception for a child victim of sexual abuse and is modeled in part after the Colorado and Utah statutes on a child victim's out-of-court statement regarding sexual abuse. Former paragraph (24) was renumbered to paragraph (25) and all other amendments are technical in nature and no substantive change is intended.

Rule 803 was amended, effective March 1, 2000, to follow the December 1, 1997, federal amendment. The contents of Rule 803(25) are transferred to new Rule 807.

Paragraph (6)(d) was amended, effective _____, to allow the foundation for admission of a record of a regularly conducted activity to be established by a certification that complies with Rule 902(11) or (12).

Rule 803 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Supreme Court Conference Minutes~~: Rule 803(24);~~ of October 23 and ~~October~~ 25, 1989 [Rule 803 (24)]. Joint Procedure Committee Minutes:

of _____; Rule 803(25), September 24-25, 1998, page 4; April 30-May 1, 1998, page 16; Rule 803(24), April 20, 1989, pages 6-8; March 24, 1988, pages 2-6 and 15-16; December 3, 1987, pages 6-7; May 21, 1987, pages 6-7; Rule 803(5), (18), (19), (21), (25), December 3, 1987, pages 15-16; Rule 803, June 3, 1976, page 15; Rule 803(1), (2), January 29, 1976, page 19; Rule 803(3), January 29, 1976, page 19; October 1, 1975, page 7; Rule 803(4), (5), January 29, 1976, page 19; Rule 803(6), January 29, 1976, page 20; Rule 803(7), January 29, 1976, page 20; October 1, 1975, page 7; Rule 803(8), January 29, 1976, page 21; October 11, 1975, page 7; Rule 803(9), (10), (12), (13), (14), (15), (16), (17), (18), (20), (21), January 29, 1976, pages 21-23; Rule 803(11), June 3, 1976, page 15; January 29, 1976, page 22; Rule 803(19), June 3, 1976, page 15; January 29, 1976, page 23; Rule 803(22), January 29, 1976, page 23, 24; October 1, 1975, page 7; Rule 803(23), January 29, 1976, page 24; Rule 803(24), April 8, 1976, pages 8a, 9; January 29, 1976, page 24. ~~Rule~~ Fed.R.Ev. 803; ~~Federal Rules of Evidence~~; Rule 803, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-09-11, 31-09-12.

Considered: N.D.C.C. §§ 2-06-05, 4-09-05, 4-09-07, 4-10-03, 4-10-12, 4-11-15, 4-11-19, 4-11-20, 4-22-15, 6-03-32, 6-08-10, 7-01-12, 7-08-02, 7-08-03, 10-04-19, 10-15-08, 10-19-55, 10-23-13, 10-24-31, 10-28-09, 11-11-38, 11-13-08, 11-15-16, 11-18-09, 11-20-01, 11-20-05, 11-20-13, 12-44-18, 14-03-24, 15-29-10, 15-51-10, 16-13-11, 16-20-08, 19-01-10, 19-03.1-37, 19-20.1-17, 23-02-40, 23-24-04, 24-07-15, 26-08-07, 26-12-09, 26-12-13, 26-12-15, 26-15-04, 26-15-26, 26-29-12, 28-20-31, 28-23-12, 31-04-05, 31-04-06, 31-08-01, 31-08-

02, 31-08-05, 32-19-26, 32-25-03, 32-25-04, 33-01-13, 33-04-17, 35-21-05, 35-22-11, 35-22-16, 36-09-08, 36-09-20, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-11-08, 40-16-09, 40-42-01, 40-58-08, 41-03-66, 42-02-07, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-10-07, 43-11-10, 43-13-12, 43-17-11, 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17, 44-06-08, 44-06-09, 47-19-06, 47-19-12, 47-19-23, 47-19-24, 47-19-45, 48-02-15, 49-01-14, 49-06-14, 49-19-16, 57-24-29, 57-38-46, 61-03-06, 61-04-25, 61-05-19, 61-16-06.

Cross Reference: N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction; N.D.R.Ev. 807 (Residual Exception); N.D.R.Crim.P. 11 (Pleas); N.D.R.Crim.P 12 (Pleadings and Pretrial Motions).

RULE 902. ~~SELF-AUTHENTICATION~~ EVIDENCE THAT IS SELF-AUTHENTICATING

~~Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:~~

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

~~(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.~~

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

~~(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district~~

~~or political subdivision of the officer or employee certifies under seal that the signer has the official capacity and that the signature is genuine.~~

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal, or its equivalent, that the signer has the official capacity and that the signature is genuine.

~~(3) Foreign public documents. A document purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court, for good cause shown, may order that they be treated as presumptively authentic without final certification~~

~~or permit them to be evidenced by an attested summary with or without final certification.~~

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester, or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

~~(4) Certified copies of public records. A copy of an official record or report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.~~

(4) Certified Copies of Public Records. A copy of an official record, or a copy of a

document that was recorded or filed in a public office as authorized by law, if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the North Dakota Supreme Court.

~~(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.~~

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

~~(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.~~

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

~~(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.~~

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

~~(8) Acknowledged documents. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.~~

(8) Acknowledged Documents. A document accompanied by a certificate of

acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

~~(9) Commercial paper and related documents. Commercial paper, signatures thereon, and documents relating thereto to the extent provided by general commercial law.~~

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

~~(10) Matters declared by statute. Any signature, document, or other matter declared by statute to be presumptively or prima facie genuine or authentic.~~

(10) Presumptions Under a Statute. A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person in the form of an affidavit or an unsworn declaration made under penalty of perjury. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record, and must make the record and certification available for inspection, so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also

meet the notice requirements of Rule 902(11).

EXPLANATORY NOTE

Rule 902 was amended, effective March 1, 1990; _____.

Rule 902 is based on Fed.R.Ev. 902. It represents a relaxation of the common law requirement of authentication by creating a presumption that certain documents and records are authentic and ~~thereby~~ placing the burden of showing lack of genuineness on the party opposing introduction of the offered evidence. ~~This has been done by statute for certain public documents, records, and certified copies. Rule 902 extends the benefits of this presumption to private documents in which the risk of falsification is slight.~~

Rule 902 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Paragraphs (11) and (12) were added to the rule, effective _____. The intent of these provisions is to allow the foundation for admission of a record of a regularly conducted activity to be established by a certificate made under penalty of perjury rather than by live testimony. The certificate may be in affidavit form or in the form of a declaration containing the required foundation and stating: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the State of North Dakota that the foregoing is true and correct. Executed on (date). (Signature)." Paragraphs (11) and (12) also establish a notice requirement, which is intended to provide an opposing party a fair opportunity to test the adequacy of the foundation provided in the certification.

Rule 902 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of ; March 24-25, 1988, pages 15-16; December 3, 1987, page 15; June 3, 1976, pages 10-12, 14; October 1, 1975, pages 8, 9. ~~Rule 902, Federal Rules of Evidence~~ Fed.R.Ev. 902; Rule 902, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 31-09; N.D.C.C. §§ 11-18-11, 16-13-11, 31-04-10, 31-08-02, 31-08-02.1, 31-08-06, ~~Ch. 31-09,~~ 43-13-12~~, NDCC~~.

~~Rules:~~

~~Considered: Rule 44(a), NDRCivP;Rule 27, NDRCrimP.~~

Cross Reference: N.D.R.Ev. 803 (Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness); N.D.R.Civ.P. 44 (Proving an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [*Other Exceptions.*] [Transferred to Rule 807.]

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1939; Dec. 12, 1975, P.L. 94-149, § 1(11), 89 Stat. 905; Oct. 1, 1987; Dec. 1, 1997; Dec. 1, 2000.)

(As amended Dec. 1, 2011.)

Amendments:

1975. Act Dec. 12, 1975, in catchline of subsec. (23), inserted comma after "family".

Notes of Advisory Committee on Rules. The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication. Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, *28 Colum.L.Rev. 432 (1928),* it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot., *53 A.L.R.2d 1245* (statements as to cause of or responsibility for motor vehicle accident); Annot., *4 A.L.R.3d 149* (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. *Illustrative are Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942);* and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the time element, Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, *46 Iowa L.Rev. 224, 243 (1961);* McCormick § 272, p. 580.

Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, supra; McCormick, supra; 6 Wigmore § 1755; Annot., *78 A.L.R.2d 300.*

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co. v. Mosely, 75 U.S. (8 Wall.), 397, 19 L.Ed. 437 (1869);* Wheeler v. United States, 93 U.S.A.App. D.C. 159, *211 F.2d 19 (1953);* cert. denied *347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; Wetherbee v. Safety Casualty Co., 219 F.2d 274 (5th Cir. 1955); Lampe v. United States, 97 U.S.App.D.C. 160, 229 F.2d 43 (1956).* Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, supra at 246, and as the "prevailing practice," McCormick § 272, p. 579. *Illustrative are Armour & Co. v. Industrial Commission, 78 Colo. 569, 243 P. 546 (1926); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926).* Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland, 22 Ill.2d 175, 174 N.E.2d 804 (1961).* However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963); Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939),* a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther.

In Exception [paragraph] (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See *Sanitary Grocery Co. v. Snead, 67 App.D.C. 129, 90 F.2d 374 (1937),* slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc. v. Ball, 101 U.S.App.D.C. 416, 249 F.2d 508 (1957),* upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), *6 Wayne L.Rev. 204, 206-209 (1960).*

Similar provisions are found in Uniform Rule 63(4)(a) and (b); *California Evidence Code § 1240* (as to Exception (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind). *Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933);* Maguire, The Hillmon Case--Thirty-three Years After, *38 Harv.L.Rev. 709, 719-731 (1925);* Hinton, States of Mind and the Hearsay Rule, *1 U.Chi.L.Rev. 394, 421-423 (1934).* The rule of *Mutual Life Ins. Co. v. Hillman, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892),* allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577-578; Annot., *34 A.L.R.2d 588, 62 A.L.R.2d 855.* A similar recognition of the need for and practical value of this kind of evidence is found in *California Evidence Code § 1260.*

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission, 2 Ill.2d 590, 119 N.E.2d 224 (1954);* McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965),* citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., *82 A.L.R.2d 473, 520.* The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens v. State, 67 Md. 307, 316, 10 A. 210, 212 (1887).*

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; *Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962),* cert. denied *373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965).* Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are *California Evidence Code § 1237* and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg &*

Meridian R.R. v. O'Brien, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); Ahern v. Webb, 268 F.2d 45 (10th Cir. 1959); and see *N.L.R.B. v. Hudson Pulp and Paper Corp., 273 F.2d 660, 665 (5th Cir. 1960); N.L.R.B. v. Federal Dairy Co., 297 F.2d 487 (1st Cir. 1962).* But cf. *United States v. Adams, 385 F.2d 548 (2d Cir. 1967).*

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella, 93 N.J.L. 222, 107 A. 279 (1919),* is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. *28 U.S.C. § 1732.* A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941); La Porte v. United States, 300 F.2d 878* (9th Cir. 1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa, L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to

the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930),* held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214* (9th Cir. 1957), cert. denied *356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; Yates v. Bair Transport, Inc., 249 F.Supp. 681 (S.D.N.Y. 1965);* Annot., *69 A.L.R.2d 1148.* Cf. *Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir 1966).* Contra, 5 Wigmore § 1530a, n. 1, pp. 391-392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge . . . to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record . . ." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, *28 U.S.C. § 1732,* may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co. v. Taylor, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); Lyles v. United States, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957),* cert. denied *356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; England v. United States, 174 F.2d 466 (5th Cir. 1949); Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967).* Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941); Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944); Medina v. Erickson, 226 F.2d 475* (9th Cir. 1955); *Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962); Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960).* In the state courts, the trend favors admissibility. *Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938); Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490 (1940); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).* In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943),* exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942).* The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, *46 Iowa L.Rev. 276, 285 (1961).* As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." *129 F.2d at 1002.* A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc., 249 F.Supp. 681 (S.D.N.Y. 1965),* otherwise if offered by the opposite party, *Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir. 1951),* cert. denied *342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.*

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954),* error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States v. Ware, 247 F.2d 698 (7th Cir. 1957),* error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), infra, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1962); Taylor v. Baltimore & O. R. Co., 344 F.2d 281 (2d Cir. 1965),* since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews v.*

United States, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos v. United States, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947),* error to admit police records of convictions; *Standard Oil Co. of California v. Moore, 251 F.2d 188* (9th Cir. 1957), cert. denied *356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148,* error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in *Rule 801, supra,* decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); *California Evidence Code § 1272*; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, *28 U.S.C. § 1733*, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. *Kay v. United States, 255 F.2d 476 (4th Cir. 1958).* The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo v. McGrath, 196 F.2d 120* (9th Cir. 1952), and see *Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919).* As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), supra.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919),* Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906),* General Land Office records; *Ballew v. United States, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895),* Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook, 284 F.2d 489 (7th Cir. 1960),* remanded for resentencing *365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821,* letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957),* affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945);* Weather Bureau records of rainfall; *United States v. Meyer, 113 F.2d 387 (7th Cir. 1940),* cert. denied *311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459,* map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States v. Dumas, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893),* statement of account certified by Postmaster General in action against postmaster; *McCarty v. United States, 185 F.2d 520 (5th Cir. 1950),* reh. denied *187 F.2d 234,* Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950),* report of Bureau of Mines as to cause of gas tank explosion; *Petition of W--, 164 F.Supp. 659 (E.D.Pa.1958),* report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944),* State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950),* Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956),* "Status Reports" offered to justify delay in

processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., *69 A.L.R.2d 1148.* Various kinds of evaluative reports are admissible under federal statutes; *7 U.S.C. § 78*, findings of Secretary of Agriculture prima facie evidence of true grade of grain; *7 U.S.C. § 210(f)*, findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; *7 U.S.C. § 292*, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; *7 U.S.C. § 1622(h)*, Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; *8 U.S.C. § 1440(c)*, separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; *18 U.S.C. § 4245*, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; *42 U.S.C. § 269(b)*, bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; *46 U.S.C. § 679*, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? *42 Iowa L.Rev. 363 (1957);* (2) the special skill or experience of the official, id., (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944);* (4) possible motivation problems suggested by *Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).* Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluate reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of *California Evidence Code § 1281.*

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see *8 U.S.C. § 1284(b)*, proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and *42 U.S.C. § 405(c)(3)*, (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People v. Love, 310 Ill. 558, 142 N.E. 204 (1923),* certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); *California Evidence Code § 1284*; Kansas Code of Civil Procedure § 60-460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. *8 U.S.C. § 1360(d)*, certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924),* holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be

furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See *California Evidence Code § 1315* and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); *California Evidence Code § 1316*; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, *20 C.F.R. § 404.703(c)*, recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, supra. The rule is substantially identical in coverage with *California Evidence Code § 1312*.

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an Erie nature under *Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939),* is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); *California Evidence Code § 1330*; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. Id. § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 id. § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961),* upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see id. 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see *California Evidence Code § 1331*.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702,

authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. Id. §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); *California Evidence Code § 1340*; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967);* Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(ce), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966); Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967); Colwell v. Gardner, 386 F.2d 56 (6th Cir. 1967); Glendenning v. Ribicoff, 213 F.Supp. 301 (W.D.Mo. 1962); Cook v. Celebrezze, 217 F Supp. 366 (W.D.Mo. 1963); Sosna v. Celebrezze, 234 F.Supp. 289 (E.D.Pa. 1964);* and see *McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964).* The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., *60 A.L.R.2d 77.* The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949),* and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson, 193 So.2d 648 (Fla.App. 1967),* cert. denied *Fla., 201 So.2d 556; Darling v. Charleston Memorial Community Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965); Dabroe v. Rhodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964).*

In Reilly v. Pinkus, supra, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe v. Rhodes Co., supra.* Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6130(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. Id. § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or

community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935); State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956);* Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); *California Evidence Code §§ 1313, 1314*; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, id., and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); *California Evidence Code §§ 1320-1322*; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); *California Evidence Code § 1324*; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., *18 A.L.R.2d 1287, 1299,* which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note *27 Ill.L.Rev. 195 (1932),* it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939),* in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S.S. Co. v. Continental Cas. Co., 117 F.2d 404, 411 (2d Cir. 1941); Connecticut Fire Ins. Co. v. Farrara, 277 F.2d 388 (8th Cir. 1960).*

Practical considerations require exclusion of convictions of minor offenses, not became the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598 (1940); Jones v. Talbot, 87 Idaho 498, 394 P.2d 316 (1964); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943);* Annot., *18 A.L.R.2d 1287, 1295-1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950).* Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899),* error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. *15 U.S.C. § 902*(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); *California Evidence Code § 1300*; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691);* Neill v. Duke of Devonshire, 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the *United States, Patterson v. Gaines, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847),* follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co. v. United States, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914),* in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933),* records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v. Cahill, 81 F.2d 809* (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, *In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).*

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892),* so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, *18 U.S.C. 3500.* Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in *28 U.S.C. 1732.* Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

Notes of Committee on the Judiciary, Senate Report No. 93-1277. The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with *rule 35 of the Federal Rules of Civil Procedure* which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify

accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act [*18 U.S.C. § 3500*].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis v. Bradley [65 Conn. 99, 31 Atl. 591 (1894);* see, also *Rathbun v. Brancatella, 93 N.J.L. 222, 107 Atl. 279 (1919);* see, also McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors--e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment. [See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20-4-803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the words "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule

804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. *7 U.S.C. § 78*, findings of Secretary of Agriculture prima facie evidence of true grade of grain; *42 U.S.C. § 269(b)*, bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

. . . . .

Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigation? *42 Iowa L.Rev. 363 (1957);* (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co., 141 F.2d 568* (19th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).* Others no doubt could be added.

. . . . .

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6) [(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trust worthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assoc. Co., Ltd., 286 F.2d 388 (5th Cir. 1961)* illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also *United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968).*

Because exceptional cases like the Dallas County case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, an only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

Notes of Conference Committee, House Report No. 93-1597. Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)--Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1997 amendments. The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Notes of Advisory Committee on 2000 amendments. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp., 968 F.2d 999* (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and *18 U.S.C. § 3505* for foreign records in criminal cases.

Notes of Advisory Committee on 2011 amendments. The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

FEDERAL RULES OF EVIDENCE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Under a Federal Statute.* A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1944; Oct. 1, 1987; Nov. 1, 1988; Dec. 1, 2000.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; *California Evidence Code § 1452.* More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; *California Evidence Code § 1453*, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. *39 U.S.C. § 4005(b)*, public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932),* Baby Ruth candy bar; *Doyle v. Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928),* loaf of bread; *Weiner v. Mager & Throne, Inc., 167 Misc 338, 3 N.Y.S.2d 918 (1938),* same. And see W.Va. Code 1966, § 47-3-5, trade-mark on bottle prima facie evidence of ownership. Contra, *Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954); Murphy v. Campbell Soup Co., 62 F.2d 564 (1st Cir. 1933).* Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46-606; *State v. Wolfley, 75 Kan. 406, 89 P. 1046 (1907);* Annot., *11 L.R.A. (N.S.) 87.* Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry. v. Callaghan, 157 Ill. 406, 41 N.E. 909 (1895);* 9 Wigmore § 2510a. See also the provision of *19 U.S.C. § 1615(2)* that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are *California Evidence Code § 1451* and *N.Y.CPLR 4538*, McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).* Rule 302, supra. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).* Cf. *United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966).* In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams v Walker-Thomas-Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445 (1965).* Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, *10 U.S.C. § 936*, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; *15 U.S.C. § 77f(a)*, signature on SEC registration presumed genuine; *26 U.S.C. § 6064*, signature to tax return prima facie genuine.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).* Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins, 304 U.S. 64 (1938),* State law will apply irrespective of whether it is the Uniform Commercial Code.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2000 amendments. The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). *18 U.S.C. § 3505* currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies *28 U.S.C. § 1746* would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

Notes of Advisory Committee on 2011 amendments. The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

18 U.S.C. § 3505

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that -
(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
(B) such record was kept in the course of a regularly conducted business activity;
(C) the business activity made such a record as a regular practice; and
(D) if such record is not the original, such record is a duplicate of the original;
unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
(2) A foreign certification under this section shall authenticate such record or duplicate.
(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.
(c) As used in this section, the term -
(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;
(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and
(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

§ 902.13 Certified Records of a Regularly Conducted Activity

[1] Domestic Records

Certified domestic records of a regularly conducted activity are self-authenticating.[1] Under Rule 902(11), the original or a copy[2] of a domestic record of a regularly conducted activity is self-authenticating if it meets the requirements of Rule 803(6)(A)–(C), "as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court."[3] In other words, Rule 902(11) extends Rule 803(6) "by allowing a written foundation in lieu of an oral one."[4] See § 803.08 concerning the foundation for the business records exception.

Rule 803(6)(D) provides that a document may be qualified as a record of a regularly conducted activity "by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification."[5] Thus, a certificate complying with Rule 902(11) could replace the testimony of the record's custodian.[6] A declaration that complies with Title 26, Section 1746 of the United States Code would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.[7]

There is a notice requirement when offering a record of a regularly conducted activity by certificate. The proponent of the evidence must give an adverse party reasonable notice of the intention to offer that evidence, and must make the record and certification available for inspection, "so that the party has a fair opportunity to challenge them."[8] This notice requirement is intended to give the adverse party a full opportunity to test the adequacy of the foundation set forth in the certification.[9] Thus, this provision does not affect the right of the opponent to challenge the authenticity of the records; it only relieves the proponent of the burden of presenting a live witness

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[1] Fed. R. Evid. 902(11).

[2] *See* Fed. R. Evid. 1001(d), (e) (definitions of "original" and "duplicate" for purposes of best evidence rule).

[3] Fed. R. Evid. 902(11).

[4] **Written foundation.** United States v. Adefehinti, 510 F.3d 319, 326–327 (D.C. Cir. 2007) (foundation was sufficient because witness "was sufficiently familiar with the [business's] practice and testified that such [records] were made as part of that practice").

[5] Fed. R. Evid. 803(D).

[6] *See* Fed. R. Evid. 803(6); *see* § 803.11[1].

[7] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2]; *see* 28 U.S.C. § 1746 (requirements for unsworn declarations under penalty of perjury).

[8] Fed. R. Evid. 902(11); *compare* United States v. Jordan, 544 F.3d 656, 669–670 (6th Cir. 2008) (trial court did not abuse its discretion when it ordered government to correct its Rule 902(11) notice of intent to offer T-Mobile records to reflect correct telephone number, and when it ordered government to promptly serve defendant in person) *with* Latman v. Burdette, 2004 U.S. App. LEXIS 11212 (9th Cir. 2004) (unpublished opinion; bank account records alleged to be records of debtors' undisclosed bank account were inadmissible as self-authenticating, in part because notice and inspection requirements of Fed. R. Evid. 902(11) were not met).

[9] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2].

at trial. An opponent who believes that the declarant has not established a sufficient foundation will have to present evidence that demonstrates the failure.

[2] Foreign Records

Certified foreign records of a regularly conducted activity are self-authenticating.[10] Under Rule 902(12), in a civil case, the original or a copy[11] of a foreign record of a regularly conducted activity is self-authenticating if it meets the requirements for a self-authenticating domestic record under Rule 902(11) (see [1], *above*), "modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed."[12]

Under Rule 803(6), that a document may be qualified as a record of a regularly conducted activity "by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification."[13] Thus, a certificate complying with Rule 902(12) could replace the testimony of the record's custodian.[14]

Rule 902(12) is intended to establish a procedure for foreign records of a regularly conducted activity in civil cases that is similar to the procedure set forth in Title 18 of the United States Code, Section 3505 for certifying foreign records in criminal cases.[15]

There is a notice requirement when offering a business record by certificate. The proponent of the evidence must give an adverse party reasonable notice of the intention to offer that evidence, and must make the record and certification available for inspection, "so that the party has a fair opportunity to challenge them."[16] This notice requirement is intended to give an adverse party a full opportunity to test the adequacy of the foundation set forth in the declaration.[17] Thus, this provision does not affect the right of the adverse party to challenge the authenticity of the business records; it only relieves the proponent of the burden of presenting a live witness at trial. An adverse party who believes that the declarant has not established a sufficient

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[10] Fed. R. Evid. 902(12).

[11] *See* Fed. R. Evid. 1001(d), (e)(definitions of "original" and "duplicate" for purposes of best evidence rule), which are discussed in detail in Ch. 1001, *Definitions That Apply to This Article.*

[12] Fed. R. Evid. 902(12).

[13] Fed. R. Evid. 803(6)(D).

[14] *See* Fed. R. Evid. 803(6)(D).

[15] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2]; *see* 18 U.S.C. § 3505 (very similar provisions for admitting foreign records of regularly conducted activity in criminal cases); *see, e.g.*, United States v. Jawara, 474 F.3d 565, 584–585 (9th Cir. 2007) (test of 18 U.S.C. § 3505 for admission of foreign records was derived from Fed. R. Evid. 803(6); Gambian school examination records were properly admitted when accompanied by high school principal's certification confirming accuracy of test records prepared by examination agency).

[16] Fed. R. Evid. 902(11), 902(12); *see* United States v. Olguin, 684 F.3d 384, 390–391 (5th Cir. 2011) (government satisfied Rule 902(11)'s pre-trial notice requirement by providing records six months before trial and giving written notice of its intent to introduce records five days before trial).

[17] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2].

foundation will have to present evidence that demonstrates the failure.

CHAPTER 31-04
GENERAL PROVISIONS

31-04-01. Methods of taking testimony of witnesses.
Testimony of witnesses may be taken by:
1. Affidavit.
2. Deposition.
3. Oral examination.

31-04-02. Affidavit defined.
An affidavit is a written declaration under oath made without notice to the adverse party.

31-04-03. Deposition defined.
A deposition is a written declaration under oath made upon notice to the adverse party for the purpose of enabling the adverse party to attend and cross-examine, or upon written interrogatories.

31-04-04. Oral examination defined.
An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

31-04-04.1. Videotaped statement of child sexual offense victim - Criteria for admission as evidence.
1. In any prosecution for a violation of section 12.1-20-03, 12.1-20-03.1, 12.1-20-04, 12.1-20-05, 12.1-20-06, 12.1-20-07, or 12.1-20-11 in which the victim is less than fifteen years of age, the oral statement of the child victim may be recorded before trial and, subject to subsection 2, is admissible as evidence in any court proceeding regarding the offense if the following conditions are satisfied:
   a. The court determines there is reasonable cause to believe that the child victim would experience serious emotional trauma as a result of in-court participation in the proceeding;
   b. The accused must be given reasonable written notice of the time and place for taking the videotaped statement;
   c. The accused must be afforded the opportunity to hear and view the testimony from outside the presence of the child by means of a two-way mirror or other similar method that will ensure that the child cannot hear or see the accused;
   d. The accused must have the opportunity to communicate orally with counsel by electronic means while the videotaped statement is being made; and
   e. All questioning must be done by the prosecutor or counsel for the defendant unless the defendant is an attorney pro se. An attorney pro se must conduct all questioning from outside the presence of the child. Upon request of any of the parties or upon the determination of the court that it would be appropriate, the court may appoint a person who is qualified as an expert and who has dealt with the child in a therapeutic setting to aid the court throughout proceedings conducted under this section and the court may appoint a guardian ad litem to protect the interests of the child.
2. A child victim's videotaped statement is admissible pursuant to subsection 1 if the court finds that the child is unavailable as a witness to testify at trial and, upon viewing the videotape recording before it is shown to the jury, determines that it is sufficiently reliable and trustworthy and that the interests of justice will best be served by admission of the statement into evidence. For purposes of this subsection, "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or psychological strain if

required to testify at trial. The court, in making its findings and determinations under this subsection, shall consider at least the following:

a. The nature of the offense;
b. The significance of the child's testimony to the case;
c. The child's age;
d. The child's psychological maturity and understanding; and
e. The nature, degree, and duration of potential injury to the child from testifying.

31-04-05. Use of affidavits.

An affidavit may be used:

1. To verify a pleading.
2. To prove the service of a summons, notice, or other process in an action.
3. To obtain a provisional remedy.
4. To obtain an examination of a witness.
5. To obtain a stay of proceedings.
6. Upon a motion.
7. In any other case permitted by law.

31-04-06. How proof of publication made.

Proof of the publication of a document or notice required by law or by court order to be published in a newspaper may be made by the affidavit of the publisher of the newspaper, or the publisher's designee, annexed to a copy of the document or notice, specifying the paper in which and the times when the publication was made.

31-04-07. Where and how affidavits may be made.

An affidavit may be made in or out of this state before any person authorized to administer an oath.

31-04-08. Procedure for securing affidavit of person refusing to make the same.

When any party intends to make or oppose a motion in any court and it shall be necessary for the party to have the affidavit of any person who shall have refused to make the same, such court, by order, may appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee the same as before a referee to whom an action is referred to try an issue, and the fees of such referee for such service shall be three dollars per day.

31-04-09. No title required to affidavits.

It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title or with a defective title shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refers to the action or proceeding in which it is made.

31-04-10. Form and contents of certificate for certifying copies to be used as evidence.

Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there is any, or if such officer is a clerk of a court having a seal, under the seal of such court.

31-04-11. Mediation - Inadmissibility of evidence - Exception.

When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:

1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act;
2. The evidence relates to a breach of duty by the mediator;
3. The validity of the mediated agreement is in issue; or
4. All persons who conducted or otherwise participated in the mediation consent to disclosure.

31-04-12. Expressions of empathy.

1. A statement, affirmation, gesture, or conduct of a health care provider, or health care provider's employee or agent, which expresses apology, sympathy, commiseration, condolence, compassion, or benevolence to a patient or to a patient's relative or representative is not admissible as evidence of liability or as an admission against interest in a civil action, arbitration proceeding, or administrative hearing regarding the health care provider.
2. For purposes of this section, unless the context otherwise requires:
   a. "Health care provider" means:
      (1) An individual licensed or certified by the state to deliver health care;
      (2) A hospital or clinic, including an ambulatory surgery center or group of physicians operating a clinic or outpatient care facility, or a professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state; and
      (3) A nursing, basic, or assisted living facility licensed by this state or by any other health care organization.
   b. "Relative" means an individual who has a relationship to the patient by marriage, blood, or adoption.
   c. "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a health care directive, or any person recognized in law or custom as a patient's agent.

UNITED STATES CODE SERVICE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 115. EVIDENCE; DOCUMENTARY

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

HISTORY:

(Added Oct. 18, 1976, P.L. 94-550, § 1(a), 90 Stat. 2534.)

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 3, 2013

RE: Rule 68, N.D.R.Civ.P., Offer of Settlement or Confession of Judgment; Tender

At the January meeting, the committee addressed Attorney Steven Leibel's request that the committee consider amendments to Rule 68 that would encourage plaintiffs to make offers of settlement by making it possible for them to receive double costs if the defendant rejects the offer and the plaintiff later obtains a more favorable result at trial. The committee rejected the double costs approach.

In the course of its discussion, the committee discussed the Minnesota approach to offers of settlement and several members indicated it was superior to North Dakota's because it provided more clarity about the offer of settlement process and outcome. In response to the committee's requests, staff has prepared proposed amendments to Rule 68 that would incorporate the Minnesota approach. The amendments are attached.

RULE 68. OFFER OF SETTLEMENT OR CONFESSION OF JUDGMENT; TENDER

(a) Offer of Settlement.

(1) Making an offer~~; Judgment on an accepted offer. At least 14 days before the trial begins, a party may serve on an opposing party an offer of settlement on specified terms, with the costs then accrued and to enter into a stipulation dismissing the claim or allowing judgment to be entered accordingly. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment on order of the court.~~

(A) At any time more than 14 days before the trial begins, any party may serve on an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.

(B) An offer does not have the consequences provided in Rule 68(a)(2) and Rule 68(a)(3) unless it expressly refers to Rule 68.

(C) An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which must be added to the amount stated as provided in Rule 68(a)(2) and Rule 68 (a)(3).

(D) The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and

applicable attorney fees.

(E) When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which has the same effect as an offer made before trial if it is served within a reasonable time not less than 14 days before the commencement of a hearing or trial to determine the amount or extent of liability.

(F) Notwithstanding the provisions of Rule 5(d), no offer under this rule need be filed with the court unless the offer is accepted.

~~(2) Unaccepted offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.~~

~~(3) Offer after liability is determined. When one party's liability to another has been determined but the amount or extent of liability remains to be determined by further proceedings, any party may make an offer of settlement. It must be served at least seven days before a hearing to determine the amount or extent of liability, or as otherwise ordered by the court.~~

(2) Acceptance or Rejection of Offer.

(A) Acceptance of the offer must be made by service of written notice of acceptance within 14 days after service of the offer. During the 14-day period the offer is irrevocable.

(B) If the offer accepted is an offer of judgment, either party may file the offer and

the notice of acceptance, together with the proof of service, and the court must order entry of judgment as follows:

(i) If the offer is a total-obligation offer as provided in Rule 68(a)(1)(D), judgment must be for the amount of the offer.

(ii) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, must be determined by the court and included in the judgment.

(C) If the offer accepted is an offer of settlement, the settled claim(s) must be dismissed on:

(i) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied; or

(ii) order of the court implementing the terms of the agreement.

(D) If the offer is not accepted within the 14-day period, it is considered withdrawn.

(E) The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

~~(4) Paying costs after an unaccepted offer. If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.~~

(3) Effect of Unaccepted Offer.

(A) Evidence of an unaccepted offer is not admissible, except in a proceeding to determine costs and disbursements.

(B) An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(i) If the offeror prevails or the relief awarded to the offeree is less favorable than the offer, the offeree must pay the offeror's costs and disbursements incurred in the action after service of the offer, and the offeree may not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the offeree may not be affected by this provision.

(ii) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

(C) To determine for purposes of this rule if the relief awarded is less favorable to the offeree than the offer:

(i) a damages-only offer is compared with the amount of damages awarded to the plaintiff; and

(ii) a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer.

(4) Applicable Attorney Fees and Prejudgment Interest.

(A) "Applicable attorney fees" for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule may be construed to create a right to attorney fees not provided for under the applicable substantive law.

(B) "Applicable prejudgment interest" for the purposes of Rule 68 means any prejudgment interest to which a party is entitled by statute, rule, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule may be construed to create a right to prejudgment interest not provided for under the applicable substantive law.

(b) Tender of money in lieu of judgment.

(1) Making a tender. If the action is for the recovery of money, instead of the offer of settlement provided for in subdivision (a), any party may, at least 14 days before the trial begins, tender to the other party the full amount to which that other party is entitled, together with costs and disbursements then accrued.

(2) Unaccepted tender. If the tender is not accepted within 14 days, the offeree may not have costs and disbursements unless the recovery is more than the sum tendered. The offeror's costs and disbursements must be deducted from the recovery, but if they exceed the recovery, the offeror is entitled to judgment for the excess. Evidence of the tender is not admissible except in a proceeding to determine costs.

(c) Confession of judgment.

(1) In General. A judgment by confession may be entered without action, either for

money due or to become due, or to secure any person against contingent liability on behalf of the defendant, or both, in the manner prescribed by this subdivision.

(2) Written Statement Required. A written statement must be made, signed by the defendant, and verified by oath, stating the following:

(A) the amount for which judgment may be entered and authorizing the entry of judgment; and

(B) if the judgment to be confessed is for money due or to become due, the concise facts underlying the debt, and showing that the debt is justly due or to become due; or

(C) if the judgment to be confessed is for the purpose of securing the plaintiff against a contingent liability, it must state concisely the facts constituting the liability and must show that the sum confessed does not exceed the amount of that liability.

(3) Entry of Judgment. The statement must be presented to the court and, if it is found sufficient, the court must order the clerk to enter judgment. The statement, order for judgment, and judgment entered constitute the judgment roll.

(4) Execution in General. Execution of the judgment may be issued and enforced according to the statutes of this state. If the amount due on the judgment is payable in installments that are not currently due, the execution may be issued on that judgment for the collection of installments due.

(5) Form of Execution. The execution must be in the usual form, and must contain:

(A) a direction to the sheriff to collect the amount due on the judgment;

(B) the amount due on the judgment, including interest and costs; and

(C) the signature of the attorney or person issuing the execution.

(6) Future Installments. Notwithstanding the issue and collection of the execution, the judgment remains as security for the future installments to become due. When future installments become due, execution may be issued for its collection and enforcement.

EXPLANATORY NOTE

Rule 68 was amended, effective March 1, 2011; _____.

Subdivision (a) ~~is derived from N.D.R.Civ.P. 68~~ was amended, _____, to incorporate the approach to making an offer of settlement set out in Minn.R.Civ.P. 68.

~~Paragraph (a)(1) was amended, effective March 1, 2011, to change the time period to make an offer of settlement from 10 to 14 days before a trial begins.~~

~~Paragraph (a)(3) was amended, effective March 1, 2011, to change the time for making an offer after liability is determined from 10 to 7 days before a hearing.~~

~~Subdivision~~ Under subdivision (b), ~~is similar to subdivision (a) except~~ the defendant may tender money instead of making an offer of settlement. Unlike the offer of settlement, this can only be made in an action for the recovery of money.

Subdivision (c) authorizes a judgment by confession to be entered without commencing an action. ~~This subdivision is the same as Chapter 28-10, NDRC 1943, which previously governed the subject. However, depending upon~~ Depending on the facts of a particular case, a confession of judgment obtained without notice and hearing may be vulnerable to constitutional attack on due process grounds. See D. H. Overmyer Co. v. Frick Co., 405 U.S. 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). ~~Early in its history, the~~ The North

Dakota Supreme Court has ruled that the authority to confess judgment must be clear and explicit and must be strictly followed. Underwood Farmers Elevator v. Leidholm, 460 N.W.2d 711 (N.D. 1990), Rasmussen v. Hagler, 108 N.W. 541 (N.D. 1906).

Rule 68 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 31-February 1, 2013, pages 26-28; April 29-30, 2010, pages 16-17, 18-19; January 28-29, 2010, pages 19-20; May 21-22, 1987, pages 3-5; February 19-20, 1987, pages 17-19; September 18-19, 1986, pages 4-7; September 26-27, 1985, pages 6, 9-10;January 17-18, 1980, pages 6-7; Fed.R.Civ.P. 68. Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254 cases and Section 2255 proceedings in the United States District Courts, Proposed Amendment to Fed.R.Civ.P. 68 (not adopted), September 1984. Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure, Proposed Amendment to Fed.R.Civ.P. 68 (not adopted), August 1983.

Cross Reference: N.D.R.Civ.P. 12 (Defenses and Objections When and How Presented By Pleading or Motion - Motion for Judgment on Pleadings) and N.D.R.Civ.P. 67 (Deposit in Court); N.D.R.Ev. 408 (Compromise and Offers to Compromise).

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January 11, 2013

Hon. Mary Muehlen Maring
Justice of the Supreme Court
Chair of Joint Procedure Committee
State Capitol
Bismarck, ND 58505-0530

RE: Proposed Changes to North Dakota Rule of Civil Procedure 68

Dear Justice Maring,

I am writing to respectfully request that the Joint Committee on the Rules of Civil Procedure consider an amendment to North Dakota's Rule of Civil Procedure 68. In its current form, Rule 68 only provides half the parties to a lawsuit with incentive to realistically evaluate his or her contentions. Both basic fairness and North Dakota public policy should compel the Joint Committee to amend Rule 68 and make this procedure available to all.

North Dakota has a public policy of encouraging settlements and providing speedy economic relief to injured parties. *E.g. Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Property & Cas. Co.*, 452 N.W.2d 319, 323 (1990). Rule 68 is North Dakota's rule pertaining to offers of settlement, and is similar to the Federal rule. The purpose of Fed.R.Civ. P. 68 is to encourage settlement of litigation. *See Jundt v. Jurassic Resources Development, N.A., LLC.*, 2004 ND 65, ¶ 15, 677 N.W.2d 209, 214. Like its Federal counterpart, N.D.R.Civ.P. 68 contains a cost-shifting provision. This cost-shifting provision provides a "disincentive for plaintiffs from continuing to litigate a case after being presented with a reasonable offer." *Id.* (internal citation omitted). If a defendant serves an offer of settlement that is not accepted, and the plaintiff subsequently fails to obtain a judgment that is more favorable than the offer, the offeree must pay the costs incurred after the offer is made. *See* N.D.R.Civ.P. 68(a)(4).

However, Rule 68 is a one-way street that only empowers a defendant to invoke the cost-shifting provision. This is because the only financial incentive provided by Rule 68 is recovery of costs—something a plaintiff is entitled to anyway if he or she prevails. Consequently, Rule 68 fails to provide a "disincentive" for a *defendant* to continue "to litigate a case after being presented with a reasonable offer." Because of this unfairness, among other things, the Federal version of Rule 68 has been criticized by both commentators and the Federal Rules Advisory Committee. *See, e.g.* Hon. William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the*

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New Mexico Experience, Vol. 39, N.M. Law Rev., pg. 349, 351-52 (2009). In contrast to the Federal stalemate, state courts have been much more proactive in empowering claimants to also invoke Rule 68. In Judge Lynch's thoughtful 2009 law review article, cited above, he notes that the modern trend is moving away from Federal Rule 68's one-way street. For your convenience, I have enclosed a copy of this law review article which was printed from the University of New Mexico Law School website.

Specifically, I request that the Joint Committee amend North Dakota's Rule 68 to provide a financial incentive for a plaintiff to make an offer of settlement. Because a North Dakota plaintiff is already entitled to costs and disbursements under Rule 54 if the plaintiff prevails at trial, the amendment to Rule 68 should provide an additional financial incentive for defendants to seriously consider a reasonable offer of settlement. I believe an award of double costs and disbursements if the plaintiff recovers more than its offer of settlement is a modest and appropriate incentive. Any amendment should also explicitly bar a claimant from making an offer of settlement prior to the expiration of a reasonable time after commencement of the lawsuit. In my experience, 120 days is sufficient to allow a defendant to do discovery and arrive at its own evaluation of the case. I have attached to this letter a copy of New Mexico's Rule 1-068, which was the subject of Judge Lynch's article. I believe this rule is an appropriate template for an amendment to North Dakota's Rule 68 because New Mexico is generally consistent with North Dakota's effort to maintain the simplicity of the Federal rules. After comparing the two rules, I believe that only subpart (a) of Rule 68, N.D.R.Civ.P. would probably need to be modified. As another example of how states have modified this rule, I am also enclosing with this letter a copy of Minnesota's Rule 68, *et seq*. This rule is similar in its effect to New Mexico's rule, but the format reflects Minnesota's departure from the simplicity of the Federal rules of civil procedure. To the extent the Joint Committee wishes to review other rules, Judge Lynch, at fn. 50, cites rules in other states that the Joint Committee may also wish to review.

I practiced as an insurance defense lawyer in an Albuquerque litigation firm for 11 years prior to moving to Bismarck to raise my young family. As part of my practice in New Mexico, I made and received offers of settlement on a weekly basis. In my experience, empowering a plaintiff to make offers of settlement benefits all parties because it encourages settlement in a number of ways. First, the ability to recover double costs provides an incentive to a claimant to make a "bottom line" offer of settlement. Obviously, the lower the offer is, the more likely a claimant is to get a judgment better than the offer. Second, a claimant is not the only party to a lawsuit that can be unreasonable. Allowing a plaintiff to recover double costs if he or she beats an offer of settlement can be very effective in thawing an intransigent defendant. This is especially true in smaller cases, where a defendant with means may have a financial incentive to litigate irrespective of liability or damages. Perhaps most importantly, allowing both sides to make offers of settlement opens up a line of communication that provides a financial incentive for all parties to be reasonable. While I would guess that less than 5% of the offers I sent or received were formally accepted by either party, in 100% of the cases Rule 68's effect was discussed with my clients, and in 100% of the cases an offer of settlement forced the offeree to

take a hard look at his or her position. Often times, settlement followed. The survey results cited by Judge Lynch are consistent with my experience.

There should be no question that North Dakota's growth in population and corresponding growth in litigation will place a burden on the judges, lawyers, and parties charged with administering the judicial system. Chief Justice VandeWalle's January 9, 2013 State of the Judiciary speech makes clear that North Dakota is facing an unprecedented strain on judicial resources. Even placing aside the fundamental issue of fairness that demands equal access to the remedies provided by the Rules, anything the Joint Committee can do to help parties resolve their disputes short of trial and alleviate this strain on the system is a worthwhile endeavor. This is the modern trend in the United States, and North Dakota should not hesitate to join the states that have made Rule 68 a two-way street.

For these reasons, I respectfully request that the Joint Committee propose an amendment to Rule 68 that removes the unfairness inherent in Rule 68's one-way street and encourages all parties to a dispute to assess and resolve claims prior to trial. Please feel free to contact me with any questions regarding this letter, or if you would like me to assist the Joint Committee in any way.

Respectfully yours,

LARSON LATHAM HUETTL LLP

By: _____
Steven J. Leibel

Encl: 1) Hon. William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, Vol. 39, N.M. Law Rev., pg. 349, 351-52 (2009);
2) N.M.R.A. 1-068; and,
3) Minn.R.Civ.P. 68.01-68.04.

cc(w/encl): Mike Hagburg.

68.01 OFFER

(a) Time of Offer. At any time more than ten days before the trial begins, any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.

(b) Applicability of Rule. An offer does not have the consequences provided in Rules 68.02 and 68.03 unless it expressly refers to Rule 68.

(c) Damages-only Offers. An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which shall be added to the amount states as provided in Rules 68.02(b)(2) and (c).

(d) Total-obligation Offers. The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees.

(e) Offer Following Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days before the commencement of a hearing or trial to determine the amount or extent of liability.

(f) Filing. Notwithstanding the provisions of Rule 5.04, no offer under this rule need be filed with the court unless the offer is accepted.

68.02 ACCEPTANCE OR REJECTION OF OFFER

(a) Time for Acceptance. Acceptance of the offer shall be made by service of written notice of acceptance within ten days after service of the offer. During the ten-day period the offer is irrevocable.

(b) Effect of Acceptance of Offer of Judgment. If the offer accepted is an offer of judgment, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and the court shall order entry of judgment as follows:

(1) If the offer is a total-obligation offer as provided in Rule 68.01(d), judgment shall be for the amount of the offer.

(2) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment.

(c) Effect of Acceptance of Offer of Settlement. If the offer accepted is an offer of settlement, the settled claim(s) shall be dismissed upon:

(1) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied; or

(2) order of the court implementing the terms of the agreement.

(d) Offer Deemed Withdrawn. If the offer is not accepted within the ten-day period, it shall be deemed withdrawn.

(e) Subsequent Offers. The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

68.03 EFFECT OF UNACCEPTED OFFER

(a) Unaccepted Offer Not Admissible. Evidence of an unaccepted offer is not admissible, except in a proceeding to determine costs and disbursements.

(b) Effect of Offer on Recovery of Costs. An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(1) If the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer, and the plaintiff-offeree shall not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the plaintiff-offeree shall not be affected by this provision.

(2) If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

(3) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

(c) Measuring Result Compared to Offer. To determine for purposes of this rule if the relief awarded is less favorable to the offeree than the offer:

(1) a damages-only offer is compared with the amount of damages awarded to the plaintiff; and

(2) a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer.

68.04 APPLICABLE ATTORNEY FEES AND PREJUDGMENT INTEREST

(a) "Applicable Attorney Fees" Defined. "Applicable attorney fees" for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to attorney fees not provided for under the applicable substantive law.

(b) "Applicable Prejudgment Interest" Defined. "Applicable prejudgment interest" for the purposes of Rule 68 means any prejudgment interest to which a party is entitled by statute, rule, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to prejudgment interest not provided for under the applicable substantive law.

Advisory Committee Comment - 2008 Amendment

Rule 68 is extensively revamped both to clarify its operation and to make it more effective in its purpose of encouraging the settlement of litigation. The overarching goal of this set of amendments is to add certainty to the operation of the rule and to remove surprises both to parties making offers and those receiving and deciding whether to accept them. Additionally, Rule 68.03 is revised to make the mechanism of Rule 68 better address the goal of providing incentives for both claimants and parties opposing claims. This rule is not as closely modeled on its federal counterpart, Fed. R. Civ. P. 68, as is the existing rule, so that rule and decisions construing it may not be persuasive guidance in construing this rule.

Rule 68 uses the term "offer" to include offers to settle made by any party. Thus, both an offer by a defendant to pay a sum in return for a dismissal of a claim and an offer by a claimant to accept a sum in return for dismissal--often termed a "demand" and not an "offer"--are offers for the purposes of the rule.

Rule 68.01(b) is a new provision that requires that in order to be given the cost-shifting effect of the rule an offer must include express reference to the rule. See Matheiu v. Freeman, 472 N.W.2d 187 (Minn. App. 1991). This provision is intended to make it unlikely that an offer would come within the scope of the rule without the offeror intending that and the offeree having notice that it is an offer with particular consequences as defined in the rule.

The revised rule caries forward the former rule's application both to offers of judgment and to offers of settlement. The effects of these two types of offer are different, and are clarified in Rule 68.02. Rules 68.01(c) and (d) create an additional dichotomy in the rule, creating new categories of "damages-only" and "total-obligation" offers. This dichotomy is important to the operation of the rule, and is intended to remove a significant "trap for the unwary" where an accepted offer may be given two substantially different interpretations by offeror and offeree. Under the former rule, if a statute allowed the recovery of attorney fees as costs and a Rule 68 offer were made and did not expressly include reference to attorney fees, fees could be recovered in addition to the amount offered. See, e.g., Collins v. Minn. Sch. of Business, Inc., 655 N.W.2d 320 (Minn. 2003). Fees recoverable by contract, rather than statute, would be subsumed

within the offer, and not be recoverable in addition to the amount of the accepted offer. See, e.g., Schwickert, Inc. v. Winnegabo Seniors, Ltd., 680 N.W.2d 79 (Minn 2004). Similar uncertainty may exist as to whether prejudgment interest is included in or to be added to the amount of an offer. See, e.g., Collins; Stinson v. Clark Equip. Co., 743 N.W.2d 333 (Minn. App. 1991). Discussion of other ambiguities under the federal counterpart to Rule 68, Fed. R. Civ. P. 68, is included in Danielle M. Shelton, Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment, 91 MINN. L. REV. 865 (2007).

The "damages-only" or "total-obligation" offer choice allows the party making the offer to control and understand the effect of the offer, if accepted; similarly, a party deciding how to respond to an offer should be able to determine the total cost of accepting an offer. Rule 68.01(c) creates a presumption that an offer made under Rule 68 is a "damages-only" offer unless it expressly meets the criteria of Rule 68.01(d) by stating that it is a "total-obligation" offer. The added precision allowed by distinguishing the types of offers permits the new rule to provide greater clarity and certainty as to the effect both of accepted offers and unaccepted offers.

Rule 68.03(b)(1) changes the effect of Rule 68 on costs and disbursements when a defendant's offer is rejected and the judgment is less favorable to the plaintiff offeree. Under the former rule, the offeree would nevertheless recover its costs and disbursements from the offeror. Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998). The revised rule provides that the offeree does not recover its costs and disbursements incurred after service of the offer. But this change does not affect a prevailing plaintiff's right to attorney fees to which it is entitled under law or contract. In this respect the revised rule, like the former rule, does not incorporate the cut-off of attorney fees that occurs under the federal Rule 68 as interpreted in Marek v. Chesney, 473 U.S. 1 (1986). Additionally, under the former rule, the offeror was entitled to its costs and disbursements incurred from the beginning of the case. Vandenheuvel v. Wagner, 690 N.W.2d 757 (Minn. 2005). As to this issue, the revised rule now has the same effect as the federal rule (although with language that is not identical), requiring the offeree to pay the offeror's costs and disbursements incurred after service of the offer.

Rule 68.03(b)(2) introduces a consequence for a defendant's rejection of a plaintiff's Rule 68 offer if the judgment is less favorable to the defendant offeree. In that circumstance, this new provision requires the defendant to pay double the offeror's costs and disbursements incurred after service of the offer. If the defendant is merely required to pay the offeror's costs, as under the current rule, there is no adverse consequence for a defendant who rejects a Rule 68 offer. In contrast, under the revised rule, a plaintiff who rejects a Rule 68 offer suffers dual adverse consequences: loss of the right to recover his costs and required payment of the defendant's costs.

Rule 68.04(a) expressly provides that the rule does not create a right to recover attorney fees. This provision is intended only to avoid confusion. The rule might affect the extent of fees recoverable by statute, common law, or by contract, but it does not create any right to recover fees that does not exist outside of Rule 68.

Similarly, Rule 68.04(b) expressly provides that the rule does not create a right to recover prejudgment interest, which right must rather be drawn from an applicable statute, rule, contract, or common law. It is noteworthy that MINN. STAT. [#xa7] 549.09, subd. 1(b), which governs prejudgment interest in most cases, contains a mechanism analogous to this rule that adjusts calculation of prejudgment interest based on the relationship between the parties' offers of settlement and the ultimate judgment or award in the case.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2013

RE: Rule 8.10, N.D.R.Ct., Uniform Collaborative Law Rule

Judge Hagerty has requested the committee consider adoption of the Uniform Collaborative Law Rule in North Dakota. A proposed new Rule 8.10 containing the text of the uniform rule is attached. The committee discussed this proposal briefly at the January meeting and decided to table it until this meeting.

According to the Uniform Law Commission, "collaborative law is a voluntary, client-driven form of alternative dispute resolution practiced in all 50 states." The uniform act was promulgated in 2009 "because of the need for a comprehensive statute addressing the practice of collaborative law." An enactment status map form the ULC is attached, showing that 6 states have enacted the UCLA. Also attached is the ULC's explanation of why states should adopt ucla.

Judge Hagerty states in her proposal letter that collaborative law would be a useful option in family law cases. She states that it also would be beneficial in Eastern North Dakota because collaborative law is practiced in Minnesota. She included with her letter an article from the Grand Forks Herald discussing collaborative law and how it can be applied in divorce cases. This material is attached.

While Minnesota has not adopted the UCLA, it does have a very simple rule allowing the practice of collaborative law. A copy is attached. Collaborative law seems to be practiced extensively in Minnesota. An article entitled "What is Collaborative Law" from one of the many Minnesota law firms offering collaborative law services is attached.

Judge Hagerty also provided a copy of the uniform rule including the text of the rule and comments and explanatory material about the different provisions, which is attached.

RULE 8.1. UNIFORM COLLABORATIVE LAW RULE

(a) Definitions.

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A: is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

Alternative B: is described in a collaborative law participation agreement.

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

(8) "Party" means a person that signs a collaborative law participation agreement and

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whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial

entity.

(10) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

(b) Collaborative Law Participation Agreement.

(1) A collaborative law participation agreement must:

(A) be in a record;

(B) be signed by the parties;

(C) state the parties' intention to resolve a collaborative matter through a collaborative law process under these rules;

(D) describe the nature and scope of the matter;

(E) identify the collaborative lawyer who represents each party in the process; and

(F) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

(2) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

(c) Beginning and Concluding Collaborative Law Process.

(1) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(2) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(3) A collaborative law process is concluded by a:

(A) resolution of a collaborative matter as evidenced by a signed record;

(B) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(C) termination of the process.

(4) A collaborative law process terminates:

(A) when a party gives notice to other parties in a record that the process is ended;

(B) when a party:

(i) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(ii) in a pending proceeding related to the matter:

-- initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

-- requests that the proceeding be put on the [tribunal's active calendar]; or

-- takes similar action requiring notice to be sent to the parties; or

(C) except as otherwise provided by Rule 8.1 (c)(7), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(5) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(6) A party may terminate a collaborative law process with or without cause.

(7) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by paragraph (e) is sent to the parties:

(A) the unrepresented party engages a successor collaborative lawyer; and

(B) in a signed record:

(i) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(ii) the agreement is amended to identify the successor collaborative lawyer; and

(iii) the successor collaborative lawyer confirms the lawyer's representation of a party in the collaborative process. 53

(8) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(9) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

(d) Proceedings Pending Before Tribunal; Status Report.

(1) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to paragraph (c) and Rules 7 and 8, the filing operates as an application for a stay of the proceeding.

(2) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under paragraph (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the

process.

(3) A tribunal in which a proceeding is stayed under paragraph (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(4) A tribunal may not consider a communication made in violation of paragraph (c).

(5) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

(e) Emergency Order. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

(f) Approval of Agreement by Tribunal. A tribunal may approve an agreement resulting from a collaborative law process.

(g) Disqualification of Collaborative Lawyer and Lawyers in Associated Law Firm.

(1) Except as otherwise provided in Rule 8.1(g)(3), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(2) Except as otherwise provided in paragraph (c) and Rules 10 and 11, a lawyer in

a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under paragraph (a).

(3) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(A) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(B) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(4) If Rule 8.1 (3)(B) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

(h) Low Income Parties.

(1) The disqualification of Rule 8.1(g)(1) applies to a collaborative lawyer representing a party with or without fee.

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Rule 8.1(g)(1) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter

if:

(A) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

(B) the collaborative law participation agreement so provides; and

(C) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

(i) Governmental Entity as Party.

(1) The disqualification of Rule 8.1(g)(1) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

(2) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(A) the collaborative law participation agreement so provides; and

(B) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

(j) Disclosure of Information. Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full,

candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

(k) Standards of Professional Responsibility and Mandatory Reporting Not Affected. These rules do not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

(l) Appropriateness of Collaborative Law Process. Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal

intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 8.1 (g)(1), (h)(2), or (i)(2).

(m) Coercive or Violent Relationship.

(1) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(2) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(3) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(A) the party or the prospective party requests beginning or continuing a process; and

(B) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

(n) Confidentiality of Collaborative Law Communication. A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than these rules.

(o) Privilege Against Disclosure for Collaborative Law Communication; Admissibility; Discovery.

(1) Subject to Rules 18 and 19, a collaborative law communication is privileged under Rule 8.1(o) (2), is not subject to discovery, and is not admissible in evidence.

(2) In a proceeding, the following privileges apply:

(A) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.

(B) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

(3) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

(p) Waiver and Preclusion of Privilege.

(1) A privilege under Rule 8.1(o) may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(2) A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege

under Rule 8.1(o), but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

(q) Limits of Privilege.

(1) There is no privilege under Rule 8.1(o) for a collaborative law communication that is:

(A) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(B) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(C) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(D) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(2) The privileges under Rule 8.1(o) for a collaborative law communication do not apply to the extent that a communication is:

(A) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

(B) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(3) There is no privilege under Rule 8.1(o) if a tribunal finds, after a hearing in

camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

(A) a court proceeding involving a felony [or misdemeanor]; or

(B) a proceeding seeking rescission or reformation of a contract arising out of the 67 collaborative law process or in which a defense to avoid liability on the contract is asserted.

(4) If a collaborative law communication is subject to an exception under paragraph (2) or (3), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(5) Disclosure or admission of evidence excepted from the privilege under paragraph (2) or (3) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(6) The privileges under Rule 8.1(o) do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This paragraph does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

(r) Authority of Tribunal in Case of Noncompliance.

(1) If an agreement fails to meet the requirements of Rule 8.1(b), or a lawyer fails to comply with Rule 8.1(l) or (m), a tribunal may nonetheless find that the parties intended to

enter into a collaborative law participation agreement if they:

(A) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(B) reasonably believed they were participating in a collaborative law process.

(2) If a tribunal makes the findings specified in paragraph (1), and the interests of justice require, the tribunal may:

(A) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(B) apply the disqualification provisions of Rule 8.1 (c), (d), (g), (h), and (i); and

(C) apply a privilege under Rule 8.1(o).

EXPLANATORY NOTE

Rule 8.1 took effect _____.

STATE OF NORTH DAKOTA

DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
P.O. BOX 1013
BISMARCK, NORTH DAKOTA 58502

GAIL HAGERTY
PRESIDING DISTRICT JUDGE

(701) 222-6682
FAX (701) 222-6689
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RECEIVED BY
Justice Maring
Supreme Court

NOV 2[illegible]

STATE OF
NORTH DAKOTA

November 28, 2012

Justice Mary Maring
Chair, Joint Procedure Committee
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

Dear Justice Maring:

Please find enclosed a recent article from the Fargo Form concerning collaborative law in divorce cases and a copy of the Uniform Collaborative Law Act as amended by the Uniform Law Commission in 2010.

On behalf of North Dakota's Uniform Law Commission, I request that the Joint Procedure Committee consider adopting the Uniform Collaborative Law Act by rule as a useful option for family law cases. Adoption of the Act would be particularly beneficial to attorneys in the eastern part of North Dakota, since collaborative law is practiced in Minnesota.

The Uniform Law Conference's website has additional information and resources concerning the Act. The website address is: http://www.uniformlaws.org. If there are questions or issues which can be addressed by those involved in drafting the Act, please let me know and I will assist in making contacts.

Thank you for your consideration.

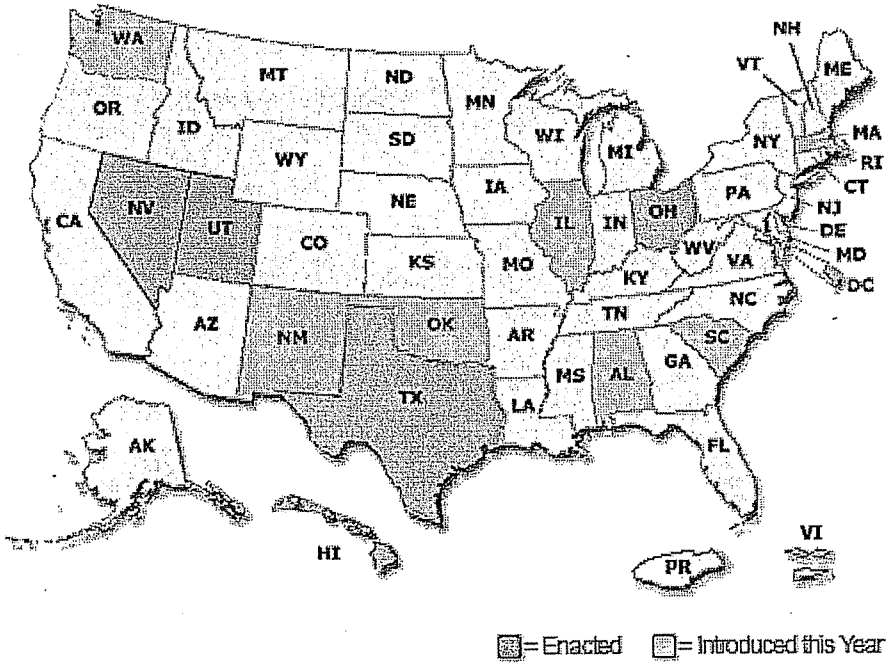
Sincerely,

Gail Hagerty

Gail Hagerty

Copy: Peter Munson
Eric Fish

Enactment Status Map



Legislative Tracking

2013 Introductions & Enactments

State	Bill	Sponsor	Status
Alabama	HB396 / SB320	Black / Ward	Introduced
Illinois	SB 31 / HB 1029	Sandoval	Introduced
Massachusetts	HB 34		Introduced
New Mexico	SB 401	McSorley	Introduced
Ohio	HB 461	Stebelton	Enacted
Oklahoma	SB 238	Standridge	Introduced
South Carolina	HB 3715	Smith	Introduced
Washington	HB 1116	Pedersen	Introduced

Uniform Law Commission

The National Conference of Commissioners on Uniform State Laws

Contact Us: **312.450.6600**

Why States Should Adopt UCLA

The **Uniform Collaborative Law Act** was promulgated by the Uniform Law Commission in 2009 because of the need for a comprehensive statute addressing the practice of collaborative law. Collaborative law is a voluntary, client-driven form of alternative dispute resolution practiced in all 50 states. However, existing state statutes vary in length and complexity. Collaborative law has been widely used in family law cases, but is beginning to be used in other types of cases, such as insurance disputes or disputes between members of closely held businesses. Although collaborative law is not appropriate for all disputes, its increased use as a dispute resolution mechanism calls for consistency between state law regarding collaborative agreements.

The **Uniform Collaborative Law Act** standardizes the most important features of collaborative law that protects consumers, prevents lawyers from engaging in unethical practices, and creates rules covering disclosure of information and evidentiary privilege. The Uniform Collaborative Law Act should be adopted because:

- The Uniform Collaborative Law Act provides consistency from state to state regarding the enforceability of collaborative law agreements. This consistency is important for parties that may choose collaborative law as a process to resolve interstate disputes.
- The Uniform Collaborative Law Act establishes minimum requirements for collaborative law participation agreements. These requirements include written agreements that state the parties' intention to resolve their dispute through the collaborative processes, description of the matter, and designation of collaborative lawyers.
- The Uniform Collaborative Law Act gives specific instruction on when and how the collaborative process begins and concludes.
- The Uniform Collaborative Law Act codifies the disqualification requirement for collaborative lawyers if the collaborative process concludes. The disqualification requirement is a fundamental characteristic of the collaborative process.
- The Uniform Collaborative Law Act modifies the disqualification rule for lawyers representing low income clients or government parties. As a result, the Act allows legal aid offices, firms providing pro bono services, and law school clinics to continue representation of the low income client even if the collaborative process fails. By modifying the disqualification rule, the act assures that low income and government parties have access to this form of dispute resolution without detrimentally affecting their future ability to obtain legal services.
- The Uniform Collaborative Law Act directs lawyers to advise clients about alternatives (such as litigation, arbitration, and mediation), mandates that the lawyers screen for instances of domestic violence or other coercive behavior, and orders the lawyer to assess whether a collaborative law process is appropriate for the client's case with the prospective client
- The Uniform Collaborative Law Act creates a privilege for communications during the collaborative law process that would not be available or vary when a dispute crosses state lines.

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Act History

Origin: Completed by the Uniform Law Commission in 2009.
Committee: Collaborative Law Act
Resources: Draft Materials

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GENERAL RULES OF PRACTICE FOR THE DISTRICT COURTS
PART B. SCHEDULING
RULE 111. SCHEDULING OF CASES

Rule 111.05. Collaborative Law

(a) Collaborative Law Defined. Collaborative law is a process in which parties and their respective trained collaborative lawyers and other professionals contract in writing to resolve disputes without seeking court action other than approval of a stipulated settlement. The process may include the use of neutrals as defined in Rule 114.02(b), depending on the circumstances of the particular case. If the collaborative process ends without a stipulated agreement, the collaborative lawyers must withdraw from further representation.

(b) Deferral from Scheduling. Where the parties to an action request deferral in a form substantially similar to Form 111.03 and the court has agreed to attempt to resolve the action using a collaborative law process, the court shall defer setting any deadlines for the period specified in the order approving deferral.

(c) Additional ADR following Collaborative Law. When a case has been deferred pursuant to subdivision (b) of this rule and is reinstated on the calendar with new counsel or a collaborative law process has resulted in withdrawal of counsel prior to the filing of the case, the court should not ordinarily order the parties to engage in further ADR proceedings without the agreement of the parties.

(Added effective January 1, 2008.)

NOTES:

Advisory Committee Comment -- 1994 Amendment

This rule is new. This rule is intended to establish a uniform, mandatory practice of dealing with scheduling in every case by some court action. The rule does not establish, however, a single means of complying with the scheduling requirement nor does it set any rigid or uniform schedules. In certain instances, other rules establish the event giving rise to the requirement that the scheduling procedures be followed. See, e.g., Rule 141 (condemnation scheduling triggered by appeal of commissioner's award); 144.01 (wrongful death scheduling triggered by filing paper in wrongful death action, not proceedings for appointment of trustee). Because applications to compel or stay arbitrations are, by statute, authorized to be handled by the District Court in a summary matter and without the commencement of a separate action, it is appropriate that they be exempted from the formal case scheduling requirements of Rule 111.

Although the rule allows parties to submit scheduling information separately, this information may also be submitted jointly and required to be submitted jointly. In many cases, the efficient handling of the case may be fostered by the parties meeting to discuss scheduling issues and submitting a joint statement.

The rule contemplates establishment of a separate deadline for completion of an independent medical examination because the Task Force believes that it is frequently desirable to allow such an examination to take place after the conclusion of other discovery. The rule does not create any specific schedule for independent medical examinations, but allows, and encourages, the court to consider this question separately. The timing of these examinations is best not handled by rigid schedule, but rather, by the exercise of judgment on the part of the trial judge based upon the views of the lawyers, any medical information bearing on timing and the status of other discovery, as well as the specific factors set forth in Minn. R. Civ. P. 35. The Task Force considered a new rule expressly to exempt the use of requests for admissions pursuant to Minn. R. Civ. P. 36 from discovery completion deadlines in the ordinary case. The Task Force determined that a separate rule exempting requests for admissions from discovery deadlines in all cases was not necessary, but encourages use of extended deadlines for requests for admissions in most cases. The primary function served by these requests is not discovery, but the narrowing of issues, and their use is often most valuable at the close of discovery. See R. Haydock & D. Herr, Discovery Practice section 7.2 (2d ed. 1988). Because requests for admissions serve an important purpose of narrowing the issues for trial and resolving evidentiary issues relating to trial, it is often desirable to allow use of these requests after the close of other discovery.

Advisory Committee Comment -- 2007 Amendment

Rule 111.05 is a new rule to provide for the use of collaborative law processes in matters that would otherwise be in the court system. Collaborative law is a process that attempts to resolve disputes outside the court system. Where court approval or entry of a court document is necessary, such as for minor settlements or entry of a decree of marriage dissolution, the court's role may be limited to that essential task. Collaborative law is defined in Rule 111.05(a). The primary distinguishing characteristic of this process is the retention of lawyers for the parties, with the lawyers' and the parties' written agreement that if the collaborative law process is not successful and litigation ensues, each lawyer will withdraw from representing the client in the litigation.

Despite not being court-based, the committee believes the good faith use of collaborative law processes by the parties should be accommodated by the court in two ways. First, as provided in new Rule 111.05(b), the parties should be able to request deferral from scheduling for a duration to be determined appropriate by the parties. This can be accomplished through the use of new Form 111.03 or similar submission providing substantially the same information. Second, if the parties have obtained deferral from scheduling for a collaborative law process that proves unsuccessful, the action should not normally or automatically be ordered into another ADR process. The rule intentionally does not bar a second ADR process, as there may be cases where the court fairly views that such an effort may be worthwhile. These provisions for deferral and presumed exemption from a second ADR process are also made expressly applicable to family law matters by a new Rule 304.05.

What is Collaborative Law?

Collaborative law is a new way to resolve disputes by removing the disputed matter from the litigious court room setting and treating the process as a way to "trouble shoot and problem solve" rather than to fight and win.

As part of the collaborative law method, both parties retain separate attorneys whose job it is to help them settle the dispute. No one may go to court. If that should occur, the collaborative law process terminates and both attorneys are disqualified from any further involvement in the case.

Each party in the Collaborative law process signs a contractual agreement which include the following terms:

1. ***Disclosure of Documents.***
   Each party agrees to honestly and openly disclose all documents and information relating to the issues. Neither spouse may take advantage of a miscalculation or an inadvertent mistake. Instead, such errors are identified and corrected.
2. ***Respect.***
   Each party agrees to act respectfully and avoid disparaging or vilifying any of the participants.
3. ***Insulating Children.***
   As part of the process all participants agree to insulate the children from the proceeding and to act ins such a way as to minimize the impact of the divorce on them.
4. ***Sharing Experts.***
   The parties agree to implement outside experts where necessary in a cooperative fashion and share the costs related to those experts. (eg. real estate appraisers, business appraisers, parenting consultants, vocational evaluators, or accountants)
5. ***Win-Win Solutions.***
   The primary goal of the process is to work toward an amicable solution and to create a "win-win" situation for all.
6. ***No Court.***
   Neither party may seek or threaten court action to resolve disputes. If the parties decide to go to court, the attorneys must withdraw and the process begins anew in the court system.

One of the biggest differences in the Collaborative law process is that it recognizes that emotional issues exist that cannot be addressed by the legal system. How often have you heard stories of divorcing parties spending thousands of dollars in legal fees to argue about pets or furniture that has limited monetary value. Generally speaking, the parties in such cases are not arguing about dogs, cats or furniture. Instead, they are reacting to psychological pains that they are experiencing. These emotional issues that are ignored in the Court process. By contrast, the collaborative law process specifically addresses these issues by bringing them to the forefront and using professionals as part of team approach to find solutions.

A ***team of professionals*** is assembled to help the parties understand and resolve their disputes in many different contexts. The disputes may be legal disputes or emotional and include: mental health counselors/coaches for each party, neutral financial advisors, accountants, parenting specialists, child specialists, vocational experts, and appraisers, if needed. A list of professionals may include:

A ***child specialist*** may play a very important role in the collaborative process. So often, children become the unintended victims in divorce proceedings. They internalize the conflict and often blame themselves for the break up of their family. The child specialist works with children of divorcing parents. It is their job to assist the children in understanding that the parental dispute is not their fault and to teach them how to cope and communicate with their parents. In this way, the children have a voice in the proceedings and become part of the team process.

Financial professionals may be used to help define values of assets. In the litigious court process often redundant appraisals are performed by one expert for each party. The end result is a duplication of services at greater cost and with increased distrust. this often results in an expensive ***war of experts*** at trial where each expert testifies regarding their different valuations. In the collaborative process, the parties choose a neutral appraiser that is not associated with either party. With a trust relationship established, the parties agree on some division of cost and agree to be bound by the appraised value.

Most Cases Settle. The Statistics state that more than 90% of all divorce cases are resolved without a trial. In the Court system that resolution often comes more than a year after the divorce was commenced and after many hurtful statements have been made part of the public record in the form of affidavits and motions. Doesn't it make more sense to seek that resolution before the bridges are burned and the missiles are launched in a courtroom? Certainly, collaborative law will not work in every case. After all, it takes two to tango and it takes two willing participants to effectively use the collaborative law process. However, in the cases where collaborative law has been used, even if reluctantly, there have been more rapid settlements at a fraction of the normal cost associated with divorce.

INFORUM
The Forum of Fargo-Moorhead

Published November 26, 2012, 11:40 PM

A civil separation: Collaborative divorce aims for balanced approach

FARGO – A couple's split can be messy and contentious, but some Fargo-Moorhead attorneys, mental health professionals and financial advisers are bringing a different way to divorce to the area.

By: Tracy Frank, INFORUM

FARGO – A couple's split can be messy and contentious, but some Fargo-Moorhead attorneys, mental health professionals and financial advisers are bringing a different way to divorce to the area.

Collaborative divorce is an approach in which the divorcing couple and attorneys agree to stay out of court, exchange information honestly and work together to find the best solution for the couple and their children.

"Our system is really good at applying pressure toward more peaceful resolutions," said Michael Gjesdahl, a family law attorney with Gjesdahl Law in Fargo.

With collaborative divorce, a couple works with a team to help ensure the financial, emotional and legal security of both parties and their children.

Financial specialists review assets and incomes and help plan feasible financial options as well as work through issues like the tax implications of divorce.

"When people are financially stable after a divorce, it makes them feel much more confident about their future," said Angie McCarthy, a financial adviser with Ameriprise Financial Services in Fargo.

Mental health professionals work as divorce coaches and child specialists. Divorce coaches help their clients manage the emotional turmoil of divorce and focus on their plans and goals. Child specialists help children express their feelings and concerns about the divorce and make sure their voices are heard when working with the collaborative divorce team.

"As counselors, we see a lot of times the damage and struggles of kids who are living with parents who are still in conflict during and following divorce," said Peter Moynihan, a child specialist and divorce coach with Solutions Behavioral Healthcare Professionals in Moorhead.

"We're all interested in minimizing the long-term risk factors for families and children and want to engage in a process that has more of a protective factor for families and give people more control in their divorce process," said Krislea Wegner, a divorce coach and child specialist with Wegner Psychological and Therapeutic Services in Fargo.

"This process tries to create an intervention at the front-end to avoid a lot of those potential negative factors," Wegner adds.

It can be extremely difficult to resolve issues after a couple has been through months and even years of litigation, said Carolyn Meske, a divorce coach and child specialist with Solutions Behavioral Healthcare Professionals in Moorhead.

"Our intent is to help make it as nondestructive as possible," she said.

If after attempting the collaborative process the couple still decides to go through a divorce in court, the attorneys involved withdraw from the case.

NEW APPROACH

Collaborative divorce has been around for a while. Minneapolis lawyer Stuart Webb founded the approach in 1990 as a way to help his clients settle and negotiate their problems outside the courtroom and avoid the road blocks and frustrations he kept running into by settling divorce issues in court, according to collaborativedivorce.net.

But the method is still new to the Fargo-Moorhead area. The group of Fargo-Moorhead attorneys, mental health professionals and financial advisers went through training with Collaborative Family Law out of Minneapolis earlier this year and now offers the service locally.

"Employers are starting to look at it as a model because they know their employees are taken off track by the divorce process and if there's some way of helping them not be so completely stressed out, they will have more energy and attention for their jobs," said Gail Nelson, a divorce coach with Journey Counseling in Fargo. "People are realizing this process helps everybody – the kids, the employer, the families."

One of the biggest differences between traditional divorce and collaborative divorce is in a traditional divorce the parties are focused on filing motions like temporary custody, child-support and alimony and putting themselves in a better position for litigation, said Krista Andrews, a family law attorney with Anderson, Bottrell, Sanden & Thompson law firm in Fargo.

Even the process of being served divorce papers can feel like an attack that immediately puts someone in a defensive position, the attorneys and mental health professionals said.

But the collaborative process changes the entire emotional dynamic, Wegner said.

Alyssa Krakowski, of Bloomington, Minn., said having a team help guide her through the process of divorce was one of the biggest benefits to using collaborative divorce.

"I just felt really supported," she said.

She said judging from her own experience and the experience of friends of hers who have divorced, the collaborative process seems the healthiest way to go through it.

"It really did keep it more civil," Krakowski said. "It did keep it more amicable between us."

With a collaborative divorce, everyone is focused on restructuring the family, Andrews said.

"From the get-go, it doesn't get amped up right away," she said. "The most striking difference is the tone of the meeting. You can openly discuss things with the other attorney. We're all on the same page. There's nothing adversarial in that room because we're all there simply to get the case settled."

Where the traditional approach is more lawyer-led, the collaborative process is led by the clients, Gjesdahl said.

The traditional system is adversarial by design, he said.

"The benefit of this is you can create your own solution rather than having a judge impose a solution," said Timothy McLarnan, a family law attorney with McLarnan & Skatvold law firm in Moorhead.

Learn more about collaborative divorce or to find local collaborative divorce professionals, visit: www.collaborativedivorce.net, www.collaborativepractice.com or www.collaborativelaw.org.

Tags:shesays, family

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[?]

UNIFORM COLLABORATIVE LAW RULES

and

UNIFORM COLLABORATIVE LAW ACT

(Last Revised or Amended in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
IN SANTA FE, NEW MEXICO
JULY 9-16, 2009

WITH PREFATORY NOTE AND COMMENTS

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By
NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 12, 2010

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The **Uniform Law Commission** (ULC), also known as National Conference of Commissioners on Uniform State Laws (NCCUSL), now in its 118th year, provides states with non-partisan, well-conceived and well-drafted legislation that brings clarity and stability to critical areas of state statutory law.

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DRAFTING COMMITTEE ON UNIFORM COLLABORATIVE LAW RULES AND UNIFORM COLLABORATIVE LAW ACT

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[*] Professor Schepard thanks Yishai Boyarin, Hofstra Law School L.L.M. 2009, Elizabeth Bruzzo and Rebecca Miller, Hofstra Law School J.D. 2007, Laura Daly, Hofstra Law School J.D. 2008, Angela Burton, Jesse Lubin, Joshua Reiger, and Brittany Shrader, Hofstra Law School J.D. 2009, and Mary Ann Harvey, Ashley Lorance, Beyza Killeen, Jessie Fillingim, Hofstra Law School class of 2010, and Stephanie Conti, Hofstra Law School class of 2011, for their invaluable and ongoing research assistance. He also thanks Michael De Matos, Editor-in-Chief, and the editorial board and staff of Volume 38 of the Hofstra Law Review for their essential help on the final version of the Act.

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Note for enacting states: The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution, and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.

UNIFORM COLLABORATIVE LAW RULES

RULE 1. SHORT TITLE. These rules may be cited as the Uniform Collaborative Law Rules.

RULE 2. DEFINITIONS. In these rules:

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law

process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

Alternative B

is described in a collaborative law participation agreement.

End of Alternatives

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

(8) "Party" means a person that signs a collaborative law participation agreement and

whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

Comment

"Collaborative law process" and "collaborative law participation agreement." A collaborative law process is created by written contract, a collaborative law participation agreement. It requires parties to engage collaborative lawyers. The minimum requirements for collaborative law participation agreements are specified in Rule 4.

"Collaborative law communication." Rule 17 creates an evidentiary privilege for collaborative law communications, a term defined here.

The definition of "collaborative law communication" parallels the definition of "mediation communication" in the Uniform Mediation Act Section 2(2). Collaborative law communications are statements that are made orally, through conduct, or in writing or other recorded activity. This definition is similar to the general rule, as reflected in Federal Rule of Evidence 801(a), which defines a "statement" as "an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a).

Understandable confusion has sometimes resulted because the terms "oral *or* . . . verbal" are both used in Rule 2(1) and some think the terms are synonymous. They are not. "Oral" can be defined as "[u]ttered by the mouth or in words; spoken, not written." BLACK'S LAW DICTIONARY 1095 (6th ed. 1990). Although commonly used interchangeably with "oral," "verbal" is defined strictly as "of or pertaining to words; expressed in words, whether spoken or written." *Id.* at 1558. "Thus, 'verbal' is a broader term, and it is possible for something to be verbal but not oral." Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 102 n.6 (2001); *see also* Lynn E. MacBeth, *Lessons In Legalese: Words Commonly Misused by Lawyers ... or, Sounds Like*, LAW. J., May 2002, at 6 ("Unfortunately, the word verbal has been so misused that . . . it has come to mean 'oral.' However, in standard English verbal means 'consisting of words,' as opposed to nonverbal, which is communication by signs, symbols, and means other than words. . . . The correct adjective for a spoken communication is *oral*, or if you want to sound more erudite, *parol*. Verbal communication encompasses both written and spoken communication that consists of words.").

Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. ARK. CODE ANN. § 16-7-206 (1999); CAL. EVID. CODE § 1119 (West 1997); IOWA CODE ANN. §§ 679C.102, 679C.104 (West Supp. 2009); KAN. STAT. ANN. § 60-452a (2008) (assertive representations); MASS. GEN. LAWS ch. 233, § 23C (1986); MONT. CODE ANN. § 26-1-813 (2009); NEB. REV. STAT. § 25-2914 (LexisNexis 2004); NEV. REV. STAT. ANN. § 48.109 (West 2004); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OHIO REV. CODE ANN. § 2317.023 (West 2004); OKLA. STAT. ANN. TIT. 12, § 1805 (West 1993); OR. REV. STAT. ANN. § 36.220 (West 2003); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (2004); VA. CODE ANN. § 8.01-576.10 (2007); WASH. REV. CODE ANN. § 5.60.070 (West 2009); WIS. STAT. § 904.085 (West 2000); WYO. STAT. ANN. § 1-43-102 (2009). The same is true of the privilege created by these rules.

The mere fact that a person attended a collaborative law session—in other words, the physical presence of a person—is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a "communication" because it is meant as an

assertion; however nonverbal conduct such as smoking a cigarette during the collaborative law session typically would not be a "communication" because it was not meant by the actor as an assertion.

Mental impressions that are based even in part on collaborative law communications would generally be protected by privilege. More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid collaborative law communications. *But see* U.S. v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) (finding that ordinarily the act of giving a document to an attorney will not be privileged). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *But see* U.S. v. White, 950 F.2d 426, 430 & n.2 (7th Cir. 1991) (noting the distinction between communication and lack of communication). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.14[3][a] (Joseph M. McLaughlin, ed., 2nd ed. 1997). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

If evidence of mental impressions would reveal, even indirectly, collaborative law communications, then that evidence would be blocked by the privilege. *See* Gunther v. U.S., 230 F.2d 222, 223-24 (D.C. Cir. 1956). For example, a party's mental impressions of the capacity of another party to enter into a binding settlement agreement would be privileged if that impression was in part based on the statements that the party made during the collaborative law process, because the testimony might reveal the content or character of the collaborative law communications upon which the impression is based. In contrast, the mental impression would not be privileged if it was based exclusively on the party's observation of that party wearing heavy clothes and an overcoat on a hot summer day because the choice of clothing was not meant to inform. *See e.g.* Darrow v. Gunn, 594 F.2d 767, 774 (9th Cir. 1979) (discussing California law which states that observations and impressions of clients are not privileged).

The definition of "collaborative law communication" has a fixed time element—it only includes communications that occur between the time a collaborative law participation agreement is signed and before a collaborative law process is concluded. The methods and requirements for beginning and concluding a collaborative law process are specified in Rule 5. The defined time period and methods for ascertaining are designed to make it easier for tribunals to determine the applicability of the privilege to a proposed collaborative law communication.

The definition of collaborative law communication does include some communications that are not made during actual negotiation sessions, such as those made for purposes of convening or continuing a negotiation session after a collaborative law process begins. It also includes "briefs" and other reports that are prepared by the parties for the collaborative law process.

Whether a document is prepared for a collaborative law process is a crucial issue in determining whether it is a "collaborative law communication." For example, a tax return brought to a collaborative law negotiation session for a divorce settlement would not be a "collaborative law communication," even though it may have been used extensively in the

process, because it was not created for "purposes of conducting, participating in, continuing, or reconvening a collaborative law process," but rather because it is a requirement of federal law. However, a note written on the tax return to clarify a point for other participants during a negotiation session would be a collaborative law communication. Similarly, a memorandum specifically prepared for the collaborative law process by a party or a party's counsel explaining the rationale behind certain positions taken on the tax return would be a collaborative law communication. Documents prepared for a collaborative law process by experts retained by the parties would also be covered by this definition.

"Collaborative lawyer." A collaborative lawyer represents a party in a collaborative law process. As discussed in the Preface, a party must be represented by a lawyer to participate in a collaborative law process; it is not an option for the self-represented. Rule 4(a)(5) requires that a collaborative law participation identify the collaborative lawyer who represents each party and Rule 4(a)(6a) requires that the agreement contain a statement by the designated lawyer confirming the representation.

"Collaborative matter." The act uses the term "matter" rather the narrower term "dispute" to describe what the parties may attempt to resolve through a collaborative law process. Matter can include some or all of the issues in litigation or potential litigation, or can include issues between the parties that have not or may never ripen into litigation. The broader term emphasizes that parties have great autonomy to decide what to submit to a collaborative law process and encourages them to use the process creatively and broadly.

The drafting committee provides two alternatives for enacting states to define "collaborative matter" and thus the scope of matters that can be submitted to the collaborative law process. Alternative A limits "collaborative matter" to those which arise under the family or domestic relations law of a state. States which choose to include this language will thus limit the collaborative law process to those substantive areas where it has so far achieved the greatest acceptance and growth and in which collaborative lawyers have the greatest experience. They will, however, exclude matters which do not arise under the family or domestic relations law of a state from the collaborative law process.

Alternative B, in contrast, places no substantive limitation on matters that can be submitted to a collaborative law process, relying instead on the informed consent of parties based on the information provided by their counsel under the standards for informed consent specified in Rules 12 and 13. Under Alternative B collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter.

Under either Alternative A or B, the parties must describe the matter that they seek to resolve through a collaborative law process in their collaborative law participation agreement. *See* Rule 4(a)(4). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Rule 9, which is applicable to the collaborative matter and matters "related to the collaborative matter," and the application of the evidentiary privilege under Rule 17.

"Law firm." This definition of "law firm" is adapted from the definition of the term in

the American Bar Association's Model Rules of Professional Conduct Rule 1.0 (c). It includes lawyers representing governmental entities whether employed by the government or by a private law firm. It is included to help define the scope of the imputed disqualification requirement of Rule 9.

"Nonparty participant." This definition parallels the definition of "nonparty participant" in the Uniform Mediation Act Section 2(4). It covers experts, friends, support persons, potential parties, and others who participate in the collaborative law process. Nonparty participants are entitled to assert a privilege before a tribunal for their own collaborative law communications under Rule 17(b) (2). This provision is designed to encourage mental health and financial professionals to participate in a collaborative law process without fear of becoming embroiled in litigation without their consent should the process terminate.

Nonparty participants do not, however, include a collaborative lawyer for a party. The attorney-client privilege is applicable to communications between a collaborative lawyer and the party whom he or she represents. The collaborative attorney thus has the obligation placed upon all lawyers to maintain client confidences and assert evidentiary privilege for client communications. The obligations of professional responsibility for a lawyer are not altered by the lawyer's representation of a party in collaborative law. Rule 13. Under the Model Rules of Professional Conduct the attorney-client privilege is held by the client and can only be waived by the client, even over the attorney's objection. *See* MODEL RULES OF PROF'L CONDUCT R 1.6(a) (2002) ("A lawyer shall not reveal information relating to the representation of a client *unless the client gives informed consent* . . . .") (emphasis added); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that "the [attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."). An attorney does not have the right to override a client's decision to waive privilege, and including collaborative lawyers in the category of nonparty participants entitled to independently assert privilege might be thought of as changing that traditional view. *See, e.g.*, Comm'r v. Banks, 543 U.S. 426, 436 (2005) (stating that "[t]he attorney is an agent who is duty bound to act only in the interests of the principal . . . ."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1958) (stating that an attorney is an agent authorized to act under the control of another). A collaborative lawyer thus does not have any additional right to independently assert privilege because of the lawyer's participation in the collaborative law process as a "nonparty."

A few states declare ADR neutrals incompetent to testify about communications in the ADR processes. The declaration of incompetence to testify normally does not apply to lawyers representing clients, but is limited to third party neutrals, such as mediators and arbitrators. CAL. EVID. CODE § 703.5 (West 1995). In Minnesota, the competency standard has been extended to lawyers participating in mediation as well. *See* MINN. STAT. ANN. § 114.08 (West 2008); MINN. STAT. ANN. § 595.02(1)(b) (West 2000).

"Party." The act's definition of "party" is central to determining who has rights and obligations under the rules, especially the right to assert the evidentiary privilege for collaborative law communications. Fortunately, parties to a collaborative law process are relatively easy to identify—they are signatories to a collaborative law participation agreement

and they engage designated collaborative lawyers.

Participants in a collaborative law process who do not meet the definition of "party," such as an expert retained jointly by the parties to provide input, do not have the substantial rights under additional rules that are provided to parties. Rather, these nonparty participants are granted a more limited evidentiary privilege under Rule 17(b)(2)—they can prevent disclosure of their own collaborative law communications but not those of parties or others who participate in the process. Parties seeking to apply broader restrictions on disclosures by such nonparty participants should consider drafting such a confidentiality obligation into a valid and binding agreement that the nonparty participant signs as a condition of participation in the collaborative law process.

"Person." Rule 2(9) adopts the standard language recommended by the Uniform Law Commission for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

"Proceeding." The definition of "proceeding" is drawn from Section 2(7) of the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 2(7), 7A U.L.A. 105–06 (2006). Its purpose is to define the adjudicative type proceedings to which the rules apply, and should be read broadly to effectuate the intent of the rules. It was added to allow the Drafting Committee to delete repetitive language throughout the act, such as "judicial, administrative, arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions, conferences, and discovery; or . . . a legislative hearing or similar process." *Id.*

"Prospective party." The definition of "prospective party" is drawn from the ABA Model Rules of Professional Conduct Rule 1.18(a) which defines a lawyer's duty to a prospective client. MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2009). The rules use the term "party" rather than "client" to clarify that it does not change the standards of professional responsibility applicable to lawyers. The collaborative lawyer's obligations to prospective parties are described in rules 14 and 15.

"Related to a collaborative matter." Under Rule 9, a collaborative lawyer and lawyers in a law firm with which the collaborative law is associated are disqualified from representing parties in court in a matter "related to a collaborative matter" when a collaborative law process concludes. The definition of "related to a collaborative matter" thus determines the scope of the disqualification provision. The rationale and application of the definition of "related to a collaborative matter" is discussed in detail in the Prefatory Note. *See supra.*

"Sign." The definitions of "record" and "sign" adopt standard language approved by the Uniform Law Commission intended to conform Uniform Acts with the Uniform Electronic Transactions Act ("UETA") and its federal counterpart, Electronic Signatures in Global and National Commerce Act ("E-Sign"). Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001–7002 (2009); UNIF. ELECTRONIC TRANSACTION ACT § 2 (1999), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf. Both UETA and E-Sign were written in response to broad recognition of the commercial and other uses of electronic technologies for communications and contracting and the consensus that the choice of medium should not control the enforceability of transactions. UNIF. ELECTRONIC TRANSACTION ACT (Prefatory Note) (1999); DEPARTMENT OF COMMERCE & FEDERAL TRADE COMMISSION,

ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT: THE CONSUMER CONSENT PROVISION IN SECTION 101(s)(1)(c)(ii) i (2001). These rules are consistent with both UETA and E-Sign. UETA has been adopted by the Commission and received the approval of the American Bar Association House of Delegates. *See* UNIF. ELECTRONIC TRANSACTION ACT (1999); Richard L. Field & Michael H. Byowitz, *Recommendation in Support of the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2006 A.B.A. SEC. SCI. & TECH. LAW 303, *available at* http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf; The Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, A Few Facts on the Uniform Electronic Transactions Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Oct. 19, 2009). As of December 2001, it had been enacted in more than 35 states. The National Conference of State Legislatures, Uniform Electronic Transactions Act, http://www.ncsl.org/default.aspx?tabid=13484 (last visited Oct. 19, 2009).

The practical effect of these definitions is to make clear that electronic signatures and documents have the same authority as written ones for such purposes as establishing the validity of a collaborative law participation agreement under Rule 4, notice to terminate the collaborative law process under Rule 5(d)(1), party agreements concerning the confidentiality of collaborative law communications under Rule 16, and party waiver of the collaborative law communication privilege under Rule 19(f).

"Tribunal." The definition of "tribunal" is adapted from Rule 1.0(m) of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2009). It is included to insure the provisions of these rules are applicable in judicial and other forums such as arbitration and is consistent with the broad definition of "proceeding" in subsection (10).

RULE 3. APPLICABILITY. These rules apply to a collaborative law participation agreement that meets the requirements of Rule 4 signed [on or] after [the effective date of the rules].

Comment

Rule 3 defines the scope of the rules and limits its applicability to collaborative law participation agreements that meet the requirements of Rule 4. While parties are free to collaborate in any other way they choose, if parties want the benefits and protections of these rules they must meet its requirements, subject to the "savings" provisions of Rule 20.

Rule 3 also sets an effective date for the rules so that the parties can decide when to "opt in" to its provisions. It precludes application of the rules to collaborative law participation agreements before the effective date on the assumption that most of those making these agreements did not take into account the changes in law. The evidentiary privilege created by the rules in Rule 17, for example, does not apply retroactively to agreements made before the rules' effective date. If parties to these collaborative law participation agreements seek to be covered by the rules, they can sign a new agreement on or after the effective date of the rules, or amend

an existing agreement to conform to the rules' requirements.

RULE 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative matter through a collaborative law process under these rules;

(4) describe the nature and scope of the matter;

(5) identify the collaborative lawyer who represents each party in the process; and

(6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

(b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

Comment

Subsection (a) sets minimum conditions for the validity of collaborative law participation agreements. They are designed to insure that a written record evidences the parties' agreement and intent to participate in a collaborative law process under the rules. They were formulated to require collaborative law participation agreements to be fundamentally fair, but simple and thus to make collaborative law more accessible to potential parties.

To qualify as a collaborative law participation agreement, the parties must explicitly state their intention to proceed "under these rules." The participation agreement must thus specifically reference these rules to make its provisions such as the evidentiary privilege for collaborative law communications applicable. This requirement is designed to help insure that parties make a deliberate decision to "opt into" in a collaborative law process rather than participate by inadvertence. It is also designed to differentiate a collaborative law process under these rules from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

The requirements of subsection (a) are also designed to help tribunals and parties more easily administer and interpret the disqualification and evidentiary privileges provisions of the

rules. It is, for example, difficult to determine the scope of the disqualification requirement unless the parties describe the matter submitted to collaborative law in their participation agreement and designate collaborative lawyers.

Rule 4(a)(6) requires that participation agreements "contain a statement by each collaborative lawyer confirming the lawyer's representation of the party in the collaborative law process. The confirmation of representation required by this rule does not make the collaborative lawyer to be a "party" to the participation agreement, a status which, as discussed in the Preface, would raise professional responsibility concerns. See Preface, supra. The rules explicitly note that they do not change in any way the lawyer's responsibilities to the client under the rules of professional responsibility. Rule 13(1). The requirement of a confirmation of representation simply is designed to identify the party's collaborative lawyer so that the disqualification provision can be more easily administered.

The requirements of subsection (a) are subject to the provisions of Rule 20 which give a tribunal discretion to find that, despite flaws in their written participation agreement, parties reasonably believed they were participating in a collaborative law process and thus to apply the provisions of the act "in the interests of justice."

Many collaborative law participation agreements are far more detailed than the minimum form requirements of subsection (a) contemplate and contain numerous additional provisions. In the interest of encouraging further continuing growth and development of collaborative law, subsection (b) authorizes additional provisions to be included in participation agreements if they are not inconsistent with the rules.

Subsection (b), however, does not give unlimited discretion to add provisions to a collaborative law participation agreement. They cannot modify the defining characteristics of the collaborative law process or agree to waive the rules protections for prospective parties. Parties thus cannot waive the a party's right to terminate collaborative law with or without cause, for any reason at any time during the process set forth in Rule 5, the disqualification requirements of rules 9, 10, and 11, the informed consent requirements of Rule 14, or the prospective collaborative lawyer's duty to inquire into a history of coercive and violent relationships between parties required by Rule 15. This provision of the rules should thus be interpreted as analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIF. ARBITRATION ACT § 4(b) (2000) (provisions that parties cannot waive in a pre-dispute arbitration clause such as the right to counsel).

Parties are, however, free to supplement the required provisions under the rules with additional terms that meet their particular needs and circumstances that are not inconsistent with the fundamental nature of the collaborative law process. For example, they may define the scope of voluntary disclosure under Rule 12. They may provide for broader protection for the confidentiality of collaborative law communications than the privilege against disclosure in legal proceedings provided in Rule 16. *See supra.* They may provide, as do many models of collaborative law practice, for the engagement of jointly retained neutral experts to participate in collaborative law and prohibit parties from retaining their own experts. They may provide that experts retained for the purpose of consulting with parties during the collaborative law process may testify at trial if the collaborative law process concludes. They may provide that if the collaborative law process terminates, litigation may not be instituted for a short, set period of

time, a common provision in collaborative law participation agreements. They may agree to toll applicable statutes of limitations during the collaborative law process or include choice of law clauses in their participation agreements. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52, 63–64 (1995) (holding that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration provision covers arbitration; neither sentence intrudes upon the other."); Homa v. Am. Express Co., 558 F.3d 225, 228 (3d Cir. 2009) (stating that New Jersey courts will uphold choice-of-law provisions so long as they do not violate public policy); Badger v. Boulevard Bancorp, Inc., 970 F.2d 410, 410-11 (7th Cir. 1992) (enforcing an agreement tolling the statue of limitations); SEC v. DiBella, 409 F. Supp. 2d 122, 129 (D. Conn. 2006) (finding the tolling agreement of the statute of limitations valid and binding); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (stating that judicial respect for the parties' choice of law advances the policy party autonomy).

Appropriate bar groups should be encouraged to develop form collaborative law participation agreements for use by lawyers and parties that comply with the requirements of these rules. *See* Fawzy v. Fawzy, 973 A.2d 347, 363 (N.J. 2009) (New Jersey Supreme Court makes similar suggestion for arbitration agreements in family law).

RULE 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW PROCESS.

(a) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(b) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(c) A collaborative law process is concluded by a:

(1) resolution of a collaborative matter as evidenced by a signed record;

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative law process terminates:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar]; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:

(1) the unrepresented party engages a successor collaborative lawyer; and

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer's

representation of a party in the collaborative process.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

Comment

Rule 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection.

Rule 5 is also designed to make it as administratively easy for parties and tribunals as possible to determine when a collaborative law process begins and ends. To the extent feasible, it links those events to signed records communicated between the parties and collaborative lawyers or events that are documented in the record of a tribunal. Establishing the beginning and end of a collaborative law process is particularly important for application of the evidentiary privilege for collaborative law communications recognized by Rule 17 which applies only to communications in that period.

The evidentiary privilege for collaborative law communications ends when the collaborative law process concludes. The rules specify two methods of concluding a collaborative law process: (1) agreement for resolution of all or part of a matter in a signed record (assuming that the parties do not agree to continue the collaborative law process to resolve the remaining issues); and (2) termination of the process. A party can terminate the process in several ways, including sending notice in a record of termination and by taking acts that are inconsistent with the continuation of collaborative law, such as commencing or recommencing an action in court. Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an obligation to give notice on the former collaborative lawyer. *See supra* Rule 5(e).

Rule 5(g) allows for continuation of a collaborative law proves even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged in a defined period of time and under conditions and with documentation which indicate that the parties want the collaborative law process to continue.

Rule 5(h) allows the parties to agree to present an agreement resulting from a collaborative law process to a tribunal for approval under Rule 8 without terminating the process. Read together, these rules allow, for example, collaborative lawyers in divorce proceedings to present uncontested settlement agreements to the court for approval and incorporation into a court order as local practice dictates. The collaborative law process—and the evidentiary

privilege for collaborative law communications—is not terminated by presentation of the settlement agreement to the court.

RULE 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Rules 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

Legislative Note: *In enacting this Rule, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Rule 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

Comment

Rule 6 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 6 be enacted by judicial rule rather than legislation.

This rule authorizes parties to enter into a collaborative law participation agreement to attempt to resolve matters in pending proceedings, a subject discussed in the Prefatory Note. *See supra*. To give the collaborative law process time and breathing space to operate, it creates an application for a stay of proceedings upon the filing of a collaborative law participation agreement. The stay should normally be granted from the time the tribunal receives written notice that the parties have executed a collaborative law participation agreement until it receives written notice that the collaborative law process is concluded.

Rule 6 and its accompanying legislative note give states an option to treat the signing of a participation agreement as the occasion for a mandatory stay of proceedings or to treat it as an application for a stay which the tribunal has the discretion to grant or deny. States differ on this subject. In some states, the signing of an agreement to mediate or collaborative law participation agreement creates an automatic stay of pending proceedings, while in other states the tribunal retains the discretion to continue previously scheduled hearing and trial dates. *Compare* 2010 Laws of Utah § 78B-19-106 (signing of collaborative law participation agreement treated as application for a discretionary stay) *and* Or. Rev. Stat. § 36.190(3) (2009) (same for an agreement to mediate},*with* N.C. Gen. Stat. § 50-74 (2009) (mandatory stay created by signing of a collaborative law participation agreement) and Tex, Fam. Code Ann. § 6.603(e) (Vernon 2006) (same).

The stay of proceedings is qualified by Rule 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Rule 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Rule 6(c) authorizes a tribunal to ask for status reports on the collaborative law process in pending proceedings while the stay created by party entry into a collaborative law process is in effect. It also put limitations on the scope of the information that can be requested by the status report. The provisions of these rules are based on Section 7 of the Uniform Mediation Act, adapted for collaborative law. *See* UNIF. MEDIATION ACT § 7, 7A U.L.A. 135–36 (2006). Rules 6(c) and (d) recognize that the tribunal asking for the status report may rule on the matter being negotiated in the collaborative law process and should not be influenced by the behavior of the parties or counsel therein. Its provisions would not permit the tribunal to ask in a status report whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. *See* Lande, *Using Dispute System Design Methods*, supra, at 104 & n.185. The status report only can ask for non-substantive information related to scheduling and whether the collaborative law process is ongoing.

Some jurisdictions use statistical analysis of the timeliness of case dispositions to evaluate judicial performance, and sometimes those statistics are made available to the public. *See* COLO. REV. STAT. ANN. §§ 13-5.5-103, -105 (West Supp. 2009); UTAH ADMIN. CODE r. 3-111.01, -111.02 (2009); Colorado Office of Judicial Performance Evaluation, Commissions on Judicial Performance, http://www.cojudicialperformance.com/index.cfm (last visited Oct. 20,

2009). Judicial administrators are encouraged to recognize that while cases in which a collaborative law participation agreement is signed are technically "pending," they should not be considered under active judicial management for statistical or evaluation purposes until the collaborative law process is terminated.

RULE 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

Comment

Rule 7 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 7 be enacted by judicial rule rather than legislation.

The collaborative law process terminates if a party seeks an emergency order of the kind authorized by this rule. Rule 5(c)(2) ends the stay of proceedings created by Rule 6(a). Parties may, however, fail to provide notice of the termination of a collaborative law process to each other and the tribunal. Additionally, an emergency order might be sought in a new proceeding after a collaborative law process terminates.

To avoid any possible confusion, this rule authorizes tribunals to issue emergency orders despite the execution of a collaborative law participation agreement or a stay of proceedings under Rule 6(a). A collaborative lawyer is also authorized to seek or defend an application for an emergency order despite the termination of the collaborative law process under the time limited terms and conditions of Rule 9(c)(2).

Rule 7 is thus one of the rules' provisions addressing the safety needs of victims of coercion and violence in collaborative law. It is based on the concern that a party in a collaborative law process may be a victim of such violence or coercion or a dependent of a party such as a child may be threatened with abuse or abduction while a collaborative law process is ongoing. A party should not be left without access to a tribunal during such an emergency.

The reach of this rule is not limited to victims of coercion and violence themselves. It extends to members of their families and households. Each state is free to define the scope of this rule by cross referencing its civil protection order statute. *Compare* CAL. FAM. CODE § 6211 (West 2004) (defining family or household member to include current and former spouses, cohabitants, and persons in a dating relationship, as well as persons with a child in common, or any other person related by blood or marriage), *with* WASH. REV. CODE ANN. § 26.50.010 (West 2005) (includes current and former spouses, domestic partners, and cohabitants, persons with a child in common, persons in a current or former dating relationship, and persons related by blood or marriage), *and* S.C. CODE ANN. § 20-4-20(b) (Supp. 2008) (defining family or household member to mean current or former spouses, persons with a child in common, or a male and female who are or were cohabiting).

The reach of this rule is also not limited to emergencies involving threats to physical safety. The term "interest" encompasses financial interest or reputational interest as well. This rule, in effect, authorizes a tribunal otherwise authorized to do so to issue emergency provisional relief to protect a party in any critical area as it would in any civil dispute. A party who finds out that another party is secretly looting assets from a business, for example, while participating in a collaborative law process can seek an emergency restraining order under this rule and the court is authorized to grant it despite the stay of proceedings under Rule 6(b).

RULE 8. APPROVAL OF AGREEMENT BY TRIBUNAL. A tribunal may approve an agreement resulting from a collaborative law process.

Comment

Rule 8 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 8 be enacted by judicial rule rather than legislation.

Rule 5(h) authorizes parties who reach agreements to present them to a tribunal for approval without terminating a collaborative law process. This rule authorizes the tribunal to review and approve the agreement of the parties if required by law, as in, for example, many divorce settlements, settlements of infants' estates, or class action settlements. *See* UNIF. MARRIAGE & DIVORCE ACT § 306 (d) (1998) (Parties' agreement may be incorporated into the divorce decree if the court finds that it is "not unconscionable" regarding the property and maintenance and "not unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(2) (standard for judicial evaluation of settlement of a class action, which is that the settlement must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable); Mnookin, *supra*, at 1015–16.

RULE 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Rules 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Comment

Rule 9 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Rule 9 be enacted by judicial rule rather than legislation.

The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law. As previously discussed in the Prefatory Note, this rule extends the disqualification provision to "matters related to the collaborative matter" in addition to the matter described in the collaborative law participation agreement. *See supra*. It also extends the disqualification provision to lawyers in a law firm with which the collaborative lawyer is associated in addition to the collaborative lawyer him or herself, so called "imputed disqualification." Appropriate exceptions to the disqualification requirement are made for representation to seek emergency orders for a limited time (see Rule 7) and to allow collaborative lawyers to present agreements to a tribunal for approval (Rule 5(f) and 8).

RULE 10. LOW INCOME PARTIES.

(a) The disqualification of Rule 9(a) applies to a collaborative lawyer representing a party with or without fee.

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Rule 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

(2) the collaborative law participation agreement so provides; and

(3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

Comment

Rule 10 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Rule 10 be enacted by judicial rule rather than legislation.

As previously discussed in the Prefatory Note, this rule allows parties to modify the imputed disqualification requirement by advance agreement for lawyers in a law firm which represents low-income clients without fee. *See supra.*

RULE 11. GOVERNMENTAL ENTITY AS PARTY.

(a) The disqualification of Rule 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(1) the collaborative law participation agreement so provides; and

(2) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm

which are reasonably calculated to isolate the collaborative lawyer from such participation.

Comment

Rule 11 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The drafting committee thus believes that Rule 11 might best be enacted by judicial rule rather than legislation.

This rule allows parties to agree in advance to modify the imputed disqualification requirement for lawyers in a law firm which represents the government or its agencies or subdivisions. The rationale for creating this exception to the imputed disqualification requirement is discussed in the Prefatory Note. *See supra.*

RULE 12. DISCLOSURE OF INFORMATION. Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

Comment

Voluntary informal disclosure of information related to a matter is a defining characteristic of collaborative law. The rationale for this rule is described in the Prefatory Note. *See supra.*

RULE 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. These rules do not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

Comment

The relationship between the rules and the standards of professional responsibility for

collaborative lawyers is discussed in the Prefatory Note. *See supra.* In the interests of clarity, this rule reaffirms that the rules do not alter the professional responsibility or child abuse and neglect reporting obligations of all professionals, lawyers and non lawyers alike, who participate in a collaborative law process.

RULE 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 9(c), 10(b), or 11(b).

Comment

The policy behind and the rules' requirements for a prospective collaborative lawyer's facilitating the informed consent of a party to participate in a collaborative law process are

discussed in the Prefatory Note. *See supra.*

RULE 15. COERCIVE OR VIOLENT RELATIONSHIP.

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a process; and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

Comment

This rule is a major part of the rules' overall approach to assuring safety for victims of coercive and violent relationships who are prospective parties or parties in collaborative law. The subject is discussed extensively in the Prefatory Note which covers the scope of the lawyer's duty under this rule. *See supra.*

RULE 16. CONFIDENTIALITY OF COLLABORATIVE LAW

COMMUNICATION. A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than these rules.

Comment

In subsequent provisions, the rules create an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. As previously discussed in the Prefatory Note, the Drafting Committee recommends that a court rule only assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. *See supra.* This rule encourages parties to a collaborative law process to reach agreement on broader confidentiality matters such as disclosure of collaborative law communications to third parties between themselves.

RULE 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.

(a) Subject to Rules 18 and 19, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.

(2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

Comment

In many states legislation is required to create a privileged communication. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000). The Drafting Committee recommends that Rule 17 be enacted by legislation rather than court rule.

Overview

Rule 17 sets forth the rules' general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more

expansive discussion of the issues raised here.

Holders of the Privilege for Collaborative Law Communications Parties

Parties are holders of the collaborative law communications privilege. The privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in that its paramount justification is to encourage candor by the parties, just as encouraging the client's candor is the central justification for the attorney-client privilege. Using the attorney-client privilege as a core base for the collaborative law communications privilege is also particularly appropriate since the extensive participation of attorneys is a hallmark of collaborative law.

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because collaborative law involves parties whose interests appear to be adverse, such as marital partners now seeking a divorce. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the collaborative law communications privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See* United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); Static Control Components, Inc. v. Lexmark Int'l, Inc., 250 F.R.D. 575, 578-79 (D. Colo. 2007); United States v. Pizzonia, 415 F. Supp. 2d 168, 178 (E.D.N.Y. 2006); Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 428–29 (Cal. Ct. App. 1989); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 689–91 (2008). *But see* Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be waived if parties become adverse); Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985) (refusing to apply the joint defense doctrine to parties who were not directly adverse). *See generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981) (exploring the logical extensions of the attorney-client privilege, including the doctrine of joint defense). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.*, Med. Protective Co. v. Pang, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); *In re* Rules of Prof'l Conduct, 2 P.3d 806, 812 (Mont. 2000); Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 200–01 (2005).

Nonparty Participants Such as Experts

Of particular note is the act's addition of a privilege for the nonparty participant, though limited to the communications by that individual in the collaborative law process. Joint party retention of experts such as mental health professionals and financial appraisers to perform various functions is a feature of many models of collaborative law, and this provision encourages and accommodates it. Extending the privilege to nonparties for their own communications seeks to facilitate the candid participation of experts and others who may have information and perspective that would facilitate resolution of the matter. This provision would also cover statements prepared by such persons for the collaborative law process and submitted as part of it, such as experts' reports. Any party who expects to use such an expert report prepared to submit

in a collaborative law process later in a legal proceeding would have to secure permission of all parties and the expert in order to do so. This is consistent with the treatment of reports prepared for a collaborative law process as collaborative law communications. *See* Rule 2(1).

As previously discussed in the comments to Rule 2(7), collaborative lawyers are not nonparty participants under the rules, as they maintain a traditional attorney-client relationship with parties, which allocates to clients the right to waive the attorney-client privilege, even over their lawyer's objection.

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Rule 17(c) concerning evidence otherwise discoverable and admissible makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process. *See* CAL. EVID. CODE §§ 1119–20 (2009); U.S. Fid. & Guar. Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003); Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004). For purposes of the collaborative law communication privilege, it is the communication that is made in the collaborative law process that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in collaborative law is subject to discovery, just as it would be if the collaborative law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the collaborative law communication privilege. For example, a party who learns about a witness during a collaborative law proceeding is not precluded by the privilege from subpoenaing that witness should collaborative law terminate and the matter wind up in a courtroom. FED. R. EVID. 408 (evidence not excluded if offered for proving bias, prejudice, undue delay, or obstruction); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); Feldman v. Kritch, 824 So. 2d 274, 276 (Fla. Dist. Ct. App. 2002) (citing FLA. STAT. ANN. § 44.102 (West Supp. 2009) and DR Lakes, Inc. v. Brandsmart U.S.A. 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002) (holding that privilege does not bar evidence to correct a mutual mistake in settlement amount)).

RULE 18. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Rule 17 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Rule 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Comment

The Drafting Committee recommends that Rule 18 be enacted by legislation rather than court rule. See comment to Rule 17 *supra*.

RULE 19. LIMITS OF PRIVILEGE.

(a) There is no privilege under Rule 17 for a collaborative law communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Rule 17 for a collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Rule 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Rule 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

Comment

The Drafting Committee recommends that Rule 19 be enacted by legislation rather than court rule. See comment to Rule 17 *supra.*

Unconditional Exceptions to Privilege

The rules articulates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications. They are based on limited but vitally important values such as protection against serious bodily injury, crime prevention and the right of someone accused of professional misconduct to respond that outweigh the importance of confidentiality in the collaborative law process. The exceptions are similar to those contained in the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 6, 7A U.L.A. 124 (2006).

As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the rules contemplate that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended.

Exception to Privilege for Written, But Not Oral, Agreements

Of particular note is the exception that permits evidence of a collaborative law communication "in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement." Rule 19(a)(4). The exception permits such evidence to be introduced in a subsequent proceeding convened to determine whether the terms

of that settlement agreement have been breached.

The words "agreement . . . evidenced by a record signed by all parties" in this exception refer to written and executed agreements, those recorded by tape recording and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in rules 2(12) and 2(14). In other words, a party's notes about an oral agreement would not be "an agreement . . . signed by all parties." On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a collaborative law session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule of privilege. As a result, parties might be less candid, not knowing whether a controversy later would erupt over an oral agreement.

Despite the limitation on oral agreements, the rules leave parties other means to preserve the agreement quickly. For example, parties can state their oral agreement into the tape recorder and record their assent. One would also expect that counsel will incorporate knowledge of a writing requirement into their collaborative law representation practices.

Case by Case Exceptions

The exceptions in Rule 19(a) apply regardless of the need for the evidence because society's interest in the information contained in the collaborative law communications may be said to categorically outweigh its interest in the confidentiality of those communications. In contrast, the exceptions under Rule 19(b) would apply only in situations where the relative strengths of society's interest in a collaborative law communication and a party's interest in confidentiality can only be measured under the facts and circumstances of the particular case. The rules place the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of the exceptions listed under Rule 19(b). In other words, the exceptions listed in Rule 19(b) include situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

Rule 19(f) allows the parties to opt for a non-privileged collaborative law process or session of the collaborative law process by mutual agreement and thus furthers the rules' policy of party self-determination. If the parties so agree, the privilege provisions of the rules do not apply, thus fulfilling the parties reasonable expectations regarding the confidentiality of that session. Parties may use this option if they wish to rely on, and therefore use in evidence, statements made during the collaborative law process. It is the parties and their collaborative lawyers who make this choice. Even if the parties do not agree in advance, they and all nonparty participants can waive the privilege pursuant to Rule 18(a).

If the parties want to opt out, they should inform the nonparty participants of this agreement, because without actual notice, the privileges of the rules still apply to the

collaborative law communications of the persons who have not been so informed until such notice is actually received. Thus, for example, if a nonparty participant has not received notice that the opt-out has been invoked and speaks during the collaborative law process, that communication is privileged under the rules. If, however, one of the parties tells the nonparty participant that the opt-out has been invoked, the privilege no longer attaches to statements made after the actual notice has been provided, even though the earlier statements remain privileged because of the lack of notice.

RULE 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

(a) If an agreement fails to meet the requirements of Rule 4, or a lawyer fails to comply with Rule 14 or 15, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:

(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(2) reasonably believed they were participating in a collaborative law process.

(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Rules 5, 6, 9, 10, and 11; and

(3) apply a privilege under Rule 17.

Comment

The rules protect persons from inadvertently or inappropriately entering into a collaborative law participation agreements by establishing protections that cannot be waived by the parties. Rule 4 sets forth minimum standards for a collaborative law participation agreement. Rule 14 sets forth requirements for a lawyer's facilitating informed party consent to participate in collaborative law. Rule 15 requires a lawyer to inquire into potential coercive and violent relationships and take appropriate safety precautions.

Rule 20 anticipates, however, that, as collaborative law expands in use and popularity, claims will be made that agreements reached in collaborative law should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This rule

takes the view that, while parties should not be forced to participate in collaborative law involuntarily (see Rule 5(b)), the failures of collaborative lawyers in drafting agreements and making required disclosures and inquiries should not be visited on parties whose conduct indicates an intention to participate in collaborative law.

By analogy to the doctrine established allowing enforcement of arguably flawed arbitration agreements, this rule places the burden of proof on the party seeking to enforce a collaborative law participation agreement or agreements resulting from a collaborative law process despite the failures of form, disclosure or inquiry. *See* Fleetwood Enterprises. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) ("The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration . . ."); Layton-Blumenthal, Inc. v. Jack Wasserman Co., 111 N.Y.S.2d 919, 920 (N.Y. App. Div. 1952) ("The burden is upon a party applying to compel another to arbitrate, to establish that there was a plain intent by agreement to limit the parties to that method of deciding disputes.").

Doubts about the parties' intentions should be resolved against enforcement. To invoke its discretion under this rule the tribunal must find that a signed record of some kind—usually a written agreement—indicates that the parties intended to participate in a collaborative law process. It cannot find that the parties entered into a collaborative law process solely on the basis of an oral agreement. The tribunal must also find that, despite the failings of the participation agreement or the required disclosures, the parties nonetheless intended to participate in a collaborative law process and reasonably believed that they were doing so. If the tribunal makes those findings this rule gives it the discretionary authority to enforce agreements resulting from the process the parties engaged in and the other provisions of these rules if the tribunal also finds that the interests of justice so require.

RULE 21. EFFECTIVE DATE. These rules take effect.....

Comment

States should choose an effective date for the rules that allows substantial time for notice to the bar and the public of its provisions and for the training of collaborative lawyers.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 6, N.D.R.Civ.P., Computing and Extending Time; Time for Motion Papers

Form and style amendments were applied to Rule 6 effective March 1, 2011. Staff was recently called by an attorney who pointed out an inconsistency between the text of the rule and the explanatory note. Specifically, the attorney said that explanatory note text suggested that the longstanding restriction on extending time under the rules listed in Rule 6(b)(2) had been eliminated. Proposed amendments to correct the explanatory note language to remove this inconsistency are attached.

RULE 6. COMPUTING AND EXTENDING TIME; TIME FOR MOTION PAPERS

(a) Computing time. The following rules apply in computing any time period specified in these rules, or in any local rule, court order, or statute that does not specify a method of computing time.

(1) Period stated in days or a longer unit. When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period stated in hours. When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the clerk's office. Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" defined. Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" defined. The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(b) Extending time.

(1) In general. When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions. A court cannot extend the time to act under Rules 4(e)(7), 52(b), 59(c), (i) and (j), and 60(b).

(c) [Rescinded]

(d) Motions and notices of hearing.

(1) In general. A written motion and notice of the motion must be served at least 21 days before the motion may be heard, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different period; or

(C) when a court order - which a party may, for good cause, apply for ex parte - sets a different period.

(e) Service made electronically, by mail or third-party commercial carrier.

(1) Whenever a party must or may act within a prescribed period after service and service is made electronically, by mail or third-party commercial carrier under Rule 5, three days are added after the prescribed period would otherwise expire under N.D.R.Civ.P. 6(a).

(2) If service is made by mail or third-party commercial carrier under Rule 4, the prescribed period begins running upon delivery.

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

EXPLANATORY NOTE

Rule 6 was amended, effective 1971; March 1, 1990; on an emergency basis,

March 1, 1992; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2001; March 1, 2004: March 1, 2007; March 1, 2009; March 1, 2011; _____.

Legal holidays in North Dakota are listed in N.D.C.C. ch. 1-03.

Rule 6 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.

Subdivision (a) was amended, effective March 1, 2011, to simplify and clarify the provisions that describe how deadlines are computed. Under the previous rule, intermediate weekends and holidays were omitted when computing short periods but included when computing longer periods. Under the amended rule, intermediate weekends and holidays are counted regardless of the length of the specified period.

Paragraph (b)(2) was amended, effective March 1, 2011, to ~~eliminate the exception for extending~~ clarify that there can be no extension of the times set by provisions in Rules 4(e)(7), 52(b), 59(c), (i) and (j), and 60(b).

Subdivision (d) was amended, effective March 1, 1997, because Rule 3.2, N.D.R.Ct., governs when papers supporting or opposing a motion must be served. The March 1, 2001 amendment changes from 14 to 18 days when a motion must be served before it may be heard.

Paragraph (d)(1) was amended, effective March 1, 2011, to change from 18 to 21 days when a motion must be served before it may be heard.

Subdivision (e) was amended, effective March 1, 1999, to make the three-day extension for service by mail applicable when service is via third-party commercial carrier. The proof of service must contain the date of mailing or deposit with the third-party commercial carrier.

Subdivision (e) was amended, effective March 1, 2004, to restrict applicability of the three-day extension for service by mail or third-party commercial carrier to items served under Rule 5. The time of service for an item served by mail or third-party commercial carrier under Rule 4 is the time the item is delivered to or refused by the recipient.

Subdivision (e) was amended, effective March 1, 2007, to clarify how to count the three-day extension for service by mail or third-party commercial carrier.

Subdivision (e) was amended, effective March 1, 2009, to provide that a document served by electronic means is treated as if it were mailed on the date of transmission. Service by electronic means includes facsimile transmission.

Sources: Joint Procedure Committee Minutes of _____; April 29-30, 2010, pages 4-5; April 24-25, 2008; January 24, 2008, page 15; April 27-28, 2006, pages 6-7; January 26, 2006, page 11; January 30-31, 2003, pages 4-6; September 26-27, 2002, pages 15-18; January 27-28, 2000, pages 16-17; September 23-24, 1999, pages 20-21; January 29-30, 1998, page 18; April 25, 1996, pages 8-11; April 28-29, 1994, pages 15-17; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 14-16 and 20; April 29-30, 1993, page 20; November 7-8, 1991, page 3; October 25-26, 1990, page 12;

April 20, 1989, page 2; December 3, 1987, page 11; June 22, 1984, pages 30-31; September 20-21, 1979, pages 5-6; Fed.R.Civ.P. 6.

Statutes Affected:

Considered: N.D.C.C. ch. 1-03.

Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction -- Process -- Service), N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers), N.D.R.Civ.P. 52 (Findings by the Court), 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.Crim.P. 45 (Time); N.D.R.Ct. 3.2 (Motions).

FEDERAL RULES OF CIVIL PROCEDURE

TITLE II. COMMENCING AN ACTION; SERVICE OF PROCESS, PLEADINGS, MOTIONS, AND ORDERS

Rule 6. Computing and Extending Time; Time for Motion Papers

(a) Computing Time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time.

(1) *Period Stated in Days or a Longer Unit.* When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) *Period Stated in Hours.* When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) *Inaccessibility of the Clerk's Office.* Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) *"Last Day" Defined.* Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) *"Next Day" Defined.* The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(6) *"Legal Holiday" Defined.* "Legal holiday" means:

(A) the day set aside by statute for observing New Year's Day, Martin Luther King Jr.'s Birthday, Washington's Birthday, Memorial Day, Independence Day, Labor Day, Columbus Day, Veterans' Day, Thanksgiving Day, or Christmas Day;

(B) any day declared a holiday by the President or Congress; and

(C) for periods that are measured after an event, any other day declared a holiday by the state where the district court is located.

(b) Extending Time.

(1) *In General.* When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) *Exceptions.* A court must not extend the time to act under Rules 50(b) and (d), 52(b), 59(b), (d), and (e), and 60(b).

(c) Motions, Notices of Hearing, and Affidavits.

(1) *In General.* A written motion and notice of the hearing must be served at least 14 days before the time specified for the hearing, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different time; or

(C) when a court order--which a party may, for good cause, apply for ex parte--sets a different time.

(2) *Supporting Affidavit.* Any affidavit supporting a motion must be served with the motion. Except as Rule 59(c) provides otherwise, any opposing affidavit must be served at least 7 days before the hearing, unless the court permits service at another time.

(d) Additional Time After Certain Kinds of Service. When a party may or must act within a specified time after service and service is made under Rule 5(b)(2)(C), (D), (E), or (F), 3 days are added after the period would otherwise expire under Rule 6(a).

HISTORY:

(Amended March 19, 1948; July 1, 1963; July 1, 1966; July 1, 1968; July 1, 1971; Aug. 1, 1983; Aug. 1, 1985; Aug. 1, 1987; Dec. 1, 1999; Dec. 1, 2001; Dec. 1, 2005.)

(As amended Dec. 1, 2007; Dec. 1, 2009.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. *Note to Subdivisions (a) and (b).* These are amplifications along lines common in state practices, of former Equity Rule 80 (Computation of Time--Sundays and Holidays) and of the provisions for enlargement of time found in former Equity Rules 8 (Enforcement of Final Decrees) and 16 (Defendant to Answer--Default--Decree Pro Confesso). See also Rule XIII, Rules and Forms in *Criminal Cases, 292 U.S. 661, 666.* Compare Ala. Code Ann. (Michie, 1928) § 13 and former Law *Rule 8 of the Rules of the Supreme Court* of the District of Columbia (1924), superseded in 1929 by Law Rule 8, Rules of the District Court of the United States for the District of Columbia (1937).

Note to Subdivision (c). This eliminates the difficulties caused by the expiration of terms of court. Such statutes as U.S.C. Title 28, former § 12 (Trials not discontinued by new term) are not affected. Compare Rules of the United States District Court of Minnesota, Rule 25 (Minn. Stat. (Mason, Supp 1936), p. 1089).

Note to Subdivision (d). Compare 2 Minn. Stat. (Mason, 1927) § 9246; N.Y.R.C.P. (1937) Rules 60 and 64.

Notes of Advisory Committee on 1946 amendments. *Note to Subdivision (b).* The purpose of the amendment is to clarify the finality of judgments. Prior to the advent of the Federal Rules of Civil Procedure, the general rule that a court loses jurisdiction to disturb its judgments, upon the expiration of the term at which they were entered, had long been the classic device which (together with the statutory limits on the time for appeal) gave finality to judgments. See Note to Rule 73(a). Rule 6(c) abrogates that limit on judicial power. That limit was open to many objections, one of them being inequality of operation because, under it, the time for vacating a judgment rendered early in a term was much longer than for a judgment rendered near the end of the term.

The question to be met under Rule 6(b) is: how far should the desire to allow correction of judgments be allowed to postpone their finality? The rules contain a number of provisions permitting the vacation or modification of judgments on various grounds. Each of these rules contains express time limits on the motions for granting of relief. Rule 6(b) is a rule of general application giving wide discretion to the court to enlarge these time limits or revive them after they have expired, the only exceptions stated in the original rule being a prohibition against enlarging the time specified in Rule 59(b) and (d) for making motions for or granting new trials, and a prohibition against enlarging the time fixed by law for taking an appeal. It should also be noted that Rule 6(b) itself contains no limitation of time within which the court may exercise its discretion, and since the expiration of the term does not end its power, there is now no time limit on the exercise of its discretion under Rule 6(b).

Decisions of lower federal courts suggests that some of the rules containing time limits which may be set aside under Rule 6(b) are Rules 25, 50(b), 52(b), 60(b), and 73(g).

In a number of cases the effect of Rule 6(b) on the time limitations of these rules has been considered. Certainly the rule is susceptible of the interpretation that the court is given the power in its discretion to relieve a party from failure to act within the times specified in any of these other rules, with only the exceptions stated in Rule 6(b), and in some cases the rule has been so construed.

With regard to Rule 25(a) for substitution, it was held in *Anderson v. Brady, 1 F.R.D. 589, 4 Fed. Rules Serv. 25a.*1, Case 1 (E.D. Ky. 1941), and in *Anderson v. Yungkau, 153 F.2d 685 (6th Cir. 1946),* cert. granted, *66 S. Ct. 1025 [90 L. Ed. 1606]* (1946), that under Rule 6(b) the court had no authority to allow substitution of parties after the expiration of the limit fixed in Rule 25(a).

As to Rules 50(b) for judgments notwithstanding the verdict and 52(b) for amendment of findings and vacation of judgment, it was recognized in *Leishman v. Associated Wholesale Electric Co., 318 U.S. 203, [87 L. Ed. 714] 63 S. Ct. 543 (1943),* that Rule 6(b) allowed the district court to enlarge the time to make a motion for amended findings and judgment beyond the limit expressly fixed in Rule 52(b). See *Coca-Cola v. Busch, 7 Fed. Rules Serv. 59b.*2, Case 4

(E.D. Pa 1943). Obviously, if the time limit in Rule 52(b) could be set aside under Rule 6(b), the time limit in Rule 50(b) for granting judgment notwithstanding the verdict (and thus vacating the judgment entered "forthwith" on the verdict) likewise could be set aside.

As to Rule 59 on motions for a new trial, it has been settled that the time limits in Rule 59(b) and (d) for making motions for or granting new trial could not be set aside under Rule 6(b), because Rule 6(b) expressly refers to Rule 59, and forbids it. See *Safeway Stores, Inc. v. Coe, 78 U.S. App. D.C. 19, 136 F.2d 771 (D.C. Cir. 1943); Jusino v. Morales & Tio, 139 F.2d 946 (1st Cir. 1944); Coca-Cola Co. v. Busch, 7 Fed. Rules Serv. 59b.*2, Case 4 (E.D. Pa. 1943); *Peterson v. Chicago Great Western Ry. Co., 3 F.R.D. 346, 7 Fed. Rules Serv. 59b.*2, Case 1 (D. Neb. 1943); *Leishman v. Associated Wholesale Electric Co., 318 U.S. 203, 63 S. Ct. 543 (1943).*

As to Rule 60(b) for relief from a judgment, it was held in *Schram v. O'Connor, 5 Fed. Rules Serv. 6b.*31, Case 1, *2 F.R.D. 192,* s c *5 Fed. Rules Serv. 6b.*31, Case 2, *2 F.R.D. 192 (E.D. Mich. 1941)* , that the six-months time limit in original Rule 60(b) for making a motion for relief from a judgment for surprise, mistake, or excusable neglect could be set aside under Rule 6(b). The contrary result was reached in *Wallace v. United States, 142 F.2d 240 (2d Cir. 1944)* , cert. denied *323 U.S. 712, [89 L. Ed. 573] 65 S. Ct. 37 (1944); Reed v. South Atlantic Steamship Co. of Del., 2 F.R.D. 475, 6 Fed. Rules Serv. 60b.*31, Case 1 (D. Del. 1942).

As to Rule 73(g), fixing the time for docketing an appeal, it was held in *Ainsworth v. Gill Glass & Fixture Co., 104 F.2d 83 (3d Cir. 1939),* that under Rule 6(b) the district court, upon motion made after the expiration of the forty-day period, stated in Rule 73(g), but before the expiration of the ninety-day period therein specified, could permit the docketing of the appeal on a showing of excusable neglect. The contrary was held in *Mutual Benefit Health & Accident Ass'n v. Snyder, 109 F.2d 469 (6th Cir. 1940)* and in *Burke v. Canfield, 72 App. D.C. 127, 111 F.2d 526 (D.C. Cir. 1940).*

The amendment of Rule 6(b) now proposed is based on the view that there should be a definite point where it can be said a judgment is final; that the right method of dealing with the problem is to list in Rule 6(b) the various other rules whose time limits may not be set aside, and then, if the time limit in any of those other rules is too short, to amend that other rule to give a longer time. The further argument is that Rule 6(c) abolished the long standing device to produce finality in judgments through expiration of the term, and since that limitation on the jurisdiction of courts to set aside their own judgments has been removed by Rule 6(c), some other limitation must be substituted or judgments never can be said to be final.

In this connection reference is made to the established rule that if a motion for a new trial is seasonably made, the mere making or pendency of the motion destroys the finality of the judgment, and even though the motion is ultimately denied, the full time for appeal starts anew from the date of denial. Also, a motion to amend the findings under Rule 52(b) has the same effect on the time for appeal. *Leishman v. Associated Wholesale Electric Co., 318 U.S. 203, 63 S. Ct. 543 (1943).* By the same reasoning a motion for judgment under Rule 50(b), involving as it does the vacation of a judgment entered "forthwith" on the verdict (Rule 58), operates to postpone, until an order is made, the running of the time for appeal. The Committee believes that the abolition by Rule 6(c) of the old rule that a court's power over its judgments ends with the term, requires a substitute limitation, and that unless Rule 6(b) is amended to prevent enlargement of the times specified in Rules 50(b), 52(b) and 60(b), and the limitation as to Rule 59(b) and (d) is retained, no one can say when a judgment is final. This is also true with regard to proposed Rule 59(e), which authorizes a motion to alter or amend a judgment, hence that rule is also included in the enumeration in amended Rule 6(b). In consideration of the amendment, however, it should be noted that Rule 60(b) is also to be amended so as to lengthen the six-months period originally prescribed in that rule to one-year.

As to Rule 25 on substitution, while finality is not involved, the limit there fixed should be controlling. That rule, as amended, gives the court power, upon showing of a reasonable excuse, to permit substitution after the expiration of the two-year period.

As to Rule 73(g), it is believed that the conflict in decisions should be resolved and not left to further litigation, and that the rule should be listed as one whose limitation may not be set aside under Rule 6(b).

As to Rule 59(c), fixing the time for serving affidavits on motion for new trial, it is believed that the court should have authority under Rule 6(b) to enlarge the time, because, once the motion for new trial is made, the judgment no longer has finality, and the extension of time for affidavits thus does not of itself disturb finality.

Other changes proposed in Rule 6(b) are merely clarifying and conforming. Thus "request" is substituted for "application" in clause (1) because an application is defined as a motion under Rule 7(b). The phrase "extend the time" is substituted for "enlarge the period" because the former is a more suitable expression and relates more clearly to both clauses (1) and (2). The final phrase in Rule 6(b), "or the period for taking an appeal as provided by law," is deleted and a reference to Rule 73(a) inserted, since it is proposed to state in that rule the time for appeal to a circuit court of appeals, which is the only appeal governed by the Federal Rules, and allows an extension of time. See Rule 72.

Subdivision (c). The purpose of this amendment is to prevent reliance upon the continued existence of a term as a source of power to disturb the finality of a judgment upon grounds other than those stated in these rules. See *Hill v. Hawes, 320 U.S. 520, [88 L. Ed. 283] 64 S. Ct. 334 (1944); Boaz v. Mutual Life Ins. Co. of New York, 146 F.2d 321 (8th Cir. 1944); Bucy v. Nevada Construction Co., 125 F.2d 213* (9th Cir. 1942).

Notes of Advisory Committee on 1963 amendments. *Note to Subdivision (a).* This amendment is related to the amendment of Rule 77(c) changing the regulation of the days on which the clerk's office shall be open.

The wording of the first sentence of Rule 6(a) is clarified and the subdivision is made expressly applicable to computing periods of time set forth in local rules.

Saturday is to be treated in the same way as Sunday or a "legal holiday" in that it is not to be included when it falls on the last day of a computed period, nor counted as an intermediate day when the period is less than 7 days. "Legal holiday" is defined for purposes of this subdivision and amended Rule 77(c). Compare the definition of "holiday" in *11 U.S.C. § 1(18)*; also *5 U.S.C. § 86a*; Executive Order No. 10358, "Observance of Holidays," June 9, 1952, *17 Fed. Reg. 5269.* In the light of these changes the last sentence of the present subdivision, dealing with half holidays, is eliminated.

With Saturdays and State holidays made "dies non" in certain cases by the amended subdivision, computation of the usual 5-day notice of motion or the 2-day notice to dissolve or modify a temporary restraining order may work out so as to cause embarrassing delay in urgent cases. The delay can be obviated by applying to the court to shorten the time, see Rules 6(d) and 65(b).

Note to Subdivision (b). The prohibition against extending the time for taking action under Rule 25 (Substitution of parties) is eliminated. The only limitation of time provided for in amended Rule 25 is the 90-day period following a suggestion upon the record of the death of a party within which to make a motion to substitute the proper parties for the deceased party. See Rule 25(a)(1), as amended, and the Advisory Committee's Note thereto. It is intended that the court shall have discretion to enlarge that period.

Notes of Advisory Committee on 1966 amendments. *Note to Subdivision (c).* P.L. 88-139, § 1, 77 Stat. 248, approved on October 16, 1963, amended *28 U.S.C. § 138* to read as follows: "The district court shall not hold formal terms." Thus Rule 6(c) is rendered unnecessary, and it is rescinded.

Notes of Advisory Committee on 1968 amendments. The amendment eliminates the references to Rule 73, which is to be abrogated.

Notes of Advisory Committee on 1971 amendments. The amendment adds Columbus Day to the list of legal holidays to conform the subdivision to the Act of June 28, 1968, 82 Stat. 250, which constituted Columbus Day a legal holiday effective after January 1, 1971.

The Act, which amended *Title 5, U.S.C. § 6103(a)*, changes the day on which certain holidays are to be observed. Washington's Birthday, Memorial Day and Veterans Day are to be observed on the third Monday in February, the last Monday in May and the fourth Monday in October, respectively, rather than, as heretofore, on February 22, May 30, and November 11, respectively. Columbus Day is to be observed on the second Monday in October. New Year's Day, Independence Day, Thanksgiving Day and Christmas continue to be observed on the traditional days.

Notes of Advisory Committee on 1983 amendments. *Note to Subdivision (b).* The amendment confers finality upon the judgments of magistrates by foreclosing enlargement of the time for appeal except as provided in new Rule 74(a) (20 day period for demonstration of excusable neglect).

Notes of Advisory Committee on 1985 amendment. Rule 6(a) is amended to acknowledge that weather conditions or other events may render the clerk's office inaccessible one or more days. Parties who are obliged to file something with the court during that period should not be penalized if they cannot do so. The amendment conforms to changes made in *Federal Rule of Criminal Procedure 45(a)*, effective August 1, 1982.

The Rule also is amended to extend the exclusion of intermediate Saturdays, Sundays, and legal holidays to the computation of time periods less than 11 days. Under the current version of the Rule, parties bringing motions under rules with 10-day periods could have as few as 5 working days to prepare their motions. This hardship would be especially acute in the case of Rules 50(b) and (c)(2), 52(b), and 59(b), (d), and (e), which may not be enlarged at the discretion of the court. See Rule 6(b). If the exclusion of Saturdays, Sundays, and legal holidays will operate to cause excessive delay in urgent cases, the delay can be obviated by applying to the court to shorten the time. See Rule 6(b).

The Birthday of Martin Luther King, Jr., which becomes a legal holiday effective in 1986, has been added to the list of legal holidays enumerated in the Rule.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1999 amendments. The reference to Rule 74(a) is stricken from the catalogue of time periods that cannot be extended by the district court. The change reflects the 1997 abrogation of Rule 74(a).

Notes of Advisory Committee on 2001 amendments. *Note to Subdivision (e).* The additional three days provided by Rule 6(e) is extended to the means of service authorized by the new paragraph (D) added to Rule 5(b), including--with the consent of the person served--service by electronic or other means. The three-day addition is provided as well for service on a person with no known address by leaving a copy with the clerk of the court.

Notes of Advisory Committee on 2005 amendments. *Note to Subdivision (e).* Rule 6(e) is amended to remove any doubt as to the method for extending the time to respond after service by mail, leaving with the clerk of court, electronic means, or other means consented to by the party served. Three days are added after the prescribed period otherwise expires under Rule 6(a). Intermediate Saturdays, Sundays, and legal holidays are included in counting these added three days. If the third day is a Saturday, Sunday, or legal holiday, the last day to act is the next day that is not a Saturday, Sunday, or legal holiday. The effect of invoking the day when the prescribed period would otherwise expire under Rule 6(a) can be illustrated by assuming that the thirtieth day of a thirty-day period is a Saturday. Under Rule 6(a) the period expires on the next day that is not a Sunday or legal holiday. If the following Monday is a legal holiday, under Rule 6(a) the period expires on Tuesday. Three days are then added--Wednesday, Thursday, and Friday as the third and final day to act. If the period prescribed expires on a Friday, the three added days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the third and final day to act.

Application of Rule 6(e) to a period that is less than eleven days can be illustrated by a paper that is served by mailing on a Friday. If ten days are allowed to respond, intermediate Saturdays, Sundays, and legal holidays are excluded in determining when the period expires under Rule 6(a). If there is no legal holiday, the period expires on the Friday two weeks after the paper was mailed. The three added Rule 6(e) days are Saturday, Sunday, and Monday, which is the third and final day to act unless it is a legal holiday. If Monday is a legal holiday, the next day that is not a legal holiday is the final day to act.

Notes of Advisory Committee on 2007 amendments. The language of Rule 6 has been amended as part of the general restyling of the Civil Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Notes of Advisory Committee on 2009 amendments. *Note to Subdivision (a).* Subdivision (a) has been amended to simplify and clarify the provisions that describe how deadlines are computed. Subdivision (a) governs the computation of any time period found in these rules, in any local rule or court order, or in any statute that does not specify a method of computing time. In accordance with Rule 83(a)(1), a local rule may not direct that a deadline be computed in a manner inconsistent with subdivision (a).

The time-computation provisions of subdivision (a) apply only when a time period must be computed. They do not apply when a fixed time to act is set. The amendments thus carry forward the approach taken in *Violette v. P.A. Days, Inc., 427 F.3d 1015, 1016 (6th Cir. 2005)* (holding that Civil Rule 6(a) "does not apply to situations where the court has established a specific calendar day as a deadline"), and reject the contrary holding of *In re American Healthcare Management, Inc., 900 F.2d 827, 832 (5th Cir. 1990)* (holding that Bankruptcy Rule 9006(a) governs treatment of date-certain deadline set by court order). If, for example, the date for filing is "no later than November 1,2007," subdivision (a) does not govern. But if a filing is required to be made "within 10 days" or "within 72 hours," subdivision (a) describes how that deadline is computed.

Subdivision (a) does not apply when computing a time period set by a statute if the statute specifies a method of computing time. *See, e.g., 2 U.S.C. § 394* (specifying method for computing time periods prescribed by certain statutory provisions relating to contested elections to the House of Representatives).

Note to Subdivision (a)(1). New subdivision (a)(1) addresses the computation of time periods that are stated in days. It also applies to time periods that are stated in weeks, months, or years. *See, e.g.,* Rule 60(c)(1). Subdivision (a)(1)(B)'s directive to "count every day" is relevant only if the period is stated in days (not weeks, months or years).

Under former Rule 6(a), a period of 11 days or more was computed differently than a period of less than 11 days. Intermediate Saturdays, Sundays, and legal holidays were included in computing the longer periods, but excluded in computing the shorter periods. Former Rule 6(a) thus made computing deadlines unnecessarily complicated and led to counterintuitive results. For example, a 10-day period and a 14-day period that started on the same day usually ended on the same day--and the 10-day period not infrequently ended later than the 14-day period. *See Miltimore Sales, Inc. v. Int'l Rectifier, Inc., 412 F.3d 685,686 (6th Cir. 2005).*

Under new subdivision (a)(1), all deadlines stated in days (no matter the length) are computed in the same way. The day of the event that triggers the deadline is not counted. All other days--including intermediate Saturdays, Sundays, and legal holidays--are counted, with only one exception: If the period ends on a Saturday, Sunday, or legal holiday, then the deadline falls on the next day that is not a Saturday, Sunday, or legal holiday. An illustration is provided below in the

discussion of subdivision (a)(5). Subdivision (a)(3) addresses filing deadlines that expire on a day when the clerk's office is inaccessible.

Where subdivision (a) formerly referred to the "act, event, or default" that triggers the deadline, new subdivision (a) refers simply to the "event" that triggers the deadline; this change in terminology is adopted for brevity and simplicity, and is not intended to change meaning.

Periods previously expressed as less than 11 days will be shortened as a practical matter by the decision to count intermediate Saturdays, Sundays, and legal holidays in computing all periods. Many of those periods have been lengthened to compensate for the change. *See, e.g.,* Rule 14(a)(1).

Most of the 10-day periods were adjusted to meet the change in computation method by setting 14 days as the new period. A 14-day period corresponds to the most frequent result of a 10-day period under the former computation method--two Saturdays and two Sundays were excluded, giving 14 days in all. A 14-day period has an additional advantage. The final day falls on the same day of the week as the event that triggered the period--the 14th day after a Monday, for example, is a Monday. This advantage of using week-long periods led to adopting 7-day periods to replace some of the periods set at less than 10 days, and 21-day periods to replace 20-day periods. Thirty-day and longer periods, however, were generally retained without change.

Note to Subdivision (a)(2). New subdivision (a)(2) addresses the computation of time periods that are stated in hours. No such deadline currently appears in the Federal Rules of Civil Procedure. But some statutes contain deadlines stated in hours, as do some court orders issued in expedited proceedings.

Under subdivision (a)(2), a deadline stated in hours starts to run immediately on the occurrence of the event that triggers the deadline. The deadline generally ends when the time expires. If, however, the time period expires at a specific time (say, 2:17 p.m.) on a Saturday, Sunday, or legal holiday, then the deadline is extended to the same time (2:17 p.m.) on the next day that is not a Saturday, Sunday, or legal holiday. Periods stated in hours are not to be "rounded up" to the next whole hour. Subdivision (a)(3) addresses situations when the clerk's office is inaccessible during the last hour before a filing deadline expires.

Subdivision (a)(2)(B) directs that every hour be counted. Thus, for example, a 72-hour period that commences at 10:23 a.m. on Friday, November 2, 2007, will run until 9:23 a.m. on Monday, November 5; the discrepancy in start and end times in this example results from the intervening shift from daylight saving time to standard time.

Note to Subdivision(a)(3). When determining the last day of a filing period stated in days or a longer unit of time, a day on which the clerk's office is not accessible because of the weather or another reason is treated like a Saturday, Sunday, or legal holiday. When determining the end of a filing period stated in hours, if the clerk's office is inaccessible during the last hour of the filing period computed under subdivision (a)(2) then the period is extended to the same time on the next day that is not a weekend, holiday, or day when the clerk's office is inaccessible.

Subdivision (a)(3)'s extensions apply "[u]nless the court orders otherwise." In some circumstances, the court might not wish a period of inaccessibility to trigger a full 24-hour extension; in those instances, the court can specify a briefer extension.

The text of the rule no longer refers to "weather or other conditions" as the reason for the inaccessibility of the clerk's office. The reference to "weather" was deleted from the text to underscore that inaccessibility can occur for reasons unrelated to weather, such as an outage of the electronic filing system. Weather can still be a reason for inaccessibility of the clerk's office. The rule does not attempt to define inaccessibility. Rather, the concept will continue to develop through caselaw, *see, e.g.,* William G. Phelps, *When Is Office of Clerk of Court Inaccessible Due to Weather or Other Conditions for Purpose of Computing Time Period for Filing Papers under Rule 6(a) of Federal Rules of Civil Procedure, 135 A.L.R. Fed. 259 (1996)* (collecting cases). In addition, many local provisions address inaccessibility for purposes of electronic filing, *see, e.g.,* D. Kan. Rule 5.4.11 ("A Filing User whose filing is made untimely as the result of a technical failure may seek appropriate relief from the court.").

Note to Subdivision (a)(4). New subdivision (a)(4) defines the end of the last day of a period for purposes of subdivision (a)(1). Subdivision (a)(4) does not apply in computing periods stated in hours under subdivision (a)(2), and does not apply if a different time is set by a statute, local rule, or order in the case. A local rule may, for example, address the problems that might arise if a single district has clerk's offices in different time zones, or provide that papers filed in a drop box after the normal hours of the clerk's office are filed as of the day that is date-stamped on the papers by a device in the drop box.

28 U.S.C. § 452 provides that "[a]ll courts of the United States shall be deemed always open for the purpose of filing proper papers, issuing and returning process, and making motions and orders." A corresponding provision exists in Rule 77(a). Some courts have held that these provisions permit an after-hours filing by handing the papers to an appropriate official. *See, e.g., Casalduc v. Diaz, 117 F.2d 915, 917 (1st Cir. 1941).* Subdivision (a)(4) does not address the effect of

the statute on the question of after-hours filing; instead, the rule is designed to deal with filings in the ordinary course without regard to Section 452.

Note to Subdivision (a)(5). New subdivision (a)(5) defines the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C). The Federal Rules of Civil Procedure contain both forward-looking time periods and backward-looking time periods. A forward-looking time period requires something to be done within a period of time *after* an event. *See, e.g.,* Rule 59(b) (motion for new trial "must be filed no later than 28 days after entry of the judgment"). A backward-looking time period requires something to be done within a period of time *before* an event. *See, e.g.,* Rule 26(f) (parties must hold Rule 26(f) conference "as soon as practicable and in any event at least 21 days before a scheduling conference is held or a scheduling order is due under Rule 16(b)"). In determining what is the "next" day for purposes of subdivisions (a)(1)(C) and (a)(2)(C), one should continue counting in the same direction--that is, forward when computing a forward-looking period and backward when computing a backward-looking period. If, for example, a filing is due within 30 days *after* an event, and the thirtieth day falls on Saturday, September 1,2007, then the filing is due on Tuesday, September 4,2007 (Monday, September 3, is Labor Day). But if a filing is due 21 days *before* an event, and the twenty-first day falls on Saturday, September 1, then the filing is due on Friday, August 31. If the clerk's office is inaccessible on August 31, then subdivision (a)(3) extends the filing deadline forward to the next accessible day that is not a Saturday, Sunday, or legal holiday--no later than Tuesday, September 4.

Note to Subdivision (a)(6). New subdivision (a)(6) defines "legal holiday" for purposes of the Federal Rules of Civil Procedure, including the time-computation provisions of subdivision (a). Subdivision (a)(6) continues to include within the definition of "legal holiday" days that are declared a holiday by the President or Congress.

For forward-counted periods--*i.e.,* periods that are measured after an event--subdivision (a)(6)(C) includes certain state holidays within the definition of legal holidays. However, state legal holidays are not recognized in computing backward-counted periods. For both forward- and backward-counted periods, the rule thus protects those who may be unsure of the effect of state holidays. For forward-counted deadlines, treating state holidays the same as federal holidays extends the deadline. Thus, someone who thought that the federal courts might be closed on a state holiday would be safeguarded against an inadvertent late filing. In contrast, for backward-counted deadlines, not giving state holidays the treatment of federal holidays allows filing on the state holiday itself rather than the day before. Take, for example, Monday, April 21, 2008 (Patriot's Day, a legal holiday in the relevant state). If a filing is due 14 days after an event, and the fourteenth day is April 21, then the filing is due on Tuesday, April 22 because Monday, April 21 counts as a legal holiday. But if a filing is due 14 days before an event, and the fourteenth day is April 21, the filing is due on Monday, April 21 ; the fact that April 21 is a state holiday does not make April 21 a legal holiday for purposes of computing this backward-counted deadline. But note that if the clerk's office is inaccessible on Monday, April 21, then subdivision (a)(3) extends the April 21 filing deadline forward to the next accessible day that is not a Saturday, Sunday or legal holiday--no earlier than Tuesday, April 22.

The times set in the former rule at 1 or 5 days have been revised to 7 or 14 days.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 101, N.D.R.Ev., Scope; Definitions

Under the 2011 form and style amendments to Fed.R.Ev. 101, the rule was expanded to include definitions. Proposed amendments to N.D.R.Ev. 101 consistent with the federal amendments are attached. The proposed addition of definitions seems helpful, especially the definition of "record" and the item providing that references to written material and other mediums include electronic documents.

RULE 101. SCOPE; DEFINITIONS

~~These rules govern proceedings in the courts of North Dakota, to the extent and with the exceptions stated in Rule 1101.~~

(a) Scope. These rules apply to proceedings in North Dakota courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under constitutional authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

EXPLANATORY NOTE

Rule 101 was amended, effective _____.

Rule 101 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; April 8, 1976, page 14. Rule 101, Federal Rules of Evidence; Rule 101 SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 29-21-12.

~~Rules:~~

~~Considered: Rule 43(a), NDRCivP; Rule 26, NDRCrim.; N.D.R.Crim.P. 26.~~

Cross Reference: ~~Rule 1101,~~ N.D.R.Ev. 1101 (Applicability of Rules); N.D.R.Civ.P. 43 (Evidence); N.D.R.Crim.P. 26 (Taking Testimony).

FEDERAL RULES OF EVIDENCE
ARTICLE I. GENERAL PROVISIONS

Rule 101. Scope; Definitions

(a) Scope. These rules apply to proceedings in United States courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:
(1) "civil case" means a civil action or proceeding;
(2) "criminal case" includes a criminal proceeding;
(3) "public office" includes a public agency;
(4) "record" includes a memorandum, report, or data compilation;
(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under statutory authority; and
(6) a reference to any kind of written material or any other medium includes electronically stored information.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1929; March 2, 1987, eff. Oct. 1, 1987; April 25, 1988, eff. Nov. 1, 1988; April 22, 1993, eff. Dec. 1, 1993; April 26, 2011, eff. Dec. 1, 2011.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:
Notes of Advisory Committee on Rules. Rule 1101 specifies in detail the courts, proceedings, questions, and stages of proceedings to which the rules apply in whole or in part.
Notes of Advisory Committee on 1987 amendments. United States bankruptcy judges are added to conform this rule with Rule 1101(b) and Bankruptcy Rule 9017.
Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.
Notes of Advisory Committee on 1993 amendments. This revision is made to conform the rule to changes made by the Judicial Improvements Act of 1990.
Notes of Advisory Committee on 2011 amendments. The language of Rule 101 has been amended, and definitions have been added, as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.
The reference to electronically stored information is intended to track the language of *Fed. R. Civ. P. 34.*
The Style Project
The Evidence Rules are the fourth set of national procedural rules to be restyled. The restyled Rules of Appellate Procedure took effect in 1998. The restyled Rules of Criminal Procedure took effect in 2002. The restyled Rules of Civil Procedure took effect in 2007. The restyled Rules of Evidence apply the same general drafting guidelines and principles used in restyling the Appellate, Criminal, and Civil Rules.
1. General Guidelines
Guidance in drafting, usage, and style was provided by Bryan Garner, *Guidelines for Drafting and Editing Court Rules,* Administrative Office of the United States Courts (1969) and Bryan Garner, *Dictionary of Modern Legal Usage* (2d ed. 1995). See also Joseph Kimble, *Guiding Principles for Restyling the Civil Rules,* in *Preliminary Draft of Proposed Style Revision of the Federal Rules of Civil Procedure,* at page x (Feb. 2005) (available at http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Prelim_draft_ proposed_pt1.pdf); Joseph Kimble, *Lessons in Drafting from the New Federal Rules of Civil Procedure, 12* Scribes J. Legal Writing 25 (2008-2009). For specific commentary on the Evidence restyling project, see Joseph Kimble, *Drafting Examples from the Proposed New Federal Rules of Evidence, 88 Mich. B.J. 52 (Aug. 2009); 88 Mich. B.J. 46 (Sept. 2009); 88 Mich. B.J. 54 (Oct. 2009); 88 Mich. B.J. 50 (Nov. 2009).*

2. Formatting Changes

Many of the changes in the restyled Evidence Rules result from using format to achieve clearer presentations. The rules are broken down into constituent parts, using progressively indented subparagraphs with headings and substituting vertical for horizontal lists. "Hanging indents" are used throughout. These formatting changes make the structure of the rules graphic and make the restyled rules easier to read and understand even when the words are not changed. Rules 103, 404(b), 606(b), and 612 illustrate the benefits of formatting changes.

3. Changes to Reduce Inconsistent, Ambiguous, Redundant, Repetitive, or Archaic Words

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Because different words are presumed to have different meanings, such inconsistencies can result in confusion. The restyled rules reduce inconsistencies by using the same words to express the same meaning. For example, consistent expression is achieved by not switching between "accused" and "defendant" or between "party opponent" and "opposing party" or between the various formulations of civil and criminal action/case/proceeding.

The restyled rules minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or something else, depending on context. The potential for confusion is exacerbated by the fact the word "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending on which one the context and established interpretation make correct in each rule.

The restyled rules minimize the use of redundant "intensifiers." These are expressions that attempt to add emphasis, but instead state the obvious and create negative implications for other rules. The absence of intensifiers in the restyled rules does not change their substantive meaning. See, e.g., Rule 104(c) (omitting "in all cases"); Rule 602 (omitting "but need not"); Rule 611(b) (omitting "in the exercise of discretion").

The restyled rules also remove words and concepts that are outdated or redundant.

4. Rule Numbers

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions have been rearranged within some rules to achieve greater clarity and simplicity.

5. No Substantive Change

The Committee made special efforts to reject any purported style improvement that might result in a substantive change in the application of a rule. The Committee considered a change to be "substantive" if any of the following conditions were met:

a. Under the existing practice in any circuit, the change could lead to a different result on a question of admissibility (e.g., a change that requires a court to provide either a less or more stringent standard in evaluating the admissibility of particular evidence);

b. Under the existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made (e.g., a change in the time in which an objection must be made, or a change in whether a court must hold a hearing on an admissibility question);

c. The change would restructure a rule in a way that would alter the approach that courts and litigants have used to think about, and argue about, questions of admissibility (e.g., merging Rules 104(a) and 104(b) into a single subdivision); or

d. The amendment would change a "sacred phrase"--one that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations. Examples in the Evidence Rules include "unfair prejudice" and "truth of the matter asserted."

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 501, N.D.R.Ev., Privileges Recognized Only as Provided

The 500 series of North Dakota's Rules of Evidence is derived from the Uniform Rules of Evidence, not from the federal rules. The uniform rules were originally promulgated in 1974. There were extensive amendments in 1986, a minor amendment in 1988, and additional amendments in 1999. Thirty-eight states have adopted all or part of the uniform rules, and any reliance on those states' interpretations of the rules in a North Dakota case would stem from the "uniformity" of the comparative rules. Therefore, staff has not attempted to rewrite any of the 500 series rules based on the federal form and style guidelines; instead only minor changes, such as eliminating the use of "shall," are proposed. In addition, the more recent amendments to the uniform rules will be presented for the committee to consider.

Amendments are proposed to Rule 501 to replace the term "writing" in the rule with the term "record." The proposed amendments are attached. This amendment is intended to account for electronic records and documents and is based on the 1999 amendment to Uniform Rule 501. A copy of the latest version of the uniform rule is attached. The use of the term "record" in the amendments seems consistent with the proposed definition in Rule 101.

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the supreme court of this state, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or ~~writing~~ record; or

(4) prevent another from being a witness or disclosing any matter or producing any object or ~~writing~~ record.

EXPLANATORY NOTE

Rule 501 was amended, effective _____.

As a general principle, evidentiary privileges will be granted and applied in accordance with the provisions of these rules.

Certain statutory privileges, however, include matters beyond the proper scope of evidentiary rules, and others have been found to be in accordance with the philosophy of these rules. These statutes have been left undisturbed. Thus, for example, the privilege against self-incrimination (N.D.C.C. § 31-01-09), ~~and~~ the privilege relating to grand jury testimony (N.D.C.C. § 29-10.1-30) and the privileges afforded qualified school counselors (N.D.C.C. § 31-01-06.1) and ~~newsmen~~ journalists (N.D.C.C. § 31-01-06.2) all remain in effect under these rules.

Rule 501 was amended, effective _____, to replace the term "writing"

with the term "record" to account for electronic records and documents. The amendment is consistent with the 1999 amendments to the Uniform Rules of Evidence.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 2. Rule 501, Uniform Rules of Evidence (1974).

Statutes Affected:

Superseded: N.D.C.C. §§ 14-12.1-22, 31-01-02, 31-01-06(1), 31-01-06(2), 31-01-06(3).

Considered: N.D.C.C. §§ 10-23-10, 10-28-06, 12-59-04, 12.1-29-04, 14-02.1-07, 14-16-02, 14-17-19, 14-17-22, 19-16.1-10, 23-01-15, 23-02-23, 23-07-01.1, 23-25-06, 26-17.1-49, 27-05.1-14, 29-10.1-30, 31-01-06(4), 31-01-06.1, 31-01-06.2, 31-01-09, 37-18-11(6)(b), 50-25.1-11, 65-13-10.

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED.

Except as otherwise provided by constitution or statute or by these or other rules promulgated by [the Supreme Court of this State], no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or record; or

(4) prevent another from being a witness or disclosing any matter or producing any object or record.

Comment

The word "record" has been substituted for the word "writing." See the Comment to Rule 101.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 502, N.D.R.Ev., Husband-Wife Privilege

Proposed amendments to Rule 502 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments seem primarily intended to simplify the language of the rule and to improve its organization.

A substantive change is proposed to paragraph (a)(5) adding the language "or reasonably believed by the client to be employed" to assure that the client does not lose the benefit of the privilege in situations where a representative of a lawyer is not in the employment of the lawyer, but is nevertheless reasonably believed by the client to be employed by the lawyer.

Another proposed substantive change is to paragraph (d)(4), which would provide that there is no privilege under the rule "as to a communication necessary for a lawyer to defend in a legal proceeding a charge that the lawyer assisted the client in criminal or fraudulent conduct."

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) Definitions. ~~As used in~~ In this rule:

(1) "Client" means a person~~, including a public officer, corporation, association, or other organization or entity, either public or private, who is rendered~~ for whom a lawyer renders professional legal services ~~by a lawyer,~~ or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(3) "Lawyer' means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or country.

~~(2) "Representative of the client" means:~~

~~(A) A person who has authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or~~

~~(B) a person who is specifically authorized to provide the client's lawyer with, or receive from the lawyer, information relating to the legal services being rendered and that was acquired during the course of, or as a result of, such person's relationship with the client as principle, employee, officer or director, and is provided to, or received from, the lawyer for the purpose of obtaining for the client legal advice or other legal services of the lawyer.~~

~~(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or nation.~~

(4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

~~(4)~~ (5) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.

~~(5) A communication is "confidential" if not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.~~

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client~~, if the communication was made~~:

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer,

(2) between the lawyer and a representative of the lawyer,

(3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein,

(4) between representatives of the client or between the client and a representative of the client, or

(5) among lawyers and their representatives representing the same client.

(c) Who may claim the privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have the authority to claim the privilege, but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) ~~Furtherance of crime or fraud. If~~ if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known ~~to be~~ was a crime or fraud~~.~~;

(2) ~~Claimants through same deceased client. As~~ as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos~~.~~;

(3) ~~Breach of duty by a lawyer or client. As~~ as to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer~~.~~;

(4) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

~~(4) Document attested by a lawyer. As~~ (5) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness~~.~~;

~~(5) Joint clients. As~~ (6) as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients~~.~~; or

~~(6) Public officer or agency. As~~ (7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to ~~process~~ act uponthe claim or conduct a pending investigation, litigation, or proceeding in the public interest.

EXPLANATORY NOTE

Rule 502 was amended, effective March 1, 2001; _____.

~~The amendment to subdivision (a)(2)~~ Paragraph (a)(4) expands the definition of who constitutes a "representative of the client." The rule is no longer limited to the "control group," i.e. people who have authority to obtain professional legal services, or to act on the advice rendered on behalf of the client. See Upjohn Co. v. United States, 449 U.S. 383 (1981).

If the benefits this rule of privilege offers to the judicial system – that is, frank and

open disclosure of facts by a client – are to be realized, then a client needs to be assured that confidential communications made to those necessarily involved in the performance of legal services will not be disclosed. ~~Subdivision~~ Paragraph (a)(~~4~~ 5) achieves this by including, as privileged communications, those made to a lawyer's representative. As used in this rule, the term "employed" is not limited to those employed for compensation.

Paragraph (a)(5) was amended, effective _____, to include the language "or reasonably believed by the client to be employed" to assure that the client does not lose the benefit of the privilege in situations where a representative of a lawyer is not in the employment of the lawyer, but is nevertheless reasonably believed by the client to be employed by the lawyer at the time of the communication intended by the client to be confidential. While the test in this subdivision, as in paragraph (a)(3), is partially subjective, it is not totally subjective since there must be some reasonable basis for the belief.

The general rule of privilege stated in subdivision (b) is intended to encompass all communications necessarily made in the performance of legal services, not just those made between a client and his attorney.

Subdivision (c) states, generally, that this privilege may be claimed by the client or representative of the client and that a lawyer and representative of the lawyer are presumed to have authority to claim the privilege.

As to the exception stated in ~~subdivision~~ paragraph (d)(1), it has been observed that "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in

carrying out an illegal or fraudulent scheme." McCormick on Evidence § 95 at 199 (2d ed. 1972).

The privilege afforded by this rule is the client's; all other claimants have only derivative authority to assert the privilege. Thus, ~~subdivision~~ paragraph (d)(2) provides that, in an action to determine which party shall take through a deceased client, the action is not adverse to the deceased client and the justification for allowing the privilege is dissolved. In such cases, "The interest of the estate as well as the interest of the deceased client demand that the truth be determined." In re Graf's Estate, 119 N.W.2d 478 (N.D. 1963).

In cases of dispute between attorney and client, ~~subdivision~~ paragraph (d)(3) provides that the privilege does not apply. As to these parties, the communication could not have been intended to be confidential.

A new paragraph (d)(4) was added, effective _____, providing that there is no privilege under the rule "as to a communication necessary for a lawyer to defend in a legal proceeding a charge that the lawyer assisted the client in criminal or fraudulent conduct." Access to otherwise privileged communications seems essential if the lawyer is defending a charge of assisting a client in criminal or fraudulent conduct.

~~Subdivision~~ Paragraph (d)(~~4~~ 5) states that, as an attesting witness, an attorney may testify relevant to issues concerning the attested document, for as to these matters the attorney is not acting in his professional capacity. Consider also, in this regard, the "scrivener" exception to the privilege. O'Neill v. Murray, 6 Dak. 107, 50 N.W. 619 (1888); Bolyea v. First Presbyterian Church of Wilton, 196 N.W. 2d 149 (N.D. 1972).

It cannot be said that communications made between or among joint clients were intended to be confidential as to those clients. ~~Subdivision~~ Paragraph (d)(~~5~~ 6) removes the privilege in these instances.

~~Subdivision~~ Paragraph (d)(~~6~~ 7) provides, in the usual instance, that communications between a public agency and its attorneys are not privileged. Exception is made for those instances in which the court determines that disclosure will "seriously impair" the listed functions of the public agency.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; September 23-24, 1999, pages 6-7; January 29, 1976, pages 2, 3. Unif. R. Evid. 502 (1974).

Statutes Affected:

Superseded: N.D.C.C. § 31-01-06(1).

Cross Reference: N.D.R. Prof. Conduct 1.6 (Confidentiality of Information).

RULE 502. LAWYER-CLIENT PRIVILEGE.

(a) Definitions. In this rule:

(1) "Client" means a person for whom a lawyer renders professional legal services or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

(2) A communication is "confidential" if it is not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication.

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any State or country.

(4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

(5) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.

(b) General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to

the client:

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;

(2) between the lawyer and a representative of the lawyer;

(3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;

(4) between representatives of the client or between the client and a representative of the client; or

(5) among lawyers and their representatives representing the same client.

(c) Who may claim privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. A person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the client.

(d) Exceptions. There is no privilege under this rule:

(1) if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known was a crime or fraud;

(2) as to a communication relevant to an issue between parties who claim through the same deceased client, regardless of whether the claims are by testate or intestate succession or by transaction inter vivos;

(3) as to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer;

(4) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

(5) as to a communication relevant to an issue concerning an attested document to which the lawyer is an attesting witness;

(6) as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients; or

(7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to act upon the claim or conduct a pending investigation, litigation, or proceeding in the public interest.

Commen
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The language ", or reasonably believed by the client to be employed," is added in subdivision (a)(5) to assure that the client does not lose the benefit of the privilege in situations where a representative of a lawyer is not in the employment of the lawyer, but is nevertheless reasonably believed by the client to be employed

by the lawyer at the time of the communication intended by the client to be confidential. While the test in this subdivision, as in subdivision (a)(3), is partially subjective, it is not totally subjective since there must be some reasonable basis for the belief.

Rule 502 has also been amended to include a subdivision (d)(4) providing that there is no privilege under the rule "as to a communication necessary for a lawyer to defend in a legal proceeding a charge that the lawyer assisted the client in criminal or fraudulent conduct." Access to otherwise privileged communications seems essential if the lawyer is defending a charge of assisting a client in criminal or fraudulent conduct.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 503, N.D.R.Ev., Physician and Psychotherapist-Patient Privilege

Proposed amendments to Rule 503 based on the 1999 amendments to the Uniform Rules of Evidence are attached.

Rule 503 provides for the physician and psychotherapist privilege from testifying against a patient. The 1999 amendments add a new category, "mental-health provider" as another type of person privileged under Rule 503. The relationships between physician and mental-health provider and patient, privilege the physician or mental-health provider from having to testify in court on anything respecting that relationship. The definition of "mental health provider" seems to include "psychotherapist," which is the term currently used in the rule.

Mental health provider is obviously a broader term than psychotherapist. North Dakota law, however, would seem to support the proposed expansion. In particular, the addiction counselor privilege statutes from N.D.C.C. § 31-01-06.3 through § 31 -01-06.6, attached, seem to support a broader privilege. These were originally adopted in 1981, after the Rules of Evidence were enacted. It is possible that these statutes can be superseded if the expanded definition of "mental health provider" is included in Rule 503.

Five new exceptions to the privilege have been added at the end of the rule. The relate to situations when there is crime of fraud, when the patient has threatened self-hamr or harm to others, when there is a competency proceeding against the health professional, when there is an alleged breach of duty by the health professional, and when a mandatory disclosure

statute applies.

RULE 503. PHYSICIAN AND ~~PSYCHOTHERAPIST~~ MENTAL HEALTH PROVIDER-PATIENT PRIVILEGE

(a) Definitions. ~~As used in~~ In this rule:

(1) A communication is "confidential" if it is not intended to be disclosed to third persons, except those present to further the interest of the patient in the consultation, examination, or interview, those reasonably necessary for the transmission of the communication, and persons who are participating in the diagnosis and treatment of the patient under the direction of a physician or mental-health provider, including members of the patient's family.

(2) "Mental-health provider" means a person authorized, in any state or country, or reasonably believed by the patient to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs.

(~~1~~ 3) ~~A "patient" is a person~~ "Patient" means an individual who consults or is examined or interviewed by a physician or ~~psychotherapist~~ mental-health provider.

(~~2~~ 4) ~~A "physician" is~~ "Physician" means a person authorized ~~to~~ in any state or country, or reasonably believed by the patient to be authorized to practice medicine ~~in any state or nation, or reasonably believed by the patient so to be~~.

~~(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a~~

~~person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.~~

~~(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.~~

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of ~~his~~ the patient's physical, mental, or emotional condition, including addiction to alcohol or drugs ~~addiction~~, among ~~himself, his~~ the patient, the patient's physician or ~~psychotherapist~~ or mental health provider, and persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician or ~~psychotherapist~~ or mental health provider~~, including members of the patient's family~~.

(c) Who may claim the privilege. The privilege under this rule may be claimed by the patient, ~~his~~ the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or ~~psychotherapist~~ or mental health provider at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient.

(d) Exceptions. There is no privilege under this rule for communication:

(1) ~~Proceedings for hospitalization. There is no privilege under this rule for communications~~ relevant to an issue in proceedings to hospitalize the patient for mental illness~~, including alcohol or drug addiction~~, if the ~~psychotherapist~~ or mental health provider in the course of diagnosis or treatment has determined that the patient is in need of hospitalization~~.~~;

(2) ~~Examination by order of court. If the court orders an~~ made in the course of a court-ordered investigation or examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, ~~communications made in the course thereof are not privileged under this rule~~ with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise~~.~~;

(3) ~~Condition an element of claim or defense. There is no privilege under this rule as to a communication~~ relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which ~~he~~ the patient relies upon the condition as an element of ~~his~~ the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of ~~his~~ the party's claim or defense~~.~~;

(4) if the services of the physician or mental-health provider were sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, was a crime or fraud or mental or physical injury to the patient or another individual;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual;

(6) relevant to an issue in a proceeding challenging the competency of the physician or mental-health provider;

(7) relevant to a breach of duty by the physician or mental-health provider; or

(8) that is subject to a duty to disclose under rule or statute.

EXPLANATORY NOTE

Rule 503 was amended, effective _____.

Rule 503 is modeled after Rule 503 of the Uniform Rules of Evidence ~~(1974)~~. The rule retains the physician-patient privilege which has long been provided by statute in North Dakota. The rule also provides that certain communications made to a ~~psychotherapist or to a licensed psychologist~~ mental health provider are privileged.

Subdivision (a) contains the definitions of the parties to the privilege and of the term "confidential." It should be noted that members of a patient's family are expressly included in that group of people to whom communications may be made without a waiver of the privilege, provided, of course, that the communications otherwise meet the requirements of the rule.

Subdivision (a) was amended, effective _____, to replace the definition of "psychotherapist" with that of "mental health provider," a broader term that includes all professionals authorized by a state or country to provide mental health services. "Mental health provider" replaces "psychotherapist" throughout the rule.

As to the general rule of privilege contained in subdivision (b), note should be made of the fact that only those communications made "for the purpose of diagnosis or treatment"

are privileged. This is a narrower privilege than under prior law, N.D.C.C. § 31-01-06, which covered "any communication made by the patient in the course of professional employment."

Subdivision (c) provides that the privilege may be claimed by the personal representative of a deceased patient. In action where all parties are claiming through a deceased patient, the privilege has been held not to apply. Lembke v. Unke, 171 N.W.2d 837 (N.D. 1969).

~~Subdivision~~ Paragraph (d)(1) provides that there is no privilege for communications relevant to an issue in hospitalization proceedings. "Such an exception is essential if the psychiatrist is to perform his role which will, in some instances, require that he use the material supplied by the patient as a basis for hospitalization." Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn. Bar J. 175 at 187 (1962).

The exception applies only to communications ~~(1)~~ relevant to an issue ~~(2)~~ in proceedings to hospitalize the patient for mental illness. As to communications not relevant to the subject of commitment, and in actions other than commitment proceedings, the privilege applies.

In a court-ordered examination of a party or witness, the purpose usually is not for treatment or for diagnosis with a view toward treatment. No professional relationship is created and, thus, under ~~subdivision~~ paragraph (d)(2), the privilege does not attach to communications made in the course of those examinations.

Whenever a patient brings ~~his~~ physical or mental condition into issue as an element

of a claim or defense, there is no longer any reason to continue the privilege as the patient has voluntarily chosen to disclose certain aspects of the privileged communication. Nor is there justification for allowing the privilege to be used as a "sword," rather than a "shield." ~~Subdivision~~ Paragraph (d)(3) removes the privilege in these instances. ~~For a recent case holding that, under prior law, the privilege is waived by the initiation of a medical malpractice action, see~~ See Sagmiller v. Carlsen, 219 N.W.2d 885 (N.D. 1974).

Subdivision (d) was amended, effective _____, to add paragraphs (4)-(8), which provide additional exceptions to the privilege allowed under this rule.

Rule 503 was amended, effective _____, to follow the 1999 amendments to Rule 503 of the Uniform Rules of Evidence. The rule has been reorganized and gender specific language has been replaced with neutral language.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; January 29, 1976, page 5. Rule 503, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-06(3).

Considered: N.D.C.C. §§ 14-17-13, 23-07-01.1, 31-01-06.3, 31-01-06.4, 31-01-06.5, 31 -01-06.6, 37-18-11(6)(b), 50-25.1-10.

~~Rules:~~

~~Considered~~ Cross Reference: N.D.R.Civ.P. Rule 35~~(b)(2), NDRCivP~~ (Physical and Mental Examination).

RULE 503. [PSYCHOTHERAPIST] [PHYSICIAN AND PSYCHOTHERAPIST] [PHYSICIAN AND MENTAL-HEALTH PROVIDER] [MENTAL-HEALTH PROVIDER] – PATIENT PRIVILEGE.

(a) Definitions. In this rule:

(1) A communication is "confidential" if it is not intended to be disclosed to third persons, except those present to further the interest of the patient in the consultation, examination, or interview, those reasonably necessary for the transmission of the communication, and persons who are participating in the diagnosis and treatment of the patient under the direction of a [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider], including members of the patient's family.

[(2) "Mental-health provider" means a person authorized, in any State or country, or reasonably believed by the patient to be authorized, to engage in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs.]

[(3) "Patient" means an individual who consults or is examined or interviewed by a[psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider].]

[(4) "Physician" means a person authorized in any State or country, or reasonably believed by the patient to be authorized to practice medicine.]

[(5) "Psychotherapist" means a person authorized in any State or country, or reasonably believed by the patient to be authorized, to practice

medicine, while engaged in the diagnosis or treatment of a mental or emotional condition, including addiction to alcohol or drugs, or a person licensed or certified under the laws of any State or country, or reasonably believed by the patient to be licensed or certified, as a psychologist, while similarly engaged.]

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of the patient's [physical,] mental[,] or emotional condition, including addiction to alcohol or drugs, among the patient, the patient's [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider] and persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider].

(c) Who may claim the privilege. The privilege under this rule may be claimed by the patient, the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider] at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient.

(d) Exceptions. There is no privilege under this rule for a communication:

(1) relevant to an issue in proceedings to hospitalize the patient for mental illness, if the [psychotherapist] [physician or psychotherapist] [physician

or mental-health provider] [mental-health provider], in the course of diagnosis or treatment, has determined that the patient is in need of hospitalization;

(2) made in the course of a court-ordered investigation or examination of the [physical,] mental[,] or emotional condition of the patient, whether a party or a witness, with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise;

(3) relevant to an issue of the [physical,] mental[,] or emotional condition of the patient in any proceeding in which the patient relies upon the condition as an element of the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of the party's claim or defense;

(4) if the services of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider] were sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, was a crime or fraud or mental or physical injury to the patient or another individual;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual;

(6) relevant to an issue in a proceeding challenging the competency of the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider];

(7) relevant to a breach of duty by the [psychotherapist] [physician or psychotherapist] [physician or mental-health provider] [mental-health provider]; or

(8) that is subject to a duty to disclose under [statutory law].

Comment

The amendment of Rule 503 to incorporate a "mental health provider" privilege is an outgrowth of a belief that some form of a "licensed social worker" privilege should be incorporated in the Uniform Rules of Evidence to comport, at least in part, with the decision of the Supreme Court of the United States in *Jaffee v. Redmond*, 518 U.S. 1, 116 S.Ct. 1923, 135 L.Ed.2d 337 (1996), recognizing what may be generally described as a "social worker privilege" privilege. However, the amendment represents a narrower concept of the privilege than a broadly defined "social worker privilege" which would be fraught with interepretive difficulties and unnecessarily interfere with litigation in an evidentiary system based largely upon "the fundamental principle that "the public . . . has a right to every . . . [person's] evidence" and that testimonial privileges "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *See Trammel v. United States*, 445 U.S. 40, 50, 100 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980), together with *United States v. Nixon*, 418 U.S. 683, 710, 94 S.Ct. 3090, 3108, 41 L.Ed.2d 1039 (1974). This policy led the Conference to adopt a narrower form of the privilege denominated a "mental health provider" privilege protecting only communications relating to the "treatment of a mental or emotional condition, including alcohol or drug addiction" and incorporating the privilege in the physician and psychotherapist-patient privilege of Rule 503.

The exceptions to the privilege established by Rule 503 have also been broadened in subdivision (d). The exceptions have a generic application, not only to the mental health provider privilege, but also to the physician-patient or psychotherapist-patient privilege embraced within the rule as well. The exceptions to the "social worker privilege" recognized in the several states are numerous and varied. However, it is believed that most of the exceptions recognized in the several states will be subsumed under one or the other of the exceptions set forth in amended Rule 503(d), in particular, under subdivision (d)(8) providing that there is no privilege under the rule for a communication "that is subject to a duty to disclose under [statutory law]."

Finally, flexibility for the several states in the adoption of the rule is preserved through bracketing the provisions relating to the physician-patient, psychotherapist-patient and mental health provider privileges.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 504, N.D.R.Ev., Husband-Wife Privilege

Proposed amendments to Rule 504 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments seem primarily intended to simplify the language of the rule and to improve its organization.

A substantive change, which is incorporated throughout the proposed amendments to the rule, is that the privilege would be extended to civil cases. The original Uniform Rule 504 limited the privilege to criminal cases, and this is the approach the committee followed in drafting our Rule 504. The previous rule in North Dakota, however, was that marital privilege extended to both civil and criminal cases.

RULE 504. HUSBAND-WIFE PRIVILEGE

(a) ~~Definition~~. Confidential Communication. A communication is confidential if it is made privately by ~~any person~~ an individual to ~~his or her~~ the individual's spouse and is not intended for disclosure to any other person.

~~(b) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.~~

(b) Marital Communications. An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative if the individual is deceased.

~~(c) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.~~

(c) Spousal Testimony in Criminal Proceeding. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

(d) Exceptions. There is no privilege under this rule: ~~in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person, committed in the course of committing a crime against any of them.~~

(1) in any civil proceeding in which the spouses are adverse parties;

(2) in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged;

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse; or

(4) in any other proceeding, in the discretion of the court, if the interests of a minor child of either spouse may be adversely affected by invocation of the privilege.

EXPLANATORY NOTE

Rule 504 was amended, effective _____.

Rule 504 provides a husband-wife privilege, formerly provided by N.D.C.C. § 31-01-02. The rule ~~is substantially the same as~~ is derived from Rule 504 of the Uniform Rules of Evidence ~~(1974)~~.

~~By the terms of the definition contained in~~ Under subdivision (a), a communication is not "confidential" if it is intended to be disclosed to any person other than one's spouse. This would include one's children.

The intent with which a communication is made may determine whether it is confidential. If a communication is made privately, with the intent that it not be disclosed, it is confidential for the purposes of this rule even though it is overheard by an eavesdropper

to the conversation. ~~But cf. § 82, McCormick on Evidence (2d ed. 1972).~~ See State v. McMorrow, 314 N.W. 2d 287 (N.D. 1982).

~~A major alteration in the husband-wife privilege, as it has existed in North Dakota, is occasioned by subdivision (b), which applies only to an accused in a criminal proceeding. Under prior law, the privilege was applicable, with certain exceptions, to criminal and civil actions.~~

~~Given the limited application of this rule, there can be no claim of privilege made by representatives of the holder of the privilege. Under subdivision (b), only the accused, or the spouse on behalf of the accused, may claim the privilege.~~

The exceptions listed in subdivision (d), or at least the instances in which one spouse commits a crime against the other or a child of either, have been said to be based upon necessity, i.e., a necessity to avoid the injustice which would occur should the privilege be granted in these instances. This is, however, an inadequate explanation, for injustice may be said to occur in any case in which evidence is suppressed by privilege.

The real basis for the exceptions, as Wigmore has cogently stated (VIII Wigmore on Evidence § 2239 (McNaughton rev. 1961)), is that in these instances the very reason for the privilege is lacking. The social policy behind the husband-wife privilege is to promote or, at least, to avoid disrupting marital harmony. In proceedings in which a spouse is accused on committing a crime against (1) the other, (2) a child of either, (3) a member of either household, or (4) a third person, in the course of committing a crime against any of them, it can hardly be said that allowing a spouse to testify against the other will disrupt an otherwise

compatible relationship. In those cases, the theoretical basis for the privilege should not be blindly followed to the needless detriment of the administration of justice.

Rule 504 was amended, effective _____, to incorporate the 1999 amendments to Rule 504 of the Uniform Rules of Evidence. Under the amendments, spousal privilege is extended to civil cases.

Sources: Joint Procedure Committee Minutes of _____; January 29, 1976, page 7. Rule 504, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-02.

Considered: N.D.C.C. §§ 12.1-29-04, 27-05.1-14.

RULE 504. SPOUSAL PRIVILEGE.

(a) Confidential communication. A communication is confidential if it is made privately by an individual to the individual's spouse and is not intended for disclosure to any other person.

(b) Marital communications. An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder's guardian or conservator, or the individual's personal representative if the individual is deceased.

(c) Spousal testimony in criminal proceeding. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

(d) Exceptions. There is no privilege under this rule:

(1) in any civil proceeding in which the spouses are adverse parties;

(2) in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged,;

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either

spouse; or

(4) in any other proceeding, in the discretion of the court, if the interests of a minor child of either spouse may be adversely affected by invocation of the privilege.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 505, N.D.R.Ev., Religious Privilege

Proposed amendments to Rule 505 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments seem primarily intended to simplify the language of the rule and to remove gender-specific references.

RULE 505. RELIGIOUS PRIVILEGE

(a) Definitions. ~~As used in~~ In this rule:

(1) ~~A "clergyman" is~~ "Cleric" means a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting ~~him~~ the cleric.

(2) A communication is "confidential" if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. ~~A person~~ An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the ~~person~~ individual to a ~~clergyman~~ cleric in ~~his~~ the cleric's professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege under this rule may be claimed by ~~the person, by his~~ an individual or the individual's guardian or conservator, or ~~by his~~ the individual's personal representative if ~~he~~ the individual is deceased. The ~~person~~ individual who was the ~~clergyman~~ cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

EXPLANATORY NOTE

Rule 505 was amended, effective _____.

Rule 505 ~~follows the language of~~ is based on Rule 505 of the Uniform Rules of Evidence ~~(1974)~~. It provides the privilege that has been traditionally termed the "priest-

penitent" privilege, although it does so in a form that gives the privilege a somewhat wider scope.

Originally, this privilege was granted only to penitents and priests, and then only if the communication was made in confession, an institution of the Catholic Church which is cloaked with absolute secrecy. Gradually, the application of the privilege was broadened; before the promulgation of this rule, North Dakota statutory law protected communications made to a "clergyman or priest," but only if the communications were made in "confession."

~~Subdivision~~ Paragraph (a)(1) makes it clear that the privilege applies not only to certain named members of the clergy, but also to "other similar functionar(ies) of a religious organization." It will be the function of the courts to determine whether, in a given case, the status of the spiritual adviser is such that invocation of the privilege is warranted.

Under ~~subdivision~~ paragraph (a)(2), a communication may be ~~deemed~~ considered confidential even though other persons are present, but only if the person's presence is necessary to further the purpose of the communication.

The general rule of privilege contained in subdivision (b) protects from disclosure communications made to a ~~clergyman~~ cleric acting in a "~~in his~~ professional character as spiritual adviser." Thus, although the privilege is no longer confined to the confessional, it must be made to a ~~clergyman~~ cleric acting in ~~his~~ a professional capacity.

In keeping with the belief that there may be occasions in which it is appropriate for a guardian or personal representative to claim a privilege, subdivision (c) provides for these parties to make the claim on behalf of the holder. The ~~clergyman~~ cleric may, of course, claim

the privilege on behalf of the communicant.

Rule 505 was amended, effective _____, to follow the 1999 amendments to Uniform Rule of Evidence 505, replacing gender specific language with neutral language. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 7. Rule 505, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-06(2).

RULE 505. RELIGIOUS PRIVILEGE.

(a) Definitions. In this rule:

(1) "Cleric" means a minister, priest, rabbi, accredited Christian Science Practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the individual consulting the cleric.

(2) A communication is "confidential" if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the individual to a cleric in the cleric's professional capacity as spiritual adviser.

(c) Who may claim the privilege. The privilege under this rule may be claimed by an individual or the individual's guardian or conservator, or the individual's personal representative if the individual is deceased. The individual who was the cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 506, N.D.R.Ev., Political Vote

Proposed amendments to Rule 506 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments seem primarily intended to simplify the language of the rule and to remove gender-specific references.

Under the proposal, the phrase "or determines that disclosure should be compelled under the election laws of the state" would be added to subdivision (b) of the rule. Similar language was contained in the 1974 version of the Uniform Rule that the committee considered. The January 1976 minutes show that the committee decided not to include this language, even though the explanatory note was not amended and reads as if this language was included in the rule. If the committee decides not to include this language in the rule, the explanatory note will need to be amended.

RULE 506. POLITICAL VOTE

(a) General rule of privilege. ~~Every person~~ An individual has a privilege to refuse to disclose the tenor of ~~his~~ the individual's vote at a political election conducted by secret ballot.

(b) Exceptions. The privilege under N.D.R.Ev. 506(a) does not apply if the court finds that the vote was cast illegally or determines that disclosure should be compelled under the election laws of the state.

EXPLANATORY NOTE

Rule 506 was amended, effective _____.

Rule 506 is taken from the Uniform Rules of Evidence ~~(1974)~~ and promotes the right of secrecy of the ballot which is secured by Article 2, § ~~129~~ 1 of the Constitution of North Dakota.

Subdivision (a)~~(1)~~ states the general rule of privilege. Because the privilege to refuse to disclose the tenor of a secret ballot confers a benefit to the institutions of government as well as to the individual elector, it has been argued that, as a matter of public policy, a party to litigation should be allowed to claim error if the privilege is denied. See, e.g., the dissenting opinion of Christianson, C.J., in Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134 at 142 (1937).

Despite this argument, it has generally been accepted that the rule is one of personal privilege, rather than one of exclusion. The distinction is material: As a personal privilege,

the protection conferred may be waived by the holder; furthermore, it may be claimed only by the elector. Rule 506 follows the generally accepted theory and grants a personal privilege to refuse to disclose the tenor of one's ballot. This is in accord with the case law of North Dakota. See Wehrung v. Ideal School District No. 10, 78 N.W.2d 68 (N.D. 1956), Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134 (1937).

Of course, if the privilege is erroneously granted, the adverse party may object in ~~his~~ the capacity as a litigant, but this is a claim apart from those made by the holder of the privilege.

Subdivision (b) states that if the vote was cast illegally, or if the court finds that disclosure is proper pursuant to the election laws of this state, then this privilege does not apply. This reaffirms the practice that has been developed and followed in this State. See Torkelson v. Byrne, supra.

Rule 506 was amended, effective _____, to follow the 1999 amendments to Uniform Rule of Evidence 506, replacing gender specific language with neutral language.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 7. Rule 506, Uniform Rules of Evidence ~~(1974)~~.

RULE 506. POLITICAL VOTE.

(a) General rule of privilege. An individual has a privilege to refuse to disclose the tenor of the individual's vote at a political election conducted by secret ballot.

(b) Exceptions. The privilege under subdivision (a) does not apply if the court finds that the vote was cast illegally or determines that disclosure should be compelled pursuant to [the election laws of the State].

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 507, N.D.R.Ev., Trade Secrets

Proposed amendments to Rule 507 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments seem primarily intended to simplify the language of the rule and to remove gender-specific references.

The amendments to this rule replace gender-specific references with "person" while "individual" is used in other amended Uniform Rules. This suggests that a corporate "person" could take advantage of this privilege, while it would be barred from relying on the religious or political vote privileges, for example.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by ~~him~~ the person or ~~his~~ the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by ~~him~~ the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court ~~shall~~ must take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

EXPLANATORY NOTE

Rule 507 was amended, effective _____.

Rule 507 is an adoption of its counterpart in the Uniform Rules of Evidence ~~(1974)~~. It provides a limited privilege to protect from disclosure that group of confidential facts necessary to the internal operation of a business entity.

The instances in which the invocation of this privilege is justified are few, given the comprehensive application of public registration, patent and copyright laws and given the nature of the lawsuits in which the privilege is likely to be asserted. There is no need to invoke the privilege in those cases in which public registration laws provide adequate protection of ideas or products; the privilege should not be allowed in those cases in which knowledge of business practices is essential to the determination of relevant issues being tried, for example, in cases involving unfair trade practices.

Therefore, the rule provides that the privilege may be claimed, but only "if the

allowance of the privilege will not tend to conceal fraud or otherwise work injustice." In so framing this rule of privilege, the admonition of Dean Wigmore is heeded:

" * * * the occasional necessity of recognizing it (a trade secrets privilege) should not blind us to the danger of such a measure, or entice us into an unqualified sanction for such a demand." 8 Wigmore on Evidence § 2212(3) at 155 (McNaughton Rev. 1961).

Once the decision to require disclosure is made by the trial judge, the ultimate sentence of this rule gives the judge freedom to direct disclosure in a manner that recognizes the interest of the holder of the privilege and balances this interest against the interests of the parties and of justice. The rule does not prescribe any certain method to be utilized; the matter is one within the trial judge's discretion. It would seem that the variety of interests might often be served through the use of in camera disclosures in the presence of only those to whom the information is necessary to the conducting of the trial.

Rule 507 was amended, effective _____, to follow the 1999 amendments to Uniform Rule of Evidence 507, replacing gender specific language with neutral language. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 7. Rule 507, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Considered: N.D.C.C. §§ 19-16.1-10, 23-25-06.

~~Rules:~~

~~Considered:~~ Cross Reference: N.D.R.Civ.P. ~~Rule~~ 26~~(c)(7), NDRCivP~~ (General

Provisions Governing Discovery).

RULE 507. TRADE SECRETS. A person has a privilege, which may be claimed by the person or the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court shall take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 508, N.D.R.Ev., Secrets of State and Other Official Information; Governmental Privileges

Proposed amendments to Rule 508 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments add titles to the subdivisions.

The explanatory note to this rule is quite expansive, perhaps reflecting the fact that Watergate was a current event when the rule was drafted and approved.

RULE 508. SECRETS OF STATE AND OTHER OFFICIAL INFORMATION; GOVERNMENTAL PRIVILEGES

(a) Claim of privilege under law of United States. If the law of the United States creates a governmental privilege that the courts of this ~~State~~ state must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) Privileges created by laws of state. No other governmental privilege is recognized except as provided in N.D.R.Ev. 508(a) or created by the constitution ~~or~~, statutes or rules of this state.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court ~~shall~~ must make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

EXPLANATORY NOTE

Rule 508 was amended, effective _____.

Rule 508 is taken from the Uniform Rules of Evidence ~~(1974)~~. The rule does not create a governmental privilege, but rather recognizes and incorporates such privileges as have been, or may be, provided by the laws of the United States or of North Dakota.

Subdivision (a) provides that privileges created by federal law, which must be

recognized by state courts, may be claimed in North Dakota in the manner provided by federal law.

Of the federal privileges which must be recognized in North Dakota, the one of most importance to the law of evidence is that commonly known as the "executive privilege." This is not a general privilege on the part of executive officials to refuse to testify; that privilege does not exist, for, as Wigmore has stated of the chief executive of a state: "His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice (to give evidence)." 8 Wigmore on Evidence § 2370 at 748 (McNaughton Rev. 1961). Rather, the application of the privilege is limited to two distinct instances: (1) secrets of state, which include military secrets and matters of national security; and (2) official communications, which encompass other matters and are privileged in certain instances because of the confidentiality necessary to the operation of a co-equal branch of government.

The privilege protecting secrets of ~~State~~ state is one "well established in the law of evidence." United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953). It is in this area that the greatest deference is given to the executive.

The privilege protecting official, confidential communications is somewhat more amorphous. Clearly, it applies to the confidential communications of the President and his close advisers, and as to these, at least, is said to have "constitutional underpinnings." United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). And yet, even at this level, the claim of confidentiality does not afford the protection that encloses secrets of

~~State~~ state. There are instances in which the privilege must yield:

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality, it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specified need for evidence in a pending criminal trial." United States v. Nixon, supra, 418 U.S. 713.

The holding of the Nixon case was expressly limited to evidence for which a specified need in a criminal trial could be shown. What the decision would be in cases in which evidence was sought for use in a civil trial, or in cases in which lesser officials were involved, remains an open question. It may be stated with assurance, however, that the decision will be reached by balancing conflicting interests rather than by application of an absolute privilege.

The ultimate phrase of subdivision (a) provides that "the privilege may be claimed as provided by the law of the United States." This confronts the North Dakota courts with an attendant problem which has long troubled the federal judiciary: To what extent is the trial judge involved in the determination of whether certain information is privileged? As a basic premise, it may be stated that the courts have not departed from the philosophy inherent in Chief Justice Marshall's statement that "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch, 137, 177 (1803). This is certainly true with respect to communications claimed to be privileged on the basis

of confidentiality. In these cases it is appropriate for the trial judge to review, in camera, the information asserted to be privileged, and to excise and protect from disclosure those portions deserving of privilege. United States v. Nixon, supra.

There may be cases, however, in dealing with secrets of state, in which the information claimed to be privileged is so sensitive that even review of the information by a judge alone, in camera, would be inappropriate. United States v. Reynolds, supra. In those cases, the trial judge must decide the issue without the benefit of viewing the information itself.

If the court is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged," the privilege should be granted without further inquiry. United States v. Reynolds, supra, at 10.

If the court decides that the privilege does not apply, any order requiring disclosure should allow for appeal to be taken so as to avoid possible injustice.

Subdivision (b) provides that the only privileges that will be recognized, other than those of federal origin, are those created by the North Dakota Constitution or by North Dakota statutes.

The North Dakota Constitution, like its federal counterpart, contains no provision for an executive privilege. Presumably, however, the "constitutional underpinnings" of the privilege (constitutional separation of powers and the implied power to carry out enumerated duties) which were recognized on the federal level in United States v. Nixon, supra, could

be said to be present under North Dakota laws. The North Dakota Constitution does provide for a limited legislative privilege in Article 4, § ~~42~~ 15, which is known as the "speech and debate" clause. This provision, which operates as more of a means of insulating legislators from substantive liability than as an evidentiary privilege, states that: "~~For words used in any speech or debate in either house, they (the legislators) shall not be questioned in any place~~ Members of th legislative assembly may not be questioned in any other place for any words used in a speech or debate in legislative proceedings."

By statute in North Dakota, a public officer "cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure." N.D.C.C. § 31-01-06(4). ~~Although this statute has not been judicially construed in North Dakota, statutes~~ Statutes of similar wording have been said to create a privilege for "official information," those confidential communications made in the course of governmental operations which do not qualify as secrets of state. 8 Wigmore on Evidence § 2378 (McNaughton Rev. 1961).

In addition to the general privilege of N.D.C.C. § 31-01-06(4), the North Dakota legislature has shielded certain specific information from disclosure. For example, as to motor vehicle accident reports, it is stated in N.D.C.C. § 39-08-14(3): "No written reports or written information mentioned in this section shall be used as evidence in any trial, civil or criminal . . . . " In this and other "secrecy statutes," the legislature has made an express determination that the candor and accuracy of official reports which is gained by making those reports confidential outweighs the assistance to judicial proceedings disclosure might

bring.

The privileges these statutes provide remain undisturbed under this rule.

Subdivision (c) directs the trial judge, in cases in which a sustained claim of privilege deprives a party of material evidence, to "make any further orders the interests of justice require. . . ." The balance of the subdivision lists, by way of example and not of limitation, some devices which may be involved. The particular order issued would depend, inter alia, upon the nature of the case and the prejudice to a party occasioned by the exclusion of evidence. As stated in the Advisory Committee's Note to Federal Rule 509 (the Secrets of State rule which was deleted prior to passage of the Federal Rules):

"Reference to other types of cases serves to illustrate the variety of situations which may arise and the impossibility of evolving a single formula to be applied automatically to all of them. The privileged materials may be the statement of government witness, as under the Jencks statute, which provides that, if the government elects not to produce the statement, the judge is to strike the testimony of the witness, or that he may declare a mistrial if the interests of justice so require. 18 U.S.C. § 3500(d). Or the privileged materials may disclose a possible basis for applying pressure upon witnesses. United States v. Beekman, 155 F.2d 580 (2d Cir. 1946). Or they may bear directly upon a substantive element of a criminal case, requiring dismissal in the event of a successful claim of privilege. United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); and see United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953). Or they may relate to an element of a plaintiff's claim against the government, with the decision indicating unwillingness to allow the government's

claim of privilege for secrets of state to be used as an offensive weapon against it. United States v. Reynolds, supra; Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551(D. Md. 1956.) "

As may be seen, the parties to a lawsuit and their roles as plaintiff or defendant will have an effect on the question of what remedial order, if any, should be issued.

In cases in which the government is a party, the considerations involved in issuing a remedial order under this section will vary according to the government's position in the case. In a criminal prosecution, exclusion of privileged evidence may warrant dismissal, for the government should not be allowed to convict a defendant without full disclosure of potentially exculpatory evidence. In a case brought against the government, the claim of privilege should not operate as an "offensive weapon" against the government.

In cases in which the government is not a party, the considerations upon which a remedial order is based may be less clear. In fact, under the proposed federal rule, no remedial order could issue in cases in which the government was not a party. See Rule 509, Deleted and Superseded Materials, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975). Despite the argument made under the proposed federal rule that the excluded evidence should be treated as simply unavailable, as in the case of a successful claim of the self-incrimination privilege, it is felt that there is no reason to withhold a remedy if one can be reasonably afforded. However, this subdivision should be applied with caution in those cases in which the government is not a party; in attempting to remedy the injustice worked upon the proponent of such evidence, the rights of the opposing party should not be made to

suffer unduly.

Rule 508 was amended, effective _____, to follow the 1999 amendments to Uniform Rule of Evidence 508, adding titles to subdivisions (a) and (b).

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 9. Rule 508, Uniform Rules of Evidence (1974).

RULE 508. SECRETS OF STATE AND OTHER OFFICIAL INFORMATION; GOVERNMENTAL PRIVILEGES.

(a) Claim of privilege under law of United States. If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) Privileges created by laws of State. No governmental privilege is recognized except as provided in subdivision (a) or created by the constitution, statutes, or rules of this State.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 509, N.D.R.Ev., Identity of Informer

Proposed amendments to Rule 509 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments seem primarily intended to simplify the language of the rule and to improve its organization. "Person" is changed to "individual" throughout the rule.

Subdivision (e) details the extent of the privilege under Rule 509 when an informer is relied on to establish the legality of the means by which evidence was obtained. This subdivision was derived from the rules of privilege that were proposed for, but never enacted as part of, the Federal Rules of Evidence. It is not part of the Uniform Rule.

RULE 509. IDENTITY OF INFORMER

(a) Rule of privilege. The United States or a state ~~or subdivision thereof~~ has a privilege to refuse to disclose the identity of ~~a person~~ an individual who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege under this rule may be claimed by an appropriate representative of the ~~public entity~~ government to which the information was furnished.

(c) Exceptions~~:~~.

~~(1) Voluntary disclosure; informer a witness. No~~ There is no privilege ~~exists~~ under this rule if the identity of the informer or ~~his~~ the informer's interest in the subject matter of ~~his~~ the informer's communication has been disclosed ~~to those~~ by a holder of the privilege or by the informer's own action to persons who would have cause to resent the communication ~~by a holder of the privilege or by the informer's own action,~~ or if the informer appears as a witness for the government.

~~(2) Testimony on relevant issue~~ (d) Procedures. If it appears ~~in the case~~ that an informer may be able to give testimony relevant to ~~any~~ an issue in a criminal case, or to a fair determination of a material issue on the merits in a civil case to which ~~a public entity~~ the government is a party, and the informed ~~public entity~~ government invokes the privilege, the court ~~shall~~ must give the ~~public entity~~ government an opportunity to show in ~~camera~~

chambers facts relevant to determining whether the informer can, in fact, supply ~~that~~ the testimony. The showing will ordinarily be ~~in the form of affidavits~~ by affidavit, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the ~~public entity~~ government elects not to disclose ~~his~~ the informer's identity, in criminal cases the court on motion of the defendant or on its own motion ~~shall~~ must grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of ~~him~~ the defendant, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court ~~shall~~ must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents ~~shall~~ may not otherwise be revealed without consent of the informed ~~public entity~~ government. All counsel and parties ~~are permitted to~~ may be present at every stage of ~~proceedings~~ a proceeding under this subdivision except a showing in ~~camera at which~~ chambers, if the court has determined that no counsel or party ~~shall be permitted to~~ may be present.

~~(3)~~ (e) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court ~~shall~~

must, on request of the government, direct that the disclosure be made in ~~camera~~ chambers. All counsel and parties concerned with the issue of legality ~~shall~~ must be permitted to be present at every stage of ~~proceedings~~ a proceeding under this subdivision except a disclosure in ~~camera~~ chambers, at which no counsel or party ~~shall be permitted to~~ may be present. If disclosure of the identity of the informer is made in ~~camera~~ chambers, the record ~~thereof~~ ~~shall~~ must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents ~~shall~~ may not otherwise be revealed without consent of the government.

EXPLANATORY NOTE

Rule 509 was amended, effective _____;

Rule 509~~,~~ is modeled after Rule 509 of the Uniform Rules of Evidence ~~(1974),~~ and protects, in certain instances, the identity of one who furnishes information that aids the government in the investigation of violations of the law. The need for a privilege of this nature is clear. As McCormick has stated:

"Informers are shy and timorous folk, whether they are undercover agents of the police or merely citizens stepping forward with information about violations of law, and if their names were subject to be readily revealed, this enormously important aid to law enforcement would be almost cut off." McCormick on Evidence § 111 at 236 (2d ed. 1972).

Thus, subdivision (a) grants a privilege that protects the identity of an informer. Although often called the "informer's privilege," the true holder of the privilege is the governmental entity to which the information is furnished. The privilege protects only the

identity of the informer and not ~~his~~ the informer's communication, except to the extent that protection of the contents of the communication is necessary to preserve the informer's anonymity. 8 Wigmore on Evidence § 2374 at 765 (McNaughton Rev. 1961).

Invocation of the privilege is most likely to occur in the context of a criminal proceeding, but the privilege is not limited to those proceedings. Prosecutions of civil violations and investigations by legislative bodies may include the use of informers and the possibility of reprisal against them. The privilege is extended to protect the informer's identity in those situations.

Subdivision (b) provides that the privilege may be claimed by "an appropriate representative" of the entity to which the information was given. Normally, this representative will be counsel. However, in cases in which neither the United States nor the State of North Dakota is a party, other representatives should be accepted as proper claimants. See Advisory Committee's Note to Rule 510, Deleted and Superseded Material, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).

Subdivision (c)~~(1)~~ lists two instances in which the privilege does not apply. The first is whenever the identity of the informer or ~~his~~ the informer's interest in the subject matter of the communication "has been disclosed to those "who would have cause to resent the communication." This language, taken from the landmark opinion of Roviaro v. United States, 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), is designed to remove the privilege in those cases in which the identity of an informer is already known to those from whom it was to be shielded, and, at the same time, to leave the privilege intact whenever disclosure is otherwise made, e.g., to other enforcement authorities.

Disclosure may be made by the government or by the informer ~~himself~~. Allowing the informer, who is not the holder of the privilege, essentially to "waive" its protection is a minor departure from the law of privileges for, normally, only a holder or ~~his~~ representative may effect a waiver. The nature of this particular privilege and the practical necessities involved dictate this result; the government could not reasonably restrain an informer's desire to disclose ~~his~~ the informer's identity.

The second exception stated in ~~this subsection~~ subdivision (c) is that the privilege is inapplicable whenever the informer appears as a witness for the government. This exception is of constitutional origin. A defendant may not be denied his rights to confrontation of witnesses and to due process of law on the basis of an informer's privilege. Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).

Subdivision ~~(c)(2)~~ (d) states that the general rule of privilege does not apply whenever it appears that the informer may be able to give testimony relevant to "any issue in a criminal case" or to "a fair determination of a material issue on the merits in a civil case." The doctrine supporting the exception is essentially one of fairness. In each case, or at least in criminal prosecutions, a balancing of the conflicting interests must be made:

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Roviaro v. United States, supra, 353 U.S. 62.

In Roviaro, the informer was also a participant in the crime. Since that decision, participation in the crime has been deemed to be a critical factor in the decision of whether disclosure of an informer's identity should be required. See United States v. Clark, 482 F.2d 103 (5th Cir. 1973). See generally, the cases collected in 2 Wright, Federal Practice and Procedure, § 406 (1969). An informer's participation in a crime will be a factor to consider under this rule, not in and of itself, but as it bears upon the relevancy and significance of the informer's potential testimony.

If it appears that an informer may be able to give relevant testimony and the government, when informed of this fact, invokes the privilege, this rule provides the procedure by which the validity of the claim is to be tested. The court shall review, in ~~camera~~ chambers, the facts relevant to determining whether relevant information may be obtainable from the informer. This limited intrusion into what may be privileged material is deemed to be the most equitable manner of balancing the conflicting interests involved.

If the court finds that disclosure is in order and the government refuses to reveal the informer's identity, the court, in its discretion, may grant appropriate relief, as delineated in the rule.

Subdivision (e) details the extent of the privilege under this rule when an informer is relied upon to establish the legality of the means by which evidence was obtained. This subdivision was derived from the rules of privilege that were proposed for, but never enacted as part of, the Federal Rules of Evidence.

Rule 509 was amended, effective _____, to follow the 1999 amendments to Uniform Rule of Evidence 509. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ of _____ ; January 29, 1976, pages 9, 10. Rule 509, Uniform Rules of Evidence ~~(1974)~~; Proposed Rule 509(c)(3), Federal Rules of Evidence (not enacted).

RULE 509. IDENTITY OF INFORMER.

(a) Rule of privilege. The United States or a State has a privilege to refuse to disclose the identity of an individual who has furnished information relating to or assisted in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege under this rule may be claimed by an appropriate representative of the government to which the information was furnished.

(c) Exceptions. There is no privilege under this rule if the identity of the informer or the informer's interest in the subject matter of the informer's communication has been disclosed by a holder of the privilege or by the informer's own action to persons who would have cause to resent the communication or if the informer appears as a witness for the government.

(d) Procedures. If it appears that an informer may be able to give testimony relevant to an issue in a criminal case, or to a fair determination of a material issue on the merits in a civil case to which the government is a party, and the informed government invokes the privilege, the court shall give the government an opportunity to show in chambers facts relevant to whether the informer can, in fact, supply the testimony. The showing ordinarily will be by affidavit, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a

reasonable probability that the informer can give the testimony, and the government elects not to disclose the informer's identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of the defendant, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may issue any order the interests of justice require. Evidence submitted to the court must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents may not otherwise be revealed without consent of the informed government. All counsel and parties may be present at every stage of a proceeding under this subdivision except a showing in chambers, if the court has determined that no counsel or party may be present.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 510, N.D.R.Ev., Waiver of Privilege

Proposed amendments to Rule 510 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments combine the content of current rules 510 and 511 to create a single rule on waiver of privilege.

RULE 510. WAIVER OF PRIVILEGE ~~BY VOLUNTARY DISCLOSURE~~

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure is ~~conferred by rule or by law~~ waives the privilege if ~~he~~ the person or ~~his~~ the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged or if N.D.R.Civ.P. 26 (b)(6 5)(B) applies.

(b) Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege.

EXPLANATORY NOTE

Rule 510 was amended, effective March 1, 2008; _____.

~~This rule~~ Subdivision (a) merely states in express terms that which is inherent in the preceding rules of privilege. The rules of privilege are designed to foster certain relationships or policies that are deemed important to our society. The rules seek to accomplish this end by enveloping selected communications with the necessary degree of confidentiality.

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

sense approach. If the substance of the privileged material is disclosed, the privilege should be revoked. Otherwise, it should remain intact.

~~Rule 510~~ Subdivision (a) was amended, effective March 1, 2008, to recognize that N.D.R.Civ.P. 26(b)(~~2~~ 5)(B)'s safe harbor provision protects claims of privilege under some circumstances when information is voluntarily produced in the course of discovery.

Under subdivision (a), a voluntary disclosure of privileged material operates as a waiver of a given privilege. Subdivision (b) provides for a contrary result whenever the disclosure is erroneously compelled or is made without opportunity by the holder to claim the privilege.

Subdivision (b) will most often operate as a rule of exclusion, i.e., it will render inadmissible evidence of the prior disclosure in a civil or criminal action to which the holder of the privilege is a party. But, the rule does more than prohibit the use of such evidence against the holder of the privilege, it provides that the privilege shall remain intact, to be treated as originally granted. Thus, the holder, as a witness, may claim the privilege, in an action to which he is not a party. Cf. The proposed Federal Rule 512, Deleted and Superseded Materials, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).

The need for a protective rule of this type is clear with respect to disclosures erroneously compelled. Whether the compulsion is judicial or comes from some other authority, the rules of privilege should not be left open to circumvention by their very breach.

The second basis for exclusion is meant to deal with those instances in which disclosure is made by someone other than the holder of the privilege. This would include

disclosure by a recipient of privileged information (e.g. a lawyer), one allowed to transmit privileged information (e.g., a lawyer's representative), or an eavesdropper, among others.

It may be argued that once disclosure by a third party is made, the need for confidentiality ceases and, therefore, the privilege should not be maintained. However, with the increasing number and sophistication of intrusions into individual privacy, it is necessary to guard jealously those confidential communications deemed of such social importance as to warrant being privileged. This provision will maximize the effect of a given privilege, although, as may be argued, it cannot totally repair a breach of confidentiality.

Rule 510 was amended, effective _____, to follow the 1999 amendments to Uniform Rule of Evidence 510. The amendments incorporate the content of former Rule 511 so that both the voluntary and involuntary waiver of a privilege can be addressed in one comprehensive rule. There is no intent to change any result in any ruling on evidence admissibility.

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

Statutes Affected:

Superseded: N.D.C.C. § 31-01-07.

RULE 510. WAIVER OF PRIVILEGE.

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure waives the privilege if the person or the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged.

(b) Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege.

Comment

Uniform Rule 510 has been amended to deal with both the voluntary and involuntary waiver of a privilege in one comprehensive rule. Existing Rule 511 has been deleted and Rule 512 has been renumbered as Rule 511. There is no change in the substance of either of the rules.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Rule 511, N.D.R.Ev., Comment Upon or Inference From Claim of Privilege; Instruction

Proposed amendments to Rule 511 based on the 1999 amendments to the Uniform Rules of Evidence are attached. The amendments delete the content of current rule 511 and replace it with the content of current Rule 512. The content of current rule 511 is transferred to Rule 510 and current Rule 512 would be deleted. Language changes are minimal.

RULE 511. ~~PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE~~ COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

~~A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.~~

(a) Comment or inference not permitted. A claim of privilege, whether in the present proceeding or upon a previous occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from the claim.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

EXPLANATORY NOTE

Rule 511 was amended, effective _____.

~~Under Rule 510, a voluntary disclosure of privileged material operates as a waiver of a given privilege. This rule provides for a contrary result whenever the disclosure is erroneously compelled or is made without opportunity by the holder to claim the privilege.~~

~~The rule will most often operate as a rule of exclusion, i.e., it will render inadmissible~~

~~evidence of the prior disclosure in a civil or criminal action to which the holder of the privilege is a party. But, the rule does more than prohibit the use of such evidence against the holder of the privilege, it provides that the privilege shall remain intact, to be treated as originally granted. Thus, the holder, as a witness, may claim the privilege, in an action to which he is not a party. Cf. The proposed Federal Rule 512, Deleted and Superseded Materials, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

~~The need for a protective rule of this type is clear with respect to disclosures erroneously compelled. Whether the compulsion is judicial or comes from some other authority, the rules of privilege should not be left open to circumvention by their very breach.~~

~~The second basis for exclusion is meant to deal with those instances in which disclosure is made by someone other than the holder of the privilege. This would include disclosure by a recipient of privileged information (e.g. a lawyer), one allowed to transmit privileged information (e.g., a lawyer's representative), or an eavesdropper, among others.~~

~~It may be argued that once disclosure by a third party is made, the need for confidentiality ceases and, therefore, the privilege should not be maintained. However, with the increasing number and sophistication of intrusions into individual privacy, it is necessary to guard jealously those confidential communications deemed of such social importance as to warrant being privileged. This provision will maximize the effect of a given privilege, although, as may be argued, it cannot totally repair a breach of confidentiality.~~

~~Sources: Joint Procedure Committee Minutes: January 29, 1976, page 12. Rule 511, Uniform Rules of Evidence (1974).~~

Effective _____, the previous content of Rule 511 was transferred to Rule 510 to create a single rule on waiver of privilege. Former Rule 512 was deleted and its content transferred to this rule.

Subdivision (a) states the general policy of these rules, which is that no comment shall be made upon, nor any inference drawn from, a claim of privilege. This area of the law of privileges is one of dispute, with some courts holding that an inference may be drawn from a claim of privilege, presumably on the basis that the suppression of relevant evidence by a party should be noticed and considered by a jury. See McCormick on Evidence § 76 (2d ed. 1972). That this argument has some merit is recognized; however, it is believed that the position taken in this rule is based upon more weighty considerations, the essence of which have been stated by Lord Chelmsford:

"'The exclusion of such (privileged) evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?' Wentworth v. Lloyd, 10 H.L.Cas. 589, 591 (1864)," quoted in McCormick on Evidence § 76 at 155, 156 (2d ed. 1972).

McCormick concludes his discussion of the subject by stating:

"It is submitted that the best solution is to recognize only privileges which are soundly based in policy and to accord those privileges the fullest protection." McCormick on Evidence, supra, at 156.

This is the approach taken by these rules, and the result is in accord with the case law of North Dakota. State v. Bell, 67 N.D. 382, 272 N.W. 334 (1937); Meyer v. Russell, 55 N.D. 546, 214 N.W. 857 (1927).

Subdivision (b) is an effort to further the announced policy of this rule by providing that claims of privilege should be made, where practicable, outside the hearing of the jury.

In most cases this will be easily accomplished, as it will often be known in advance of trial that a privilege will be claimed. (In this regard, note the case of State v. Bell, supra, in which the practice of forcing a holder to claim a privilege in the presence of the jury was, if not accepted, held not to constitute prejudicial error.)

Subdivision (c) provides that a party against whom the jury may draw an adverse inference from a claim of privilege may have, as a matter of right, an instruction that no inferences may be drawn. This is intended to provide a partial remedy in those instances in which disclosure to the jury of a claim of privilege cannot be reasonably avoided. The instruction may be requested by a party, whether the privilege is being claimed by him or by a witness, if the party will be the subject of an adverse inference arising from the claim of privilege.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 12. Rule 511, Uniform Rules of Evidence.

Statutes Affected:

Considered: N.D.C.C. § 29-21-11.

RULE 512. ~~COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE;~~ ~~INSTRUCTION~~ [TRANSFERRED]

~~(a) Comment or inference not permitted. The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not a proper subject of comment by court or counsel. No inference may be drawn therefrom.~~

~~(b) Claiming privilege without knowledge of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.~~

~~(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.~~

EXPLANATORY NOTE

The content of Rule 512 was transferred to Rule 511, effective _____.

~~Subdivision (a) states the general policy of these rules, which is that no comment shall be made upon, nor any inference drawn from, a claim of privilege. This area of the law of privileges is one of dispute, with some courts holding that an inference may be drawn from a claim of privilege, presumably on the basis that the suppression of relevant evidence by a party should be noticed and considered by a jury. See McCormick on Evidence § 76 (2d ed. 1972). That this argument has some merit is recognized; however, it is believed that the position taken in this rule is based upon more weighty considerations, the essence of which~~

have been stated by Lord Chelmsford:

" 'The exclusion of such (privileged) evidence is for the general interest of the community, and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?' Wentworth v. Lloyd, 10 H.L.Cas. 589, 591 (1864)," quoted in McCormick on Evidence § 76 at 155, 156 (2d ed. 1972).

McCormick concludes his discussion of the subject by stating:

"It is submitted that the best solution is to recognize only privileges which are soundly based in policy and to accord those privileges the fullest protection." McCormick on Evidence, supra, at 156.

This is the approach taken by these rules, and the result is in accord with the case law of North Dakota. State v. Bell, 67 N.D. 382, 272 N.W. 334 (1937); Meyer v. Russell, 55 N.D. 546, 214 N.W. 857 (1927).

Subdivision (b) is an effort to further the announced policy of this rule by providing that claims of privilege should be made, where practicable, outside the hearing of the jury.

In most cases this will be easily accomplished, as it will often be known in advance of trial that a privilege will be claimed. (In this regard, note the case of State v. Bell, supra, in which the practice of forcing a holder to claim a privilege in the presence of the jury was, if not accepted, held not to constitute prejudicial error.)

Subdivision (c) provides that a party against whom the jury may draw an adverse

~~inference from a claim of privilege may have, as a matter of right, an instruction that no inferences may be drawn. This is intended to provide a partial remedy in those instances in which disclosure to the jury of a claim of privilege cannot be reasonably avoided. The instruction may be requested by a party, whether the privilege is being claimed by him or by a witness, if the party will be the subject of an adverse inference arising from the claim of privilege.~~

~~Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 12. Rule 512, Uniform Rules of Evidence (1974).~~

~~Statutes Affected:~~

~~Considered: N.D.C.C. § 29-21-11.~~

RULE 511. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION.

(a) Comment or inference not permitted. A claim of privilege, whether in the present proceeding or upon a previous occasion, is not a proper subject of comment by judge or counsel. No inference may be drawn from the claim.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn therefrom.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 1101, N.D.R.Ev., Applicability of Rules

Form and style amendments to Rule 1101 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

A new subdivision (e) has been added to the rules to account for situations in which a court rule outside the Rules of Evidence may be relevant to the admission or rejection of evidence in a particular situation.

Reference to proceedings before "family court counselors" was deleted. The authorizing statute has been repealed.

N.D.C.C. § 14-17-09, repealed in 2005, authorized an informal pretrial hearing in a Uniform Parentage Act case. Rule 1101 excluded such hearings from the Rules of Evidence. Staff could locate no reference to such hearings in the current UPA, but the proposed amendments continue to exclude pretrial hearings under the UPA from the Rules of Evidence. Committee members currently practicing in these cases may be able to comment on whether continued exclusion under the rule is appropriate.

RULE 1101. APPLICABILITY OF RULES

(a) To Courts and Magistrates. These rules apply to all courts and magistrates of this state.

(b) To Cases and Proceedings ~~generally~~. These rules apply ~~generally to all~~ in:

(1) civil ~~actions~~ cases and proceedings,

(2) special proceedings, ~~and~~

(3) criminal ~~actions~~ cases and proceedings, and

(4) ~~to~~ contempt proceedings, except those in which the court may act summarily.

(c) Rules ~~of~~ on Privilege. The rules ~~with respect to privileges~~ on privilege apply ~~at~~ to all stages of ~~all actions, cases, and proceedings~~ a case or proceeding.

(d) ~~Rules inapplicable. The rules, other than those with respect to privileges,~~ Exceptions. These rules, except for those on privilege, do not apply ~~in~~ to the following ~~situations~~:

(1) ~~Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.~~ the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) ~~Grand jury. Proceedings before grand juries.~~ grand-jury proceedings; and

(3) miscellaneous proceedings~~:~~ such as:

~~Proceedings for~~ (A) extradition or rendition;

(B) issuing an arrest warrant, criminal summons, or search warrant;

(C) a preliminary ~~examinations~~ examination in a criminal ~~cases~~ case;

(D) sentencing~~;~~;

(E) ~~or~~ granting or revoking probation or parole; ~~issuance of warrants for arrest, criminal summonses, and search warrants; and~~

(F) ~~proceedings with respect to release on~~ considering whether to release on bail or otherwise~~;~~;

(G) detention hearings~~;~~;

(H) transfer and dispositional hearings in juvenile court~~;~~; and

(I) pretrial proceedings conducted in accordance N.D.C.C. ~~§ 14-17-09~~ ch. 14-20~~, and ch. 27-05.1~~.

(e) Other Rules. A rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

EXPLANATORY NOTE

Rule 1101 was amended, effective March 1, 1994; _____

This rule is patterned after Rule 1101 of the Federal Rules of Evidence. It was modified in committee by deleting reference to proceedings which are unique to the federal courts, and by adding pretrial proceedings under the Uniform Parentage Act, N.D.C.C. ~~§ 14-17-09~~ ch. 14-20~~; proceedings before family court counselors under N.D.C.C. ch. 27-05.1~~; detention hearings; juvenile court transfer hearings, and dispositional hearings in juvenile court to the list of miscellaneous proceedings exempted

from coverage by ~~subdivision~~ paragraph (d)(3). Dispositional hearings in juvenile court are the counterpart to sentencing of adults and require the same evidentiary treatment. A juvenile court transfer hearing is equivalent to a preliminary examination in a criminal case which has relaxed standards for admission of evidence.

~~Subdivision~~ Paragraph (d)(3) was amended, effective March 1, 1994, in response to the 1991 amendment to N.D.C.C. § 28-32-06, and Madison v. North Dakota Dep't of Transp., 503 N.W.2d 243 (N.D. 1993). The amendment deletes the provision making the Rules of Evidence inapplicable to administrative proceedings.

Subdivision (e) was added, effective _____, to account for situations in which a court rule outside the Rules of Evidence may exclude or admit evidence in a particular situation.

Rule 1101 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; October 30-31, 1980, pages 29-30; June 3, 1976, page 13; Rule 1101, Federal Rules of Evidence; Rule 1101, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 27-05.1, 27-20, 28-32, 29-10.1, 29-30, 29-30.1.

~~Rules:~~

~~Considered~~ Cross Reference: ~~Rules~~ N.D.R.Crim.P.4 (Arrest Warrant or Summons Upon Complaint), N.D.R.Crim.P. 5.1 (Initial Appearance Before the Magistrate), N.D.R.Crim.P. 32 (Sentencing and Judgment), N.D.R.Crim.P. 41 (Search and Seizure), N.D.R.Crim.P. 46 (Release from Custody), ~~NDRCrimP~~; ~~Rule~~ N.D.R.App.P. 9; ~~NDRAppP~~ (Release in Criminal Case).

FEDERAL RULES OF EVIDENCE
ARTICLE XI. MISCELLANEOUS RULES

Rule 1101. Applicability of the Rules

(a) To Courts and Judges. These rules apply to proceedings before:
- United States district courts;
- United States bankruptcy and magistrate judges;
- United States courts of appeals;
- the United States Court of Federal Claims; and
- the district courts of Guam, the Virgin Islands, and the Northern Mariana Islands.

(b) To Cases and Proceedings. These rules apply in:
- civil cases and proceedings, including bankruptcy, admiralty, and maritime cases;
- criminal cases and proceedings; and
- contempt proceedings, except those in which the court may act summarily.

(c) Rules on Privilege. The rules on privilege apply to all stages of a case or proceeding.

(d) Exceptions. These rules--except for those on privilege--do not apply to the following:
(1) the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;
(2) grand-jury proceedings; and
(3) miscellaneous proceedings such as:
- extradition or rendition;
- issuing an arrest warrant, criminal summons, or search warrant;
- a preliminary examination in a criminal case;
- sentencing;
- granting or revoking probation or supervised release; and
- considering whether to release on bail or otherwise.

(e) Other Statutes and Rules. A federal statute or a rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1947; Dec. 12, 1975, P.L. 94-149, § 1(14), 89 Stat. 806; Nov. 6, 1978, P.L. 95-598, Title II, §§ 251, 252, 92 Stat. 2673; Apr. 2, 1982, P.L. 97-164, Title I, Part A, § 142, 96 Stat. 45; March 2, 1987, eff. Oct. 1, 1987; April 25, 1988, eff. Nov. 1, 1988; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7075(c), 102 Stat. 4405; April 22, 1993, eff. Dec. 1, 1993; April 26, 2011, eff. Dec. 1, 2011.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1975. Act Dec. 12, 1975, in subsec. (e), substituted "admiralty" for "admirality".

1978. Act Nov. 6, 1978, P.L. 95-598, Title II, § 252, 92 Stat. 2673 (effective 10/1/79, as provided by § 402(c) of such Act, which appears as *11 USCS prec. § 101* note), in subsec. (a), deleted ", referees in bankruptcy," which followed "in these rules included United States magistrates" and in subsec. (b), substituted "title 11, United States Code" for "the Bankruptcy Act".

Section 252 of such act further (effective 4/1/84, as provided by § 402(b) of such Act, which appears as *11 USCS prec. § 101* note), amended subsec. (a) by inserting "the United States bankruptcy courts,".

1982. Act Apr. 2, 1982 (effective 10/1/82, as provided by § 402 of such Act, which appears as *28 USCS § 171* note), in subsec. (a), substituted "United States Claims Court" for "Court of Claims" and deleted "and commissioners of the Court of Claims" following "include United States magistrates".

1988. Act Nov. 18, 1988, in subsec. (a), substituted "rules" for "Rules" and "courts of appeals" for "Courts of Appeals".

Other provisions:

Notes of Advisory Committee on Rules. Subdivision (a). The various enabling acts contain differences in phraseology in their descriptions of the courts over which the Supreme Court's power to make rules of practice and procedure extends. The act concerning civil actions, as amended in 1966, refers to "the district courts * * * of the United States in civil actions, including admiralty and maritime cases. * * * *28 U.S.C. § 2072*, Pub. L. 89-773, § 1, 80 Stat. 1323. The bankruptcy authorization is for rules of practice and procedure "under the Bankruptcy Act." *28 U.S.C. § 2075*, Pub. L. 88-623, § 1, 78 Stat. 1001. The Bankruptcy Act in turn creates bankruptcy courts of "the United States district courts and the district courts of the Territories and possessions to which this title is or may hereafter be applicable." *11 U.S.C. §§ 1(10), 11(a)*. The provision as to criminal rules up to and including verdicts applies to "criminal cases and proceedings to punish for criminal contempt of court in the United States district courts, in the district courts for the districts of the Canal Zone and Virgin Islands, in the Supreme Court of Puerto Rico, and in proceedings before United States magistrates." *18 U.S.C. § 3771*.

These various provisions do not in terms describe the same courts. In congressional usage the phrase "district courts of the United States," without further qualification, traditionally has included the district courts established by Congress in the states under Article III of the Constitution, which are "constitutional" courts, and has not included the territorial courts created under Article IV, Section 3, Clause 2, which are "legislative" courts. *Hornbuckle v. Toombs, 85 U.S. 648, 21 L.Ed. 966 (1873)*. However, any doubt as to the inclusion of the District Court for the District of Columbia in the phrase is laid at rest by the provisions of the Judicial Code constituting the judicial districts, *28 U.S.C. § 81* et seq. creating district courts therein, Id. § 132, and specifically providing that the term "district court of the United States" means the courts so constituted. Id. § 451. The District of Columbia is included. Id. § 88. Moreover, when these provisions were enacted, reference to the District of Columbia was deleted from the original civil rules enabling act. *28 U.S.C. § 2072*. Likewise Puerto Rico is made a district, with a district court, and included in the term. Id. § 119. The question is simply one of the extent of the authority conferred by Congress. With respect to civil rules it seems clearly to include the district courts in the states, the District Court for the District of Columbia, and the District Court for the District of Puerto Rico.

The bankruptcy coverage is broader. The bankruptcy courts include "the United States district courts," which includes those enumerated above. Bankruptcy courts also include "the district courts of the Territories and possessions to which this title is or may hereafter be applicable." *11 U.S.C. §§ 1(10), 11(a)*. These courts include the district courts of Guam and the Virgin Islands. *48 U.S.C. §§ 1424(b), 1615*. Professor Moore points out that whether the District Court for the District of the Canal Zone is a court of bankruptcy "is not free from doubt in view of the fact that no other statute expressly or inferentially provides for the applicability of the Bankruptcy Act in the Zone." He further observes that while there seems to be little doubt that the Zone is a territory or possession within the meaning of the Bankruptcy Act, *11 U.S.C. § 1(10)*, it must be noted that the appendix to the Canal Zone Code of 1934 did not list the Act among the laws of the United States applicable to the Zone. 1 Moore's Collier on Bankruptcy P 1.10, pp. 67, 72, n. 25 (14th ed. 1967). The Code of 1962 confers on the district court jurisdiction of:

"(4) actions and proceedings involving laws of the United States applicable to the Canal Zone; and

"(5) other matters and proceedings wherein jurisdiction is conferred by this Code or any other law." Canal Zone Code, 1962, Title 3, § 141.

Admiralty jurisdiction is expressly conferred. Id. § 142. General powers are conferred on the district court, "if the course of proceeding is not specifically prescribed by this Code, by the statute, or by applicable rule of the Supreme Court of the United States * * *" Id. § 279. Neither these provisions nor § 1(10) of the Bankruptcy Act ("district courts of the Territories and possessions to which this title is or may hereafter be applicable") furnishes a satisfactory answer as

to the status of the District Court for the District of the Canal Zone as a court of bankruptcy. However, the fact is that this court exercises no bankruptcy jurisdiction in practice.

The criminal rules enabling act specifies United States district courts, district courts for the districts of the Canal Zone and the Virgin Islands, the Supreme Court of the Commonwealth of Puerto Rico, and proceedings before United States commissioners. Aside from the addition of commissioners, now magistrates, this scheme differs from the bankruptcy pattern in that it makes no mention of the District Court of Guam but by specific mention removes the Canal Zone from the doubtful list.

The further difference in including the Supreme Court of the Commonwealth of Puerto Rico seems not to be significant for present purposes, since the Supreme Court of the Commonwealth of Puerto Rico is an appellate court. The Rules of Criminal Procedure have not been made applicable to it, as being unneeded and inappropriate, *Rule 54(a) of the Federal Rules of Criminal Procedure*, and the same approach is indicated with respect to rules of evidence.

If one were to stop at this point and frame a rule governing the applicability of the proposed rules of evidence in terms of the authority conferred by the three enabling acts, an irregular pattern would emerge as follows:

Civil actions, including admiralty and maritime cases--district courts in the states, District of Columbia, and Puerto Rico.

Bankruptcy--same as civil actions, plus Guam and Virgin Islands.

Criminal cases--same as civil actions, plus Canal Zone and Virgin Islands (but not Guam).

This irregular pattern need not, however, be accepted. Originally the Advisory Committee on the Rules of Civil Procedure took the position that, although the phrase "district courts of the United States" did not include territorial courts, provisions in the organic laws of Puerto Rico and Hawaii would make the rules applicable to the district courts thereof, though this would not be so as to Alaska, the Virgin Islands, or the Canal Zone, whose organic acts contained no corresponding provisions. At the suggestion of the Court, however, the Advisory Committee struck from its notes a statement to the above effect. 2 Moore's Federal Practice P 1.07 (2nd ed. 1967); 1 Barron and Holtzoff, Federal Practice and Procedure § 121 (Wright ed. 1960). Congress thereafter by various enactments provided that the rules and future amendments thereto should apply to the district courts of Hawaii, 53 Stat. 841 (1939), Puerto Rico, 54 Stat. 22 (1940), Alaska, 63 Stat. 445 (1949), Guam, 64 Stat. 384-390 (1950), and the Virgin Islands, 68 Stat. 497, 507 (1954). The original enabling act for rules of criminal procedure specifically mentioned the district courts of the Canal Zone and the Virgin Islands. The Commonwealth of Puerto Rico was blanketed in by creating its court a "district court of the United States" as previously described. Although Guam is not mentioned in either the enabling act or in the expanded definition of "district court of the United States," the Supreme Court in 1956 amended Rule 54(a) to state that the Rules of Criminal Procedure are applicable in Guam. The Court took this step following the enactment of legislation by Congress in 1950 that rules theretofore or thereafter promulgated by the Court in civil cases, admiralty, criminal cases and bankruptcy should apply to the District Court of Guam, *48 U.S.C. § 1424(b)*, and two Ninth Circuit decisions upholding the applicability of the *Rules of Criminal Procedure to Guam. Pugh v. United States, 212 F.2d 761* (9th Cir. 1954); *Hatchett v. Guam, 212 F.2d 767* (9th Cir. 1954); Orfield, The Scope of the *Federal Rules of Criminal Procedure, 38* U. of Det.L.J. 173, 187 (1960).

From this history, the reasonable conclusion is that Congressional enactment of a provision that rules and future amendments shall apply in the courts of a territory or possession is the equivalent of mention in an enabling act and that a rule on scope and applicability may properly be drafted accordingly. Therefore the pattern set by *Rule 54 of the Federal Rules of Criminal Procedure* is here followed.

The substitution of magistrates in lieu of commissioners is made in pursuance of the Federal Magistrates Act, P.L. 90-578, approved October 17, 1968, 82 Stat. 1107.

Subdivision (b) is a combination of the language of the enabling acts, supra, with respect to the kinds of proceedings in which the making of rules is authorized. It is subject to the qualifications expressed in the subdivisions which follow.

Subdivision (c), singling out the rules of privilege for special treatment, is made necessary by the limited applicability of the remaining rules.

Subdivision (d). The rule is not intended as an expression as to when due process or other constitutional provisions may require an evidentiary hearing. Paragraph (1) restates, for convenience, the provisions of the second sentence of Rule 104(a), supra. See Advisory Committee's Note to that rule.

(2) While some states have statutory requirements that indictments be based on "legal evidence," and there is some case law to the effect that the rules of evidence apply to grand jury proceedings, 1 Wigmore § 4(5), the Supreme Court has not accepted this view. In *Costello v. United States, 350 U.S. 359, 76 S.Ct. 406, 100 L.Ed. 397 (1965),* the Court refused to allow an indictment to be attacked, for either constitutional or policy reasons, on the ground that only hearsay evidence was presented.

"It would run counter to the whole history of the grand jury institution, in which laymen conduct their inquiries unfettered by technical rules. Neither justice nor the concept of a fair trial requires such a change." *Id. at 364.* The rule as drafted does not deal with the evidence required to support an indictment.

(3) The rule exempts preliminary examinations in criminal cases. Authority as to the applicability of the rules of evidence to preliminary examinations has been meagre and conflicting. Goldstein, The State and the Accused: Balance of Advantage in Criminal Procedure, *69 Yale L.J. 1149, 1168, n. 53 (1960);* Comment, Preliminary Hearings on Indictable Offenses in Philadelphia, 106 U. of Pa.L.Rev. 589, 592-593 (1958). Hearsay testimony is, however, customarily received in such examinations. Thus in a Dyer Act case, for example, an affidavit may properly be used in a preliminary examination to prove ownership of the stolen vehicle, thus saving the victim of the crime the hardship of having to travel twice to a distant district for the sole purpose of testifying as to ownership. It is believed that the extent of the applicability of the Rules of Evidence to preliminary examinations should be appropriately dealt with by the Federal Rules of Criminal Procedure which regulate those proceedings.

Extradition and rendition proceedings are governed in detail by statute. *18 U.S.C. §§ 3181-3195.* They are essentially administrative in character. Traditionally the rules of evidence have not applied. 1 Wigmore § 4(6). Extradition proceedings are accepted from the operation of the Rules of Criminal Procedure. *Rule 54(b)(5) of Federal Rules of Criminal Procedure.*

The rules of evidence have not been regarded as applicable to sentencing or probation proceedings, where great reliance is placed upon the presentence investigation and report. *Rule 32(c) of the Federal Rules of Criminal Procedure* requires a presentence investigation and report in every case unless the court otherwise directs. In *Williams v. New York, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949),* in which the judge overruled a jury recommendation of life imprisonment and imposed a death sentence, the Court said that due process does not require confrontation or cross-examination in sentencing or passing on probation, and that the judge has broad discretion as to the sources and types of information relied upon. Compare the recommendation that the substance of all derogatory information be disclosed to the defendant, in A.B.A. Project on Minimum Standards for Criminal Justice, Sentencing Alternatives and Procedures § 4.4, Tentative Draft (1967, Sobeloff, Chm.). Williams was adhered to in *Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967),* but not extended to a proceeding under the Colorado Sex Offenders Act, which was said to be a new charge leading in effect to punishment, more like the recidivist statutes where opportunity must be given to be heard on the habitual criminal issue.

Warrants for arrest, criminal summonses, and search warrants are issued upon complaint or affidavit showing probable cause. *Rules 4(a) and 41(c) of the Federal Rules of Criminal Procedure.* The nature of the proceedings makes application of the formal rules of evidence inappropriate and impracticable.

Criminal contempts are punishable summarily if the judge certifies that he saw or heard the contempt and that it was committed in the presence of the court. *Rule 42(a) of the Federal Rules of Criminal Procedure.* The circumstances which preclude application of the rules of evidence in this situation are not present, however, in other cases of criminal contempt.

Proceedings with respect to release on bail or otherwise do not call for application of the rules of evidence. The governing statute specifically provides:

"Information stated in, or offered in connection with, any order entered pursuant to this section need not conform to the rules pertaining to the admissibility of evidence in a court of law." *18 U.S.C.A. § 3146(f).* This provision is consistent with the type of inquiry contemplated in A.B.A. Project on Minimum Standards for Criminal Justice, Standards Relating to Pretrial Release, § 4.5(b), (c), p. 16 (1968). The references to the weight of the evidence against the accused, in Rule 46(a)(1), (c) of the Federal Rules of Criminal Procedure and in *18 U.S.C.A. § 3146(b),* as a factor to be considered, clearly do not have in view evidence introduced at a hearing.

The rule does not exempt habeas corpus proceedings. The Supreme Court held in *Walker v. Johnston, 312 U.S. 275, 61 S.Ct. 574, 85 L.Ed. 830 (1941),* that the practice of disposing of matters of fact on affidavit, which prevailed in some circuits, did not "satisfy the command of the statute that the judge shall proceed 'to determine the facts of the case, by hearing the testimony and arguments.'" This view accords with the emphasis in *Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963),* upon trial-type proceedings, *Id. 311, 83 S.Ct. 745,* with demeanor evidence as a significant factor, *Id. 322, 83 S.Ct. 745,* in applications by state prisoners aggrieved by unconstitutional detentions. Hence subdivision (e) applies the rules to habeas corpus proceedings to the extent not inconsistent with the statute.

Subdivision (e). In a substantial number of special proceedings, ad hoc evaluation has resulted in the promulgation of particularized evidentiary provisions, by Act of Congress or by rule adopted by the Supreme Court. Well adapted to the particular proceedings, though not apt candidates for inclusion in a set of general rules, they are left undisturbed. Otherwise, however, the rules of evidence are applicable to the proceedings enumerated in the subdivision.

Notes of Committee on the Judiciary, House Report No. 93-650. Subdivision (a) as submitted to the Congress, in stating the courts and judges to which the Rules of Evidence apply, omitted the Court of Claims and commissioners of that Court. At the request of the Court of Claims, the Committee amended the Rule to include the Court and its commissioners within the purview of the Rules.

Subdivision (b) was amended merely to substitute positive law citations for those which were not.

Application of 1978 amendments. Act Nov. 6, 1978, P.L. 95-598, Title IV, § 405(b), 92 Stat. 2685, provided:

"During the transition period [commencing on Oct. 1, 1979, ending on Mar. 31, 1984], the amendments made by sections 241, 243, 250, and 252 of this Act [adding *28 USCS §§ 1471* et. seq., amending *28 USCS §§ prec. 1, 1869(f)*, adding *28 USCS § 2256*, amending *28 USCS prec. § 2241*, Rules of Evidence, Rule 1101] shall apply to the courts of bankruptcy continued by section 404(a) of this Act [*11 USCS prec. § 101* note] the same as such amendments apply to the United States bankruptcy courts established under section 201 of this Act [adding *28 USCS §§ 151* et seq. amending *28 USCS prec. § 1*].".

Notes of Advisory Committee on 1987 amendments. Subdivision (a) is amended to delete the reference to the District Court for the District of the Canal Zone, which no longer exists, and to add the District Court for the Northern Mariana Islands. The United States bankruptcy judges are added to conform the subdivision with Rule 1101(b) and Bankruptcy Rule 9017.

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1993 amendments. This revision is made to conform the rule to changes in terminology made by *Rule 58 of the Federal Rules of Criminal Procedure* and to the changes in the title of the United States magistrates made by the Judicial Improvements Act of 1990.

Notes of Advisory Committee on 2011 amendments. The language of Rule 1101 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 12, 2013

RE: Form and Style Amendments to the Rules of Evidence

The committee requested an opportunity to review its approved form and style amendments to the Rules of Evidence. If the committee wants these amendments to be published in 2014 rulebooks, these amendments must be presented to the Supreme Court during the summer of 2013. If the committee decides to delay consideration of the completed amendments until a later meeting, the soonest they could be published is in 2015.

RULE 102. PURPOSE ~~AND CONSTRUCTION~~

~~These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.~~

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

EXPLANATORY NOTE

Rule 102 was amended, effective _____.

Rule 102 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, page 14; October 1, 1975, page 2. Rule 102, Federal Rules of Evidence; Rule 102, SBAND proposal.

~~Rules:~~

~~Considered: Rule 2, NDRCrimP; Rule 1, NDRCivP.~~

Cross Reference: N.D.R.Civ.P. 1 (Scope and Purpose of Rules); N.D.R.Crim.P. 1

22 (Scope and Exceptions).

RULE 103. RULINGS ON EVIDENCE

~~(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and~~

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

~~(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or~~

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

~~(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.~~

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

~~(b) Record of offer and ruling. The court may add any other or further statement which~~

~~shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. It may direct the making of an offer in question and answer form.~~

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

~~(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.~~

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

~~(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.~~

(e) Taking Notice of Error. A court may take notice of an error affecting a substantial right, even if the claim of error was not properly preserved.

EXPLANATORY NOTE

Rule 103 was amended, effective _____.

The purpose of subdivision (a) is to give the trial court an adequate basis for making a ruling, and to create a record ~~which~~ that will permit informed appellate review. ~~See~~

~~generally Signal Drilling Co. v. Liberty Petroleum Co., 226 N.W.2d 148 (N.D. 1975). See also State v. Haakenson, 213 N.W.2d 394 (N.D. 1973); Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964). As to rulings made by a court in nonjury cases, the North Dakota Supreme Court has stated that "the~~ In a non-jury case, the introduction of allegedly inadmissible evidence ~~in a nonjury case~~ will rarely be reversible error~~." Signal Drilling, supra, at 153, quoting Schuh v. Allery, 210 N.W.2d 96, 99 (N.D. 1973)~~.

Subdivision (b) was added, effective _____, to clarify that a party need not renew an objection or offer of proof once the court "rules definitively" on the record at trial. A definitive ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strile.

Subdivision ~~(b)~~ (c) encourages the trial court to add to the record any statement that may aid the appellate court in its review of evidentiary rulings. ~~See the related discussion of Rule 43(c), NDRCivP, in Signal Drilling, supra, at 153.~~

Subdivision ~~(d)~~ (e) is a statement of the doctrine of plain error, but omits the word "plain." The omission was meant to signify that errors affecting substantial rights should be corrected whether or not they are "plain" or "obvious." ~~Cf. Rule 52, NDRCrimP and Rule 61, NDRCivP.~~

Rule 103 was amended, effective _____, in response to the December 1,

2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, page 14; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev.103~~, Federal Rules of Evidence~~; Rule 103, SBAND proposal.

~~Rules:~~

~~Considered: Rules 43(c) , 46, 51(c), and 61, NDRCivP; Rules 30(c), 51, and 52, NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 43 (Evidence); N.D.R.Civ.P. 46 (Objecting to a Ruling or Order); N.D.R.Civ.P. 51 (Instructions to Jury); N.D.R.Civ.P. 61 (Harmless Error); N.D.R.Crim.P. 30 (Jury Instructions); N.D.R.Crim.P. 51 (Preserving Claimed Error); N.D.R.Crim.P. 52 (Harmless and Obvious Error).

RULE 104. PRELIMINARY QUESTIONS

~~(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence, shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.~~

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

~~(b) Relevancy conditioned on fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.~~

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

~~(c) Hearing of jury. Hearings on the admissibility of confessions in criminal cases must be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases must be so conducted whenever the interests of justice require or, in criminal cases,~~

~~whenever an accused is a witness and so requests.~~

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

~~(d) Testimony by accused. By testifying upon a preliminary matter, an accused does not become subject to cross-examination as to other issues in the case.~~

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

~~(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.~~

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

EXPLANATORY NOTE

Rule 104 was amended, effective March 1, 1990; _____.

Subdivision (a) continues the orthodox practice of placing with the court the responsibility of determining preliminary questions of admissibility of evidence. These determinations as to the competency of evidence involve deciding matters of both law and

fact, and the two are often inextricably intertwined so as to render inappropriate a jury determination of the factual questions. A jury cannot be expected to view facts in terms of the often technical legal standards of competency of evidence. The jury cannot be expected to look at certain evidence and determine whether it is hearsay and, if it is, whether it comes within a recognized hearsay exception. Nor can a jury be expected to ignore evidence which, after consideration, is found to be incompetent and properly excluded.

For these reasons, questions of the competency of evidence are for decision by the court. In making its determination, the court is not bound by rules of evidence, except by rules of privilege, which are given exceptional status because of the need to maintain, totally, the confidentiality they are designed to protect.

Subdivision (b) provides that whenever a preliminary question is one of conditional relevancy of evidence, rather than its competency, the jury is to determine whether the preliminary fact exists. Thus, if the relevancy of a statement depends on whether it was heard by a certain party, the jury may receive the statement subject to fulfillment of the condition that, in fact, it was heard by the appropriate party. This preliminary, conditional question is one of fact that should be determined by a jury. None of the problems which render preliminary questions of competency proper matters for the court's determination exist when questions of conditional relevancy are involved; the question is solely one of the probative value of evidence. Nor is there a need to shield from the jury evidence that is introduced and later found irrelevant because the conditional fact is found not to exist. The jury is likely to recognize the lack of probative force of the evidence once they have found that the condition

has not been met and, after being instructed not to consider that evidence, may be assumed to be able to ignore it.

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

Rule 104 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 16; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev. 104~~, Federal Rules of Evidence~~; Rule 104(a), Uniform Rules of Evidence (1974); Rule 104, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 29-21-03, 29-21-04.

~~Rules:~~

~~Considered: Rule 43(c), NDRCivP.~~

Cross Reference: ~~Rule~~ N.D.R.Ev. 1008~~, NDREv.~~ (Functions of Court and Jury); N.D.R.Civ.P. 43 (Evidence).

RULE 105. ~~LIMITED ADMISSIBILITY~~ LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES

~~Whenever evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.~~

If the court admits evidence that is admissible against a party or for a purpose, but not against another party or for another purpose, the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

EXPLANATORY NOTE

Rule 105 was amended, effective _____.

Evidence is often admissible for one purpose, but not for another. Whenever this occurs the trial judge may decide, under Rule 403, that the prejudicial effect of admitting the evidence outweighs its probative value and exclude the evidence entirely. But total exclusion of evidence which has some probative value is a harsh remedy ~~and, especially in civil cases, as McCormick has suggested, should be used only "where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight or the point for which it is competent can readily be proved by other evidence. * * * " McCormick on Evidence 136. Normally, the decision made will be to admit the evidence. In these situations, this~~ This rule requires that a court restrict ~~the~~ use of evidence to its proper scope and instruct the jury accordingly.

Situations in which evidence is admissible as to one party but not to another usually occur in a joint trial of criminal defendants. ~~Rule 105~~ This rule applies to these situations, but its use must be carefully considered in light of constitutional protections surrounding criminal defendants. ~~For example, it has been held that allowing the admission of statements made by a defendant who refused to testify, exculpating himself and incriminating a co-defendant, was a deprivation of the latter's right to cross-examination and, furthermore, that instructions restricting the use of the evidence were not sufficient to cure the problem of the jury's possible misuse of the evidence. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). But see Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), holding that not all violations of Bruton are reversible error.~~

Rule 105 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: ~~of~~ _____; Joint Procedure Committee Minutes: April 8, 1976, page 17; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev. 105, ~~Federal Rules of Evidence~~; Rule 105, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 45-06-03.

~~Rules:~~

~~Considered: Rules 8, 13, and 14, NDRCrimP.~~

Cross Reference: N.D.R.Ev. 403 (Exclusion of Relevant Evidence on Grounds of Prejudice, Confusion, or Waste of Time); N.D.R.Crim.P. 8 (Joinder of Offenses or Defendants); N.D.R.Crim.P. 13 (Joint Trial of Separate Cases); N.D.R.Crim.P. 14 (Relief from Prejudicial Joinder).

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

~~Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.~~

If a party introduces all or part of a writing or recorded statement, an opposing party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time.

EXPLANATORY NOTE

Rule 106 was amended, effective March 1, 1990; _____.

Rule 106 ~~is an expression of what Wigmore has termed "the rules of completeness." VII Wigmore on Evidence § 2094, et seq. (3d ed. 1940). The rule~~ is not a rule of admissibility, but rather one dealing with order of proof and, as such, may be considered to be but a specific application of the general dictates of Rule 611.

~~According to the Advisory Committee's note to 106, FRE: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." 1 Weinstein's Evidence 106-2.~~

~~To avoid these problems, Rule 106 requires that the remainder of or related writings or recordings be admitted at the same time as the principal evidence if the trial court~~

~~determines, in fairness, that this ought to be done.~~ The standard of fairness gives the trial court wide discretion under this rule, which accords with the powers of a trial court to regulate the mode and order of proof, generally, granted by Rule 611. ~~Thus, the court need not admit all evidence that may be related to the evidence sought to be introduced. Rules of relevancy, and other rules of admissibility, generally, should guide the trial court's decision.~~

~~Rule 106 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

Rule 106 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 17; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev. 106, ~~Federal Rules of Evidence~~; Rule 106, SBAND proposal.

~~Rules:~~

~~Considered: Rules 32(a)(4), NDRCivP; Rule 15(e), N.D.R.Crim.P.~~

Cross Reference: N.D.R.Ev. 611 (Mode and Order of Interrogation and Presentation); N.D.R.Civ.P. 32 (Using Depositions in Court Proceedings) N.D.R.Crim.P. 15 (Depositions).

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

~~(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.~~

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

~~(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.~~

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

~~(c) When discretionary. A court may take judicial notice, whether requested or not.~~

~~(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.~~

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

~~(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.~~

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

~~(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.~~

~~(g)~~ (f) Instructing jury. The court shall instruct the jury to accept as conclusive any fact judicially noticed.

~~(f) Instructing the Jury. In a civil case, the court must instruct the jury to accept the noticed fact as conclusive. In a criminal case, the court must instruct the jury that it may or may not accept the noticed fact as conclusive.~~

EXPLANATORY NOTE

Rule 201 was amended, effective _____.

Rule 201 is the only rule dealing with the subject of judicial notice and, by the terms of subdivision (a) is limited in application to the judicial notice of adjudicative facts, i.e., the facts of the particular case before the courts, facts that are normally the subject of proof by formal introduction of evidence. Judicial notice of legislative facts, facts that aid the court in the interpretation and application of law and policy, is not governed by this or any other

rule of evidence. ~~This represents a change in North Dakota law, for under N.D.C.C. ch. 31-10, both adjudicative and legislative facts were subject to the constraints of the doctrine of judicial notice. These rules contemplate that notice of legislative facts must be freely taken, without the requirement of first showing that the fact is one of common knowledge or capable of easy and accurate verification. To do otherwise would stifle the growth and development of decisional law.~~

~~Subdivision (b) provides that the kinds of adjudicative facts which may be judicially noticed must be either (1) generally known or (2) capable of accurate and ready determination. The first basis for taking judicial notice, i.e., that a fact is one of common knowledge, is perhaps more familiar, but the second is clearly recognized by practice if not always by name. See, e.g., Boehm v. Burleigh County, 130 N.W.2d 170 (N.D. 1964). See also McCormick on Evidence § 330. If the function of judicial notice is to remove from the stricture of formal proof facts that are clearly beyond dispute, then either basis for the exercise of judicial notice is valid.~~

~~Subdivisions (c) and (d) provide that a court may take judicial notice on its own motion and must take judicial notice of a fact when requested by a party to do so, provided, of course, that the basic requirements for taking judicial notice are met.~~

~~It should be noted that although the taking of judicial notice, under subdivision (c), is discretionary if not requested by a party, the scope of appellate review of a trial court's decision is not limited to determining whether the trial court's decision was "clearly erroneous," the usual standard applied in reviewing discretionary decisions. As stated in 1~~

Weinstein's Evidence Para 201(04) at 201-33-34:

"The grant of discretionary authority does not mean, as it does in other situations, that the trial judge's determination is virtually insulated from appellate review. An appellate court is in as good a position as the trial court to ascertain the degree of probability of a judicially noticeable fact. There is no need for the appellate court to defer to the trial judge's feel for the case. Accordingly, subdivision (b) must be read in conjunction with subdivision (f) authorizing judicial notice 'at any stage of the proceedings.' If the trial judge failed to notice a fact which the appellate court feels was a proper subject for judicial notice, the appellate court may notice the fact despite the grant of discretionary authority. This does not mean, however, that 'judicial notice * * * should be used as a device to correct on appeal an almost complete failure to present adequate evidence to the trial court.'

"Appellate courts have adequate power in the reverse situation where they disagree with the trial judge's recognition of a fact. The reviewing court may reverse if it finds that the fact was neither 'generally known' nor 'verifiable.'"

Subdivision (c) grants to parties the basic right to be heard concerning the taking of judicial notice. Whenever judicial notice is to be taken pursuant to a party's request, all parties will be notified of that fact and may exercise their right to be heard on the issue. Whenever a judge contemplates taking judicial notice of a fact on his own motion, he should clearly inform the parties of his intention and provide an opportunity for hearing of the issue. If the court fails to give proper notification, it must provide an opportunity for objection after judicial notice has been taken.

~~The object of this subdivision is to achieve procedural fairness. No special form of notice is required nor is there a need for a formal hearing. If the parties, in fact, are given notice and an opportunity to be heard, the requirements of this subdivision will have been satisfied.~~

~~Under subdivision (f), judicial notice may be taken at any stage of a proceeding. This is in accord with North Dakota law and practice under which the Supreme Court has traditionally taken judicial notice of certain facts. See, e.g., Wyldes v. Patterson, 31 N.D. 282, 153 N.W. 630 (1915).~~

~~It should be noted that the requirements of notice and an opportunity to be heard contained in subdivision (e) apply to appellate courts contemplating taking original judicial notice. A hearing of the issues may be afforded during oral argument or, if oral argument has been completed, supplemental briefs may be requested.~~

~~There has been a continuing debate as to whether parties should be allowed to controvert a judicially noticed fact through the introduction of adverse evidence. See 1 Weinstein's Evidence Para 201(07). The arguments advanced in favor of admitting contrary evidence are made by those who would treat judicial notice as a method of tentatively establishing facts that have not been challenged, but are not necessarily beyond dispute. Moreover, the proponents of admitting contrary evidence would include within the realm of judicial notice legislative facts, to which this rule does not apply. See, e.g., Thayer, A Preliminary Treatise on Evidence, 308 (1898).~~

~~Under this rule, a judicially noticed fact may not be controverted and the court is to~~

~~instruct the jury that they shall accept those facts as conclusive.~~

~~The position that judicially noticed facts may not be controverted is taken under this rule primarily because of the narrow scope of application of the rule. The rule applies only to adjudicative facts that are not subject to reasonable dispute. Thus, the determination that a fact is beyond dispute is made before the fact is judicially noticed. It would serve no useful purpose to later admit evidence contrary to the noticed fact.~~

Rule 201 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, pages 17, 18; October 1, 1975, page 3. Rule 201, Federal Rules of Evidence; Rule 201(g), Uniform Rules of Evidence (1974); Rule 201, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-10-01, 31-10-02.

Considered: N.D.C.C. §§ 28-29-06, 31-10-03, 31-10-04, 31-10-05, 32-25-04, 39-08-01, 40-01-03, 40-18-19.

~~Rules:~~

~~Considered: Rule 44.1, NDRCivP; Rule 26.1, NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 44.1 (Determining Foreign Law); N.D.R.CrimP. 26.1

127 (Foreign Law Determination).

RULE 301. PRESUMPTIONS IN ~~GENERAL IN~~ A CIVIL ~~ACTIONS AND PROCEEDINGS~~ CASE GENERALLY

(a) Effect. In ~~all civil actions and proceedings not otherwise provided for by statute or by these rules~~ a civil case, unless a statute or these rules provide otherwise, if facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed.

(b) Rebuttal. ~~until~~ If the trier of fact finds from credible evidence that the fact presumed does not exist, ~~in which event~~ the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

~~(b)~~ (c) Inconsistent presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

EXPLANATORY NOTE

Rule 301 was amended, effective _____.

Rule 301 deals with presumptions, prescribing their effect in all civil proceedings not otherwise provided for by law. It provides that a presumption imposes upon the party against whom it is directed the burden of proving its non existence. Rule 301 differs substantially from Fed.R.Ev. 301.

The term "presumption" has been ascribed various meanings, but in the last analysis

it is found that very little may be said about presumptions that is agreeable to all. Given the effect of presumptions under this rule, a presumption may be stated to be a rule of law that requires the trier of fact to draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of the inference is disproved. ~~Compare the definition of presumption of law found in Black's Law Dictionary at 1349 (rev. 4th ed. 1968).~~

Thus, a presumption is not evidence, it is a legal method of dealing with evidence. Nor may a presumption be said to be a mere inference, for an inference always draws its force from the logical, probative value of facts. A presumption is given its effect because of legal considerations, which may be grounded in probability, but are as likely to be based upon trial expedience, access to evidence, or legal or social policies. For example, the presumption that a letter, duly posted, is received may be said to be based upon probability and also upon the inherent difficulty a party would have in proving receipt by other means. The presumption that a child born into a marriage is legitimate is based largely on the socially desirable policy of avoiding "the visitation upon the child of the sins of the parents." McCormick on Evidence, § 343 at 811 (2d ed. 1972).

The function of a presumption is often stated in terms of its effect upon the burden of proof at trial. According to one theory, espoused by Morgan (Morgan, Some Problems of Proof, 74-81 (1956)), a presumption operates to "shift" the original burden of proof to the opponent of the presumption.

Under another theory, espoused by Thayer and often called the "bursting bubble" theory, a presumption imposes upon its opponent a burden of going forward with evidence

to rebut the presumption; once this is done, the presumption disappears.

The procedural consequences that result from the application of the two theories are these: Under either theory, a presumption avoids a directed verdict against its proponent at the close of his case and, if no evidence is later introduced to rebut the presumption, entitles the proponent to a directed verdict at the close of all the evidence. The differences arise when some evidence is introduced that is contrary to the presumption.

If the burden of proof is said to be fixed upon the opponent of the presumption, then he must introduce enough evidence to carry his burden. If the trier of fact reaches the conclusion that the opposing "evidence" is equal, then a verdict must be rendered in favor of the proponent of the presumption.

If a presumption is said to impose a burden of going forward with evidence to rebut the presumption, the amount of evidence that must be introduced by the opponent to avoid a directed verdict against him is that amount which convinces the judge that reasonable jurors could find contrary to the presumption. Once this is accomplished, the presumption is of no force and the issue is decided on the probative force of the evidence itself. If the evidence is in even balance, then the party who had the burden of proof, originally, must lose, even though his case may have been initially aided by a presumption.

It should be noted that, in all cases, presumptions are disputable and may be overcome by contrary evidence. "Conclusive presumptions," as contained in N.D.C.C. § 31-11-02, are not presumptions at all, but rather legislative statements of substantive law.

Rule 301, as an expression of the theory expressed by Morgan, provides that a

presumption imposes upon the party against whom it is directed the burden of proving its non existence. This comports with the effect given presumptions, by Rule 301, Uniform Rules of Evidence (1974); it gives presumptions a stronger effect than they are given under the comparable Federal Rule of Evidence, which imposes only a burden of producing evidence to rebut a presumption. It was felt that this is desirable, in light of the important social considerations which give rise to presumptions.

By giving this effect to presumptions, Rule 301 comports with past interpretations of North Dakota law. See Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959); Svihovec v. Woodmen Accident Co., 69 N.D. 259, 285 N.W. 447 (1939). But see Fancher v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 105 (N.D. 1963); Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960). See also North Dakota Jury Instruction 1030 (October 1, 1970).

Rule 301 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 11-12; June 4, 1976, page 18; June 3, 1976, page 1; October 1, 1975, page 3. Rule 301, Uniform Rules of Evidence (1974); Rule 301, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 31-11-01.

Considered: N.D.C.C. §§ 4-09-05, 4-10-03, 4-10-12, 4-11-19, 4-14-03, 4-14-04, 4-22-15, 6-01-31, 6-03-32, 6-09.4-21, 7-01-12, 7-08-02, 7-08-03, 9-03-04, 9-05-10, 9-07-19, 9-10-04, 10-04-19, 10-07-03, 10-23-13, 10-24-31, 10-28-09, 11-13-08, 11-15-16, 11-18-09, 11-20-01, 11-20-05, 12-44-18, 13-01-06, 14-03-24, 14-07-17, 14-05-16, 14-17-04(2), 15-29-10, 15-51-10, 19-01-10, 19-01-11, 19-02-17, 20.1-13-13, 23-02-40, 23-24-04, 24-07-15, 26-08-07, 26-12-09, 26-12-15, 26-15-04, 26-15-26, 26-29-12, 28-01-07, 28-01-12, 28-20-31, 28-23-12, 31-09-08, 31-11-02, 31-11-03, 31-11-04, 31-11-04.1, 32-03-09.1, 32-04-09, 32-04-18, 32-18-03, 32-19-26, 32-25-03, 33-04-17, 35-05-03, 35-21-05, 35-22-16, 36-09-08, 36-21-12, 36-09-20, 37-01-12, 39-03-15, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-42-01, 40-58-08, 41-03-53, 41-03-66, 41-08-05, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-11-10, 43-17-11, 43-17-23, 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17, 45-07-06, 47-09-06, 47-10-13, 47-11-10, 47-14-03, 47-16-05, 47-16-06, 47-19-06, 47-19-12, 47-19-14.2, 48-02-15, 49-06-14, 49-19-16, 57-02-01, 57-24-29, 57-38-46, 57-40.2-05, 57-40.3-08, 57-52-16, 57-53-06, 59-01-16, 60-01-24, 61-02-34, 61-04-25, 61-05-19, 61-16-06, 62-03-04.

RULE 302. ~~APPLICABILITY OF FEDERAL LAW IN CIVIL ACTIONS AND PROCEEDINGS~~ APPLYING FEDERAL LAW TO PRESUMPTIONS IN CIVIL CASES

~~In civil actions and proceedings, the effect of a presumptions respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.~~

In a civil case, federal law governs the effect of a presumption regarding a claim or defense for which federal law supplies the rule of decision.

EXPLANATORY NOTE

Rule 301 was amended, effective _____.

~~"Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied." Comment, Rule 302, Uniform Rules of Evidence (1974).~~

Rule 302 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 12-13; June

22 4, 1976, page 28; April 8, 1976, page 19. Rule 302, Uniform Rules of Evidence (1974).

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

[Reserved]

EXPLANATORY NOTE

~~(~~Presumptions in criminal cases are governed by N.D.C.C. § 12.1-01-03~~)~~.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 13; April 8, 1976, pages 19, 20; October 1, 1975, page 3.

Statutes Affected:

Considered: N.D.C.C. §§ 5-01-08.2, 12.1-01-03, 12.1-28-01, 12.1-29-02, 14-02.2-01, 16-20-08, 19-03.1-37, 19-05-04, 19-20.1-17, 20.1-01-14, 20.1-01-20, 20.1-05-05, 31-01-09, 34-07-04, 36-12-04, 37-01-12.

RULE 401. ~~DEFINITION OF "~~ TEST FOR RELEVANT EVIDENCE~~"~~

~~"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.~~

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

EXPLANATORY NOTE

Rule 401 was amended, effective _____.

~~This definition of "relevant evidence" has been adopted by the North Dakota Supreme Court. State v. Hendrickson, 240 N.W.2d 846, Syllabus Para2 (N.D. 1976). The definition presents no conceptual departures from traditional thoughts on the subject of relevancy.~~ The language of Rule 401 is intended to reflect the realization that stringent legal standards cannot be meaningfully applied to govern determinations of relevancy and, consequently, that the area is one best left to the wide discretion of the trial court.

~~One point merits attention, and that is that evidence may be relevant even though directed toward a fact that is not in dispute. As stated in the Advisory Committee's Note to Rule 401, Federal Rules of Evidence:~~

~~"While situations will arise which call for the exclusion of evidence offered to prove~~

~~a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding."~~

Rule 401 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 13; April 8, 1976, page 19; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 401~~, Federal Rules of Evidence~~; Rule 401, SBAND proposal.

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE ~~GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE~~

~~All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States or the state of North Dakota, by any applicable Act of Congress, by statutes of North Dakota, by these rules, or by other rules adopted by the supreme court of North Dakota. Evidence which is not relevant is not admissible.~~

Relevant evidence is admissible unless any of the following provides otherwise:

(a) the United States Constitution;

(b) the North Dakota Constitution;

(c) a federal statute;

(d) a North Dakota statute;

(e) these rules; or

(f) other rules prescribed by the Supreme Court of North Dakota.

Irrelevant evidence is not admissible.

EXPLANATORY NOTE

Rule 402 was amended, effective _____.

The focal point of this rule is not the statement that all relevant evidence is admissible and irrelevant evidence is inadmissible, but rather that the many exceptions to this general statement are recognized and left undisturbed. Thus, for example, relevant evidence may be excluded to assure the continued recognition of a defendant's constitutional rights in a

criminal action (such as Miranda); to further the socially desirable policies underlying the privileges of Article V of these rules; or to avoid undue delay, prejudice, or confusion of the issues (Rule 403).

Rule 402 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 13-14; April 8, 1976, pages 19, 20; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev.402~~, Federal Rules of Evidence~~; Rule 402, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12-59-04, 12.1-04-05, 23-01-15, 25-13-04, 25-14-01, 27-20-54, 29-29.1-05, 39-06.1-03, 39-16-03, 39-16-11, 41-03-52, 50-09-13, 50-10-08, 50-24-31.1, 65-01-11.

RULE 403. ~~EXCLUSION OF~~ EXCLUDING RELEVANT EVIDENCE ~~ON GROUNDS OF~~ FOR PREJUDICE, CONFUSION, ~~OR~~ WASTE OF TIME, OR OTHER REASONS

~~Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.~~

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

(a) unfair prejudice;

(b) confusing the issues;

(c) misleading the jury;

(d) undue delay;

(e) wasting time; or

(f) needlessly presenting cumulative evidence.

EXPLANATORY NOTE

Rule 403 was amended, effective _____.

Rule 403 is an adaptation of Rule 403 of the Federal Rules of Evidence. ~~It does not change North Dakota law, but rather codifies it. Evidence has been traditionally excluded on grounds of remoteness, see, e.g., In re Graf's Estate, 119 N.W.2d 478 (N.D. 1963), and on grounds that its probative value is not commensurate with the time required for its use as~~

~~evidence. See Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967).~~ The rule vests wide discretion in the trial court to control the introduction of evidence.

It should be noted that surprise is not listed as a ground for exclusion. ~~It has been stated that granting~~ Granting a continuance is the proper remedy for unfair surprise. ~~See Advisory Committee's Note to Rule 403, FRE.~~

Rule 403 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 14; April 8, 1976, page 20; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev.403~~, Federal Rules of Evidence~~; Rule 403, SBAND proposal.

RULE 404. CHARACTER EVIDENCE; ~~NOT ADMISSIBLE TO PROVE CONDUCT,~~ ~~EXCEPTIONS: OTHER~~ CRIMES OR OTHER ACTS

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

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

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

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

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

~~aggressor;~~

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

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

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) ~~Other~~ Crimes, Wrongs, or Other Acts. ~~Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.~~

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

EXPLANATORY NOTE

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

~~The general rule that character evidence may not be introduced to show that a person acted in conformity to character is compatible with present North Dakota case law.~~ Character evidence is not admissible when its purpose would be to prove circumstantially how a person acted on a particular occasion. Whenever the character of a person is in issue, as in a defamation case, this exclusion does not apply.

~~Subdivision (a)(1)~~ Paragraph (a)(2) allows the accused to offer circumstantial evidence of character. Traditionally, this has been allowed, for the objection to character evidence in general is not that it has no relevancy but that its probative value, when weighed against possible prejudice, does not warrant admission. If the accused offers such evidence, the issue of prejudice is no longer a factor.

~~Subdivision~~ Paragraph (a)~~(1)~~(2)(B) was amended, effective March 1, 2008, to add

clarifying language on victim character evidence.

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

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

Subdivision (b) restates the general rule, but continues to provide that character evidence offered for other purposes, e.g., motive, intent, or identity, is admissible. But the mere labeling of such evidence does not automatically bring admission.

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

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

Rule 404 was amended, effective _____, in response to the December 1,

2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 14; January 25, 2007, pages 10-11; September 28-29, 2006, pages 13-14; April 29-30, 1993, page 10; January 28-29, 1993, pages 11-12; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 20, 21. Fed.R.Ev. 404; Rule 404, SBAND proposal.

Statutes Affected:

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

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

RULE 405. METHODS OF PROVING CHARACTER

~~(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.~~

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

~~(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.~~

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

EXPLANATORY NOTE

Rule 402 was amended, effective March 1, 1990; _____.

Rule 405 deals only with the method of proving character, once the admissibility of the character evidence has been determined. The three methods approved by this rule are (1) reputation, (2) opinion, and (3) specific instances of conduct.

~~Of these three, evidence of a person's general reputation has been admissible to prove character in North Dakota, but there is some case law which implies that opinion evidence is not admissible. See State v. Nierenberg, 80 N.W.2d 104 (N.D. 1956). This rule abolishes the distinction between reputation and opinion evidence. Both are considered acceptable methods of proving character. This change has been advocated by commentators for some time, and is believed to reflect a more accurate view of the relative values of opinion and reputation evidence of character. As Wigmore has stated:~~

~~"The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.'" VII Wigmore on Evidence § 1986 at 167 (3d ed. 1940).~~

~~The third method of proving character, specific instances of conduct, is perhaps the most probative or revealing of the three, but it is also the most likely to create confusion or undue prejudice in the minds of triers of fact. For this reason, it is allowed only on cross-examination under subdivision (a), or under subdivision (b) in cases in which the character of a person is an essential element of a claim, charge, or defense. This use comports with present law. See McCormick on Evidence, § 187.~~

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

Rule 402 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 15; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 22; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 405~~, Federal Rules of Evidence~~; Rule 405, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ev. 404~~, NDREv~~ (Character Evidence; Crimes or Other Acts).

RULE 406. ~~HABIT~~; ROUTINE PRACTICE

~~Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.~~

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

EXPLANATORY NOTE

Rule 406 was amended, effective March 1, 1990; _____.

Habit~~, which has been described by McCormick as "one's regular response to a repeated specific situation" (McCormick on Evidence, 196, p. 462 (2d ed. 1972))~~, differs from character in its degree of specificity. Character is general, a summation of traits; habit is specific, an individual response to an individual stimulus. The distinction is important, for Rule 406 allows the use of evidence of habit to show that a person acted in conformity ~~therewith~~ with it, while Rule 404 denies a similar use of character evidence.

The rule does away with what has been termed the "eyewitness rule," which, as a general proposition, stated that evidence of habit was admissible only if there was no direct evidence of the act in question. As in other areas of these rules, it was felt that the admission

of relevant evidence, rather than its exclusion, should be furthered. This represents a change in North Dakota practice, for the Supreme Court, in Glatt v. Feist, 156 N.W.2d 819 (N.D. 1968), adopted a modified eyewitness rule, stating that in cases in which eyewitnesses were present, evidence of habit would be allowed only if the direct evidence was in conflict. This rule admits evidence of habit regardless of the type of direct evidence present in a case.

Adoption of this rule means another departure from past North Dakota practice. In Haider v. Finken, 239 N.W.2d 508 (N.D. 1976), the North Dakota Supreme Court held that:

"Where there is no eyewitness, evidence of habit for care is inadmissible to prove the plaintiff's care and freedom from carelessness. Thus, one cannot establish a standard of care for the measurement of his own conduct on the occasion in question by showing that he has used care under similar circumstances on former occasions." Syllabus 6, 239 N.W.2d 508.

Under this rule, evidence of habit is relevant to show that a person acted in conformity therewith, regardless of whether this evidence tends to prove care or lack of care. This is not to say that evidence of habit must be admitted whenever offered. The rule states only that such evidence is relevant; it may be excluded--as may other relevant evidence--under other of these rules. See, e.g., Rule 403.

Rule 406 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 15; April 8, 1976, page 22; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 406~~, Federal Rules of Evidence~~; Rule 406, SBAND proposal.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

~~Whenever, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove fault, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.~~

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

(a) fault;

(b) culpable conduct;

(c) a defect in a product or its design; or

(d) a need for a warning or instruction.

The court may admit this evidence for another purpose, such as impeachment or, if disputed, proving ownership, control, or the feasibility of precautionary measures.

EXPLANATORY NOTE

Rule 407 was amended, effective March 1, 2000; March 1, 1990; _____.

Rule 407 was amended, effective March 1, 2000, to follow the 1997 federal amendment. The amendment clarifies~~: "Evidence~~ that evidence of measures taken by ~~the~~ a

defendant prior to ~~the~~ an ~~'~~event~~'~~ causing 'injury or harm' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of ~~the~~ a product.~~"~~ ~~Rule 407, Fed.R.Evid., 1997 Advisory Committee Notes.~~ The amendment also extends the exclusionary principle of the rule to products liability actions.

Rule 407 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 15-16; September 24-25, 1998, pages 2-3; April 30-May 1, 1998, pages 14-15; April 8, 1976, pages 23, 25; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 407~~, Federal Rules of Evidence~~; Rule 407, SBAND proposal.

RULE 408. COMPROMISE ~~AND~~ OFFERS ~~TO COMPROMISE~~ AND NEGOTIATIONS

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

(a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

~~(1) furnishing, offering, or promising to furnish or accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and~~

(1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and

~~(2) conduct or statements made in compromise negotiations is likewise not admissible.~~

(2) conduct or a statement made during compromise negotiations.

~~Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required.~~

~~(b) Permitted Uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include~~

~~proving a witness's bias or prejudice; disproving a contention of undue delay; proving an effort to obstruct a criminal investigation or prosecution.~~

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

EXPLANATORY NOTE

Rule 408 was amended, effective March 1, 2008; _____.

The policy underlying this rule is the furtherance of compromise and settlement of disputes among parties. ~~The general rule as to compromise finds support in North Dakota case law and similar~~ Similar objectives have been fostered in the North Dakota Rules of Civil Procedure and by statute. N.D.R.Civ.P. 68 provides that an unaccepted offer of judgment is inadmissible in a proceeding except to determine costs. N.D.C.C. ch. 32-39 provides that a voluntary partial payment of a claim is inadmissible for the purpose of determining either the amount of a judgment or the liability of a party.

Admissions of independent fact or other evidence of statements or conduct disclosed in the course of a compromise negotiation are likewise protected by this rule. It is thought that open and effective discussions of compromise may be held only if the parties know in advance that they will not jeopardize their case by fully discussing all aspects of a claim. This does not mean, however, that the mere recital of evidence during a compromise negotiation

precludes the admission of that evidence. The rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

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

Rule 408 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

As part of the _____ amendments, subdivision (a) was amended to delete the reference to "liability" because "liability" is covered by the broader term "validity." No change in current practice or in the coverage of the rule is intended.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 16-17; September 28-29, 2006, pages 14-16; April 8, 1976, page 23; October 1, 1975, page 3. Fed.R.Ev. 408; Rule 408, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 11-26-07.

Considered: N.D.C.C. § 33-08-13.

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

RULE 409. ~~PAYMENT OF~~ OFFERS TO PAY MEDICAL AND SIMILAR EXPENSES

~~Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove civil or criminal liability for the injury.~~

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

EXPLANATORY NOTE

Rule 409 was amended, effective _____.

The general underpinnings of this rule are the same as those dealt with in Rules 407 and 408. A salutary action, the furnishing of medical or similar expenses is not to be discouraged by attaching to it the liability that would ensue were the fact to be admitted into evidence.

Unlike Rule 408, which protects statements made during compromise even if unrelated to the offer, Rule 409 protects only the act of furnishing or offering or promising to pay medical expenses. Statements made apart from the actual offer are not covered by the rule. There is no need to protect all discussion because discussion is not a necessary part of furnishing medical expenses.

It is likely that admissions will at times be so intertwined with an offer to furnish medical expenses that the two cannot be severed. Whenever this occurs, a choice must be made between admitting the evidence, totally, or excluding it. Balance must be made of the

social policy behind this rule and the need for such evidence.

Note should be made of N.D.C.C. § 32-39-01, which prohibits the use, as evidence of liability, of a voluntary partial payment of a claim. The statute is somewhat broader than this rule as it is not limited to the payment of medical or similar expenses, but applies to payment of any part of a claim.

Rule 409 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 17; April 8, 1976, pages 24, 25; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 409~~, Federal Rules of Evidence~~; Rule 409, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 32-39-01, 32-39-02, 32-39-03.

Cross Reference: N.D.R.Ev. 407 (Subsequent Remedial Measures); N.D.R.Ev. 408 (Compromise Offers and Negotiations).

RULE 410. ~~OFFER TO PLEAD GUILTY; NOLO CONTENDERE; WITHDRAWN PLEA OF GUILTY~~ PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

~~Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with and relevant to any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.~~

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Fed.R.Crim.P. 11, N.D.R.Crim.P. 11, or comparable procedure in another state; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. This rule does not apply to the introduction of a voluntary and reliable ~~statements~~ statement made in court on the record in connection with ~~any of the foregoing pleas or offers where~~ a plea discussion or plea proceeding when the statement is offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false

statement, but only if ~~in any case~~ the statement was made under oath; and on the record~~, and in the presence of counsel~~.

EXPLANATORY NOTE

Rule 410 was amended, effective _____.

Rule 410 governs the admissibility of withdrawn guilty pleas, pleas of nolo contendere, or offers to plead against the person making the plea or offer. The rule prohibits admission of the pleas and offers themselves, and of statements made in connection with and relevant to the withdrawn pleas or offers. ~~The emphasized language was added by the committee to insure that only~~ Only discussion necessary to negotiation is protected.

~~The~~ Rule 410 does not prohibit the use of plea-related statements when offered for impeachment purposes or in a subsequent prosecution against the defendant for perjury or false statement if the statement was made under oath and on the record.

~~It should be noted that the latest amendment to Rule 410, P.L. 94-149(9), 89 Stat. 805 (1975), does not allow use of plea-related evidence for impeachment purposes, and allows such evidence to be admitted in a subsequent prosecution for perjury or false statement only if the statement was made under oath, on the record, and in the presence of counsel.~~

Rule 410 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 17-18; June 4, 1976, page 37; April 8, 1976, page 24; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 410; ~~Federal Rules of Evidence~~; Rule 410, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 29-21-38, 33-12-24.

RULE 411. LIABILITY INSURANCE

~~Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability if offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.~~

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

EXPLANATORY NOTE

Rule 411 was amended, effective March 1, 1990; _____.

~~This general prohibition against disclosure of the fact that a person is or is not insured against liability is a fair statement of present North Dakota law. See, Bischoff v. Koenig, 100 N.W.2d 159 (N.D. 1959); Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918). But, see, James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950), wherein a direct action by a third party against an insurance company was allowed on the grounds that municipal ordinance requiring insurance for the benefit of a public carrier passenger made insurer directly liable. See also, the discussion in Shermoen v. Lindsay, 163 N.W.2d 738 (N.D. 1968).~~

The reason for the rule is that the existence or nonexistence of liability insurance is of low probative value as to the issue of negligence, and may be prejudicial. ~~But see the~~

~~criticism of this rule and the policy underlying it in McCormick on Evidence § 201 (2d ed. 1972).~~

The second sentence of the rule merely states that evidence of insurance need not be excluded if offered for another purpose to which it may be relevant.

Rule 411 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 411 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 19-20; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 411~~, Federal Rules of Evidence~~; Rule 411, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 39-16-03, 39-16-11, 49-18-33.

RULE 412. ~~ADMISSIBILITY OF ALLEGED VICTIM'S SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION IN CRIMINAL PROCEEDING~~ SEX-OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

~~(a) Evidence generally inadmissible. The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):~~

~~(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and~~

~~(2) evidence offered to prove any alleged victim's sexual 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. ~~In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:~~

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

~~(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;~~

(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;

~~(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and~~

(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

~~(3) evidence the exclusion of which would violate the constitutional rights of the defendant.~~

(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) A party intending to offer evidence under subdivision (b) must:~~

~~(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and~~

~~(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.~~

(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) Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the~~

~~record of the hearing must be sealed and remain under seal unless the court orders otherwise.~~

(2) Hearing. 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. 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 _____.

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

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

Subdivision (d) was added, effective _____, to clarify that the definition of "victim" includes "alleged victim."

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

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 20-21; September

26-27, 1996, pages 2-5; April 25, 1996, pages 12-15. ~~Rule~~ Fed.R.Ev. 412~~, Federal Rules of Evidence~~.

Statutes Affected:

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

RULE 601. ~~GENERAL RULE OF~~ COMPETENCY TO TESTIFY IN GENERAL

~~Every person is competent to be a witness except as otherwise provided in these rules.~~

Every person is competent to be a witness unless these rules provide otherwise.

EXPLANATORY NOTE

Rule 601 was amended, effective _____.

The essential thought underlying this rule is that, generally, the evaluation of a witness should be made by the trier of fact, through a determination of the weight and credibility of that witness' testimony, rather than by the prior imposition of standards of competency. Thus, there are no standards put forth relating to mental or moral competency in these rules. ~~(Cf. State v. Oliver, 78 N.D. 398, 49 N.W.2d 564 (1951), wherein it was held that competency is to be determined as a matter of law, considering the witness' intelligence, ability to discern truth and falsehood, and recognition of the obligation of his oath.) The trial judge will retain a certain amount of control over the "evaluation" of a witness in his review of the sufficiency of the evidence.~~

~~Neither this rule nor any of the rules of this code contain a "Dead Man's" statute. This represents a departure from former North Dakota law. The former "Dead Man's" statute, N.D.C.C. § 31-01-03, and by reference N.D.C.C. § 31-01-04 and N.D.C.C. § 31-01-05, are superseded by adoption of these rules.~~

Rule 601 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, pages 21-22; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 601~~, Federal Rules of Evidence~~; Rule 601, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-01-01, 31-01-03, 31-01-04, 31-01-05.

Cross Reference: ~~Rule~~ N.D.R.Ev. 501~~, NDREv~~ (Privilege in General).

RULE 602. ~~LACK OF~~ NEED FOR PERSONAL KNOWLEDGE

~~A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.~~

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

EXPLANATORY NOTE

Rule 602 was amended, effective March 1, 1990; _____.

This rule deals with the competency of a witness, but only in a most basic sense. The requirement of personal knowledge is deeply embedded in the common law ~~(See, generally, McCormick on Evidence, § 10 (2d ed. 1972)), and is established in North Dakota case law. See Teegarden v. Dahl, 138 N.W.2d 668, 46 A.L.R.3d 708 (N.D. 1965)~~.

The rule states that a witness may ~~not~~ testify ~~"unless evidence is introduced sufficient to support a finding"~~ "if evidence is introduced sufficient to support a finding" that the witness has personal knowledge. This gives the trial judge the power to reject testimony if the judge finds, as a matter of law, that no reasonable juror could believe that the witness perceived the event about which the witness is testifying.

The last sentence is intended to avoid any confusion which might otherwise arise concerning the relative requirements of this rule and Rule 703. This rule is subordinate to Rule 703, which does not require that an expert opinion be based on the expert's own perception.

Rule 602 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 602 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 22; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 602~~; Federal Rules of Evidence~~; Rule 602, SBAND proposal.

RULE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

~~Before testifying, every witness must be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.~~

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

EXPLANATORY NOTE

Rule 603 was amended, effective March 1, 1990; _____.

Rule 603 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 603 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 22; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 603~~, Federal Rules of Evidence~~; Rule 603, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ct. 6.10~~, N.D.R.Ct~~ (Courtroom Oaths).

RULE 604. INTERPRETERS

~~An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.~~

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

EXPLANATORY NOTE

Rule 604 was amended, effective March 1, 1990; _____.

This rule ~~merely~~ includes within the ~~evidence code~~ Rules of Evidence that which exists in North Dakota law. N.D.C.C. § 31-01-11 provides for the appointment of interpreters and for their oath while N.D.C.C. ch. 28-33 provides additional standards for interpreters for deaf persons; ~~Rule 28(b), NDRCrimP provides for the appointment of interpreters~~.

Rule 604 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 604 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 26-

27, 2012, pages 22-23; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 604~~, Federal Rules of Evidence~~; Rule 604, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 28-33; §§ 31-01-11, 31-01-12.

Cross Reference: N.D.R.Crim.P. 28 (Interpreters); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D.Sup.Ct.Admin.R. 50 (Court Interpreter Qualifications and Procedures).

RULE 605. JUDGE'S COMPETENCY ~~OF JUDGE~~ AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. ~~No objection need be made in order to preserve the point.~~ A party need not object to preserve the issue.

EXPLANATORY NOTE

Rule 605 was amended, effective _____.

This rule provides that a judge is wholly incompetent to testify in a trial over which ~~he~~ the judge is presiding. ~~This changes the North Dakota practice, which allowed the judge to testify and gave the judge the discretion to order the trial to be held before another judge or jury. N.D.C.C. § 31-01-10. This concept of "discretionary" incompetency was rejected as involving practical problems in the conduct of a trial should the judge decide to continue hearing the case, e.g., can the judge rule on his own testimony? It was also felt that, in the words of McCormick, a judge's "role as a witness is manifestly inconsistent with his customary role of impartiality in the adversary system of trial." McCormick on Evidence § 68, p. 147 (2d ed. 1972).~~

Rule 605 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 23; January

29, 1976, page 12; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 605~~, Federal Rules of Evidence~~; Rule 605, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-10.

RULE 606. JUROR'S COMPETENCY ~~OF JUROR~~ AS A WITNESS

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

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

~~(b) Inquiry into validity of verdict or indictment.~~

~~Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.~~

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

~~However, a juror may testify about (1) whether extraneous prejudicial information was~~

~~improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, (3) whether the verdict of the jury was arrived at by chance, or (4) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.~~

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror;

(C) the verdict was arrived at by chance; or

(D) a mistake was made in entering the verdict on the verdict form.

EXPLANATORY NOTE

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

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

Subdivision (b) ~~comports with existing North Dakota law by prohibiting~~ prohibits a

juror from testifying as to the mental processes inherent in arriving at a verdict but ~~allowing~~ allows jurors to testify as to whether outside influences were brought to bear upon a juror, or whether the verdict was arrived at by chance.

Subdivision (b) was amended, effective March 1, 2008, to allow juror testimony about mistakes in entering the verdict on the verdict form.

The rationale of this rule is to further free deliberation in the jury room by protecting from disclosure the manner in which a verdict was reached, and to promote finality of verdicts. At the same time considerations much be given to the arrival of a just result in each particular case. Where a verdict is reached because of extraneous, prejudicial information or outside influence, much of the reason for disallowing a juror to testify disappears, and the balance is weighted in favor of obtaining justice in the individual case. Justice also requires disclosure whenever a verdict is arrived at by chance, including a "quotient" verdict, in which the jurors agree in advance to be bound. Although the view has been criticized, it is felt that reaching a verdict by chance is an extreme irregularity which replaces deliberation rather than being a part of it and, as such, should be disclosed.

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

Rule 606 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 23-24; September 28-29, 2006, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, page 13; October 1, 1975, page 4. Fed.R.Ev. 606; Rule 606, SBAND proposal.

Statutes Affected:

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

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

RULE 607. WHO MAY IMPEACH A WITNESS

~~The credibility of a witness may be attacked by any party, including the party calling the witness.~~

Any party, including the party that called the witness, may attack the witness's credibility.

EXPLANATORY NOTE

Rule 607 was amended, effective March 1, 1990; _____.

This rule does away with the prohibition against impeaching one's own witness. ~~The rule against impeaching one's own witness has long been criticized (see 3 Weinstein's Evidence Para 607(01) at 607-7, 607-8 (1975)) and was abandoned at the federal level as being "based on false premises. A party does not hold out his witness as worthy of belief, since he rarely has a free choice in selecting them." Advisory Committee Note to Rule 607, FRE. Furthermore, the abolition of the rule in criminal cases is probably constitutionally required. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).~~

~~Allowing a party to impeach its own witness represents a change from past North Dakota cases, although the Supreme Court has strongly indicated its disfavor with the "voucher" rule:~~

~~"While North Dakota has recognized the 'voucher rule' that one is presumed to vouch for the truthfulness of his own witness (George v. Triplett, 5 N.D. 50, 63 N.W. 891 (1895))~~

~~we have permitted cross-examination of one's own witnesses in case of surprise (George v. Triplett, supra), and contradiction of one's own witnesses by other witnesses (Jacobson v. Mutual Benefit H. & A. Association, 70 N.D. 566, 296 N.W. 545 (1941)), as well as the calling of a witness as a court witness, thereby permitting cross-examination by both sides. See Hefty v. Aldrich, 220 N.W.2d 840 (N.D. 1974). The 'voucher rule' will be rejected entirely if the newly-proposed Federal Rules of Evidence are adopted. See 607. It should be. Wigmore calls it 'a primitive notion, resting on no reason whatever, but upon mere tradition * * * .' IIIA Wigmore on Evidence, Chadbourn Edition, Sec. 898.~~

~~"The true extent of the 'voucher rule' is probably simply that the party calling a witness is likely to be held responsible for the testimony of that witness in the eyes of the judge or jury, and jury arguments to that effect can be made, but the rule should never be used to prevent cross-examination of a witness who is adverse or hostile or one whom a party is required to call by the necessities of the case." State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974).~~

Rule 607 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 607 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 24; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27; January 29, 1976, page 13. ~~Rule~~ Fed.R.Ev. 607~~, Federal Rules of Evidence~~; Rule 607, SBAND proposal.

~~Rules:~~

~~Considered: Rule 43(b), NDRCivP.~~

Cross Reference: ~~Rules~~ N.D.R.Ev. 404 (Character Evidence; Crimes or Other Acts), N.D.R.Ev. 608 (A Witness's Character for Truthfulness or Untruthfulness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), ~~NDREv~~; N.D.R.Civ.P. 43 (Evidence).

RULE 608. ~~EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS~~

A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

~~(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.~~

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

~~(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in N.D.R.Ev. 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.~~

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

(c) Privilege Against Self-incrimination. ~~The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters relating only to character for truthfulness.~~ A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

EXPLANATORY NOTE

Rule 608 was amended, effective March 1, 1990, March 1, 2005;_____.

Rule 608 is taken from Rule 608, Federal Rules of Evidence. It develops the exception stated in Rule 404 to the general prohibition against use of character evidence by allowing evidence of a witness' truthful or untruthful character to support or attack the witness' character for truthfulness. ~~As stated in the explanatory note to Rule 405, allowing the use of opinion evidence of character represents a change in North Dakota practice.~~

Rule 608 was amended, effective March 1, 1990. The amendment is technical in

nature and no substantive change is intended.

Rule 608 was amended, effective March 1, 2005, to substitute the term "character for truthfulness" for the term "credibility" in subdivisions (b) and (c).

Rule 608 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 24; January 29-30, 2004, page 21; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 608~~, Federal Rules of Evidence~~; Rule 608, SBAND proposal.

Cross Reference: ~~Rules~~ N.D.R.Ev. 404 (Character Evidence; Crimes or Other Acts), N.D.R.Ev. 607 (Who May Impeach a Witness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), ~~NDREv~~.

RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION ~~OF CRIME~~

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

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

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

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

~~(2) evidence that any witness has been convicted of a crime must be admitted regardless of the punishment, if the elements of the crime required proof or admission of an~~

~~act of dishonesty or false statement by the witness.~~

(2) for any crime regardless of the punishment, the evidence must be admitted if the elements of the crime required proving, or the witness's admitting, a dishonest act or false statement.

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

~~(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction is vacated or has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.~~

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been vacated or is the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

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

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

EXPLANATORY NOTE

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

Rule 609 is taken from the Uniform Rules of Evidence (1974) ~~and has been modified only for the purpose of clarification. In subdivision (b), the phrase "unless the witness is still~~

~~in confinement for that conviction" was added to make it clear that where there is no release the expiration of the ten-year period will not bring a confined witness under this section.~~

Subdivision (c) was modified by adding the words "~~is~~ vacated" in paragraph (1). This was done to assure that cases involving deferred imposition of sentences would be covered.

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

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

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

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

Subdivision (e) was added to the rule, effective _____, to clarify that convictions pending appeal are admissible under this rule.

Rule 609 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 24-25; of September 28-29, 2006, pages 16-18; September 23-24, 1993, page 21; November 7-8, 1991, pages 4-5; October 25-26, 1990, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; April 26-27, 1979, page 9; April 8, 1976, pages 28-29; October 1, 1975, page 5. Fed.R.Ev. 609; Rule 609, SBAND proposal; Rule 609, Uniform Rules of Evidence (1974).

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

~~Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.~~

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

EXPLANATORY NOTE

Rule 610 was amended, effective March 1, 1990; _____.

This rule is adopted from ~~Rule~~ Fed.R.Ev. 610 ~~of the Federal Rules of Evidence. It should be noted that the~~ The rule prohibits admission of evidence of religious beliefs only if offered to affect credibility. Such evidence may be offered for other purposes, such as showing bias.

Rule 610 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 610 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 25-26; March 24-25, 1988, page 12; December 3, 1987, page 15; June 3, 1976, page 2; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 610~~, Federal Rules of Evidence~~; Rule 610, SBAND proposal.

RULE 611. MODE AND ORDER OF ~~INTERROGATION AND PRESENTATION~~ EXAMINING WITNESSES AND PRESENTING EVIDENCE

~~(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.~~

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

~~(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court, in the exercise of discretion, may permit inquiry into additional matters as if on direct examination.~~

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

~~(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily,~~

~~leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.~~

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

EXPLANATORY NOTE

Rule 610 was amended, effective March 1, 1990; _____.

Rule 611 is substantially the same as ~~Rule~~ Fed.R.Ev. 611 ~~of the Federal Rules of Evidence~~. The rule gives the court wide discretion over the mode and order of presenting evidence. ~~This comports with established North Dakota case law. See Killmer v. Duchscherer, 72 N.W.2d 650 (N.D. 1955).~~

~~The trial judge may allow a child witness to use an anatomically correct doll if a proper foundation is laid. The doll may not be used in a suggestive manner and the nonverbal testimony must be relevant. See, State v. Jenkins, 326 N.W.2d 67 (N.D. 1982).~~

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

Rule 611 was amended, effective _____, in response to the December 1,

2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 26; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; May 21-22, 1987, pages 18-19; February 19-20, 1987, pages 10-12; June 3, 1976, page 2; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 611~~, Federal Rules of Evidence~~; Rule 611, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 31-04-01, 31-04-04, 31-04-05.

~~Rules:~~

~~Considered: Rules 30, 31, 32, 43(b), NDRCivP.~~

Cross Reference: N.D.R.Civ.P. 30 (Depositions by Oral Examination), N.D.R.Civ.P. 31 (Depositions by Written Questions), N.D.R.Civ.P. 43 (Evidence).

RULE 612. WRITING OR OBJECT USED TO REFRESH A WITNESS'S MEMORY

~~(a) While testifying. If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.~~

~~(b) Before testifying. If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.~~

~~(c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court~~

~~in its discretion determines that the interests of justice so require, declaring a mistrial.~~

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. But if production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If the producing party claims that a writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing or Object. If a writing or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or, if justice so requires, declare a mistrial.

EXPLANATORY NOTE

Rule 612 was amended, effective March 1, 1990; _____.

Rule 612 is identical to Rule 612 of the Uniform Rules of Evidence, (1974). The rule

varies from its federal counterpart in ~~structure, and in~~ that it applies to objects as well as to writings. It was felt that objects used to refresh the memory of a witness, such as a recording tape, should be subject to production. This rule also departs from the federal rule by explicitly providing for inspection of writing or object at its location if production of the writing or object at trial is impracticable.

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

Rule 612 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 26; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 3. Fed.R.Ev. 612; Rule 612, Uniform Rules of Evidence (1974); Rule 612, SBAND proposal.

~~Rules:~~

~~Considered: Rule 16(h), NDRCrimP.~~

Cross Reference: N.D.R.Crim.P. 16 (Discovery and Inspection).

RULE 613. ~~PREVIOUS STATEMENTS OF WITNESSES~~ WITNESS'S PRIOR STATEMENT

~~(a) Examining witness concerning previous statement. In examining a witness concerning a previous statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same must be shown or disclosed to opposing counsel.~~

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

~~(b) Extrinsic evidence of previous inconsistent statement of witness. Extrinsic evidence of a previous inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admission of a party-opponent as defined in Rule 801(d)(2).~~

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing

party's statement under Rule 801(d)(2).

EXPLANATORY NOTE

Rule 613 was amended, effective March 1, 1990; _____.

Rule 613 is ~~an adoption of~~ based on ~~Rule~~ Fed.R.Ev. 613 ~~of the Federal Rules of Evidence. The rule has been specifically approved by the North Dakota Supreme Court:~~

~~"The rule requiring a predicate for impeachment by prior inconsistent statements, sometimes called the rule in Queen Caroline's Case, is gradually disappearing. See McCormick, § 37; 3 Weinstein, Evidence, p. 613-3 (1975). As we have stated, it does not apply to admissions by parties. As to other witnesses, the requirement has been eliminated in many recent revisions of the rules of evidence. The new Federal Rules of Evidence eliminate the requirement of prior opportunity to explain or deny. Instead, they provide that the witness must have the opportunity at some time to explain or deny, but that the judge may dispense with the requirement if the interests of justice require. Rule 613(b). They also provide that the witness need not be shown a contradictory statement, but it must be shown or disclosed to his counsel on request. Rule 613(a). We believe these rules represent the best available reconciliation of conflicting interests, and we specifically approve them." Starr v. Morsette, 236 N.W.2d 183, 188, n. 2 (N.D. 1975).~~

Rule 613 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 613 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 26-27; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 4; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 613~~, Federal Rules of Evidence~~; Rule 613, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-07.

~~Rules:~~

~~Considered: Rule 32(c), NDRCivP; Rule 15(c), NDRCrimP.~~

Cross Reference: ~~Rule~~ N.D.R.Ev. 801~~(d)(2), NDREv.~~ (Definitions the Apply to This Article; Exclusions from Hearsay); N.D.R.Civ.P. 32 (Using Depositions in Court Proceedings); N.D.R.Crim.P. 15 (Depositions).

RULE 614. COURT'S CALLING ~~AND INTERROGATION OF WITNESSES BY COURT~~ OR EXAMINING A WITNESS

~~(a) Calling by court. The court, on its own motion or at the suggestion of a party, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.~~

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

~~(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.~~

(b) Examining. The court may examine a witness regardless of who calls the witness.

~~(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it or to specific questions by it may be made at the time or at the next available opportunity when the jury is not present.~~

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

EXPLANATORY NOTE

Rule 614 was amended, effective _____.

This rule is ~~an adoption of~~ based on ~~Rule~~ Fed.R.Ev. 614 ~~of the Federal Rules of Evidence. The calling by the court of a witness, who may then be cross-examined by both sides, is established in Rule 28, NDRCrimP (as to experts and interpreters), and is approved by the North Dakota Supreme Court. See State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974).~~

Rule 614 provides that objections to interrogation by the court or to the calling of a witness by the court may be made out of the jury's presence so as to avoid any possible prejudice to the objecting party.

Rule 614 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 27; June 3, 1976, page 5; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 614~~, Federal Rules of Evidence~~; Rule 614, SBAND proposal.

Cross Reference: N.D.R.Crim.P. 28 (Interpreters).

RULE 615. ~~EXCLUSION OF~~ EXCLUDING WITNESSES

~~At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (i) a party who is a natural person, or (ii) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (iii) a person whose presence is shown by a party to be essential to the presentation of the party's cause.~~

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own. This rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

EXPLANATORY NOTE

Rule 615 was amended, effective March 1, 1990; _____.

Rule 615 is ~~taken from~~ based on ~~Rule~~ Fed.R.Ev. 614 ~~of the Federal Rules of Evidence~~. It provides that it is mandatory for a court to exclude witnesses when so requested

by a party, subject to stated exceptions. ~~The mandatory demand of this rule marks a departure from prior North Dakota law, which was that the exclusion of witnesses was a matter within the court's discretion. Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956).~~

Rule 615 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 615 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 27-29; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 5; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 615~~; Federal Rules of Evidence~~; Rule 615, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-34-02, 29-07-13, 29-07-14.

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

~~If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.~~

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

EXPLANATORY NOTE

Rule 701 was amended, effective March 1, 1990; _____.

Rule 701 is an adoption of based on Fed.R.Ev. ~~Rule~~ 701 ~~of the Federal Rules of Evidence. It presents no new practice to North Dakota.~~

Rule 701 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 701 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 29-30; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6; Rule Fed.R.Ev. 701, ~~Federal Rules of Evidence~~; Rule 701, SBAND proposal.

RULE 702. TESTIMONY BY ~~EXPERTS~~ EXPERT WITNESSES

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

EXPLANATORY NOTE

Rule 702 was amended, effective March 1, 2007; _____.

Rule 702 states the general rule governing expert testimony.

Rule 702 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of April 26-27, 2012, pages 30-31; September 22-23, 2005, pages 2-6; June 3, 1976, page 6; ~~Rule~~ Fed.R.Ev. 702, ~~Federal Rules of Evidence~~.

22 Cross Reference: N.D.R.Ev. 703 (Bases of Opinion Testimony by Experts).

RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY ~~BY EXPERTS~~

~~The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissable shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.~~

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

EXPLANATORY NOTE

Rule 703 was amended, effective March 1, 1990, March 1, 2007;_____.

Rule 703 is based on Rule 703 of the Federal Rules of Evidence.

Rule 703 was amended, effective March 1, 1990. The amendments are technical in

nature and no substantive change is intended.

Rule 703 was amended, effective March 1, 2007, to incorporate the 2000 amendments to Fed.R.Ev. 703.

Rule 703 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of April 26-27, 2012, page 31; September 22-23, 2005, pages 2-6; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6. Rule 703, Federal Rules of Evidence.

Cross Reference: N.D.R.Ev. 702 (Testimony by Experts).

RULE 704. OPINION ON AN ULTIMATE ISSUE

~~Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.~~

An opinion is not objectionable just because it embraces an ultimate issue.

EXPLANATORY NOTE

Rule 704 was amended, effective _____.

This rule is ~~taken from Rule~~ based on Fed.R.Ev. 704 ~~of the Federal Rules of Evidence~~. It should be noted that this rule applies to the opinions of lay witnesses, whenever admissible, as well as to opinions of experts.

This rule omits language found in Fed.R.Ev. 704 (b), which bars opinion testimony in a criminal case on whether the defendant had a "mental state or condition that constitutes an element of the crime charged or of a defense." This rule does not bar this type of testimony.

Rule 704 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. The term "inference" was deleted to make the rule flow better and because any "inference" is covered by the broader term "opinion." There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: ~~of~~ _____; June 3, 1976, page 7. ~~Rule~~ Fed.R.Ev. 704~~, Federal Rules of Evidence~~; Rule 704, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-04.1-03, 12.1-04.1-04, 12.1-04.1-13.

RULE 705. ~~DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION~~ DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

~~The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.~~

Unless the court orders otherwise, an expert may state an opinion, and give the reasons for it, without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination.

EXPLANATORY NOTE

Rule 705 was amended, effective March 1, 1990; March 1, 1997; _____.

Rule 705 is based on Fed.R.Ev. 705.

Rule 705 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~:~~ of April 26-27, 2012, page 32; September 28-29, 1995, pages 18-19; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 7. ~~Rule~~ Fed.R.Ev. 705~~, Federal Rules of Evidence~~; Rule 705,

22 SBAND proposal.

RULE 706. COURT-APPOINTED EXPERTS WITNESSES

~~(a) Appointment. The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness may not be appointed by the court unless the witness consents to act.~~

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

~~A witness so appointed must be informed of the witness' duties by the court in writing, a copy of which must be filed with the clerk, or at a conference in which the parties have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness is subject to cross-examination by each party, including a party calling the witness.~~

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

~~(b) Compensation. Expert witnesses so appointed are entitled to a reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law. In civil actions where no funds are provided by law, the compensation shall be paid by the parties in such proportion and at such times as the court directs and thereafter charged in like manner as other costs.~~

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case, or in a civil case when the law allows it, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs, and the compensation is then charged like other costs.

~~(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.~~

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

~~(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.~~

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling

its own experts.

EXPLANATORY NOTE

Rule 706 was amended, effective March 1, 1990; _____.

~~With only a minor change, this rule is an adoption of Rule 706 of the Federal Rules of Evidence. It comports with present North Dakota practice, but is a more detailed statement of the procedure involved whenever a court appoints an expert than presently exists in North Dakota law. Cf. Rule 28, NDRCrimP.~~

Rule 706 is based on Fed.R.Ev. 706.

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

Rule 706 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 32; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, pages 7, 8; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 706~~, Federal Rules of Evidence~~; Rule 706, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 28-26-06(5).

~~Rules:~~

~~Considered: Rules 16(4), 26, 35, NDRCivP; Rule 28(a), NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 16 (Pretrial Conferences; Scheduling; Management), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 35 (Physical and Mental Examination); N.D.R.Crim.P. 28 (Interpreters).

RULE 707. ANALYTICAL REPORT ADMISSION; CONFRONTATION

(a) Notification to defendant. If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney ~~at least~~ no later than 30 days ~~before the trial~~ after the defendant's arraignment.

(b) Objection. ~~At least 14 days before the trial, the~~ Within 30 days of service of a copy of the report, the defendant may object in writing to the introduction of the report and identify ~~the~~ by name or job title ~~of the witness~~ a person who made a testimonial statement in the report to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.

(c) Extension. The court may extend any of the deadlines under this rule on a showing of good cause.

~~(c)~~ (d) Waiver. If the defendant does not timely object to the introduction of the report, the defendant's right to confront the person who prepared the report is waived.

(d) Juvenile proceedings. This procedure applies to juvenile proceedings that involve analytical reports issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20.

EXPLANATORY NOTE

Rule 707 was adopted effective February 1, 2010. Rule 707 was amended, effective March 1, 2011;_____.

Rule 707 requires the prosecution to notify a defendant if it intends to introduce an analytical report in a criminal trial. If the defendant objects to the admission of the report, the defendant must identify the witness it seeks to examine about the report at trial and the prosecution must produce the witness.

Some examples of analytical reports include: a certified copy of an analytical report of a blood, urine, or saliva sample from the director of the state crime laboratory or the director's designee; a certified copy of the checklist and test records from a certified breath test operator; or a certified copy of an analytical report signed by the director of the state crime laboratory or the director's designee of the results of the analytical findings involving the analysis of a controlled substance or sample.

Subdivision (a) was amended, effective_____, to require to serve a copy of the analytical report on the defendant no later tha 30 days after the defendant's arraignment.

Subdivision (b) was amended, effective_____, to require the defendant to object to introduction of the report at trial within 30 days of receiving a copy. The subdivision was also amended to clarify that, if the defendant requests a person to testify about the report at trial, the person must be someone who made a testimonial statement in the report.

Subdivision (c) was added, effective _____, to give the court discretion to extend the rule's deadlines.

Under North Dakota law, if the person who prepared the report does not testify at trial, a certified copy of an analytical report must be accepted as prima facie evidence of the results of a chemical analysis. See N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8), and 39-24.1-08(6).

Sources: Joint Procedure Committee Minutes of _____; January 31-February 1, 2013, pages 20-23; September 27, 2012, pages 6-7; April 26-27, 2012, page 33; September 23-24, 2010, pages 10-13; Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

Statutes Affected:

Superseded: N.D.C.C. §§ 19-03.1-37(5), 20.1-13.1-10(7), 20.1-15-11(9), 39-20-07(9), and 39-24.1-08(7).

Considered: N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8), and 39-24.1-08(6).

RULE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

~~The following definitions apply under this Article:~~

~~(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.~~

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

~~(b) Declarant. A "declarant" is a person who makes a statement.~~

(b) Declarant. "Declarant" means the person who made the statement.

~~(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.~~

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

~~(d) Statements which are not hearsay. A statement is not hearsay if:~~

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

~~(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony but, if offered in a criminal proceeding, was given under oath~~

~~and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition;~~ ~~or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or~~

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and, if offered in a criminal proceeding, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

~~(2) Admission by party-opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity, (ii) a statement of which the party has manifested an adoption or belief in its truth, (iii) a statement by a person authorized by the party to make a statement concerning the subject, (iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.~~

(2) An Opposing Party's Statement. The statement is offered against an opposing party

and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

EXPLANATORY NOTE

Rule 801 was amended, effective July 1, 1981; March 1, 1990; _____.

The definition of hearsay contained in this rule is dependent, in part, upon the definition of a statement contained in subdivision (a). In this regard, it should be noted that nonverbal conduct, to be a statement, and thus hearsay, must be intended by the party to be an assertion. Nonassertive conduct is not a statement and therefore not objectionable as hearsay. Thus, pointing out a suspect in response to the question, "Who did it?" is assertive conduct and, if it otherwise falls within the definition, hearsay. Conversely, the act of opening an umbrella is not intended to be assertive, is not hearsay, and may be offered as substantive evidence that rain was falling at a certain place and time.

Hearsay is defined in subdivision (c) as a statement made by a declarant, other than one made at the trial or hearing offered to prove the truth of the matter asserted. This definition is of two distinct parts. The first is that the statement is one not made at the trial in which it is offered. The second is that the statement must be offered to prove the truth of its content, i.e., the matter asserted in the statement. If offered for other purposes, e.g., to show that the declarant in fact made a statement – any statement – and, thus, was conscious at a particular time, the statement is not objectionable as hearsay. ~~See e.g., Chester v. Einarson, 76 N.D. 205, 34 N.W.2d 418 (1948).~~ The reason for this requirement is that it is only when a statement is offered to prove the truth of the matter asserted that there is a lack of the safeguards used to insure credibility of the declarant. It is this lack of an oath and cross-examination of the declarant that warrants the exclusion of evidence as hearsay.

~~It should be noted that subdivision (c) does not define as hearsay statements made out of the presence of a party against whom offered. The presence or absence of a party is not, nor has it ever been, a criterion by which hearsay is defined. It should be discarded as a "remarkably persistent bit of courthouse folklore." McCormick on Evidence, § 246 at 586 (2d ed. 1972).~~

Subdivision (d) exempts from the hearsay definition, and allows as substantive evidence, two types of statements which are technically hearsay. The reason for the exemptions are that the dangers normally attendant to receiving hearsay statements are at least partially removed in the exempted situations. In ~~subdivision~~ paragraph (d)(1), the opportunity to cross-examine the declarant is present. In ~~subdivision~~ paragraph (d)(2), the

nature of the adversary system strengthens the reliability of ~~an admission by a party-opponent~~ a statement by an opposing party.

~~Subdivision~~ Paragraph (d)(1)~~(i)~~ follows Rule 801, Uniform Rules of Evidence, allowing prior inconsistent statements always to be used as substantive evidence in civil cases and, if the prior statement was made under oath in criminal cases. This varies from Rule 801 of the Federal Rules of Evidence, which requires that the prior statement be made under oath in all cases. See the discussion of Rule 801, Federal Rules of Evidence, in State v. Igoe, 206 N.W.2d 291 (N.D. 1973).

~~Subdivision (d)(1)(iii)~~ Subparagraph (d)(1)(C) was added, ~~[~~effective July 1, 1981~~]~~, to comply with the federal rule. This provision was omitted from the original promulgation of the Federal Rules of Evidence but was added soon thereafter.

~~Subdivision (d)(2), for the reasons stated above, exempts from the hearsay definition admissions of a party-opponent. This comports, generally, with the philosophy expressed by the North Dakota Supreme Court. See the discussion of the comparable federal rules in Starr v. Morsette, 236 N.W.2d 183 (N.D. 1975).~~

Rule 801 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 801 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, pages 15-16; December 3, 1987, pages 6-7 and 15; May 21-22, 1987, pages 6-7; February 19-20, 1987, pages 10-17; September 18-19, 1980, pages 18-20; March 27-28, 1980, pages 11-12; January 29, 1976, page 18; October 1, 1975, page 6; ~~Rule~~ Fed.R.Ev. 801, ~~Federal Rules of Evidence~~; Rule 801, SBAND proposal.

RULE 802. THE RULE AGAINST HEARSAY ~~RULE~~

~~Hearsay is not admissible except as provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.~~

Hearsay is not admissible unless any of the following provides otherwise:

(a) a statute;

(b) these rules; or

(c) other rules prescribed by the North Dakota Supreme Court.

EXPLANATORY NOTE

Rule 802 was amended, effective _____.

Rule 802 states the general rule excluding the admissibility of hearsay statements. Exception is made for those cases in which statutes or other rules allow the use of hearsay evidence.

Rule 802 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 18; October 1, 1975, page 7. ~~Rule~~ Fed.R.Ev. 802~~, Federal Rules of Evidence~~; Rule 802, SBAND proposal.

RULE 804. ~~HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE~~ EXCEPTIONS TO THE RULE AGAINST HEARSAY--WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

~~(a) Definition of unavailability.~~

~~"Unavailability as a witness" includes situations in which the declarant =~~

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

~~(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;~~

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

~~(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;~~

(2) refuses to testify about the subject matter despite a court order to do so;

~~(3) testifies to a lack of memory of the subject matter of the declarant's statement;~~

(3) testifies to not remembering the subject matter;

~~(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or~~

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

~~(5) is absent from the hearing and the proponent of a statement has been unable to procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.~~

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

~~A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.~~

This subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

~~(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:~~

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

~~(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.~~

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had, or, in a civil case, whose predecessor in interest had, an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

~~(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of the declarant's belief in impending death.~~

(2) Statement Under the Belief of Imminent Death. A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

~~(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement without believing it to~~

~~be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.~~

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if it is offered in a criminal case to exculpate the accused, is supported by corroborating circumstances that clearly indicate its trustworthiness as a statement that tends to expose the declarant to criminal liability.

A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

~~(4) Statement of personal or family history.~~

(4) Statement of Personal or Family History. A statement about:

~~(i) A statement concerning the declarant's own birth, adoption, marriage, divorce, parentage, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal~~

~~knowledge of the matter stated; or~~

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

~~(ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.~~

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Transferred to Rule 807]

~~(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.~~

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

EXPLANATORY NOTE

Rule 804 was amended, effective March 1, 1990; March 1, 2000; _____.

Rule 804 is ~~taken in the main from the Uniform Rules of Evidence (1974)~~ based on Fed.R.Ev. 804.

~~Subdivision~~ Paragraph (b)(3) differs from ~~the comparable federal rule~~ Fed.R.Ev. 804 by excluding from this exception statements made by a codefendant or other person ~~which~~ implicate both the ~~codefendant~~ other person and the accused. Such statements may not be against interest, and the area is one in which constitutional rights of the defendant may preclude their admission. Rather than proceed on a case-by-case basis, it was decided to preclude admission of such statements entirely.

Rule 804 was amended, effective March 1, 2000, to follow the December 1, 1997, federal amendment. The contents of Rule 804(b)(5) are transferred to new Rule 807. The addition of Rule 804(b)(6) provides for forfeiture of the right to object on hearsay grounds due to a party's own wrongdoing.

Rule 804 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~:~~ of _____ ; September 24-25, 1998, page 4; April 30-May 1, 1999, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 9, 10, 11, 12; October 1, 1975, page 8. ~~Rule 804(a), (b)(4), Federal Rules of Evidence~~ Fed.R.Ev. 804; Rule 804(b)(1), (b)(2), (b)(3), (b)(6),

127 Uniform Rules of Evidence (1974); Rule 804, SBAND proposal.

128 Cross Reference: N.D.R.Ev. 807 (Residual Exception).

RULE 805. HEARSAY WITHIN HEARSAY

~~Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these Rules.~~

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

EXPLANATORY NOTE

Rule 805 was amended, effective _____.

Rule 805 provides that double or multiple hearsay statements are not to be excluded if each step is admissible under a hearsay exception. Thus, a dying declaration containing another declarant's statement of his present sense impression ~~would~~ could be admissible.

Rule 805 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, page 13. ~~Rule 805, Federal Rules of Evidence~~ Fed.R.Ev. 805; Rule 805, SBAND proposal.

RULE 806. ATTACKING AND SUPPORTING ~~CREDIBILITY OF DECLARANT~~ THE DECLARANT'S CREDIBILITY

~~If a hearsay statement, or a statement defined in Rule 801(d)(2)(iii), (iv), or (v), is admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.~~

When a hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

EXPLANATORY NOTE

Rule 806 was amended, effective March 1, 1990; _____.

Rule 806 treats a declarant of hearsay evidence as any other witness by allowing the declarant's credibility to be attacked in accordance with the rules ~~of Article VI~~. One deviation is required, however, and that is a declarant need not have been given an opportunity to deny or explain a statement inconsistent with the hearsay statement. ~~Compare Rule 613(b), NDREv.~~ This is because the inconsistent statement may well have been subsequent to the hearsay statement offered in evidence, precluding bringing it to the declarant's attention.

Rule 806 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 806 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 13; October 1, 1975, page 8. ~~Rule 806, Federal Rules of Evidence~~ Fed.R.Ev. 806; Rule 806, SBAND proposal.

Cross Reference: N.D.R.Ev. 607 (Who May Impeach a Witness), N.D.R.Ev. 608 (A Witness's Character for Truthfulness or Untruthfulness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), N.D.R.Ev. 613 (Witness's Prior Statement).

RULE 807. RESIDUAL EXCEPTION

~~A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.~~

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

~~However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party and to the court in writing sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

EXPLANATORY NOTE

Rule 807 was adopted, March 1, 2000. Rule 807 was amended, effective _____.

Rule 807 contains the contents of former Rules 803(25) and 804(5).

Rule 807 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; September 24-25, 1998, page 4; April 30-May 1, 1998, page 16. ~~Rule 807, Federal Rules of Evidence~~ Fed.R.Ev. 807.

RULE 901. ~~REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION~~

AUTHENTICATING OR IDENTIFYING EVIDENCE

~~(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.~~

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

~~(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:~~

(b) Examples. The following are examples only, not a complete list, of evidence that satisfies the requirement:

~~(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.~~

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

~~(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.~~

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting

is genuine, based on a familiarity with it that was not acquired for the current litigation.

~~(3) Comparison by trier or nonexpert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.~~

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

~~(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.~~

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

~~(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.~~

(5) Opinion About a Voice. An opinion identifying a person's voice, whether heard firsthand or through mechanical or electronic transmission or recording, based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

~~(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the~~

~~telephone.~~

(6) Evidence About a Telephone Conversation. For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

~~(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.~~

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

~~(8) Ancient documents or data compilations. Evidence that a document or data compilation in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence twenty years or more at the time it is offered.~~

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

~~(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.~~

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

~~(10) Methods provided by statute or rule. Any method of authentication or identification complying with these rules, or other rules adopted by the North Dakota supreme court, or as provided by statute.~~

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a statute or a rule prescribed by the North Dakota Supreme Court.

EXPLANATORY NOTE

Rule 901 was amended, effective _____.

~~Article IX is taken from the Federal Rules of Evidence and has been the subject of only minor revision.~~ Rule 901 is based on Fed.R.Ev. 901.

~~The Article deals with the method of authenticating evidence. Authentication has been said by Wigmore to be a matter of "logical necessity":~~

~~"In short, when a claim or offer involves impliedly or expressly any element of personal connection with a corporal object, that connection must be made to appear, like the other elements, else the whole fails in effect." VII Wigmore, Evidence, § 2129 at 564 (3d ed.~~

~~1940).~~

~~Thus, authentication~~ Authentication is merely a preliminary question of conditional relevancy and, as such, is to be determined according to the standards and requirements of N.D.R.Ev. 104(b)~~, NDREv~~. A determination that evidence is authentic does not render it admissible. It may be hearsay, e.g., and excluded on that ground.

The ~~illustrations~~ examples listed in subdivision (b) are derived from traditional methods of authentication. They should be read in light of the general requirement of subdivision (a), which is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

Rule 901 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; June 3, 1976, pages 8-10; October 1, 1975, page 8. ~~Rule 901, Federal Rules of Evidence~~ Fed.R.Ev. 901; Rule 901, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 47-19-23, 47-19-24.

~~Rules:~~

~~Considered: Rule 44(a), NDRCivP; Rule 27, NDRCrimP.~~

Cross Reference: N.D.R.Ev. 104 (Preliminary Questions); N.D.R.Civ.P. 44 (Proving an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

RULE 903. SUBSCRIBING WITNESS'S TESTIMONY ~~UNNECESSARY~~

~~The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.~~

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

EXPLANATORY NOTE

Rule 903 was amended, effective _____.

~~By statute~~ Under N.D.C.C. § 31-08-02, the common law requirement that subscribing witnesses testify to the authenticity of a document ~~has been~~ was abrogated. ~~N.D.C.C. § 31-08-02.~~ This rule continues the statutory practice, but provides that those witnesses must testify if required by the laws governing the validity of the writing.

Rule 903 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; June 3, 1976, page 12. ~~Rule 903, Federal Rules of Evidence~~ Fed.R.Ev. 903; Rule 903, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-02, ch. 31-09, §§ 47-19-23, 47-19-24.

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE

~~For purposes of this Article the following definitions are applicable:~~

In this article:

~~(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation.~~

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

~~(2) Photographs. "Photographs" include still photographs, X-ray films, videotapes, and motion pictures.~~

(c) A "photograph" means a photographic image or its equivalent stored in any form.

~~(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an "original".~~

(d) An "original" of a writing or recording means the writing or recording itself or any

counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout, or other output readable by sight, if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

~~(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.~~

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

EXPLANATORY NOTE

Rule 1001 was amended, effective _____.

Rule 1001 is based on Fed.R.Ev. 1001.

Article X is addressed to that aspect of the law of evidence traditionally termed the "best evidence" rule or, at times, more correctly, the rule requiring the production of original documents. The phrase, "best evidence," does not appear in any of the rules of this Article; its omission was intentional, meant to signify a departure from the interpretation often given the rule, if not from the true import of the rule itself.

Article X applies only to writings, recordings, and photographs. These items are defined, for purposes of this Article, in ~~Rule 1001~~ this rule.

~~Paragraph (1) expands~~ Subdivisions (a) and (b) expand the definitions of "writings" and "recordings" to include not only those documents produced by traditional methods, such as handwriting, typing, and printing, but also to include data recorded ~~by means of~~ in any form or manner, including by photography, magnetic impulse, and mechanical or electronic recording. This definition ~~would bring~~ brings within the scope of these rules sound recordings as well as data ~~contained in computer banks~~ recorded digitally and stored electronically. The reason which gave birth to the "original documents" rule, i.e., the need for an accurate and honest presentation of written evidence, demands the expanded application of the rule to these later, modern methods of data ~~recordation~~ recording. The definition is "open-ended," ~~encompassing "other form(s) of data compilation" that are generically similar to those listed. The definition~~ but it is not intended to include symbols which are not representative of words or numbers.

~~Paragraph (2)~~ Subdivision (c) defines photographs as photographic images in any form, which would include still photographs, X-rays, ~~videotapes~~ videos and motion pictures. This definition is included in a section apart from that defining writings and recordings, for there will be occasions when Rule 1002, requiring production of an original, will apply to photographs, not because they are duplicates of writings, but because the contents of the photographs will be sought to be proved. ~~See Rule 1002 and explanatory note, infra.~~

An "original," as defined in ~~paragraph (3)~~ subdivision (d) for the purposes of this Article may be, but will not necessarily be, that document or recording one would ordinarily label an original, if speaking in lay terms. One would ordinarily think of an original as being

the document, recording, or photograph first made in point of time. But for purposes of this Article, the definition and existence of an "original" is not dependent upon the chronology of production. ~~As stated in 5 Weinstein's Evidence 1001-49 (1975):~~ Instead, it is ~~"The 'original' is~~ the document whose contents are to be proved. ~~Its jural significance makes it the original,~~ whether or not it was written before or after another, was copied from another, or was itself used to copy from." ~~Thus, for~~ For example, in an action for libel, a ~~Xeroxed~~ photocopy of a letter, if published, would be the "original" for purposes of this rule.

The intent of the parties to a transaction will often bear upon the legal significance of a writing and~~, thus,~~ its status as an original under this rule. ~~Thus~~ For example, if the parties to a contract execute several copies, intending that each be legally effective, all copies are ~~deemed to be~~ "originals." ~~5 Weinstein, supra, at 1001-50.~~

The prints from a photographic negative or a digital image file are treated as originals, as they are ~~the first recognizable~~ the recognizable and tangible form of a photograph. The negative and the digital image file, of course, would also be ~~an original in the usual case~~ originals.

The last sentence of ~~paragraph (3)~~ subdivision (d) accords the status of original to computer printouts or other output "readable by sight," provided the printout is shown to accurately reflect the ~~data~~ information it contains. This is a necessary provision as the underlying data ~~is not~~ may not be readily comprehensible.

~~Paragraph (4)~~ Subdivision (e) defines "duplicate," as that term is used in this Article. The definition is broad enough to include carbon copies, printed items such as newspapers

or other writings produced from a single matrix, ~~Xeroxed~~ photocopies, microfilms, tape records of material originally recorded on wire, or other techniques which accurately reproduce the original. Accurate reproduction of the original is the sole, essential feature of a duplicate under this rule. There is no requirement that the duplicates be made "in the regular course of business~~" as under prior statutes. See N.D.C.C. § 31-08-01.1~~. The duplicating process itself is ~~deemed~~ considered sufficient to assure accuracy.

It should be noted at this juncture that two main reasons have been advanced for the requirement that original documents be produced: (1) the prevention of inaccurate reproduction, and (2) the prevention of fraud. ~~McCormick on Evidence § 231 (2d ed. 1972).~~ ~~This paragraph~~ Subdivision (e) provides an assurance of accuracy in its definition; it does not deal with the possibility of fraudulent duplications. Rule 1003~~, infra,~~ is designed to require production of an original whenever the authenticity of an original is in issue.

Finally, it should be noted that although many nice questions may arise as to whether a document is an original or a duplicate, the end result will often be its admission regardless of its status. Under these rules, except when the authenticity of a writing is questioned or when it would be unfair to admit a duplicate, duplicates and originals are treated interchangeably. ~~See Rule 1003, infra.~~

Rule 1001 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 14. ~~Rule~~ Fed.R.Ev.1001~~, Federal Rules of Evidence~~; Rule 1001, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-01.1.

Cross Reference: N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1003 (Admissibility of Duplicates).

RULE 1002. REQUIREMENT OF THE ORIGINAL

~~To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.~~

An original writing, recording, or photograph is required in order to prove its content unless these rules, another rule adopted by the North Dakota Supreme Court, or a statute provides otherwise.

EXPLANATORY NOTE

Rule 1002 was amended, effective _____.

Rule 1002 is based on Fed.R.Ev. 1002.

~~Rule 1002 states the rule that "to prove the content of a writing, recording, or photograph" the original is required. This rule is a familiar one as applied to writings; it is expanded under this section to include recordings and photographs. Advisory Committee's Note to Rule 1002, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

The rule is intended to be one of preference, rather than one of rigid application. The definitions contained in Rule 1001 and the ensuing Rules 1003-1007 are designed to insure that the rule operates as an aid in the search for truth and not as a rule of needless exclusion of evidence.

Perhaps the most persistent problem in applying this rule lies in determining whether the rule should be applied at all. To phrase this in terms of the present section: When are the

contents of a writing, recording, or photograph sought to be proved?

With respect to writings, there are certain instances in which it is clear that testimony is given, or a writing utilized, for purposes other than to prove the contents of a writing. For example, a witness may use a writing to refresh his memory without coming under this rule ~~(see, e.g., Kemmer v. Sunshine Mutual Ins. Co., 79 N.D. 518, 57 N.W.2d 856 (1953); and~~ evidence of payment made may be given without producing the written receipt. ~~McCormick on Evidence, § 233 at 564 (2d ed. 1972).~~

Conversely, where the writing has a legal, operative effect, as in the case of a deed, it must be produced if its terms are to be proved. For example, where the contents of a notice of tax sale are in issue, the ~~newspaper~~ document containing the notice must be produced; testimony as to the contents of the notice will not be admitted. ~~De Nault v. Hoerr, 66 N.D. 82, 262 N.W. 361 (1935).~~

~~Thus, the~~ The test may be said to be one of legal efficacy of the document in question. And, although this test has been criticized as one of difficult application, and one producing questionable results ~~(see, McCormick on Evidence, § 233 (2d ed. 1972))~~, it is retained, but with safeguards which should remove the bases for such criticism. Rule 1003~~(4)~~ provides a basis for the non-application of this rule in cases where a writing is not closely related to a material issue. Rules 611 and 614 allow the trial court to require written evidence, when available, even though oral testimony would be acceptable under this rule. ~~See, 5 Weinstein's Evidence Para 1002(12) (1975).~~

This rule has application to photographs as well as writings, although it is the rare case

in which the contents of a photograph will be in issue. ~~Normally, a~~ A photograph will often be introduced to "illustrate" the testimony of a witness who has personally observed that which is depicted in the photograph. ~~McCormick on Evidence § 214 (2d ed. 1972).~~ In these cases, this rule does not apply. There are instances, however, such as defamation cases in which the contents of the photograph are involved and are subject to this rule. Also, photographs taken by automatic means, such as those used in many banks, will be subject to the rule requiring production of the original.

Exception to this rule has been made in recognition of the many statutes which direct the admittance of certified copies of documents as if they were originals. See, e.g., N.D.C.C. §§ ~~26-15-04 and~~ 28-23-12. These statutes, and those of similar import, are left undisturbed by this rule.

Rule 1002 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; January 29, 1976, page 14. ~~Rule~~ Fed.R.Ev.1002~~, Federal Rules of Evidence~~; Rule 1002, SBAND proposal.

Cross Reference: ~~Rule 1003, NDREv,~~ N.D.R.Ev. 1003 (Admissibility of Duplicates), statutes considered.

RULE 1003. ADMISSIBILITY OF DUPLICATES

~~A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.~~

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

EXPLANATORY NOTE

Rule 1003 was amended, effective _____.

Rule 1003 is based on Fed.R.Ev. 1003.

As was discussed in relation to Rule 1001, the primary reasons for requiring the production of original documents are to prevent inaccurate reproductions of evidence and to prevent fraud. Technological advances have rendered the inaccurate copy a rarity. Rule 1001, in its definition of a duplicate, insures that only accurate reproductions will be admitted in lieu of originals. In light of this, Rule 1003 provides that a duplicate is admissible to the same extent as an original except where there is a genuine question as to a document's authenticity or whenever it would be unfair to admit the duplicate.

The first exception is intended to cover those cases in which there is a genuine allegation of inaccuracy of reproduction or where the circumstances surrounding the case yield a substantial suggestion that the original document is not authentic. Possibilities of

fraud may arise, for example, where a party in possession of an original document claims that the document has been lost or destroyed. Of course, this factor alone should not preclude admission of a duplicate, but coupled with an allegation of fraud and an inadequate explanation of the loss or destruction, exclusion of a duplicate may be warranted. ~~5 Weinstein's Evidence Para 1003 (02) (1975).~~

The circumstances of unfairness ~~which~~ that would warrant exclusion of a duplicate cannot be set out with any precision. This exception is intended to prevent application of the general rule admitting duplicates whenever the circumstances are such that a party will be prejudiced by the absence of the original in evidence. For example, where only a part of the original is reproduced, and the remainder bears upon the part offered in evidence, fairness would require production of the original. ~~See Advisory Committee's Notes to Rule 1003, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

In the final analysis, it will be the responsibility of the courts to shape the parameters of this rule and its exceptions. The exceptions will necessarily be utilized in limited instances to insure fairness, but they should not be interpreted in a manner that undermines the policy of the general rule which is to further the use of duplicates as evidence of writings.

Rule 1003 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: ~~of~~ _____; Sources: Joint Procedure Committee Minutes: January 29, 1976, page 15. ~~Rule~~ Fed.R.Ev.1003~~, Federal Rules of Evidence~~; Rule 1003, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 2-06-05, ~~4-09-05,~~ 4-10-03, ~~4-11-19,~~ 4-22-15, 6-08-10, ~~7-01-12, 7-08-02, 10-23-13, 10-28-09,~~ 11-11-38, 11-13-08, 11-18-09, ~~12-44-18,~~ 14-03-24, ~~15-29-10, 15-51-10,~~ 19-01-10, 19-03.1-37, 19-20.1-17, ~~23-02-40,~~ 24-02-11, 24-07-15, ~~26-08-07, 26-12-09, 26-12-15, 26-12-23, 26-15-04, 26-15-26,~~ 28-23-12, 31-04-10, 31-08-01.1, 31-08-06, 31-09-02, 31-09-03, 31-09-04, 31-09-05, 31-09-06, 31-09-10, ~~33-01-13,~~ 35-21-05, 35-22-11, 35-22-16, 37-01-34, 39-20-07, 40-04-06, 40-11-08, 40-16-09, 43-01-21, 43-07-13, 43-10-07, 43-13-12, 43-19.1-10, 43-28-08, 43-32-16, ~~44-06-08, 44-06-09,~~ 47-19-06, 47-19-45, ~~48-02-15,~~ 49-01-14, 54-46.1-03, ~~57-24-29,~~ 61-02-34, 61-03-06, 61-05-19, 61-16-06.

Cross Reference: N.D.R.Ev. 1001 (Definitions that Apply to this Article).

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

~~The~~ An original is not required, and other evidence of the ~~contents~~ content of a writing, recording, or photograph is admissible if:

~~(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;~~

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

~~(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;~~

(b) an original cannot be obtained by any available judicial process;

~~(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or~~

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

~~(4) Collateral matters. The~~ (d) the writing, recording, or photograph is not closely related to a controlling issue.

EXPLANATORY NOTE

Rule 1004 was amended, effective _____.

Rule 1004 is based on Fed.R.Ev. 1004.

Rule 1004 excuses production of an original writing, recording, or photograph in four cases:

(1) Subject to a good faith requirement on the part of a proponent of evidence, ~~paragraph (1)~~ subdivision (a) continues the common law exception that secondary evidence is admissible whenever an original has been lost or destroyed.

Under ~~paragraph (1)~~ subdivision (a), the intentional destruction of an original does not automatically preclude admission of secondary evidence as to its contents. ~~As stated by Wigmore: "The view now generally accepted is that (1) a destruction~~ For example, destruction in the ordinary course of business~~, and, of course, a destruction~~ or by mistake~~;~~ is sufficient to allow the contents to be shown as in other cases of loss. ~~, and that (2) a destruction otherwise made will equally suffice, provided the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud." 4 Wigmore on Evidence § 1198 at 457-460 (Chadbourn rev. 1972).~~

The most common means of proving loss or destruction is by showing that a search has been made and that it did not produce the document in question. ~~5 Weinstein's Evidence Para 1004(1) (05) (1975).~~ It is difficult to describe with preciseness the type of search that will be sufficient to prove loss or destruction; perhaps nothing meaningful can be said other than that the search must be diligent. It is the function of the trial judge to determine whether proof of a search satisfactorily removes the possibility of fraud. See ~~Rule~~ N.D.R.Ev.104~~;~~ ~~NDREv~~.

(2) ~~Paragraph (2)~~ Subdivision (b) applies when the writing, recording, or photograph in question is in the possession or control of a person not a party to the litigation. In those cases in which the original is in the possession of a party opponent, ~~paragraph (3)~~ subdivision (c) governs.

The fact that a subpoena duces tecum has been served upon a person within the state, ~~pursuant to Rule~~ under N.D.R.Civ.P. 45~~, NDRCivP,~~ or ~~Rule~~ N.D.R.Crim.P. 17~~, NDRCrimP~~, and has been dishonored will constitute a showing that an original is not obtainable, sufficient under this rule to permit the introduction of secondary evidence.

Documents may also be ordered produced in conjunction with the taking of depositions under ~~Rule~~ N.D.R.Civ.P. 28~~, NDRCivP,~~ and ~~Rule~~ N.D.R.Crim.P. 15~~, NDRCrimP~~. Again, failure to produce the documents will constitute a sufficient showing under this ~~paragraph~~ rule.

(3) In contrast to the showing required under ~~Rule 1004(2)~~ subdivision (b), whenever an original is in the possession of an opponent all that need be shown is that the opponent was "put on notice" that the contents of the original would be a subject of proof at the hearing. The notice may be held to be given by the pleadings in cases where it is clear that the document in possession of the opponent will be a subject of proof. An example would be a suit involving the terms of a contract or deed.

The safest way to insure that adequate notice is given is to provide written notice. This practice should become a matter of course under this paragraph.

(4) ~~Paragraph (4)~~ Subdivision (d) is intended to relieve the requirements of Rule 1002

whenever a writing in question "is not closely related to a controlling issue." The rule is necessary to the orderly conduct of a trial. As stated by McCormick:

"At nearly every turn in human affairs some writing – a letter, a bill of sale, a newspaper, a deed – plays a part. Consequently any narration by a witness is likely to include many references to transactions consisting partly of written communications or other writings. A witness to a confession, for example, identifies the date as being the day after the crime because he read of the crime in the newspaper that day, or a witness may state that he was unable to procure a certain article because it was patented. It is apparent that it is impracticable to forbid such references except upon condition that the writings (e.g., the newspaper, and the patent) be produced in court. Recognition of an exception exempting 'collateral writings' from the operation of the basic rule has followed as a necessary concession to expedition of trials and clearness of narration, interests which outweigh, in the case of merely incidental references to documents, the need for perfect exactitude in the presentation of these documents' contents." McCormick on Evidence § 234 at 565 (2d ed. 1972).

Rule 1004 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 1004 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, page 15; ~~Rule~~ Fed.R.Ev.1004; ~~Federal Rules of Evidence~~; Rule 1004, SBAND proposal.

Cross Reference: N.D.R.Ev. 104 (Preliminary Questions); N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken); N.D.R.Civ.P. 45 (Subpoena); N.D.R.Crim.P. 15 (Depositions); N.D.R.Crim.P. 17 (Subpoena).

RULE 1005. COPIES OF PUBLIC RECORDS TO PROVE CONTENT

~~The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations, in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.~~

The proponent may use a copy to prove the content of an official record, or of a document that was recorded or filed in a public office as authorized by law, if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

EXPLANATORY NOTE

Rule 1005 was amended, effective _____.

Rule 1005 is based on Fed.R.Ev. 1005.

It is recognized under Rule 1005 that requiring production of original public records "would be attended by serious inconvenience to the public and to the custodian." ~~Advisory Committee's Note to Rule 1005, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~ Therefore, Rule 1005 is designed to provide a limited exception to Rule 1002 in those cases

where official records or recorded documents are in issue.

Unlike the balance of the rules in Article X, Rule 1005 recognizes, to a limited extent, the existence of degrees of secondary evidence. Certified and compared copies are preferred over other evidence of the contents of original public records. Certification of a copy is to be accomplished ~~pursuant to~~ under Rule 902, which in turn incorporates the statutes of North Dakota. See Rule 902(4). ~~Thus, the~~ The methods of proving official documents contained in N.D.C.C. ch. 31-09, are permissible under Rule 1005.

The preference given to certified or compared copies precludes the use of duplicates unless, of course, the preferred copies are not available. Rule 1003 is therefore preempted by application of Rule 1005. It should be noted, however, that Rule 1005 applies to documents authorized to be recorded only if they are actually recorded or filed. In a case where the terms of a document are in issue, if a ~~photostat or other~~ copy is filed and the original returned to the owner, the original may be proved in any method permitted by Article X in general. ~~(~~However, if the contents of the document filed are in issue, e.g., to prove notice, the filed document is considered the "original" even if it is a ~~photostat.)~~ copy.

The question may arise whether an attempt must be made to produce the original if a certified or compared copy cannot be obtained by a reasonably diligent effort. The answer is ~~affirmative~~ yes. The original is the best proof of its contents; the admissibility of copies is allowed to accommodate public officials and others who may use official or recorded documents. This reasoning does not support the admissibility of oral evidence, for example, where the original document could be produced. ~~See, generally, 5 Weinstein's Evidence Para~~

~~1005(06); accord, Harmening v. Howland, 25 N.D. 38, 141 N.W. 131 (1913).~~

Rule 1005 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; January 29, 1976, page 16. ~~Rule~~ Fed.R.Ev.1005~~, Federal Rules of Evidence~~; Rule 1005, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 31-09.

Cross Reference: ~~Rule~~ N.D.R.Ev. 902 (Evidence that is Self-Authenticating), N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1103~~, NDREv, statutes considered~~(Admissibility of Duplicates).

RULE 1006. SUMMARIES TO PROVE CONTENT

~~The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.~~

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. The court may order the proponent to produce them in court.

EXPLANATORY NOTE

Rule 1006 was amended, effective _____.

Rule 1006 is based on Fed.R.Ev. 1006.

The admissibility of summaries of voluminous writings over the objection that such summaries are not the "best evidence" has long been permitted in North Dakota. ~~See Wishek v. United States Fidelity & Guaranty Co., 55 N.D. 321, 213 N.W. 488 (1927).~~ Rule 1006 continues this rule of convenience and expands it to include summaries of recordings and photographs.

It is a condition precedent to the invocation of the rule that the component parts of the

summary be made available for examination or copying. This is intended to give the party against whom the summary is offered a chance to analyze the underlying data and prepare any challenges to the summary he may wish to make. The court may direct that the original writings be produced at trial. This would be necessary, for example, should the opposing party wish to introduce the originals in an attack on the accuracy of the summary.

Rule 1006 does not permit the admissibility of summaries where the individual writings are themselves inadmissible. For example, where the original documents contain hearsay, summarizing the documents will not cure the hearsay objection.

It should be noted that not all summaries will come within the scope of Rule 1006. Computer printouts, which are summaries of stored data, are themselves originals. See Rule 1001~~(3)~~(d). Summaries of absent originals may be admitted under Rules 1004 or 1005 without reference to Rule 1006. ~~5 Weinstein's Evidence Para 1006(05) (1975).~~

Rule 1006 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 16. ~~Rule~~ Fed.R.Ev.1006~~, Federal Rules of Evidence~~; Rule 1006, SBAND proposal.

Cross Reference: N.D.R.Ev. 1001 (Definitions that Apply to this Article), N.D.R.Ev.

1004 (Admissibility of Other Evidence of Content), N.D.R.Ev. 1105 (Copies of Public Records to Prove Content).

RULE 1007. TESTIMONY OR ~~WRITTEN ADMISSION~~ STATEMENT OF A PARTY TO PROVE CONTENT

~~Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.~~

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

EXPLANATORY NOTE

Rule 1007 was amended, effective March 1, 1990; _____.

Rule 1007 is based on Fed.R.Ev. 1007.

Rule 1007 operates as an exception to Rule 1002 by allowing the contents of a writing, recording, or photograph to be proved by the admission of the party against whom it is offered, without accounting for the nonproduction of the original. ~~To this extent, the rule is in accord with the common law. 4 Wigmore on Evidence § 1256 (Chadbourn rev. 1972). However, in a departure from the leading case on the subject (Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840)), not~~ Not all admissions are recognized for the purpose of proving the contents of a writing, but only those that are written or given as testimony or in a deposition. This limitation is designed to insure that the admission will be accurately related to the trier of facts and thus excludes extrajudicial, oral admissions because these are

vulnerable to erroneous transmission. ~~See, generally, McCormick § 242 (2d ed. 1972).~~

Rule 1007 is not intended to prevent the use of an opponent's admission to directly prove a fact that may also be evidenced by a writing. Only where the admission is used to prove the contents of a writing will Rule 1007 come into play. The test is much the same as that utilized under Rule 1002 to determine whether the contents of a writing are in issue. Nor should Rule 1007 be held to bar the use of an adverse party's admission where secondary evidence becomes admissible under the other provisions of Article X. See Rules 1004 and 1005.

Rule 1007 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 1007 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~:~~ of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, pages 16, 17. ~~Rule~~ Fed.R.Ev.1007~~, Federal Rules of Evidence~~; Rule 1007, SBAND proposal.

Cross Reference: N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1004 (Admissibility of Other Evidence of Content), N.D.R.Ev. 1105 (Copies of Public Records to Prove Content).

RULE 1008. FUNCTIONS OF THE COURT AND JURY

~~Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing, recording, or photograph ever existed, (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.~~

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. In a jury trial, the jury determines, in accordance with Rule 104(b), any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

EXPLANATORY NOTE

Rule 1008 was amended, effective _____.

Rule 1008 is based on Fed.R.Ev. 1008.

Rule 1008 divides the functions of judge and jury with respect to preliminary

questions of admissibility under the rules requiring or exempting the production of original writings, recordings, or photographs. This rule is but a specific application of Rule 104, which separates the function of judge and jury with respect to preliminary questions of admissibility in general. As such, Rule 1008 has as its fundamental divider between the functions of judge and jury the same distinction between preliminary questions relating to the competence of evidence and those relating to conditional relevancy. See Rule 104 and Explanatory Note.

As explained in the explanatory note to Rule 104, preliminary questions of admissibility which involve the competence of proffered evidence are properly decided by the judge, as these are questions whose answers are based upon broad policy considerations and the fulfillment of technical legal standards. Conversely, questions which are of relevance conditioned on fact are normally questions of probative value of the proffered evidence, and are logically to be decided by the jury.

Applying this distinction to the questions which are likely to arise under the rules of this article, a division of duties becomes apparent. ~~Weinstein gives us examples of the preliminary~~ Preliminary questions of fact ~~which~~ may arise when determining whether secondary evidence should be admitted pursuant to the rules of this article, such as: "Is the original lost? Was a diligent search conducted for it? Is the original unobtainable because it is a public document? Is it outside the jurisdiction? Does the other party have possession or control over the original? Is the authenticating witness' testimony incompetent as hearsay or because of privilege?" ~~5 Weinstein's Evidence Para 1008(01) (1975).~~

Examination of these questions reveals that their answers depend upon consideration of what the "best evidence" rule is intended to accomplish and also upon application of legal standards. The examples quoted are of questions to be decided by the judge under Rule 1008.

Contrast with these the questions which, under Rule 1008, are to be decided by the jury: Did the asserted writing ever exist? Is another writing the original? Does other evidence of contents correctly reflect the contents? These are questions which involve only the relevance of the proffered evidence and may be answered without application of legal standards or policy considerations. The jury may, after answering the question, simply accord the writing the appropriate probative value; it needn't ignore the evidence as if it were inadmissible as hearsay. ~~See 5 Weinstein's Evidence, supra, Para 1008(02) at 1008-9.~~

A further reason for distinguishing between questions involving competence and those involving conditional relevance is that the former are solely preliminary but the latter have a tendency to transcend the status of a preliminary question and become central issues of a case. Thus, the reason for distinguishing between the two becomes one of fairness to the parties. As stated by the Advisory Committee for the Federal Rules of Evidence:

"However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue."

Advisory Committee's Note to ~~Rule~~ Fed.R.Ev.1008~~, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975)~~.

This rule is designed to insure consideration by a jury of critical issues that also happen to be preliminary issues. It should be noted at this point that Rule 1008 is intended to apply to all questions of conditional relevance, not just those listed in the rule. ~~5 Weinstein's Evidence, supra, Para 1008(01) at 1008-5, 6.~~

Finally, as a matter of practice, notice should be taken that Rule 1008 incorporates the provisions of Rule 104 as to the procedure for determining preliminary questions of admissibility. Thus, even as to questions to be decided by the jury, the judge plays a part in the determination. The judge, under this rule, as under Rule 104, should admit asserted evidence if he believes the proponent will establish the conditional fact to the satisfaction of a reasonable juror, subject to an instruction to the jury to disregard the evidence if they ultimately find against the existence of the conditional fact. ~~1 Weinstein's Evidence, supra, Para 104(02) (5).~~

Rule 1008 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 17; October 1, 1975, page 9. ~~Rule~~ Fed.R.Ev.1008~~, Federal Rules of Evidence~~;

85 Rule 1008, SBAND proposal.

86 Cross Reference: ~~Rule~~ N.D.R.Ev. 104~~, NDREv~~ (Preliminary Questions).