

AGENDA

JOINT PROCEDURE COMMITTEE

April 27-28, 2006
Fargo

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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

JOINT PROCEDURE COMMITTEE
MEMBERS AND STAFF

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Georgia Dawson, District Judge
Donovan Foughty, District Judge
M. Richard Geiger, District Judge
Gail Hagerty, District Judge
Debbie Gordon Kleven, District Judge
David W. Nelson, District Judge
Allan L. Schmalenberger, District Judge
Thomas J. Schneider, District Judge
Mikal Simonson, District Judge

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Galen J. Mack
Jeanne McLean
Ronald H. McLean
Sherry Mills Moore
Stephen W. Plambeck
Bruce D. Quick
Cathy Howe Schmitz
Michael G. Sturdevant

Staff Attorney
Michael Hagburg

MINUTES OF MEETING

Joint Procedure Committee

January 26, 2006

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CALL TO ORDER

The meeting was called to order at 1:00 p.m., on January 26, 2006, by the Chair, Justice Dale Sandstrom.

ATTENDANCE

Present:

Justice Dale V. Sandstrom, Chair
Honorable Georgia Dawson
Honorable Donovan Foughty
Honorable M. Richard Geiger
Honorable Gail Hagerty
Honorable Debbie Kleven
Honorable David W. Nelson
Honorable Allan L. Schmalenberger
Honorable Mikal Simonson
Mr. John C. Kapsner

Mr. Daniel S. Kuntz
Mr. Galen J. Mack
Mr. Ronald H. McLean
Ms. Sherry Mills Moore
Mr. Steven W. Plambeck
Mr. Bruce D. Quick
Ms. Cathy Howe Schmitz
Mr. Michael G. Sturdevant

Absent:

Honorable Thomas J. Schneider
Ms. Jeanne L. McLean

Staff:

Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

The Chair discussed the schedule for the meeting and reviewed the schedule for future meetings.

The Chair informed the Committee that the Supreme Court had been discussing term limits for members of all committees. A member suggested that if term limits were imposed for the Committee, it would be better if the term limits did not apply to the attorney members but only to the judge members. The member said that the attorney members who had been on the Committee for a number of years seemed to have a real sense of history about the what the Committee has done.

On another topic, a member asked whether it would be possible for the meeting materials to be distributed to Committee members by e-mail. The member said that this would save the cost of mailing and provide members a convenient opportunity to respond by e-mail about whether they were planning to attend the meeting. An informal poll of the Committee suggested that a majority of the Committee would support e-mail distribution of meeting materials.

APPROVAL OF MINUTES

Judge Hagerty MOVED to approve the minutes. Ms. Schmitz seconded. Motion CARRIED unanimously.

CRIMINAL RULES/ANNUAL RULES PACKAGE (PAGES 30-39 OF THE AGENDA MATERIAL)

Staff reported that the Supreme Court had approved the Committee's proposed rule amendments with a limited number of changes. Staff informed the Committee that the amendments will become effective on March 1, 2006.

RULE 7, N.D.R.Crim.P. - THE INDICTMENT AND THE INFORMATION (PAGES 40-57 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court had suggested an amendment to Rule 7 and requested that the Committee discuss the proposal.

Mr. Kapsner MOVED to approve the amendments to Rule 7. Judge Simonson seconded.

Mr. Kapsner's motion to add the rule, as amended, to the annual rules package CARRIED unanimously.

RULE 46, N.D.R.Crim.P. - RELEASE FROM CUSTODY (PAGES 58-86 OF THE AGENDA MATERIAL)

Staff explained that the Governor's Task Force on Violent and Sexual Offenders had proposed an amendment to Rule 46 that would require detention hearings in certain cases. Staff informed the Committee that Judge McCullough had also submitted a comment relevant to pretrial detention under Rule 46.

Ms. Moore MOVED to approve the amendments to Rule 46. Ms. Schmitz seconded.

A member asked why the term "person" was used in the rule instead of "defendant." Staff explained that this reflected the federal form and was likely because a material witness could also be put in pretrial detention under the rule.

A member indicated support for Judge McCullough's position. The member said the language of the state constitution requires that bail be made available for non-capital offenses. The member said if the task force wants Rule 46 changed they need to amend the state constitution first.

A member indicated that the language of the proposed amendment could be modified to possibly make it constitutional. The member suggested deletion of proposed language

requiring a magistrate to order pretrial detention. Another member suggested that the “musts” in the proposed amendment could be changed to “mays.”

A member observed that the first part of the proposed amendment suggested that a detention hearing would only be held on a prosecutor’s motion, but the second part of the proposal said a detention hearing must be held “immediately on the person’s initial appearance.” The member said these provisions did not mesh well together, because of the implication that a magistrate had to act on holding a detention hearing even if the prosecutor did not bring a motion.

A member said that the constitution would require bail to be set even if a magistrate determined under the proposal that no combination of conditions would reasonably assure the safety of the community if the person was released. A member responded that a very high bail amount could be set in such a case.

A member said that the procedure described in the first part of the proposal was similar to a regular bail hearing. The member said the last part of the proposal, requiring detention under certain circumstances, was the part that created problems. The member said that the constitution did not allow detention without the possibility of bail except in capital cases.

A member suggested that a problem the proposed amendment would address were situations where a person is charged with a misdemeanor and can bond out without a court appearance, even though the misdemeanor is a crime of violence. The member said that requiring such persons to appear for a detention hearing might provide additional protection for the community. A member responded that hearings were already required for persons charged with crimes involving domestic violence. A member added that some districts already have policies requiring court appearances when any crime of violence is charged.

A member said the procedure described in the proposed amendment would likely only be useful in the uncommon and unusual case.

A member explained that the federal law on which the proposed amendment was based provides for pretrial detention under limited circumstances. The member said that the federal procedure had been held constitutional. Members commented that the bail provision in the federal constitution was different than the state constitution’s bail provision.

A member said that the proposal would be constitutional if it was limited to capital cases. A member asked for a definition of “capital cases.” Several members responded that these were cases where capital punishment was an option, and that capital punishment has

not been an option in North Dakota for more than thirty years.

A member asked whether the provision could be interpreted as applying to types of cases for which capital punishment was an option at the time the state constitution was implemented. A member said that at the time of statehood murder and perhaps treason were offenses for which capital punishment was an option. A member said pretrial detention could be constitutional when such offenses are charged.

A member asked what tool could be used to keep potentially dangerous offenders locked up before trial if pretrial detention is not constitutional in most cases. Members responded that high bail could be imposed and that setting high bail in cases involving potentially dangerous offenders is completely reasonable.

A member asked whether the proposal was in response to a specific case where a North Dakota judge had released a person pre-trial and something negative had happened. A member responded that the proposal seemed to be in response to national problems rather than to any North Dakota case.

A member said that the proposal seemed to be a response to the Rodriguez case. The member commented that if the governor's task force believes that a substantive change in pretrial detention practice is required in North Dakota, it should propose a constitutional amendment.

A member said that a "capital crime" in modern North Dakota would be a AA felony. The member also pointed out that, under the proposal, pretrial detention is not mandatory unless the magistrate finds that no release conditions would assure the appearance of the person and the safety of the community.

Ms. Moore's motion to add the rule, as amended, to the annual rules package FAILED on a unanimous vote.

RULE 32.2, N.D.R.Crim.P. - FORFEITURE (PAGES 87-131 OF THE AGENDA MATERIAL)

Staff explained that Justice Maring had requested the Committee to consider adoption of a criminal forfeiture rule based on the federal model.

Judge Dawson MOVED to approve the proposal to adopt Rule 32.2. Judge Kleven seconded.

A member said a procedural rule on forfeitures would be helpful, but that provisions in the forfeiture statutes would need to be changed before such a rule would be possible. The member said adopting a rule before necessary statutory changes were made would be putting the cart before the horse.

A member observed that, under the statute, a forfeiture proceeding was a civil proceeding and a criminal conviction was not required before a forfeiture could take place. The member asked whether this meant that the burden of proof in forfeiture matters was preponderance of the evidence. A member responded that, under North Dakota law, the prosecution needs to show only probable cause for forfeiture and this causes a burden shift to the property owner to show by a preponderance of the evidence that the property is not forfeitable.

A member asked whether the burden shifting calculation would confuse the jury in a criminal prosecution. A member responded that the judge would make all decisions about forfeiture.

A member said that the proposed rule was too much at odds with the existing statutes on forfeiture. A member suggested that the question of whether an action should be a civil action or a criminal action was a question the courts could answer through a rule. A member said that a rule of procedure could supersede a procedural statute. A member said that the forfeiture statutes were substantive, not procedural.

A member commented that having a rule like the one proposed would be a good idea. The member suggested that the legislature look at the issue and give the courts the authority to make such a rule.

A member asked for an explanation of how a forfeiture action works. The member asked whether there would be a criminal prosecution and then a separate civil action to forfeit property. The member asked why a criminal procedure rule would be necessary to guide forfeiture actions when these should be conducted under the Rules of Civil Procedure. The member said that, unless the legislature changes its approach to forfeitures, the Committee should not approve a forfeiture rule.

A member said it would make sense to have the same judge who sits on the criminal case decide the related forfeiture case. The member said that a rule allowing consolidation of a criminal action with a civil proceeding would allow the same judge to decide both. A member said such a hybrid action would be confusing for the jury. A member responded that the judge would decide the (civil) forfeiture action while the jury decided the criminal case.

A member commented that adopting the rule proposal would create confusion instead of economy. The member said bringing together the forfeiture action with the criminal trial would muddy both proceedings. A member reminded the Committee that there is no need for criminal charges to be brought against anyone before a forfeiture action may be brought and property forfeited.

A member asked whether the timeliness requirement, set out in statute and developed by the Supreme Court in case law, would still apply if the rule was adopted. A member said that there was nothing in the case law that suggested any problems with the statutory scheme that the proposed rule could solve.

Staff commented that the proposed rule was based on the federal rule, but that the federal rule contained provisions that went far beyond what North Dakota's forfeiture statutes seemed to allow. Staff said that the proposed rule did not contain these provisions and, therefore, was something of a watered down product.

A member said that the rule dealt with substantive issues that properly belong to the legislature and should not be approved.

A member said that one advantage of having forfeiture proceedings fall under the civil procedure rules was that third parties who might have an interest in the property would more easily be able to involve themselves in the action. A member said it was also an advantage for the defendant to be able to defend against a forfeiture action in a separate civil action because the defendant would not have to give up self-incrimination rights in the criminal action in order to defend against the forfeiture.

A member commented that any judicial economy created by allowing simultaneous forfeiture actions and criminal prosecutions was lost if third parties claimed an interest in the property because this would require ancillary proceeding.

Judge Dawson's motion to add the proposed new rule to the annual rules package FAILED on a unanimous vote.

RULE 44, N.D.R.Crim.P. - RIGHT TO AND APPOINTMENT OF COUNSEL (PAGES 132-136 OF THE AGENDA MATERIAL)

Staff explained that, because the courts were no longer involved in appointing counsel for indigents, amendments to Rule 44 were needed.

Judge Geiger MOVED to approve the amendments to Rule 44. Mr. Sturdevant

seconded.

Without objection, “2005” on lines 50 and 56 of the proposal was replaced with “2006.”

A member asked about the provision of the rule allowing appointment of counsel for non-indigent defendants. A member explained that sometimes defendants cannot find an attorney to take their case. The defendant can then come to the court and the judge can appoint a defense attorney, who the defendant then has to pay.

A member said that, in some cases, a defendant will not have a low enough income to qualify for indigent counsel. Yet, the defendant still may not have enough money to hire counsel or pay a retainer, especially in a serious felony case. The court can then get involved and appoint a defense counsel and help the defendant arrange payment. The member said the court would still need to continue to do this even with the transfer of indigent defense responsibilities to the Commission on Legal Counsel for Indigents.

A member said the commission would only be appointing attorneys for defendants who were indigent. The member said that when non-indigent defendants could not find counsel, this was a judicial problem.

A member asked who was responsible for paying a court-appointed attorney if the defendant did not pay. A member responded that the court can compel payment if the defendant is convicted, but that if the defendant is acquitted, the attorney must use civil collection methods to obtain payment.

A member said that the language of the rule seemed to require the court to appoint counsel whenever a defendant alleged an inability to find counsel. The member said that the case law only requires such appointments when there is a possibility of imprisonment.

Judge Simonson MOVED to delete lines 14-15 from the proposal. Judge Kleven seconded.

A member said that a defendant has a constitutional right to be represented by an attorney at a criminal trial. The member said that, when a defendant who can afford counsel cannot find counsel, judges have always stepped in to assist. The member said that the provision on court appointments for non-indigent defendants is necessary. A member agreed that it was important to retain the provision. A member commented that requiring defendants go forward pro se in criminal cases when counsel could not be found was not appropriate.

A member said there could be situations where the judge could not find anyone to represent a defendant. The member said that the rule should not require the judge to find counsel.

Without objection, Judge Simonson's proposal to delete lines 14-15 was substituted to change the word "must" to "may" on line 14 and retain the remainder of the text.

A member wondered whether any judge would allow a trial to go forward when a defendant wanted a lawyer but claimed an inability to find one, given that any resulting conviction would likely be vacated. The member said that a judge would be required to act to appoint counsel in such a situation.

A member said that sometimes defendants who claim an inability to find a lawyer just are not trying very hard, which creates a difficult situation for the court. A member said that having an independent commission in charge of indigent defense has taken a great burden off the courts, but that requiring judges to appoint counsel in cases where defendants claim inability to locate counsel returns some of the burden.

A member responded that courts have a constitutional duty to see that all defendants who want representation can obtain representation. The member said district judges are in a good position to twist attorney's arms to assure that representation is provided.

A member said that it is only in rare situations that a non-indigent defendant will need the assistance of the court in order to obtain counsel, especially since appointment would only be required in cases where imprisonment was possible. A member agreed that such situations did not happen often.

Judge Simonson's motion, as substituted, CARRIED.

Judge Geiger's motion to add the rule, as amended, to the annual rules package CARRIED unanimously.

RULE 32, N.D.R.Crim.P. - SENTENCING AND JUDGMENT (PAGES 137-161 OF THE AGENDA MATERIAL)

Staff explained that amendments to Fed.R.Crim.P. 32.1 on revoking or modifying probation had been approved so similar amendments to Rule 32's probation provision were being proposed.

Mr. Kapsner MOVED to approve the amendments to Rule 32. Mr. Mack seconded.

Mr. Kapsner's motion to add the rule, as amended, to the annual rules package CARRIED unanimously.

RULE 29, N.D.R.Crim.P. - MOTION FOR A JUDGMENT OF ACQUITTAL; RULE 33, N.D.R.Crim.P. - NEW TRIAL; RULE 34, N.D.R.Crim.P. - ARRESTING JUDGMENT (PAGES 162-178 OF THE AGENDA MATERIAL)

Staff explained that amendments to Fed.R.Crim.P. 29, 33 and 34 had been approved so similar amendments to the corresponding North Dakota rules were being proposed.

Judge Dawson MOVED to approve the amendments to the rules. Ms. Moore seconded.

A member asked, if these rules were amended, where a party seeking an extension of time to file would turn. Staff explained that the general extension provision applicable to the criminal rules is in Rule 45.

A member asked whether the 10-day deadline in these rules could be deleted but language allowing the court to set another deadline could be retained. A member responded that this would allow parties to indefinitely delay the filing of motions under these rules.

Judge Geiger MOVED to adopt additional language in the explanatory notes of the three rules indicating that requests for additional time under these rules must be made under Rule 45. Ms. Schmitz seconded.

A member asked for clarification of what would happen if a party failed to make a motion for extension of time within the time frames currently in these rules. A member explained that the rules' time frames were jurisdictional, so if a party fails to timely file a motion or a request for extension of time, the party would not be allowed to obtain relief. The member said that the proposed changes would relax time limits for making extension requests.

The motion to amend the explanatory note CARRIED.

Judge Dawson's motion to add the rules, as amended, to the annual rules package CARRIED unanimously.

RULE 6, N.D.R.Crim.P. - TIME; RULE 45, N.D.R.Crim.P. - COMPUTING AND EXTENDING TIME (PAGES 179-196 OF THE AGENDA MATERIAL)

Staff explained that amendments to Fed.R.Civ.P. 6 and Fed.R.Crim.P. 45 had been approved so similar amendments to the corresponding North Dakota rules were being proposed.

Ms. Moore MOVED to approve the amendments to the rules. Judge Kleven seconded.

A member said it was strange that, under the proposed language, days would be added after the period. The member said that some language had been omitted from the proposal that was in the federal proposal, the words “otherwise expires.” The member said that use of the word “after” would have made more sense if the omitted language had been used in the proposal. The member said that the current rule’s use of “to” was preferable to “after.”

Staff explained that the proposal was based on the final federal amendments and that the “otherwise expires” language appeared in an early federal draft.

Mr. Kuntz MOVED to remove the word “after” and change to “to” on Rule 6, line 34 and Rule 45, line 31. Mr. Sturdevant seconded. Motion CARRIED.

A member asked why the word “three” was spelled out in the proposal instead of a numeral being used.

Judge Simonson MOVED to use a numeral “3” on line 34 of Rule 6. Mr. Quick seconded.

A member commented that basic style rules dictated that numbers up to ten be written out and numerals used for numbers greater than ten. A member said that this rule was not consistently followed throughout the rules and that the Committee should choose a guideline for numbers and then follow it consistently.

Motion FAILED.

Ms. Moore’s motion to add the rules, as amended, to the annual rules package CARRIED unanimously.

RULE 27, N.D.R.Crim.P. - DEPOSITIONS BEFORE ACTION OR PENDING APPEAL
(PAGES 197-207 OF THE AGENDA MATERIAL)

Staff explained that amendments to Fed.R.Civ.P. 27 have been approved so similar amendments to Rule 27 were being proposed.

Mr. McLean MOVED to approve the amendments to Rule 27. Ms. Schmitz seconded.

Mr. McLean's motion to add the rule, as amended, to the annual rules package CARRIED unanimously.

RULE 3.2, N.D.R.Ct. - MOTIONS (PAGES 208-219 OF THE AGENDA MATERIAL)

Staff explained the proposed amendments to Rule 3.2.

Judge Nelson MOVED to approve the amendments to Rule 3.2. Ms. Schmitz seconded.

A member said that the proposed amendment to the rule regarding testimony in family law proceedings should be reviewed by a broad spectrum of practitioners in family law. The member suggested that the Committee gather comments on the proposed amendment before taking further action on it. The member volunteered to distribute the proposal to members of the bar.

Ms. Moore MOVED to postpone consideration of the amendment to subdivision (b) and of the amendment to Rule 8.4 (next agenda item) so that comment could be sought from the bar. Mr. Kapsner seconded.

A member commented that postponement would be wise.

Motion CARRIED.

A member discussed the proposed change relating to standing orders for hearings. The member explained that the East Central Judicial District had adopted a standing order requiring hearings on certain types of motions because hearings were generally needed on these motions. The member asked why having such a requirement would be a problem.

Staff responded that standing orders, unlike local rules, are not published. Staff said out-of-town lawyers might wholly unfamiliar with standing orders and would have no way to look them up. The Chair further explained that the Rule on Local Court Rules sets out

a procedure under which lawyers and other interested parties are provided with notice of local rule proposals and have an opportunity to comment, which is something that does not happen when standing orders are issued.

The Chair said that the ECJD standing order appeared to be cover ground that should be covered in a local rule. The Chair added that the Committee's role on new local rules was to evaluate whether they should be extended statewide, but that it could not exercise this role with standing orders.

A member responded that a standing order could be issued in a more timely manner than a local rule, and that the ECJD had issued the standing order on hearings in response to an immediate need, the expiration of the former ECJD local rule on hearings. The member also said that hearings were required by statute for the types of motions embraced by the standing order.

A member commented that whether a hearing should be conducted on a motion was a procedural issue, not a substantive one, so a statutory hearing requirement was subject to being superseded by procedural rule. The member said that Rule 3.2 should apply uniformly statewide so that lawyers across the state would know what to expect when practicing outside their home districts. The member said the Committee should discuss whether standing orders and local rules should continue to exist. The member said a lawyer should be able to walk into any court in the state and know what the rules are, but that this is not a reality because of standing orders and local rules.

Mr. Kuntz MOVED to table the rule until the April meeting. Judge Geiger seconded. Motion CARRIED.

RULE 8.4, N.D.R.Ct. - SUMMONS IN ACTION FOR DIVORCE OR SEPARATION (PAGES 220-224 OF THE AGENDA MATERIAL)

Rule 8.4 was tabled pending comment by the bar on the proposed amendments.

RULE 10.2, N.D.R.Ct. - SMALL CLAIMS COURT (PAGES 225-243 OF THE AGENDA MATERIAL)

Staff explained that, because of the recent Supreme Court decision in Wetzel v. Schlenvogt, 2005 ND 190, 705 N.W.2d 836, it was not clear whether corporations and other businesses could act in small claims court without legal representation. Staff explained that the new Rule 10.2 was proposed so that businesses could continue to use small claims court without legal representation.

The Chair explained that a corporation is an artificial person that has to be represented by a natural person and that a lawyer generally plays the role of representative. In small claims court in some parts of the state, non-lawyers appear to represent corporations. The Chair said that the rule proposal addresses this circumstance.

Mr. Sturdevant MOVED to approve the new Rule 10.2. Mr. Mack seconded.

Mr. Kapsner MOVED to delete the sentence at lines 6-7, the second sentence of subdivision (a). Ms. Schmitz seconded.

A member said that if a lawyer appears to represent a party in small claims court, the lawyer should be able to represent the party without being limited by the small claims court referee. The member observed that some small claims court referees are not familiar with the rules or the law and should not be allowed to restrict lawyer behavior. A member agreed that the proposed language gave small claims court referees too much discretion to limit the scope of a lawyer's representation.

A member commented that, under the small claims court statutes (and unlike in district court) the court conducts the proceeding. The member said that small claims court proceedings are designed to be quick, so attorneys do not always get to operate as they wish. The member said lawyers should not expect small claims court to be conducted the same way as district court.

Mr. Kapsner's motion CARRIED.

Mr. Kuntz MOVED to insert the word "employee" at line 10 then to delete everything after the word "association" on line 11, with deletion continuing through line 17. Ms. Moore seconded.

A member said the change was aimed at allowing employees to appear in small claims court to represent a corporation without formal corporate authorization. The member said that companies located throughout the United States operate offices in North Dakota and periodically they become involved in small claims court actions. The member said it is typically mid-level employees like office managers and foremen who are in the best position to go and represent the company in small claims court. The member said it would create problems if these employees needed to get formal authorization from corporate headquarters before representing the company in small claims court.

A member said the motion raises the question of what happens if an employee goes into local small claims court and gets the matter removed to district court without corporate

authority to do so—has the corporation submitted to district court jurisdiction in such a case? Outside of small claims court the employee, whether authorized or not, cannot continue to represent the corporation.

A member said that an officer, owner or partner should be able to represent a business without producing documentation, but an employee or agent should be required to provide authorization.

A member responded that mid-level employees have been representing businesses in small claims court in North Dakota for years without having to show authorization documents.

A member said that a rule requiring employees to be authorized before representing a business in small claims court is needed. The member said that these employees should also be required to produce authorizing documents or other evidence (including testimony) in court.

A member said that requiring documentation would create problems. The member said if the proposal was approved, a referee would have no choice but to enter default if an employee showed up in small claims court without documentation. The member said the amount of money involved in small claims court is too small to warrant excessive formality in procedure.

A member said that a requirement for an employee or agent to provide some evidence of authority would create a minimal burden.

Mr. Kapsner MOVED a substitute motion to use the language “employee or agent” instead of “employee” and to retain language starting in line 15 of the proposal requiring evidence of authority Mr. Quick seconded.

A member responded that small claims court is not a court of record. If a party comes in and testifies about their authority, there will be nothing to show later on what they said or did not say. The member said that any exhibits are given back to the parties once the proceeding is over. The member said that the only documents filed after the proceeding are the claim affidavit, request for hearing and judgment.

A member said that adopting the proposed substitute language would complicate small claims court procedure. The member said an employee’s authority to represent a business should only be an issue if the matter gets removed to district court. The member said that the small claims court statute, fairly interpreted, states that a business can appear in small claims

court without an attorney. The member said that the Wetzel decision implied that businesses would now have to hire attorneys. The member suggested that any rule changes should be directed toward correcting this problem.

A member said that the rule proposal did not address political subdivisions. The member said political subdivisions also have appeared in small claims court without attorneys.

A member said that, given the fact that limited records are kept of small claims court proceedings, requiring employees to prove that they have authority to represent businesses would be an empty gesture.

Motion to substitute FAILED.

Mr. Kuntz's motion CARRIED.

Mr. Mack MOVED to amend line 10 to add "or authorized employee or agent" and to delete all material following. Mr. Kapsner seconded.

Motion to amend CARRIED.

Ms. Schmitz MOVED to add "or political subdivision" to line 8 of rule. Mr. Kuntz seconded. Motion CARRIED.

A member asked if political subdivisions often appeared in small claims court. A member responded they appeared often in small claims court.

Without objection, "political subdivisions" was added to the title of the rule in line 8.

A member said that the language of the rule might send a message to collection agencies that they somehow qualify to act in small claims court. A member responded that the statute clearly says that assigned claims cannot be heard in small claims court. The member suggested that language be added to the explanatory note cross-referencing the statutory provision.

Judge Hagerty MOVED to add language to the explanatory note: "Under N.D.C.C. § 27-08.1-01(3), a claim may not be filed in small claims court by an assignee of the claim." Ms. Schmitz seconded. Motion CARRIED.

A member suggested that, under the proposed language approved by the Committee,

a collection agent could appear in small claims court as an agent of a business association. A member responded that a claim could not be assigned. A member responded that this did not prevent agents from showing up on behalf of creditors.

A member said the language of the rule could be further modified to head off participation of collection agencies in small claims court.

A member asked whether the term “partnership” in the rule was broad enough to include limited liability partnerships and other variations on the partnership form. The consensus was that the term was broad enough.

Judge Hagerty MOVED to add a new sentence to the rule text: “An owner or employee of a collection agency may not act as an agent under subdivision (b).” Judge Simonson seconded. Motion CARRIED.

A member asked if the language would preclude an insurance company that paid property damages from taking an assignment from the insured. A member responded that the small claims court statute itself prevented assignees from acting in small claims court. A member said that sometimes an insurer will bring the insured into small claims court and let the insured appear to prosecute the claim.

Mr. Sturdevant’s motion to approve the new rule, as amended, CARRIED unanimously.

Mr. Kuntz MOVED to forward the new rule immediately to the Supreme Court. Judge Foughty seconded. Motion CARRIED.

FOR THE GOOD OF THE ORDER

The Chair announced that the Committee had worked through its backlogged material and asked Committee members for suggestions on topics for the next meeting.

A member said that there did not appear to be a consistent procedure for formal probate hearings. The member said that there was a statutory probate jury demand procedure that was not consistent with the civil rules. The member said it might be worth looking at this. Another member suggested there was also an issue of whether Rule 3.2 applies to probate proceedings. The member said the Committee should look at how the statutes in the probate code mesh with the rules of procedure.

A member suggested that the Committee look at N.D.R.Crim.P. 45(b). The member

said almost all attorneys serve a sufficient subpoena with notice and check. The member said 45(b)(2) looks like it requires an additional document, a notice for production. The member said that this document is not generally sent with the subpoena and should not be required.

A member said the Committee should look into creating a pretrial diversion rule. The member said that Minnesota has Rule 27.05 which could be used as a model. A member responded that there is an alternatives to incarceration commission working in this area and it might be wise to wait and see what they come up with.

A member suggested that there should be a rule on safe firearms handling in the courtroom when a firearm is to be offered into evidence. The member said that Judge McCullough had been working on such a rule.

A member said the Committee should revisit N.D.R.Crim.P. 4(c)(3) on demand to file a complaint. A member said the Committee could address issues such as whether one party's demand for a complaint to be filed applies to all parties.

A member said the Committee might consider whether to expand reciprocal discovery under N.D.R.Crim.P. 16.

The meeting adjourned at approximately 4:00 p.m. on January 26, 2006.



Michael J. Hagburg

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
RE: Indigent Counsel Rule Changes

At the January meeting, the Committee approved changes to N.D.R.Crim.P. 44 reflecting the new role of the Commission on Legal Counsel for Indigents in providing counsel for indigents and funding the defense of indigents. A copy of Rule 44 that includes the Committee's approved changes is attached.

Staff has located several other rules where related changes could be made:

— N.D.R.Crim.P. 5. Propose removal of the words "court appointed" in subparagraph (b)(1)(E) and addition of explanatory note language explaining new role of Commission.

— N.D.R.Crim.P. 11. Propose removal of the words "court appoint" in subparagraph (b)(1)(C) and addition of word "provided." Also propose addition of explanatory note language explaining new role of Commission.

— N.D.R.Crim.P. 17. Propose adding language to subdivision (b) and to the explanatory note that would redirect indigents seeking subpoena assistance to the Commission. Poor but non-indigent defendants would still be able to seek subpoena assistance from court under subdivision (b).

— N.D.R.Crim.P. 17.1. Propose removal of the word "appointed" in subparagraph (b)(1)(A) and addition of word "provided." Also propose addition of explanatory note language explaining new role of Commission.

Rule drafts including the proposed changes are attached.

Staff from the Commission on Legal Counsel for Indigents have suggested that the changes be implemented as soon as possible. Their biggest concern is that motions under the ex parte assistance provision of Rule 44 are still being made and these are creating problems for the Commission—they have to send attorneys out to resist the motions and to request that courts redirect assistance requests to the Commission instead.

RULE 44. RIGHT TO ~~AND APPOINTMENT OF~~ COUNSEL

(a) ~~Appointment of~~ Right to Counsel.

(1) Felony Cases. An indigent defendant facing a felony charge in state court is entitled to have counsel ~~appointed~~ provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right.

(2) Non-Felony Cases. An indigent defendant facing a non-felony charge in state court is entitled to have counsel ~~appointed~~ provided at public expense to represent the defendant at every stage of the proceeding from initial appearance through appeal, unless the defendant waives this right or the magistrate determines that sentence upon conviction will not include imprisonment.

(3) Non-Indigent Defendants. The court ~~must~~ may appoint counsel to represent a defendant at the defendant's expense if the defendant is unable to obtain counsel and is not indigent.

~~(b) Ex Parte Application for Financial Assistance. An indigent defendant may apply ex parte for financial assistance to obtain investigative, expert, or other services necessary for an adequate defense. The application, the record of any proceeding, and the order on the application must be kept under seal, unless the court orders otherwise.~~

~~(c)~~(b) Inquiry Into Joint Representation.

(1) Joint Representation. Joint representation occurs when:

22 (A) two or more defendants have been charged jointly under Rule 8(b) or have been
23 joined for trial under Rule 13; and

24 (B) the defendants are represented by the same counsel, or counsel who are associated
25 in law practice.

26 (2) Court's Responsibilities in Cases of Joint Representation. The court must promptly
27 inquire about the propriety of joint representation and must personally advise each defendant
28 of the right to the effective assistance of counsel, including separate representation. Unless
29 there is good cause to believe that no conflict of interest is likely to arise, the court must take
30 appropriate measures to protect each defendant's right to counsel.

31

32 EXPLANATORY NOTE

33 Rule 44 was amended, effective September 1, 1983; March 1, 1990; March 1, 2001;
34 March 1, 2004; March 1, 2006;_____.

35 Rule 44 is a modification of Fed.R.Crim.P. 44 governing the appointment of counsel.
36 In non-felony cases, ~~this rule provides for appointment of counsel~~ for an indigent defendant
37 will be provided when the defendant faces a term of imprisonment, including a suspended
38 sentence of imprisonment or a deferred imposition of sentence, unless imprisonment is
39 waived. In contrast, Fed.R.Crim.P. 44 requires appointment of counsel for all indigent
40 defendants.

41 Rule 44 was amended, effective September 1, 1983, to add the words "in the courts
42 of this state" in each of the first two sentences to make it clear that ~~appointment of counsel~~

43 for indigent defendants will be provided at public expense ~~is required~~ only in proceedings
44 through appeal in the courts of North Dakota.

45 Rule 44 was amended, effective March 1, 1990. The amendments are technical in
46 nature and no substantive change is intended.

47 Rule 44 was amended, effective March 1, 2001, to authorize an application for
48 financial assistance ex parte. This provision was deleted, effective _____, because
49 the North Dakota Commission on Legal Counsel for Indigents became responsible for
50 providing services to indigent defendants on January 1, 2006.

51 Rule 44 was amended, effective March 1, 2006, in response to the December 1, 2002,
52 revision of the Federal Rules of Criminal Procedure. The language and organization of the
53 rule were changed to make the rule more easily understood and to make style and
54 terminology consistent throughout the rules.

55 Rule 44 was amended, effective _____, to remove references to appointment
56 of counsel for indigents. Courts ceased appointing counsel for indigents on January 1, 2006,
57 when the North Dakota Commission on Legal Counsel for Indigents became responsible for
58 indigent defense.

59 Subdivision (c)(b) was added, effective March 1, 2006, to explain the court's duties
60 in situations involving joint representation of multiple defendants. A court inquiry is
61 necessary in these cases because serious conflicts can develop when a single attorney
62 represents defendants who may have different interests.

63 SOURCES: Joint Procedure Committee Minutes of _____ pages _____;

64 January 27-28, 2005, pages 36-37; September 18-19, 2003, pages 27-31; January 27-28,
65 2000, pages 3-4; September 23-24, 1999, pages 3-6; April 20, 1989, page 4; December 3,
66 1987, page 15; September 30-October 1, 1982, page 22; October 15-16, 1981, page 15; Joint
67 Procedure Committee Minutes of April 24-26, 1973, page 14; December 11-15, 1972, pages
68 44-48; May 6-8, 1971, pages 1-11; November 20-21, 1969, pages 3-8; July 10-11, 1969,
69 pages 16-22; Fed.R.Crim.P. 44.

70 STATUTES AFFECTED:

71 SUPERSEDED: N.D.C.C. §§ 29-07-01, 29-07-04, 29-13-03, 33-12-09.

72 CONSIDERED: N.D.C.C. §§ 12-59-15, 29-01-06, 29-20-01.

73 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the Magistrate);
74 N.D.R.Crim.P. 8 (Joinder of Offenses or Defendants); N.D.R.Crim.P. 13 (Joint Trial of
75 Separate Cases); N.D.R.Crim.P. 43 (Defendant's Presence).

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) General.

(1) Appearance Upon an Arrest. An officer or other person making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate.

(2) Arrest Without a Warrant. If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exists under Rule 4(a). If probable cause exists to believe that the arrested person has committed a criminal offense, a complaint must be filed in the county where the offense was allegedly committed. A copy of the complaint must be given within a reasonable time to the arrested person and to any magistrate before whom the arrested person is brought, if other than the magistrate with whom the complaint is filed.

(b) Statement by the Magistrate at the Initial Appearance.

(1) In All Cases. The magistrate must inform the defendant of the following:

(A) the charge against the defendant and any accompanying affidavit;

(B) the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant;

(C) the defendant's right to the assistance of counsel before making any statement or answering any questions;

(D) the defendant's right to be represented by counsel at each and every stage of the proceedings;

22 (E) if the offense charged is one for which ~~court-appointed~~ counsel is required, the
23 defendant's right to have legal services provided at public expense to the extent that the
24 defendant is unable to pay for the defendant's own defense without undue hardship; and

25 (F) the defendant's right to be admitted to bail under Rule 46.

26 (2) Felonies. If the defendant is charged with a felony, the magistrate must inform the
27 defendant also of the defendant's right to a preliminary examination and the defendant's right
28 to the assistance of counsel at the preliminary examination.

29 (3) Misdemeanors. If the defendant is charged with a misdemeanor, the magistrate
30 must inform the defendant also of the defendant's right to trial by jury in all cases as
31 provided by law and of the defendant's right to appear and defend in person or by counsel.

32 (c) Right to Preliminary Examination.

33 (1) Waiver.

34 (A) If the offense charged is a felony, the defendant has the right to a preliminary
35 examination. The defendant may waive the right to preliminary examination at the initial
36 appearance if assisted by counsel.

37 (B) If the defendant is assisted by counsel and waives preliminary examination and
38 the magistrate is a judge of the district court, the defendant may be permitted to plead to the
39 offense charged in the complaint at the initial appearance.

40 (C) If the defendant waives preliminary examination and does not plead at the initial
41 appearance, an arraignment must be scheduled.

42 (D) The magistrate must admit the defendant to bail under the provisions of Rule 46.

43 (2) Non-waiver. If the defendant does not waive preliminary examination, the
44 defendant may not be called upon to plead to a felony offense at the initial appearance. A
45 magistrate of the county in which the offense was allegedly committed must conduct the
46 preliminary examination. The magistrate must admit the defendant to bail under the
47 provisions of Rule 46.

48 (d) Interactive television may be used to conduct an appearance under this rule as
49 permitted by N.D. Sup. Ct. Admin. R 52.

50

51 EXPLANATORY NOTE

52 Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1,
53 2006;_____.

54 Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the defendant
55 of the charge against the defendant and to inform the defendant of the defendant's rights.
56 This procedure differs from arraignment under Rule 10 in that the defendant is not called
57 upon to plead.

58 Subdivision (a) provides that an arrested person must be taken before the magistrate
59 "without unnecessary delay." Unnecessary delay in bringing a person before a magistrate is
60 one factor in the totality of circumstances to be considered in determining whether
61 incriminating evidence obtained from the accused was given voluntarily.

62 Subdivision (a) was amended, effective January 1, 1995, to clarify that a "prompt"
63 judicial determination of probable cause is required in warrantless arrest cases.

64 Subdivision (b) is designed to carry into effect the holding of *Miranda v. Arizona*, 384
65 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). Because the Miranda rule
66 is constitutionally based, it applies to all officers whether state or federal. One should note
67 that the protections required by Miranda apply as soon as a person “has been taken into
68 custody or otherwise deprived of his freedom of action in any significant way,” while the
69 requirement that an accused be taken before a magistrate is applicable only to an “arrested
70 person.” The Miranda decision is based upon the Fifth Amendment privilege against self-
71 incrimination; and holds that no statement obtained by interrogation of a person in custody
72 is admissible, unless, before the interrogation begins, the accused has been effectively
73 warned of the accused’s rights, including the right not to answer questions and the right to
74 have counsel present.

75 Subdivision (b) specifies the action which must be taken by the magistrate.
76 Subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C) are stated by Miranda to be absolute
77 prerequisites to interrogation and cannot be dispensed with on even the strongest showing
78 that the person in custody was aware of those rights.

79 Paragraph (b)(1) was amended, effective _____, to remove a reference to
80 court appointment of indigent counsel. Courts ceased appointing counsel for indigents on
81 January 1, 2006, when the North Dakota Commission on Legal Counsel for Indigents became
82 responsible for indigent defense.

83 Paragraph (b)(2) provides an additional requirement to the instructions given by the
84 magistrate in paragraph (b)(1) when the charge is a felony. It requires the magistrate to

85 inform the defendant of the right to a preliminary examination. The Sixth Amendment right
86 to counsel applies to a preliminary examination granted under state law because the
87 preliminary examination is a critical stage of the state's criminal process.

88 Subdivisions (b) and (c) were amended, effective March 1, 1990. The amendments
89 track the 1987 amendments to Fed.R.Crim.P. 5, which are technical in nature, and no
90 substantive change is intended.

91 Subdivision (c) was amended, effective January 1, 1995, in response to elimination
92 of county courts and to ensure that a defendant is not called upon to waive the preliminary
93 examination or to plead without the assistance of counsel at the initial appearance.

94 Subdivision (d) was amended, effective March, 1, 2004, to permit the use of
95 interactive television to conduct initial proceedings. Subdivision (d) was amended, effective
96 March 1, 2006, to reference N.D. Sup. Ct. Admin. R. 52, which governs proceedings
97 conducted by interactive television.

98 Rule 5 was amended, effective March 1, 2006, in response to the December 1, 2002,
99 revision of the Federal Rules of Criminal Procedure. The language and organization of the
100 rule were changed to make the rule more easily understood and to make style and
101 terminology consistent throughout the rules.

102 SOURCES: Joint Procedure Committee Minutes of _____ pages _____; January
103 29-30, 2004, pages 22-23; September 26-27, 2002, pages 12-13; January 27-28, 1994, pages
104 3-5; September 23-24, 1993, pages 4-7; April 20, 1989, page 4; December 3, 1987, page 15;
105 February 22-23, 1973, page 18; March 23-24, 1972, pages 2-3, 11-12; January 27, 1972,

106 pages 17-22; November 21-22, 1969, pages 2, 8-9, 17-19; May 3-4, 1968, pages 1-2; January
107 26-27, 1968, pages 7-9.

108 STATUTES AFFECTED:

109 SUPERSEDED: N.D.C.C. §§ 29-05-04, 9-05-11, 29-05-17, 29-05-19, 29-07-01, 29-
110 07-02, 29-07-04, 29-07-05, 29-07-07, 29-07-08, 29-07-09, 29-07-10, 33-12-07, 33-12-09.

111 CONSIDERED: N.D.C.C. §§ 29-07-03, 29-07-06, 40-18-15, 40-18-16, 40-18-18.

112 CROSS REFERENCES: N.D.R.Crim.P. 5.1 (Preliminary Examination);
113 N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence);
114 N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Assignment of
115 Counsel); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

RULE 11. PLEAS

(a) Entering a Plea.

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

(2) Conditional Plea. With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea.

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

(b) Advice to defendant.

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

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

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, the right to have the court appoint counsel provided under Rule 44;

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

22 attendance of witnesses;

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

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

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

26 (H) any mandatory minimum penalty; and

27 (I) the court's authority to order restitution.

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

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

36 (c) Plea Agreement Procedure.

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

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

42 (B) recommend, or agree not to oppose the defendant's request, that a particular

43 sentence is appropriate; or

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

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

49 (3) Judicial Consideration of a Plea Agreement.

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

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

56 (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must
57 inform the defendant that, to the extent the plea agreement is of the type specified in Rule
58 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

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

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

63 (B) advise the defendant personally that the court is not required to follow the plea

64 agreement and give the defendant an opportunity to withdraw the plea; and

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

68 (6) Time of Plea Agreement Procedure. Except for good cause shown, notification to
69 the court of the existence of a plea agreement must be given at the arraignment or at such
70 other time, prior to trial, as may be fixed by the court.

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

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

77 (f) Defendant's Presence at Plea Proceeding. A plea of guilty may be made only by
78 the defendant, in open court, unless the defendant is a corporation, in which case it may be
79 made by counsel; or in a non-felony case, the defendant may petition to enter a plea of guilty
80 as provided in Rule 43(b).

81

82 EXPLANATORY NOTE

83 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996;
84 March 1, 2006;_____.

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

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

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

98 Paragraph (a)(2) was adopted effective March 1, 1986. This provision allows the
99 defendant, with the approval of the court and the consent of the prosecuting attorney, to enter
100 a conditional plea of guilty and reserve in writing the right, on appeal of the adverse
101 determination of any specified pretrial motion. The conditional plea procedure is intended
102 to conserve prosecutorial and judicial resources and advance speedy trial objectives by
103 avoiding the necessity of a trial simply to preserve pretrial issues for appellate review.

104 Subdivision (b) prescribes the advice which the court must give to the defendant as
105 a prerequisite to the acceptance of a plea of guilty. The court is required to determine that a

106 plea is made with an understanding of the nature of the charge and the consequences of the
107 plea. Subdivision (b) also establishes the requirement that the court address the defendant
108 personally.

109 Paragraph (b)(1) requires the court to determine if the defendant understands the
110 nature of the charge and requires the court to inform the defendant of and determine that the
111 defendant understands the mandatory minimum punishment, if any, and the maximum
112 possible punishment. The objective is to insure that the defendant knows what minimum
113 sentence the judge MUST impose and the maximum sentence the judge MAY impose and,
114 further, to explain the consecutive sentencing possibilities when the defendant pleads to more
115 than one offense. This provision is included so that the judicial warning effectively serves
116 to overcome subsequent objections by the defendant that the defendant's counsel gave the
117 defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the
118 defendant waives by a plea of guilty and ensures a knowing and intelligent waiver of counsel
119 is made. A similar requirement is found in Rule 5(b) governing the initial appearance.

120 Paragraph (b)(1) was amended, effective _____, to remove a reference to
121 court appointment of indigent counsel. Courts ceased appointing counsel for indigents on
122 January 1, 2006, when the North Dakota Commission on Legal Counsel for Indigents became
123 responsible for indigent defense.

124 Paragraph (b)(2) requires the court to determine that a plea of guilty is voluntary
125 before accepting it. Paragraph (b)(2), together with subdivision (c), affords the court an
126 adequate basis for rejecting an improper plea agreement induced by threats or inappropriate

127 promises. The rule specifies that the court personally address the defendant in determining
128 the voluntariness of the plea.

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

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

140 Paragraph (c)(1) specifies that both the attorney for the prosecution and the attorney
141 for the defense, or the defendant when acting pro se, participate in plea discussions. It also
142 makes clear that there are three possible concessions that may be made in a plea agreement:
143 first, the charge may be reduced to a lesser or related offense; second, the attorney for the
144 prosecution may agree not to recommend or not oppose the imposition of a particular
145 sentence; or third, the attorney for the prosecution may promise to move for a dismissal of
146 other charges. The court is not permitted to participate in plea discussions because of the
147 possibility that the defendant would believe that the defendant would not receive a fair trial,

148 if no agreement had been reached or the court rejected the agreement, and a subsequent trial
149 ensued before the same judge.

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

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

160 Paragraph (c)(5) requires the court, on the record, upon its rejection of the plea
161 agreement, to inform the defendant of this fact and to advise the defendant personally, in
162 open court, or for good cause, in camera, that the court is not bound by the plea agreement.
163 The defendant must be afforded an opportunity to withdraw the defendant's plea and must
164 be advised that if the defendant persists in the defendant's guilty plea, the disposition of the
165 case may be less favorable to the defendant than contemplated by the plea agreement.

166 Paragraph (c)(6) requires that the court be notified of the existence of a plea
167 agreement at the arraignment or at another time prior to trial fixed by the court unless it can
168 be shown that for good cause this was not done. Having a plea entered at this stage provides

169 a reasonable time for the defendant to consult with counsel and for counsel to complete any
170 plea discussions with the attorney for the prosecution. The objective of the provision is to
171 make clear that the court has authority to require a plea agreement to be disclosed sufficiently
172 in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

173 Subdivision (d) makes it clear that N.D.R.Ev. 410 governs the admissibility of plea
174 discussions.

175 Subdivision (e) requires that a verbatim record be kept of the proceedings. The record
176 is important in the event of a post-conviction attack.

177 Subdivision (f) was amended, effective March 1, 1996, to reference Rule 43(c). In a
178 non-felony case, if the defendant wants to plead guilty without appearing in court, a written
179 form must be used which advises the defendant of his or her constitutional rights and creates
180 a record showing that the plea was made voluntarily, knowingly, and understandingly. See
181 Appendix Form 17. A court may accept a guilty plea via interactive television using the
182 procedure set out in N.D. Sup. Ct. Admin. Rule 52.

183 Rule 11 does not include a subdivision entitled harmless error and differs from the
184 1983 amendment to Fed.R.Crim.P. 11(h) in that respect. Rule 52(a), Harmless Error, is
185 intended to have general application to all the criminal rules of procedure.

186 SOURCES: Joint Procedure Committee Minutes of _____ pages _____;
187 September 22-23, 2005, pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004,
188 pages 28-30; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-
189 29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984,

190 pages 11-16; April 26, 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978,
191 pages 31-34; March 16-17, 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977,
192 page 4; April 24-26, 1973, pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972,
193 pages 2-6; November 18-20, 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4,
194 1968, page 9.

195 STATUTES AFFECTED:

196 SUPERSEDED: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-
197 14-16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23, 29-14-24,
198 29-14-26, 29-14-27, 33-12-17, 33-12-18.

199 CONSIDERED: N.D.C.C. § 31-13-03.

200 CROSS REFERENCE: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44
201 (Right to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo
202 Contendere; Withdrawn Plea of Guilty); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

203

RULE 17. SUBPOENA

(a) Content.

(1) A subpoena must state the court's name and the title of the action, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk or magistrate shall issue a signed blank subpoena, or a signed blank subpoena for the production of documentary evidence or objects, to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(2) The attorney for a party to any proceeding may issue a subpoena, or a subpoena for the production of documentary evidence or objects, in the court's name. A subpoena issued by an attorney has the same effect as a subpoena issued under Rule 17(a)(1). The subpoena must state the attorney's name, office address, and the party for whom the attorney appears.

(b) Defendant Unable to Pay. ~~Upon a defendant's ex parte application, the~~ A defendant who does not qualify to have counsel provided at public expense may apply ex parte for the court to issue a subpoena. The court must order that a subpoena be issued for a named witness if the defendant shows:

(1) an inability to pay the witness's fees; and

(2) the necessity of the witness's presence for an adequate defense.

If the court orders a subpoena to be issued, the process costs and witness fees must be paid in the same manner as those paid for witnesses the prosecution subpoenas.

22 (c) Producing Documents and Objects.

23 (1) In General. A subpoena may order the witness to produce any books, papers,
24 documents, data, or other objects the subpoena designates. The court may direct the witness
25 to produce the designated items in court before trial or before they are to be offered in
26 evidence. When the items arrive, the court may permit the parties and their attorneys to
27 inspect all or part of them.

28 (2) Quashing or Modifying the Subpoena. On motion made promptly, the court may
29 quash or modify the subpoena if compliance would be unreasonable or oppressive.

30 (d) Service. A peace officer or any nonparty who is at least 18 years old may serve a
31 subpoena. The server must deliver a copy of the subpoena to the witness and must tender to
32 the witness one day's witness attendance fee and the legal mileage allowance. The server
33 need not tender the attendance fee or mileage allowance when the prosecution or a defendant
34 unable to pay under Rule 17(b) has requested the subpoena.

35 (e) Place of service.

36 (1) In North Dakota. A subpoena requiring a witness to attend a hearing or trial may
37 be served anywhere within North Dakota.

38 (2) Witness Outside State. Service on a witness outside this state may be made only
39 as provided by law.

40 (f) Issuing a Deposition Subpoena.

41 (1) Issuance. An order to take a deposition authorizes the clerk of court or a magistrate
42 to issue a subpoena for any witness named or described in the order.

43 (2) Place. After considering the convenience of the witness and the parties, the court
44 may order—and the subpoena may require—the witness to appear anywhere the court
45 designates.

46 (g) Contempt. Failure by any witness without adequate excuse to obey a subpoena
47 served upon that witness may be a contempt of the court from which the subpoena issued.

48 (h) Information Not Subject to Subpoena. No party may subpoena a statement of a
49 witness or of a prospective witness under this rule. Rule 16 governs the production of a
50 statement.

51

52 EXPLANATORY NOTE

53 Rule 17 was amended September 1, 1983; March 1, 1990; March 1, 2006.

54 Rule 17 follows Fed.R.Crim.P. 17 in substance and controls with respect to all
55 subpoenas in criminal cases issued by the courts of this state.

56 Rule 17 is not limited to subpoena for the trial. A subpoena may be issued for a
57 preliminary hearing, in aid of a grand jury investigation, for a deposition, or for a
58 determination of an issue of fact raised by a pretrial motion. Rule 17 is also intended to
59 obtain witnesses and documents for use as evidence, although it is not a discovery device.

60 Rule 17 was amended, effective March 1, 2006, in response to the December 1, 2002,
61 revision of the Federal Rules of Criminal Procedure. The language and organization of the
62 rule were changed to make the rule more easily understood and to make style and
63 terminology consistent throughout the rules.

64 Paragraph (a)(1) follows Fed.R.Crim.P. 17(a) except that subpoenas may be issued
65 by the magistrate as well as the clerk of court. The fact that some of the lesser state courts
66 are without the benefit of a clerk necessitates this requirement.

67 Paragraph (a)(2) was amended, effective September 1, 1983, to provide that an
68 attorney for a party may issue subpoenas with the same effect as the clerk or magistrate.

69 Subdivision (b) follows Fed.R.Crim.P. 17(b). Subdivision (b) provides a means by
70 which the defendant unable to pay witnesses' fees and travel costs may have persons
71 subpoenaed. If a subpoena is issued under subdivision (b), the fees and costs are paid in the
72 same manner as in the case of a witness subpoenaed by the prosecution. Subdivision (b) was
73 amended, effective _____ . As amended, it applies only to defendants who do not
74 qualify to have counsel provided at public expense. As of January 1, 2006, the North Dakota
75 Commission on Legal Counsel for Indigents became responsible providing all defense
76 services, including subpoenas, to indigent defendants.

77 Subdivision (c) follows Fed.R.Crim.P. 17(c) and authorizes issuance of a subpoena
78 duces tecum. Rule 17 generally is available to any "party" and this is no less true of
79 subdivision (c). Thus the prosecution as well as the defendant may use subdivision (c),
80 subject to the limitations imposed by the Fourth and Fifth Amendments.

81 Subdivision (d) was amended, effective March 1, 2006, to simplify service
82 instructions for a subpoena and to eliminate outmoded methods of service.

83 A subpoena will ordinarily be served by a peace officer although subdivision (d)
84 permits service by any person who is not a party and who is 18 or more years old. Service of

85 a subpoena under Fed.R.Crim.P. 17 has been held effective only if the fee for one day's
86 attendance and the mileage allowed by law are tendered to the witness when the subpoena
87 is delivered. Fees and mileage need not be tendered if the subpoena is issued in behalf of the
88 state or on behalf of a defendant unable to pay.

89 Subdivision (e) is an adaptation of the Colorado Rules of Criminal Procedure. Under
90 N.D.C.C. ch. 31-03 (Means of Compelling Attendance of Witnesses), North Dakota has
91 adopted a Uniform Act to secure the attendance of witnesses from another state in criminal
92 proceedings. Under paragraph (e)(2) service of subpoenas on witnesses out-of-state is
93 governed by N.D.C.C. ch. 31-03.

94 Subdivision (f) follows Fed.R.Crim.P. 17(f), with appropriate changes to satisfy the
95 requirements of North Dakota. Paragraph (f)(1) provides that a court order for the taking of
96 depositions gives authority to the clerk of court or magistrate to issue subpoenas for the
97 persons named or described therein.

98 Paragraph (f)(2) provides the court with discretion in determining where the
99 deposition is to be taken.

100 Subdivision (g) follows N.D.R.Civ.P. 45(e). This provision merely restates existing
101 law.

102 Subdivision (h) was adopted, effective September 1, 1983, to provide that statements
103 made by witnesses or prospective witnesses are not subject to subpoena under Rule 17 but
104 are subject to production in accordance with Rule 16. This correlates to Rule 16's provisions
105 relating to production of statements.

106 SOURCES: Joint Procedure Committee Minutes of January 27-28, 2005, pages 13-14;
107 April 20, 1989, page 4; December 3, 1987, page 15; November 18-19, 1982, pages 10-13;
108 October 15-16, 1981, pages 6-10; October 12-13, 1978, page 8; June 26-27, 1972, pages 14-
109 20; July 25-26, 1968, pages 6-10; Fed.R.Crim.P. 17.

110 STATUTES AFFECTED:

111 SUPERSEDED: N.D.C.C. § § 31-03-04, 31-03-07, 31-03-08, 31-03-09, 31-03-13,
112 31-06-07, 40-18-09.

113 CONSIDERED: N.D.C.C. § § 29-10.1-19, 31-03-01, 31-03-15, 31-03-16, 31-03-17,
114 31-03-18, 31-03-25, 31-03-26, 31-03-27, 31-03-28, 31-03-29, 31-03-30, 31-03-31.

115 CROSS REFERENCE: N.D.R.Civ.P. 45 (Subpoena).

RULE 17.1. OMNIBUS HEARING AND PRETRIAL CONFERENCE

(a) Setting of Omnibus Hearing.

(1) If a guilty plea is not entered at the arraignment, the court may, with agreement of the parties, schedule an omnibus hearing.

(2) In scheduling an omnibus hearing the court must allow counsel time:

(A) to initiate and complete discovery;

(B) to conduct investigation necessary to the defendant's case; and

(C) to continue plea discussion.

(b) Omnibus Hearing.

(1) At the omnibus hearing, the court, in counsel and defendant's presence—unless the defendant waives the right to be present—must:

(A) ensure that, if required, counsel has been ~~appointed~~ provided for the defendant;

(B) determine whether discovery is complete; and, if not, make orders to expedite completion;

(C) determine whether there are requests for additional disclosures under Rule 16;

(D) rule on any pending motion or request and determine whether any additional motion or request will be made at the hearing or a continued hearing;

(E) determine whether any procedural or constitutional issues exist;

(F) on agreement of counsel, or on a finding that the trial may be protracted or complex, schedule a pretrial conference under Rule 17.1(c); and

22 (G) on the defendant's request, permit a change of plea.

23 (2) Unless the court otherwise directs, any pretrial motion or request must be
24 presented at the omnibus hearing. All issues presented at the omnibus hearing may be raised
25 without prior notice by counsel or the court. If discovery, investigation, an evidentiary
26 hearing, or a formal presentation is necessary for a fair determination of any issue, the
27 omnibus hearing may be continued.

28 (3) Any pretrial motion, request or issue not raised at the omnibus hearing is waived,
29 unless the party did not have the information necessary to make the motion or request or raise
30 the issue.

31 (4) Stipulations by any party or party counsel will bind the parties at trial unless set
32 aside or modified by the court in the interests of justice.

33 (5) A record must be made of all proceedings at the hearing indicating disclosures
34 made, rulings and orders of the court, stipulations, and any other matters determined or
35 pending.

36 (c) Pretrial Conference.

37 (1) On its own, or on a party's motion, the court may hold one or more pretrial
38 conferences—in addition to the omnibus hearing—to promote a fair and expeditious trial.
39 Counsel and the defendant must be present at any pretrial conference, unless the defendant
40 waives the right to be present.

41 (2) A pretrial conference may be held for purposes including:

42 (A) making stipulations to facts;

- 43 (B) marking exhibits;
- 44 (C) waiving foundation to exhibits;
- 45 (D) deleting from statements material prejudicial to a codefendant;
- 46 (E) severance of defendants or offenses;
- 47 (F) arranging for seating of defendants and counsel;
- 48 (G) examining juror lists and questionnaires;
- 49 (H) instructing the conduct of voir dire;
- 50 (I) deciding the number and use of peremptory challenges;
- 51 (J) establishing procedure on objections when there are multiple counsel;
- 52 (K) establishing order of presentation of evidence and arguments when there are
53 multiple defendants;
- 54 (L) establishing order of cross-examination when there are multiple defendants; and
- 55 (M) providing for necessary temporary absence of defense counsel during trial.
- 56 (3) Pretrial conferences must be recorded verbatim. At the conclusion of a conference,
57 a pretrial order, or memorandum of the matters agreed upon, must be signed by counsel,
58 approved by the court and filed. The order will bind the parties at trial, on appeal, and in
59 postconviction proceedings unless the court, in the interests of justice, sets it aside or
60 modifies it. The prosecution may not use any statement or admission made during a pretrial
61 conference by the defendant or the defendant's attorney unless it is in writing and is signed
62 by the defendant and the defendant's attorney.
- 63

EXPLANATORY NOTE

Rule 17.1 was amended, effective March 1, 1990; March 1, 2006:_____.

Rule 17.1 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

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

SOURCES: Joint Procedure Committee Minutes of _____ pages _____; January 27-28, 2005, page 14; April 20, 1989, page 4; December 3, 1987, page 15; April 24-26, 1973, page 10; June 26-27, 1972, pages 20-26; July 25-26, 1968, page 10; Fed.R.Crim.P. 17.1.

STATUTES AFFECTED: None

CROSS REFERENCES: N.D.R.Crim.P. 16 (Discovery and Inspection).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 6, N.D.R.Civ.P., Time; Rule 45, N.D.R.Crim.P., Computing and Extending Time

At its January meeting, the Committee considered and approved amendments to Rule 6 and Rule 45. The amendments were based on amendments to Fed.R.Civ.P. 6 and Fed.R.Crim.P. 45, which were amended, effective December 1, 2005.

Mr. Kuntz has suggested that the Committee take another look at these rules. His email is attached. He explains that the change to the federal rules was substantive because they decided to use the word “after” instead of “to” when indicating how the three days for mailing should be added to a prescribed period.

The Committee dealt with the issue of how the extra three days should be counted in 2000 when deadlines were changed in the civil rules. The Committee decided to extend the time a motion with a 10-day answer deadline must be served before a hearing to 18 days, which accounts for:

- service of the answer brief one day before the hearing
- ten days to prepare the answer brief
- four days for excluded holidays and weekend days
- three days for service by mail

The Committee’s discussion of the 18-day period is included in an attached minutes excerpt.

The Committee’s decision to adopt an 18-day period suggests that it contemplated the three days being added after the 10-day period—if the three days were added to the 10-day

period, it would become a 13-day period and weekends and holidays would need to be counted rather than excluded.

The Committee may wish to discuss what approach to counting the three-day period should be taken and whether additional changes to Rule 6 and Rule 45 need to be made to clarify the intent of the rules. The Committee may also wish to take another look at the first draft of the changes to Fed.R.Civ.P. 6, which is attached. It is possible that the lengthier federal first draft language was more clear than the terse language ultimately approved.

Potential options are:

Using the language already approved by the Committee: “Whenever a party ~~has the right or is required to do an~~ must or may act within a prescribed period after service of a notice or other paper and the notice or paper is served and service is made by mail or third-party commercial carrier under N.D.R.Civ.P. 5, ~~3 days must be~~ three days are added to the prescribed period.”

Using the new federal language: “Whenever a party ~~has the right or is required to do an~~ must or may act within a prescribed period after service of a notice or other paper and the notice or paper is served and service is made by mail or third-party commercial carrier under N.D.R.Civ.P. 5, ~~3 days must be~~ three days are added to after the prescribed period.”

Using the federal first draft language: “Whenever a party ~~has the right or is required to do an~~ must or may act within a prescribed period after service of a notice or other paper and the notice or paper is served and service is made by mail or third-party commercial carrier under N.D.R.Civ.P. 5, ~~3 days must be~~ three days are added to after the prescribed period would otherwise expire under subdivision (a).”

Another question raised at the January meeting was whether numbers should be spelled out in the rules. The Legislative Drafting Manual is schizophrenic: it says spell out all numbers in statutes, but spell out only numbers from one to nine in resolutions. The Dictionary of Modern Legal Usage, which was put together by the person who wrote the style guidelines for the federal rules, says to spell out numbers from one to ten. Yet, in both Fed.R.Civ.P. 6 and Fed.R.Crim.P. 45, the term “3 days” is used. The Committee may wish to decide what approach to take for Rules 6 and 45 as well as for future rules the Committee addresses. Excerpts from the above-cited reference books are attached.

RULE 6. TIME

(a) Computation. In computing any period of time prescribed or allowed by these rules, by the local rules of any district court, by order of court, or by any applicable statute, the day of the act, event, or default from which the designated period of time begins to run may not be included. The last day of the period so computed must be included, unless it is a Saturday, a Sunday, or a legal holiday, in which event the period runs until the end of the next day which is not a Saturday, a Sunday, or a legal holiday. When the period of time prescribed or allowed is less than 11 days, intermediate Saturdays, Sundays, and legal holidays must be excluded in the computation. Service by facsimile transmission must be completed by 5:00 p.m., receiver's time, on a weekday, which is not a legal holiday, or service is considered made on the following weekday which is not a legal holiday.

(b) Enlargement. When an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion (1) with or without motion or notice order the period enlarged if a request for enlargement is made before expiration of the period originally prescribed or as extended by a previous order, or (2) upon motion made after expiration of the specified period permit the act to be done if the failure to act was the result of excusable neglect; but it may not extend the time for taking any action under N.D.R.Civ.P. 4(e)(7), 52(b), 59(c), (i) and (j), and 60(b), except to the extent and under the conditions stated in them.

(c) Unaffected by expiration of term. The period of time provided for the doing of any

22 act or the taking of any proceeding is not affected or limited by the continued existence or
23 expiration of a term of court. The continued existence or expiration of a term of court in no
24 way affects the power of a court to do any act or take any proceeding in any civil action
25 which is pending.

26 (d) For motions—Affidavits. A written motion, other than one which may be heard ex
27 parte, and notice of the motion must be served at least 18 days before the motion may be
28 heard, unless a different period is fixed by rule or court order. A party may apply ex parte for
29 the court to hear a motion sooner than 18 days after service of the motion.

30 (e) Service by mail or commercial carrier.

31 (1) Whenever a party ~~has the right or is required to do an~~ must or may act within a
32 prescribed period after service of a notice or other paper and the notice or paper is served and
33 service is made by mail or third-party commercial carrier under N.D.R.Civ.P. 5, ~~3 days must~~
34 be three days are added to the ~~prescribed~~ period.

35 (2) If service is made by mail or third-party commercial carrier under N.D.R.Civ.P.
36 4, the prescribed period begins running upon delivery.

37 (3) Service by facsimile transmission is not service by mail or third-party commercial
38 carrier for purposes of this rule.

39

40 EXPLANATORY NOTE

41 Rule 6 was amended, effective 1971; March 1, 1990; on an emergency basis, March
42 1, 1992; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2001; March 1, 2004;

43

_____.

44

This rule omits the listing of “legal holidays” found in subdivision (a) of the federal rule. See N.D.C.C. ch. 1-03, concerning holidays in North Dakota.

46

Subdivision (a) was amended, effective March 1, 2001, to extend the period from 7 days to 11 days when intermediate Saturdays, Sundays, and legal holidays are excluded from time computations.

49

Subdivision (d) was amended, effective March 1, 1997, because N.D.R.Ct. 3.2, 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.

53

Subdivision (e) was amended, effective March 1, 1999, to make the three-day extension for service by mail applicable when service is via commercial carrier. The proof of service must contain the date of mailing or deposit with the commercial carrier.

56

Subdivision (e) was amended, effective March 1, 2004, to restrict applicability of the three-day extension for service by mail or commercial carrier to items served under N.D.R.Civ.P. 5. The time of service for an item served by mail or commercial carrier under N.D.R.Civ.P. 4 is the time the item is delivered to or refused by the recipient.

60

Subdivision (e) was amended, effective _____, to clarify how to count the three-day extension for service by mail or commercial carrier.

62

SOURCES: Joint Procedure Committee Minutes of January 30-31, 2003, pages 4-6; September 26-27, 2002, pages 15-18; January 27-28, 2000, pages 16-17; September 23-24,

63

64 1999, pages 20-21; January 29-30, 1998, page 18; April 25, 1996, pages 8-11; April 28-29,
65 1994, pages 15-17; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 14-16
66 and 20; April 29-30, 1993, page 20; November 7-8, 1991, page 3; October 25-26, 1990, page
67 12; April 20, 1989, page 2; December 3, 1987, page 11; June 22, 1984, pages 30-31;
68 September 20-21, 1979, pages 5-6; Fed.R.Civ.P. 6.

69 STATUTES AFFECTED:

70 Superseded: N.D.R.C. 1943 §§ 28-0739, 28-2803, 28-2815, 28-2816, 28-2817, 28-
71 2818, 28-2902, 28-2903, 28-3006.

72 CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction–Process–
73 Service), N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers), N.D.R.Civ.P.
74 52 (Findings by the Court), N.D.R.Civ.P. 59 (New Trials–Amendment of Judgments), and
75 N.D.R.Civ.P. 60 (Relief From Judgment or Order); N.D.R.Crim.P. 45 (Time); N.D.R.Ct. 3.2
76 (Motions).

RULE 45. COMPUTING AND EXTENDING TIME

(a) Computing Time. The following rules apply in computing any period of time specified in these rules, any local rule, or any court order:

(1) Day of the Event Excluded. Exclude the day of the act, or event, or default that begins the period.

(2) Exclusion from Brief Periods. Exclude intermediate Saturdays, Sundays and legal holidays when the period is less than 11 days.

(3) Last Day. Include the last day of the period unless it is a Saturday, Sunday, legal holiday, or day on which weather or other conditions make the clerk's office inaccessible. When the last day is excluded, the period runs until the end of the next day that is not a Saturday, Sunday, legal holiday or day when the clerk's office is inaccessible.

(4) Facsimile Service. Service by facsimile transmission must be completed by 5:00 p.m., receiver's time, on a weekday that is not a legal holiday, or service is considered made on the following weekday that is not a legal holiday.

(5) "Legal Holiday" Defined. As used in this rule, "legal holiday" means:

(A) a specific day set aside as a holiday under N.D.C.C. § 1-03-01; or

(B) any other day declared a public holiday by the President of the United States or the governor of this state.

(b) Extending Time.

(1) In General. When an act must or may be done within a specified time, the court

22 on its own may extend the time, or for good cause may do so on a party's motion made:

23 (A) before the originally prescribed period or previously extended time expires; or

24 (B) after the time expires if the party failed to act because of excusable neglect.

25 (2) Exceptions. The court may not extend the time for taking any action under Rules
26 ~~29, 33, 34, 35~~; and 37, except as stated in those rules.

27 (c) Additional Time After Service by Mail or Commercial Carrier. Whenever a party
28 must or may ~~do an act within a prescribed period after service of a notice or other document;~~
29 ~~and the notice or document is served~~ and service is made by mail or third-party commercial
30 carrier, three days ~~must be~~ are added to the ~~prescribed~~ period. Service by facsimile
31 transmission is not service by mail or third-party commercial carrier.

32 EXPLANATORY NOTE

33 Rule 45 was amended, effective March 1, 1990; January 1, 1995; March 1, 1999;
34 March 1, 2001; March 1, 2006; _____.

35 Rule 45 is an adaptation of Fed.R.Crim.P. 45 with certain modifications. The rule is
36 similar to N.D.R.Civ.P. 6, which also deals with computing time.

37 Rule 45 was amended, effective March 1, 2006, in response to the December 1, 2002,
38 revision of the Federal Rules of Criminal Procedure. The language and organization of the
39 rule were changed to make the rule more easily understood and to make style and
40 terminology consistent throughout the rules.

41 A subdivision referring to terms of court was deleted, effective March 1, 2006. The
42

43 district courts of North Dakota are in continuous session and terms of court are not a factor
44 in computing or extending time. At the same time, and consistent with the federal rule, a
45 subdivision dealing with motions and affidavits was transferred to Rule 47.

46 Subdivision (a) was amended, effective March 1, 2001, to extend the period from 7
47 days to 11 days when intermediate Saturdays, Sundays, and legal holidays are excluded from
48 time computations.

49 Subdivision (a) was amended, effective March 1, 2006, to include a paragraph
50 defining the term “legal holiday”.

51 Subdivision (b) was amended, effective _____, to delete Rules 29, 33
52 and 24 from the exceptions paragraph.

53 Subdivision (c) is an adaptation of N.D.R.Civ.P. 6 (e).

54 Subdivision (c) was amended, effective March 1, 1999, to make the three-day
55 extension for service by mail applicable when service is via commercial carrier. The proof
56 of service must contain the date of mailing or deposit with the commercial carrier as required
57 by Rule 49(e) and N.D.R.Civ.P. 4(k) and 5(f).

58 Subdivisions (a) and (c) were amended, effective January 1, 1995, to clarify time
59 computations when making service by facsimile transmission. Subdivision (c) was amended,
60 effective _____, to clarify how to count the three-day extension for service by mail
61 or commercial carrier.

62 SOURCES: Joint Procedure Committee Minutes of _____ pages _____;
63 January 27-28, 2005, page 37; January 27-28, 2000, pages 16-17; January 29-30, 1998, page

64 20; April 28-29, 1994, pages 15-16; January 27-28, 1994, pages 24-25; September 23-24,
65 1993, pages 14-16 and 20; April 29-30, 1993, pages 20-22; April 20, 1989, page 4;
66 December 3, 1987, page 15; June 22, 1984, page 31; December 11-15, 1972, pages 48-50;
67 September 17-19, 1970, page 10; March 12-14, 1970, pages 16-18; Fed.R.Crim.P. 45.

68 STATUTES AFFECTED:

69 SUPERSEDED INsofar AS CRIMINAL PROCESS: N.D.C.C. § 1-02-15.

70 CONSIDERED: N.D.C.C. §§ 1-01-33, 1-03-01(2-14).

71 CROSS REFERENCE: N.D.R.Crim.P. 29 (Motion for a Judgment of Acquittal);
72 N.D.R.Crim.P. 33 (New Trial); N.D.R.Crim.P. 34 (Arresting Judgment); N.D.R.Crim.P. 35
73 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 37 (Appeal as of Right to District
74 Court; How Taken); N.D.R.Crim.P. 47 (Motions); N.D.R.Civ.P. 4 (Persons Subject to
75 Jurisdiction–Process–Service); N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
76 Papers); N.D.R.Civ.P. 6 (Time); N.D.R.App.P. 26 (Computing and Extending Time).

Hagburg, Mike

From: DAN S & MARY KUNTZ [dskuntz@msn.com]
Sent: Sunday, January 29, 2006 8:17 PM
To: MHagburg@ndcourts.com
Subject: Rule 6 Revisions

Mike,

At the meeting of the JPC on Thursday I made a motion which the Committee adopted regarding the proposed revisions for extending time periods when service is made by mail. I made a motion to retain the Rule's current language that 3 days be added "to" the period for a party to act rather than "after" the period because the revised language seemed confusing. After the meeting I reviewed the Federal Committee's commentary in more detail. Apparently, the Federal Committee intends a substantive change from what has been my interpretation of the current rule. Under the federal proposal, the 3 days are added after the period expires rather than simply adding 3 days to the period. This could be a substantive change when weekends and holidays are involved. For example, as I understand the current rule, a 30 day period that others expires on Saturday requires action by Monday. If service was by mail, the due date is Tuesday (33 days). Under the federal proposal, the 3 days are added after the period expires and the due date is Thursday. While I don't have a problem with the current rule (other than a clarification that 3 days added to a 10 period still provides for exclusion of intermediate Saturdays and Sundays), the method of counting the 3 days will be different under the federal rules than what will be provided under the state rules. Perhaps we should revisit this rule to make sure the Committee is comfortable with the action taken on Thursday. If we adopt the federal approach, I would like to see language that was more explicit as to how the rule is intended to work; otherwise, we will need a commentary similar to the federal rule to explain this to practitioners.

Dan

22 3(B)(7) permits ex parte communications for scheduling and administrative purposes, or
23 when expressly authorized by law. The motion to adopt Rule 6 CARRIED by a vote of 12
24 to 1.

25 The Committee considered the proposed amendment to N.D.R.Crim.P. 45. Members
26 noted, the rule does not indicate what constitutes a legal holiday as does N.D.R.App.P. 26
27 and the explanatory note to Rule 6. Members also said, different clerk of court offices are
28 open or closed on different days for holidays. The Committee concluded, practitioners are
29 sufficiently aware of the definition of a legal holiday. The motion to adopt Rule 45
30 CARRIED by a vote of 12 to 1.

31 The Committee considered proposed N.D.R.App.P. 26. The Committee noted,
32 N.D.R.App.P. 27 governs motions in the Supreme Court. The provision requiring a motion
33 to be served at least 18 days before the motion may be heard is not needed in the Rules of
34 Appellate Procedure. The motion to adopt Rule 26 CARRIED 13 to 0.

35 -17-

36 On page 117, the Committee considered the proposed amendment to the
37 explanatory note to Rule 3.2. The amendment flags the change in time computations
38 under N.D.R.Civ.P. 6, N.D.R.Crim.P. 45, and N.D.R.App.P. 26. The motion to adopt the
39 amendment CARRIED by a vote of 12 to 0 with one member abstaining.

NORTH DAKOTA LEGISLATIVE DRAFTING MANUAL

2005



Legislative Council

State Capitol

600 East Boulevard

Bismarck, ND 58505

(701) 328-2916

METRIC MEASUREMENT EQUIVALENTS

North Dakota Century Code Section 46-03-10 requires the Legislative Council office to insert equivalent metric measurements in brackets wherever references to customary weights and measures appear in the laws of this state. The Legislative Council office will insert metric measurement equivalents in legislative enactments prior to codification if the enactment does not contain metric measurement equivalents and insertion of equivalents will not cause confusion or problems in readability. Do not use any commas in metric equivalents, e.g., [78924.35].

NUMBERS

Except for citation to statutes, rules, or executive orders, spell out all numbers. Spell out percentages, e.g., fifty percent, one hundred twenty-five percent. Do not follow with figures in parentheses. When it is necessary to avoid confusion when two numbers occur together, write ten 12-room houses, twelve 6-inch guns, one 100-pound weight, etc.

Exception: In resolutions use the numbers, but write out numbers nine and below, except an age or page number, e.g., 70 percent, seven years, 2 years of age.

ORTHOGRAPHY

For word spellings and word divisions, use the *United States Government Printing Office Style Manual*, or a modern dictionary, preferably *Webster's Third New International Dictionary* or *Black's Law Dictionary*. Preferred spellings for some common words with alternate spelling are as follows:

accessible	judgment
acknowledgment	kidnapping
adviser	labeling
analog	liquefied
archaeology	liquefy
baptisteries	marijuana
benefited	marshal (n.)
briquette	marshall (v.)
canceled	occasion
canceling	parimutuel
cancellation	payer
cargoes	requester
collectible	sulfur
computer disk	supersede
drought	theater
ensure	totaled
impaneled	transferable
impaneling	traveled
intervenor	uncollectible
inure	usable

PUNCTUATION

Observe grammatical rules in punctuation. Punctuate when it will clearly aid understanding, but avoid overpunctuation. Colons and semicolons should be placed inside the quotation marks only when they are a part of the quotation; otherwise place them outside the quotation marks.

In legislative drafting and certain other classes of work showing amendments, all punctuation marks are placed after the quotation marks when not a part of the quoted matter. For example:

"Slingshot" does not include a device commonly known as a "zipgun".

Delete the words "one, two,", "seven", and "eight" and insert the word "several".

A DICTIONARY OF
MODERN
LEGAL USAGE

SECOND EDITION

Bryan A. Garner

New York Oxford
OXFORD UNIVERSITY PRESS
1995

stating the maxim *nullum crimen sine lege*, sometimes known as the principle of legality." Andrew Ashworth, *Principles of Criminal Law* 59 (1991). See MAXIMS.

nullify. See **annul**.

nullip, a clipped form of the gynecological term *nullipara* (= a woman who has never borne children), has become common in litigation of mass-tort claims relating to female infertility. The appearance and sound of the word are startling at first, when one considers the context, which seems much more likely to give rise to soft-sounding EUPHEMISMS—e.g.: "A prime candidate is the young *nullip* who will settle for nothing less than the most modern, trouble-free method of birth control." *Hawkinson v. A.H. Robins Co.*, 595 F. Supp. 1290, 1305–06 (D. Colo. 1984) (quoting a corporate advertisement). "[T]he jury could consider defendant's statement that the Cu-7 was 'excellent for use' with *nullips* as a statement of fact, and not as an opinion." *Kociemba v. G.D. Searle & Co.*, 707 F. Supp. 1517, 1525 (D. Minn. 1989).

nullity = (1) the fact of being legally void <petition for nullity of marriage>; or (2) something that is legally void <the contract that is now regarded as a nullity>. Sense (2) is now more common—e.g.: "A forged transfer is a *nullity* . . ." J. Charlesworth, *The Principles of Company Law* 89 (4th ed. 1945). But sense (1) also appears from time to time—e.g.: "In questions of *nullity* of marriage, English courts will generally recognise the validity of a foreign decree . . ." R.H. Graveson, *Conflict of Laws* 332 (7th ed. 1974).

nullum crimen sine lege. See **nulla poena sine lege**.

nul tiel is LAW LATIN meaning "no such," and it typically occurs in denials that something exists, as in the names of pleas called *nul tiel record*, *nul tiel corporation*, and *nul tiel debt*. E.g., "Appellant filed an answer containing an allegation that the debt was the debt of another, a plea of '*nul tiel debt*,' and a general denial." *Gregson v. Webb*, 239 S.E.2d 230, 231 (Ga. Ct. App. 1977). "The merits would be fully open to examination on a plea of the general issue, which would be *nil nebet* or non-assumpsit, and not *nul tiel record*." *De la Mata v. American Life Ins. Co.*, 771 F. Supp. 1375, 1381 n.13 (D. Del. 1991).

The phrase is less likely to be replaced than many other JARGON phrases because it is the *name* of a plea, and lawyers are unlikely to adopt

a new name such as "the no-such-corporation plea." Even so, many American jurisdictions, including the federal courts, do quite well without the phrase.

NUMBER. See **CONCORD**, & **SEXISM (A) SUBJECT-VERB AGREEMENT**.

number of, a. This phrase is generally paired with a plural noun and a plural verb—i.e., *there are a number of reasons* instead of *there is a number of reasons*. The former is correct because of the linguistic principle known as SYNESIS—e.g.: "There have been a number of cases in which error or inadvertence has led to failure to comply with the provisions of section 33 or its forerunner." "[A] number of scholastic and, as it seems to me, unprofitable dogmas have grown up . . ." Carleton K. Allen, *Law in the Making* 268 (7th ed. 1964). "There is [read *are*] a number of reasons for this." Patrick Devlin, *The Enforcement of Morals* vii (1968). "However, there is [read *there are*] a number of exceptions to this rule, whose importance appears to be increasing today." P.S. Atiyah, *An Introduction to the Law of Contract* 260 (3d ed. 1981) (Cf. p. 31: "There are a number of different ways of classifying contracts.").

But when *number* is modified with an adjective—that is, when the SET PHRASE that gives rise to the plural locution is changed—the focus shifts to the singular noun *number*, and the verb should become singular. E.g., "There *are* [read *is*] a considerable number of cases in the United States where courts have ordered the employer to pay the bonus notwithstanding language like that just quoted." Lon L. Fuller, *Anatomy of the Law* 128 (1968). "There *is* a surprising number of cases in the advance sheets [involving] joint and mutual wills . . ." Thomas L. Shaffer, *The Planning and Drafting of Wills and Trusts* 184 (2d ed. 1979).

NUMERALS. A. General Guidance in Using. The best practice in legal writing is to spell out all numbers ten and below, and to use numerals for numbers 11 and above. This "rule" has five exceptions:

1. If numbers recur throughout the text or are being used for calculations—that is, if the context is quasi-mathematical—then use numerals.
2. Approximations are usually spelled out <about two hundred years ago>.
3. In units of measure, words substitute for rows of zeros where possible <\$3 million, \$3 billion>, and digits are used with words of measure <9 inches, 4 millimeters>.

4. Percentages may be spelled out <eight percent> or written as numbers <8 percent or 8%>.
5. Numbers that begin sentences must always be spelled out. (See C.)

B. Coupling Numerals with Words. In 1992, one lawyer wrote another, saying: "Dear Sally: I really enjoyed seeing you and your two (2) sons in the park last week." All that was missing was the clincher, "Please give my warm wishes to same."

The noxious habit of spelling words out and putting numerals in parentheses decreases the readability of much legal writing, especially DRAFTING. Following is a genuine example from a Canadian court order:

That of the sum of twelve thousand five hundred dollars (\$12,500) payable to the Infant, the sum of twelve thousand dollars (\$12,000) be paid to the District Registrar of the Supreme Court of British Columbia, Vancouver, British Columbia, to the credit of the Infant to be held on behalf of the Infant until further order or until she shall attain the age of nineteen (19) years and that the remaining sum of five hundred dollars (\$500) together with the sum of one thousand eight hundred and nineteen dollars and ninety-two cents (\$1,819.92) be paid to X.Y. Clarke, Solicitor for the Petitioners and the Infant on account of legal fees and disbursements." (Can.)

This belt-and-suspenders practice seems to have originated in a fear of typographical errors: hence, words were used instead of numbers. (And we gained the canon of construction holding that, if ever a discrepancy emerges between spelled-out numbers and numerals, the words control.) But the words did not readily draw the eye to all the important numerical figures, so these were added in parentheses to alert readers. The result is often a bog.

Modern teachers of drafting tend to prefer using the numerals alone. They caution drafters about the urgent necessity of reviewing numerals carefully because, as they note, a misplaced decimal or an added zero (or three) can give rise to malpractice claims. But if clarity and readability are to be primary goals, the belt-and-suspenders approach must be rejected.

If, on the other hand, clarity and readability are not one's primary goal as a drafter—if one is more concerned with unmistakable meaning, however hard a reader might have to work to get at it—then the belt-and-suspenders approach makes perfect sense.

C. Not Beginning Sentences with Numerals. It is stylistically poor to begin a sentence—or, as in the following example, a paragraph—with numerals. E.g., "1984 saw the publication of three substantial books on the subject . . ." George D. Gopen, *The State of Legal Writing: Res Ipsa*

Loquitur, 86 Mich. L. Rev. 333, 364 (1987). Some journals, such as *The New Yorker*, would make that sentence begin, *Nineteen-eighty-four saw the publication. . . .* But most writers and editors would probably simply begin the sentence some other way, as by writing, *In 1984, three substantial books on the subject appeared.*

D. Round Numbers. Except when writing checks or other negotiable instruments, omit double zeros after a decimal: \$400 is better form than \$400.00.

E. Decades. As late as the 1970s, editors regularly changed *1970s* to *1970's*. Today, however, the tendency is to omit the apostrophe.

F. Judicial Votes. The preferred method for recording an appellate court's votes in a particular case is to use numerals separated by an en-dash <a 5–4 decision> <voted 6–3 to reverse>. This method, which gives the reader more speed than spelling out the numbers <five-to-four decision>, is standard today—e.g.:

- "The majority was 6–3 and the opinion was by Chief Justice Warren—in itself significant, for the Chief Justice normally reserves for himself those onerous tasks likely to draw the most controversy." Robert A. Liston, *Tides of Justice: The Supreme Court and the Constitution in Our Time* 168 (1966).
- "In the 1974 Term, both Rehnquist and Powell wrote heavily in 6–3 and 5–4 cases, Powell writing in five 5–4 and three 6–3 rulings." Stephen L. Wasby, *The Supreme Court in the Federal Judicial System* 178 (1978).
- "Some would argue that one Justice or two would not make that much difference—and that even the many 5–4 splits would gradually disappear—if the Supreme Court were staffed, as they believe it should be, with men and women who understand that constitutional adjudication is simply the job of correctly reading the Constitution." Laurence H. Tribe, *God Save This Honorable Court* 49 (1985).

For more on the en-dash, see PUNCTUATION (D).

If one prefers to spell out *to* instead of using the en-dash, the phrase must be hyphenated if it functions as a PHRASAL ADJECTIVE—e.g.: "[M]ost of the dissenters in this 5 to 4 [read 5-to-4] ruling feared that the majority had gone a long way in that direction." Gerald Gunther, *Constitutional Law* 1606 (11th ed. 1985). But if the numbers function adverbially in the sentence, there are no hyphens <voted 5 to 4 to affirm>.

numerous is often merely an inflated equivalent of *many*—e.g.: "Numerous [read *Many*] learned and brilliant men have believed in witchcraft."

Thomas E. Atkinson, *Handbook of the Law of Wills* 246 (2d ed. 1953).

nunc pro tunc (lit., "now for then") is used in reference to an act to show that it has retroactive legal effect. E.g., "The Commission of Appeals refused to treat the lower court decision as a judgment *nunc pro tunc*." The LATINISM is useful legal JARGON, not a TERM OF ART, usu. appearing when a court has exercised its "inherent power . . . to make its records speak the truth by correcting the record at a later date to reflect what actually occurred [in earlier court proceedings]." *Ex parte Dickerson*, 702 S.W.2d 657, 658 (Tex. Crim. App. 1986).

nuncupative will. See **oral will**.

nuptial(s). Although *nuptial* is in good use as an adjective, the noun *nuptials* (= wedding) is generally a pomposity to be avoided. It should be left to its ineradicable place in newspaper reports

of weddings, in which it allows ambitious young journalists to practice INELEGANT VARIATION.

nurturance looks like a NEEDLESS VARIANT of *nurture*, but the words have diverged in their connotations. Whereas *nurture* means either "up-bringing" or "food," *nurturance*—a 20th-century NEOLOGISM dating from 1938—means "attentive care; emotional and physical nourishment." If this DIFFERENTIATION persists, then *nurturance* may earn a permanent position in the language. For now, it remains relatively uncommon—e.g.: "Albert was also depressed and needed environmental stimulation and *nurturance*." *In re Albert B.*, 263 Cal. Rptr. 694, 696 (Ct. App. 1989). "He added that applicant's childhood of extreme emotional and economic deprivation and [of] growing up in a household where there was no *nurturance* was important." *Ex parte Lucas*, 877 S.W.2d 315, 321 (Tex. Crim. App. 1994) (Overstreet, J., dissenting).

PROPOSED AMENDMENTS TO THE
FEDERAL RULES OF CIVIL PROCEDURE*

Rule 6. Time

* * * * *

1
2 (e) Additional Time After Certain Kinds of Service
3 ~~Under Rule 5(b)(2)(B), (C), or (D)~~. Whenever a party has
4 the right or is required to do some act or take some
5 proceedings must or may act within a prescribed period after
6 the service of a notice or other paper upon the party and the
7 notice or paper is served upon the party service and service is
8 made under Rule 5(b)(2)(B), (C), or (D), 3 days shall be are
9 added to after the prescribed period would otherwise expire
10 under subdivision (a).

Committee Note

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.

* New material is underlined; matter to be omitted is lined through.

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.

Rule 6(e) as Published

This recommendation modifies the version of Rule 6(e) that was published for comment as follows:

(e) Additional Time After Certain Kinds of Service Under Rule 5(b)(2)(B), (C), or (D): Whenever a party has the right or is required to do some act or take some proceedings must or may

~~act~~ within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party ~~service and service is made~~ under Rule 5(b)(2)(B), (C), or (D), 3 days ~~shall be~~ are added to after the prescribed period.

The changes from the published version eliminate ambiguities that were detected in the published version. Since the primary purpose of the amendment is to eliminate ambiguities, recognizing that the actual number of days allowed is a secondary concern, the changes do not require republication.

Discussion

Publication of any day-counting amendment inevitably attracts suggestions that all the time periods in the rules should be reconsidered. Improvements are urged both in expression and in function. The most satisfactory approach to this large task is likely to involve all the sets of procedural rules, establishing uniform methods that can be relied upon in all federal-court settings. The Standing Committee has recognized these pleas; the long-range agenda includes a joint project to reconsider the time rules. Until that project matures, room remains for smaller-scale improvements in individual sets of rules. The Appellate Rules Committee is considering changes to Appellate Rule 26(c) to parallel the proposed Rule 6(e) changes — indeed, it was the Appellate Rules Committee that referred these questions to the Civil Rules Committee for consideration. The proposal made here reflects helpful advice and comments made by the Appellate Rules Committee and its Reporter, Professor Schiltz. Both Professor Schiltz and the Reporter to the Bankruptcy Rules Committee, Professor Morris, are in agreement with the approach the Civil Rules Committee is taking.

Cases and commentary have recognized four possible means of calculating the three days added by present Rule 6(e). Practicing

attorneys report that much time is devoted to nervous counting and recounting the days. Achieving a clear answer is the first concern. In the abstract, there is much to be said for counting the three added days before the prescribed period is counted — the underlying theory is that a paper served by mail or the other means incorporated in Rule 6(e) may take up to three days to arrive. But an informal survey of practicing attorneys revealed that almost all add the three days at the end. Transition to a clear new rule will work best if the new rule conforms closely to what most attorneys have been doing anyway.

The premise that three days should be added at the end of the prescribed period could be implemented in different ways. The shortest extension would be provided by adding three days after counting the days in the original period without regard to any Saturday, Sunday, or legal holiday. If the last prescribed day is a Saturday, for example, day 1 would be Sunday, day 2 would be Monday even if Monday is a legal holiday, and day 3 would be Tuesday. The act would be due on Tuesday; in this illustration, the 3 added days would not extend the time to act. An intermediate extension could be provided by looking to the last day to act under Rule 6(a) before counting the three added days. In the example just given the original period would expire on Tuesday, the first day that is not a Saturday, Sunday, or legal holiday. Wednesday, Thursday, and Friday would be the three added days.

In determining how to express in the rule the method of calculating the addition of three days, the Civil Rules Committee has attempted to be clear, resolving the ambiguities that the public comment had pointed out; consistent with proposed Appellate Rule 26(c) and with the corresponding Bankruptcy Rules; and to provide the maximum time to act that meets these goals. The method of calculation that achieves all these objectives is to count to the end of the prescribed period under Rule 6(a), using all the time-counting rules except the three-day extension, and then add three days. The

rule language set out above is clear and consistent with the Appellate Rules. After the end of the prescribed period is identified, three days are added. The Notes provide explicit direction on how to treat intermediate Saturdays, Sundays, and legal holidays. The last day to act is the third day, unless the third day is a Saturday, Sunday, or legal holiday. The last day to act in that case is the next day that is not a Saturday, Sunday, or legal holiday.¹

This formulation is consistent with the Appellate Rule calculation and as generous as that consistency allows. Application is illustrated in the Committee Note. One way to explain the result is that no Saturday, Sunday, or legal holiday is to be counted against more than one exclusion. Adoption of this recommendation reflects the view that such an extension will not often interfere with the real-world pace of litigation.

Rule 6(a) states that the last of the counted days is included in calculating time limits unless, among other things, the required act is filing a paper in court and the day is one on which weather or other conditions have made the clerk's office inaccessible. There is no

¹ In April 2004, the Civil Rules Committee agreed on language that would have excluded intermediate Saturdays, Sundays, and legal holidays in the calculation of the three days following the expiration of the prescribed period.

The full Committee has agreed unanimously to revise that language. The revision resulted from the recognition that the Committee mistakenly believed its approach was consistent with the approach of proposed Appellate Rule 26. The Appellate Rule approach is simply to count the prescribed period, making use of all of the timecounting rules save the three-day extension. After the end of the prescribed period is identified, three "real" (i.e., calendar) days are added. The effect of the language the Civil Rules Committee first adopted in April 2004 excluded intermediate Saturdays, Sundays, or holidays in calculating the three days, which was inconsistent with the Appellate Rules approach.

apparent reason to address this circumstance in Rule 6(e). If the clerk's office is inaccessible on the last day counted under Rule 6(e), the time to act is extended by Rule 6(a). Inaccessibility during the period before the last day counted under Rule 6(e) does not warrant any additional extension.

Changes Made After Publication and Comment

Changes were made to clarify further the method of counting the three days added after service under Rule 5(b)(2)(B), (C), or (D).

* * * * *

nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Rule 45. Computing and Extending Time

1 * * * * *

2 **(b) Extending Time.**

3 **(1) *In General.*** When an act must or may be done
4 within a specified period, the court on its own may
5 extend the time, or for good cause may do so on a
6 party's motion made:

7 (A) before the originally prescribed or
8 previously extended time expires; or

9 (B) after the time expires if the party failed to
10 act because of excusable neglect.

11 **(2) *Exceptions Exception.*** The court may not extend
12 the time to take any action under Rule ~~Rules 29, 33,~~
13 ~~34 and 35,~~ except as stated in ~~those rules~~ that rule.

14 * * * * *

COMMITTEE NOTE

Rule 45(b) has been amended to conform to amendments to Rules 29, 33, and 34, which have been amended to remove the requirement that the court must act within the seven-day period specified in each of those rules if it sets another time for filing a motion under those rules.

Currently, Rules 29(c)(1), 33(b)(2), and 34(b) require the defendant to move for relief under those rules within the seven-day periods specified in those rules or within some other time set by the court in an order issued during that same seven-day period. Courts have held that the seven-day rule is jurisdictional. Thus, for example, if a defendant files a request for an extension of time to file a motion for a judgment of acquittal or a motion for new trial within the seven-day period, the court must rule on that motion or request within the same seven-day period. If for some reason the court does not rule on the request for an extension of time within the seven days, the court loses jurisdiction to act on the underlying substantive motion. *See, e.g., United States v. Smith*, 331 U.S. 469, 473-474 (1947) (rejecting argument that trial court had power to grant new trial on its own motion after expiration of time in Rule 33); *United States v. Marquez*, 291 F.3d 23, 27-28 (D.C. Cir. 2002) (citing language of Rule 33, and holding that “district court forfeited the power to act when it failed to . . . fix a new time for filing a motion for a new trial within seven days of the verdict”).

Rule 45(b)(2) currently specifies that a court may not extend the time for taking action under Rules 29, 33, or 34, except as provided in those rules.

Assuming that the current provisions in Rules 29, 33, and 34 were intended to promote finality, there is nothing to prevent the court from granting the defendant a significant extension of

time, under those rules, as long as it does so within the seven-day period. Thus, the Committee believed that those rules should be amended to be consistent with all of the other timing requirements in the rules, which do not force the court to rule on a motion to extend the time for filing, within a particular period of time or lose jurisdiction to do so. The change to Rule 45(b)(2) is thus a conforming amendment.

The defendant is still required to file motions under Rules 29, 33, and 34 within the seven-day period specified in those rules. The defendant, however, may consistently with Rule 45, seek an extension of time to file the underlying motion as long as the defendant does so within the seven-day period. But the court itself is not required to act on that motion within any particular time. Further, under Rule 45(b)(1)(B), if for some reason the defendant fails to file the underlying motion within the specified time, the court may nonetheless consider that untimely motion if the court determines that the failure to file it on time was the result of excusable neglect.

Changes Made After Publication and Comment—Rules 29, 33, 34, & 45

The Committee made no substantive changes to Rules 29, 33, 34, and 45 following publication.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
RE: Rule 3.2, N.D.R.Ct., Motions

The Committee looked at proposed changes to Rule 3.2 at its January meeting. The Committee decided to defer consideration of the changes.

Proposed changes to Rule 3.2 include form and style changes to subdivision (a), including dividing the subdivision into numbered paragraphs to improve clarity and moving language about oral argument request deadlines into the new paragraph (a)(3).

Creating a new subdivision (b) on court hearings is also proposed.

The proposed new subdivision includes a paragraph (b)(1), which would contain existing language on a court's power to hear oral argument on motions. Proposed new language on hearings by electronic means including interactive television is added to existing language allowing telephonic hearings.

Paragraph (b)(1) would also include a limitation on a court's ability to order oral argument without first reviewing the parties' submissions. This limitation is a response to the East Central Judicial District's standing order requiring hearings to be held on certain specified types of motions without case-by-case review. A copy of the standing order is attached.

Comments were made at the January meeting that motion practice rules should be uniform statewide. In light of these comments, the Committee may wish to consider whether to delete language in the explanatory note suggesting that hearings on Rule 3.2 motions can be required by local rule. Given that local rules are approved by judicial districts and not by

the Supreme Court, the explanatory note language seems open to question.

On the other hand, for the sake of uniformity across the state, the Committee may wish to discuss incorporating the ECJD standing order language into the rule. A paragraph requiring hearings in certain types of cases could be inserted into new subdivision (b).

Proposed new subdivision (b) also includes a paragraph (b)(2) on hearings in domestic relations and custody cases. The language in the new paragraph was proposed by attorney Valeska Hermanson, who suggests that a party who submits affidavits in support of a motion relating to a divorce or custody matter should be required to make the affiant available for cross examination at the hearing. In a letter, which is attached, she outlines the reasons why it would be appropriate to impose such a requirement in divorce and custody matters.

The Committee delayed action on Hermanson's proposal to receive comment from the bar. Staff received only one comment. The comment, which was from David Boeck, is attached: it generally supports the proposal to amend Rule 3.2 as suggested.

In addition to the proposed addition of the new subdivision (b), the remaining subdivisions are re-lettered.

Amendments to subdivision (f) on the scope of the rule are also proposed. The subdivision would be divided into paragraphs. Paragraph (f)(1) would contain the existing language. Paragraph (f)(2) would include new language indicating that the rule applies to formal proceedings under the Uniform Probate Code.

Judge Schmalenberger suggested the probate addition to the rule at the January meeting and explained it in an email, which is attached. According to N.D.C.C. § 30.1-01-06, a formal proceeding under the UPC is any proceeding conducted before a judge with notice to interested parties. N.D.C.C. § 30.1-02-04 says that the Rules of Civil Procedure govern formal proceedings. Judge Schmalenberger explains in his email that formal proceedings get put on the hearing calendar, but that the parties and their attorneys often fail to show up.

Judge Geiger has also suggested that steps should be taken to establish that the rules apply to formal proceedings in probate. One problem he highlights is the lack of attention in probate matters to preparing written responses to petitions. Adding the proposed language stating that Rule 3.2 applies to formal probate proceedings should be enough to extend Rule 3.2's briefing requirements to these proceedings, but the Committee may also wish to add explanatory note language stating its specific intent.

Amendments have also been proposed to the explanatory note to explain the proposed changes discussed above. A copy of the rule, with proposed amendments, is attached.

RULE 3.2 MOTIONS

(a) Submission of motion.

(1) Notice. Notice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested.

(2) Briefs. Upon serving and filing a motion, the moving party shall serve and file a brief and other supporting papers and the adverse party shall have 10 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within 5 days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is deemed submitted to the court unless counsel for any party requests oral argument on the motion.

(3) Requesting Oral Argument. If any party who has timely served and filed a brief requests oral argument, the request must be granted. A timely request for oral argument must be granted even if the movant has previously served notice indicating that the motion is to be decided on briefs. The party requesting oral argument shall secure a time for the argument and serve notice upon all other parties. Requests for oral argument or the taking of testimony must be made not later than 5 days after expiration of the time for filing the answer brief.

(b) Court Hearing.

(1) In General. The court may hear oral argument on any motion. by A hearing may be held using electronic means, including telephonic conference or interactive television. The

22 After reviewing the parties' submissions, the court may require oral argument and may allow
23 or require testimony on the a motion. Requests for oral argument or the taking of testimony
24 must be made not later than 5 days after expiration of the time for filing the answer brief.

25 (2) Domestic Relations and Custody Cases. When an evidentiary hearing is held on
26 a motion filed by a party in a domestic relations or custody case, evidence presented by
27 affidavit may not be considered unless, at the time of the evidentiary hearing, the party
28 offering the affidavit makes the affiant available for cross-examination.

29 (b) (c) Failure to File Briefs. Failure to file a brief by the moving party may be deemed
30 an admission that, in the opinion of party or counsel, the motion is without merit. Failure to
31 file a brief by the adverse party may be deemed an admission that, in the opinion of party or
32 counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must
33 still demonstrate to the court that it is entitled to the relief requested.

34 (c) (d) Extension of Time. Extensions of time for filing briefs and other supporting
35 papers, or for continuance of the hearing on a motion, may be granted only by written order
36 of court. All requests for extension of time or continuance, whether written or oral, must be
37 accompanied by an appropriate order form.

38 (d) (e) Time Limit for Filing Motion. Except for good cause shown, a motion must
39 be filed in such time that it may be heard not later than the date set for pretrial of the case.

40 (e) (f) Application of Rule.

41 (1) Conflicting Rules. This rule does not apply to the extent it conflicts with another
42 rule adopted by the Supreme Court.

64 Paragraph (b)(1) was amended, effective _____, to expand hearing
65 options to include hearing by interactive television and to add a requirement that the court
66 review the parties' submissions before it orders oral argument or testimony.

67 Paragraph (b)(2) was added, effective _____. It is applies only to
68 domestic relations and custody matters and was derived from N.D.R.Ct. 8.2(e)(2).

69 Subdivision (e) Paragraph (f)(1) was added, effective March 1, 1997, to clarify that,
70 in the case of a conflict between this rule and any other Supreme Court rule, the other rule
71 will govern. For example, N.D.R.Civ.P. 56 allows parties 30 days to respond to a summary
72 judgment motion, which conflicts with the 10 day response period specified in subdivision
73 (a) of this rule. Under subdivision (e), the N.D.R.Civ.P. 56 response period would prevail.

74 Paragraph (f)(2) was added, effective _____, to specify that this rule
75 applies to formal proceedings under the Uniform Probate Code. N.D.C.C. § 30.1-01-06(19)
76 defines "formal proceedings" as "proceedings conducted before a judge with notice to
77 interested persons."

78 SOURCES: Joint Procedure Committee Minutes of _____ pages
79 _____; April 29-30, 2004, pages 25-26; September 28-29, 2000, page 13; April 25, 1996,
80 pages 8-11; January 25-26, 1996, pages 10-16; April 28-29, 1994, pages 15-17; January 27-
81 28, 1994, pages 24-25; September 23-24, 1993, pages 13-16; April 29-30, 1993, pages 20-22;
82 April 20, 1989, pages 10-15; March 24-25, 1988, pages 7-10 and 13-15; Dec. 3, 1987, pages
83 4-5; February 19-20, 1987, pages 21-22; June 22, 1984, page 30; April 26, 1984, pages 17-
84 19.

85 STATUTES AFFECTED:
86 CONSIDERED: N.D.C.C. ch. 30.1.
87 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
88 Papers); N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 7 (Pleading Allowed–Form of Motions);
89 N.D.R.Civ.P. 56 (Summary Judgment); N.D.R.Crim.P. 45 (Time); N.D.R.Crim.P. 47
90 (Motions); N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.App.P. 27 (Motions);
91 N.D.R.App.P. 34 (Oral Argument); N.D.R.Ct. 8.2 (Interim Orders in Domestic Relations
92 Cases); N.D. Sup. Ct. Admin. R. 52 (Interactive Television).

**STANDING ORDER RE:
NOTICES OF MOTION**

WHEREAS, North Dakota Rule of Court 3.2 provides a notice must accompany every motion filed with the Court but allows that motions may be submitted on briefs without a hearing; and

WHEREAS, the East Central Judicial District had previously enacted Local Rule 1, which Local Rule had required all motions, with certain limited exceptions, be noticed for hearing; and

WHEREAS, Local Rule 1 of the East Central Judicial District has expired and has not been re-enacted, and is, therefore, no longer of any force and effect; and

WHEREAS, Rule 3.2 of the North Dakota Rules of Court allows that the Court may allow or require a hearing on any motion presented to it;

NOW, THEREFORE, IT IS HEREBY ORDERED, that the following types of motions, applications, petitions or requests for action must be accompanied with a Notice for Hearing at a specific date, time and place:

1. Adoptions;
2. Interim Orders in Divorce Matters;
3. Forcible Detainers;
4. Guardianship/Conservatorship Matters;
5. Orders to Show Cause;
6. Protection Orders;
7. Disorderly Conduct Restraining Orders;
8. Minor Settlement Matters;
9. Juvenile Applications;
10. Rule 16 Scheduling Conferences;
11. Pretrial Conferences; and
12. Mental Health Matters.

IT IS FURTHER ORDERED that all other types of motions, applications, petitions, or requests for action must comply with Rule 3.2 of the North Dakota Rules of Court and must be accompanied with either a Notice of Hearing at a specific date, time and place or a Notice compliant with Rule 3.2 of the North Dakota Rules of Court, similar to the following (which is set forth for illustrative purposes only):

<u>/s/</u> Hon. Frank L. Racek District Judge East Central Judicial District	<u>/s/</u> Hon. Douglas R. Herman District Judge East Central Judicial District
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<u>/s/</u> Hon. Cynthia Rothe-Seeger District Judge East Central Judicial District	<u>/s/</u> Hon. Steven L. Marquart District Judge East Central Judicial District
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<u>/s/</u> Hon. John C. Irby District Judge East Central Judicial District	<u>/s/</u> Hon. Steven E. McCullough District Judge East Central Judicial District
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MARK L. STENEHJEM*
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VALESKA A. HERMANSON*

*ALSO ADMITTED IN MONTANA
**CERTIFIED CIVIL TRIAL SPECIALIST

TAMMY LaCROSSE, PARALEGAL

BRANCH OFFICE LOCATED IN WATFORD CITY, ND

January 4, 2006

JUSTICE SANDSTROM
SUPREME COURT

JAN 0 2006

Hon. Dale V. Sandstrom
Supreme Court Justice
State Capital
600 E. Boulevard Ave
Bismarck ND 58505-0530

Re: Joint Procedure Committee
Suggestion for changes to Court Rules

Dear Justice Sandstrom:

I am writing to suggest two changes to the Court Rules. The first would be an addition to the Rules of Court which would create a special summons in custody cases, requiring that neither party remove the minor children from North Dakota without written consent of the other party or order of the Court. I have attached a proposed addition to North Dakota Rules of Court 8.4 for the Joint Procedure Committee's consideration.

This provision is already included in the divorce summons at North Dakota Rules of Court 8.4(a)(4). However, in custody cases where the parties are not married, there is no requirement that the parties remain in the state with the children while the action is pending. Therefore, in cases where moving is an issue, I have had to obtain Interim Orders to keep the parties in the state.

I believe this provision in the divorce summons is reasonable and necessary in order for the North Dakota courts to exercise jurisdiction over the custody issues involving minor children. Additionally, while under the UCCJA North Dakota courts would retain jurisdiction if the children were removed from the state, the logistics of actually getting a party to return the children would create difficulties sufficient to justify such a rule. The same reasons that justify such a rule in divorce cases would justify such a rule in non-divorce custody cases.

The second change I suggest is the adoption of a rule requiring a party presenting affidavits in a Motion relating to a divorce or custody matter to make the affiant available for cross-examination at a hearing on that matter. This would be similar to the

rule on Interim Motions, North Dakota Rules of Court 8.2 (e)(2). I have attached a proposed change to North Dakota Rules of Court 3.2 for the Joint Procedure Committee's consideration.

The general rules relating to Motions, North Dakota Rules of Civil Procedure, Rule 7(b) and North Dakota Rule of Court 3.2, do not require the party to make an affiant available for cross examination. In matters such as a motion for Summary Judgment or a Motion in Limine, cross examination is not necessary to the motion. However, motions in divorces and custody cases generally relate to issues of property or custody or contempt and generally require an evidentiary hearing. In such cases, one party should not be allowed to present an affidavit without making the affiant available for cross-examination at the hearing.

There are several reasons I believe this would be justified. First, the hearings on these matters are usually scheduled within 30 days or less. This leaves little time for the other party to schedule a deposition in order to cross examine the affiant. Secondly, it should not be the other party's responsibility to incur the cost of deposing the affiant or subpoenaing them to court in order to cross-examine that affiant. The party presenting the affidavit intended the affidavit to replace in-court testimony in support of their case and therefore should assume the costs of presenting the testimony.

Most important, without such a rule, I foresee some very unfair misuse of affidavits. For example, an attorney could submit an affidavit from a person residing in New York in support of their client's position. Since the responding party can't subpoena the affiant in New York to the court in North Dakota, he/she must depose the affiant if they want to cross-examine the affiant. Therefore, the party presenting the affiant has now forced the responding party to incur the cost of taking a deposition in New York, or forgo the opportunity to cross examine that affiant. This causes an undue burden on the responding party in order to cross-examine the testimony presented by the moving party, and an unfair advantage to the moving party. As noted before, if a party wishes to present testimony, in fairness they should be responsible for the costs associated with presenting the testimony in a manner which allows the other party to cross-examine the witness so the Court has an opportunity to determine the facts of the case.

Lastly, I believe such a rule would conform with quite a few attorney's understanding of the manner of presenting affidavits in divorce or custody matters. It was mine until recently and, in a hearing last week, a veteran attorney made the same mistake.

Thank you and the Joint Procedure Committee for considering my suggestions. If anyone has questions, I would be happy to discuss them.

Sincerely,



Valeska A. Hermanson\

enc: Rule 8.4 with suggested changes
Rule 3.2 with suggested changes

RULE 3.2 MOTIONS

(a) Submission of Motion. Notice must be served and filed with a motion. The notice must indicate the time of oral argument, or that the motion will be decided on briefs unless oral argument is timely requested. Upon serving and filing a motion, the moving party shall serve and file a brief and other supporting papers and the adverse party shall have 10 days after service of a brief within which to serve and file an answer brief and other supporting papers. The moving party may serve and file a reply brief within 5 days after service of the answer brief. Upon the filing of briefs, or upon expiration of the time for filing, the motion is deemed submitted to the court unless counsel for any party requests oral argument on the motion. If any party who has timely served and filed a brief requests oral argument, the request must be granted. A timely request for oral argument must be granted even if the movant has previously served notice indicating that the motion is to be decided on briefs. The party requesting oral argument shall secure a time for the argument and serve notice upon all other parties. The court may hear oral argument on any motion by telephonic conference. The court may require oral argument and may allow or require testimony on the motion. Requests for oral argument or the taking of testimony must be made not later than 5 days after expiration of the time for filing the answer brief.

(b) Submission of affidavits in domestic relations and custody cases. When an evidentiary hearing is held concerning a motion filed by a party in a domestic relations or custody case, evidence presented by affidavit may not be considered unless, at the time of the evidentiary hearing, the party offering the affidavit makes the affiant available for cross examination.

~~(b)~~ (c) Failure to File Briefs. Failure to file a brief by the moving party may be deemed an admission that, in the opinion of party or counsel, the motion is without merit. Failure to file a brief by the adverse party may be deemed an admission that, in the opinion of party or counsel, the motion is meritorious. Even if an answer brief is not filed, the moving party must still demonstrate to the court that it is entitled to the relief requested.

~~(c)~~ (d) Extension of Time. Extensions of time for filing briefs and other supporting papers, or for continuance of the hearing on a motion, may be granted only by written order of court. All requests for extension of time or continuance, whether written or oral, must be accompanied by an appropriate order form.

~~(d)~~ (e) Time Limit for Filing Motion. Except for good cause shown, a motion must be filed in such time that it may be heard not later than the date set for pretrial of the case.

~~(e)~~ (f) Application of Rule. This rule does not apply to the extent it conflicts with another rule adopted by the Supreme Court.

Hagburg, Mike

From: Boeck, David E. [dboeck@state.nd.us]
Sent: Thursday, February 09, 2006 4:19 PM
To: MHagburg@ndcourts.com
Subject: Proposed Changes to Rule 8.4 of the Rules of Court

Mike Hagburg –

I have read the proposed changes to Rules 3.2 and 8.4 of the Rules of Court. For the most part, the changes appear likely to be helpful to the courts and litigants.

Proposed Rule 8.4 (b) (2) requires bold print for the statement, "IF EITHER PARTY VIOLATES ANY OF THESE PROVISIONS, THAT PARTY MAY BE IN CONTEMPT OF COURT." Text is more difficult to read when printed in all capital letters. Emphasis is better achieved through bold text, underlined text, text printed in a larger font, or text enclosed in a text box. I recommend the text not be in all capital letters.

Thank you.

David Boeck
Protection & Advocacy Project
400 East Boulevard Avenue, Suite 409
Bismarck, ND 58501-4071

Phone 701-328-2950
Fax 701-328-3934
Web www.ndpanda.org

Hagburg, Mike

From: Schmalenberger, Allan
Sent: Wednesday, March 29, 2006 2:30 PM
To: Hagburg, Mike
Subject: RE: Rules and probate

I am in favor of using Rule 3.2. Most of the scheduled formal probate hearings no shows up including the lawyer. Which really makes the judge happy if it is the only hearing scheduled in the non-chambers courtroom you just drive an hour to get there.

Allan

-----Original Message-----

From: Hagburg, Mike
Sent: Wednesday, March 29, 2006 1:26 PM

-----Original Message-----

From: Geiger, Richard
Sent: Saturday, April 08, 2006 11:48 AM
To: Hagburg, Mike
Cc: Schmalenberger, Allan
Subject: RE: jury demand in probate

Mike,

My complaint with probate proceedings is two-fold.

The first relates to the demand for jury trial which is found at NDCC 30.1-15-04 and relates to any fact issues in formal testacy proceedings. It is not the same as what is found at Rule 38(b) N.D.R.Civ.P.. Rule 38(b) requires the demand to be within ten days of the last pleading. Then typically through Rule 16 you schedule a hearing either before the court or as a jury trial because you know in advance BEFORE you schedule a hearing if a timely jury trial demand has been made. Under NDCC 30.1 -15 -04 and NDCC 30.1-03-01, a petition for formal testacy proceeding requires that a notice of hearing be sent out with the petition. So, you are scheduling it without knowing if it will be a jury trial or a bench trial (unless the petitioner has demanded a jury trial and then the questions whether your scheduled hearing should be a pre-trial conference of some kind or the actual trial). Finally, even though the demand for jury trial needs to be attached to the last pleading, that can be as late as having it served and filed (and therefore the court and the other parties finding out about it) as late as seven days before the scheduled hearing. It is my experience that these hearings that are initially scheduled end up to be Rule 16 scheduling conferences, partly because of this.

Because the demand procedure does not mirror Rule 38 we do not have the benefit of either uniformity or case law that interprets Rule 38(b). Another problem is addressing what happens when a judge decides the demand is untimely or otherwise defective. Then *United Hospital v. Hagen* 285 NW2d 586 (ND1979) would likely kick in.

The second problem I have with probate proceedings relating to formal testacy proceedings (and really any other formal proceeding) is that no formal and written response is required to be served or filed before the hearing. NDCC 30.1-03-01 requires notice of a hearing and a copy of the petition to be sent out to all interested parties and attorneys. But, I can find nothing in the probate laws that requires a written response even if the party objects to the relief sought in the petition. The only place where I can find that a written response is required is if you are seeking to preserve a right to a jury trial under NDCC 30.1-15-04.

Requiring a written response to any formal petition in order to be heard or to challenge the relief sought at the scheduled hearing would better allow the court and the petitioner to know what to expect at the noticed hearing. It would allow every to know what issues really exist and which interested parties are making the challenge. It would help know whether parties need to be prepared with witnesses or to expect to treat the proceeding as a pre-trial conference.

Judge Schmalenberger also expressed a desire to look at these procedures. So, I am copying him in case he has any comments.

Dick Geiger

NORTH DAKOTA CENTURY CODE

TITLE 30.1 Uniform Probate Code

Article I - General Provisions, Definitions, and Probate Jurisdiction of Court
CHAPTER 30.1-01 Short Title - Construction - General Provisions - Definitions

30.1-01-06. (1-201) General definitions.

Subject to additional definitions contained in the subsequent chapters which are applicable to specific chapters, and unless the context otherwise requires, in this title:

1. "Agent" includes an attorney-in-fact under a durable or nondurable power of attorney, an individual authorized to make decisions concerning another's health care, and an individual authorized to make decisions for another under a natural death act.

2. "Application" means a written request to the court for an order of informal probate or appointment under chapter 30.1-14.

3. "Augmented estate" means the estate described in section 30.1-05-02.

4. "Beneficiary", as it relates to a trust beneficiary, includes a person who has any present or future interest, vested or contingent, and also includes the owner of an interest by assignment or other transfer; as it relates to a charitable trust, includes any person entitled to enforce the trust; as it relates to a beneficiary of a beneficiary designation, refers to a beneficiary of an account with a payable on death designation, of a security registered in beneficiary form transferable on death, or other nonprobate transfer at death; and, as it relates to a "beneficiary designated in a governing instrument", includes a grantee of a deed, a devisee, a trust beneficiary, a beneficiary of a beneficiary designation, a donee, or a person in whose favor a power of attorney or a power held in any individual, fiduciary, or representative capacity is exercised.

5. "Beneficiary designation" refers to a governing instrument naming a beneficiary of an account with payable on death designation, of a security registered in beneficiary form transferable on death, or other nonprobate transfer at death.

6. "Child" includes an individual entitled to take as a child under this title by intestate succession from the parent whose relationship is involved and excludes a person who is only a stepchild, a foster child, a grandchild, or any more remote descendant.

7. "Claims", in respect to estates of decedents and protected persons, includes liabilities of the decedent or protected person whether arising in contract, in tort, or otherwise, and liabilities of the estate which arise at or after the death of the decedent or after the appointment of a conservator, including funeral expenses and expenses of administration. The term does not include estate or inheritance taxes, or demands or disputes regarding title of a decedent or protected person to specific assets alleged to be included in the estate.

8. "Conservator" means a person who is appointed by a court to manage the estate of a protected person, and includes limited conservators as defined in this section.

9. "Court" means the court having jurisdiction in matters relating to the affairs of decedents.

10. "Descendant" of an individual means all descendants of all generations, with the relationship of parent and child at each generation being determined by the definition of child and parent contained in this title.

11. "Devise", when used as a noun, means a testamentary disposition of real or personal property, and when used as a verb, means to dispose of real or personal property by will.

12. "Devisee" means a person designated in a will to receive a devise. In the case of a devise to an existing trust or trustee, or to a trustee or trust described by will, the trust or trustee is the devisee and the beneficiaries are not devisees.

13. "Disability" means cause for a protective order as described in section 30.1-29-01.

14. "Distributee" means any person who has received property of a decedent from the decedent's personal representative other than as a creditor or purchaser. A testamentary trustee is a distributee only to the extent of distributed assets or increment thereto remaining in the trustee's hands. A beneficiary of a testamentary trust to whom the trustee has distributed property received from a personal representative is a distributee of the personal representative. For the purposes of this provision, "testamentary trustee" includes a trustee to whom assets are transferred by will to the extent of the devised assets.

15. "Estate" includes the property of the decedent, trust, or other person whose affairs are subject to this title as originally constituted and as it exists from time to time during administration.

16. "Exempt property" means that property of a decedent's estate which is described in section 30.1-07-01.

17. "Fiduciary" includes a personal representative, guardian, conservator, and trustee.

18. "Foreign personal representative" means a personal representative appointed by another jurisdiction.

19. "Formal proceedings" means proceedings conducted before a judge with notice to interested persons.

20. "Governing instrument" means a deed, will, trust, insurance or annuity policy, account with payable on death designation, security registered in beneficiary form transferable on death, pension, profit-sharing, retirement, or similar benefit plan, instrument creating or exercising a power of appointment or a power of attorney, or a dispositive, appointive, or nominative instrument of any similar type.

21. "Guardian" means a person who or nonprofit corporation that has qualified as a guardian of a minor or incapacitated person pursuant to testamentary or court appointment, and includes limited guardians as defined in this section, but excludes one who is merely a guardian ad litem.

22. "Heirs", except as controlled by section 30.1-09.1-11, means persons, including the surviving spouse and the state, who are entitled under the statutes of intestate succession to the property of a decedent.

23. "Incapacitated person" means an individual described in section 30.1-26-01.

24. "Informal proceedings" means those conducted by the court for probate of a will or appointment of a personal representative without notice to interested persons.

25. "Interested person" includes heirs, devisees, children, spouses, creditors, beneficiaries, and any others having a property right in or claim against a trust estate or the estate of a decedent, ward, or protected person. The term also includes persons having priority for appointment as personal representative, and other fiduciaries representing interested persons. The meaning as it relates to particular persons may vary from time to time and must be determined according to the particular purposes of, and matter involved in, any proceeding.

26. "Issue" of a person means descendant as defined in subsection 10.

27. "Joint tenants with the right of survivorship" and "community property with the right of survivorship" includes coowners of property held under circumstances that entitle one or more to the whole of the property on the death of the other or others, but excludes forms of coownership registration in which the underlying ownership of each party is in proportion to that party's contribution.

28. "Lease" includes an oil, gas, or other mineral lease.

29. "Letters" includes letters testamentary, letters of guardianship, letters of administration, and letters of conservatorship.

30. "Limited conservator" means a person or nonprofit corporation, appointed by the court, to manage only those financial resources specifically enumerated by the court for the person with limited capacity, and includes limited conservators as described by section 30.1-29-20.

31. "Limited guardian" means a person or nonprofit corporation, appointed by the court, to supervise certain specified aspects of the care of a person with limited capacity, and includes limited guardians as described by section 30.1-28-04.

32. "Minor" means a person who is under eighteen years of age.

33. "Mortgage" means any conveyance, agreement, or arrangement in which property is encumbered or used as security.

34. "Nonresident decedent" means a decedent who was domiciled in another jurisdiction at the time of death.

35. "Organization" means a corporation, limited liability company, government or governmental subdivision or agency, business trust, estate, trust, partnership, joint venture, association, or any other legal or commercial entity.

36. "Parent" includes any person entitled to take, or who would be entitled to take if the child died without a will, as a parent under this title, by intestate succession from the child whose relationship is in question and excludes any person who is only a stepparent, foster parent, or grandparent.

37. "Payer" means a trustee, insurer, business entity, employer, government, governmental agency or subdivision, or any other person authorized or obligated by law or a governing instrument to make payments.

38. "Person" means an individual, a corporation, a limited liability company, an organization, or other legal entity.

39. "Person with limited capacity" is as defined in section 30.1-26-01.

40. "Personal representative" includes executor, administrator, successor personal representative, special administrator, and persons who perform substantially the same function under the law governing their status. "General personal representative" excludes special administrator.

41. "Petition" means a written request to the court for an order after notice.

42. "Proceeding" includes action at law and suit in equity.
43. "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.
44. "Protected person" is as defined in section 30.1-26-01.
45. "Protective proceeding" means a proceeding described in section 30.1-26-01.
46. "Security" includes any note, stock, treasury stock, bond, debenture, membership interest in a limited liability company, evidence of indebtedness, certificate of interest or participation in an oil, gas, or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt, or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.
47. "Settlement", in reference to a decedent's estate, includes the full process of administration, distribution, and closing.
48. "Special administrator" means a personal representative as described by sections 30.1-17-14 through 30.1-17-18.
49. "State" means a state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, or any territory or insular possession subject to the jurisdiction of the United States.
50. "Successor personal representative" means a personal representative, other than a special administrator, who is appointed to succeed a previously appointed personal representative.
51. "Successors" means persons, other than creditors, who are entitled to property of a decedent under the decedent's will or this title.
52. "Supervised administration" refers to the proceedings described in chapter 30.1-16.
53. "Survive" means that an individual has neither predeceased an event, including the death of another individual, nor predeceased an event under sections 30.1-04-04 and 30.1-09.1-02. The term includes its derivatives, such as "survives", "survived", "survivor", and "surviving".
54. "Testacy proceeding" means a proceeding to establish a will or determine intestacy.
55. "Trust" includes an express trust, private or charitable, with additions thereto, wherever and however created. The term also includes a trust created or determined by judgment or decree under which the trust is to be administered in the manner of an express trust. The term excludes other constructive trusts and excludes resulting trusts, conservatorships, personal representatives, trust accounts as defined in custodial arrangements pursuant to chapter 11-22, chapter 12-48, sections 25-01.1-19 to 25-01.1-21, chapter 32-10, section 32-16-37, chapter 32-26, former chapter 47-24, chapter 47-24.1, business trusts providing for certificates to be issued to beneficiaries, common trust funds, voting trusts, security arrangements, liquidation trusts, and trusts for the primary purpose of paying debts, dividends, interest, salaries, wages, profits, pensions, or employee benefits of any kind, and any arrangement under which a person is nominee or escrowee for another.
56. "Trustee" includes an original, additional, or successor trustee, whether or not appointed or confirmed by court.
57. "Ward" means an individual described in section 30.1-26-01.

58. "Will" includes codicil and any testamentary instrument that merely appoints an executor, revokes or revises another will, nominates a guardian, or expressly excludes or limits the right of an individual or class to succeed to property of the decedent passing by intestate succession.

HISTORY: Source. S.L. 1973, ch. 257, § 1; 1981, ch. 320, § 76; 1983, ch. 313, § 5; 1985, ch. 369, § 2; 1985, ch. 508, § 23; 1991, ch. 54, § 18; 1991, ch. 326, § 115; 1991, ch. 595, § 1; 1993, ch. 54, § 106; 1993, ch. 334, § 2; 1995, ch. 322, §§ 1, 2, 27.

NOTES:

Effective Date. The 1995 amendment of this section by sections 1 and 2 of chapter 322, S.L. 1995 became effective January 1, 1996.

The 1993 amendment by section 2 of chapter 334, S.L. 1993 became effective January 1, 1996, pursuant to section 51 of chapter 334, S.L. 1993, as amended by section 27 of chapter 322, S.L. 1995.

Note. Section 30.1-01-06 was amended by the 1993 Legislative Assembly in section 2 of chapter 344, S.L. 1993 and by the 1995 Legislative Assembly in sections 1 and 2 of chapter 322, S.L. 1995. The section is printed above to incorporate the 1993 and 1995 amendments.

Editorial Board Comment. Additional sections with special definitions for Articles V and VI are 30.1-26-01 and 30.1-31-01. Except as controlled by special definitions applicable to these particular Articles, the definitions in this section apply to the entire Code.

The definition of "trust" and the use of the term in Article VII eliminate procedural distinctions between testamentary and inter vivos trusts. Article VII does not deal with questions of substantive validity of trusts where a difference between inter vivos and testamentary trusts will continue to be important.

The exclusions from the definition of "trust" are modelled basically after those in Section 1, Uniform Trustees' Powers Act. The exclusions in the Act for "a trust created in deposits in any financial institution, or other trust the nature of which does not admit of general trust administration" are omitted above. The first of these is inappropriate because of Article VI's treatment of "Totten Trusts." [See section 30.1-31-04, and Comment following.] Moreover, the probate court remedies and procedures being established by Article VII would seem suitable to unclassified trustee-beneficiary relationships that are in the nature of express trusts. Perhaps many controversies involving "hold and deliver" trusts or other dubious arrangements will involve the issue of whether there is a trust, but there would seem to be no harm in conferring jurisdiction on the probate court for these controversies.

The meanings of "child," "issue," and "parent" are related to section 30.1-04-09.

See Comment, section 30.1-32-01, concerning the definition of "trustee".

Cross-References. The term "will" includes "codicil", see § 1-01-49, subs. 8.

Claims. Determination of Heirs.

Formal Testacy Proceeding.-- -In General.-- -Will Contest. Informal Proceedings. Interested Person Notice by Publication. Notice to Interested Persons. Omitted Heirs.

Claims.

Because a creditor's claim for tort damages can be filed in a probate proceeding under this title, the death of a potential defendant before the period of the statute of limitations has run on a tort claim does not make § 28-01-16 ineffective, and § 28-01-26 does not apply. *Ness v. Stirling*, 537 N.W.2d 554 (N.D. 1995).

Determination of Heirs.

An order which stated only that: "All aunts and uncles on the maternal and paternal sides who left issue, shall receive equal shares and the share of each deceased aunt or uncle, who left issue, shall be left to the issue of that deceased person in equal shares by right of representation," merely recited the statutory direction for inheritance by representation and did not determine the heirs. *Olson v. Estate of Hoffas*, 422 N.W.2d 391 (N.D. 1988).

Formal Testacy Proceeding.

-- -In General.

Where petitioner was attempting to establish ownership of property through an unprobated will as evidence of a devise, and did not claim that he, or anyone else, was an heir entitled to the minerals under the law of intestate succession, and also did not attempt to probate a will, the proceeding was not a "formal testacy proceeding" as defined by this section or 30.1-15-01, and since 30.1-15-06 applies to a "formal testacy proceeding", it did not directly apply here. *In re Estate of Papineau*, 396 N.W.2d 735 (N.D. 1986).

-- -Will Contest.

Any will contest generally becomes a formal proceeding. *Ketterling v. Gonzalez (In re the Estate of Ketterling)*, 515 N.W.2d 158 (N.D. 1994).

Informal Proceedings.

Informal proceedings for determining testacy and appointing personal representatives generally do not have notice requirements, are basically ex parte in nature, and are handled administratively, not adversarially. *Ketterling v. Gonzalez (In re the Estate of Ketterling)*, 515 N.W.2d 158 (N.D. 1994).

Interested Person

Decedent's daughter, as the personal representative of her mother's estate and as a residuary beneficiary and child of the decedent who stood to acquire the disputed property if her action was successful, qualified as an "interested person" under N.D.C.C. § 30.1-01-06(25) with standing to bring the will contest. Therefore, the daughter had standing in a will contest proceeding and was not prohibited from relying on the alleged invalidity of her mother and second husband's marriage as evidence of fraud. *In re Estate of Richmond*, 2005 ND 145, 701 N.W.2d 897, 2005 N.D. LEXIS 179 (July 25, 2005).

Notice by Publication.

Notice is effected by publication only if the address or identity of the person is unknown and cannot be ascertained with reasonable diligence. *Olson v. Estate of Hoffas*, 422 N.W.2d 391 (N.D. 1988).

Notice to Interested Persons.

In all formal estate proceedings, notice must be given to every interested person prior to any formal hearing or order; interested persons not notified of formal proceedings are not bound. *Olson v. Estate of Hoffas*, 422 N.W.2d 391 (N.D. 1988).

Omitted Heirs.

Where the names and addresses of the omitted heirs were known prior to the hearing on the petition for order of distribution, but no notice of any kind was given to the omitted heirs, the probate court was without jurisdiction as to the omitted heirs. *Olson v. Estate of Hoffas*, 422 N.W.2d 391 (N.D. 1988).

DECISIONS UNDER PRIOR LAW

Appearance Without Citation. Interested Person. Will.

Appearance Without Citation.

Where a person of lawful age personally appeared without being cited at a hearing called by a county judge on petition for a guardian's appointment, and stated that she wished to have a person appointed as her guardian, and signed a written request for his appointment, the court acquired jurisdiction over her person to the same extent as if she had been cited. *In re Guardianship of Jones*, 66 N.D. 185, 263 N.W. 160, 102 A.L.R. 441 (1936).

Interested Person.

Former definition of "person interested" did not apply to hearings had upon accounts concerning the ranking of creditors for sharing in the estate and accounting, allowing, or disallowing it. *Elton v. Lamb*, 33 N.D. 388, 157 N.W. 288 (1916).

Will.

When used in Title 30, N.D.C.C., Judicial Procedure, Probate, the term "will" included "codicil". *Hoppin v. Fortin*, 111 N.W.2d 122 (N.D. 1961).

Collateral References. Living wills: validity, construction, and effect, 49 A.L.R.4th 812.

NORTH DAKOTA CENTURY CODE
TITLE 30.1 Uniform Probate Code
Article I - General Provisions, Definitions, and Probate Jurisdiction of Court
CHAPTER 30.1-02 Scope, Jurisdiction, and Courts

30.1-02-04. (1-304) Practice in court.

Unless specifically provided to the contrary in this title or unless inconsistent with its provisions, the rules of civil procedure, including the rules concerning vacation of orders and appellate review, govern formal proceedings under this title.

HISTORY: Source. S.L. 1973, ch. 257, § 1.

NOTES:

Appeals to District Court. N.D.R.Civ.P. 52(a). N.D.R.Civ.P. 54(b).

Appeals to District Court.

The Rules of Civil Procedure apply to appeals from county courts to district courts unless the Probate Code specifically provides otherwise or the rules are inconsistent with the code. *In re Estate of Bieber*, 256 N.W.2d 879 (N.D. 1977).

N.D.R.Civ.P. 52(a).

Rule 52(a), N.D.R.Civ.P. is applicable to probate proceedings in county court. *In re Estate of Raketti*, 340 N.W.2d 894 (N.D. 1983); *First Trust Co. v. Conway*, 345 N.W.2d 838 (N.D. 1984).

N.D.R.Civ.P. 54(b).

Rule 54(b), N.D.R.Civ.P. is applicable in probate proceedings. *In re Estate of Erickson*, 368 N.W.2d 525 (N.D. 1985); *In re Estate of Starcher*, 447 N.W.2d 293 (N.D. 1989).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 8.4, N.D.R.Ct., Summons in Action for Divorce or Separation

Attorney Valeska Hermanson submitted a proposal, attached, for amending Rule 8.4.

The Committee decided to delay consideration of Hermanson's proposal to allow member of the bar to submit comments. Staff received one comment from David Boeck, who supported Hermanson's proposal but suggested that language in capital letters be changed for the sake of readability. The attached proposal incorporates Boeck's suggestion.

The crux of Hermanson's proposal is to add a special summons requirement to the rule, which would apply in custody cases. Parties would be required to keep their children in the state while the action is pending.

Hermanson proposes language for the requirement based on the existing language for the summons in a divorce case. In her letter, which is included with the Rule 3.2 material, she explains that requirement is justified for reasons of jurisdiction and as a practical matter.

A Rule 8.4 draft containing Hermanson's proposed amendments is attached.

RULE 8.4 SUMMONS IN ACTION FOR DIVORCE, ~~OR~~ SEPARATION OR
CUSTODY

(a) Restraining Provisions—Divorce or Separation. A summons in a divorce or separation action must be issued by the clerk under the seal of the court, or by an attorney for a party to the action, and include the following restraining provisions:

(1) Neither spouse ~~shall~~ may dispose of, sell, encumber, or otherwise dissipate any of the parties' assets, except:

a. (A) For necessities of life or for the necessary generation of income or preservation of assets; or

b. (B) For retaining counsel to carry on or to contest the proceeding.

If a spouse disposes of, sells, encumbers, or otherwise dissipates assets during the interim period, that spouse shall provide to the other spouse an accounting within 30 days.

(2) Neither spouse ~~shall~~ may harass the other spouse.

(3) All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation.

(4) Neither spouse ~~shall~~ may remove any of their minor children from North Dakota without the written consent of the other spouse or order of the court except for temporary periods.

(5) Each summons must include the following statement in bold print: ~~IF EITHER SPOUSE VIOLATES ANY OF THESE PROVISIONS, THAT SPOUSE MAY BE IN~~

22 CONTEMPT OF COURT : If either spouse violates any of these provisions, that spouse may
23 be in contempt of court.

24 (c) Restraining Provisions–Custody. A summons in a custody action must be issued
25 by the clerk under seal of the court, or by an attorney for a party to the action, and include
26 the following restraining provisions:

27 (1) Neither party may remove any of their minor children from North Dakota without
28 the written consent of the other party or order of the court except for temporary periods.

29 (2) Each summons must include the following statement in bold print: If either spouse
30 violates any of these provisions, that spouse may be in contempt of court.

31 (b) (c) Applicability of restraining provisions. The restraining provisions contained
32 in the summons apply to both spouses parties upon service of the summons. The provisions
33 are effective until otherwise provided by court order or by written stipulation of the parties
34 filed with the court.

35

36 EXPLANATORY NOTE

37 Rule 8.4 was amended, effective _____.

38 Rule 8.4 was adopted, effective March 1, 1996.

39 Subdivision (c) was added, effective _____, to require restraining provisions
40 to be included in summons in custody matters.

41 SOURCES: Joint Procedure Committee Minutes of _____ pages _____; April
42 27-28, 1995, pages 17-21.

43 CROSS REFERENCE: N.D.R.Ct. Appendix A (Summons in Action for Divorce or
44 Separation).

RULE 8.4 SUMMONS IN ACTION FOR DIVORCE, OR SEPARATION OR CUSTODY

(a) Restraining Provisions-Divorce or Separation. A summons in a divorce or separation action must be issued by the clerk under the seal of the court, or by an attorney for a party to the action, and include the following restraining provisions:

(1) Neither spouse shall dispose of, sell, encumber, or otherwise dissipate any of the parties' assets, except:

- a. For necessities of life or for the necessary generation of income or preservation of assets; or
- b. For retaining counsel to carry on or to contest the proceeding;

If a spouse disposes of, sells, encumbers, or otherwise dissipates assets during the interim period, that spouse shall provide to the other spouse an accounting within 30 days.

- (2) Neither spouse shall harass the other spouse.
- (3) All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation.
- (4) Neither spouse shall remove any of their minor children from North Dakota without the written consent of the other spouse or order of the court except for temporary periods.
- (5) Each summons must include the following statement in bold print.

IF EITHER SPOUSE VIOLATES ANY OF THESE PROVISIONS, THAT SPOUSE MAY BE IN CONTEMPT OF COURT.

(b) Restraining Provisions-Custody. A summons in a custody action must be issued by the clerk under the seal of the court, or by an attorney for a party to the action, and include the following restraining provisions:

- (1) Neither party shall remove any of their minor children from North Dakota without the written consent of the other party or order of the court except for temporary periods.
- (2) Each summons must include the following statement in bold print.

IF EITHER PARTY VIOLATES ANY OF THESE PROVISIONS, THAT PARTY MAY BE IN CONTEMPT OF COURT.

(c) Applicability of Restraining Provisions. The restraining provisions contained in the summons apply to both ~~spouses~~ parties upon service of the summons. The provisions are effective until otherwise provided by court order or by written stipulation of the parties filed with the court.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 10.2, N.D.R.Ct., Smalls Claims Court

At its January meeting, the Committee considered and approved a new rule relating to small claims court. The rule was referred directly to the Supreme Court, which sought comments on it. After receiving comments, the Court decided to refer the rule back to the Committee. The Court requests that the Committee consider the comments and report back to the Supreme Court.

Based on suggestions found in the comments, Staff has prepared an amended rule proposal. Amendments and deletions to the rule as approved by the Committee are indicated by underlining and overstriking.

In general, the comments were in favor of the idea of allowing businesses to be represented in small claims court by non-lawyers. The comment from Mark Larson is an exception: he suggests that the Committee's proposal is an encroachment on the practice of law.

Court administrator Sally Holewa suggested an amendment to subdivision (a) of the Committee's proposal to clarify that appearances in court are not necessary in the case of a default. Ms. Holewa states that most small claims court cases are handled as default matters. Staff has incorporated Ms. Holewa's suggested amendment in the amended proposal.

The SBAND Board of Governors has suggested several changes:

— The Board suggests that the term "legal entity" be used instead of listing entities, as was done in the Committee's proposal. The Board's suggestion is incorporated in the

amended proposal. Language explaining the meaning of “legal entity” is incorporated into the amended explanatory note.

— The Board suggests that the list of possible representatives in the Committee’s proposal was inadequate. The Board also objects to allowing authorized agents to represent legal entities in small claims court. Marilyn Foss, general counsel of the North Dakota Banker’s Association, expresses similar concerns in her comment on the proposed rule. Because the Board’s suggested amendment to the list of possible representatives seems to also address the NDBA’s concerns, Staff has incorporated the Board’s suggestions into the amended proposal.

The Committee may wish to take note of the fact that the Board questions whether employees should be allowed to represent legal entities in small claims court. The Board’s objections seem to center on the issue of employee authority, a topic that was also discussed by the Committee at its January meeting.

The amended proposal is attached.

RULE 10.2 SMALL CLAIMS COURT

(a) Appearances. The parties to any action in which a hearing has been requested shall appear in person, unless otherwise authorized by the court, and may be represented by a lawyer admitted to practice law before the courts of this state.

(b) ~~Business Associations or Political Subdivisions~~ Legal Entities. A corporation, partnership, limited liability company, sole proprietorship, association or political subdivision legal entity may be represented in a small claims court action by the following persons who have been authorized to act on its behalf:

(1) an officer, manager, partner, or authorized;

(2) a person holding an ownership interest;

(3) a director or other member of the governing board;

(4) a trustee; or

(5) an employee or agent. ~~An owner or employee of a collection agency may not act as an agent under Rule 10.2(b).~~

EXPLANATORY NOTE

Rule 10.2 was adopted, effective _____.

Subdivision (a) applies to actions in which a hearing has been requested. Under N.D.C.C. § 27-08.1-02, if the court has not received a request for hearing within 20 days of filing of the claim, the matter proceeds by default.

22 Subdivision (b) allows certain authorized persons to represent a legal entity in small
23 claims court. A legal entity is a body, other than a natural person, that can function legally,
24 sue or be sued, and make decisions through authorized representatives. Examples of legal
25 entities are corporations, partnerships, limited liability companies, and political subdivisions.

26 Under N.D.C.C. § 27-08.1-01 (3), a claim may not be filed in small claims court by an
27 assignee of the claim, including owners or employees of collection agencies.

28 SOURCES: Joint Procedure Committee Minutes of January 26, 2006, pages ____.

29 STATUTES AFFECTED:

30 CONSIDERED: N.D.C.C. ch. 27-08.1.

Supreme Court of North Dakota

OFFICE OF THE CLERK

600 E BOULEVARD AVE DEPT 180

BISMARCK ND 58505-0530

(701) 328-2221 (Voice)

(701) 328-4480 (FAX) (701) 328-2884 (TDD)

supclerkofcourt@ndcourts.com

CLERK OF THE SUPREME COURT
PENNY MILLER

CHIEF DEPUTY CLERK
COLETTE M. BRUGGMAN

April 12, 2006

The Honorable Dale V. Sandstrom
Chairman, Joint Procedure Committee
600 East Boulevard Avenue, Dept. 180
Bismarck, ND 58505-0530

HAND DELIVERED

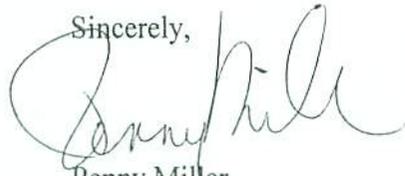
RE: Proposed N.D.R.Ct. 10.2
Supreme Court No. 20060029

Dear Justice Sandstrom:

On January 31, 2006, the Joint Procedure Committee forwarded proposed N.D.R.Ct. 10.2. The Supreme Court requested comments to Rule 10.2, and several comments were received.

Rule 10.2, along with the comments, is being re-referred to the Joint Procedure Committee for its consideration. After the Joint Procedure Committee has considered this matter, please report back to the Supreme Court at your earliest convenience.

Sincerely,



Penny Miller

Clerk

North Dakota Supreme Court

PM:cmb
attachments

pc w/attach: ✓ Mr. Michael J. Hagburg, Staff Attorney

RULE 10.2 SMALL CLAIMS COURT

(a) Appearances. The parties shall appear in person, unless otherwise authorized by the court, and may be represented by a lawyer admitted to practice law before the courts of this state.

(b) Business Associations or Political Subdivisions. A corporation, partnership, limited liability company, sole proprietorship, association or political subdivision may be represented in a small claims court action by an officer, manager, partner, or authorized employee or agent. An owner or employee of a collection agency may not act as an agent under Rule 10.2(b).

EXPLANATORY NOTE

Rule 10.2 was adopted, effective _____.

Under N.D.C.C. § 27-08.1-01 (3), a claim may not be filed in small claims court by an assignee of the claim.

SOURCES: Joint Procedure Committee Minutes of January 26, 2006, pages _____.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. ch. 27-08.1.

Cota, Terra

RECEIVED BY CLERK
SUPREME COURT FEB 3 2006

From: Wayne & Jude Heringer [heringer@westriv.com]
Sent: Friday, February 03, 2006 2:18 PM
To: supclerkofcourt@ndcourts.com
Subject: Proposed Rule 10.2

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 3 2006

Dear Clerk of Court,

STATE OF NORTH DAKOTA

Thank you so much for proposing rule changes in regards to small claims court and the persons that can represent businesses in such matters. As small business owners for 34 years we have used the small claim court as a means of trying to collect delinquent accounts. Credit is perhaps the biggest hurdle that we have to overcome as business persons. It is very often not cost effective or wise in a business sense to involve an attorney in these matters. It does give us tools at the very least to receive payment on account from persons trying to sell properties before paying their bills. We contacted our district representative and our county States Attorney immediately upon hearing of the ruling that would have changed the law for us. We thank you for your attention to this matter and respectfully request that the changes to allow small business corporations to represent themselves in small claims court be protected.

Sincerely,

Wayne and Jude Heringer
Wagon Wheel Lumber & Hardware
P.O. Box 1105
Washburn, ND 58577
701-462-8355

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ORIGINAL

(E-mailed)

20060029



State of North Dakota
OFFICE OF STATE COURT ADMINISTRATOR

SUPREME COURT
Judicial Wing, 1st Floor
600 E Boulevard Ave Dept 180
Bismarck, ND 58505-0530
701: (701) 328-4216
Fax: (701) 328-2092

SALLY HOLEWA
STATE COURT ADMINISTRATOR

TO: Penny Miller, Clerk of the Supreme Court
FROM: Sally Holewa, State Court Administrator *SH*
DATE: February 6, 2006
SUBJECT: Comments on Proposed Rule N.D.R.Ct. 10.2

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 06 2006

STATE OF NORTH DAKOTA

In response to the request for comments on proposed rule N.D.R.Ct. 10.2, I would note that currently the majority of small claims cases are handled as default matters pursuant to N.D.C.C. 27-08.1.02.

I would recommend that language be added to proposed rule N.D.R.Ct. 10.2 to clarify that the intent of the rule is not to set aside or modify the current default practices, which allow a judge or referee to issue a default judgment without a hearing if no request for hearing or request to move to District Court have been filed within 20 days of the filing of the Claim.

I have attached suggested language changes to subsection 1(a) and to the Explanatory Note.

RULE 10.2 SMALL CLAIMS COURT

1. (a) Appearances. The parties to any action in which a hearing has been requested shall appear in person, unless otherwise authorized by the court, and may be represented by a lawyer admitted to practice law before the courts of this state.

(b) Business Associations or Political Subdivisions. A corporation, partnership, limited liability company, sole proprietorship, association or political subdivision may be represented in a small claims court action by an officer, manager, partner, or authorized employee or agent. An owner or employee of a collection agency may not act as an agent under Rule 10.2(b).

EXPLANATORY NOTE

Rule 10.2 was adopted, effective _____.

Under N.D.C.C. § 27-08.1-01 (3), a claim may not be filed in small claims court by an assignee of

the claim.

Under N.D.C.C. § 27-08.1-02 if the court has not received a request for hearing within 20 days of filing of the claim, the matter proceeds by default. The provisions of subsection 1 (a) of this rule do not apply to cases that proceed by default.

SOURCES: Joint Procedure Committee Minutes of January 26, 2006, pages _____.



NORTH DAKOTA HOUSE OF REPRESENTATIVES

STATE CAPITOL
600 EAST BOULEVARD
BISMARCK, ND 58505-0360



Representative Francis J. Wald
District 37
Box 926
Dickinson, ND 58602-0926
fwald@state.nd.us

COMMITTEES:
Appropriations - Education and
Environment Division

20060029

RECEIVED BY CLERK
SUPREME COURT FEB 13 2006

Supreme Court of North Dakota
600 E Boulevard Ave
Bismarck ND 58505-0530

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

Attn: Penny Miller
Clerk of the Supreme Court

FEB 13 2006

Re: Proposed Rule 10.2
North Dakota Rules of Court

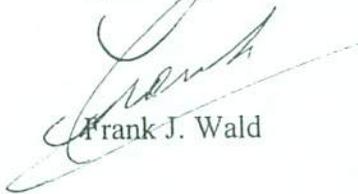
STATE OF NORTH DAKOTA

Please maintain the integrity and purpose of the small claims court
in North Dakota.

Small business person's should be allowed to represent themselves
without hiring an attorney to resolve small disputes.

In my experience the small claims court has worked very well and
should be continued in it's present scope.

Sincerely,



Frank J. Wald

ORIGINAL (e-mailed)
20060029

Cota, Terra

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

From: Evan Heustis [eheustis@ramseybank.com]

Sent: Tuesday, February 21, 2006 4:15 PM

To: supclerkofcourt@ndcourts.com

FEB 21 2006

Subject: Proposed Amendment - NDRCrt (Rule 10.2)

STATE OF NORTH DAKOTA

Please consider this my formal comment on the Joint Procedure Committee's proposed Rule 10.2 of the NDRCrt and its immediate adoption.

I write in favor of the proposition and the immediate action requested relative to its adoption. As General Counsel for The Ramsey National Bank and Trust Co. I am sometimes engaged in assisting various departments of this bank in the preparation of, the filing and execution of Small Claims Court actions. These are most often simple, rudimentary claims that could be handled by anyone with a grasp of the facts to be presented.

It does not appear logical that an individual with no background in law or business is allowed to prosecute and defend an action in Small Claims Court against a financial institution, but the representative of a financial institution may not do so on his employer's behalf.

Acting in a representative capacity for an employer, in many instances not associated with the law, is nothing unusual for a financial institution's employees. It is suggested this kind of representation would bring to the Small Claims Court a certain amount of sophistication, education and experience that should be welcome in Small Claims Court.

I am well aware of the argument that financial institutions should not be permitted to practice law and that to allow a financial institution's employees to represent the institution in **ANY COURT** is to condone that which is not permitted. However, the manner in which the Small Claims Court operates militates against a finding that to participate is the practice of law. It is, at best, an exercise in dispute resolution.

It is this dispute resolution approach which is one of the best arguments for permitting an financial institution's employees to represent their employer in Small Claims Court.

Another consideration in favor of permitting a financial institution's employees to represent the institution in Small Claims Court although there is a prohibition against the institution from practicing law; is the fact that no separate fee is being paid for this representation. The employee is engaging in conduct solely for

the salary paid for all of the employee's other efforts on behalf of the financial institution.

Also, the State of Wisconsin permits what Rule 10.2 would accomplish and it seems to have worked well in that state.

Heustis
Ramsey National Bank and Trust Co.
701-662-4024

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ORIGINAL (e-mailed)

20060029

Cota, Terra

From: Mark G. Schneider [mark@schneiderlawfirm.com]
Sent: Tuesday, February 21, 2006 4:12 PM
To: supclerkofcourt@ndcourts.com
Cc: steve; Jasper J. Schneider
Subject: proposed local rule 10.02

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FEB 21 2006

STATE OF NORTH DAKOTA

The members of our firm whoheartedly support the proposed rule. Small Claims Court should be for individual litigants with small claims, not a conduit for collection agencies.

Mark
G Schneider, Attorney at Law 815 3rd Ave S., Fargo, ND 58103



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February 22, 2006

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20060029

Penny L. Miller
Clerk of the Supreme Court
State Capitol
600 E. Boulevard Ave., Dept. 180
Bismarck, ND 58505-0530

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IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 27 2006

Re: Proposed Rule 10.2

STATE OF NORTH DAKOTA

Dear Ms. Miller:

I write in opposition to proposed Rule 10.2 of the North Dakota Rules of Court. It is obvious, of course, that this Rule is designed to overcome concerns created by Wetzel v. Schlenvogt, 2005 ND 190, 705 N.W.2d 836. It appears to me that this Rule, if adopted, would encroach upon the legislative power. Since the legislature has determined what the practice of law is, and the Wetzel case interpreted and explained why a corporation may not be represented by a non lawyer, it is clear that the standards in this matter are all legislatively drafted. To permit enactment of this Rule would mean that the Court has engaged in a legislative enactment which exceeds, I think, the court's power.

Section 27-08.1-04 of the North Dakota Century Code, a recent enactment of the legislature states, "If the defendant elects to remove the action from small claims court to district court, the district court shall award attorney's fees to a prevailing plaintiff." Presumably this now means that with the adoption of this Rule, a non attorney could be awarded attorney's fees.

Secondarily, it seems that the legislature has demonstrated a desire to prevent removal of small claim's actions. On the other hand, the recent enactment of the amendment to Section 27-08.1-04 does not award attorney's fees to a prevailing party, it merely awards attorney's fees to a prevailing plaintiff. The thought process presumably being designed to maintain an action in small claim's court and to prevent removals.

What is most frustrating to me is the continued belief that the practice of law does not require any type of specialized knowledge. After seven years of training, plus passages of the bar together with repeated continuing education programs, an attorney is allowed to practice law and represent clients. An attorney is subject to continuing disciplinary scrutiny. An attorney cannot, however, go plumb his neighbor's house and have it pass inspection, an attorney can't wire the house and have it pass

Page -2-

inspection, nor can he cut someone's hair for a fee. As a result, the expansion of the encroachment on the practice of law denigrates the professional.

I hope the Court will consider these comments and refuse passage of proposed Rule 10.2

Thank you.

Sincerely,

LARSON LAW FIRM, P.C.

A handwritten signature in cursive script that reads "Mark".

Mark V. Larson

MVL:dam:miller01



ORIGINAL
20060029

February 27, 2006

Penney Miller
Clerk of the Supreme Court
supclerkofcourt@ndcourts.com

FILED
IN THE OFFICE OF THE
CLERK OF SUPREME COURT

FEB 27 2006

RE: Proposed N.D.R.O.C. 10.2

STATE OF NORTH DAKOTA

Dear Ms. Miller:

The North Dakota Bankers Association ("NDBA") would like to thank the Court for this opportunity to comment on proposed N.D.R.Ct. 10.2. NDBA is a statewide trade association for banks and thrift associations. Our 93 members are national banks, state banks and federal savings banks. Our members serve the financial needs of North Dakotans from more than 300 offices throughout the state.

Over the past few years (long before the Wetzel decision), some NDBA member banks have suggested NDBA sponsorship of legislation to allow banks to represent themselves in small claims court because the judges in their districts will not permit them to do so. Other NDBA members have stated that in their judicial districts banks are allowed to represent themselves in small claims court actions. So far as we can tell, the difference is due to judges' contrary interpretations of what constitutes the unauthorized practice of law, rather than any requirement in N.D.C.C. Ch. 27-08.1. The small claims court was established to provide North Dakotans with a forum to resolve a limited class of small disputes without undue formality or expense. N.D.C.C. §§ 27-08.1-01(1) and 27-08.1-03. The small claims court statutes themselves recognize the parties will be both natural person and entities, including business entities and political subdivisions, and do not distinguish between them. In small claims court, the parties are to be permitted to "appear without counsel". N.D.C.C. § 27-08.1-03.

By adopting proposed N.D.R.Ct. 10.2, with some modifications, the Supreme Court will be exercising its jurisdiction over the practice of law in a manner that clear ups the uncertainty about whether banks and other entities may appear in small claims court without counsel and appropriately support the small claims court process and purpose, without endorsing the unauthorized legal representation by persons who are not licensed attorneys and without overburdening the small claims court system. **Accordingly, NDBA heartily endorses the provision within the Rules of Court of clear authority and guidelines for business entities to represent themselves in small claims court.**

The right of a small claims court party to self-representation is essential to the purposes of the small claims court law. All proposed North Dakota Rule of Court 10.2 is intended to do is to recognize that entities must do their business through individuals and to designate individuals who are appropriate to appear in small claims court on behalf of an entity . We agree that the list

should include a party's "officer[s], manager[s], partner[s], or authorized employee[s]" but propose an expansion of the list to include "directors", "governors" and "trustees", "officials" or "other appropriate individual". We suggest this change because we are concerned that the term "authorized agent" is overly broad and is likely to create a class of non-lawyers who hold themselves out as being available to be appointed as an "authorized agent" to represent entities in small claims court. This is not desirable.

We suggest that the rule includes an additional section regarding the characteristics that must be met for an individual to be an "other appropriate individual" within the meaning of the rule. These could include licensure as an attorney or alternately, other things, such as an ownership interest in the party, or requirement for the individual to have either personal knowledge of the disputed or be subject to a personal adverse effect depending upon the outcome of the proceeding. We would also include a provision to allow an individual who doesn't clearly meet the stated criteria to ask for court permission to appear on behalf of an entity and to support the request with information as to why that person is an appropriate individual within the rule. In our view "an appropriate individual" should be performing this service to the entity as part of his relationship to the entity and not for compensation in addition to or separate from regular compensation for services to the entity. We would also suggest that the entity which desires to be represented by an "other appropriate individual" and the individual be required to submit an affidavit of compliance with the requirements for that representation. These requirements would foster the concept of "self-representation" by entities while discouraging representation by a disinterested non-attorney who is retained for the matter.

North Dakota is a state of small banks and other small business which are formed as an entity for reasons that have nothing to do with limiting "personal" liability. Many, if not most, do not have resources that are substantially greater than those of a reasonably successful sole proprietor. If this rule is adopted, it will be of greater benefit to small banks and other small entities because large banks and business entities already have counsel on retainer or on staff. Representation in small claims court by counsel is not particularly burdensome to them. The adoption of the rule should also enhance the small claims court process itself because it will encourage those individuals who have personal knowledge of the matter at hand to be the ones who appear and present the case to the court.. The rule change may also strengthen public confidence in the "fairness" of a small claims court proceeding because individuals will perceive the playing field as being more even if they are not facing a licensed attorney, but another "ordinary" person.

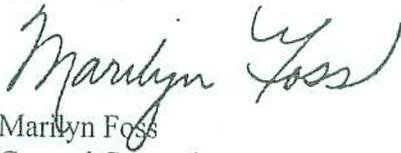
NDBA supports rules that have the effect of enhancing government services to the public in a cost effective manner. With changes to address legitimate concerns regarding the unauthorized practice of law, proposed 10.2 meets the test and should be adopted.

In closing, NDBA again thanks the Court for this opportunity to comment on proposed N.D.R.Ct. 10.2.

Sincerely Yours

Marilyn Foss
General Counsel

Sincerely,

A handwritten signature in cursive script that reads "Marilyn Foss". The signature is written in dark ink and is positioned above the printed name.

Marilyn Foss
General Counsel

M A R I N G



W I L L I A M S

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BY MSBA AND NBTA

March 20, 2006
FILED
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MAR 21 2006

RECEIVED SECRETARY

Ms. Penny Miller
State Board of Law Examiners
600 East Boulevard Avenue, Dept. 180
Bismarck, ND 58505-0530

STATE OF NORTH DAKOTA

MAR 21 2006

ND STATE BOARD
OF LAW EXAMINERS

RE: Rule 10.2, North Dakota Rules of Court

Dear Penny:

At the regular meeting of the SBAND Board of Governors on March 18, 2006, the board voted unanimously to oppose proposed Rule 10.2 of the North Dakota Rules of Court.

The primary reason for the opposition is that Rule 10.2(b) would permit a non-lawyer agent to represent a business association or political subdivision in small claims court. One unintended result of the rule change would be to permit a non-lawyer to establish a business solely for the purpose of becoming a designated agent for many business associations or political subdivisions in small claims court actions.

There were additional concerns with Subsection (b), in that it attempts to list all legal entities, and the list is incomplete. Further, Subpart (b) refers to a sole proprietorship, which does not need to be included in the list because a sole proprietor would be authorized to appear on behalf of herself.

In order to address these concerns the Board would submit for consideration that the term "legal entity" be used, and that an appropriate definition for "legal entity" be included in the Rule. In coming up with the following definition, we referred to Black's Law Dictionary, Abridged (6th Ed.):

- (B) Legal Entity. A legal entity, as used in this Rule, is something other than a natural person who has sufficient existence in legal contemplation that it can function legally, be sued or sue, and make decisions through agents as in the case of corporations. A legal entity may be represented in a small claims court action by the following persons who have been authorized to act on its behalf:

Ms. Penny Miller
March 20, 2006
Page 2

an officer, a person holding an ownership interest, a director or other member of the governing board, a trustee [or an employee].

There was substantial discussion as to whether an "authorized employee" should be allowed to appear on behalf of the legal entity. The consensus was that a billing clerk for a company who is familiar with the issues should be entitled to appear in small claims court because that would free up an officer of the corporation from having to attend the hearing. Conversely, if the Rule permits any employee to appear on behalf of the legal entity, there may be issues raised with respect to whether the employee was legally authorized to take a specific position on behalf of the corporation or whether the employee has sufficient knowledge with respect to the matter to appear on behalf of the legal entity.

In summary, the Board opposed the proposed Rule 10.2 in its present form. We believe that most of the problems can be addressed by adopting the definition of legal entity outlined herein. Finally, we submit for your consideration the issue of whether an employee should be authorized to appear on behalf of a legal entity and, if so, whether there should be any descriptors or limitations placed upon the term "employee."

Thank you for your consideration in this matter.

Sincerely,

MARING WILLIAMS LAW OFFICE, P.C.



Michael J. Williams

MJW:nw
c: Bill Neumann

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 4, N.D.R.Civ.P., Persons Subject to Jurisdiction–Process–Service

At the January meeting, Mr. Kapsner suggested that the Committee take a look at N.D.R.Civ.P. 4(c), specifically the language dealing with demand for filing a complaint. Mr. Kapsner suggested the provision was unclear, particularly in its application to cases with multiple parties.

Staff reviewed the provision and prepared proposed amendments, which are attached.

First, staff recommends the Committee consider changing N.D.R.Civ.P. 4(c)(2). This paragraph allows a summons to be served without a complaint. It then sets out a fairly complex procedure that a party can use to demand service of the complaint. Paragraph 4(c)(3) on demand for filing seems to have been based on this paragraph.

Paragraph 4(c)(2)'s language has been part of Rule 4 since it became effective in 1957. It was not derived from the federal rule but was taken from N.D.R.C. § 28-0504. The provision made sense in the revised code days–under N.D.R.C. § 28-0702 the deadline for an answer was 30 days after the complaint was served. Under N.D.R.Civ.P. 12(a), however, the answer deadline is 20 days after the summons is served. Allowing a summons to be served without a complaint and having an answer deadline based on service of the summons does not seem fair to defendants. Committee members, however, may have insight into reasons why allowing the summons to be served without the complaint is desirable.

Three of the four other states in which actions commence with service of summons–Connecticut, Minnesota, and New Hampshire–require service of the complaint with the summons. On the other hand, South Dakota allows service of a summons without

a complaint under S.D.C.L. 15-6-4, a provision nearly identical to 4(c)(2).

Staff has prepared a proposed amendment to 4(c)(2) based on Minn.R.Civ.P. 3.02. The proposed language would require the complaint to be served with the summons except when service is by publication. Rule 4(e)(2) already requires filing of the complaint when there is service by publication.

Staff has also prepared proposed amendments to 4(c)(3).

Based on Mr. Kapsner's suggestion, proposed language indicating that a demand for filing the complaint made by one party applies to all parties is added to paragraph.

A further amendment is proposed to clarify that, when a party is represented by an attorney, service of the demand under N.D.R.Civ.P. 5(b) is appropriate.

The draft proposal with amendments is attached.

RULE 4. PERSONS SUBJECT TO JURISDICTION–PROCESS–SERVICE

(a) Definition of person. As used in this rule, “person”, whether or not a citizen or domiciliary of this state and whether or not organized under the laws of this state, includes: an individual, executor, administrator or other personal representative; any other fiduciary; any two or more persons having a joint or common interest; a partnership; an association; a corporation; and any other legal or commercial entity.

(b) Jurisdiction over person.

(1) Personal jurisdiction based upon presence or enduring relationship. A court of this state may exercise personal jurisdiction over a person found within, domiciled in, organized under the laws of, or maintaining his or its principal place of business in, this state as to any claim for relief.

(2) Personal jurisdiction based upon contacts. A court of this state may exercise personal jurisdiction over a person who acts directly or by an agent as to any claim for relief arising from the person’s having such contact with this state that the exercise of personal jurisdiction over the person does not offend against traditional notions of justice or fair play or the due process of law, under one or more of the following circumstances:

(A) transacting any business in this state;

(B) contracting to supply or supplying service, goods, or other things in this state;

(C) committing a tort within or without this state causing injury to another person or property within this state;

22 (D) committing a tort within this state, causing injury to another person or property
23 within or without this state;

24 (E) owning, having any interest in, using, or possessing property in this state;

25 (F) contracting to insure another person, property, or other risk within this state;

26 (G) acting as a director, manager, trustee, or officer of a corporation organized under
27 the laws of, or having its principal place of business within, this state;

28 (H) enjoying any other legal status or capacity within this state; or

29 (I) engaging in any other activity, including cohabitation or sexual intercourse, within
30 this state.

31 (3) Limitation on jurisdiction based upon contacts. If jurisdiction over a person is
32 based solely upon paragraph (2) of this subdivision, only a claim for relief arising from bases
33 enumerated therein may be asserted against that person.

34 (4) Acquisition of jurisdiction. A court of this state may acquire personal jurisdiction
35 over any person through service of process as provided in this rule or by statute, or by
36 voluntary general appearance in an action by any person either personally or through an
37 attorney or any other authorized person.

38 (5) Inconvenient forum. If the court finds that in the interest of substantial justice the
39 action should be heard in another forum, the court may stay or dismiss the action in whole
40 or in part on any condition that may be just.

41 (c) Process.

42 (1) Summons—Contents. The summons must specify the venue of the court in which

43 the action is brought, contain the title of the action specifying the names of the parties, and
44 be directed to the defendant. It must state the time within which these rules require the
45 defendant to appear and defend, and must notify the defendant that in case of the defendant's
46 failure to do so, judgment by default will be rendered against the defendant for the relief
47 demanded in the complaint. It must be dated and subscribed by the plaintiff or the plaintiff's
48 attorney, and include the post office address of the plaintiff or plaintiff's attorney. (See
49 N.D.R.Civ.P. 4(e)(8) for additional information required if the action involves real estate and
50 service is by publication.)

51 (2) ~~Summons Served With or without Complaint. A copy of the complaint need not~~
52 ~~be served with the summons in which case the summons must state that the complaint is or~~
53 ~~will be filed with the clerk of the court in which the action is commenced, and if the~~
54 ~~defendant within twenty days after service of the summons causes notice of appearance to~~
55 ~~be given and in person or by an attorney demands in writing a copy of the complaint,~~
56 ~~specifying a place within the state where it may be served, a copy thereof within twenty days~~
57 ~~thereafter must be served accordingly. If, in that case, the complaint is not filed with the clerk~~
58 ~~within twenty days after service of the summons, the action is deemed discontinued. A copy~~
59 ~~of the complaint must be served with the summons, except when service is by publication as~~
60 ~~provided in N.D.R.Civ.P. 4(e).~~

61 (3) Summons Served and Complaint Not Filed. The defendant may serve a written
62 demand on the plaintiff to file the complaint. Service of the demand must be made under
63 subdivision (d) N.D.R.Civ.P. 5(b) on the plaintiff's attorney or under N.D.R.Civ.P. 4(d) on

64 the plaintiff if the plaintiff is not represented by an attorney. In cases with multiple
65 defendants, service of a demand by one defendant is made on behalf of all the defendants.

66 If the plaintiff does not file the complaint within 20 days after service of the demand, service
67 of the summons is void. The demand must contain notice that if the complaint is not filed
68 within 20 days, service of the summons is void under this rule.

69 (4) The defendant may file the summons and complaint, and the costs incurred on
70 behalf of the plaintiff may be taxed as provided in N.D.R.Civ.P. 54(e).

71 (d) Personal service.

72 (1) By whom process served. Service of all process may be made: within the state by
73 any person of legal age not a party to nor interested in the action; and outside the state by any
74 person who may make service under the law of this state or under the law of the place in
75 which service is made or who is designated by a court of this state.

76 (2) How service made within the state. Personal service of process within the state
77 must be made as follows:

78 (A) upon an individual fourteen or more years of age by (i) delivering a copy of the
79 summons to the individual personally; (ii) leaving a copy of the summons at the individual's
80 dwelling house or usual place of abode in the presence of a person of suitable age and
81 discretion then residing therein; (iii) delivering, at the office of the process server, a copy of
82 the summons to the individual's spouse if the spouses reside together; (iv) delivering a copy
83 of the summons to the individual's agent authorized by appointment or by law to receive
84 service of process; or (v) any form of mail or third-party commercial delivery addressed to

85 the individual to be served and requiring a signed receipt and resulting in delivery to that
86 individual;

87 (B) upon an individual under the age of fourteen years, by delivering a copy of the
88 summons to the individual's guardian, if the individual has one within the state, and, if not,
89 then to the individual's father or mother or any person or agency having the individual's care
90 or control, or with whom the individual resides. If service cannot be made upon any of them,
91 then as directed by order of the court;

92 (C) upon an individual who has been judicially adjudged incompetent or for whom
93 a guardian of the individual's person or estate has been appointed in this state, by delivering
94 a copy of the summons to the individual's guardian. If a general guardian and a guardian ad
95 litem have been appointed, both must be served;

96 (D) upon a domestic or foreign corporation or upon a partnership or other
97 unincorporated association, by (i) delivering a copy of the summons to an officer, director,
98 superintendent or managing or general agent, or partner, or associate, or to an agent
99 authorized by appointment or by law to receive service of process in its behalf, or to one who
100 acted as an agent for the defendant with respect to the matter upon which the claim of the
101 plaintiff is based and who was an agent of the defendant at the time of service; (ii) if the
102 sheriff's return indicates no person upon whom service may be made can be found in the
103 county, then service may be made by leaving a copy of the summons at any office of the
104 domestic or foreign corporation, partnership or unincorporated association within this state
105 with the person in charge of the office; or (iii) any form of mail or third-party commercial

106 delivery addressed to any of the foregoing persons and requiring a signed receipt and
107 resulting in delivery to that person;

108 (E) upon a city, township, school district, park district, county, or any other municipal
109 or public corporation, by delivering a copy of the summons to any member of its governing
110 board;

111 (F) upon the state, by delivering a copy of the summons to the governor or attorney
112 general or an assistant attorney general and, upon an agency of the state, such as the Bank
113 of North Dakota or the State Mill and Elevator Association, by delivering a copy of the
114 summons to the managing head of the agency or to the attorney general or an assistant
115 attorney general; or

116 (G) if service is made upon an agent who is not expressly authorized by appointment
117 or by law to receive service of process on behalf of the defendant, a copy of the summons
118 and complaint must be mailed or delivered via a third-party commercial carrier to the
119 defendant with return receipt requested not later than ten days after service by depositing the
120 same, with postage or shipping prepaid, in a post office or with a commercial carrier in this
121 state and directed to the defendant to be served at the defendant's last reasonably
122 ascertainable address.

123 (3) How service made outside the state. Service upon any person subject to the
124 personal jurisdiction of the courts of this state may be made outside the state:

125 (A) in the manner provided for service within this state, with the same force and effect
126 as though service had been made within this state;

127 (B) in the manner prescribed by the law of the place in which the service is made for
128 service in that place in an action in any of its courts of general jurisdiction; or

129 (C) as directed by order of the court.

130 (e) Service by publication.

131 (1) When service by publication permitted. A defendant, whether known or unknown,
132 who has not been served personally under the foregoing subdivisions of this rule may be
133 served by publication in the manner hereinafter provided in one or more of the following
134 situations only if:

135 (A) The claim for relief is based upon one or more grounds for the exercise of
136 personal jurisdiction under paragraph (2) of subdivision (b) of this rule;

137 (B) The subject of the action is real or personal property in this state and the defendant
138 has or claims a lien thereon or other interest therein, whether vested or contingent, or the
139 relief demanded against the defendant consists wholly or partly in excluding the defendant
140 from that lien or interest or in defining, regulating, or limiting that lien or interest, or the
141 action otherwise affects the title to the property;

142 (C) The action is to foreclose a mortgage, cancel a contract for sale, or to enforce a
143 lien upon or a security interest in real or personal property in this state;

144 (D) The plaintiff has acquired a lien upon property or credits or the defendant within
145 this state by attachment, garnishment, or other judicial processes and the property or credit
146 is the subject matter of the litigation or the underlying claim for relief relates to the property
147 or credits;

148 (E) The action is for divorce, separation from bed and board, or annulment of a
149 marriage of a resident of this state or to determine custody of an individual subject to the
150 court's jurisdiction; or

151 (F) The action is to award, partition, condemn, or escheat real or personal property in
152 this state.

153 (2) Filing of complaint and affidavit for service by publication. Before service of the
154 summons by publication is authorized in any case, there must be filed with the clerk of the
155 court in which the action is commenced a complaint setting forth a claim in favor of the
156 plaintiff and against the defendant based on one or more of the situations specified in
157 paragraph (1) of this subdivision and an affidavit executed by the plaintiff or the plaintiff's
158 attorney stating, as may be applicable, one or more of the following:

159 (A) That after diligent inquiry personal service of the summons cannot be made upon
160 the defendant in this state to the best knowledge, information, and belief of the affiant;

161 (B) That the defendant is a domestic corporation which has forfeited its charter or
162 right to do business in this state or has failed to file its annual report as required by law;

163 (C) That the defendant is a domestic or foreign corporation and has no officer,
164 director, superintendent, managing agent, business agent, or other agent authorized by
165 appointment or by law upon whom service of process can be made in its behalf in this state;

166 or

167 (D) That all persons having or claiming an estate or interest in, or lien or encumbrance
168 upon, the real property described in the complaint, whether as heirs, devisees, legatees, or

169 personal representative of a deceased person, or under any other title or interest, and not in
170 possession, nor appearing of record in the office of the register of deeds, the clerk of the
171 district court, or the county auditor of the county in which the real property is situated, to
172 have such claim, title or interest therein, are proceeded against as unknown persons
173 defendant pursuant to N.D.C.C. ch. 32-17 or 32-19, and stating facts necessary to satisfy the
174 requirement of those chapters.

175 (3) Number of publications. Service of the summons by publication may be made by
176 publishing the same three times, once in each week for three successive weeks, in a
177 newspaper published in the county in which the action is pending, and if no newspaper is
178 published in that county then in a newspaper having a general circulation therein although
179 published in another county.

180 (4) Mailing or delivering summons and complaint. A copy of the summons and
181 complaint, at any time after the filing of the affidavit for publication and not later than ten
182 days after the first publication of the summons, must be deposited in a post office or with a
183 third-party commercial carrier in this state, postage or shipping prepaid, and directed to the
184 defendant to be served at the defendant's last reasonably ascertainable address.

185 (5) Personal service outside state equivalent to publication. After the affidavit for
186 publication and the complaint in the action are filed, personal service of the summons and
187 complaint upon the defendant out of state is equivalent to and has the same force and effect
188 as the publication and mailing or delivery provided for in paragraphs (3) and (4) of this
189 subdivision.

190 (6) Time when first publication or service outside state must be made. The first
191 publication of the summons, or personal service of the summons and complaint upon the
192 defendant out of the state, must be made within sixty days after the filing of the affidavit for
193 publication. If not so made, the action is deemed discontinued as to any defendant not served
194 within that time.

195 (7) When defendant served by publication permitted to defend. The defendant upon
196 whom service by publication is made, or the defendant's representative, on application and
197 sufficient cause shown at any time before judgment, must be allowed to defend the action.
198 Except in an action for divorce, the defendant upon whom service by publication is made,
199 or the defendant's representative, upon making it appear to the satisfaction of the court by
200 affidavit, stating the facts, that the defendant has a good and meritorious defense to the
201 action, and the defendant had no actual notice or knowledge of the pendency of the action
202 so as to enable the defendant to make application to defend before the entry of judgment, and
203 upon filing an affidavit of merits, may be allowed to defend at any time within three years
204 after entry of judgment on such terms as may be just. If the defense is successful and the
205 judgment, or any part of the judgment, has been collected or otherwise enforced, restitution
206 may be ordered by the court, but the title to property sold under the judgment to a purchaser
207 in good faith may not be affected. A defendant who receives a copy of the summons in the
208 action mailed or delivered to the defendant as provided in paragraph (4), or upon whom the
209 summons is personally served out of this state, as provided in paragraph (5), is deemed to
210 have had notice of the pendency of the action and of the judgment.

211 (8) Additional information to be published. In all cases where publication of summons
212 is made in an action in which the title to, or an interest in or lien upon, real property is
213 involved or affected or brought into question, the publication must also contain a description
214 of the real property and a statement of the object of the action.

215 (f) Service upon a person in a foreign country. Unless otherwise provided by law,
216 service upon an individual, other than an infant or an incompetent person, may be effected
217 in a place not within any judicial district of the United States:

218 (1) by any internationally agreed means reasonably calculated to give notice, such as
219 those means authorized by the Hague Convention on the Service Abroad of Judicial and
220 Extrajudicial Documents; or

221 (2) if there is no internationally agreed means of service or the applicable international
222 agreement allows other means of service, provided the service is reasonably calculated to
223 give notice:

224 (A) in the manner prescribed by law to the foreign country for service in that country
225 in an action in any of its courts of general jurisdiction; or

226 (B) as directed by the foreign authority in response to a letter rogatory or letter of
227 request; or

228 (C) unless prohibited by the law of the foreign country, by

229 (i) delivery to the individual personally of a copy of the summons and the complaint;

230 or

231 (ii) any form of mail or third-party commercial delivery requiring a signed receipt, to

232 be addressed and dispatched by the clerk of the court to the party to be served; or

233 (3) by any other means not prohibited by international agreement as may be directed
234 by the court. Unless otherwise provided by law, service must be effected upon an infant or
235 an incompetent person in a place not within any judicial district of the United States in the
236 manner prescribed by paragraphs (2)(A) or (B), and (3). Unless otherwise provided by law,
237 service must be effected upon a foreign corporation, partnership or other unincorporated
238 association, that is subject to suit under a common name, in a place not within any judicial
239 district of the United States in the manner prescribed for individuals in this subdivision
240 except personal delivery as provided in paragraph (2)(C)(i).

241 (g) When service by publication or outside state complete. Service by publication is
242 complete upon the expiration of fifteen days after the first publication of the summons.
243 Personal service of the summons and complaint upon the defendant out of state is complete
244 upon the expiration of fifteen days after the date of service.

245 (h) Amendment. At any time and upon such notice and terms as it deems just, the
246 court, in its discretion, may allow any process or proof of service thereof to be amended
247 unless it clearly appears that material prejudice would result to the substantial rights of the
248 party against whom the process issued.

249 (i) Proof of service. Proof of service of the summons and of the complaint or notice,
250 if any, accompanying the same or of other process, must be made as follows:

251 (1) if served by the sheriff or other officer, by the officer's certificate of service;

252 (2) if served by any other person, by the server's affidavit of service;

253 (3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06
254 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of
255 a copy of the summons and complaint in accordance with subdivision (4) of subsection (e)
256 of this rule, if the same has been deposited;

257 (4) in any other case of service by mail or delivery via a third-party commercial carrier
258 resulting in delivery in accordance with paragraph (2) or (3) of subdivision (d) of this rule,
259 by an affidavit of mailing or an affidavit of delivery of a copy of the summons and complaint
260 or other process, with return receipt attached; or

261 (5) by the written admission of the defendant.

262 (j) Content of proof of service. The certificate, affidavit or admission of service
263 mentioned in subdivision (i) of this rule must state the date, time, place and manner of
264 service. If the process, pleading, order of court, or other paper is served personally by a
265 person other than the sheriff or person designated by the law, the affidavit of service must
266 also state that the server is of legal age and not a party to the action nor interested in the
267 action, and that the server knew the person served to be the person named in the papers
268 served and the person intended to be served.

269 (k) Content of the affidavit of mailing or delivery via a third-party commercial carrier.
270 An affidavit of mailing or delivery required by this rule must state a copy of the process,
271 pleading, order of court, or other paper to be served was deposited by the affiant, with
272 postage or shipping prepaid, in the mail or with a third-party commercial carrier and directed
273 to the party shown in the affidavit to be served at the party's last reasonably ascertainable

274 address. The affidavit must contain the date and place of deposit and indicate the affiant is
275 of legal age. The return receipt, if any, must be attached to the affidavit.

276 (l) Effect of mail or delivery refusal. If a summons and complaint or other process is
277 mailed or sent with delivery restricted and requiring a receipt signed by the addressee, the
278 addressee's refusal to accept the mail or delivery constitutes delivery. Return of the mail or
279 delivery bearing an official indication on the cover that delivery was refused by the addressee
280 is prima facie evidence of the refusal.

281 (m) Service under statute. If a statute requires service and does not specify a method
282 of service, service must be made under this rule.

283

284

EXPLANATORY NOTE

285 Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977; January 1,
286 1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1998;
287 March 1, 1999; March 1, 2004;_____.

288 Rule 4 governs civil jurisdiction and service of process. In contrast, N.D.R.Civ.P. 5
289 applies to service of papers other than process.

290 Rule 4 was amended, effective March 1, 1999, to allow delivery via a third-party
291 commercial carrier as an alternative to the Postal Service. The requirement for a "third-party"
292 is consistent with the rule's requirement for personal service by a person not a party to nor
293 interested in the action. The requirement for a "commercial carrier" means it must be the
294 regular business of the carrier to make deliveries for profit. A law firm may not act as its own

295 commercial carrier service for service of process. Finally, the phrase “commercial carrier”
296 is not intended to include or authorize electronic delivery. Service via e-mail or facsimile
297 transmission is not permitted by N.D.R.Civ.P. 4.

298 Originally, N.D.R.Civ.P. 4 concerned process, with no mention of jurisdiction. In
299 1971, what are now subdivisions (a) [Definition of Person] and (b) [Jurisdiction over Person]
300 were added. They were taken from the Uniform Interstate and International Procedure Act.
301 Many changes were also made to subdivision (d) [previously (c)] concerning personal
302 service, several of which were taken from that Act.

303 Subdivision (c) was amended, effective March 1, 1998, to provide a defendant with
304 the means to compel the plaintiff to file the action.

305 Paragraph (c)(2) was amended, effective _____, to require the
306 complaint to be served with the summons under most circumstances.

307 Paragraph (c)(3) was amended, effective _____, to allow a demand
308 to file the complaint to be served on an attorney using N.D.R.Civ.P. 5 procedure. The
309 amendment also clarifies that, in a multiple defendant case, service of a demand by one
310 defendant is considered to be made on behalf of all defendants.

311 Subdivision (d) was amended, effective March 1, 1998, to allow personal service by
312 delivering a copy of the summons to an individual’s spouse.

313 A problem may arise with service by mail or delivery by third-party commercial
314 carrier, under subdivisions (d)(2) or (d)(3)(C) when the person to be served refuses delivery.
315 This refusal of delivery is tantamount to receipt of the mail or delivery for purposes of

316 service. On the other hand, if the mail or delivery is unclaimed, no service is made.
317 Subdivision (l) was added in 1983, effective September 1, 1983, to make it clear that refusal
318 of delivery by the addressee constitutes delivery.

319 Paragraph (d)(4) was deleted and subdivision (m) was added, effective March 1, 2004,
320 to clarify that, when a statute requires service and no method of service is specified, service
321 must be made under this rule. Statutes governing special procedures often conflict with these
322 rules. As an example, N.D.C.C. § 32-19-32 concerning the time period for mailing the
323 summons and complaint after publication in a mortgage foreclosure conflicts with
324 N.D.R.Civ.P. 4 (e)(4).

325 A new subdivision (f) was added, effective March 1, 1996, to provide procedures for
326 service upon a person in a foreign country. The new procedures follow Fed.R.Civ.P. 26(f).

327 SOURCES: Joint Procedure Committee Minutes of _____ pages _____;
328 January 30-31, 2003, pages 6-10; September 26-27, 2002, pages 15-18; April 30-May 1,
329 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997, page
330 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16; January 26-27,
331 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages 1-4 and 11; May 21-22,
332 1987, page 5; November 29, 1984, pages 3-5; September 30-October 1, 1982, pages 15-18;
333 April 15-16, 1982, pages 2-5; December 11-12, 1980, page 2; October 30-31, 1980, page 31;
334 January 17-18, 1980, pages 1-3; November 29-30, 1979, page 2; October 27-28, 1977, page
335 10; April 8-9, 1976, pages 5-9; Fed.R.Civ.P. 4.

336 STATUTES AFFECTED:

337 Superseded: N.D.R.C. 1943 §§ 28-0502, 28-0503, 28-0504, 28-0505, 28-0601, 28-
338 0602, 28-0603, 28-0604, 28-0605, 28-0606, 28-0607, 28-0608, 28-0609, 28-0610, 28-0616,
339 28-0619, 28-0620, 28-0621, 28-0622, 28-0623, 28-0624, 26-0625, 28-0626, 28-0627, 28-
340 0628, 28-0629, 28-0632, 28-3001, and N.D.C.C. chs. 28-06, 28-06.1.

341 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
342 Papers), N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 81
343 (Applicability–In General); N.D.R.Ct. 8.4 (Summons in Action for Divorce or Separation).

28-0504. Summons and Procedure Where Complaint Not Served With Summons. A copy of the complaint in a civil action in a district court need not be served with the summons. In such case the summons shall state that the complaint is or will be filed with the clerk of the district court in the county in which the action is commenced, and if the defendant, within thirty days after service of the summons, causes notice of appearance to be given and in person or by attorney demands in writing a copy of the complaint, specifying a place within the state where it may be served, a copy thereof, within thirty days thereafter, must be served accordingly, and after such service the defendant has thirty days to answer, but only one copy need be served on the same attorney.

Source: R.C. 1895, s. 5249; R.C. 1899, s. 5249, am'd. S.L. 1903, c. 3, s. 1; R.C. 1905, s. 6835; C.L. 1913, s. 7423.

Advisory Committee Note—1985

The Rules have permitted service by any non-minor, non-party for a substantial period of time. The changes recommended to Minn.R.Civ.P. 4.02 underscore and clarify the availability of service by any individual.

The most common method for commencing an action is by service of the summons and complaint upon a defendant. A different commencement time may apply to individual defendants based upon the times upon which the summons and complaint are actually served. An alternative method for commencing an action contained in the rule provides that an action may be commenced upon delivery of the summons and complaint to a sheriff in the county where the defendant resides for service. One change to Rule 3.a¹ is intended to clarify who is a "proper officer" for service. The Committee felt this language should be clarified to remove ambiguity or uncertainty. Commencement by delivery to the sheriff is effective only, however, if service is actually made within 60 days thereafter. The amendment to the rule is intended to make it clear that delivery to a private process server is not effective to commence an action on the date of delivery even though service is actually made within 60 days thereafter. In such a case, service will be effective, but the action will be deemed commenced as of the date service is actually made. Similarly, delivery of the summons to the Postal Service for service by mail does not commence an action. The action is commenced by mail when the defendant acknowledges service. If no acknowledgement is signed and returned, the action is not commenced until service is effected by some other authorized means.

¹ Probably was intended to be Rule 3.01(c).

Rule 3.02. Service of Complaint

A copy of the complaint shall be served with the summons, except when the service is by publication as provided in Rule 4.04.

Adopted June 25, 1951, eff. Jan. 1, 1952. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

RULE 4. SERVICE

Rule 4.01. Summons; Form

The summons shall state the name of the court and the names of the parties, be subscribed by the plaintiff or by the plaintiff's attorney, give an address within the state where the subscriber may be served in person and by mail, state the time within which these rules require the defendant to serve an answer, and notify the defendant that if the defendant fails to do so judgment by default will be rendered against the defendant for the relief demanded in the complaint.

Adopted June 25, 1951, eff. Jan. 1, 1952. Amended March 3, 1959, eff. July 1, 1959. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

Rule 4.02. By Whom Served

Unless otherwise ordered by the court, the sheriff or any other person not less than 18 years of age and not a party to the action, may make service of a summons or other process.

Adopted June 25, 1951, eff. Jan. 1, 1952. Amended March 21, 1985, eff. July 1, 1985. Revised Oct. 18, 1988, eff. Jan. 1, 1989.

Advisory Committee Note—1985

The language of the first paragraph of the existing rule 4.02 was deleted because it is no longer necessary. Under current Minnesota law, a prevailing party may recover the cost of service of process, whether by sheriff or private process server as costs and disbursements. See Minn.Stat. § 549.04 (Supp.1983).

The changes to the second paragraph are intended to clarify the language of the rule and incorporate provisions for service of process other than summonses and subpoenas presently contained in Rule 4.05. Under the rule any person who is not a party to the action and is 18 years of age or over may serve a summons or other process. Service of subpoenas is governed by Rule 45.03, and the changes in Rule 4.02 are intended to be make the two rules consistent. The rule provides that the court may direct service of any process by any means it deems appropriate. As a practical matter, courts will rarely have occasion to direct a specific means of service of process.

Rule 4.03. Personal Service

Service of summons within the state shall be as follows:

(a) **Upon an Individual.** Upon an individual by delivering a copy to the individual personally or by leaving a copy at the individual's usual place of abode with some person of suitable age and discretion then residing therein.

If the individual has, pursuant to statute, consented to any other method of service or appointed an agent to receive service of summons, or if a statute designates a state official to receive service of summons, service may be made in the manner provided by such statute.

If the individual is confined to a state institution, by serving also the chief executive officer at the institution.

If the individual is an infant under the age of 14 years, by serving also the individual's father or mother, and if neither is within the state, then a resident guardian if the infant has one known to the plaintiff, and if the infant has none, then the person having control of such defendant, or with whom the infant resides, or by whom the infant is employed.

(b) **Upon Partnerships and Associations.** Upon a partnership or association which is subject to suit under a common name, by delivering a copy to a member or the managing agent of the partnership or

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 38, N.D.R.Civ.P., Jury Trial of Right

Judge Geiger suggested at the January meeting that the Committee discuss inconsistencies between the jury demand procedure in Rule 38 and the procedure in the Uniform Probate Code. Judge Geiger explained the inconsistencies in an email, which is attached.

Judge Geiger's main concern is that the UPC lacks a firm deadline for a jury trial request to be made. Rule 38(b) requires a jury trial demand to be made in writing no later than ten days after service of the last pleading "directed to such issue." The UPC statute dealing with jury trial demands, N.D.C.C. § 30.1-15-04, provides:

"The written demand must be affixed to the pleading of the party which raises any issues of fact and may not be served and filed later than seven days before the time set for hearing."

Under N.D.C.C. 30.1-02-04, the rules of civil procedure apply to formal UPC proceedings "[u]nless specifically provided to the contrary in this title or unless inconsistent with its provisions." While the jury trial demand requirements of N.D.C.C. § 30.1-15-04 and Rule 38 are not identical, they are not necessarily contrary or inconsistent—the main difference is that Rule 38 has a deadline that is triggered by a specific event while the statute's only explicit deadline is the requirement that the demand be served and filed at least seven days before the hearing.

Judge Geiger comments in his email that the absence of a jury trial demand deadline in N.D.C.C. 30.1-15-04 causes confusion for the court and the parties. As a result, he writes,

the court often has to hold a scheduling conference during the block of time set aside for the “jury trial,” which delays the hearing and the ultimate resolution of the matter.

The Supreme Court has the power to dictate court procedure. The fact that the Court put the deadline for making a jury trial demand into a procedural rule certainly suggests that the Court views such deadlines as procedural devices. In Greenwood, Greenwood & Greenwood v. Klem, 450 N.W.2d 745 (N.D. 1990), the Court acknowledged the constitutional right to a jury trial but indicated that a party waives this right if the party fails to make a timely demand under Rule 38. To protect the right to jury trial, the trial court has broad discretion to grant relief from a waiver under N.D.R.Civ.P. 39(b).

Staff has prepared a proposed amendment to the Explanatory Note of Rule 38 indicating that the rule applies to jury trial demands under N.D.C.C. § 30.1-15-04. The Committee may wish to discuss whether the language of the rule itself should be amended. A copy of the proposed amendment is attached.

RULE 38 JURY TRIAL OF RIGHT

(a) Right preserved. The right of trial by jury as declared by the constitution of the United States or by the constitution of the state of North Dakota or as given by a statute of the United States or of the state of North Dakota shall be preserved to the parties inviolate.

(b) Demand. Any party may demand a trial by jury of any issue triable of right by jury by:

(1) serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than ten days after the service of the last pleading directed to such issue, and

(2) filing the demand as required by N.D.R.Civ.P. 5(d). Such demand may be endorsed upon a pleading of the party.

(c) Size of jury. If trial by jury is demanded, the jury shall consist of six qualified jurors unless a jury of nine is specifically demanded within the time required by these rules for demanding trial by jury.

(d) Demand—Specifications of issue. In the demand a party may specify the issues the party wishes so tried; otherwise the party is deemed to have demanded trial by jury of all the issues so triable. If a party has demanded trial by jury for only some of the issues, any other party within ten days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury of any other or all of the issues of fact in the action.

(e) Waiver. The failure of a party to serve and file a demand as required by this rule

22 constitutes a waiver by the party of trial by jury. A waiver of trial by jury is not revoked by
23 an amendment of a pleading asserting only a claim or defense arising out of the conduct,
24 transaction, or occurrence set forth or attempted to be set forth in the original pleading. A
25 demand for trial by jury made as herein provided may not be withdrawn without the consent
26 of the parties.

27

28

EXPLANATORY NOTE

29 Rule 38 was amended, effective January 1, 1978; January 1, 1988; March 1, 1990;
30 March 1, 1998 _____.

31 Rule 38 applies to a demand made under N.D.C.C. § 30.1-15-04 for a jury trial in a
32 formal testacy proceeding.

33 SOURCES: Joint Procedure Committee Minutes of _____ pages _____;
34 September 26-27, 1996, page 20; April 20, 1989, page 2; December 3, 1987, page 11;
35 September 18-19, 1986, page 3; September 26-27, 1985, pages 3-4; November 29-30, 1979,
36 pages 8-9; September 15-16, 1977, pages 3-4, 9-10; June 2-3, 1977, pages 7, 10; Section 28-
37 14-03.1; Fed.R.Civ.P. 38.

38 STATUTES AFFECTED:

39 Superseded: N.D.R.C. 1943 §§ 28-1206, 28-1214.

40 Considered: N.D.C.C. § 30.1-15-04.

41 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
42 Papers) and N.D.R.Civ.P. 39 (Trial by Jury or by the Court), N.D.R.Civ.P. 48 (Juries of Less

43 Than Nine-Majority Verdict).

-----Original Message-----

From: Geiger, Richard
Sent: Saturday, April 08, 2006 11:48 AM
To: Hagburg, Mike
Cc: Schmalenberger, Allan
Subject: RE: jury demand in probate

Mike,

My complaint with probate proceedings is two-fold.

The first relates to the demand for jury trial which is found at NDCC 30.1-15-04 and relates to any fact issues in formal testacy proceedings. It is not the same as what is found at Rule 38(b) N.D.R.Civ.P.. Rule 38(b) requires the demand to be within ten days of the last pleading. Then typically through Rule 16 you schedule a hearing either before the court or as a jury trial because you know in advance BEFORE you schedule a hearing if a timely jury trial demand has been made. Under NDCC 30.1 -15 -04 and NDCC 30.1-03-01, a petition for formal testacy proceeding requires that a notice of hearing be sent out with the petition. So, you are scheduling it without knowing if it will be a jury trial or a bench trial (unless the petitioner has demanded a jury trial and then the questions whether your scheduled hearing should be a pre-trial conference of some kind or the actual trial). Finally, even though the demand for jury trial needs to be attached to the last pleading, that can be as late as having it served and filed (and therefore the court and the other parties finding out about it) as late as seven days before the scheduled hearing. It is my experience that these hearings that are initially scheduled end up to be Rule 16 scheduling conferences , partly because of this.

Because the demand procedure does not mirror Rule 38 we do not have the benefit of either uniformity or case law that interprets Rule 38(b). Another problem is addressing what happens when a judge decides the demand is untimely or otherwise defective. Then *United Hospital v. Hagen* 285 NW2d 586 (ND1979) would likely kick in.

The second problem I have with probate proceedings relating to formal testacy proceedings (and really any other formal proceeding) is that no formal and written response is required to be served or filed before the hearing. NDCC 30.1-03-01 requires notice of a hearing and a copy of the petition to be sent out to all interested parties and attorneys. But, I can find nothing in the probate laws that requires a written response even if the party objects to the relief sought in the petition. The only place where I can find that a written response is required is if you are seeking to preserve a right to a jury trial under NDCC 30.1-15-04.

Requiring a written response to any formal petition in order to be heard or to challenge the relief sought at the scheduled hearing would better allow the court and the petitioner to know what to expect at the noticed hearing. It would allow every to know what issues really exist and which interested parties are making the challenge. It would help know whether parties need to be prepared with witnesses or to expect to treat the proceeding as a pre-trial conference.

Judge Schmalenberger also expressed a desire to look at these procedures. So, I am copying him in case he has any comments.

Dick Geiger

NORTH DAKOTA CENTURY CODE

TITLE 30.1 Uniform Probate Code
Article III - Probate of Wills and Administration
CHAPTER 30.1-15 Formal Testacy and Appointment Proceedings

30.1-15-04. (3-404) Formal testacy proceedings - Written objections to probate - Demand for jury trial.

Any party to a formal proceeding who opposes the probate of a will for any reason shall state in that party's pleadings the objections to probate of the will. In a contested formal testacy proceeding, any party is entitled to a jury trial of all issues of fact by serving upon all appropriate parties and filing with the court a written demand for jury trial. The written demand must be affixed to the pleading of the party which raises any issues of fact and may not be served and filed later than seven days before the time set for hearing.

HISTORY: Source. S.L. 1973, ch. 257, § 1; 1985, ch. 368, § 1.

NOTES:

Editorial Board Comment. Model Probate Code section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

Extrinsic Evidence. Issues of Fact. Jury Trial.

Extrinsic Evidence.
Although this section authorizes a jury trial for all issues of fact, the petitioners were not entitled to a jury trial where the contested will was clear and unambiguous, thereby precluding the use of extrinsic evidence to determine the testator's intent. *Jordan v. Anderson*, 421 N.W.2d 816 (N.D. 1988).

Issues of Fact.
This section applies to determinations of factual issues regarding formal will disputes, rather than issues regarding the rescission of a contract. *Kopperud v. Reilly*, 453 N.W.2d 598 (N.D. 1990).

Jury Trial.
County court properly denied defendants' request for a jury trial in action by decedent's personal representative seeking rescission of a contract for sale of decedent's farmland to defendant son, authorized by defendant mother in her capacity as decedent's conservator. *Kopperud v. Reilly*, 453 N.W.2d 598 (N.D. 1990).



North Dakota Supreme Court Opinions ◀▲□/?

United Hospital v. Hagen, 285 N.W.2d 586 (N.D. 1979)

[Go to Docket]

Filed Oct. 25, 1979

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

The United Hospital (formerly Deaconess Hospital),
Plaintiff/Appellee

v.

Alfred Marshall Hagen, Defendant/Appellant
Anna D. Anderson, Deceased; Adolph N. Anderson, Deceased;
Public Welfare Board of North Dakota; Mae Pladson; Doris Baines;
Viola Johnson; Oscar D. Anderson; Rodger Anderson; Keith
Anderson; Bradly Anderson; Mary Nelson; Unknown heirs,
devisees, legatees or Personal Representatives of Anna D. Anderson,
Deceased; Unknown Heirs, devisees, legatees or Personal
Representatives of Adolph N. Anderson, Deceased; and all other
persons unknown claiming any estate or interest in or lien or
encumbrance upon the property described in the complaint,
Defendants

Civil No. 9683

Appeal from order of Grand Forks District Court, the Honorable A.
C. Bakken, Judge.

APPEAL DISMISSED AND MINUTE ORDERS AFFIRMED.

Opinion of the Court by Paulson, Justice.

Alfred Marshall Hagen, 501 Cherry Street, Grand Forks, pro se,
submitted on brief without oral argument, for defendant and
appellant.

Robert A. Alphson, P.O. Box 1436, Grand Forks, for plaintiff and
appellee The United Hospital.

[285 N.W.2d 587]

**The United Hospital (formerly Deaconess Hospital) v. Hagen, et
al.**

Civil No. 9683

Paulson, Justice.

The United Hospital (formerly Deaconess Hospital) ["the Hospital"]
commenced an action for the foreclosure of a mortgage on certain
real estate against Anna D. Anderson, deceased, her heirs and
devisees.

The appellant, Alfred Marshall Hagen ["Mr. Hagen"] is one of the heirs and devisees. Mr. Hagen interposed an Answer on March 15, 1979, and an Amended Answer and Counterclaim on, April 5, 1979. Doris Baines, Viola Johnson, and Oscar D. Anderson interposed their Answer on May 3, 1979.

Mr. Hagen made a demand for a jury trial on May 16, 1979, which was served on the attorney for the Hospital, on May 17, 1979. The Hospital, thereafter, served and filed a motion to strike Mr. Hagen's demand for a jury trial. A hearing was held before the Honorable A. C. Bakken, District Judge, on August 20, 1979. On August 24, 1979, Judge Bakken issued his order denying Mr. Hagen's demand for a jury trial. Mr. Hagen filed a timely appeal. We affirm.

Mr. Hagen, on August 23, 1979, filed A request for change of judge. Judge Bakken denied the request and in support of his denial cited § 29-15-21(2) of the North Dakota Century Code. The Supreme Court received the request for change of judge, together with Judge Bakken's letter dated August 24, 1979, denying the jury trial, and quoting from § 29-15-21(2), N.D.C.C. The Acting Chief Justice, serving as Administrative Justice, issued this Court's minute order on August 28, 1979, designating the Honorable Kirk Smith, District Judge, to preside at the trial. Judge Smith disqualified himself and the Chief Justice, acting as Administrative Justice, issued this Court's minute order on September 14, 1979, designating the Honorable Hamilton E. Englert, District Judge, to preside at the trial on the merits.

The Hospital prepared, served, and filed a Motion to Dismiss Appeal and Request for Review of Supreme Court Order Granting Appellants' Demand for Change of Judge. This Court's minute order dated August 28, 1979, removed Judge Bakken as the trial judge.

There are two issues to be resolved. The first issue is whether or not an appeal from an interlocutory order denying a jury trial is an appealable order.

Mr. Hagen, acting as his own attorney, urges that his appeal should not be dismissed because the denial of a jury trial is forbidden by the Constitution of the United States and by § 7 of the North Dakota State Constitution; that nonappealable orders can be reviewed by this Court pursuant

[285 N.W.2d 588]

to § 28-27-02, N.D.C.C.; that the right of trial by jury includes actions to determine the title and right of possession to personal property and that the Hospital's action to foreclose does not deprive a third party, brought in as a defendant, of the right to a jury trial.

Section 28-27-02, N.D.C.C., and the decisions of this Court interpreting this section are dispositive of this issue, Section 28-27-02, N.D.C.C., sets forth the orders which are appealable. The Supreme Court of this State in Schutt v. Federal Land Bank of Saint Paul, 71 N.D. 640, 3 N.W.2d 417 (1942), held;

"An order denying the trial of a case by a jury, and holding that the case is properly triable by the court without a Jury is not appealable under Section 7841, C.L.1913 [§ 28-27-02, N.D.C.C.]." Likewise, the Supreme Court in Stimson v. Stimson, 30 N.D. 78, 152 N.W. 132, 133 (1915), held that:

"Appeals from interlocutory orders are entirely the creation of statute and will only lie in the cases authorized by the statute."

We adhere to the rationale of Schutt v. Federal Land Bank, *supra*, and Stimson v. Stimson, *supra*, and hold that the order denying the jury trial is an interlocutory nonappealable order. However, such an order is reviewable when there is an appeal from a final judgment. In the instant case, the trial on the merits has not been heard; therefore, the other issues raised by Mr. Hagen are not before us.

The second issue which confronts us is whether or not the Supreme Court erred in granting Mr. Hagen's demand for a change of judge.

The Hospital urges, because Judge Bakken has ruled on a matter in the instant case, that is, the denial of a jury trial for Mr. Hagen and cites § 29-15-21(2), N.D.C.C.,¹ in support of its contention, that it was improper for the Supreme Court to remove Judge Bakken as trial judge.

A review of the procedure of the Supreme Court will clarify and determine this issue. The first minute order issued, on August 28, 1979, designated the Honorable Kirk Smith to preside at the trial of this action, Judge Smith disqualified himself pursuant to his letter of September 11, 1979, which he forwarded to the Supreme Court. The second minute order issued on September 1 1979 by this Court designated Honorable Hamilton E. Englert to preside at the trial. The two minute orders were issued because the request for change of judge was filed against the Honorable A. C. Bakken, presiding judge.

Administrative Rule 2-1978 issued by this Court pertains to the appointment of a presiding judge in each of the judicial districts and the delegation of certain administrative duties to each judge. Administrative Order 2-1979 designated Judge A. C. Bakken as the presiding judge and he now is and during all the times herein mentioned has been the presiding judge in the district in which this case is pending. Section 27-02-05.1, N.D.C.C. definitizes the

supervisory power of the Supreme Court with reference to all other courts.

Administrative Rule 2-1978, paragraph 9, subdivision 2, states:

"If the presiding judge is the judge against whom the demand for change of judge is filed, the demand shall be forwarded to the Clerk of the Supreme Court directly for assignment by the Chief Justice." [AR 2-1978, par. 9, subd. 2.]

Because the Hospital objected to the designation of another judge, the Chief Justice of this Court, pursuant to Administrative

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Rule 2-1978, paragraph 9, subdivision 4, set the matter for hearing before this Court as provided by Rule 27(b), of the North Dakota Rules of Appellate Procedure.

The crucial issue is not that we believe Judge Bakken is prejudiced but when there is an allegation of prejudice presented to this Court we favor granting the change of judge when the judge has denied the demand for a jury trial and would then be presiding at the trial on the merits. Therefore, by virtue of § 87 of the North Dakota Constitution, §§ 27-02-05.1 and 29-15-21, N.D.C.C., and Administrative Rule 2-1978, we affirm the minute orders designating the appointment of another district judge to preside at the trial.

For reasons stated in the opinion we dismiss the appeal and affirm the minute orders designating another judge to preside at the trial.

William L. Paulson
Ralph J. Erickstad, C.J.
Vernon R. Pederson
Gerald W. VandeWalle
Paul M. Sand

Footnote:

1. Section 29-15(2), N.D.C.C., provides:

"2. The demand is not operative unless it is filed with the clerk of the court at least three days before the matter is to be heard if upon a motion or upon arraignment, or ten days before the date the action or proceeding is scheduled for trial. In any event, no demand for a change of judge may be made after the judge sought to be disqualified has ruled upon any matter pertaining to the action or proceeding in

which the demanding party was heard or had an opportunity to be heard."

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North Dakota Supreme Court Opinions ◀▲□/?

Greenwood, Greenwood & Greenwood v. Klem, 450 N.W.2d 745 (ND 1990)

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Greenwood, Greenwood & Greenwood, P.C., Plaintiff and Appellee
v.

Ernest E. Klem, Defendant and Appellant

Civil No. 890102

Appeal from the County Court for Stark County, Southwest Judicial
District, the Honorable Ronald L. Hilden, Judge.

AFFIRMED.

Opinion of the Court by Erickstad, Chief Justice.

Freed, Dynes, Reichert & Buresh, P.C., P.O. Drawer K, Dickinson,
ND 58602-8305, for plaintiff and appellee; argued by Eugene F.
Buresh.

Ernest E. Klem, HC 1, Box 60-1, Belfield, ND 58622. Pro se.

Greenwood, Greenwood & Greenwood, P.C. v. Klem

Civil No. 890102

Erickstad, Chief Justice.

Ernest Klem appealed from a county court order 1 awarding the law
firm of Greenwood, Greenwood & Greenwood, P.C., \$2,655.60 plus
interest, costs and disbursements for legal services rendered in a
criminal proceeding against Klem. We affirm.

After a mistrial on two counts of gross sexual imposition, Klem
retained the Greenwood law firm to defend him in a second trial on
those charges. On August 17, 1987, Klem and Mark Greenwood
executed a written agreement in which the Greenwood law firm
agreed to defend Klem. According to the written agreement, Klem
paid the Greenwood firm \$5,000 as an initial retainer which was to
be "applied against the legal services actually performed [for Klem] .
. . . by the firm . . . at standard hourly rates for partners and associates
from \$75.00 per hour to \$150.00 per hour, except Court
appearances, [and] depositions for which minimum fees in excess of
hourly fees may be charged. The written agreement also required
Klem to pay out-of-pocket disbursements.

Klem was convicted on both counts of gross sexual imposition and incarcerated in the State Penitentiary in January 1988. He retained a different attorney and appealed the conviction to this court. In State v. Klem, 438 N.W.2d 798 (N.D. 1989), decided on March 22, 1989, a majority of this court reversed Klem's conviction and remanded for a new trial. Klem was then released from the State Penitentiary, and the criminal charges against him have since been dismissed.

Klem paid the Greenwood law firm a total of \$12,800 for legal services rendered in the second trial. The law firm claimed that Klem owed it an additional \$2,655.60 plus interest, and when he failed to pay that amount, it commenced this action to collect that amount by serving a summons and complaint upon Klem in the State Penitentiary on July 7, 1988. On July 13, 1988, Klem, representing himself, answered, denying that he owed the firm \$2,655.60. A bench trial was scheduled for December 20, 1988, but was continued until March 17, 1989. On March 6, 1989, the county court informed the parties that the trial would not be continued again. On March 9, 1989, Klem served a demand for a jury trial which the trial court denied. After a bench trial on March 17, 1989, the court found that Klem owed the Greenwood law firm \$2,655.60 plus interest, costs and disbursements. Klem has appealed.

I

Klem contends that the trial court abused its discretion in denying his demand for a jury trial.

Article I, Section 13, of the North Dakota Constitution provides, in part, that "[t]he right of trial by jury shall be secured to all, and remain inviolate." However, under Rule 38, N.D.R.Civ.P.,² a party waives a jury trial on any issue triable of right by a jury unless an affirmative demand for a jury trial is made no later than ten days after service of the last pleading directed to that issue. Land Office Co. v. Clapp-Thomssen Co., 442 N.W.2d 401 (N.D. 1989).

In this case, the Greenwood law firm served the summons and complaint on Klem on July 7, 1988. Klem answered on July 13, 1988; however, he did not demand a jury trial until March 9, 1989. Under Rule 38, N.D.R.Civ.P., the demand for a jury trial was therefore not within 10 days after the service of Klem's answer, the last pleading directed to the issues. Klem therefore waived his right to a jury trial. Klem's assertion that his demand for a jury trial was timely because it was made within ten days of the trial court's March 6, 1989 order that the trial would not be continued again ignores that that order is not a pleading directed to the issues of the case.

Pursuant to Rule 39(b), N.D.R.Civ.P.,³ a trial court has broad discretion to grant relief from the waiver of the right to a jury trial, and we will not reverse the denial of an untimely request for a jury

trial unless the trial court abused its discretion. Land Office Co. v. Clapp-Thomssen, *supra*; Bank of Steele v. Lang, 399 N.W.2d 293 (N.D. 1987); Shark v. Thompson, 373 N.W.2d 859 (N.D. 1985). A trial court abuses its discretion when it acts arbitrarily, unconscionably, or unreasonably. Land Office Co., *supra*. Relying on federal caselaw construing the corresponding federal rule, in Shark v. Thompson, *supra*, we said that a trial court does not abuse its discretion in denying a Rule 39(b) motion when the failure to make a timely demand for a jury trial results from mere oversight or inadvertence on the part of the moving party. We also said that "[c]ounsel's misunderstanding of the rules or a mistaken belief that no demand was necessary amounts to mere inadvertence." Shark v. Thompson, *supra*, 373 N.W.2d at 864, citing Beckham v. Safeco Insurance Co. of America, 691 F.2d 898 (9th Cir. 1982), and Aetna Casualty and Surety Co. v. Jeppesen & Co., 642 F.2d 339 (9th Cir. 1981).

Klem contends that he is not learned in the law and that he did not know when he was required to demand a jury trial. However, an attorney's misunderstanding of the rules constitutes mere inadvertence [Shark v. Thompson, *supra*], and it is a well established principle of law in this state that our statutes or rules on procedure will not be modified or applied differently merely because a party not learned in the law is acting pro se. E.g., Federal Land Bank of St. Paul v. Overboe, 426 N.W.2d 1 (N.D. 1988); Hennebry v. Hoy, 343 N.W.2d 87 (N.D. 1983). Klem, as a pro se litigant, is not entitled to any different treatment than an attorney.

Klem demanded a jury trial on March 9, 1989, just eight days before the scheduled date of trial and eight months after the service of the last pleading directed to the issues in this case. In September 1988 the parties were notified that the case had been set for a bench trial on December 20, 1988. On December 16, 1988, the parties were notified that the bench trial scheduled for December had been continued until March 17, 1989.

We conclude that the trial court did not act arbitrarily, capriciously, or unreasonably in denying Klem's belated request for a jury trial. We therefore conclude that the court did not abuse its discretion.

II

Klem asserts that Attorney Mark Greenwood's participation in this action violated several rules of professional conduct. Klem first claims that Mark Greenwood violated certain ethical considerations because he did not offer any evidence that he was authorized by the Greenwood law firm to file suit against Klem.

Section 27-13-04, N.D.C.C.,4 allows a court, on motion of either party, to require the adverse party to prove the authority under which

the attorney appears. Our statute follows the strong presumption that an attorney who files a lawsuit does so with the authority of his client and the burden of proving lack of authority is on the party denying the authority of the attorney. See 7 Am.Jur.2d, Attorneys at Law, §§ 142, 145 (1980). Klem did not make a motion under Section 27-13-04, N.D.C.C., or raise any issue about the authority of counsel in the lower court, and he cannot raise that issue for the first time on appeal. See First Nat'l Bank & Trust Co. v. Jacobsen, 431 N.W.2d 284 (N.D. 1988); Flex Credit, Inc. v. Winkowitsch, 428 N.W.2d 236 (N.D. 1988).

Klem also argues that Mark Greenwood has a conflict of interest in prosecuting this civil action for "illegal and unearned fees" because of Greenwood's ineffective representation of Klem in the criminal action. The ethical considerations cited by Klem generally refer to conflicts of interest; however, this collection action is based upon a contractual agreement between Klem and the Greenwood firm for payment for legal services.

It is well established that an attorney may commence an action against a former client in a fee dispute. Holie v. Forbes et al., 64 N.D. 696, 256 N.W. 157 (1934); see, e.g., 7 Am.Jur.2d, Attorneys at Law § 306 (1980). Additionally the attorney may testify at the trial of the fee dispute. See Rule 3.7(a)(2), N.D. Rules of Professional Conduct. There was no conflict of interest in bringing this action to collect legal fees.

III

Klem argues that the trial court abused its discretion by allowing the Greenwood firm to request payment of fees without an itemized hourly breakdown for the work performed. Klem's argument is essentially that the court's findings of fact are not supported by evidence.

Our review of the trial court's findings of fact is governed by the "clearly erroneous" standard of Rule 52(a), N.D.R.Civ.P. A finding of fact is clearly erroneous when, although there may be some evidence to support it, the reviewing court, on the entire evidence, is left with a definite and firm conviction that a mistake was made. Coldwell Banker v. Meide & Son, Inc., 422 N.W.2d 375 (N.D. 1988).

In this case the evidence adduced at trial included the total amount that had been paid by Klem, the balance due, an itemized statement of the services rendered by the Greenwood firm, and the amount charged for the services. That evidence supports the trial court's findings. Although the fees for jury selection and the jury trial were not itemized on an hourly charge, the fees were itemized on a daily basis and therefore provided a discernible basis for calculation.

Moreover, the written agreement specified that fees for those services were governed by the "court appearances" provision of the contract "for which minimum fees in excess of hourly fees may be charged."

Klem also relied upon a purported oral modification of the written retainer agreement. According to Klem, in November 1987 he and Mark Greenwood had entered into a verbal agreement in which the law firm agreed to accept \$11,500 as payment in full for the attorney fees if that amount was paid by November 13, 1987. However, the evidence adduced at trial demonstrated that Klem failed to pay that amount by that date.

After reviewing the record, we are not left with a definite and firm conviction that the trial court made a mistake in finding that Klem owed the Greenwood firm \$2,655.60 for legal services. The trial court's findings of fact are therefore not clearly erroneous.

Klem also contends that the court was partial and prejudiced in considering the evidence.

The record demonstrates that the trial court gave Klem, who appeared pro se, wide latitude to present evidence to support his theory that he did not owe the remaining attorney fees because he received ineffective representation by the Greenwood law firm. Under Rule 408, N.D.R.Ev.,⁵ the court did not err in refusing to consider an offer of settlement made by the Greenwood law firm in which it offered to drop this collection action in consideration for Klem dropping his legal malpractice action against the firm.

IV

Klem also asserts that the trial court violated certain rules of judicial conduct.

Klem argues that the court did not avoid impropriety in its activities when it did not grant him a jury trial and when it allowed attorney Gene Buresh to appear for the Greenwood law firm at trial. However, as we have previously held in Part I of this opinion, the trial court did not abuse its discretion in denying Klem's belated request for a jury trial. Moreover, Klem, did not raise any issue about the authority of trial counsel in the lower court.

Klem also argues that the county court violated Rule 3(A)(6), N.D.R.J.C.,⁶ when, at the beginning of trial, it mentioned Klem's legal malpractice action against the Greenwood law firm which he was in the process of commencing in district court. That discussion was during the course of the county court's "official duties" and was not prohibited by that rule. Moreover, the county court mentioned the malpractice case within the context of informing Klem that it

might be a compulsory counterclaim to this collection action and offering him an opportunity for a continuance so that steps could be taken to have the cases heard together. However, the parties agreed that the claims would be heard separately. See Klem v. Greenwood, N.W.2d (N.D. Civil #890188, decided on January 18, 1990) [holding that Klem's legal malpractice action was not barred by this action because the parties agreed to a separate resolution of the malpractice claim].

The county court judgment is affirmed.

Ralph J. Erickstad, C.J.
Gerald W. VandeWalle
Beryl J. Levine
Herbert L. Meschke
H.F. Gierke, III

Footnotes:

1. Klem's notice of appeal, dated March 27, 1989, states that it is from the "ORDER" issued March 21, 1989. That "ORDER" was the trial court's memorandum opinion. However, findings of fact with an order for judgment and a subsequent judgment consistent with that memorandum opinion were entered on March 28, 1989.

Consequently, we treat this appeal as properly before us. Olson v. Job Service of North Dakota, 379 N.W.2d 285 (N.D. 1985); Federal Savings & Loan Insurance Corp. v. Albrecht, 379 N.W.2d 266 (N.D. 1985).

2. Rule 38, N.D.R.Civ.P., governs the procedure for invoking the right to a jury trial and provides, in part:

"(b) Demand. Any party may demand a trial by jury of any issue triable of right by jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

"(e) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A waiver of trial by jury is not revoked by an amendment of a pleading asserting only a claim or defense arising out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties."

3. Rule 39(b), N.D.R.Civ.P., provides:

"(b) By the Court. Issues not demanded for trial by jury as provided in Rule 38 shall be tried by the court; but, notwithstanding the failure of a party to demand a jury in an action in which such a demand might have been made of right, the court in its discretion upon motion may order a trial by a jury of any or all issues."

4. Section 27-13-04, N.D.C.C., provides:

"27-13-04. Court may require proof of attorney's authority--Proceedings stayed until proof furnished.--A court, on motion of either party and on the showing of reasonable grounds therefor, may require the attorney for the adverse party, or for any one of the several adverse parties, to produce or prove by his oath or otherwise the authority under which he appears and until he does so may stay all proceedings by him on behalf of the parties for whom he assumes to appear."

5. Rule 408, N.D.R.Ev., provides:

"Evidence of (1) furnishing, offering, or promising to furnish, or (2) accepting, offering, or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for, invalidity of, or amount of the claim or any other claim. Evidence of conduct or statements made in compromise negotiations, is likewise not admissible. Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required. This rule does not require exclusion if the evidence is offered for another purpose, such as proving bias or prejudice of a witness, disproving a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution."

6. Rule 3(A)(6), N.D.R.J.C., provides:

"(6) A judge shall abstain from public comment about a pending or impending proceeding in any court, and shall require similar abstention on the part of court personnel subject to the judge's direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court."

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MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 45, N.D.R.Civ.P., Subpoena

Mr. McLean suggested at the January meeting that the Committee take a look at N.D.R.Civ.P. 45(b). He questioned the subdivision's requirement that parties serve a "notice of production" when they subpoena a witness to appear to give testimony.

Under Rule 45(b), a party who seeks to command a person to appear and give testimony must provide a deposition notice with the subpoena. Under Rule 30(b)(1), the deposition rule, parties are instructed to list material to be produced at a deposition in the deposition notice itself rather than in a separate notice of production.

The federal subpoena rule, Fed.R.Civ.P. 45, recognizes the existence of a notice "for production and inspection," but such a document is required only if a subpoena duces tecum is issued "separate from a subpoena commanding a person's attendance." The federal rule also states "A command to produce evidence may be joined with a command to appear at trial or hearing or at a deposition, or may be issued separately."

Consistent with the federal rule and Mr. McLean's suggestion, staff has prepared a proposed amended version of Rule 45 that contains language allowing a party to serve a deposition notice that contains a command to produce document or things at the deposition, without requiring a separate notice of production. The proposal retains the option for the party to issue a notice of production when a deposition notice is not issued.

Form and style amendments to Rule 45(b), designed to make the subdivision easier to navigate, are also proposed. The rule amendment proposal is attached.

RULE 45. SUBPOENA

(a) Form; Issuance.

(1) Every subpoena must

(A) state the title of the action, the name of the court in which it is filed, and its civil action number; and

(B) A command to produce evidence or to permit inspection may be joined with a command to appear at a trial or hearing or at a deposition, or may be issued separately.

(2) A subpoena must be issued by the clerk under the seal of the court or by an attorney for a party to the action or special proceeding. The subpoena must be issued in the name of the court for the county in which the action is filed. If issued by the clerk, it must be issued signed and sealed but otherwise blank, and the party requesting the subpoena shall complete it before service. If issued by an attorney for a party, the subpoena must be subscribed in the name of the attorney together with the attorney's office address and must identify the party for whom the attorney appears.

(3) A subpoena may be issued by the clerk, under seal of the court, to an attorney representing a party in a civil action pending in another state upon filing proof of service of notice under subdivision (b)(2), or to a party in a civil action pending in another state upon filing a letter of request from a foreign court. The subpoena must be issued in the name of the court for the county where the subpoena will be served. The subpoena may be used and discovery obtained within this state in the same manner and subject to the same conditions

22 and limitations as if the action were pending within this state. Any dispute regarding the
23 subpoena, or discovery demanded, needing judicial involvement must be submitted to the
24 court for the county where the subpoena issued.

25 (b) Service; Notice.

26 (1) Service of Subpoena.

27 (A) Service of a subpoena upon a named person ~~named therein~~ must be made by
28 personal service under N.D.R.Civ.P. 4(d) ~~and~~. A subpoena may be served at any place within
29 the state.

30 (B) ~~if the~~ If a person's attendance is commanded, by tendering to that person the fees
31 for one day's attendance and the mileage and travel expense allowed by law must be tendered
32 to the person. The A witness need not obey the a subpoena if the witness fee and payment
33 for mileage and travel expense are not tendered with the subpoena. The witness fee, mileage
34 and travel expense are not required to be tendered, if the witness fee, mileage and travel
35 expense are to be paid by this the state or any a political subdivision ~~thereof~~. ~~A subpoena may~~
36 ~~be served at any place within the state.~~

37 (2) Service of Notices.

38 (A) Service of a notice to take a deposition as provided in N.D.R.Civ.P. 30(b) and
39 31(a) is a prerequisite for the issuance of a subpoena that commands a person to attend, ~~and~~
40 give testimony and produce documents or things at a pretrial deposition.

41 (B) If a deposition notice has not been served, service ~~Service~~ of a notice for
42 production, inspection or copying, as provided in this rule, is a prerequisite for the issuance

43 of a subpoena that commands production, inspection or copying before trial. A description
44 of the material to be produced, inspected or copied, or a description of the premises to be
45 inspected, must be included in the notice or attached to the notice.

46 (C) Notice must be served on each party in the manner set by N.D.R.Civ.P. 5(b). A
47 copy of the notice and of the proof of service are sufficient authorization for the clerk to issue
48 a subpoena for a pretrial deposition, pretrial production, pretrial inspection or pretrial
49 copying. The attorney's signature on a subpoena issued by an attorney for a party constitutes
50 certification that notice was served.

51 (c) Protection of person subject to subpoenas.

52 (1) A party or an attorney responsible for the issuance and service of a subpoena shall
53 take reasonable steps to avoid imposing undue burden or expense on a person subject to that
54 subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and
55 impose upon the party or attorney in breach of this duty an appropriate sanction, which may
56 include, but is not limited to, lost earnings and a reasonable attorney's fee.

57 (c) (2) (A) A person commanded to produce and permit inspection and copying of
58 designated books, papers, documents or tangible things or inspection of premises need not
59 appear in person at the place of production, inspection or copying unless commanded to
60 appear for a deposition, hearing or trial.

61 (B) Subject to paragraph (d)(2) of this rule, a person commanded to produce, permit
62 inspection or copying before a trial or hearing may object in writing. The objection must be
63 received by the party or attorney designated in the subpoena within 10 days after receipt of

64 the subpoena. If the time specified in the subpoena for compliance is less than 10 days, any
65 objection must be received at least 24 hours before the time specified for compliance. If
66 objection is made, the party serving the subpoena is not entitled to production, inspection or
67 copying except upon order of the court by which the subpoena was issued. If objection is
68 made, the party serving the subpoena may, upon notice to the person commanded to produce,
69 permit inspection or copying, move at any time for an order to compel production, inspection
70 or copying. An order to compel production, inspection or copying must protect any person
71 who is not a party or an officer of a party from significant expense resulting from production,
72 inspection or copying.

73 (3) A resident of this state may be required by subpoena to attend a deposition only
74 in the county where that person resides, is employed or transacts business in person, or at
75 such other convenient place as prescribed by order of court. A nonresident of this state may
76 be required by subpoena to attend a deposition in any county of this state. A resident or
77 nonresident may be required to attend a hearing or trial any place within this state.

78 (4) On timely motion, the court by which a subpoena was issued shall quash or modify
79 a subpoena that

- 80 (i) fails to allow reasonable time for compliance;
- 81 (ii) requires attendance beyond the requirements of paragraph (c)(3) of this rule;
- 82 (iii) subjects a person to undue burden; or
- 83 (iv) requires disclosure of an unretained expert's opinion or information not
84 describing specific events or occurrences in dispute and resulting from the expert's study

85 made not at the request of any party.

86 (d) Duties in Responding to Subpoena.

87 (1) A person responding to a subpoena to produce documents shall produce them as
88 they are kept in the usual course of business or shall organize and label them to correspond
89 with the categories in the demand.

90 (2) When information subject to a subpoena is withheld on a claim that it is privileged
91 or subject to protection as trial preparation materials, the claim must be made expressly and
92 must be supported by a description of the nature of the documents, communications, or things
93 not produced that is sufficient to enable the demanding party to contest the claim.

94 (e) Contempt. Failure by any person without adequate excuse to obey a subpoena
95 served upon that person may be a contempt of the court from which the subpoena issued. An
96 adequate cause for failure to obey exists when a subpoena purports to require a non-party to
97 attend or produce at a place not within the limits provided by paragraph (c)(3).

98 (f) Notice. All subpoenas commanding pretrial or prehearing production, inspection
99 or copying must contain the following notice:

100 "You may object to this subpoena by sending or delivering a written objection, stating
101 your valid reason, to [Insert the name and address of the party, or attorney representing the
102 party seeking production, inspection or copying]. Any objection must be received within 10
103 days after you receive the subpoena. If the time specified in the subpoena for compliance is
104 less than 10 days, any objection must be received at least 24 hours before the time specified
105 for compliance.

127 January 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages
128 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987,
129 pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P.
130 45.

131 STATUTES AFFECTED:

132 Superseded: N.D.R.C. 1943 §§ 31-0113, 31-0120, 31-0121, 31-0302, 31-0303, 31-
133 0305, 31-0306, 31-0310, 31-0311, 31-0312, 31-0314; N.D.C.C. § 31-05-22.

134 CROSS REFERENCE: N.D.R.Civ.P. 26 (General Provisions Governing Discovery),
135 N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), and N.D.R.Civ.P. 31 (Depositions
136 of Witnesses Upon Written Questions); N.D.R.Crim.P. 17 (Subpoena).

FEDERAL RULES OF CIVIL PROCEDURE
VI. TRIALS

Rule 45. Subpoena

(a) Form; Issuance.

(1) Every subpoena shall

(A) state the name of the court from which it is issued; and

(B) state the title of the action, the name of the court in which it is pending, and its civil action number; and

(C) command each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated books, documents or tangible things in the possession, custody or control of that person, or to permit inspection of premises, at a time and place therein specified; and

(D) set forth the text of subdivisions (c) and (d) of this rule.

A command to produce evidence or to permit inspection may be joined with a command to appear at trial or hearing or at deposition, or may be issued separately.

(2) A subpoena must issue as follows:

(A) for attendance at a trial or hearing, from the court for the district where the trial or hearing is to be held;

(B) for attendance at a deposition, from the court for the district where the deposition is to be taken, stating the method for recording the testimony; and

(C) for production and inspection, if separate from a subpoena commanding a person's attendance, from the court for the district where the production or inspection is to be made.

(3) The clerk shall issue a subpoena, signed but otherwise in blank, to a party requesting it, who shall complete it before service. An attorney as officer of the court may also issue and sign a subpoena on behalf of

(A) a court in which the attorney is authorized to practice; or

(B) a court for a district in which a deposition or production is compelled by the subpoena, if the deposition or production pertains to an action pending in a court in which the attorney is authorized to practice.

(b) Service.

(1) A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person and, if the person's attendance is commanded, by tendering to that person the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or an officer or agency thereof, fees and mileage need not be tendered. Prior notice of any commanded production of documents and things or inspection of premises before trial shall be served on each party in the manner prescribed by Rule 5(b).

(2) Subject to the provisions of clause (ii) of subparagraph (c)(3)(A) of this rule, a subpoena may be served at any place within the district of the court by which it is issued, or at any place without the district that is within 100 miles of the place of the deposition, hearing, trial, production, or inspection specified in the subpoena or at any place within the state where a state statute or rule of court permits service of a subpoena issued by a state court of general jurisdiction sitting in the place of the deposition, hearing, trial, production, or inspection specified in the subpoena. When a statute of the United States provides therefor, the court upon proper application and cause shown may authorize the service of a subpoena at any other place. A subpoena directed to a witness in a foreign country who is a national or resident of the United States shall issue under the circumstances and in the manner and be served as provided in *Title 28, U.S.C. § 1783*.

(3) Proof of service when necessary shall be made by filing with the clerk of the court by which the subpoena is issued a statement of the date and manner of service and of the names of the persons served, certified by the person who made the service.

(c) Protection of Persons Subject to Subpoenas.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) Duties in Responding to Subpoena.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

(e) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued. An adequate cause for failure to obey exists when a subpoena purports to require a non-party to attend or produce at a place not within the limits provided by clause (ii) of subparagraph (c)(3)(A).

HISTORY:

(Amended March 19, 1948; Oct. 20, 1949; July 1, 1970; Aug. 1, 1980; Aug. 1, 1985; Aug. 1, 1987; Dec. 1, 1991.)

(As amended Dec. 1, 2005.)

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 704, N.D.R.Ev., Opinion on Ultimate Issue

Bismarck attorney Thomas Dickson has requested that the Committee consider incorporation of language drawn from Fed.R.Ev. 704(b) into N.D.R.Ev. 704. The language prohibits experts testifying in criminal cases from offering an opinion on the issue of whether the defendant did or did not have the mental state necessary to satisfy the elements of the offense charged.

The language in Fed.R.Ev. 704(b) was added to the rule in accordance with the Insanity Defense Reform Act of 1984. The Committee considered adding the proposed language to N.D.R.Ev. 704 in 1985-1986. An excerpt from the minutes of the Committee's discussion of this language is attached. The minutes show the Committee rejected inclusion of the proposed language but they do not show the Committee's rationale for rejecting the language.

Because the 704(b) language was added by Congress rather than the rules committee, there are no advisory committee notes on 704(b) in the federal rule book. For this reason, staff has attached an excerpt from the Federal Rules of Evidence Manual to the meeting materials. The Manual explains that "[t]he final sentence of subdivision (b) captures the spirit of the amendment: the Judge or jury is to decide the mental state question, not the expert." The Manual further suggests that the subdivision is problematic because it creates "difficult problems in drawing lines." The majority of the excerpt from the Manual discusses these line drawing problems.

Proposed amendments to Rule 704 are attached.

RULE 704. OPINION ON ULTIMATE ISSUE

(a) Testimony Except as provided in subdivision (b), 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.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense to the crime charged. Such ultimate issues are matters for the trier of fact alone.

EXPLANATORY NOTE

Rule 704 was amended, effective _____.

This rule is ~~taken from~~ based on Fed.R.Ev. 704. ~~It should be noted that this~~ This rule applies to the opinions of lay witnesses, whenever admissible, as well as to opinions of experts.

Rule 704 was amended, effective _____, to add subdivision (b) on expert opinion testimony in criminal cases. The subdivision is based on Fed.R.Ev. 704(b), which was added to the federal rule in accordance with the Insanity Defense Reform Act of 1984.

SOURCES: Joint Procedure Committee Minutes: of _____ pages _____;
June 3, 1976, page 7. Fed.R.Ev. 704; ~~Rule 704, SBAND proposal.~~

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February 28, 2006

RECEIVED
MAR 01 2006

Mike Hagburg
Joint Procedure Committee
Supreme Court, Judicial Wing
600 E. Boulevard Ave, Dept 180
Bismarck, ND 58505-0530

COURT ADMIN. OFFICE
SUPREME COURT

Re: NDREvid 704

Dear Mike:

This letter is a follow-up to our recent telephone conversation regarding NDREvid 704. As you know, the North Dakota Rule does not incorporate Paragraph (b) of FREvid 704.

I understand from your e-mail that it was not adopted pursuant to a motion by Judge Burdick in 1986. I feel your committee should take a look at this matter and see if the position advocated by Judge Burdick 20 years ago should now be reconsidered.

Thank you.

Very truly yours,



Thomas A. Dickson

TAD:dmm

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 704. Opinion on Ultimate Issue

(a) Except as provided in subdivision (b), 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.

(b) No expert witness testifying with respect to the mental state or condition of a defendant in a criminal case may state an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto. Such ultimate issues are matters for the trier of fact alone.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Oct. 12, 1984, P.L. 98-473, Title IV, Ch IV, § 406, 98 Stat. 2067.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Amendments:

1984. Act Oct. 12, 1984 substituted this rule for one which read: "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."

Other provisions:

Notes of Advisory Committee on Rules. The basic approach to opinions, lay and expert, in these rules is to admit them when helpful to the trier of fact. In order to render this approach fully effective and to allay any doubt on the subject, the so-called "ultimate issue" rule is specifically abolished by the instant rule.

The older cases often contained strictures against allowing witnesses to express opinions upon ultimate issues, as a particular aspect of the rule against opinions. The rule was unduly restrictive, difficult of application, and generally served only to deprive the trier of fact of useful information. 7 Wigmore § § 1920, 1921; McCormick § 12. The basis usually assigned for the rule, to prevent the witness from "usurping the province of the jury," is aptly characterized as "empty rhetoric." 7 Wigmore § 1920, p. 17. Efforts to meet the felt needs of particular situations led to odd verbal circumlocutions which were said not to violate the rule. Thus a witness could express his estimate of the criminal responsibility of an accused in terms of sanity or insanity, but not in terms of ability to tell right from wrong or other more modern standard. And in cases of medical causation, witnesses were sometimes required to couch their opinions in cautious phrases of "might or could," rather than "did," though the result was to deprive many opinions of the positiveness to which they were entitled, accompanied by the hazard of a ruling of insufficiency to support a verdict. In other instances the rule was simply disregarded, and, as concessions to need, opinions were allowed upon such matters as intoxication, speed, handwriting, and value, although more precise coincidence with an ultimate issue would scarcely be possible.

Many modern decisions illustrate the trend to abandon the rule completely. *People v. Wilson*, 25 Cal.2d 341, 153 P.2d 720 (1944), whether abortion necessary to save life of patient; *Clifford-Jacobs Forging Co. v. Industrial Comm.*, 19 Ill.2d 236, 166 N.E.2d 582 (1960), medical causation; *Dowling v. L. H. Shattuck, Inc.*, 91 N.H. 234, 17 A.2d 529 (1941), proper method of shoring ditch; *Schweiger v. Solbeck*, 191 Or. 454, 230 P.2d 195 (1951), cause of landslide. In each instance the opinion was allowed.

The abolition of the ultimate issue rule does not lower the bars so as to admit all opinions. Under Rules 701 and 702, opinions must be helpful to the trier of fact, and Rule 403 provides for exclusion of evidence which wastes time. These provisions afford ample assurances against the admission of opinions which would merely tell the jury what result to reach, somewhat in the manner of the oath-helpers of an earlier day. They also stand ready to exclude opinions phrased in terms of inadequately explored legal criteria. Thus the question, "Did T have capacity to make a will?" would be excluded, while the question, "Did T have sufficient mental capacity to know the nature and extent of his property and the natural objects of his bounty and to formulate a rational scheme of distribution?" would be allowed. McCormick § 12.

For similar provisions see Uniform Rule 56(4); *California Evidence Code* § 805; *Kansas Code of Civil Procedures* § 60-456(d); *New Jersey Evidence Rule* 56(3).

[5] Rule 704(b): Mental State or Condition in Criminal Cases

In 1984 Congress amended Rule 704 as part of its response to the insanity verdict rendered in John Hinckley's trial for the attempted assassination of President Reagan. See 18 U.S.C. §§ 4241–4247. The effect is to bar experts — at least psychiatrists and psychologists⁶ — from testifying that a criminal defendant either had or did not have the requisite mental state for committing the crime charged. The limitation imposed by subsection (b) applies only in criminal cases and only to expert testimony offered on the accused's mental state.

The final sentence of subdivision (b) captures the spirit of the amendment: the Judge or jury is to decide the mental state question, not the expert. Presumably, the drafters of the amendment hoped that it would prevent the expert

⁶ The applicability of Rule 704(b) to experts other than psychiatrists and psychologists is discussed in § 704.02[8].

from invading the province of the trier of fact, and that it would clarify the roles of experts and triers. In our view, however, there is no need for the amendment, and the Rule does more harm than good.

Rule 704(a) permits only helpful ultimate issue testimony. Rule 704(b) prohibits testimony admissible under Rule 704(a). It follows that Rule 704(b) must by definition exclude helpful expert testimony. Otherwise it has no reason for being. Unhelpful ultimate issue testimony is already excluded under Rule 702. For example, the Court in *United States v. Scop*, § 704.02[4], held that the expert's ultimate issue testimony on the defendants' guilt was conclusory and unhelpful and therefore should have been excluded under Rule 702. The Court did not need, and did not rely on, Rule 704(b) to exclude the evidence. Thus, the only situation in which Rule 704(b) can have any effect is when it is invoked to exclude helpful expert testimony. But why on earth should we exclude helpful expert testimony?

In using Rule 702 prior to the amendment of Rule 704, Trial Judges did not have to concern themselves with the question whether an opinion was ultimate, mediate, or something else. They had only to decide whether it would assist the trier of fact in reaching a fair decision in the case. The advent of Rule 704(b) has led to sporadic enforcement and difficult problems in drawing lines, as is discussed below.

[6] Problems in Applying Rule 704(b)

Rule 704(b) does not totally prohibit experts from testifying in criminal cases involving disputes over *mens rea* or insanity. Nor does it bar experts from giving opinions in cases in which mental state or condition is an element of a crime or defense. Rather, the language prevents an expert from giving an opinion as to whether the defendant did or did not have the requisite mental state or condition. Essentially, it prohibits the expert from making a specific conclusion that the defendant either did or did not have the requisite mental state. As one Court put it: "Congress did not enact Rule 704(b) so as to limit the flow of diagnostic and clinical information. Rather, the Rule changes the style of question and answer that can be used to establish both the offense and the defense thereto."⁷

Dr. Park Elliott Dietz, who led the team that evaluated John Hinckley for the United States Attorney's office, has written that barring expert opinions on the ultimate issue creates line-drawing problems, for the attorney calling a favorable witness will seek to elicit testimony that approaches the ultimate issue as nearly as the Court will permit and the witness will provide. (*Why the Experts Disagree: Variations in the Psychiatric Evaluation of Criminal Insanity*, ANNALS OF THE AMERICAN ACADEMY OF POLITICAL SCIENCE, January, 1985). We would add

⁷ *United States v. Edwards*, 819 F.2d 262, 265 (11th Cir. 1987).

that the line-drawing, while necessary under the Rule, serves only to separate the helpful testimony that can be admitted from the helpful testimony that cannot.

The Seventh Circuit's decision in *United States v. West*, 962 F.2d 1243 (7th Cir. 1992), provides an interesting example of the line-drawing that must be done between conclusions on the defendant's mental state and otherwise permissible expert testimony. It also shows how Rule 704(b) can subvert the search for truth. West was charged with bank robbery and his defense was insanity. The Trial Judge appointed a psychiatrist to examine West. The psychiatrist concluded that West was suffering from schizoaffective disorder, a severe mental disease. But he also concluded that West understood the wrongfulness of his actions when he robbed the bank. The government moved to exclude the psychiatrist's testimony, and the Trial Court agreed, reasoning that it would be outrageous to allow a defendant to call an expert to testify to a mental disorder, when that very expert has concluded that there was no causal relationship between the illness and the crime charged.

The Court of Appeals reversed in *West*. It reasoned that the psychiatrist's ultimate conclusion that West knew right from wrong was inadmissible under Rule 704(b). But Rule 704(b) did not operate to exclude the psychiatrist's conclusion that the defendant was suffering from a mental disease. The *West* Court, like the Trial Judge, was clearly concerned that the expert's testimony, bereft of its ultimate conclusion, would be misrepresentative. However, the Court believed that it was obligated to follow the rules Congress has made, and not rewrite or avoid them, however unwise they may be.⁸ Thus, while Rule 704(b) was intended to prevent distortion of the factfinding process, the decision in *West* illustrates that the Rule can actually lead to distortions of the factfinding process.

Nor is the negative impact of Rule 704(b) limited to the prosecution's presentation. Defendants have also suffered from Rule 704(b). For example, in *United States v. Bennett*⁹ the defendant was charged with fraud, check-kiting, money-laundering, and filing false statements and tax returns. In a pretrial ruling, the judge precluded the defendant's psychiatric expert from testifying that the

⁸ See also *United States v. Salava*, 978 F.2d 320 (7th Cir. 1992): It was reversible error to exclude an expert's testimony where the expert would have stated that the defendant had a severe mental disorder, even though the expert was unable to conclude that the defendant could not appreciate the wrongfulness of his acts; there is no requirement that the expert must conclude that the defendant could not appreciate the wrongfulness of his acts; indeed, Rule 704(b) prohibits testimony on that point; the expert's testimony would have been probative to establish the first prong of the insanity defense, i.e., that the defendant was suffering from a severe mental disorder:

If a psychiatrist's testimony that a defendant has a severe mental disease cannot be excluded on the basis that his opinion as to the second prong of the defense tends to *disprove* the offense, then, *a fortiori*, that same testimony cannot be excluded simply because the psychiatrist's opinion *fails to prove* the second prong.

⁹ *United States v. Bennett*, 161 F.3d 171 (3d Cir. 1998).

defendant's mental disorders made it "unlikely that he could form the intent to defraud" and "affected his ability to knowingly and wilfully submit false statements to the I.R.S." So the jury was left with general testimony about the defendant's mental disorders without a sufficient explanation of how these disorders might have affected his culpability for the charged crimes.

Rule 704(b) has also been invoked to preclude defendants from introducing exculpatory polygraph evidence, on the ground that the expert's testimony that the defendant was truthful constitutes testimony as to the defendant's mental state.¹⁰ Rule 704(b) has further been applied to preclude testimony as to the defendant's physiological responses to a polygraph, the Courts finding "no principled distinction" between such testimony and a conclusion that the defendant was telling the truth.¹¹ So the costs of Rule 704(b) are spread widely across criminal trials.

[7] Hypothetical Questions

Under Rule 704(b) the expert can testify concerning mental diseases, but is prohibited by Rule 704(b) from testifying to a causal relationship between the disease and the defendant's actions. The parties might understandably try to get around this limitation by asking the expert a hypothetical question, such as: Does this mental disease characteristically include an inability to understand the wrongfulness of one's acts?

Judge Manion, concurring in *West*, discussed in § 704.02[b], concluded that such a hypothetical question could not be asked since it would be an impermissible evasion of the restrictions of Rule 704(b). Some Courts have agreed with this conclusion. For example, in *United States v. Manley*, 893 F.2d 1221 (11th Cir. 1990), defense counsel wanted to ask the expert whether a hypothetical person with the described mental disease would be able to appreciate the nature and quality of his or her actions. The Court of Appeals upheld the Trial Judge's decision to preclude an answer to that hypothetical, on the ground that it would be an impermissible end-run around Rule 704(b).

Most Courts, however have been more permissive in allowing an expert to testify about a hypothetical person's mental state. For example, in *United States v. Brown*, 32 F.3d 236 (7th Cir. 1994), the defendant was charged with bank robbery and interposed an insanity defense. The prosecution's psychiatrist testified that Brown suffered from a major depressive disorder, and may have suffered some depressive episodes with psychotic features. Following the description of this diagnosis, the prosecutor asked the witness whether a person suffering from the disorder described was, by that reason alone, unable to

¹⁰ *United States v. Morales*, 108 F.3d 1031 (9th Cir. 1997).

¹¹ *United States v. Campos*, 217 F.3d 707 (9th Cir. 2000).

understand the wrongfulness of his acts. The witness answered in that such a person could still appreciate the wrongfulness of his acts. Brown objected that this was ultimate issue testimony as to his legal sanity, barred by Rule 704(b). But the Trial Judge denied the objection and the Seventh Circuit affirmed.

The Court of Appeals in *Brown* concluded that despite the prohibitory language of Rule 704(b), testimony may be adduced exploring the particular characteristics of the mental disease and whether those characteristics render one afflicted with the disease able to appreciate the wrongfulness or the nature and quality of his behavior. Relying on the finest of distinctions, the Court noted that the prosecution's expert never testified to Brown's particular mental state. Instead the expert merely described the mental disorder from which Brown suffered and explained that such an affliction does not preclude a person from appreciating the nature or quality of his acts. Because the expert testimony was not specific to Brown's mental state but rather concerned the characteristics of his mental disorder, it was permitted by Rule 704(b). The expert never said "Brown had the requisite mental state to commit the crime."¹² It is clear that the Court in *Brown* was struggling with the Rule, and indeed it was critical of the Rule. The Court declared that the Rule had the misguided purpose of requiring jurors to decide the issue of sanity without being told what conclusion an expert would draw. Such a result is counterproductive because it denies juries the specialized knowledge of experts in just the type of complex case in which it is most useful.

Another example of fine line-drawing arose in *United States v. Thigpen*, 4 F.3d 1573 (11th Cir. 1993) (en banc), where the Court found no error in allowing the prosecutor to ask a series of questions to elicit an opinion as to whether schizophrenia by necessity implies that a person would be unable to appreciate the nature and quality of his acts. The Court stated that these questions were permissible because the prosecutor never asked the witness to opine whether Thigpen was able to appreciate the wrongfulness of his actions. The Court concluded as follows:

While a thinly veiled hypothetical may not be used to circumvent Rule 704(b), the rule does not bar an explanation of the disease and its typical effect on a person's mental state.

The line drawn by the Court in *Thigpen* is between a hypothetical that includes virtually all of the characteristics of the defendant (i.e., a thinly veiled

¹² See also *United States v. Dixon*, 185 F.3d 393 (5th Cir. 1999) (no error in permitting an expert to testify that a person suffering from the defendant's mental disease "could still be able to appreciate the nature and quality or the wrongfulness of his acts"; the expert "merely stated that the presence of a mental illness does not answer, or contain a necessary inference that would answer, the ultimate issue"); *United States v. Salamanca*, 990 F.2d 629 (D.C. Cir. 1993) (an expert was permitted to testify that a person who drank as much as the defendant would have a diminished capacity to seek and plan).

hypothetical), and a more general hypothetical about the nature of the disease and its effect on human conduct.

But this is hardly a bright line; and it is often meaningless to distinguish between general hypotheticals and thinly veiled hypotheticals.¹³ For example, in *United States v. Kristiansen*, 901 F.2d 1463 (8th Cir. 1990), the defendant was charged with escape from a halfway house. He claimed that he lacked willful intent due to insanity. Kristiansen's expert psychiatrist testified that Kristiansen had been under the influence of cocaine and suffered from psychosis. On cross-examination, the prosecutor asked: "Would this severe mental disease affect the individual's ability to appreciate the nature and quality of the wrongfulness of his acts?" The Trial Judge sustained an objection, and the Court of Appeals affirmed, reasoning that this was a hypothetical question designed to elicit testimony on the ultimate issue of intent.

On the other hand, the Court in *Kristiansen* held that the defendant should have been permitted to ask: "Could the severe mental disease affect the ability of an individual to appreciate the nature of the quality or the wrongfulness of his acts?" The Court of Appeals reasoned as follows:

[T]he defense should have been permitted to ask this question because it relates to the symptoms and qualities of the disease itself and does not call for an answer that describes Kristiansen's culpability at the time of the crime. Rule 704(b) was not meant to prohibit testimony that describes the qualities of a mental disease.

There is obviously little difference between the two questions put to the expert in *Kristiansen*, yet the Court specifically held that one was permissible under Rule 704(b) and one was not. Thus, it is clear that the Rule as applied by the Courts calls for some fine line-drawing. Counsel would do well to craft their questions with care and to make certain that the question calls for a description of the mental disease rather than a conclusion about the defendant's mental state at the time of the crime. Thus, counsel is not permitted to ask, "Would a person suffering from the defendant's condition be able to appreciate the nature and quality of his actions?" But counsel is apparently permitted to ask, "Would the

¹³ See, e.g., *United States v. Levine*, 80 F.3d 129 (5th Cir. 1996) (finding no error where a psychologist was asked to assume facts that mirrored the events of the bank robbery, and gave an opinion that the facts were inconsistent with behavior that would be expected from someone suffering from bipolar disorder, the mental condition claimed by the defendant; hypothetical questions mirroring the fact pattern of the evidence are violative of Rule 704(b) only when the answering testimony contains a necessary inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged or of a defense thereto; the expert did not offer an opinion as to whether the defendant did or did not have the mental state or condition constituting an element of the offenses charged; rather, the expert's testimony focused on whether facts similar to those in evidence were consistent with the conduct of a hypothetical person suffering a severe manic episode).

defendant's condition affect the ability of a person suffering from that condition to appreciate the nature and quality of his actions?"¹⁴

[8] Law Enforcement Experts and Criminal Intent

It might appear that the amendment makes it more difficult for the prosecutor to use expert testimony even in cases where the technical defense of insanity is not raised. The prosecution often calls law enforcement agents as experts, and this testimony often has a bearing on the defendant's mental state. For example, the agent might be called to explain coded language on a surveillance tape, or to explain the *modus operandi* of drug dealers, or to explain that possession of a certain quantity of drugs is inconsistent with personal use. All of this testimony says something about the defendant's intent.

It could be argued that any testimony from an expert that bears upon the defendant's mental state should be excluded under Rule 704(b). But the Courts have not read the Rule that way. So long as the expert does not testify that the defendant acted with criminal intent, Courts have generally found the Rule 704(b) proscription inapplicable.¹⁵

A typical case is *United States v. Williams*, 980 F.2d 1463 (D.C. Cir. 1992). The prosecution's expert in a drug case testified that the more than 100 ziplock bags containing small amounts of drugs, which were found in a police raid on a premises, were meant to be distributed at street level. The defendant argued that this testimony impermissibly referred to his intent to distribute drugs. But the Court found that the expert's opinion did not violate the Rule 704(b) prohibition. It reasoned that the expert did not explicitly testify that *the defendant* had the mental state necessary to commit the crime charged. Rather, this testimony addressed the intentions of a hypothetical individual, not Williams in particular. Of course there was no hypothetical individual in front of the jury,

¹⁴ See, e.g., *United States v. Davis*, 835 F.2d 274 (11th Cir. 1988) (it was permissible to ask whether a person diagnosed with multiple personalities could be capable of appreciating what he or she was doing; this question sought an explanation of the disease and its typical effect on a person's mental state; it did not ask the expert to draw a conclusion as to whether the defendant actually had the requisite mental state).

¹⁵ See, e.g., *United States v. Plunk*, 153 F.3d 1011 (9th Cir. 1998) (law enforcement expert's translation of a coded conversation did not violate Rule 704(b); the officer simply interpreted the conversations, "allowing the jurors to determine for themselves the legal significance of the conversations as interpreted"). Compare *United States v. Wood*, 207 F.3d 1222 (10th Cir. 2000) (doctor charged with murder and lesser included offenses arising from treatment of a patient; it was error to admit expert testimony that the defendant's treatment was "reckless" and constituted a "homicide"; such testimony "necessarily dictates the final conclusion that Dr. Wood possessed the requisite mens rea for involuntary manslaughter").

only Williams, so it is apparent that the limitations imposed by the Court on mens rea testimony are ephemeral at best.¹⁶

Some Courts have suggested that Rule 704(b) is applicable only to psychiatric and medical expert testimony. For example, *United States v. Lipscomb*, 14 F.3d 1236 (7th Cir. 1994), involved typical expert testimony from drug enforcement agents, to the effect that the seized drugs were for street level distribution. The Court began by noting that Courts applying Rule 704(b) would typically find this testimony permissible, because the expert did not say that the particular defendant had an intent to distribute drugs. The Court found, however, that this distinction was relatively useless when applied to the testimony of law enforcement agent-experts:

In the first place, though officers did not in fact say “intent” or “intended,” they may as well have, for the effect would have been exactly the same. If the drugs found on Lipscomb were for street sale distribution, as each of the officers testified, then Lipscomb possessed them for that purpose; he intended to distribute them. Further, it would seem to make little difference that the officers’ opinions were based on an analysis of the external circumstances of the arrest, for the officers still would have stated an opinion or inference as to whether the defendant did or did not have the mental state or condition constituting an element of the crime charged, and this is what Rule 704(b) forbids.

Rather than admit outright that the Courts have simply ignored Rule 704(b), or that the Rule as promulgated makes no sense, the *Lipscomb* Court entertained

¹⁶ See also *United States v. Brumley*, 217 F.3d 905 (7th Cir. 2000) (no error in permitting expert to testify that amounts of metamphetamine in excess of one ounce were for distribution rather than personal use; the expert did not purport to base the testimony on some special knowledge of the defendant’s mental state); *United States v. Watson*, 171 F.3d 695 (D.C. Cir. 1999) (no error in the admission of expert testimony that someone possessing the “equivalent of 700 bags of crack cocaine is in the business of making money selling drugs”; Rule 704(b) proscribes only responses suggesting some special knowledge of the defendant’s mental state, not general testimony regarding the modus operandi of drug dealers); *United States v. Valle*, 72 F.3d 210 (1st Cir. 1995) (a narcotics detective was properly permitted to testify that the quantity of crack cocaine found at a search site was consistent with distribution as opposed to personal use; the witness offered no opinion as to the defendant’s intent, but instead permitted the jury to draw its own conclusions); *United States v. Chin*, 981 F.2d 1275 (D.C. Cir. 1992) (an expert who testifies that it is common practice for drug dealers to pay juveniles to transport drugs, because juveniles will not be severely punished, provides permissible *modus operandi* testimony; the expert’s general observations never purported to describe Chin’s own mental state); *United States v. Brown*, 7 F.3d 648 (7th Cir. 1993): Expert testimony that crack cocaine was intended for distribution was held not prohibited by Rule 704(b):

Although we would have preferred that the agent use a word other than intended to indicate his analysis of the relevant circumstances, we think it clear that Schaefer was not expressing an opinion as to Brown’s actual mental state, but was merely aiding the jury to draw an inference from the evidence.

the proposition that Rule 704(b) was never intended to apply to the testimony of law enforcement agent-experts:

All this assumes, however, that Rule 704(b) does in fact apply to the officers' testimony, an assumption worth questioning in view of the courts' apparent reluctance to rigorously enforce the rule in similar cases. Indeed, there is reason to think that the rule states only a very limited exception to the general rule, set forth in Rule 704(a), that witnesses *may* give opinions on ultimate issues. . . . [I]t is evident that Rule 704(b) was designed to avoid the confusion and illogic of translating the medical concepts relied upon by psychiatrists and other mental health experts into legal conclusions.

The Court concluded that the most sensible way to read the Rule, in light of its terms and purposes, is to apply it only to testimony based on a psychiatric or medical analysis of the defendant's mental processes.¹⁷

The *Lipscomb* Court was ultimately unprepared, however, to conclude that Rule 704(b) was completely inapplicable to law enforcement agent-expert testimony. It came to the following conclusion:

Notwithstanding these alternatives, we simply cannot ignore the fact that this court and others have routinely assumed that Rule 704(b) imposes an additional limitation, however slight, on the expert testimony of law enforcement officials. To reconcile that fact with our impression that the rule is of more limited scope, we conclude that when a law enforcement official states an opinion about the criminal nature of a defendant's activities, such testimony should not be excluded under Rule 704(b) as long as it is made clear, either by the court expressly or in the nature of the examination, that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes. Relevant in this regard, though not determinative, is the degree to which the expert refers specifically to the intent of the defendant, for this may indeed suggest, improperly, that the opinion is based on some special knowledge of the defendant's mental processes.¹⁸

¹⁷ See also *United States v. Gastiburo*, 16 F.3d 582 (4th Cir. 1994) (stating that Rule 704(b) does not apply to testimony of a law enforcement agent); *United States v. Richard*, 969 F.2d 849 (10th Cir. 1992) (suggesting, without deciding, that Rule 704(b) is limited to psychiatric and medical testimony).

¹⁸ See also *United States v. Willis*, 61 F.3d 526 (7th Cir. 1995) (finding no error when a law enforcement agent was permitted to testify that he had never had a drug case where the courier didn't know what he was carrying; the Court reiterated its position that Rule 704(b) does not limit law enforcement opinion testimony, so long as it is made clear that the opinion is based on the expert's knowledge of common criminal practices, and not on some special knowledge of the defendant's mental processes).

Most important was the *Lipscomb* Court's reminder that even if the law enforcement expert's testimony is not prohibited by Rule 704(b), it must still be helpful to the jury under Rule 702; and it cannot be unduly prejudicial or confusing, or else it is subject to exclusion under Rule 403.

Other Courts have rejected the argument that Rule 704(b) applies only to psychiatric and psychological testimony. As the Court stated in *United States v. Morales*, 108 F.3d 1031, 1036 (9th Cir. 1997): "The language of Rule 704(b) is perfectly plain. It does not limit its reach to psychiatrists and other mental health experts. Its reach extends to all expert witnesses."

Any differences among the Circuits on this matter, however, are of little practical effect. Assuming the Rule reaches all experts, the limitation imposed by the Rule is so minimal that for the Rule to be violated, an expert would probably have to say, point blank, that the defendant intended (or did not intend) to commit the crime.¹⁹ If the witness has to go that far to violate Rule 704(b), he also violates Rule 702, because his testimony is clearly of no assistance to the jury.

We share the *Lipscomb* Court's concern over the dangers inherent when law enforcement agents essentially instruct the jury to find the defendant guilty. We agree, however, that Rule 704(b) is unnecessary to rectify these dangers. Rather, the Court should require that the proffered testimony actually adds something important to the jury's understanding of the facts, otherwise the testimony should be excluded under Rule 702. Moreover, in some cases, even if the testimony is somewhat helpful, it might be unduly prejudicial and so subject to exclusion under Rule 403. Finally, if ultimate conclusions are allowed to be drawn, it is important to provide a limiting instruction that the expert has no special insight into the defendant's mental state and that the jury is the final arbiter of whether the prosecution has proved the elements of the crime.

There are occasional cases in which a Court has said enough is enough, and has found error when an expert's conclusion on a mental state is couched in a

¹⁹ The Court in *Morales* held that while Rule 704(b) applied to the testimony of a non-psychiatric witness, it did not preclude the testimony offered in that case. *Morales* was charged with embezzlement, and the question was whether her bookkeeping inaccuracies were intentional or rather the result of ignorance. *Morales* called an expert accountant who would have testified that *Morales* had a poor understanding of basic accounting principles. The Court held that this testimony was erroneously excluded under Rule 704(b). The testimony went to a predicate fact, rather than to the ultimate fact of intent:

Even if the jury believed Crosby's expert testimony that *Morales* had a weak grasp of bookkeeping knowledge, the jury would still have had to draw its own inference from that predicate testimony to answer the ultimate factual question whether *Morales* wilfully made false entries. *Morales* could have had a weak grasp of bookkeeping principles and still knowingly made false entries as charged. Thus, Crosby was not going to testify to an opinion or draw an inference as to the ultimate issue of *Morales*'s *mens rea* within the meaning of Rule 704(b).

hypothetical that mirrors the facts of the case. For example, in *United States v. Smart*, 98 F.3d 1379 (D.C. Cir. 1996), a narcotics case, a law enforcement agent was permitted to testify, on the basis of hypothetical facts identical to those in the case, that the facts met the “elements of drug distribution.” The Court recognized that the witness never referred directly to the defendant’s intent. However, he might as well have done so, given the explicit reference to the “elements” of drug trafficking, the crime with which the defendant was charged. The Court concluded that the use of the word “elements” carries “legal connotations that could have misled the jury into thinking that Detective Thomas was speculating on the ultimate legal issue of whether Smart had the requisite intent to distribute drugs.” The Court noted that a Rule 704(b) violation could have been avoided if the Trial Court had instructed the jury that the expert was not qualified to testify on the ultimate issue of intent. But the Trial Court gave no such instruction.²⁰

[9] Constitutional Challenges

Rule 704(b) has been challenged by some defendants on the ground that its exclusion of ultimate issue testimony violates the defendant’s constitutional right to an effective defense. These challenges have been rejected. For example, in *United States v. Austin*, 981 F.2d 1163 (10th Cir. 1992), the Court held that the Rule served legitimate state interests and thus withstood constitutional attack:

Rule 704(b) promotes fairness by eliminating confusing and often conflicting expert testimony concerning the ultimate legal issue to be found by the trier of fact. . . . The rule prevents a confusing battle of the experts and preserves the decision on the ultimate issue of state of mind for the jury, rather than leaving it in the hands of retained experts.²¹

²⁰ See also *United States v. Boyd*, 55 F.3d 667 (D.C. Cir. 1995) (the defendant was convicted of possession with intent to distribute cocaine, after a law enforcement officer was allowed to testify that, in his opinion, the hypothetical facts posed by the prosecutor showed possession with intent to distribute; the hypothetical facts exactly mirrored the facts leading up to the defendant’s arrest; this was reversible error; the Court stated that it had never held that the Government may simply recite a list of hypothetical facts that exactly mirror the case at hand and then ask an expert to give an opinion as to whether such facts prove an intention to distribute narcotics).

²¹ See also *United States v. Salamanca*, 990 F.2d 629 (D.C. Cir. 1993) (finding no violation of compulsory process rights in excluding a psychologist’s testimony as to whether the defendant had the mental state necessary to commit the crime; the Judge permitted the expert to opine about the capacities of a person of the purported mental condition of the defendant who had consumed the quantity of beer the defendant had on the night of the assault); *United States v. Blumberg*, 961 F.2d 787 (8th Cir. 1992) (Rule 704(b) does not violate the defendant’s due process right to present relevant expert opinion evidence in support of his insanity defense; the Rule allows admission of every fact about the defendant’s mental condition, including the expert’s diagnosis, the characteristics of the condition, and the expert’s opinion about the defendant’s mental state).

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
RE: Rule 6.12, N.D.R.Ct., Safe Courtroom Firearms Handling

Judge McCullough has asked the Committee to consider adoption of a safe courtroom firearms handling rule. The idea behind the rule is to set out guidelines that will maximize safety in the courtroom when firearms are being handled as evidence. Judge McCullough explains how he became interested in the rule in an email, which is attached.

Judge McCullough provided a proposal to staff and staff put the proposal into standard rule format. Some slight changes were made to conform to our style guidelines. In addition, staff transferred some explanatory material that appeared in the rule text submitted by Judge McCullough to the explanatory note. The rule proposal is attached.

RULE 6.12 SAFE COURTROOM FIREARMS HANDLING

(a) Scope.

(1) These procedures apply to all firearms to be offered into evidence that are brought into a court building or a courtroom.

(2) These procedures do not apply to firearms carried or worn by police officers and court bailiffs.

(b) Firearm Must Be Unloaded. All firearms in the court building and court room must be unloaded and empty.

(c) Firearm Must Be Open. All firearms in the court building and court room must be open. Open means:

(1) the clip or magazine removed;

(2) all bullets removed from the cylinder;

(3) the bullet removed from the chamber;

(4) if a semi-automatic pistol, the barrel slid back;

(5) if a revolver, the cylinder swung out;

(6) if a single or double barrel shotgun, the barrel broken open;

(7) if a semi-automatic rifle or shotgun, the chamber slide or cocking lever in open position.

(d) Incapacitating Device. If possible, an incapacitating device must be attached to any firearm to be offered into evidence. Incapacitating devices include:

22 (1) A long hasp lock, when the hasp of the lock is inserted in the open breech of the
23 firearm making it physically impossible to chamber and fire a round in the firearm; and

24 (2) A lock and cable, when the cable is inserted into the open breech of the firearm
25 making it physically impossible to chamber and fire a round in the firearm.

26 A trigger lock is not an incapacitating device.

27 (e) Display of Firearm. No firearm may be displayed to the jury until the time it is
28 shown to the witness designated to establish foundation for its admission into evidence. If
29 a party seeks to show a firearm in an opening statement, a photograph of the firearm, not the
30 firearm itself, must be used.

31 (f) Custody of Firearm. Firearms and ammunition brought into a court room to be
32 offered into evidence must be given to and left in the custody of the court clerk at all times
33 other than when they are being handled by prosecutors, defense attorneys or witnesses.
34 Firearms must never be left on a counsel table. During recesses of the court firearms, must
35 be:

36 (1) under the direct visual supervision of the court clerk or bailiff; or

37 (2) locked in a secure drawer, cabinet or closet.

38 (g) Pointing Firearm. Firearms must be pointed either at the ceiling or floor. No
39 firearm may be pointed at jury, judge, court personnel or spectators.

40 (h) Final Argument; Notification and Approval Required. Parties who wish to use
41 firearms admitted into evidence for demonstrative purposes in final argument must:

42 (1) notify the court of the intended use;

43 (2) state how they intend to use the firearm; and

44 (3) obtain the permission of the court for such use.

45 (i) Firearm and Ammunition Kept Separate. A firearm and ammunition may never
46 be given to a witness or to the jury at the same time. Firearms and ammunition may never
47 be placed or left together on the counsel table.

48

49 EXPLANATORY NOTE

50 Rule 6.12 was adopted effective _____.

51 Subdivision (c) requires the condition of a firearm to be such that a visual inspection
52 will indicate immediately that the firearm is unloaded and secured.

53 Under subdivision (d), trigger locks are not considered incapacitating devices because
54 in some cases it is physically impossible to see if a firearm is secured with a trigger lock.
55 More importantly, if a firearm secured by a trigger lock has a round in the chamber and is
56 dropped and lands on the hammer, the firearm could discharge.

57 Subdivision (i) is intended to ensure that a firearm and its ammunition are always kept
58 separate. If a jury seeks to examine a firearm and related ammunition in the jury room, the
59 jury may do so but the firearm and ammunition may never be sent into the jury room at the
60 same time. The firearm may be given to the jury for examination first and, after the jury is
61 done examining it, the jury must inform the bailiff and pass out the firearm. Only after this
62 is done may the bailiff give the jury the ammunition for examination.

63 SOURCES: Joint Procedure Committee Minutes of _____ pages

Erickson, Kristen

From: Dawson, Georgia
Sent: Monday, November 28, 2005 11:15 AM
To: Erickson, Kristen
Subject: FW: Joint Procedures Committee

Attachments: FIREARMS AS EVIDENCE PROCEDURE.DOC; SAFE COURTROOM FIREARMS HANDLING PROCEDURES.wpd

-----Original Message-----

From: McCullough, Steven
Sent: Monday, November 28, 2005 10:59 AM
To: Dawson, Georgia
Subject: Joint Procedures Committee

Georgia,

At the Judicial Conference I told you I would be passing along to you some proposed materials for consideration by the Joint Procedures Committee. They are generated from a presentation we received at the National Judicial College concerning the handling of firearms as evidence in a trial or other proceeding -- as a way to make sure that the safety of all in the courtroom is maximized. The topic was raised by a Minnesota Judge (Judge Morrow from Anoka) and a Minnesota law professor (Professor Simon). There are two attachments included with this e-mail. The first is the material I received from Professor Simon on this issue. The second is in the form of a proposed new rule in the Rules of Court that could accomplish this effect. (I basically just reformatted some of the Professor's language).

In any event if you want to present it to the Joint Procedures Committee, I think it is worthwhile. Even if the Joint Procedures Committee passes on it, we might want to adopt something like it for the East Central Judicial District.

Steven Mc



FIREARMS AS EVIDENCE PROCEDURE.DOC
SAFE COURTROOM FIREARMS HANDLING PROCEDURES.wpd

For Jt. Procedures

Rule 6.41. Safe courtroom firearms handling procedures.

(a) Scope.

- (1) These procedures shall apply to all firearms to be offered into evidence brought into a court building or a courtroom.
- (2) These procedures do not apply to firearms carried or worn by police officers and court bailiffs.

(b) All Firearms To Be Unloaded. All firearms shall be unloaded (empty) at all times when they are in the court building and court room.

(c) All Firearms To Be Open At All Times. All firearms, when they are in the court building and court room, shall be open, this means:

- (1) The clip or magazine removed, all bullets removed from cylinder and the bullet removed from chamber;
- (2) If a semi-automatic pistol, the barrel slid back; if a revolver, the cylinder swung out; and if a single or double barrel shotgun, the barrel "broken" open;
- (3) If a semi-automatic rifle or shotgun, the chamber slide or cocking lever in open position.

The condition of the firearm will be such that an immediate visual inspection will indicate that the firearm is unloaded and secured. Incapacitating devices shall be attached to all firearms, if possible.

For purposes of this section, incapacitating devices shall include:

- (1) A long hasp lock when the hasp of the lock is inserted in the open breech of the firearm which makes it physically impossible to chamber and fire a round in the firearm, and
- (2) A bicycle lock and cable when the cable is inserted into the open breech of the firearm which makes it physically impossible to chamber and fire a round in the firearm.

Trigger locks are not appropriate methods to secure a firearm because in some cases it is physically impossible to see if the firearm is secured with the trigger lock and, more importantly, if the firearm has a round in the chamber and is dropped and lands on the hammer, the firearm could discharge .

- (d) **No Display of Firearm Prior To Showing To Witness To Establish Foundation For Admissibility.** No firearm may be displayed to the jury until the time that it is necessary to show it to a witness to establish foundation for its admission into evidence. Photographs of firearms to be offered into evidence, rather than the firearm itself, shall be used by a prosecutor or a defense attorney who would like to refer to the firearm in an opening statement.
- (e) **Firearms To Be In Custody Of Court Clerk.** Firearms and ammunition brought into a court room to be offered into evidence shall be given to and left in the custody of court clerk at all times other than when they are being handled by prosecutors, defense attorneys or witnesses. Firearms shall never be left on counsel table. During recesses of the court firearms, shall either:
- (1) Be under the direct visual supervision of the court clerk or bailiff; or
 - (2) Be locked in a secure drawer, cabinet or closet.
- (f) **Firearm Not To Be Pointed At Any Person in Courtroom.** No firearm may be pointed at jury, judge, court personnel or spectators. Firearms shall be pointed either at the ceiling or floor.
- (g) **Notification and Approval Required Before Firearm Used In Final Argument.** Prosecutors and defense attorneys intending to use firearms admitted into evidence for demonstrative purposes in final argument shall first: 1) notify the judge of the intended use; 2) state how they intend to use the firearm; and 3) obtain the permission of the judge for such use.
- (h) **Firearm and Ammunition Never Given To Witness Or Jury At Same Time.** Firearms and ammunition may never be given to a witness or the jury at the same time. Firearms and ammunition may never be placed or left together on the counsel table. If a firearm and related ammunition are to be sent into the jury room, the jury shall be allowed to examine them but the firearm and ammunition may never sent into the jury room at the same time. The firearm may be given to the jury for examination first and after the jury is done examining it, the jury shall inform the bailiff, shall pass out the firearm and then may be given the ammunition for examination.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

RE: Rule 52, N.D. Sup. Ct. Admin. R., Interactive Television

At its April 2005 meeting, the Committee had an opportunity to examine and comment on Admin. Rule 52, the statewide interactive television rule. The version of Admin. Rule 52 that the Committee examined took effect May 1, 2005. A copy is attached.

Even though the rule had just taken effect, the Supreme Court acted quickly to consider and implement the Committee's recommendations, along with some changes of its own, in a revised version of Admin. Rule 52 that took effect June 1, 2005.

One of the changes the Supreme Court made involved defense attorney participation in ITV criminal proceedings. The early rule allowed a defense attorney to participate from a site located apart from the defendant with court permission and the defendant's consent. The current rule does not allow this in guilty plea proceedings. In such a proceeding, the trial court must make findings and a record before it allows a defense attorney to participate from a site separate from the defendant.

Judge Karen Braaten and jail administrator Gary Gardner commented in the Grand Forks Herald that the rule's provisions requiring defense attorneys to be present at the same location as the defendant would limit the use of ITV in criminal proceedings. A copy of the article containing their comments is attached. The Committee may wish to discuss whether any amendments to the rule can be made that would address these concerns or whether any further amendments to the rule are necessary based on lessons learned during the year the rule has been in place.

Other courts have been experimenting with allowing increased participation in court

proceedings by electronic means. In a recent Wisconsin habeas corpus case, the 7th Circuit reversed a state court conviction because the defendant's attorney had been allowed to participate in a guilty plea hearing by telephone instead of in-person with the defendant in court. A copy of the case, Van Patten v. Deppisch, 434 F.3d 1038 (7th Cir. 2006), and a U.S. Law Week report on the case are attached.

The VanPatten court is quite critical of the idea that a defense attorney could ever effectively represent a defendant from a location separate from the defendant. The bottom line of the VanPatten decision seems to be that the Constitution requires the defense attorney to be physically present with the defendant during any "critical stage" of the proceeding. The North Dakota Supreme Court has not had an ITV presence case like VanPatten, but it has stated that "[a] defendant has a fundamental right to counsel during all critical stages of the prosecution." State v. Murchison, 2004 ND 193, ¶ 8, 687 N.W.2d 725.

As discussed above, Admin. Rule 52 allows the defendant's attorney to be present in a location apart from the defendant in some cases. The Committee may wish to discuss whether there should be a provision in Admin. Rule 52 requiring defense attorneys to be physically in the company of the defendant at all critical stages of the prosecution.

RULE 52. INTERACTIVE TELEVISION

Section 1. Purpose.

This rule provides a framework for the use of interactive television in North Dakota's district and municipal courts. This rule is intended to enhance the current level of judicial services available within the North Dakota court system through the use of interactive television and not in any way to reduce the current level of judicial services.

Section 2. In General.

(A) Subject to the limitations in Sections 3, 4 and 5, a district or municipal court may conduct a proceeding by interactive television on its own motion or on a party's motion.

(B) A party wishing to use interactive television must obtain prior approval from the court after providing notice to other parties.

(C) Parties must coordinate approved interactive television proceedings with the court to facilitate scheduling and ensure equipment compatibility.

(D) Each interactive television site must provide equipment or facilities for confidential attorney-client communication.

(E) A method for electronic transmission of documents must be available at each interactive television site for use in conjunction with an interactive television proceeding.

Section 3. Civil Action.

In a civil action, a district or municipal court may conduct a hearing, conference, or other proceeding, or take testimony, by interactive television.

22 Section 4. Criminal Action.

23 (A) In a criminal action, a district or municipal court may conduct a hearing,
24 conference, or other proceeding by interactive television, except as otherwise provided in
25 Section 4(B).

26 (B) Exceptions.

27 (1) A defendant may not plead guilty nor be sentenced by interactive television unless
28 the parties consent.

29 (2) A witness may not testify by interactive television unless the defendant knowingly
30 and voluntarily waives the right to have the witness testify in person.

31 (3) An attorney for a defendant must be present at the interactive television site where
32 the defendant is located unless the attorney's participation from another location is approved
33 by the court with the consent of the defendant. In a guilty plea proceeding, the court may not
34 allow the defendant's attorney to participate from a site separate from the defendant unless:

35 (a) the court makes a finding on the record that the attorney's participation from the
36 separate site is necessary;

37 (b) the court confirms on the record that the defendant has knowingly and voluntarily
38 consented to the attorney's participation from a separate site; and

39 (c) the court allows confidential attorney-client communication, if requested.

40 Section 5. Mental Health Proceeding.

41 (A) In a mental health proceeding, a district court may conduct a proceeding by
42 interactive television and allow the following persons to appear or present testimony:

43 (1) the respondent or patient;

44 (2) a witness;

45 (3) legal counsel for a party.

46 (B) Notice, Objection, and Waiver.

47 (1) Notice . Before holding any mental health proceeding by interactive television, the
48 court must give notice to the petitioner and the respondent. The notice must:

49 (a) advise the parties of their right to object to the use of interactive television;

50 (b) inform the respondent that the proceedings may be recorded on video and that, if
51 there is an appeal, the video recording may be made part of the appendix on appeal and is
52 part of the record on appeal.

53 (2) Objection .

54 (a) Interactive television may not be used in a mental health proceeding if any party
55 objects. The respondent must be given the opportunity to consult with an attorney about the
56 right to object to the use of interactive television.

57 (b) If the respondent fails to make an objection or fails to make a timely objection to
58 the use of interactive television, the court may nevertheless continue the proceeding for good
59 cause.

60 (c) If the proceeding is continued, the respondent will continue to be held at the
61 facility where the respondent was receiving treatment or, at the choice of the treatment
62 provider in a less restrictive setting, until a face-to-face hearing can be completed.

63 (d) A face-to-face hearing must be scheduled to occur within four days, exclusive of

64 weekends and holidays, of the date the objection was made, unless good cause is shown for
65 holding it at a later time.

66 (3) Waiver. Upon mutual consent of the parties, and with the approval of the court,
67 notice requirements in a mental health proceeding may be waived to allow for the conduct
68 of proceedings without prior notice or with notice that does not conform to Section 5(B)(1).

69 Section 6. Effective Date.

70 This rule is effective June 1, 2005, and remains in effect until further order of the
71 supreme court.



North Dakota Supreme Court Rules N.D. Sup. Ct. Admin. R.

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[Obsolete Rule.]

[Return to Current Rule.]

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Rule 52
Adopted effective May 1, 2005

Administrative Rule 52 - INTERACTIVE TELEVISION

Section 1. Purpose.

This rule provides a framework for the use of interactive television in North Dakota's district and municipal courts. This rule is intended to enhance the current level of judicial services available within the North Dakota court system through the use interactive television and not in any way to reduce the current level of judicial services.

Section 2. In General.

(A) Subject to the limitations in Sections 3, 4 and 5, a district or municipal court may conduct a proceeding by interactive television on its own motion or on a party's motion.

(B) A party wishing to use interactive television must obtain prior approval from the court after providing notice to other parties.

(C) Parties must coordinate approved interactive television proceedings with the court to facilitate scheduling and ensure equipment compatibility.

(D) Each interactive television site must provide a facility for a confidential attorney-client conference.

(E) A method for electronic transmission of documents must be available at each interactive television site for use in conjunction with an interactive television proceeding.

Section 3. Civil Action.

In a civil action, a district or municipal court may conduct a hearing, conference, or other proceeding, or take testimony, by interactive television.

Section 4. Criminal Action.

(A) In a criminal action, a district or municipal court may conduct a hearing, conference, or other proceeding by

interactive television, except as otherwise provided in Section 4 (B).

(B) Exceptions.

(1) A defendant may not plead guilty to nor be sentenced for a felony by interactive television.

(2) A defendant convicted of a misdemeanor may not be sentenced by interactive television unless the parties consent.

(3) A witness may not testify by interactive television unless the defendant knowingly and voluntarily waives the right to have the witness testify in person.

(4) An attorney for a defendant must be present at the interactive television site where the defendant is located unless the attorney's participation from another location is approved by the court with the consent of the defendant.

Section 5. Mental Health Proceeding.

(A) In a mental health proceeding, a district court may conduct a proceeding by interactive television and allow the following persons to appear or present testimony:

(1) the respondent or patient;

(2) a witness;

(3) legal counsel for a party.

(B) Notice, Objection, and Waiver.

(1) Notice. Before holding any mental health proceeding by interactive television, the court must give notice to the petitioner and the respondent. The notice must:

(a) advise the parties of their right to object to the use of interactive television;

(b) inform the respondent that the proceedings may be recorded on video and that, if there is an appeal, the video recording may be made part of the appendix on appeal and is part of the record on appeal.

(2) Objection.

(a) Interactive television may not be used in a mental health proceeding if any party objects. The respondent must be given the opportunity to consult with an attorney about the right to object to the use of interactive television.

(b) If the respondent fails to make an objection or fails to make a timely objection to the use of interactive television, the court may nevertheless continue the proceeding for good cause.

(c) If the proceeding is continued, the respondent will continue to be held at the facility where the respondent was receiving treatment or, at the choice of the treatment provider in a less restrictive setting, until a face-to-face hearing can be completed.

(d) A face-to-face hearing must be scheduled to occur within four days, exclusive of weekends and holidays, of the date the objection was made, unless good cause is shown for holding it at a later time.

(3) Waiver. Upon mutual consent of the parties, and with the approval of the court, notice requirements in a mental health proceeding may be waived to allow for the conduct of proceedings without prior notice or with notice that does not conform to Section 5 (B) (1).

Section 6. Effective Date.

This rule is effective May 1, 2005, and remains in effect until further order of the supreme court.

Dated at Bismarck, North Dakota, this April 6, 2005.

Gerald W. VandeWalle, Chief Justice
Dale V. Sandstrom, Justice
Mary Muchlen Maring, Justice
Carol Ronning Kapsner, Justice

ATTEST:
Colette M. Bruggman
Chief Deputy Clerk

GRAND FORKS

County aims to cut mill levy

■ Commission also discusses support of Air Force base

By Lisa Davis
Herald Staff Writer

The Grand Forks County Commission unanimously approved a resolution Tuesday that sets a goal of cutting the mill levy by three mills for the 2006 budget.

The resolution, which came a day after the Grand Forks City Council passed a resolution to cut its tax rate by 9 mills, stressed that the amount is a target, not a firm commitment.

Commission members said they will continue to work with other taxing entities to reduce tax rates in the face of rapidly increasing property values in the county. Some residents, if their property values increase more than tax rates decrease, still could see their tax bills go up despite the city, county, School District and Park District's efforts to reduce tax rates.

In related action Tuesday, commissioners approved increases in property valuation for several townships, as required by the state. The increases varied from 1 percent to 7 percent for each township, said director of property and records Bob Wood.

Six county residents protested their home valuations at the meeting Tuesday.

Video court concerns

Judge Karen Braaten gave the board information about a recently amended rule that regulates interactive television between courts and jails.

The county is planning to include the so-called "video court" at the correctional facility it plans to build on a corner of the county fairgrounds property.

She said that while she supported the idea of video court, the interactive television may not be used as often as anticipated because of several new rules.

Those rules require that attorneys be on site with their clients, which could be an inconvenience for attorneys whose offices are downtown, near the courthouse, she said. The rule also requires that there be a place for an attorney to communicate with a client.

In criminal cases, a defendant can't plead guilty or be sentenced through

Base support

Commissioners encouraged county employees to attend the June 23 rally for the base, passing a resolution that employees can take up to two hours to attend the event, on the condition that their department managers approve the leave and that the employee's workloads permit attendance.

video court unless all parties give consent, Braaten said.

Jail administrator Gary Gardner said he anticipates video court would be used most often for civil cases and that prisoners involved in criminal proceedings still would be transported to the courthouse.

Commissioner Connie Triplett updated commissioners on the status of negotiations with the fair board, saying they had a "productive meeting."

The county owns the fairgrounds, but the fair board holds the lease and is trying to negotiate the best deal for giving up control of the corner the county wants to build on.

Several commissioners have been meeting with members of the fair board to discuss plans that would suit the county's needs for a jail and the fair boards needs for the fair, if it returns to the fairgrounds someday, and other events.

The county will now draft a proposal to the fair board.

Supporting the base

Commissioners encouraged county employees to attend the June 23 rally for the base, passing a resolution that employees can take up to two hours to attend the event, on the condition that their department managers approve the leave and that the employee's workloads permit attendance.

Triplett voiced concern about the resolution, saying that, while she acknowledges the importance of the base to the community, she didn't think it was a good use of public dollars.

Reach Davis at (701) 780-1105, (800) 477-6572, ext. 105, or ldavis@gfherald.com.

*Criminal Law—Right to Counsel***Counsel's 'Appearance' at Plea Hearing Via Speakerphone Was Structural Error**

■ *Defense counsel's presence at plea hearing by way of speakerphone was, under United States v. Cronin, 466 U.S. 648 (1984), structural error that requires reversal of conviction without showing of prejudice.*

A trial court's decision to let a defense attorney "appear" at a plea hearing by way of a speakerphone was the type of violation of his client's Sixth Amendment right to counsel that amounted to "structural" error requiring reversal of the conviction without a showing of prejudice, the U.S. Court of Appeals for the Seventh Circuit decided Jan. 24 (*Van Patten v. Depisch*, 7th Cir., No. 04-1276, 1/24/06).

Counsel's performance in such a situation is necessarily so "perfunctory" that prejudice should be presumed under *United States v. Cronin*, 466 U.S. 648 (1984). Judge Terence T. Evans said.

In this federal habeas corpus proceeding, defense counsel in the underlying state prosecution arranged for a change of plea proceeding in which the habeas petitioner, charged with intentional homicide, would plead no contest to reckless homicide. Because counsel had court appearances in other counties that day, the judge allowed him to provide assistance to his client by speakerphone broadcast in the courtroom. The petitioner was not asked whether he consented to this procedure. Later, the petitioner sought to withdraw his plea on the ground that his lawyer's failure to appear in person at the hearing violated his right to counsel. The state courts analyzed the claim as a complaint of ineffective assistance under *Strickland v. Washington*, 466 U.S. 668 (1984), and rejected it. The district court on habeas review agreed.

Ineffective assistance claims under *Strickland* require a defendant to show both that his attorney's performance fell below an objective standard of reasonableness and that he suffered prejudice as a result. However, *Cronin*, which was decided the same day as *Strickland*, established that prejudice may be presumed when counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." The U.S. Supreme Court has made clear that a change of plea proceeding is a critical stage of a prosecution in which counsel's assistance is crucial.

Opting to Follow *Cronin*. The Seventh Circuit decided that *Cronin* rather than *Strickland* governed this case. It observed that although the trial judge took pains to ensure that permitting counsel to participate in the plea hearing by way of a telephone connection did not violate the petitioner's rights, "the arrangements made it impossible for [the petitioner] to have the 'assistance of counsel' in anything but the most perfunctory manner." It pointed out that the petitioner "could not turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgivings."

Furthermore, the court said, the speakerphone alternative prevented the lawyer from being able to "detect and respond to cues from his client's demeanor that might have indicated he did not understand certain as-

pects of the proceeding, or that he was changing his mind." It added that any discussion between counsel and the petitioner could have been overheard by anyone else in the courtroom.

In essence, the petitioner's complaint was directed at a structural defect in the proceedings, not merely the effectiveness of his lawyer's performance, the court said. "When a defendant is denied assistance of counsel at a stage where he must assert or lose certain rights or defenses, the error 'pervades the entire proceeding,'" the court said, quoting from *Satterwhite v. Texas*, 486 U.S. 249 (1988). Allowing the hearing to go forward with counsel and client unable to see each other or communicate privately was just such a violation of the Sixth Amendment, it concluded.

"Getting the attorney on the speakerphone may have been better than nothing," the court said, but an accused is entitled to more than "formal compliance" with the Sixth Amendment. "[W]e think it problematic to treat assistance of counsel as a formality to be overcome through creative use of technology so that everyone can keep their calendars in order."

Significance of Plea Hearing. The court rejected the argument that *Cronin* is inapplicable because a plea hearing merely formalizes already negotiated bargains. Defense counsel, it said, must be just as engaged in such proceedings as at trial to help the accused navigate the legal complexities he faces and to ensure that prosecutors keep up their end of the bargain. Physical presence "is necessary not only so that counsel can keep an eye on the client and the prosecutor, but so the court can keep an eye on counsel."

If defense counsel were allowed to phone in representation as occurred here, the court wondered, "[w]hat might we be asked to accept next? Offshore defense-counsel call centers? Letting the defendant confer with counsel via Blackberry?"

Having decided that the *Cronin* presumption of prejudice applied, the court went on to emphasize that structural errors of this sort that "contaminate[] the entire proceeding" are not subject to harmless error analysis. The state courts unreasonably applied established federal law in analyzing the complaint under *Strickland*, and the petitioner is therefore entitled to habeas relief.

Judges John L. Coffey and Ann Claire Williams joined the opinion.

Linda T. Coberly, Winston & Strawn, Chicago, argued for the petitioner. Christopher Wren, U.S. attorney's office, Madison, Wis., argued for the state.

Full text at <http://pub.bna.com/cl/041276.pdf>

JOSEPH VAN PATTEN, Petitioner-Appellant, v. JODINE DEPPISCH,
Respondent-Appellee.

No. 04-1276

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

434 F.3d 1038; 2006 U.S. App. LEXIS 1658

September 21, 2005, Argued
January 24, 2006, Decided

SUBSEQUENT HISTORY: Rehearing denied by, Rehearing, en banc, denied by *Van Patten v. Deppisch*, 2006 U.S. App. LEXIS 5147 (7th Cir. Wis., Feb. 27, 2006)

PRIOR HISTORY: [**1] Appeal from the United States District Court for the Eastern District of Wisconsin. No. 98 CV 1014. Rudolph T. Randa, Chief Judge. *State v. Van Patten*, 211 Wis. 2d 891, 568 N.W.2d 653, 1997 Wisc. App. LEXIS 579 (Wis. Ct. App., 1997)

CASE SUMMARY:

PROCEDURAL POSTURE: Petitioner inmate sought review of a decision from the United States District Court for the Eastern District of Wisconsin, which denied him a writ of habeas corpus on his Sixth Amendment right to counsel claim.

OVERVIEW: This habeas case presented the novel question of what the law required when a client on the other end of a telephone hookup with his lawyer was standing before a judge, about to relinquish a bevy of important constitutional rights? The inmate in this case was to enter a plea of no contest to a charge of first degree reckless homicide, with a penalty enhancement for using a dangerous weapon. He was advised of the plea arrangement by his lawyer, but the hearing for acceptance of the plea was attended by his lawyer only over a speaker phone. The inmate later sought to withdraw his plea, arguing that the lack of his lawyer's physical presence violated his Sixth Amendment right to counsel. The district court determined

that the counsel's failure to appear in person was a harmless error under a Strickland ineffective assistance of counsel test. On review, the court held that the district court erred in applying Strickland, rather than the United States v. Cronin exception, and erred in applying a harmless-error analysis. The court held that the counsel's lack of physical presence at the plea hearing was a structural defect that pervaded the entire proceeding.

OUTCOME: The court reversed the judgment of the district court and remanded the case for the entry of an order granting the petition for a writ of habeas corpus. On the subsequent remand to state court, the proceedings against the inmate could resume with a plea of not guilty in place.

LexisNexis(R) Headnotes

Constitutional Law > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN1] Under Strickland v. Washington, a defendant must show that his counsel's performance fell below an objective standard of reasonableness. The court's review of the attorney's performance must be highly deferential, indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. Under Strickland's second prong, the defendant also bears the burden of showing prejudice--that is, a reasonable probability that, but for counsel's errors, the result of the

proceeding would have been different.

Constitutional Law > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel

[HN2] United States v. Cronin, which was decided by the United States Supreme Court on the same day as Strickland v. Washington, recognizes several circumstances where the two-pronged Strickland test does not apply, circumstances so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified. Cronin, not Strickland, applies where there has been a complete denial of counsel; where counsel has been prevented from assisting the accused during a critical stage of the prosecution; where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing; or under circumstances where although counsel is available, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the proceeding. A Cronin violation can occur where the denial of assistance of counsel was either actual or constructive.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues

[HN3] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant habeas relief from a state court conviction if it finds the state court's adjudication of a constitutional claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court. 28 U.S.C.S. § 2254(d)(1). A state court decision is contrary to Supreme Court precedent if the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to that of the Supreme Court.

Criminal Law & Procedure > Habeas Corpus > Cognizable Issues

[HN4] Factual contexts of cases may be regarded as materially indistinguishable because their legal implications are clearly the same, notwithstanding that the facts themselves are significantly different. One of the most obvious ways a state court may render a decision contrary to the Supreme Court's precedents is when it sets forth the wrong legal framework. Moreover, a state court decision is also an unreasonable application of Supreme Court precedent if it refuses to extend an established legal principle to a new context where it should apply. Thus, if the state court got its decision wrong because it identified and applied the wrong precedent, a federal court may award collateral relief.

Constitutional Law > Criminal Process > Assistance of Counsel

Criminal Law & Procedure > Counsel > Right to Counsel > Pleas

[HN5] The Sixth Amendment's right-to-counsel guarantee recognizes the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty. Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his ability to assert any other rights he may have. Thus, a defendant requires an attorney's guiding hand through every stage of the proceedings against him. It is well-settled that a court proceeding in which a defendant enters a plea (a guilty plea or a plea of no contest) is a critical stage where an attorney's presence is crucial because defenses may be irretrievably lost, if not then and there asserted. Indeed, with plea bargaining the norm and trial the exception, for most criminal defendants a change of plea hearing is the critical stage of their prosecution.

Criminal Law & Procedure > Counsel > Effective Assistance > Tests

[HN6] In deciding whether to dispense

with the two-part Strickland inquiry, a court must evaluate whether the surrounding circumstances make it unlikely that the defendant could have received the effective assistance of counsel, and thus justify a presumption that the conviction was insufficiently reliable to satisfy the Constitution.

Criminal Law & Procedure > Counsel > Right to Counsel

[HN7] When a defendant is denied assistance of counsel at a stage where he must assert or lose certain rights and defenses, the error pervades the entire proceeding.

Criminal Law & Procedure > Counsel > Right to Counsel > Pleas

[HN8] Defense counsel should be fully engaged at a plea hearing no less than at trial because in both settings, the accused is confronted with both the intricacies of the law and the advocacy of the public prosecutor. Defense counsel must also ensure that the prosecutor fully performs his end of whatever deal has been struck. However routine such hearings may have become, the Supreme Court has not revised its view that entering a guilty plea (or its equivalent, a plea of no contest) is a grave and solemn act, to be treated, like all phases of the criminal process, as a confrontation between adversaries.

COUNSEL: For JOSEPH L. VAN PATTEN, Petitioner - Appellant: Linda T. Coberly, WINSTON & STRAWN, Chicago, IL USA.

For JODINE DEPPISCH, Respondent - Appellee: Christopher Wren, OFFICE OF THE ATTORNEY GENERAL, Wisconsin Department of Justice, Madison, WI USA.

JUDGES: Before COFFEY, EVANS, and WILLIAMS, Circuit Judges.

OPINIONBY: EVANS

OPINION:

[*1040] EVANS, *Circuit Judge*. Telephone conversations with clients are a big part of what lawyers do. But can using a telephone while

representing a client go too far? This habeas case presents the novel--but, in the endless quest for efficiency, perhaps inevitable--question: What does the law require when a client on the other end of a telephone hookup with his lawyer is standing before a judge, about to relinquish a bevy of important constitutional rights?

Joseph Van Patten was charged with one count of first degree intentional homicide following a fatal shooting in Shawano County, Wisconsin. One day in September 1995, while he was in jail awaiting trial, Van Patten got a call from his attorney, James B. Connell. Connell informed Van [**2] Patten that he would shortly be transported to court for a change of plea hearing. Under an oral agreement Connell had reached with the prosecutor, Van Patten was to enter a plea of no contest to a charge of first degree reckless homicide, with a penalty enhancement for committing the offense while using a dangerous weapon. (Van Patten would later testify that he had some questions about the arrangement which he had been unable to raise in the phone call with Connell.)

At the court hearing later that day, Connell "appeared" via speakerphone. Apparently this was due not to any last-minute problem, but simply for the convenience of everyone's schedules. Connell would later explain that he had appearances in two other counties that day; that the court was holding time for Van Patten's trial; that witnesses were waiting to know whether they would be needed; and that "everyone wanted to get this matter concluded." No one asked Van Patten whether he objected to his attorney's absence from the hearing, or whether he would prefer to reschedule the hearing to a time when his attorney could appear in person.

As the participants huddled around a speakerphone on the judge's bench, the judge [**3] encouraged Van Patten to "take all the time you need to confer with your attorney, and we can perhaps get him on the line in a private place so you could talk to him privately also." The judge then informed Van Patten that "everything here is going to be on the record." The court quizzed Van Patten to be sure he understood

what was happening at the hearing, including the constitutional guarantees--his rights to a speedy and public trial, to trial by jury, to confront accusers, to compel witnesses, and to not serve as a witness against himself--he was about to forfeit by pleading no contest. Van Patten's only extended comments related to whether he would be allowed a visit in jail from his daughter. Satisfied that everything was in order, the judge accepted the plea. Two months later, Van Patten was sentenced to a maximum term of 25 years in prison.

After retaining different counsel, Van Patten moved to withdraw his plea, arguing that Connell's failure to appear in person at the change of plea hearing violated his *Sixth Amendment* right to counsel. At the hearing on that motion, Van Patten testified that he had wanted a jury trial but felt "forced" to enter a no-contest plea because [**4] Connell told him if he didn't, the prosecutor would "make sure I would die in prison." Asked whether at any point during the hearing he asked to speak to his attorney on a private line, Van Patten said no, because Connell told him to "just say yes and just go along with everything." [*1041] Van Patten testified that he would not have entered his plea if his attorney had been present at the hearing. The court denied Van Patten's postconviction motion. Claiming that he was denied his right to the assistance of counsel, Van Patten embarked on an odyssey of appellate proceedings.

The Wisconsin Court of Appeals analyzed Van Patten's *Sixth Amendment* claim as a complaint of ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). [HN1] Under *Strickland*, a defendant must show that his counsel's performance fell below an objective standard of reasonableness. *Id.* at 688. The court's review of the attorney's performance must be "highly deferential[,] . . . indulging a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. Under *Strickland* [**5] 's second prong, the defendant also bears the burden of showing prejudice--that is, a

reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. The state appellate court said its review of the plea hearing transcript "neither indicates any deficiency in the plea colloquy, nor suggests that Van Patten's attorney's participation by telephone interfered in any way with his ability to communicate with his attorney about his plea." Accordingly, the appellate court rejected Van Patten's right-to-counsel claim. n1 The Wisconsin Supreme Court denied further review.

n1 The state appellate court did acknowledge that Connell's appearance by telephone violated *Wis. Stat. § 967.08*, which authorizes some proceedings to be conducted by phone but does not permit an attorney to appear by phone at a plea hearing. But the court said this "procedural" violation was "harmless error."

Van Patten then brought his *Sixth Amendment* [**6] claim to the district court as a habeas petition under 28 U.S.C. § 2254. In his recommendation to the district court, the magistrate judge found that Connell's telephonic appearance at the plea hearing had been "effective under *Strickland*," but "ineffective" under *United States v. Cronin*, 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984).

[HN2] *Cronin*, which was decided on the same day as *Strickland*, recognizes several circumstances where the two-pronged *Strickland* test does not apply, circumstances "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *Id.* at 658. *Cronin*, not *Strickland*, applies where there has been a "complete denial of counsel"; where counsel has been "prevented from assisting the accused during a critical stage" of the prosecution; where "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing"; or under circumstances where "although counsel is available . . . the likelihood that any lawyer, even a fully competent one,

could provide effective assistance is so small that a presumption of prejudice is appropriate [**7] without inquiry into the actual conduct of the [proceeding]." *Id.* at 659-60 and 659 n.25. See also *Hollenback v. United States*, 987 F.2d 1272, 1275 (7th Cir. 1993) (recognizing *Cronic* as an "exception" to *Strickland*'s two-part test). A *Cronic* violation can occur where the denial of assistance of counsel was either "actual or constructive." *Strickland*, 466 U.S. at 692. See also *Siverson v. O'Leary*, 764 F.2d 1208, 1217 (7th Cir. 1985). Although he identified *Cronic* as the law governing Van Patten's habeas petition, the magistrate judge believed--and recommended to the district judge (incorrectly, as we will explain)-- [*1042] that the violation could be considered "harmless error."

Acting on the recommendation, the district court made two holdings that are difficult to reconcile. It endorsed the magistrate judge's analysis that counsel's failure to appear in person, albeit "harmless error," was "a violation of Van Patten's Sixth Amendment right to effective assistance of counsel" under *Cronic*. But the district court also concluded that the state appellate court had "properly identified and applied *Strickland* [**8], " rather than *Cronic*, as the appropriate legal framework. (Under *Strickland*, it seems clear Van Patten would have no viable claim.)

Thus, we must resolve two questions: Did the state court err in applying *Strickland*, rather than *Cronic*, when it decided Van Patten's Sixth Amendment claim? If the state court did apply the wrong law and Van Patten was denied assistance of counsel under *Cronic*, did the district court err in applying a harmless-error analysis to defense counsel's failure to appear in person at the plea hearing? We conclude that the answer to both questions is yes.

[HN3] Under the Antiterrorism and Effective Death Penalty Act (AEDPA), a federal court may grant habeas relief from a state court conviction if it finds the state court's adjudication of a constitutional claim "resulted in a decision that was contrary to, or involved an unreasonable application

of, clearly established federal law, as determined by the Supreme Court." 28 U.S.C. § 2254(d)(1). A state court decision is "contrary to" Supreme Court precedent "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law" or [**9] "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [that of the Supreme Court]." *Williams v. Taylor*, 529 U.S. 362, 405, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). n2 We review the district court's decision rejecting Van Patten's habeas petition *de novo*. *Searcy v. Jaimet*, 332 F.3d 1081, 1087 (7th Cir. 2003).

n2 The state argues that because the Supreme Court has never decided a case involving counsel's participation in a plea hearing by telephone, the state appellate court's application of *Strickland* to this case did not "result[] in a decision that was contrary to . . . clearly established federal law," and thus a federal court may not grant habeas relief. This argument misapprehends the AEDPA regime. [HN4] "Factual contexts of cases may be regarded as 'materially indistinguishable' because their legal implications are clearly the same, notwithstanding that the facts themselves are significantly different." RANDY HERTZ & JAMES S. LIEBMAN, FEDERAL HABEAS CORPUS PRACTICE AND PROCEDURE 1439 n.24 (4th ed. 2001) (citing *Ramdass v. Angelone*, 530 U.S. 156, 180, 120 S. Ct. 2113, 147 L. Ed. 2d 125 (O'Connor, J., concurring)). One of the most obvious ways a state court may render a decision "contrary to" the Supreme Court's precedents is when it sets forth the wrong legal framework. See *Williams*, 529 U.S. at 397-98 (state court's decision was contrary to clearly established law because it mischaracterized the appropriate rule for evaluating defendant's Sixth Amendment claim). Moreover, a state court decision is also an

"unreasonable application of" Supreme Court precedent if it "refuses to extend [an established legal] principle to a new context where it should apply." *Id.* at 407. Thus, if the state court got its decision wrong because it identified and applied the wrong precedent--as we will explain it did in this case--a federal court may award collateral relief.

[**10]

[HN5] The Sixth Amendment's right-to-counsel guarantee recognizes "the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty." *Johnson v. Zerbst*, 304 U.S. 458, 462-63, 58 S. Ct. 1019, 82 L. Ed. 1461 (1938). "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive for it affects his [*1043] ability to assert any other rights he may have." *Cronic*, 466 U.S. at 654 (citation omitted). Thus, a defendant requires an attorney's "guiding hand" through every stage of the proceedings against him. *Powell v. Alabama*, 287 U.S. 45, 53, 53 S. Ct. 55, 77 L. Ed. 158 (1932); *Cronic*, 466 U.S. at 658. It is well-settled that a court proceeding in which a defendant enters a plea (a guilty plea or, as here, a plea of no contest) is a "critical stage" where an attorney's presence is crucial because "defenses may be . . . irretrievably lost, if not then and there asserted." *Hamilton v. Alabama*, 368 U.S. 52, 54, 82 S. Ct. 157, 7 L. Ed. 2d 114 (1961). See also *White v. Maryland*, 373 U.S. 59, 60, 83 S. Ct. 1050, 10 L. Ed. 2d 193 (1963); [*11] *United States ex rel. Thomas v. O'Leary*, 856 F.2d 1011, 1014 (7th Cir. 1988). Indeed, with plea bargaining the norm and trial the exception, for most criminal defendants a change of plea hearing is the critical stage of their prosecution.

[HN6] In deciding whether to dispense with the two-part *Strickland* inquiry, a court must evaluate whether the "surrounding circumstances make it unlikely that the defendant could have

received the effective assistance of counsel," *Cronic*, 466 U.S. at 666, and thus "justify a presumption that [the] conviction was insufficiently reliable to satisfy the Constitution," *id.* at 662. In this case, although the transcript shows that the state trial judge did his best to conduct the plea colloquy with care, the arrangements made it impossible for Van Patten to have the "assistance of counsel" in anything but the most perfunctory sense. Van Patten stood alone before judge and prosecutor. Unlike the usual defendant in a criminal case, he could not turn to his lawyer for private legal advice, to clear up misunderstandings, to seek reassurance, or to discuss any last-minute misgivings. Listening over an audio [*12] connection, counsel could not detect and respond to cues from his client's demeanor that might have indicated he did not understand certain aspects of the proceeding, or that he was changing his mind. If Van Patten wished to converse with his attorney, anyone else in the courtroom could effectively eavesdrop. (We assume the district attorney would balk if he were expected to conduct last-minute consultations with his staff via speakerphone in open court, "on the record," with the defendant taking in every word.) No advance arrangements had been made for a private line in a private place, and even if one could "perhaps" have been provided, it would have required a special request by Van Patten and, apparently, a break in the proceedings. In short, this was not an auspicious setting for someone about to waive very valuable constitutional rights.

Considering all the ways he was foreclosed from receiving an attorney's guidance and support at his hearing, it is clear to us that Van Patten's case must be resolved under *Cronic*. Thus, the state appellate court arrived at a decision contrary to the Supreme Court's precedent when it analyzed the case under *Strickland* (indeed, the state [*13] court's opinion never even acknowledges *Cronic*), and the district court erred when it endorsed that decision. Properly analyzed, Van Patten's claim is not a complaint about his attorney's effectiveness; rather,

it points to a structural defect in the proceedings against him. [HN7] When a defendant is denied assistance of counsel at a stage where he must assert or lose certain rights and defenses, the error "pervades the entire proceeding." *Satterwhite v. Texas*, 486 U.S. 249, 256, 108 S. Ct. 1792, 100 L. Ed. 2d 284 (1988) (citing *White and Hamilton*). See also *Bell v. Cone*, 535 U.S. 685, 695-96, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002) (a trial is "presumptively unfair . . . where [*1044] the accused is denied the presence of counsel at 'a critical stage'" which holds "significant consequences for the accused") (citations omitted); *Cronic*, 466 U.S. at 659 (same).

Van Patten does not allege, for example, that his attorney botched his defense through bad legal judgments, or misinformed him of the ramifications of his plea. Rather, the arrangements under which the hearing was conducted, with defendant and counsel unable to see or communicate privately with each other, prevented [**14] Van Patten from receiving the assistance that the *Sixth Amendment* guarantees. However acceptable an attorney's performance may otherwise be by *Strickland* standards, it is beside the point if the attorney is prevented by the design of the proceeding from providing the full benefit of his skills when his client needs them most. Although the record may make the proceeding appear to have been routine and proper, we cannot know what Van Patten might have done had he been treated like any other defendant with counsel at his side. Under such unique circumstances, a plea cannot meet the constitutional requirement that it be intelligent and voluntary. See *Brady v. United States*, 397 U.S. 742, 749, 90 S. Ct. 1463, 25 L. Ed. 2d 747 (1970) (voluntariness of a plea "can be determined only by considering all of the relevant circumstances surrounding it"); *White*, 373 U.S. at 60 (when defendant enters a plea outside the presence of counsel, "we do not stop to determine whether prejudice resulted: 'Only the presence of counsel could have enabled [the] accused to know all the defenses available to him and to plead intelligently.' " (quoting *Hamilton*,

368 U.S. at 55)). [**15]

Getting the attorney on speakerphone may have been better than nothing. But the *Sixth Amendment* requires more than "formal compliance" with its guarantees. *Cronic*, 466 U.S. at 654 (citation omitted). See also *Childress v. Johnson*, 103 F.3d 1221, 1231 (5th Cir. 1997) (applying *Cronic* where defense counsel in a plea hearing functioned as little more than "standby counsel"). And so we think it problematic to treat assistance of counsel as a formality to be overcome through creative use of technology so that everyone can keep their calendars in order.

The state argues against applying *Cronic* here because plea hearings do not involve presentation of evidence and, in the state's view, simply formalize bargains previously negotiated by the prosecution and defense. "Defense counsel's adversarial-testing role essentially disappears" in a plea hearing, the state reasons in its brief, and thus a telephone appearance is good enough. But the state's conception of counsel's role is too limited.

[HN8] Defense counsel should be fully engaged at a plea hearing no less than at trial because in both settings, "the accused [is] confronted with both the intricacies [**16] of the law and the advocacy of the public prosecutor." *Cronic*, 466 U.S. at 654 (quoting *United States v. Ash*, 413 U.S. 300, 309, 93 S. Ct. 2568, 37 L. Ed. 2d 619 (1973)). See also *Childress*, 103 F.3d at 1227 ("A defendant is constitutionally entitled to the active assistance of counsel at a plea hearing.") (emphasis added). Defense counsel must also ensure that the prosecutor fully performs his end of what-ever deal has been struck. See *Santobello v. New York*, 404 U.S. 257, 262, 92 S. Ct. 495, 30 L. Ed. 2d 427 (1971) ("When a plea rests in any significant degree on a promise or agreement of the prosecutor . . . such promise must be fulfilled.") By the state's logic, if a plea hearing is merely *pro forma*, the state could be represented as effectively by a clerk or paralegal as by one of its professional prosecutors. But however routine such hearings may have [*1045]

become, the Supreme Court has not revised its view that entering a guilty plea (or its equivalent, as here, a plea of no contest) is "a grave and solemn act," *Brady*, 397 U.S. at 748, to be treated, like all phases of the criminal process, as a "confrontation between adversaries, [**17] " *Cronic*, 466 U.S. at 657.

Physical presence is necessary not only so that counsel can keep an eye on the client and the prosecutor, but so the court can keep an eye on counsel. Even if a private line had been arranged for Van Patten to speak with his attorney, we would regard long-distance lawyering in critical-stage proceedings as inadequate to safeguard effective assistance of counsel and the integrity of the judicial process. This point underscores why *Cronic*, not *Strickland*, applies here.

Over a phone line, it would be all too easy for a lawyer to miss something. For example, she might prejudice her client by failing to make some important point during the proceedings and later claim it was a tactical decision (in which case *Strickland* mandates a large benefit of the doubt), when in reality she wasn't paying attention. Or an attorney might realize he had neglected to inform the client of some crucial piece of information but be tempted to let it pass rather than broadcasting the issue to everyone in the room. Cf. *Ivy v. Caspari*, 173 F.3d 1136 (8th Cir. 1999) (defendant's guilty plea was not knowing and voluntary where counsel had [**18] failed to provide adequate explanation of elements of offense and other crucial information). On collateral review, courts can rarely assess an attorney's performance from the printed record alone. Even assuming that counsel could hear and understand every word (and how many people who have experienced speakerphones or conference calls would stake their liberty on that assumption?), n3 the client or the judge might never know whether the defense attorney was hanging on every word, reading documents in another case, surfing the web, or falling asleep. n4 Cf. *Burdine v. Johnson*, 262 F.3d 336 (5th Cir. 2001) (en banc), cert. denied sub nom. *Cockrell v. Burdine*, 535 U.S. 1120, 122

S. Ct. 2347, 153 L. Ed. 2d 174 (2002) (under *Cronic*, defendant was denied assistance of counsel when his attorney repeatedly dozed during trial).

n3 At the plea hearing, the judge instructed the defendant: "Mr. Van Patten, we are going to put your attorney on the speakerphone, so I want you standing up a little closer to make sure he can hear you. I think you will be able to hear him, but sometimes they cannot hear you."

[**19]

n4 Even if we assume that busy attorneys never do such things during conference calls with their clients, what might we be asked to accept next? Offshore defense-attorney call centers? Letting the defendant confer with counsel via Blackberry?

Having decided that the circumstances surrounding Van Patten's hearing justify a presumption of prejudice under *Cronic*, we must address the district court's finding that defense counsel's constructive absence was nonetheless harmless error.

In his recommendation, the magistrate judge relied on two decisions, *United States v. Morrison*, 946 F.2d 484, 503 (7th Cir. 1991), and *Siverson v. O'Leary*, 764 F.2d 1208 (7th Cir. 1985), where we said counsel's absence in some circumstances might be presumptively prejudicial yet still be subject to a harmless-error analysis. In *Siverson*, a state habeas case, the defendant's counsel was absent when the jury verdict was returned. In *Morrison*, a lengthy multi-defendant federal drug conspiracy trial, the lawyer for one of the defendants was excused (with his client's permission) [**20] from attending three court [*1046] sessions that did not involve the offering of evidence against the defendant. We viewed these situations as trial errors subject to a harmless-error analysis.

But *Siverson* and *Morrison* also

recognized that harmless-error inquiry would not apply where the denial of counsel contaminated the entire proceeding. See *Morrison*, 946 F.2d at 503-04; *Siverson*, 764 F.2d at 1217 n.6. This distinction is underscored by several Supreme Court decisions, which have made clear that while some *Sixth Amendment* violations are susceptible to harmless-error analysis, see *Arizona v. Fulminante*, 499 U.S. 279, 306-07, 111 S. Ct. 1246, 113 L. Ed. 2d 302 (1991) (citing examples), "structural defects" are not, *id.* at 309. See also *Penson v. Ohio*, 488 U.S. 75, 88, 109 S. Ct. 346, 102 L. Ed. 2d 300 (1988) (denial of counsel under the meaning of *Cronic* "can never be considered harmless error"); *Satterwhite*, 486 U.S. at 256-57 (explaining the difference between trial error and "violations that pervade the entire proceeding"); *Patrasso v. Nelson*, 121 F.3d 297, 305 (7th Cir. 1997) (remanding [**21] for grant of a habeas petition without harmless-error analysis after finding attorney's performance at defendant's sentencing hearing was "so lacking that it invites application of *Cronic* rather than *Strickland*"). Because the physical absence of counsel from a hearing where a defendant gives up his most valuable

constitutional rights and admits his guilt to a serious charge is a structural defect, the district court erred in finding that the error could be analyzed under a harmless standard.

Although counsel-by-conference call probably could not have been imagined by the Supreme Court in 1938, it is worth remembering that Justice Sutherland in *Powell*--as well as Justice Stevens in *Cronic* more than a half-century later--invoked the metaphor of the "guiding hand" of counsel which a defendant requires at every step. Similarly, we have observed that "the *Sixth Amendment* . . . guarantees more than just a warm body to stand next to the accused." *Thomas*, 856 F.2d at 1015. In this case, Van Patten didn't get even a warm body.

The judgment of the district court is REVERSED and the case is REMANDED for the entry of an order granting the petition for a writ [**22] of habeas corpus. On the subsequent remand to the Circuit Court for Shawano County, the proceedings against Mr. Van Patten can resume with a plea of not guilty in place.



North Dakota Supreme Court Opinions ◀▲□/?

State v. Murchison, 2004 ND 193, 687 N.W.2d 725

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IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2004 ND 193

State of North Dakota, Plaintiff and Appellee

v.

Kenneth Murchison, Defendant and Appellant

No. 20030328

Appeal from the District Court of Burleigh County, South Central Judicial District, the Honorable Gail H. Hagerty, Judge.

AFFIRMED.

Opinion of the Court by Maring, Justice.

Tyrone Jay Turner (on brief), Assistant State's Attorney, 514 East Thayer Avenue, Bismarck, N.D. 58501, for plaintiff and appellee.

Wayne D. Goter (on brief), P.O. Box 1552, Bismarck, N.D. 58502-1552, for defendant and appellant.

State v. Murchison

No. 20030328

Maring, Justice.

[¶1] Kenneth Murchison appealed from a judgment of conviction for the felony offense of assault on a correctional institution employee.

We conclude Murchison was not deprived of a fair trial because he was denied his right to effective assistance of counsel or because he was denied his right to an impartial and unbiased trial judge, and we affirm.

I

[¶2] Murchison, an inmate at the state penitentiary, was charged with assault on a correctional institution employee, in violation of N.D.C.C. § 12.1-17-01, a class C felony. Murchison was found guilty by a jury, and the trial court sentenced him to three years incarceration at the state penitentiary, to be served consecutively to the sentence he was serving at the time he committed the offense.

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II

[¶3] On appeal, Murchison asserts he was denied his constitutional right to effective assistance of counsel, because he was not provided court-appointed counsel at his preliminary hearing on September 19, 2003. A chronological recitation of the facts surrounding Murchison's prosecution and ultimate conviction is necessary for an understanding and resolution of this issue. A criminal complaint charging Murchison with criminal assault was filed on July 22, 2003, alleging Murchison committed the offense on June 12, 2003. It is undisputed that Murchison requested the court to appoint legal counsel for him at his initial appearance on August 15, 2003.

[¶4] Murchison appeared without counsel at the September 19, 2003 preliminary hearing. He had not filed an application demonstrating he was indigent, entitling him to court-appointed counsel; therefore, no counsel had been appointed to represent him by that date. Murchison informed the court that he thought he had completed the necessary documents at the state penitentiary to receive court-appointed counsel and he thought the documents had been forwarded to the court by the penitentiary officials. Murchison objected to a continuance of the preliminary hearing, so it was held as scheduled with Murchison representing himself. The court found probable cause to bind Murchison over for trial on the charges and a trial date was set for October 23, 2003. Later that day, Murchison filed appropriate papers demonstrating he was indigent and the court appointed counsel to represent him.

[¶5] Subsequently, Murchison's attorney indicated Murchison would be changing his plea. The jury trial was canceled, and on October 23, 2003 a hearing was held concerning Murchison's change of plea. At that hearing the State informed the court Murchison would enter a conditional guilty plea with a right to appeal the issue of the court's failure to provide him an attorney at the September 19, 2003 preliminary hearing. In addition, the State recommended that Murchison receive a two-year sentence of incarceration for the offense, with all but six months suspended for three years. The court rejected Murchison's change of plea, stating the non-binding plea agreement was not acceptable. The jury trial was rescheduled for October 30, 2003. [¶6] On October 28, 2003, Murchison filed an amended motion to dismiss the charges filed against him on the ground that he was denied his right to effective assistance of counsel at the September 19, 2003 preliminary hearing and on the ground that authorities denied him the right to attend the hearing on October 23, 2003, by failing to transport him there. Murchison also requested dismissal of the charges on the ground that the trial court was biased against him, because the judge had prosecuted him for a prior offense. In an order dated October 29, 2003, the trial court denied Murchison's motion for dismissal. Additionally, the trial court scheduled a second preliminary hearing, explaining:

When the motion to dismiss was filed, I asked that a preliminary hearing be scheduled. While it could certainly be argued the defendant waived his right to be represented by an attorney at the preliminary, it seemed to me the issue could be easily resolved. Defense counsel indicated he was unavailable on October 28th or 29th, so the preliminary hearing was scheduled for 8 a.m. on October 30th.

[¶7] On October 30, 2003, Murchison appeared with his court-appointed counsel, who indicated they were ready to proceed with the preliminary hearing. At the conclusion of the hearing, the court found probable cause to bind Murchison over for trial on the assault charges and asked the parties if they would like to have a second arraignment. After conferring with Murchison, defense counsel informed the court the defendant was ready to proceed to trial.

[¶8] The Sixth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, and Art. I, § 12 of the North Dakota Constitution, guarantee a criminal defendant effective assistance of counsel. *State v. Hilgers*, 2004 ND 160, ¶ 5, 685 N.W.2d 109. A defendant has a fundamental right to counsel during all critical stages of the prosecution. *Ernst v. State*, 2004 ND 152, ¶ 8, 683 N.W.2d 891. In our state, the preliminary hearing is for the purpose of determining whether there is probable cause to believe the defendant committed the crime charged, requiring the accused to stand trial. *N.D.R.Crim.P. 5.1*. At that hearing, the defendant has the right to cross-examine adverse witnesses and may introduce evidence. *Id.*; see also *State v. Kunkel*, 366 N.W.2d 799, 801 (N.D. 1985). A preliminary hearing conducted for this purpose and of this type is considered a critical stage of the proceedings at which the defendant has a constitutional right to representation by counsel. *Coleman v. Alabama*, 399 U.S. 1, 9-10 (1970), see also *Beck v. Bowersox*, 362 F.3d 1095, 1101 (8th Cir. 2004).

[¶9] Additionally, our rules of criminal procedure set forth the right to appointed counsel:

Absent a knowing and intelligent waiver, every indigent defendant is entitled to have counsel appointed at public expense to represent the defendant at every stage of the proceedings from initial appearance before a magistrate through appeal in the courts of this state in all felony cases.

N.D.R.Crim.P. 44(a). However, there is no legal reason to appoint counsel for someone who can afford and obtain his own attorney. *State v. DuPaul*, 527 N.W.2d 238, 241 (N.D. 1995). Before counsel will be appointed, a defendant has the burden of establishing he is indigent and qualifies for appointment of counsel. *State v. Schneeweiss*, 2001 ND 120, ¶ 10, 630 N.W.2d 482. The waiver of the right to counsel must be voluntary, knowing, and intelligent. *City*

of Fargo v. Habiger, 2004 ND 127, ¶¶ 17, 23, 682 N.W.2d 300. The standard of review on an alleged denial of a constitutional right to counsel is de novo. Id. at ¶ 18. Whether there has been an intelligent waiver of constitutional rights depends upon the facts and circumstances of each particular case, including the background, the experience, and the conduct of the accused. State v. Ochoa, 2004 ND 43, ¶ 16, 675 N.W.2d 161.

[¶10] The facts of this case are rather unique and atypical. It is undisputed Murchison requested assistance of counsel at his initial appearance on August 15, 2003, but was not represented by counsel at the September 19, 2003 preliminary hearing, because he had not submitted documents showing indigency. Nevertheless, Murchison objected to a continuance and proceeded to represent himself at that hearing. As the trial court indicated, a good argument could be made Murchison waived his right to counsel at the September 19, 2003 preliminary hearing. However, we do not have to make that determination to resolve the issue before us, because Murchison was afforded a second preliminary hearing at which he was represented by court-appointed counsel. Murchison did not object to the second preliminary hearing, which was held on October 30, 2003, and he informed the court he was ready to proceed. After the hearing, the court found probable cause to bind Murchison over for trial and asked if Murchison wanted a second arraignment. After discussing the matter with his attorney, Murchison indicated, through his attorney, that he was ready to proceed to a jury trial on the charges. Under these circumstances, we conclude that Murchison waived the issue of whether he was denied effective assistance of counsel at the September 19, 2003 preliminary hearing. Murchison received a preliminary hearing at which he was represented by counsel on October 30, 2003, and he thereafter continued to be represented by counsel at all stages of the prosecution against him.

[¶11] A defendant cannot sit silently and acquiesce in criminal procedures, raising no objection, and then assert on appeal that he was denied constitutional rights. See State v. Antoine, 1997 ND 100, ¶ 8, 564 N.W.2d 637 (defendant could not by his actions acquiesce in his attorney's decision that he not testify and then later argue that he was denied his constitutional right to testify on his own behalf); State v. Waters, 542 N.W.2d 742, 745 (N.D. 1996) (by neglecting to move for a continuance in a timely manner the defendant waived any claim he was denied his constitutional right to counsel of choice); State v. Pitman, 427 N.W.2d 337, 343 (N.D. 1988) (when defendant, who was represented by counsel, waived his right to trial he was required to do more than simply request that the state prove he validly waived a trial). We hold Murchison waived his right to assert he was denied court-appointed counsel at the September 19, 2003 preliminary hearing.

[¶12] Murchison also asserts that he was deprived of a fair trial, because he was denied his right to a trial judge who was impartial and unbiased. Murchison asserts the trial judge was not impartial because she previously prosecuted Murchison for a prior criminal offense. He also argues the trial judge showed bias by not allowing the prosecutor to make a sentence recommendation and by immediately sentencing Murchison after the jury returned its verdict, without asking for a presentence investigation or inquiring whether the parties wanted such an investigation.

[¶13] The Canons under the Judicial Code of Conduct govern the disqualification of a judge for bias or prejudice:

(1) A judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned, including but not limited to instances where:

(a) the judge has a personal bias or prejudice concerning a party or a party's lawyer, or personal knowledge of disputed evidentiary facts concerning the proceedings.

N.D. Code Jud. Conduct Canon 3(E)(1)(a). When making recusal decisions, the judge must determine whether a reasonable person could, on the basis of all the facts, reasonably question the judge's impartiality. *Farm Credit Bank of St. Paul v. Brakke*, 512 N.W.2d 718, 721 (N.D. 1994). Recusal is not required in response to spurious or vague charges of partiality. *Id.* The inquiry here is whether a reasonable person could, on the basis of the objective facts, reasonably question the judge's impartiality. See *Sargent County Bank v. Wentworth*, 500 N.W.2d 862, 878 (N.D. 1993).

[¶14] Regarding the issue of judicial prejudice and bias, the trial judge, in her October 29, 2003 order denying the defendant's motion to dismiss, stated:

The defense also suggests I should recuse because I may have prosecuted the defendant. Although I don't remember any details, I believe it is possible I prosecuted the defendant. I haven't been a prosecutor for more than 16 years, and my prior involvement in a case entirely unrelated to the one now pending is not a cause for recusal. Simply put, I have no bias or prejudice against the defendant.

The defendant has merely made a vague assertion the trial judge may have prosecuted him years ago on a prior offense. He has not submitted any evidence to support his claim. The trial judge states she has no recollection of such a prosecution and that she harbors no bias or prejudice against the defendant. Without more, we conclude the defendant's claim of bias and prejudice by the trial court against

him is insufficient for a reasonable person to question the trial judge's impartiality in this case.

[¶15] The trial judge is ordinarily allowed the widest range of discretion in fixing a criminal sentence. *State v. Bell*, 540 N.W.2d 599, 601 (N.D. 1995). Our review of the sentence is generally confined to whether the court acted within the statutory sentencing limits. *State v. Faleide*, 2002 ND 152, ¶ 4, 652 N.W.2d 312. We may also vacate a trial judge's sentencing decision if the judge substantially relied on an impermissible factor in determining the severity of the sentence. *Bell*, 540 N.W.2d at 601.

[¶16] After the jury returned its verdict, the trial judge indicated she would proceed to sentencing. The court heard from both the prosecuting attorney and Murchison's counsel. The court then asked Murchison if he wanted to say anything before sentence was imposed. Murchison indicated that he did not. Murchison made no objection to the court's sentencing procedure and did not request a presentence investigation. The sentence was within the statutory limits and there is no allegation the court relied upon an impermissible factor in determining the severity of the sentence. Under these circumstances, we conclude Murchison failed to demonstrate the court committed error in conducting the sentencing proceedings and failed to demonstrate prejudice or bias by the judge in imposing the sentence.

IV

[¶17] We hold Murchison waived his right to assert he was denied a fair trial by being denied representation by court-appointed counsel at the September 19, 2003 preliminary hearing. We further hold Murchison failed to demonstrate he was denied a fair trial because the trial judge was prejudiced or biased against him. We, therefore, affirm the judgment of conviction.

[¶18] Mary Muehlen Maring
William A. Neumann
Carol Ronning Kapsner
Bruce E. Bohlman, D.J.
Gerald W. VandeWalle, C.J.

[¶19] The Honorable Bruce E. Bohlman, D.J., sitting in place of Sandstrom, J., disqualified.