

Supreme Court of North Dakota

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MEMO

To: The Honorable Mary Muehlen Maring
Chair, Joint Procedure Committee
From: Penny Miller
Date: August 21, 2013
Re: Revisions to Appellate Rules

A couple years ago, my office started working on revisions to the Rules of Appellate procedure to incorporate Administrative Order 14. After Odyssey filing started, we worked to revise the rules to be consistent with e-filing in the district courts. There are a few other tweaks this office believes are necessary, i.e. Rule 24. The Court requested I forward these rules to your committee for your review. Below is a summary of the proposed amendments and issues that we believe need resolution.

Additionally, the Court has requested amendments to have the notice of appeal, along with a specification of issues, to be filed in the Supreme Court.

I am happy to discuss the changes with the Committee or assist the committee with the review of these rules.

Rule 2.1 and 2.2

Rules 2.1 and 2.2 were amended to provide for filing of the notice of appeal in the Supreme Court rather than the district court. We note that under Rule 2.1(a), an appeal “may be taken by filing . . .” but Rule 2.2(a) says “must be taken by filing . . . and Rule 4(a) and (b) say must and may. We question if these should be consistent.

Rule 3

Rule 3 was amended to provide for filing of the notice of appeal in the Supreme Court rather than the district court, and for the Supreme Court to serve notice of filing the notice of appeal. Subdivision (e) was amended to conform to electronic filing.

Rule 4

Rule 4 was amended to provide for filing of the notice of appeal in the Supreme Court rather than the district court. We retained the necessity to move the district court for an extension of time to file the notice of appeal, because our office felt that the Supreme Court would not have jurisdiction to consider that motion.

With regard to amendments to Rule 4(a)(3)(A)(iv), we added these after a case a couple years ago that fell into a gap in the rule. Under Civ.R. 59, a motion filed six months after a judgment could toll the time to appeal on the grounds of newly discovered evidence.

Under Civ.R. 60 a motion filed up to one year or more (“reasonable time”) after the judgment could toll the time to appeal. So, it would be possible for a party to be out of time to file a notice of appeal under the regular rules, but toll the time to appeal the judgment by filing one of these motions. This is just an area the Committee may want to look at.

Rule 10

Rule 10 was amended to conform the rule to electronic filing. We were not sure the best way to amend this rule in light of the fact that we get electronic, paper, and physical record items as well as a separate transcript. Currently, this Court receives a certification of the items that are available as electronic documents in Odyssey. We try to be sure that the certification notes any documents or physical items that are forwarded by mail or retained at the district court. How to incorporate those variables into the rule may take additional amendments. The Committee may want to examine this rule in more detail.

Rule 10(b)(1) was amended to eliminate filing paper copies with the Supreme Court.

Rule 10(b)(1)(E), and 10(b)(4) were amended to require the order for transcript to be filed in the Supreme Court. The Supreme Court clerk would then transmit the order to the district court clerk. That clerk would then transmit it to the appropriate person to prepare the transcript. It would not be possible for the Supreme Court clerk to transmit the order to the appropriate person to prepare the transcript, and in many instances, we do not know who was recording or reporting the hearing or trial. However, we did leave the time period in 10(b)(4) to file the transcript as 50 days from the filing of the order for transcript with the Supreme Court. Increasing that time may account for any delay due to this change.

Rule 10(c) was amended to have the transcript filed in Odyssey when it is filed with the Supreme Court. It was also amended to clarify the transcript is due promptly for expedited appeals.

Rule 11

Rule 11 was amended to conform the rule to electronic filing. The Committee also may want to examine this rule in more detail. The rule needs to require that there is a numbered list of documents which reasonably identifies the documents, i.e. register of actions, docket sheet, or case summary tab in Odyssey. However, the actual documents do not need to be numbered - except if not scannable. If not, they do need to have the docket number on them to be identifiable.

Rule 11(a)(3) was added to clarify the record is due promptly in expedited appeals.

Retention of the record was eliminated as unnecessary. Previously, the court reporter or recorder may have needed the record to prepare the transcript. However, the electronic record is now available to both the Supreme Court and the court reporter or recorder at the same time.

Rule 11(h) (now 11(c)) was amended to put the burden of filing the record on the appellant. However, much of the old rule was eliminated. Presently, and even prior to electronic records, this office tracks when records need to be filed. We send reminders to the district court if they are overdue and ensure they are filed. Counsel is never involved in that process.

Rule 12

Rule 12 was amended to conform the rule to filing the notice of appeal in the Supreme Court. Rule 12(a) was amended to require payment of the filing fee before the Supreme Court will file and docket the appeal. Rule 12(c) was added to address situations where a petition to waive the filing fee is filed to allow a file to be provisionally opened absent the fee.

Rule 21

Rule 21 was amended to make it applicable to all writs and to conform it to electronic filing.

Rule 24

Rule 24 was amended to change the title from a brief to a statement to be consistent with the language of the rule.

Rule 25

Rule 25 was amended to incorporate electronic filing. Much of Administrative Order 14 was incorporated into Rule 25. However, some of the language could be consolidated or changed based on e-filing. We would leave it up to the Committee to address those issues.

In Administrative Order 14, payment for appendices filed with motions was unclear. In AO 14(C)(4)(1)(a), it states anything more than 20 pages for a motion would have a surcharge, including appendices. But, in AO 14(C)(4)(1)(c), it states an appendix more than 100 pages would have a surcharge - whether filed with a brief, motion, etc. Therefore, we changed it to charge \$0.50 for motions over 20 pages in length, regardless of whether it is part of an appendix or not.

Rule 25, 28, 29, 30, 32, and 40

Rules 25, 28, 29, 30, 32, and 40 were amended to incorporate electronic filing.

cc: Mike Hagburg