

MINUTES OF MEETING

Joint Procedure Committee

January 26-27, 1995

TABLE OF CONTENTS

Preliminary Matters	2
Approval of Minutes	2
Rule 2.2, N.D.R.O.C.-Facsimile Transmission	2
Rules 3, 5, 7, N.D.R.Crim.P	3
Rules 11 and 43, N.D.R.Crim.P.-Absentee Plea of Guilty by Misdemeanor Defendant	5
Explanatory Notes to Rules 25, 28 and 30, N.D.R.App.P.	6
Rule 4, N.D.R.Civ.P.-Persons Subject to Jurisdiction-Process-Service	7
Rule 11, N.D.R.Civ.P.-Signing of Pleadings, Motions and Other Papers; Sanctions	8
Rule 16, N.D.R.Civ.P.-Pretrial Conferences; Scheduling, Management	10
Rule 26, N.D.R.Civ.P.-General Provisions Concerning Discovery	10
Rule 28, N.D.R.Civ.P.-Persons Before Whom Deposition May be Taken	12
Rule 29, N.D.R.Civ.P.-Stipulations Regarding Discovery Procedure	12
Rule 30, N.D.R.Civ.P.-Depositions Upon Oral Examination	14

CALL TO ORDER

The meeting was called to order at approximately 9:00 a.m., January 26, 1995, by Justice Beryl J. Levine, Chairperson.

ATTENDANCE

Present:

Justice Beryl J. Levine
Honorable Bruce E. Bohlman
Honorable Gail Hagerty
Honorable Ronald L. Hilden
Honorable Maurice D. Hunke
Honorable Lawrence A. Leclerc
Honorable James A. Wright
Ms. Patricia R. Ellingson (1/26/95 a.m. only)
Mr. Robert C. Heinley
Mr. Michael R. Hoffman
Mr. John C. Kapsner
Professor Larry Kraft
Mr. Ronald H. McLean (1/26/95 only)
Ms. Sherry Mills Moore

Absent:

Honorable Wallace D. Berning
Honorable James H. O'Keefe
Honorable Kirk Smith
Mr. James L. Lamb
Mr. James Odegard
Ms. Cathy Howe Schmitz

Staff:

Mr. Gerhard Raedeke

PRELIMINARY MATTERS

The Committee was informed of upcoming meeting dates: April 27-28, 1995, at the Bismarck Radisson, and September 28-29, 1995, at the Kelly Inn in Bismarck.

Committee membership was reviewed. The memberships of Judge Bohlman, Pat Ellingson, Judge Hagerty, Judge Wright, and John Kapsner have been renewed for another three-year term. Sherry Mills Moore, the newest member of the Committee, was welcomed.

APPROVAL OF MINUTES

Judge Hagerty MOVED that the minutes of the Joint Procedure Committee meeting of September 29-30, 1994, be approved as submitted. The Motion was seconded by Ms. Ellingson. Motion CARRIED.

RULE 2.2, NDROC-FACSIMILE TRANSMISSION (PAGES 27-28 OF THE AGENDA MATERIAL)

Staff outlined the substantive changes the Supreme Court made to the Rules proposed by the Joint Procedure Committee. Committee members criticized Rule 2.2, NDROC, as adopted. Justice Levine instructed that a letter be sent to staff if there is a specific problem that the Supreme Court has not already considered.

On page 27b, Mr. McLean MOVED to change the word "court" to the phrase "clerk of court" because documents are initially received by the "clerk of court" rather than the "court." Mr. Kapsner seconded. Motion CARRIED.

Committee members noted that Rule 5(d), NDRCivP, already requires papers be filed with the clerk, rather than the court. Other Committee members said that judges will receive facsimile

transmissions on their machine if the rule is not corrected. It was also noted that in other rules the Committee

-3-

has been changing the language from "court" to "clerk of court" to be more precise and to avoid confusion.

RULES 3, 5, 7, N.D.R.CRIM.P. (PAGES 28-40 OF THE AGENDA MATERIAL)

The Committee considered the proposed amendment to Rule 3, NDRCrimP, on page 31 and the proposed amendment to Rule 7, NDRCrimP, on page 33. Staff explained that, as a result of court unification, questions have arisen as to whether a felony is to be initiated by complaint or information. The reason for the confusion is that Rule 7 requires. felony prosecutions in district court to be by indictment or information. The rules do not specifically provide that the initial charging document for all criminal offenses is the complaint. The proposed amendment is intended to maintain the status quo. Felony prosecutions are to be initiated by complaint. After the preliminary examination, felonies are to proceed upon information.

Other Committee members suggested that felonies should be initiated by information. There is no need for two documents as long as a preliminary examination is still used to challenge the probable cause finding. Committee members suggested amending Rule 5, NDRCrimP, on page 40, lines 8-12 to provide as follows:

"If probable cause exists to believe that the arrested person has committed a criminal offense a complaint or information must be filed forthwith in the county where the offense was allegedly committed."

Other Committee members questioned whether Rule 9, NDRCrimP, would also have to be amended. Committee members were concerned that under Rule 9, you might be able to go to the clerk for a warrant of arrest without a probable cause determination by a judge. Other Committee members said that Rule 9 requires a probable cause finding by the court by the reference to Rule 4(a), NDRCrimP.

Committee members questioned whether providing that the charging document for all criminal offenses is the complaint creates a statute of limitations issue. If the complaint is the initial charging document, a prosecutor would not be able to file an information without a complaint to beat the statute of limitations.

Some Committee members thought that if there is only going to be one document, the document should be the complaint and not the information. Other Committee members commented that the constitution requires all crimes to be prosecuted by information. Using an information would be more consistent with the constitution.

Others argued that both the complaint and the information should be used. There is a difference between the information and the complaint. Requiring a second paper is not that big a deal. The information contains a list of witnesses and the prosecution does not have to sign a complaint. An information is also different than a complaint, because the information is filed after the judge has an opportunity to hear from both sides.

Committee members argued that Rule 3 and Rule 7 should be amended as proposed. The proposals are consistent with the Committee's original intent. If the rules are not amended, there will not be uniformity in practice among the districts. Some prosecutors have started using an information to initiate a felony prosecution.

Judge Hagerty MOVED to adopt the proposed amendment to Rule 3 on page 31, except that the phrase "charging document" should be changed to the phrase "initial charging document" on line 5. Mr. Hoffman seconded. The amendment is meant to continue practice as it was before court unification except that the complaint will be filed in district court.

Judge Hagerty amended her motion to include the changes to Rule 7 on page 33. Mr. Hoffman seconded. Motion CARRIED. Judge Hagerty MOVED to adopt the proposed explanatory note to Rule 3 on page 32 and explanatory note to Rule 7 on page 36. Mr. Hoffman seconded. Motion CARRIED.

Staff was instructed to review North Dakota's rules of criminal procedure, and the pertinent statutes, to determine what would be involved to require only one document, i.e., an information.

Next, staff explained that questions have arisen as to whether a pro se defendant may waive the preliminary examination after the initial appearance. The Committee considered whether the explanatory note should be amended on page 45 to clarify that a felony defendant may waive the preliminary examination at a subsequent appearance.

Committee members questioned what "subsequent appearance" means. Members suggested that "subsequent appearance" implies something more than 3 to 4 minutes after the initial appearance. Committee members commented that the explanatory note may create confusion. Committee members thought that the rule was already clear. The rule only addresses a waiver of the right to a preliminary examination and pleas at the initial appearance. Mr. Kapsner MOVED to reject the proposed explanatory note. Judge Leclerc seconded. Motion CARRIED.

Committee members criticized the explanatory note. The explanatory note is incomplete. It is unclear as to which

portions of the rule follow the federal rule and how the rule differs from the federal rule.

The Committee discussed whether the explanatory note should contain a discussion comparing North Dakota's rule to the federal rule. The problem is that given the number of amendments, the explanatory notes become lengthy by citing each difference with the federal rules. The explanatory notes are often misleading. In some instances, the explanatory notes will cite differences with the federal rule in great detail while other differences are not cited.

Committee members also questioned the value of explaining how North Dakota's rules differ from the federal rules. The problem is that by discussing the differences with the federal rule in the explanatory note, every user of the rule ends up reading a lengthy explanatory note to ensure that nothing is missed. If a question as to the meaning of North Dakota's rule, or a question as to the differences with the federal rule arises, the researcher can refer to the federal commentaries. A lengthy dissertation is not needed in the explanatory note to North Dakota's rules.

RULES 11 AND 43, N.D.R.CRIM.P.-ABSENTEE PLEA OF GUILTY BY MISDEMEANOR DEFENDANT (PAGES 47-79 OF THE AGENDA MATERIAL)

The Committee reviewed the amendment to Rule 11, NDRCrimP, that was approved by the Committee at the last meeting. The Committee considered whether to adopt the proposed explanatory note to Rule 11 on page 60.

Some Committee members questioned whether judges should have discretion to accept a written petition to enter a guilty plea. Some judges refuse to accept guilty pleas that are not made in person. Other Committee members said that the court has to have discretion whether to accept the guilty plea to ensure that there is a factual basis for the plea and that the plea is made voluntarily, knowingly and intelligently. Judge Leclerc MOVED to adopt the proposed explanatory note to Rule 11(g) on page 60. Judge Wright seconded. Motion CARRIED.

The Committee reviewed Rule 43, NDRCrimP, on page 63. Judge Leclerc MOVED to adopt the explanatory note to Rule 43 on page 67. Judge Bohlman seconded. Motion CARRIED. The Committee questioned whether a waiver of constitutional rights must be made "intelligently" or "understandingly." The Committee was concerned about the terminology. The Committee noted that the United States Supreme Court uses the words "understandingly" and "intelligently" interchangeably.

The Committee considered three alternative proposed forms on pages 69 through 79 of the material. Staff explained that the purpose of adopting one of the forms would be to ensure

that an adequate record is created. The form prepared by the North Dakota Legal Counsel for Indigents Commission on page 69 is a general waiver of appearance form. Committee members

noted that the form does not establish a factual basis for a plea. The form gives an attorney blanket authority.

Committee members thought that a form should be adopted. Otherwise, there is not uniformity of practice and the court has to determine whether each form establishes the required record. Other Committee members argued that the Committee should not be in the form business. Attorneys should be allowed to tailor the form to the facts of the case. Judge members said they have to reject many forms that are not adequate.

Judge Hunke MOVED to adopt the form on page 76 that is patterned after the form found in Appendix B to Rule 15, Minn.R.Crim.P. Judge Wright seconded. Motion CARRIED. The Committee adopted the form for illustrative purposes, and use of the form is not mandatory.

EXPLANATORY NOTES TO RULES 25, 28 AND 30, N.D.R.APP.P. (PAGES 80-100 OF THE AGENDA MATERIAL)

The Committee considered the explanatory note to Rule 25, NDRAppP, on pages 82 through 83. The purpose of the additional note is to indicate that proof of service does not have to be by affidavit. Proof of service may be made by certificate of an attorney as provided in Rule 5(f), NDRCivP.

Judge Leclerc MOVED to adopt the explanatory note to Rule 25. Ms. Ellingson seconded. Motion CARRIED.

The Committee considered the proposed explanatory note to Rule 28, NDRAppP, on pages 89-91. Committee members approved citing the dates when Rule 28 was amended in abbreviated form. Lines 188 through 192 were added at the request of the Committee at the previous meeting. The Committee did not think examples should be in the rule. Judge Leclerc MOVED to adopt the explanatory note as proposed. Professor Kraft seconded. Motion CARRIED.

The Committee considered the proposed explanatory note to Rule 30, NDRAppP, on pages 98 through 100. Committee members suggested that on line 178 the phrase "their own" should be deleted and substituted with the word "an," and that the word "not" on line 179 should be substituted with the word "no." Committee members also suggested that the word "still" be eliminated on line 180.

The Committee questioned whether the explanatory note should indicate that sanctions may be awarded under Rule 13, NDRAppP. Other Committee members stated that it is important to

emphasize that the appendices are not to contain duplicate material. The Committee stated that by citing Rule 13 in explanatory note to Rule 30, the Committee did not intend that Rule 13 is inapplicable to rules that do not contain a citation to Rule 13 in their explanatory note.

Committee members expressed concern that the Supreme Court may reject the proposed amendment to Rule 30. Committee members again emphasized the importance of the amendment to Rule 30. The current rule is not workable because the appellee does not know what should be included in the appendix at the time the designation for inclusion in the appendix is required. Having a single appendix is unfairly advantageous to the appellant.

The Committee noted that the explanatory note lectures and repeats what's in the rule contrary to the Committee's usual intent when drafting explanatory notes. Committee members stated that an exception should be made in this instance to emphasize that there should not be duplication and that parties are encouraged to agree on the contents of a single appendix.

Justice Levine expressed concern that allowing two appendices will cause space problems and create more filing for the clerk of the supreme court.

Mr. Hoffman MOVED to adopt the proposed explanatory note to Rule 30. Motion CARRIED. The Committee noted that most of the explanatory note was no longer accurate after the proposed amendment, and that citing differences with the federal rule is not helpful.

RULE 4, N.D.R.CIV.P.-PERSONS SUBJECT TO JURISDICTION-PROCESS-SERVICE
(PAGES 101-126 OF THE AGENDA MATERIAL)

The Committee reviewed the changes made by the 1993 amendment to Rule 4, Fed.R.Civ.P. The Committee reviewed the proposed amendment on pages 117 through 119. Committee members thought that we should define in our rules how service may be affected in a foreign country, rather than just providing that service may be made as provided in response to a letter rogatory. It should be made as easy as possible for litigants to effect service in a foreign country. Committee members also noted that federal guidance in this area would be particularly helpful as the procedures outlined in the Hague Convention must be followed.

Judge Hunke MOVED to adopt the proposed amendment to Rule 4. Judge Leclerc seconded. Motion CARRIED.

The Committee reviewed the explanatory note to Rule 4 on pages 121 through 126. The Committee noted that the explanatory note cites each and every amendment to Rule 4, and then restates the substance of each amendment. The problem is

that the explanatory notes are getting lengthy. Committee members suggested simply citing when amendments are made in abbreviated form. An extended discussion of what is in each amendment is not necessary. Judge Hunke MOVED to adopt the explanatory note as proposed, but with an additional reference to the date that each amendment to Rule 4 was made. Judge Leclerc seconded. Motion CARRIED.

The meeting recessed for lunch at approximately 12:00 noon.

**RULE 11, N.D.R.CIV.P. - SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS;
SANCTIONS (PAGES 127-139 OF THE AGENDA MATERIAL)**

Staff explained that at the last meeting, the Committee reviewed Rule 11 subdivision by subdivision. The Committee had suggested adding a requirement to subdivision (a) that attorneys include their State Bar Board Identification Number when signing papers. Committee members questioned which number is required to be included with an attorney's signature. The Committee noted that the correct number is the identification number that appears in the directory put out by the State Bar Board, and not the license number that appears on each attorney's license card.

Staff explained that in subdivision (b), the amendment revises the certification being made by presenting to the court. Certification is expanded to cover the advocacy of documents previously filed. Currently, the certification does not cover the advocacy of a document already before the court. This amendment would make a litigant subject to potential sanctions for insisting upon a position after it is no longer tenable. The amendment does not require a litigant to amend the pleadings. The amendment only requires that the litigant not continue to advocate the original allegation.

The amendments to Rule 11 are intended to allow greater tolerance of initial pleadings so that plaintiff litigation is not chilled. Staff explained that the amendment on lines 46 through 48 changes the certification being made. The proponent of a document will initially have a lesser burden. Currently, the duty is to make reasonable inquiry. The amendment provides that the duty is to make reasonable inquiry under the circumstances.

In paragraph 2 of subdivision (b), the certification as to one's legal contentions is changed. Currently, legal contentions are required to be made in good faith. Under the amendment, legal contentions are required to be nonfrivolous.

The Committee noted that Section 28-26-01, N.D.C.C., requires that legal contentions be made in good faith. Proposed Rule 11 requires legal contentions to be nonfrivolous which is a more stringent standard. A nonfrivolous standard eliminates

pure heart justifications. The more stringent standard in Rule 11 will govern.

Staff explained that under paragraphs 3 and 4 of subdivision (b), allegations may be made if they are likely to have evidentiary support. Denials may be made if they are reasonably based on a lack of information or belief. At the last meeting, the Committee rejected the federal language that requires allegations and denials to be specifically identified if there is not immediate evidentiary support for the allegation or denial. Currently allegations or denials are required to be well grounded in fact. Defendants have a lesser burden because they are allowed to deny based

on a lack of information or belief under Rule 8 of the Rules of Civil Procedure. The proposal equalizes pleading requirements for plaintiffs and defendants.

The Committee questioned whether under amended Rule 11 general denials are still permitted. Other Committee members commented that general denials are still permitted.

Committee members commented that if a party is not required to amend the pleadings after learning that the initial denial or allegation is incorrect, the other party will have to make a motion for partial summary judgment. Other Committee members noted that the safe harbor provision will allow attorneys to withdraw allegations or denials that are no longer reasonable under the circumstances. The safe harbor provision provides that a motion for sanctions must not be filed until 21 days after service of the motion.

Committee members questioned whether Rule 11 sanctions will create satellite litigation for attorney's fees. Other Committee members commented that the safe harbor provision will mean that fewer motions are filed with the court. Under the proposal, there will also be fewer motions for sanctions because the proposal gives the court discretion whether to impose sanctions. Currently, Rule 11 requires the court to impose sanctions for violations.

Committee members commented that the proposal should be adopted. Otherwise North Dakota will be stuck with a rule that has proved not to work in the federal system. In federal courts, Rule 11 is overused and sanctions are applied arbitrarily. Committee members said that Rule 11 is rarely used in North Dakota.

Mr. McLean MOVED to adopt Rule 11 as proposed in the material. Judge Leclerc seconded. Motion CARRIED.

The Committee considered the explanatory note to Rule 11 on pages 137 through 139. The Committee noted that Rule 11 should have a notation as to when amendments were made to Rule 11 in abbreviated form. In the explanatory note on line 157,

-10-

the phrase "respects following" should be changed to "following respects." Committee members agreed that the explanatory note is no longer helpful because it is discussing the 1983 federal version of Rule 11. Professor Kraft MOVED to adopt the explanatory note to Rule 11 with the changes suggested by the Committee. Judge Leclerc seconded. Motion CARRIED.

RULE 16, N.D.R.CIV.P.-PRETRIAL CONFERENCES; SCHEDULING,
MANAGEMENT(PAGES 140-161 OF THE AGENDA MATERIAL)

At the last meeting, the Committee approved an amendment to Rule 16(b) to follow the 1993 federal amendment. The amendment draws attention to the court's opportunity to manage cases and resolves any doubt about the court's power to manage cases. The Committee considered

whether the explanatory note on pages 145-147 should be adopted. The Committee noted that the explanatory note is restating the rule and is not helpful. Judge Hagerty MOVED to adopt the proposed explanatory note with the addition of a citation in abbreviated form as to when Rule 16 has been amended. Judge Bohlman seconded. Motion CARRIED.

The Committee discussed whether the citation in the source notes should be to the "Joint Procedure Committee" rather than the "Procedure Committee." Some Committee members commented that the name "Procedure Committee" is more accurate. The Joint Procedure Committee is really not a joint committee because the State Bar Association only appoints one member to the Committee. Other Committee members noted that it is still a joint committee because it is made up of half attorneys and half judges. The Committee noted that the North Dakota Rule on Procedural Rules provides the Committee with the name "Joint Procedure Committee." The Committee decided not to amend the source notes.

RULE 26, N.D.R.CIV.P.-GENERAL PROVISIONS CONCERNING DISCOVERY (PAGES 148-161 OF THE AGENDA MATERIAL)

At the last meeting, the Committee rejected a proposal to amend Rule 26 to follow the 1993 federal amendment in its entirety. However, the Committee did request that a couple of changes be considered at this meeting.

On pages 154 and 155, the Committee considered whether to amend the discovery rules to impose presumptive limits on the number of depositions and interrogatories. Amended Rule 30, F.R.Civ.P., imposes a presumptive limit of 10 depositions and also requires leave of court if the deponent has already been deposed in the case. Amended Rule 33, F.R.Civ.P., imposes a presumptive limit of 25 interrogatories. The Committee noted that Minnesota imposes a limit of 50 interrogatories.

-11-

The Committee argued that in complicated tort cases and professional liability cases more than 50 interrogatories may be needed. Interrogatories are valuable for narrowing the issues and help the system manage cases. Committee members also noted that more interrogatories are needed in domestic cases. Interrogatories are the cheapest way of getting information. If a limit on the number of interrogatories is imposed, the parties will end up taking more depositions which is more expensive.

Committee members did not think that an excessive number of interrogatories is served very often. The Committee noted that different kinds of cases require different numbers of interrogatories. The Committee also noted that North Dakota does not require the initial mandatory disclosures of amended Rule 26, F.R.Civ.P.

The Committee also felt that limiting the number of depositions to 10 would not be helpful. Committee members stated that often a defendant needs to take the plaintiff's deposition more

than once. A lot is learned after the first deposition that needs to be inquired about at a second deposition. The second deposition is often where the most important information is discovered.

By consensus, the Committee decided to reject the proposals to amend Rule 30 and Rule 33, N.D.R.Civ.P., to limit the number of depositions and interrogatories. The Committee decided against amending subdivision (b)(1) on pages 154 and 155 to allow the court to alter the limits on discovery.

The Committee considered the proposed amendment on page 156. The proposal allows experts who are expected to testify at trial to be deposed without court authorization. Currently, according to the rule, a party must get a court order to depose the other side's experts who are expected to testify at trial. The Committee noted that amended Rule 26(b)(4)(A), F.R.Civ.P., allows a party to depose any person who has been identified as an expert whose opinions may be presented at trial without the necessity of obtaining a court order.

Committee members stated that depositing an opponent's experts is important. Under the current rule, some judges prohibit depositing another party's experts who are expected to testify at trial. Allowing depositions will encourage cases to settle. Otherwise, cases will be tried for lack of information.

The Committee questioned how a person noticing a deposition can deal with an expert who is charging an unreasonable fee. The party noticing the deposition would have to bring a motion to get a court order limiting the fee to a reasonable amount. Rule 26(b)(4)(C) allows the court to order that the party seeking discovery only has to pay a reasonable fee. If the expert is charging an excessive fee, the side

-12-

hiring the expert will have to make up the difference or not use the expert.

Committee members commented that the proposed amendment would save the court time, because the parties will not need to obtain authorization to take an opposing party's expert's deposition.

Mr. Kapsner MOVED to adopt lines 58 through 68 as proposed in the material on page 156. Judge Wright seconded. Motion CARRIED.

Committee members questioned whether the language providing that the court may prohibit the deposition if it is "unnecessary, overly burdensome or unfairly oppressive," is necessary. Other Committee members argued that if this language is eliminated, parties will argue that they have an unqualified right to take the deposition of an expert who is expected to testify at trial.

The Committee reviewed proposed Rule 26(g) on page 157. To achieve consistency with proposed Rule 3.1, N.D.R.O.C., the proposal adds the requirement that an attorney's State Bar

Board identification number be included when an attorney signs discovery documents. Ms. Mills Moore MOVED to adopt subdivision (g) as proposed. Judge Hagerty seconded. Motion CARRIED.

The Committee reviewed the explanatory note to Rule 26 on pages 159 through 161. Mr. Kapsner MOVED to adopt the explanatory note. Professor Kraft seconded. Motion CARRIED. The dates on which Rule 26 has been amended should be cited in abbreviated form.

RULE 28, N.D.R.CIV.P.-PERSONS BEFORE WHOM DEPOSITIONS MAY BE TAKEN
(PAGES 162-167 OF THE AGENDA MATERIAL).

The Committee studied Rule 28, FRCivP, as amended in 1993. The amendment provides for taking of a deposition in a foreign country pursuant to a treaty or letter of request. The purpose of the amendment is to make use of the Hauge Convention and to use some more modern language "letter of request" rather than "letters rogatory."

Professor Kraft MOVED to adopt the proposed amendment to Rule 28, NDR CivP, as set forth on pages 164 through 165. Judge Bohlman seconded. Motion CARRIED. Professor Kraft MOVED to adopt the explanatory note as set forth on pages 165 through 167. Judge Wright seconded. Motion CARRIED.

RULE 29, N.D.R.CIV.P.-STIPULATIONS REGARDING DISCOVERY PROCEDURE
(PAGES 168-171 OF THE AGENDA MATERIAL)

-13-

The Committee studied Rule 29, F.R.Civ.P., as amended in 1993. The amendment allows stipulations extending the time for responding to discovery requests. The Committee noted that Rule 29, NDR CivP, requires court approval to extend the time for responding to discovery.

Committee members criticized the provision not allowing stipulations extending the time beyond the discovery deadlines set by the court. Committee members thought it was a waste of the court's time to require parties who are in agreement to obtain a court order authorizing discovery past the discovery deadline. However, the parties should not be allowed to defeat court management by stipulations that affect a motion date or trial date. Committee members commented that frequently there is a need for discovery after the discovery deadline because of things that unexpectedly arise. Judges do not want parties coming to court if the extra discovery is not going to interfere with a motion date or trial date.

Committee members suggested amending paragraph 2 to provide as follows:

"(2) Modify other procedures governing or limitations placed upon discovery unless they would interfere with any time set for hearing of a motion or for trial."

The Committee noted that the court would still have discretion to prohibit the parties from stipulating. Lines 4 and 5 provide: "Unless directed by the court, the parties may by written stipulation"

Committee members noted that the federal amendment only applies to Rules 33, 34 and 36. Other members commented that Rule 29, Minn.R.Civ.P., does not contain any limitation as to stipulations. Minnesota's rule provides as follows:

"The parties may by stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner, and when so taken may be used like other depositions, and (2) modify the procedures provided in these rules for other methods of discovery."

The consensus of the Committee was that allowing the parties to stipulate for extensions beyond the time set for discovery, but not allowing stipulations beyond a motion date or trial date was a fair compromise. Mr. Kapsner MOVED to adopt the language proposed by Judge Hagerty. Mr. Hoffman seconded. Motion CARRIED.

Staff proposed amending the explanatory note to Rule 29 on lines 20 through 24 as follows:

-14-

"The rule was amended in 1971 to track the 1970 federal amendment.

"The rule was amended, effective_____."

Staff suggested deleting lines 25 through 31. Judge Bohlman MOVED to adopt the explanatory note as recommended by staff. Judge Hagerty seconded. Motion CARRIED.

RULE 30, N.D.R.CIV.P.-DEPOSITIONS UPON ORAL EXAMINATION (PAGES 172-192 OF THE AGENDA MATERIAL)

Staff explained that a number of significant changes were made by the 1993 federal amendment to Rule 30. The proposed amendment to Rule 30, N.D.R.Civ.P., follows the amended federal rule as closely as possible.

The proposed amendment to subdivision (a) defines when a party must obtain leave of court to take a deposition. Staff explained that the proposal adds two additional times when leave of court is required. Leave of court would be required to take a deposition if the proposed deposition would result in more than 10 depositions being taken. Leave of court to take a deposition would also be required if the person to be examined has already been deposed. The Committee had already discussed whether limitations should be imposed on the number of depositions taken or the number of times the same person could be deposed when discussing Rule 26, NDRCivP. Mr.

McLean MOVED to reject the proposed amendments in subparagraphs (a) and (b) on page 179. The motion was seconded. Motion CARRIED.

The Committee reviewed paragraph (c) on lines 33 through 40 on page 179. It was noted that this is a style change because these requirements are already in the current rule on page 180 lines 58 through 71. The rule would be clearer if all the provisions regarding when leave of court must be obtained are in subdivision (a).

The Committee questioned the provision on line 25 requiring leave of court to take a deposition of a person confined in prison. Committee members pointed out that the requirement already exists in the current rule on line 20. Committee members commented that leave of the prison warden is really required. Other members commented that authorization for a deposition of a prisoner should come directly from the court rather than a subpoena issued by an attorney.

Committee members questioned whether lines 14 through 15 should be eliminated. Lines 14 and 15 provide that leave of court is not required for a plaintiff to take a deposition, if the defendant has already served a notice of taking a deposition or otherwise sought discovery. The Committee noted that those provisions have been eliminated from the federal rule. Under

-15-

the amended federal rule, depositions are not taken until after the meeting of the parties required by Rule 26(f), FRCivP. Committee members argued that lines 14 and 15 should remain in the rule.

Mr. McLean MOVED to adopt lines 22 through 26 on page 178 and lines 33 through 40 on page 179 with proposed subparagraph (c) becoming part of paragraph 2.

It was suggested that lines 14 through 15 be added as a new sentence in paragraph 2 that would provide: "The plaintiff is not required to obtain leave of court to take a deposition, if a defendant has served a notice of taking depositions or otherwise sought discovery."

The Committee instructed staff to redraft subdivision (a) consistent with the Committee's recommendations, so that the Committee can take a fresh look at the proposal.

Staff explained the proposed changes to subdivision (b) on pages 179 through 181. Lines 58 through 64 are deleted because they are covered in lines 33-36. Lines 65 through 71 are deleted because the provisions regarding certification are covered in lines 37-40. Lines 72 through 77 are deleted because the proposed amendment to Rule 32 covers the use of accelerated depositions at trial.

The proposed amendment on lines 77 through 82 would allow a deposition to be recorded by nonstenographic means without prior court approval or agreement of the parties. A deposition could be taken by sound, sound-and-visual, or stenographic means. The notice of deposition is

required to indicate how the deposition will be recorded. Lines 82 through 84 provide that any party may arrange for a transcription of a nonstenographic deposition.

The Committee discussed the proposal. Committee members were afraid that the person noticing the deposition would use a cheap tape recorder and that the tape would not be transcribable. Other Committee members argued that a poor litigant, with a just cause, needs an inexpensive way to litigate. In any event, the other side can have an additional record created by other means if concerned about the quality of the recording. Committee members also commented that there is no guarantee that the quality of a transcript from a deposition taken by stenographic means will be any better than a deposition that is recorded.

The Committee noted that Rule 32(c), FRCivP, provides that a party offering deposition testimony at trial in nonstenographic form must provide the court with a transcript. Rule 26(a)(3)(B), FRCivP, requires the party using nonstenographic deposition testimony as substantive evidence to provide the other parties with a transcript in advance of trial.

-16-

Committee members stated that the most effective means of cross-examination would be to use a tape recording. Committee members questioned whether a transcript is required under Rule 32 if a recording is used for impeachment purposes.

Committee members argued that if all you want is information, you should be able to take a discovery deposition without the expense of having to prepare a transcript. The purpose of the proposed amendment is to make it easier to get information with less expense. Committee members commented that not all depositions are taken for use at trial. In family law cases, it is valuable to be able to acquire the information. The purpose of the proposal is also to allow use of sound recordings at trial rather than reading a deposition transcript.

Committee members commented that often the transcripts prepared by stenographic means are really bad. A quality problem will exist regardless of whether the deposition is taken by sound, sound-and-visual, or stenographic means.

The meeting recessed at approximately 4:30 p.m.

JANUARY 27, 1995 - FRIDAY

Justice Levine reconvened the meeting at approximately 9:00 a.m.

The Committee continued its discussion as to whether depositions should be allowed by sound, sound-and-visual, or stenographic means as provided in the 1993 amendment to Rule 30, FRCivP. The Committee questioned whether a recorded deposition can be used at trial for impeachment purposes without a transcript. Rule 32, FRCivP, requires that the court be provided with a transcript, if a deposition is "offered" in nonstenographic form. The Committee

questioned whether impeachment evidence is "offered." Committee members suggested that language should be added to Rule 32 requiring a transcript if a nonstenographic deposition is used for any purpose at trial.

The Committee questioned whether there should be a time generator requirement as in Rule 30.1, NDRCivP. The Committee decided to review Rule 30.1 if proposed Rule 30 is approved. Committee members stated that the proposed rule is not much different than Rule 30.1, NDRCivP.

The proposed rule allows parties to obtain information without having to incur the expense of having a transcript prepared. Under Rule 26(a)(3)(B), a party does not have to provide a transcript to the other side until 30 days before trial. Ninety-five percent of cases settle without going to trial, so the preparation of a transcript may be unnecessary in many cases. If a party wants to use a deposition at trial, it is their responsibility to have a transcript prepared.

-17-

Committee members differed in their opinion as to whether transcripts prepared from recordings are reliable. If both parties have the deposition recorded, there are two official records. Currently under Rule 30.1, NDRCivP, both the tape and the transcript are the official records. Other members pointed out that if a deposition is going to be used at trial it will be to the lawyer's own advantage to use quality equipment and to produce a quality tape. In addition, experts are so expensive that the parties are not going to record a deposition by a means that is inaudible. Other Committee members suggested that there should be minimum standard requirements as to the quality of the equipment used to record a deposition. Other members commented that a judge will not allow a deposition to be used at trial if the recording is inaudible.

If the parties come in with recordings or transcripts that are different, there will be a swearing match as to which one is accurate. Committee members also noted that the witness has the opportunity to review the transcript or recording.

The Committee reviewed lines 96 through 132 on pages 181 and 182. Under the proposal, court approval is no longer required to take a deposition by audio recording. The proposal deletes lines 106 through 112 because they are covered in subdivision (e) and (f). Lines 114 through 132 are added to require a statement on the record by the officer at the beginning and end of a deposition and at the beginning of each unit of a tape.

In paragraph (4) on page 182, Committee members questioned whether subparagraphs (a) through (d) would need to be repeated every time the camera is stopped. Other Committee members commented that those provisions only need to be repeated at the beginning of each unit of a recorded tape. In any event, the parties can otherwise stipulate.

The Committee reviewed the proposed amendment to subdivision (c) on page 184 through 185. The amendment addresses whether other witnesses may attend a deposition by providing that

Rule 615, NDREv, does not apply. Under Rule 615, the court is required to order witnesses excluded upon request. If Rule 615 is inapplicable, the court can still order exclusion under Rule 26(c)(5), NDR CivP, when appropriate.

Prior to the 1993 amendment, federal courts differed as to whether Rule 615 applied to depositions. The purpose of the federal amendment is to clarify that Rule 615 does not apply to depositions.

Committee members suggested that the rule should clarify that other people cannot be present at a deposition by providing that Rule 615 does apply to depositions. By making Rule 615 applicable to depositions, it is clearer that a judge will rule that the person who is not the deponent must be

-18-

excluded. Making Rule 615 applicable to depositions will mean that it will be less likely that an attorney will get resistance from opposing counsel when asking people to leave the room.

The Committee reviewed subdivision (d)(1) on page 185. The purpose of the amendment is to diminish improper obstructive tactics by providing that the deponent may be instructed not to answer only in limited circumstances. Some Committee members argued that the list of circumstances is too narrow as to when one can instruct a witness not to answer. Other Committee members argued that the proposal will eliminate hardball tactics.

A problem often occurs in malpractice litigation when a physician who is a fact witness is being deposed. The other side will attempt to use the physician as an expert by asking questions regarding the standard of care. The physician is unrepresented. The physician will be advised not to answer any opinion questions unless paid for their opinion. If the opinion testimony is recorded, the judge will often allow it to be used because the testimony is relevant. Even though the physician was not noticed as an expert, the testimony will be allowed because the other side was present at the examination and there is not unfair surprise. It is difficult to stop during the middle of a deposition and go to the judge to get a protective order. Committee members argued that the physician should not be required to answer questions regarding the standard of care.

Committee members commented that the proposal switches the burden of going to court to the party who is not answering the question.

Some Committee members argued that a problem does not exist under the present rules. Others said that the proposed rule does not change the current rules. Many Committee members thought that there is a problem with attorneys obstructing depositions by instructing the deponent not to answer.

Committee members argued that the proposed language should be adopted so that the rule is clear. It will be easier for attorneys to take depositions if the same procedure for taking depositions exists in both state and federal court.

The Committee considered proposed subdivision (d)(2) on page 185. The proposal would give the court authority to control the duration of a deposition and to impose sanctions for frustrating the fairness of a deposition. Some Committee members thought lines 201 through 205 could be eliminated. Proposed Rules 16(b) and Rule 26(c) and (f) already allow the court to control the length of a deposition. Committee members argued that by expanding the rules, more opportunities are created for hardball tactics. The rules are the problem. Creating more detail creates more ammunition.

-19-

Other Committee members questioned whether eliminating lines 201 through 205 would raise questions as to whether the court has the power to control the length of a deposition. The user of the rule may think some substantive difference is intended if the federal rule has the provision, but North Dakota's rule does not have the provision. The comments to the federal rule indicate that the provision is intended to clarify that the court has the power. If the provisions are not adopted, the explanatory note to North Dakota's rule will need a notation explaining that a substantive difference is not intended from the federal rule. Including the provision in the rule may be easier than drafting a commentary in the explanatory note.

On lines 205 through 211, the Committee questioned whether the provision authorizing sanctions for frustrating the fairness of a deposition is needed. The Committee determined that Rule 37, NDRCivP, is concerned with a failure to make discovery; rather than for frustrating the fairness of a deposition. The sanctions in Rule 37 only cover the expense of obtaining a court order. The unfair conduct is not sanctioned. The Committee also noted that under the proposal sanctions could be imposed on a nonparty witness.

The Committee debated whether North Dakota should be following the federal rules. Members argued that the federal rules are too complicated and state practice is different. We should be our own laboratory. Other Committee members argued that the guidance of the federal drafters is helpful. The Committee has not had great success in formulating its own rules such as Rule 2.2 and Rule 3.2, NDROC. Other Committee members commented that practice is easier if the rules are as close as possible.

The Committee considered the proposed amendments to subdivision (e) on pages 186 through 187. The proposed amendment to subdivision (e) simplifies the procedure for reviewing and signing a deposition. Under the proposal, the deponent can request to review the transcripts and is given 30 days for the review. Currently, the deponent must examine and sign the transcript unless examination and signing are waived.

Committee members questioned whether the deponent would have to go to the office of the attorney noticing the deposition to review the tape. Other Committee members stated that lines 305 through 308 provide that the deponent is entitled to a copy of the recording.

The Committee questioned the reason for the amendment. The federal comments indicate that reporters frequently have difficulties obtaining signatures, and the return of depositions from deponents. Under the revision, pre-filing review by the deponent is required only if requested before the deposition is completed.

-20-

Generally, in practice, the examination and signing are waived if the deposition is taken by audio-visual means. Committee members questioned whether opposing counsel will be advising the deponent as to changes the deponent should make when reviewing the deposition. Other Committee members questioned whether an attorney would advise witnesses as to changes, because the attorney would be creating impeachment material.

Committee members noted that the court reporter is not sitting with the witness when the witness reviews the transcript under current practice. The same potential for opposing counsel to suggest changes exists under present practice.

Other Committee members commented that witnesses cannot really change the substance of their testimony. They can only note changes in substance and give a reason for the changes.

The Committee reviewed subdivision (f) on pages 187 through 189. Subdivision (f) concerns certification of the deposition by the officer recording the deposition.

Committee members questioned who is responsible for storing the transcript. Committee members noted that the officer who is responsible for storing the recording may be the attorney who noticed the deposition. Committee members discussed whether lawyers are likely to tamper with the tapes and distort what has been said. The consensus of the Committee seemed to be that tapes would not be altered.

Committee members expressed concern that attorneys will charge an excessive fee for furnishing the other side with a copy of the recording of the deposition. Some members suggested that the rule should impose a cost limit on line 82. Other Committee members stated that the court is not in the business of price-fixing. The problem is that it is not practical to go to the court over a fee dispute because it is also expensive to argue the dispute in court. Committee members said the problem is analogous to the problem with requests for production when attorneys charge excessive fees for photocopying.

Some Committee members were troubled by the built in conflict by having an attorney act as an officer at a deposition. The attorney may be the one who swears in the witness, records the

deposition, and stores the original tape. Attorneys can also use their own secretaries to transcribe the recording. Committee members were concerned about the potential for foul play.

Other Committee members said that other attorneys can protect themselves by bringing their own recorder to the deposition. If a conflict occurs, the other attorney can also make a transcript from their own recording and there will be a swearing match as to which contains the accurate version of the

-21-

deposition. Committee members stated that the worst case scenario is being visualized.

A couple of Committee members suggested adopting a separate rule for informal depositions. The rule should allow depositions to be taken without the necessity of a transcript. The concern was that Rule 30 is becoming too complicated. Other Committee members countered that the proposed rule may actually be shorter than the current Rule 30.

The Committee noted that Rule 29, NDRCrimP, allows parties to stipulate to alternative forms of discovery. The problem is that Rule 29 concerns the parties. An informal deposition is needed for nonparties when you do not want to use the deposition in court.

Other Committee members said that the proposed rule accomplishes both purposes. If the party wants to use the deposition in court, they must prepare a transcript. If they do not want to incur the expense, they may simply record the deposition and not use the deposition in court.

Committee members also noted that sometimes it is difficult with recordings to tell who is talking because not all recorders have separate tracks.

Committee members said that being able to take depositions without incurring the expense of a transcript is important. The depositions of parties are important enough that they will be transcribed. Untranscribed depositions will be used for nonparties such as family members and neighbors in child custody issues. It's important to know what they have to say even if the deposition is not used at trial. Judge Hunke MOVED to adopt Rule 30 with the deletions made during the meeting. Judge Hilden seconded.

The Committee was unsure as to the exact language covered by the motion. The Committee questioned what the language would be on line 162 through 165 on page 184. Committee members stated that Rule 615 of the North Dakota Rules of Evidence should apply to depositions. Under Rule 615, it is clear as to what the court's action will be if a motion is brought for exclusion of witnesses. Judge Hunke said that under his motion there is a period after Rule 103 and the phrase "and 615" is deleted on line 165.

Some Committee members questioned whether Rule 615 applies to depositions because at depositions one does not yet know who the witnesses will be at trial. The federal drafters

excluded Rule 615 to avoid confusion as to whether Rule 615 applied to depositions. The consensus of the Committee was that in North Dakota Rule 615 should apply to depositions.

-22-

Committee members were in disagreement as to whether lines 201 through 205 should remain in the rule on page 185.

Judge Leclerc made a substitute motion to table the matter to the next meeting so that there could be further consideration. Rule 30 should be the first item on the next agenda. Mr. Kapsner seconded. Motion CARRIED.

The Committee requested that Rules 30.1 and 32, NDRCivP, also be put on the agenda with Rule 30 for consideration at the next meeting. The Committee asked to consider the family law proposals before the remaining 1993 federal amendments.

The meeting adjourned at approximately 12:00 noon.