AGENDA

JOINT PROCEDURE COMMITTEE

April 26-27, 2012
Fargo, N.D.

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JUSTICES OF THE NORTH DAKOTA
SUPREME COURT

Chief Justice
Gerald W. VandeWalle

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

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Bruce D. Quick
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Staff Attorney
Michael Hagburg

MINUTES OF MEETING

Joint Procedure Committee
January 26-27, 2012

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CALL TO ORDER

The meeting was called to order at 9:00 p.m., on September 30, 2011, by the Chair, Justice Mary Muehlen Maring.

ATTENDANCE

Present:
Justice Mary Muehlen Maring, Chair
Honorable John Greenwood
Honorable Debbie Kleven
Honorable Steven L. Marquart
Honorable Steven McCullough
Honorable William McLees
Honorable Thomas E. Merrick
Honorable David E. Reich
Mr. Larry L. Boschee
Mr. Daniel Dunn
Mr. Robert Hoy
Mr. Richard H. McGee
Assistant Dean Jeanne L. McLean
Mr. Lonnie Olson
Ms. Joanne Hager Ottmar
Mr. Bruce D. Quick (Friday only)
Mr. Kent Reierson

Absent:
Honorable Laurie Fontaine
Honorable William A. Herauf
Mr. Bradley Beehler

Staff:
Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

The Chair welcomed new members, Judge Merrick and Mr. Olson. The Chair announced that this would be the last meeting for Asst. Dean Jeanne McLean.

APPROVAL OF MINUTES

Judge Reich MOVED to approve the minutes. Ms. McLean seconded. A member pointed out a typographical error on page 8, which was corrected with unanimous consent

of the Committee. The motion to approve the minutes CARRIED unanimously.

RULE 5.1, N.D.R.Ct., INTERSTATE DEPOSITIONS AND DISCOVERY (PAGES 59-87 OF THE AGENDA MATERIAL)

Staff explained that the Committee had discussed the new Uniform Interstate Deposition and Discovery Act at the April 2011 meeting and recommended that it be adopted as a new rule of court. After further discussion at the September 2011 meeting, the Committee recommended that cross-references to the proposed new rule be added to N.D.R.Civ.P. 45, N.D.R.Crim.P. 17 and N.D.R.Juv.P. 13. Staff presented the proposed amendments for consideration and informed the Committee that Mr. Eric Fish of the Uniform Laws Commission would be available by teleconference to answer any questions the Committee still had about the Act.

The Chair asked whether any members had questions they wanted to pose to Mr. Fish about the uniform act. The Chair suggested that the Committee hold a preliminary discussion to figure out what the Committee might wish to learn from Mr. Fish.

A member said that Mr. Fish had indicated in his written comments on the issues raised at the September meeting that the act was designed to cover civil, not criminal, practice. The member noted that the draft amendments applied the act to the civil, criminal and juvenile rules. The member said the Committee should discuss whether the act should apply to the different rules.

Staff said that research had been presented at the September meeting indicating that about half of the states that had adopted the act had adopted it specifically as part of their civil rules.

A member asked how a subpoena issued by the clerk under the act would be served. A member replied that it would be served like a subpoena currently is under the rules. The member said the proposed rule changed two things: first, instead of filing a deposition notice to get a subpoena, the party would file a subpoena from another state; second, the rule says this act of filing the out-of-state subpoena is not an appearance in North Dakota. These are the main changes from the current practice.

A member said that we have a provision in our civil rule dealing with subpoenas in out-of-state cases. The member said that the proposal would remove this mechanism from our civil rule and replace it with the Uniform Act in the Rules of Court. The member said this seemed to be a dubious strategy if the rule is intended only to be used in civil actions. The member said the act should be made part of the civil rules if it is going to be used only in

civil actions.

Staff informed the Committee that the Court had included some language from the uniform act when it adopted amendments to Rule 45. Staff said the existing language in Rule 45 was specifically drafted by the Committee and was not modeled on another state's rule or a uniform law.

A member asked whether anyone has claimed that the existing Rule 45 mechanism for issuing subpoenas in out-of-state cases does not work. A member replied that the Rule 45 mechanism works just fine. The member said that the reason to adopt the uniform rule would be to have uniformity with other states, like the Uniform Commercial Code.

A member said under the current rule coming to North Dakota to get a subpoena would constitute an appearance and a local lawyer would have to be enlisted to help in the process, which would be an added cost. A North Dakota lawyer going to another state would face the same costs, except in states where the uniform act is in force.

The Chair asked if there is no appearance, who would have jurisdiction if there was an ethical violation in connection with a subpoena issued under the uniform act? A member said that the home state where the case was pending would seem to have jurisdiction. The member said if an attorney needed to take a step such as filing a motion related to the subpoena, that would constitute an appearance in this state and local counsel would need to be involved.

A member asked whether there was a consensus that the Committee wanted to go forward with a rule based on the uniform act. The Chair reminded the Committee that it had approved the rule in April 2011.

The Chair asked what is currently done in criminal matters. A member said it was rare to do a deposition in a criminal case. A member said one of the advantages of making the proposed rule applicable to civil, criminal and juvenile cases was that all matters would be treated the same and there would be no need to wonder about the correct procedure in the rare criminal or juvenile deposition.

A member said that if the Committee decided that the proposal should be adopted only for civil cases, then the only significant change from current procedure would be that the request for a subpoena would not be an appearance. The member said that it would not be worthwhile adopting the proposal only to make this change, especially given the questions about ethics jurisdiction if there is no appearance.

Mr. Fish was contacted by telephone to answer the Committee's questions.

The Chair asked Mr. Fish to explain why the act was not intended for criminal actions. Mr. Fish said that the group that developed the uniform act was instructed to develop a procedure for civil cases so the group did not discuss whether the act should be applied to criminal actions. He said there was nothing in the act the was not compatible with a criminal action, but the act was not designed for criminal actions.

The Chair asked about language in the act that said requesting subpoenas under the act was not an appearance in the state. The Chair asked which state would have jurisdiction to disciple a lawyer who behaved unethically in connection with a subpoena issued under the act. Mr. Fish said the intent was that the state where the action was taking place, and where the attorney was a member of the bar, would have jurisdiction over any inquiry into unethical conduct related to a subpoena obtained under the act.

The Chair asked whether it would be considered an appearance if the out-of-state attorney attempted to enforce a subpoena issued in North Dakota under the uniform act. Mr. Fish said it would be considered an appearance if the attorney took action directly related to service of the subpoena in North Dakota such as responding to an attempt to modify or quash.

The Chair confirmed the attorney would then have to be admitted pro hac vice or find local counsel if the attorney made an appearance in connection with the uniform act subpoena.

A member asked whether, if the request for a subpoena is not an appearance, conducting an examination under the subpoena would also not be an appearance. Mr. Fish said this would not be an appearance; an appearance would not take place without another step to enforce or modify the subpoena.

A member asked whether a complaint based on unethical conduct at the subpoena deposition would then have to be brought in the attorney's home state. Mr. Fish said it would have to be brought in the home state since taking a deposition under the subpoena was not an appearance.

The Chair asked whether the purpose of the act was to create uniformity across the states. Mr. Fish said the purpose of the act was to allow subpoenas of out-of-state witnesses with a minimal amount of judicial intervention. He said there was a hodgepodge of laws across the country and uncertainty among attorneys about what procedure should be followed in a given state. He said that uniformity was an important purpose of the act and also to

create a familiar procedure that was parallel to that of the federal courts.

Mr. Fish said close to 30 states have currently adopted the act. He said many states and courts saw the benefit of having a simple and uniform procedure across the country. He said 22 states had adopted the act and that several others were considering it, including South Dakota and Iowa.

The chair asked whether the states that had adopted the uniform act had been making significant modifications. Mr. Fish said that the states had generally been adopting the act as is, making minor modifications to work with existing law. Mr. Fish said that most states have made the act applicable to civil actions either by making it part of their civil rules or by specifications in statute.

The Chair thanked Mr. Fish for his assistance.

A member said that having a uniform rule that could be applied in civil, criminal and juvenile cases was a good idea. The member said that the troubling part of the proposal was that someone from out-of-state could come and conduct a deposition or require the production of records without being subject to North Dakota ethics jurisdiction.

A member said that making obtaining a subpoena a non-appearance is one thing, but allowing an attorney to come to the state, perhaps spending days conducting a deposition of a non-represented witness, and not calling this an appearance was something else. The member said the worst part was if the attorney engaged in unethical behavior during the deposition, the non-represented witness would have to somehow figure out that any complaints would need to be directed to an out-of-state disciplinary body.

A member said that attorneys in civil practice regularly come to North Dakota to take depositions while North Dakota attorneys travel to other states. The member said the proposed rule reflected ordinary deposition practice and would not be a change. A member said a deponent with a complaint could contact the State Bar Association of North Dakota, which would refer the deponent to the proper authorities.

A member said subpoenas are not generally needed when an attorney wants to depose a North Dakota resident in an out-of-state action. The member said everything is typically taken care of by agreement and that problems are rare.

A member said that if lawyers are involved on both sides in the deposition they may be able to resolve problems among themselves. The member said, however, that if a non-represented witness is treated unethically in a deposition, it is troubling that the witness

would have to go to another state to seek discipline against the lawyer. A member replied that if a person gets a subpoena, they generally seek some guidance from a lawyer and would be able to do the same if they had a problem with unethical conduct during the deposition.

A member said that it is very easy to get a subpoena to conduct an out-of-state deposition in federal court, the attorney simply asks for one.

The Chair asked staff to go over the proposed amendments to N.D.R.Civ.P. 45, N.D.R.Crim.P. 17 and N.D.R.Juv.P. 13. Staff explained that Rule 45 currently contains the mechanism for a party to seek a subpoena in an out-of-state action. Staff said that, under the proposed amendments, this mechanism would be deleted from Rule 45 and replaced with a cross reference to new Rule 5.1. Staff said that similar cross-references were proposed for the criminal and juvenile rules, making the Rule 5.1 procedure applicable to civil, criminal and juvenile actions.

Mr. Boschee MOVED to adopt the proposed amendments to N.D.R.Civ.P. 45, N.D.R.Crim.P. 17 and N.D.R.Juv.P. 13. Judge McLees seconded.

A member said North Dakota would be unique by making the uniform act applicable to civil, criminal and juvenile matters. A member said that having it apply to criminal matters would not be a problem because it was a good idea to have a consistent procedure that applied to deposition subpoenas.

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 29-46 OF THE AGENDA MATERIAL)

Staff explained that the Court considered the Committee's proposed amendments to Rule 41 along with comments it received on the proposal and approved amendments that differed from the Committee's proposal. Staff asked the Committee whether it wanted a form motion and order developed to be used with the amendments as approved by the Court.

A member said it would be difficult to draft a form motion for a balancing test. A member said that the judge will have to do a balancing test and so a form order would be very difficult to devise. The member said a fill in the blanks form motion that provided the information the judge needed to do the balancing test might be possible.

A member said the form motion would have to contain blanks that reflected all the

balancing factors from the rule.

A member said what the Committee sent to the Court was a request to make it easier to restrict Internet access to certain types of criminal case information. The member said the Court then changed the language, making it possible to restrict access to the information only after application of the existing balancing test. The member said it seemed less likely that requests to restrict access would arise given the restrictive test the Court imposed.

A member questioned whether a motion to restrict access under the provision could be an ex parte motion. A member said the rule requires notice to be given. A member said the procedure under the rule is not necessarily being followed.

A member said the change was proposed because of the real problems people with dismissed charges or acquittals face in not being able to find housing or jobs because of the way criminal records are presented on the Internet. The member said that it may ultimately be a legislative issue: the statutes now require that agencies report all arrests, acquittals, and convictions to the BCI. The member said people should be required to go to the BCI for these records. The member said some law enforcement agencies apparently are selling incomplete criminal record information, i.e., arrest information with no information on charges or disposition. The member said that the legislature should act to stop the sale of this incomplete information, which is harmful to people who may be arrested but who are not charged or who are exonerated.

A member said that the information in court records is far more thorough than the BCI records, which are all fingerprint driven. Another member said that the BCI records are not updated as accurately as court records.

The Committee agreed that putting a form motion together would be difficult. Members said that litigants would need to submit the motion and provide notice, so a notice of motion form would also be required. A member said an affidavit of service would also be required. A member suggested that the small claims package of forms could be a model of the types of forms required.

By consensus, the Committee decided that staff should attempt to put together a set of draft forms for making a Rule 41 motion. Staff will present the drafts at the April meeting.

RULE 24, N.D.R.App.P., SUPPLEMENTAL BRIEF OF INDIGENT DEFENDANT; RULE 32, N.D.R.App.P, FORM OF BRIEFS, APPENDICES AND OTHER PAPERS; RULE 40, N.D.R.App.P., PETITION FOR REHEARING (PAGES 47-58 OF THE AGENDA

MATERIAL)

Staff explained that the Committee considered the Supreme Court's suggestion that page and word limits be reduced for appellate briefs at its April and September 2011 meetings. Staff said the Committee approved the proposed amendments at the September meeting by less than a two-third majority. Therefore, the proposal was back before the Committee for further consideration if desired.

Mr. Boschee MOVED to rescind approval of Rules 24, 32 and Rule 40. Ms. Ottmar seconded. Motion FAILED on 6-9 vote. The rule proposals will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 58, N.D.R.Civ.P., ENTRY AND NOTICE OF ENTRY OF JUDGMENT; RULE 77, N.D.R.Civ.P., DISTRICT COURTS AND CLERKS (PAGES 128-149 OF THE AGENDA MATERIAL)

Staff explained that the Committee discussed Rule 58's requirements related to notice of entry of judgment and Unit 2's new policy reducing the clerk's role in giving notice of entry of orders to attorneys and parties at the September meeting. The Committee instructed staff to research notice of entry policy across the state and to make inquiries with the Court Technology Committee regarding electronic filing of notice of entry of judgment documents and possibly providing notice of entry by email. Staff provided the Committee with proposed amendments to Rule 58 and Rule 77 that would make court clerks responsible for sending out notice of entry.

Ms. Ottmar MOVED to adopt the proposed amendments. Judge Kleven seconded.

A member wondered why filing of the judgment with the Notice of Entry of Judgment was an issue. The member said it was common practice to serve a copy of the judgment with the Notice and an Affidavit of Service but it was not necessary to then file the copy judgment with the Notice and Affidavit. A member said that unless the copy judgment that was served was also filed, there would be uncertainty about what was in the judgment that was served. A member replied that if the Notice and Affidavit referred to the judgment on file with the court and indicated that a copy of that judgment was served, filing of the copy judgment should not be necessary.

A member asked whether the electronic docket entry for a Notice of Entry of Judgment filed with a copy judgment labeled as "exhibit 1" could simply read "Notice of Entry of Judgment with Exhibit 1," with the whole package scanned together. A member said the problem with this approach was that the clerks have been directed to file attachments

as separate documents. The member said if an affidavit comes in with attachments, the affidavit is filed as one item and the attachments are listed as additional items. The member said that this is helpful for someone looking at the electronic file because they are not required to search within a large electronic document for the item they need.

A member said the clerks are concerned that, if there are multiple versions of the judgment on file, even if the second version is labeled "exhibit 1" or "copy judgment," that there will be confusion about the date the judgment was filed. A member said that if the copy judgment is properly labeled when it is filed there will be no confusion—the clerk simply needs to identify what the attachment is.

A member said filing of copy judgments is a minor issue compared to the major problem of lawyers and parties not getting notice of orders being entered. The member said there is no consistent policy among the clerks—one clerk will send out notice, another will not. The member said sometimes it takes judges a long time to issue orders, so if the clerk is not sending out notice, the lawyer or party will need to check with the court daily for a couple of months to confirm whether the order has been entered. The member said the proposed amendment to Rule 77 corrects the problem of inconsistent policy and having to check back for orders—if an order is issued, the clerk will send notice.

A member said sending out notice should be a simple matter with the Odyssey system. A member replied sending out notice was not simple if the lawyer or party is not connected to Odyssey. The member said the clerks deal with many self-represented litigants who are not on Odyssey. If the clerks are required to send out notice of orders to everyone, this will increase their workload and create staffing issues.

A member said that Minnesota clerks have been sending out notice of orders for years. A member replied that Minnesota has more court staff. A member said to simplify matters clerks could just mail out a simple notice that an order had been entered and provide the docket number to the self-represented litigant—it would not be necessary to mail out the order.

A member said it would be simplest to leave the rules as they are. The member said attorneys can continue to file copy judgments with the notice of entry because this is allowed by the rule. A member answered that some clerks do not accept copy judgments and even throw them away. A member replied that the clerks are required to follow the rules and how the clerks handle copy judgments is a training issue with the clerks' office.

A member said the main issue is not being able to timely find out when an order is entered. The member said sometimes it is weeks before attorneys find out that orders are

entered. The member said the lawyers and law office staff do not have the time to check Odyssey every day on every case where an order might be entered. The member said that the federal court system is wonderful because once an order is entered, every attorney on the case gets notice that very day. The member said that if this could be done through Odyssey, many of the concerns the Committee had raised would be solved. The member said there needed to be a uniform system across the state where notice of entry of orders is handled the same way and all attorneys and parties get notified. The member said getting notice of orders is necessary so that attorneys and parties can resolve their cases.

A member asked what kind of orders do attorneys not get notice of. A member replied orders on motions, for example. A member responded that in Unit 2, if there is a hearing on a motion and a judge has to make a decision and enter an order, the judge's secretary sends out a copy of the order to the parties. The member said it was surprising if this policy was not being followed across the state on judge issued orders—if a judge does a memorandum opinion, it should go immediately to the parties.

Members said that the practice varies across the state and orders do not necessarily get sent to attorneys. A member said it can be weeks before an attorney hears back on whether an order submitted for a judge's signature got signed.

A member said that the Committee needed a report from the Court Technology Committee on whether it is possible for notices to be sent out through the Odyssey system. A member said the best solution to the problem of giving notice of orders entered would be using an automatic electronic system that sends out notice.

A member said the federal court system was effective and maybe attorneys had become conditioned to that level of service. The member said attorneys used to working with the federal system were simply baffled that it is not possible to get notice through the state system. The member said that providing notice seems like a basic and fundamental capability that an electronic filing system should have.

A member said that providing notice must be a function that can be provided through Odyssey. The member is involved with a case in McLean County and is getting notice through Odyssey every time anything is filed in the case. A member said that this notice is initiated by the clerk, not automatically. A member asked why it was not possible for clerks to push a button and provide this kind of notice in every case.

A member said that, on the notice issue, addresses were a real problem. The member said that pro se litigants often provide multiple or uncertain addresses to the court. The member said the clerks were also concerned about having a rule that placed a duty to provide

notice on them.

A member said it was important to get an answer from the Court Technology Committee on Odyssey's capabilities to address the notice issue.

Judge McCullough MOVED to table the rule amendment proposal. Ms. Ottmar seconded.

A member said the Committee should pass the proposal rather than tabling it to show the court administration and the clerks that the Committee is serious about having notice provided to parties and attorneys. A member said that court policy should not be set according to Odyssey's capabilities.

The motion to table CARRIED on an 8-7 vote.

RULE 8, N.D.R.Civ.P., GENERAL RULES OF PLEADING (PAGES 150-156 OF THE AGENDA MATERIAL)

Staff explained that Committee member Mr. Larry Boschee had pointed out that subdivision (d) of Rule 8 contains an internal cross-reference and otherwise lacks content. Mr. Boschee proposed the rule could be amended to eliminate the empty subdivision.

Judge Marquart MOVED to adopt the proposal. Judge Reich seconded. Motion CARRIED.

RULE 4, N.D.R.Civ.P., PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE (PAGES 157-176 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court requested that the Committee discuss adding a sentence to Rule 4's explanatory note indicating that "the time of service for an item served by mail or third-party commercial carrier under Rule 4(d) is the time the item is delivered to or refused by the recipient." Staff also presented a proposed amendment that would transfer language on demanding a party to file the complaint to Rule 5.

Judge Kleven MOVED to adopt the proposal. Judge McCullough seconded.

A member suggested that the proposed language be placed in the text of the rule in addition to the explanatory note. The member said other states have rules that sort out all the possible results that can happen when a party attempts to serve by mail and set out when service is effective.

A member asked how is the date of refusal established for the purpose of setting a date of service. A member said if service of a certified letter is refused, the person who refuses service must sign the card and it is returned to the sender. The member asked how refusal of service is documented when sent by a shipping service other than the post office. The member said it might be helpful to develop rule language to indicate when service is effective under a variety of different serve by mail situations.

A member said it is problematic to develop rule language because most questions about when service was effective are factual questions. The member said different commercial carriers use different documentation and different delivery procedures. The member said that rule language could not be developed without taking the different procedures into account.

A member said that there are rules from other states and federal rule proposals that could be used as a model for a more specific rule defining when service is effective. A member said Rule 4(l) was quite specific about the effect of delivery refusal. A member suggested that the proposed new explanatory note language could possibly be added to Rule 4(l) to make the rule language more specific.

Mr. Boschee MOVED to amend Rule 4 at page 173, line 297, to add the language "The time of refusal is the time of service." Mr. Reierson seconded.

A member suggested that the motion language be rephrased to put the emphasis on service. A member suggested that "date" should be used rather than "time."

By unanimous consent, the motion language was amended to read: "Service is complete on the date of refusal."

Motion CARRIED.

A member asked if there was an inconsistency between the language at page 172, line 294, "mailed or sent with delivery restricted and requiring a receipt signed by the addressee" with other language in the rule referencing sending by "third party commercial carrier." Members responded that language on page 173, line 295, referred to "mail or delivery" refusal, which seemed to embrace attempted delivery by "third party commercial carrier."

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 5, N.D.R.Civ.P., SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(PAGES 177-187 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court requested that the Committee discuss proposed changes to Rule 5 that would require a party seeking to file a summons and complaint or other initiating pleading to also provide proof of service under Rule 4 that would be filed at the same time. Staff also presented a proposed amendment that would transfer language on demanding a party to file the complaint from Rule 4.

Judge McLees MOVED to adopt the proposed amendments to Rule 5. Judge McCullough seconded.

A member asked how a party could seek a temporary restraining order under Rule 65 if they were prevented by the new language in Rule 5 from filing a complaint without also providing proof of service. The Chair said that there was a procedure set out in the revised Rule 65 that allowed parties to file a copy of the complaint as part of the procedure for seeking injunctive relief.

A member said certain statutory actions, like claim and delivery, require a party to get a court order before the complaint is served. A member said this would be a problem under the proposed rule only if the complaint had to be filed at the time the court order is requested. A member said in a claim and delivery action an affidavit must be filed and then a court order is issued, which order is then served with the summons.

A member said a person had been trying to get a North Dakota complaint served in another state. The out-of-state sheriff refused to serve the complaint without a file number. The member said the person would not be able to get a file number under the proposed rule because service would not be complete. A member said that the person could find a commercial process server or a private party to serve the complaint if the sheriff refused.

The Chair said it has always been the rule that a complaint or other initiating document needed to be served before a file could be opened and further action could take place in the matter. A civil action is not commenced until service is made. Unfortunately, the rule against opening a file in a matter that has not been commenced has not been followed consistently.

A member said that eviction actions normally are filed before service so that a hearing date can be obtained. The summons and complaint are then served with the hearing date inserted.

A member said there was recently a rash of complaints filed by an inmate suing many

people in the legal community. The court went ahead and filed the complaints without the complaints being served beforehand. The inmate claimed to be indigent and claimed the court therefore had responsibility to serve the complaints. The member said it was a mess. A member asked whether the rule could account for the need to sometimes file before service by inserting language allowing a matter to be filed without proof of service with prior approval of the court.

Mr. McGee MOVED to amend at page 181, line 62, to add the language "Absent prior approval by the court." Ms. McLean seconded.

A member asked how someone seeking court approval to file would get access to the court. A member said the clerk could simply bring the request to a judge without filing the matter. The member, however, said that while an exception to the service requirement was appropriate, the proposed language would give the court unfettered discretion on whether to allow filing before service. The member said it might be better to have an exception that allowed filing without service if filing was allowed by law.

A member said that when bringing a petition under the Uniform Child Custody Jurisdiction Act, it is often necessary to get an emergency order before filing a petition. A member said if the motion was changed to provide an "allowed by law" exception, there would be no obstacle to getting an emergency order before filing.

A member said an "allowed by law" exception might be better than a judicial approval exception because this would limit questions about a judge's exercise of discretion. A member said such an exception would also put the burden on the party to identify a law that authorized filing before service.

A member asked whether the clerk would be required to make a legal decision about whether filing before service in a given case was authorized by law. A member said that the clerk could simply refuse to file absent authorization by a judge to file. A member said eventually the clerk's manual could be supplemented with material on the clear cases where filing before service are authorized, such as eviction.

Judge Greenwood MOVED to amend the motion to substitute the language "Unless otherwise authorized by rule or statute." Judge McCullough seconded.

A member said that the clerk's office is a gatekeeper on what documents are filed, and the proposed language would require the clerk to make a legal decision on whether filing is allowed before service in a given case. A member said that clerks could consult with a judge. A member asked whether this would be possible in a rural county. A member responded that

clerks can consult judges by telephone or email.

A member said if lawyers or parties consult the rule before attempting to file a document, they will know that they either need to serve the document first or be prepared to show why the law allows the document to be filed prior to service.

A member said while the language of the proposal seems to give the clerks the responsibility to decide whether a law allows filing before service, as a practical matter they will seek advice from a judge before filing. A member said in places where there is an established practice that allows filing of certain actions, such as evictions, prior to service the judges may advise the clerks to go ahead in filing these cases without further consultation with a judge.

The motion to amend CARRIED. The motion as amended CARRIED.

Staff was instructed to reference the amended language in the explanatory note.

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 3.1, N.D.R.Ct., PLEADINGS (PAGES 188-198 OF THE AGENDA MATERIAL)

Staff explained that amendments to Rule 3.1 had been developed to supplement the previously discussed amendments to N.D.R.Civ.P. 5. The amendments would eliminate the requirement to "attach" proof of service and make it clear that a document that does not meet all of the rule requirements cannot be filed. In addition, Mr. Brad Beehler, SBAND's representative to the Committee, requested that the Committee address superseding the N.D.C.C. § 29-15-21 requirement that demands for a change of judge be submitted in triplicate.

Judge McCullough MOVED to adopt the proposed amendments. Judge Kleven seconded.

By unanimous consent the word "instrument" at page 191, line 32, was replaced by "document."

A member said that even if the proposed amendment to the rule were adopted, people looking at the change of judge statute would still find the word "triplicate" and would still send in their demands in triplicate. Staff said that when the Court approves a rule change that supersedes a procedural statute, the Court informs the Legislative Council and the statute is

removed.

A member said that criminal defendants send in motions for reduction of sentence all the time. The member said that these motions are never served on the state's attorney. The member said the court typically sends a copy of the motion to the state's attorney. A member said that at times these reduction of sentences motions are so clearly baseless that the court will examine the motion and deny it without involving the state's attorney.

The member said that the proposed language of the rule would bar filing of these motions. A member said that it did not seem appropriate for the court to file these motions if they had not been served. A member said that filing of documents without proof of service was already contrary to the rule, but that in some judicial units clerks have been instructed to file everything.

A member asked about the language at page 190, lines 20-21, that had been proposed to supersede the triplicate language in the change of judge statute. The member said the proposed language conceivably could be used to prevent filing of document copies as attachments to documents. A member said that duplicate documents get filed with briefs and affidavits on a regular basis. A member said that it would be unfortunate if the proposed language was used to prevent the legitimate use of copy documents with affidavits and briefs.

Mr. Hoy MOVED to amend the language at page 190, line 20-21, to read: "A party need only file the original demand for change of judge." Ms. Ottmar seconded.

Members said that the language seemed out of place in Rule 3.1 and that people would likely still file triplicate copies under the statute until the language was removed from the statute. A member said the main benefit of making the amendment would be to supersede the statute.

Motion CARRIED.

By unanimous consent, the explanatory note was amended to be consistent with the amended language of the rule.

The main motion CARRIED.

RULE 26, N.D.R.Civ.P., GENERAL PROVISIONS GOVERNING DISCOVERY (PAGES 199-230 OF THE AGENDA MATERIAL)

Staff explained that the Chair requested that the Committee discuss the status of

electronic discovery in North Dakota. To provide a basis for the discussion, staff presented proposed amendments to Rule 26 that would create a framework for voluntary discovery meetings and provide a definition of "electronically stored information" and of discoverable metadata.

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

The Chair said that based on recent developments in electronic discovery, it may be advisable for North Dakota to take additional steps to deal with it. The Chair said that the rules should give guidance to litigators practicing in court so that electronic discovery issues do not come as a surprise when they arise.

A member asked for the definition of "reasonably accessible" metadata. Staff said that this standard was the most conservative standard for access to metadata and was based on the 7th Circuit standard. The 7th Circuit comments indicate that reasonably accessible metadata includes date sent, date received, author and recipient but deeper metadata is not discoverable.

A member said that the proposed language for the discovery meeting location and meeting seems to conflict—the initial language seems to require the discovery meeting to be in the county where the action is pending while later language allows the meeting to be held by telephone or video conference. A member suggested that the rule's requirements would be satisfied if one person was in the county while another was on the phone—the locus would be where either of the recipients was at.

A member said that the language dictating where the meeting was to take place was not needed. The member said that, in North Dakota, an attorney from Williston and one from Fargo may have a case venued in Bismarck. The member said it makes no sense to have the attorneys meet in the county where the case is venued if they are located elsewhere.

A member said the proposed language allows attorneys to agree to meet wherever they wish for the discovery meeting.

Mr. Dunn MOVED to rewrite language at page 209, line 181-182: "If such a request is made, the parties must meet within 21 days, unless agreed otherwise by the parties or their attorneys or another time for the meeting is ordered by the court." Mr. Reierson seconded.

Motion CARRIED.

Mr. Hoy MOVED to replace "pursuant to" with "under" and delete "rule" at page 211, line 223. Ms. McLean seconded.

Motion CARRIED.

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

The meeting recessed at 4:30 p.m. on January 26, 2012.

January 27, 2012 - Friday

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

N.D.R.Crim.P. 46, RELEASE FROM CUSTODY (PAGES 88-127 OF THE AGENDA MATERIAL)

The Chair welcomed Tom Trenbeath, chief deputy attorney general, and Tim Myers, BCI agent, who were present to answer any questions the Committee might have on the 24/7 program.

Staff reviewed the discussion of Rule 46 at the September 2011 meeting, when the Committee addressed a letter from the N.D. Association of Criminal Defense Lawyers, who had concerns about participation in the 24/7 sobriety program being used as a condition of bail. Staff presented the Committee with research on the use of the 24/7 program as a bail condition in South Dakota and how 24/7 violations were enforced in that state.

The Chair asked how many judges were using 24/7. The judges on the Committee do use the program. As far as enforcement when someone violates the program, some judges have been forfeiting a portion of their bond and post an additional amount to get out. Other judges have leaned to the Minnesota approach, which is to obtain a large cash bond or a smaller cash bond plus participation in the 24/7 program. If someone who chooses the smaller bond violates the program, they are taken into custody and can request a new bond hearing.

A member said that one type of violation is that people do not have the money to pay for a given test. These people are taken into custody and generally put out as soon as the court sees them. If the person has a positive test, the court will hold the person longer in jail and increase their cash bond.

A member said that in some parts of the state, a defendant submits a "promise to appear" after the initial arrest and is released on a sheriff's bond with no judicial intervention. In some cases, the defendant may agree to submit to the 24/7 program as a condition of release on a promise to appear. A member said that if the defendant is not satisfied with the sheriff's bond conditions, the defendant can request a bond hearing in court. The member said that in State v. Hayes, 2012 ND 9, the Supreme Court held that conditions of release cannot be imposed absent an inquiry by the magistrate under Rule 46(a)(3). The member said that imposition of release conditions under a sheriff's bond without judicial involvement may be contrary to Hayes.

A member said that under Rule 46(a)(4), the court is directed to inform a person given a conditional release that a warrant for their arrest will be issued on any violation of the conditions. The member said that if a person is released under the condition of participating in the 24/7 program, the person can be arrested immediately without a warrant if there is a violation. The member said this result seems inconsistent with the rule, but it is allowed under the 24/7 statutes.

Staff said that the South Dakota bond condition form provides a warning that violation of the 24/7 condition can lead to immediate arrest and detention without bond.

The Committee did not make any changes to Rule 46.

RULE 3.1, N.D.R.Ct., PLEADINGS (PAGES 188-198 OF THE AGENDA MATERIAL)

Staff informed the Committee that it would need to send Rule 3.1 to the Supreme Court as an emergency measure if it wished to timely supersede the triplicate filing requirement in the change of judge statute.

Mr. Hoy MOVED to send the Rule 3.1 proposal to the Supreme Court as an emergency measure. Ms. Ottmar seconded. Motion CARRIED.

RULE 33, N.D.R.Civ.P., INTERROGATORIES TO PARTIES (PAGES 231-266 OF THE AGENDA MATERIAL)

Staff explained that Mr. David Peterson wrote the Committee to request that Rule 33 be amended to limit the number of interrogatories a party may serve to 25, consistent with Fed.R.Civ.P. 33. Mr. Peterson's maintained that the change was needed because of the "excessive and ridiculous" number of interrogatories being served even in simple cases.

Mr. Dunn MOVED to approve the proposed amendments to Rule 33. Mr. Boschee

seconded.

A member said serving an abusive amount of interrogatories is a big problem in North Dakota. The member said limiting interrogatories to 25 would not be good, especially in domestic cases when parties are trying to save legal fees by conducting discovery through interrogatories. The member said 75 might be a reasonable amount of interrogatories, but that it was not necessary to make a rule to keep people limit interrogatories.

A member said that a colleague recently received a set of 247 interrogatories in a domestic relations case. The member said that interrogatory abuse has not been a problem in North Dakota, but things are changing and it is becoming a problem. The member said 25 interrogatories was too low a limit, but that there should be some limit. The member said attorneys should not have to seek protective orders in every case.

A member said that having many interrogatories served in domestic cases is becoming a more frequent occurrence. The member said that 25 interrogatories or so was customary just a few years ago but now 200 or more interrogatories in domestic cases is not uncommon. The member said that much of the information sought by the many interrogatories seems like information that should be automatically disclosed under Rule 8.3. The member said often at the conclusion of a domestic case the attorneys ask for $20,000 plus in attorney fees to cover this discovery from clients who do not have that much money between them to begin with. The member said this is frustrating for the court.

A member said the rules allow a party who receives harassing discovery to seek protection from the court. The member said the proposed 25 interrogatory limit is too low and there are ways to deal with too many interrogatories that do not involve changing the rules.

A member said 25 interrogatories would not be enough, but that the example submitted by Mr. Peterson is typical of the excess amounts of interrogatories commonly seen. The member said there were "only" 84 questions but this rose to 275 questions if subparts were included. The member said if interrogatories were the only way to get discovery, having unlimited interrogatories would be fine. The member said, however, that the same questions asked in interrogatories are typically asked again in depositions. The member said it seems like parties do not even look at the interrogatory answers. The member said that some attorneys are abusing the current system and that there needs to be some limit on interrogatories. The member said going to the court for help is not a desirable solution because the court does not want to be involved in discovery disputes.

A member said that some attorneys who send out hundreds and hundreds of

interrogatory questions refuse to provide the other side with electronic copies. The other side then has to type out all the questions again while preparing the answers. The member said there should be limits on interrogatories, perhaps 50-75. The member said interrogatories are supposed to give attorneys a start on discovery with follow up done in depositions.

A member said attorneys hate to go into court and ask for a protective order on interrogatories especially when their clients do not have much money.

Mr. Boschee MOVED to amend at page 248, line 13, to change "25" to "50." Judge McLees seconded. Motion CARRIED.

A member asked for the definition of "discrete subpart." Staff said the federal commentary said subparts to a question could not seek information about separate subjects but could seek specific details related to the main question. Staff said that federal case law likely expanded upon this commentary.

Judge Kleven MOVED to add language to the explanatory note including the federal definition of "discrete subpart." Ms. Ottmar seconded. Motion CARRIED.

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 4.1, N.D.R.Crim.P., COMPLAINT, WARRANT, OR SUMMONS BY TELEPHONE OR OTHER RELIABLE ELECTRONIC MEANS (PAGES 267-300 OF THE AGENDA MATERIAL)

Staff explained that a new Fed.R.Crim.P. 4.1, separating and updating the parts of Fed.R.Crim.P. 41 that authorized the issuance of search warrants by remote communication and electronic transmission, took effect December 1, 2011. Staff presented a proposed new Rule 4.1 for North Dakota based on the federal rule and companion rule amendments to N.D.R.Crim.P. 3, 4, 9 and 41 designed to implement the "reliable electronic means" option for complaints, arrest warrants, summons and search warrants.

Judge McLees MOVED to adopt the proposed new Rule 4.1. Mr. Olson seconded.

A member said that one change in the proposed new rule is that the magistrate would be responsible for recording and transcription. The member said that some judges do not have recording equipment at home, which is where they receive many warrant requests. The member said the requesting entity typically has done the recording and transcribing in the past.

A member said that probable cause is generally done by affidavit rather than called in. The member wondered why it would be necessary to make a transcript immediately of the probable cause proceeding as the proposal seems to require.

A member said that the current rules require a magistrate to make a recording if a device is available or to take notes if not. A member said that the state's attorney or police generally have digital recorders and they make the recording, not the magistrate. The member said if the magistrate is able to do the proceeding in the courthouse, then they use their own equipment. The member said the recordings, regardless of who makes them, are not now automatically transcribed as the rule proposal would require.

A member said the point of the rule is not to require judges to buy recording equipment but to ensure the integrity of the record on which a warrant is issued. The member said leaving the recording with the officer does cause some concern, but as long as there is a recording made that is provided to the court so that it can be transcribed at a later date, the rule's intent would seem to be satisfied. The member said that as part of modernizing the rule, the Committee should take into account modern recording devices.

A member said the transcription requirement in the proposal is probably not necessary for many of the warrants the rule covers, such as arrest warrants and summonses. A member said that a recording of a proceeding can be saved on a disk or flash drive, but this is something the clerks will have difficulty filing.

A member asked how the recorded proceedings were stored and preserved. Judges on the Committee indicated that they were uncertain. A member said many of the transcriptions were not very good and preserving the integrity of the recordings was important so that proceedings can be reviewed.

A member said if a BCI agent is seeking a warrant, they record the proceeding on their end and put it on a disk. The disk is then turned over to the judge who stores it in chambers. The member said the proceeding does not get transcribed unless there is a controversy.

A member said in a middle of the night situation, when no court recorder is available, the police will record the proceeding on their digital recorder and they make a transcript, which is turned over to the court. The member said that it would be possible to request an electronic copy in addition to the transcript.

A member said that, from a criminal defense perspective, if law enforcement makes the recording, it would be preferable for them to turn the recording over to the court and have

any transcript made by court staff. A member said the one solution would be to have law enforcement make a transcript and a digital copy so that the transcript could be cross-checked if there is any controversy.

A member said consequences would have to be borne by the state if the recording could not be found, or had deteriorated, or was unintelligible. A member said that law enforcement seems to be very thorough in making adequate recordings and more judges are obtaining recording equipment to use in their homes. The member said recordings are replacing law enforcement affidavits so law enforcement has taken steps to have adequate recording equipment.

A member said it is necessary to have warrant forms ready when doing a warrant by remote means. A member said that law enforcement typically emails the form to the judge, who can complete or amend it and email it back to law enforcement. A member said being able to work with warrants by email is a great tool for rural counties.

The Committee discussed possible amendments to the proposal consistent with the issues raised during the discussion.

Mr. Quick MOVED to amend the proposal at page 268, lines 17-22, as follows:

"(i) ~~have~~ ensure the testimony is recorded verbatim by an electronic recording device, by a court reporter or recorder, or in writing;

(ii) ensure any recording or notes are filed, transcribed on request, ~~transcribed have the transcription~~ and any transcription is certified as accurate;

(iii) sign any other written record and ensure it is certified as accurate and filed.~~; and~~

(iv) ~~make sure that~~ ensure the exhibits are filed."

Judge Reich seconded.

A member wondered what sort of written record would need to be signed as required by (iii). A member said possibly the court reporter's notes, as when recorded by shorthand. Another possibility was the original affidavit— a member said the whole point of this part of the proposal was to account for additional testimony and exhibits used to supplement the original affidavit.

A member said sometimes the affidavit is submitted and then there needs to be additional writing on it by the officer. The officer would initial off on the writing and then the magistrate would need to sign the affidavit as required by (iii).

A member asked why the magistrate would have to ensure the written was certified as accurate. A member said that in some cases, the warrant would be obtained by remote communication and law enforcement would have any documents rather than the magistrate. The magistrate would then have to ensure the document was accurate once it was received from law enforcement.

A member asked who would do the certification when police officers transcribe a recording. A member said the person who did the transcription would have to certify it as accurate under the rule.

The motion CARRIED.

A member said it was not clear from the rule that a record needed to be made of the entire proceedings. The member said that (b)(2)(B), which the Committee amended, made it clear that a record needed to be made when taking additional testimony. The member said there were no details of how to make a record in (b)(1).

A member said (b)(2)(A) deals with the affidavit, which is testimony under oath. The member said that any "testimony" in connection does not need to be recorded, it is attested to on the affidavit in writing. The member said additional testimony and evidence has to be recorded, and this is dealt with in (b)(2)(B).

A member said if there is no affidavit and the magistrate is just taking an officer's testimony, this would be required to be record under (b)(2)(B). A member said that a standard warrant is just based on an affidavit and it is not necessary to make a recording of swearing in the officer on the affidavit.

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 3, N.D.R.Crim.P., THE COMPLAINT (PAGES 273-275 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to N.D.R.Crim.P. 3 were designed to implement proposed N.D.R.Crim.P. 4.1 and the "reliable electronic means" method for obtaining complaints.

Ms. McLean MOVED to adopt the proposed amendments to Rule 3. Judge McCullough seconded.

The motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 4, N.D.R.Crim.P., ARREST WARRANT OR SUMMONS UPON COMPLAINT (PAGES 276-285 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to N.D.R.Crim.P. 4 were designed to implement proposed N.D.R.Crim.P. 4.1 and the "reliable electronic means" method for obtaining arrest warrants and summonses.

Mr. Olson MOVED to adopt the proposed amendments to Rule 4. Judge Marquart seconded.

The motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 9, N.D.R.Crim.P., WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION (PAGES 286-289 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to N.D.R.Crim.P. 9 were designed to implement proposed N.D.R.Crim.P. 4.1 and the "reliable electronic means" method for obtaining arrest warrants and summonses.

Judge Kleven MOVED to adopt the proposed amendments to Rule 9. Mr. Hoy seconded.

The motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 41, N.D.R.Crim.P., SEARCH AND SEIZURE (PAGES 290-300 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to N.D.R.Crim.P. 41 were designed to implement proposed N.D.R.Crim.P. 4.1 and the "reliable electronic means" method for obtaining search warrants.

Judge Marquart MOVED to adopt the proposed amendments to Rule 3. Mr. Quick seconded.

A member said that it was unclear whether the execution provision of Rule 41, which

would be deleted under the proposal, was incorporated into proposed Rule 4.1. A member suggested that the provision be retained in Rule 41.

Judge Marquart MOVED to restore language at page 293, lines 75-76, move it to page 294, line 85, rename it paragraph (d)(1), and reletter subdivision (d). Judge Reich seconded.

Motion CARRIED.

By unanimous consent, the words "or summons" were deleted at page 298, line 180.

The main motion CARRIED. The rule proposal will be sent to the Supreme Court as part of the Annual Rules Package.

RULE 9, N.D.R.Crim.P., WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION (PAGES 286-289 OF THE AGENDA MATERIAL)

Judge Kleven requested that the Committee take a second look at Rule 9.

A member pointed out that at page 286, line 14, the rule requires that warrants be signed by the clerk. The member said that in some districts, magistrates or judges sign all arrest warrants. The member said that other language in the rule indicates that warrants are issued by the court. The member suggested that it would be appropriate for the rule to require warrants to be signed by a magistrate or judge.

Judge Kleven MOVED to amend Rule 9 at page 286, line 14, to replace "clerk" with "court." Mr. Olson seconded.

A member said that Rule 4(b)(1) says that a warrant on a complaint must be signed by the issuing magistrate. A member said there might be a reason why an arrest warrant on an indictment or information needs to be signed by the clerk.

Judge Kleven MOVED to table for staff to research why the clerk has been designated to sign the warrant under Rule 9. Judge McCullough seconded. Motion CARRIED.

FORM AND STYLE AMENDMENTS TO THE N.D.R.Ev.(PAGES 301-348 OF THE AGENDA MATERIAL)

Staff informed the Committee that form and style revisions to the Federal Rules of Evidence took effect on December 1, 2011. Staff said that the Rule on Rules, requires the Committee to study and review all rules of pleading, practice and procedure, including the

North Dakota Rules of Evidence. Staff explained that the proposed changes to the evidence rules were designed to make the rule more easily understood and to make style and terminology consistent throughout the rules without changing any result in any ruling on evidence admissibility.

RULE 102, N.D.R.Ev., PURPOSE AND CONSTRUCTION (PAGES 307-309 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 102 based on the amendments to the federal rule.

Mr. Dunn MOVED to adopt the proposed amendments to Rule 102. Judge Marquart seconded.

The motion CARRIED. The rule proposal will be made part of the Evidence Rules Package, which will be sent to the Supreme Court when complete.

RULE 103, N.D.R.Ev., RULINGS ON EVIDENCE (PAGES 310-317 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 103 based on the amendments to the federal rule. Staff explained that the proposal contained new language that eliminated the requirement for a party to renew objections to evidence admission once a definitive ruling was made.

Mr. Boschee MOVED to adopt the proposed amendments to Rule 103. Judge Marquart seconded.

A member said the new language on renewal of objections was a significant change to the rule. A member said there was a lot of case law on the existing requirement that objections be renewed. The member said the theory behind requiring is that evidence can come out differently at trial than expected at the pre-trial motion in limine stage, so objections need to be renewed at trial.

A member said that the change was not a good idea. The member said the context of a motion in limine can change at trial. A member said it is very common to have witnesses change their testimony between preparation and when they get on the stand.

A member said that the change, if accepted, would be across the board and apply to civil and criminal trials. A member said it does not hurt to require a party to renew an

objection or try to offer evidence again once trial begins. The member said that the negative side of the current rule is that a party who really wants a piece of evidence admitted has license to try again and again to have it admitted, based on an alleged change of context. The opposing party then needs to raise their objection again to prevent it from coming in and to preserve the issue for appeal.

A member said that judges will be able to get around the new language, if it is accepted, by being less definitive with their rulings on motions in limine.

A member said that, under the current rule, if a side objects to a type of evidence that is likely to be discussed by many of the opposing witnesses, the side will be required to make repeated and identical objections at trial in order to attempt to prevent the evidence from being admitted and to preserve the issue for appeal. A member said the proposed change would be beneficial in this situation because the side would only need to make its objection once.

A member said a compromise solution would be to limit the non-renewal rule to objections made at trial. The parties could then make motions in limine, and any party aggrieved by a ruling on a motion in limine could renew their objection at trial. Once a definitive ruling was made on an objection at trial, however, there would be no requirement to renew the objection.

Mr. Hoy MOVED to amend at page 310, line 19, to delete the words "either before or." Judge Marquart seconded.

A member said the proposed amendment would help prevent the situation where a decision on a pretrial motion in limine may not definitively decide an issue, but a party relies on it without renewing the issue at trial.

Motion CARRIED.

A member asked what the meaning of "suggested" was when used in subdivision (d) at page 311, lines 31-33. A member said the prior language of the rule gave examples for suggestion of evidence, such as the court or attorneys making statements or offers of proof within the hearing of the jury.

Mr. Dunn MOVED to restore the former language at page 311, lines 39-30, and transfer it to the end of the sentence at page 311, line 33. Ms. McLean seconded.

A member said the term "suggest" was very awkward and some explanation was

appropriate.

Motion CARRIED.

A member asked what would happen if an exhibit is offered, objected to, an offer of proof made, but ultimately not admitted when one witness is on the stand. Then later, another witness provides the foundation for the exhibit that was offered, but the party who offered the exhibit makes no effort to renew its attempt to admit the exhibit. The member asked whether the party offering the evidence on appeal could then argue the court erred by not admitting the evidence because Rule 103 essentially required the court to reverse itself without the party offering taking any affirmative action.

A member said the federal notes at page 315 said that the "no need to renew" language imposes an obligation on counsel to ensure that an evidentiary ruling is definitive. A member asks whether this means that counsel has an obligation to attempt to reintroduce evidence once a new foundation is laid or whether they can simply search the record after trial for foundation and use what they find to argue that the judge erred in refusing to admit an exhibit. Committee members said that the evidence would have to be re-offered once the foundation had been laid.

A member suggested that the language of the rule could be modified to indicate that the court must state that an evidence ruling is definitive before a party could rely on not having to renew an objection or make an offer of proof. A member said that it is unclear what "definitive" means. A member said that a zealous attorney will continue to try to admit important evidence even when the court says a ruling is definitive. A member said it is counsel's job, not the court's, to try to admit evidence and to point out new foundation that comes out in the course of trial.

A member pointed out language in the federal comments on page 316 that provided insight into the definition of a "definitive" ruling. Staff was instructed to revise the explanatory note to include the federal language to reflect the changes made by the Committee.

The main motion CARRIED. The rule proposal will made part of the Evidence Rules Package, which will be sent to the Supreme Court when complete.

RULE 104, N.D.R.Ev., PRELIMINARY QUESTIONS (PAGES 318-322 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 104 based on the amendments to the

federal rule.

Judge Marquart MOVED to adopt the proposed amendments to Rule 104. Ms. McLean seconded.

The motion CARRIED. The rule proposal will made part of the Evidence Rules Package, which will be sent to the Supreme Court when complete.

RULE 105, N.D.R.Ev., LIMITED ADMISSIBILITY (PAGES 323-326 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 105 based on the amendments to the federal rule.

Ms. Ottmar MOVED to adopt the proposed amendments to Rule 105. Judge Kleven seconded.

The motion CARRIED. The rule proposal will made part of the Evidence Rules Package, which will be sent to the Supreme Court when complete.

RULE 106, N.D.R.Ev., REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS (PAGES 327-329 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 106 based on the amendments to the federal rule.

Judge Marquart MOVED to adopt the proposed amendments to Rule 106. Mr. Dunn seconded.

The Chair said that the Supreme Court had recently reviewed a matter in which one party wanted to read part of a deposition into the record and the opposing party requested that the entire deposition be admitted under Rule 106. Unfortunately, the full transcription was not yet available so there was an issue as to who had to pay for the full transcription. The full transcription ultimately was not admitted because it had not been completed.

The motion CARRIED. The rule proposal will made part of the Evidence Rules Package, which will be sent to the Supreme Court when complete.

RULE 201, N.D.R.Ev., JUDICIAL NOTICE OF ADJUDICATIVE FACTS (PAGES 330-337 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 201 based on the amendments to the federal rule. Staff explained that the proposed new subdivision (f) follows the federal rule and applies different standards to jury instructions on judicial notice in civil and criminal cases.

Mr. Quick MOVED to adopt the proposed amendments to Rule 201. Judge Marquart seconded.

Mr. Olson MOVED to amend at page 331, lines 33-35, deleting the proposed new language and restoring the previous language at page 331, lines 31-32. Judge Marquart seconded.

A member said there was no need to have a separate standard for judicial notice in civil and criminal cases. A member said if there was a separate standard for judicial notice, there would be no reason for a judge ever to take judicial notice in a criminal case.

A member said the court needs to take judicial notice of certain things, such as that a can of beer contains alcohol, so the state does not need to have chemical tests done in every minor in possession case. The member said if evidence is so strong that the court is able to take judicial notice of it, then there should be no separate standard in a criminal case. The member said that safeguards exist under the rule and the opposing part can raise objections to judicial notice and make a record.

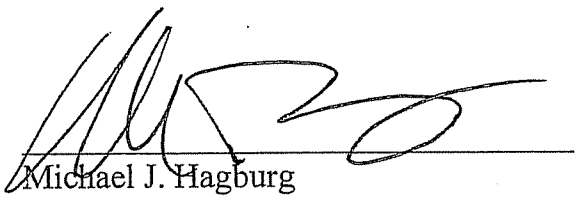
A member said if the state is asking the court to take judicial notice of an important fact, such as whether there was alcohol in a beer can, the defense should be able to object and the jury should be allowed to consider the issue for itself. The member said there should not be conclusive judicial notice of facts in a criminal case. The member said judicial notice is mostly useful to speed the trial along and this is not a key consideration in a criminal case.

A member said that judicial notice is not often needed in a criminal case given that the jury almost always gets the matters of common knowledge and science instruction.

The motion CARRIED 11-5.

The main motion CARRIED. The rule proposal will made part of the Evidence Rules Package, which will be sent to the Supreme Court when complete.

The meeting adjourned at approximately 11:35 a.m. on January 27, 2012.



Michael J. Hagburg

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 58, N.D.R.Civ.P., Entry and Notice of Entry of Judgment; Rule 77, N.D.R.Civ.P., District Courts and Clerks; Rule 4, N.D.R.App.P., Appeal–When Taken.

At the September 2011 meeting, the Committee discussed Rule 58's requirements related to notice of entry of judgment. At the January 2012 meeting, the Committee discussed proposed amendments to Rule 58, Rule 77 and appellate Rule 4 that would put the duty to provide notice of entry of judgments and orders on the clerk. The Committee tabled the proposed amendments pending answers to how the proposals, if adopted, would be handled by clerk staff and the Odyssey case management system.

Electronic Notice:

The Committee asked whether clerks could provide notice of entry of judgments and orders through the Odyssey system as is done by the federal case management system. Staff obtained an answer from court technology chief Larry Zubke. This cannot be done yet, but the courts are planning to adopt the necessary technology once it becomes available. At the last Odyssey user group meeting, they were discussing going live with a new file and serve system Nov. 1 and going with mandatory e-filing and service on April 1, 2013. This has to be approved by the Court Technology Committee and the Court.

At present, Odyssey is essentially an electronic version of the paper filing system the courts previously used. Parties send in paper or electronic documents and the clerk puts these documents in electronic files. Parties are not required to file electronically or

to accept electronic service so there is no uniform way to contact parties. If the clerks are required to send notice of orders entered, they will need to look up all the parties and send them notice by email or postal mail, whatever is appropriate for the given party.

Now, if the clerks were required to send out notice of entry of judgments and orders in all cases, as proposed in the draft amendments to Rules 58 and 77, this would increase their workload. At the September and January meetings, however, the discussion showed that this workload does not necessarily need to fall wholly on the clerks because some judges have already taken on the role of sending notice of their own memorandum opinions and orders themselves. Therefore, staff has made a small change to the proposed amendments to Rule 77 that would place the duty to send out notice on the institution of the court rather than specifically on the clerk.

The intent of this proposed change is to allow each court to make its own decision on how to allocate the duty to provide notice and what methods to use. For example, the presiding judge or court administrator could direct that chambers would give notice of orders they enter and clerks give notice of other orders.

Current Problems With Notice:

Petra Hulm, the chief deputy clerk of the Supreme Court, has identified an issue relevant to the Committee's discussion of Rule 58, Rule 77 and appellate Rule 4. Recently, there have been several instances of the Court receiving civil appeals in which no Rule 58 Notice of Entry of Judgment was served. In these cases (all from Eastern N.D.) the parties received a "Notice of Entry," sometimes accompanied by an affidavit of service, from the district court. The prevailing parties then apparently decided not to serve a Notice of Entry of Judgment as required by Rule 58, possibly thinking that all notice necessary had been taken care of through the district court sending out notice of entry. One pro se litigant who did not receive the Rule 58 notice has appealed multiple cases, and the Court has allowed the appeals to proceed even though the appeal time would have expired long ago had a Rule 58 notice been sent. An email from Ms. Hulm discussing this issue is attached.

Adopting the amendments to Rule 58, Rule 77 and appellate Rule 4 would address the issue raised by Ms. Hulm because the proposed amendments would start the appeal clock running on entry and place the duty of sending notice of entry on the court, relieving attorneys of the need to send Rule 58 notices. If the Committee does not favor approving the proposed amendments, it may wish to discuss what alternative approaches could be used to address the problem under the existing system.

Staff has prepared an alternative version of Rule 77, attached as "Alt. A," which attempts to address this issue. It would require the court to notify parties when orders or

judgments are entered, but would still require the prevailing party to serve a formal notice of entry of judgment and is a companion to Rule 58 "Alt. A," which will be discussed below.

Filing the Notice of Entry of Judgment:

The problem that brought Rule 58 before the Committee in September was inconsistent policy for filing copy judgments in the Odyssey system. Some attorneys who attempted to file a copy judgment with their notice of entry of judgment were having the copy judgment returned and being instructed by clerk staff that filing was not allowed. Discussion by the Committee revealed that there was a disconnect between what Rule 58 allowed and what Odyssey operations policy allowed. The Committee made several proposals on how this problem could be remedied and asked in a letter to the Court Technology Committee whether these proposals could be implemented.

The Odyssey User Group discussed this issue on March 22, with staff providing background on the Committee's proposals. Ultimately, the group decided that clerk staff should file the copy judgment as a subdocument to the notice of entry judgment, which is essentially what the Committee proposed. Attorneys who e-file their pleadings will have to make sure that they submit the notice of entry and the copy judgment as one document because the system does not allow the clerks to turn two separately submitted documents into one document. The clerks will be trained on the appropriate way to handle notice of entrys submitted with copy judgments, and they will instruct attorneys on the proper way to submit these documents when e-filing.

Suggestions were made at the user group meeting that a compromise that would serve both the courts and attorneys would be to amend Rule 58 to allow attorneys to continue to serve copy judgments but to file only information on the judgment docket number and date instead of the copy judgment. It was pointed out that judgments that are e-filed are given a docket number almost instantaneously that could then be used to specifically and positively identify the judgment to which the notice of entry refers. Proposed amendments to Rule 58 incorporating this suggestion are attached, labeled "Alt. A."

Proposed amendments to Rule 58, Rule 77 and appellate Rule 4, and alternative amendments to Rule 58 and Rule 77, are attached.

Notice of Entry ~ NWJD

If the Judge prepares the Order, Court Recorder/Reporter sends it along with a Certificate of Service to the attorneys of record. The same is done for Orders prepared by the attorney and signed by the Judge.

Increasingly, they are emailing a copy of the signed Order to the attorney who presented it, assuming that they will serve all parties with it.

Civil - copies are sent to the parties if both pro se and copies to all attorneys when applicable. If there is only one attorney a copy to that attorney to serve on the parties.

Criminal – a copy is sent to the State's Attorney and Defense Attorney if there is one. If not a copy is sent to the Defendant.

Orders that the judge had court recorder/reporter prepare, they send out copies and certificate of mailing to attorneys and pro se parties.

Orders generated from chambers they send out copies to all attorneys and pro se parties.

County offices will often send out their orders.

Orders court rec./rep. send out are the ones the judge prepares; any opinions issued by the judge; any scheduling orders; correspondence & jail mail; notice of self-disqualification by the judge; disorderly conduct restraining orders; and any time-sensitive rulings. Also, OSCs prepared in chambers and are sent out once the judge signs the order – these are rare.

Certificate of Service for Opinions or Orders or (when time is limited) they just put a cc: on the document with a notation of who it went to. (These can be sent a number of ways: scan & email, scan & fax, or copy and mail.)

Notice of Entry – NECJD & NEJD

McHenry:
When a Judgment (that has been provided to the Court for signature) has been signed by the Judge, we send out a courtesy copy to the attorney that provided the Judgment. They are responsible for doing a Notice of Entry of Judgment and providing copies to other attorneys/parties.

If the Judge prepares a Judgment/Memorandum Opinion his court reporter provides copies to parties/attorneys. She always attaches a Certificate of Service to her documents, so we know that copies have been provided to parties/attorneys.

Renville:
I send copies of any Orders and documents signed by the Judge to the attorneys.

Nelsen:
We send a copy of the signed order to the attorneys involved in the case - or the parties if an attorney is not involved.

Pembina Co.
In CIVIL matters, we send a copy of the signed Judgment or Order to the prevailing party, so they may send it out for service. Usually by e-mail, if possible. Otherwise, by snail mail. I'm supposing with Odyssey, they could just go in and pick up a copy for themselves now.

Ramsey County
In our county, [in all case types except criminal] we send signed orders, etc. to the party that submitted. From then on out it is that party's duty to send notice to anyone else involved. In criminal case types, both parties get copies of orders, etc. Why the distinction here? Don't know, but seems to work out ok.

Cavalier County:
In civil cases the judge's office mails a copy of the signed order out to the attorney that prepared the order. If we notice that the Judge's office did not send a copy, then we do.

Grand Forks County:
In Grand Forks County, the attorneys and pro se litigants are provided a copy/e-copy of the signed/filed Orders by the clerk's office or court reporter/recorder. This is the same for Nelson County.

Walsh:
Our office does not generate these. I don't recall seeing any come from the Judge's office either.

Notice of Entry of Order – ECJD & SCJD

ECJD
We have started sending out reports to certain attorneys on certain case types. For example, we notify regional child support on child support case, we notify certain attorneys on foreclosure cases. When they get the report they go and view or print the orders as they see fit. Any place that we can be specific we use reports. We are testing this in Fargo and moving this to the rest of the unit soon. Attorneys who receive these reports love it and these are the ones that complained at first. If an attorney calls and ask for an order we are e-mailing the orders to them immediately which is much faster than mail.

SEJD

In the SE we have never sent notice to attorneys.

Notice of Entry of Order – SCJD & SWJD

SCJD

In the SCJD, the clerk typically mails a courtesy copy back to the litigant who proposed the document after the judge signs it. If the orders are generated by the judge, his/her reporter/recorder will send courtesy copies to the parties. No affidavits of mailing are prepared.

SWJD

In the SWJD, the clerk will mail a courtesy copy back to the litigant who proposed the document after the judge signs it. If the orders are originated by the judge, his reporter/recorder will send a copy of the order to both sides with an affidavit of mailing.

Hagburg, Mike

Subject: FW: Notice of Entry issue

From: Hulm, Petra
Sent: Monday, April 02, 2012 4:52 PM
To: Maring, Justice Mary
Subject: FW: Notice of Entry issue

Justice Maring – Please see the emails below. The Chief asked that I bring this to your attention. You probably know some of the background of this in light of some of my recent appealability memos. But, the court recorders and clerks are entering notices of entry basically every time an order or judgment is entered. I would say it probably covers some of Unit 1 and some of Unit 2, I've mainly noticed it in Grand Forks and Cass Counties. It potentially creates a problem with parties (particularly pro se parties) and counsel believing this to be sufficient for a notice of entry.

Please let me know if you have any questions. I can provide you with additional background if you like. Thank you.

Petra H. Mandigo Hulm
Chief Deputy Clerk of Court
North Dakota Supreme Court
phulm@ndcourts.gov
701-328-2221

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From: VandeWalle, Justice Gerald
Sent: Monday, April 02, 2012 4:45 PM
To: Hulm, Petra
Subject: RE: Notice of Entry issue

You may want to talk to Rod and tell him about the problem of when the time for the appeal begins to run and the fact that some lawyers do not understand that the notice of entry has to be served by the prevailing party under the rule. We should also bring Justice Maring, as chair of Joint Procedures into this. It is perhaps a matter the committee might want to discuss.

From: Hulm, Petra
Sent: Monday, April 02, 2012 3:50 PM
To: VandeWalle, Justice Gerald
Subject: Notice of Entry issue

Chief – Last week we talked about the issue of the clerk and/or court recorder filing a notice of entry. My concern was that parties see that as a sufficient notice of entry and not do their own. It could lead to some "timely" but very old final orders being reviewed.

You asked me to call to find out where the origin of this practice and if it was intended to be the traditional "notice of entry." I called a couple of people who entered one of these lately. They said Rod Olson and the judges (at least in the east) had had a conference to discuss how best to get notice to parties of an order or judgment. Previously, they would do an affidavit of service. To avoid them having to search for a notary, the notice of entry was the solution.

In describing what I was referring to, I mentioned that in most other counties, they just put a note at the bottom with a cc: and list of the persons served. Both people I talked to thought that was a good idea. I can see where some judges might not like that informal way, though.

I explained that I would pass the information along, but not to change anything they were doing. Is there anything further you'd like me to do on this issue? Thank you.

Petra H. Mandigo Hulm
Chief Deputy Clerk of Court
North Dakota Supreme Court
phulm@ndcourts.gov
701-328-2221
This email and any transmitted files attached are intended solely for the use of the individual or entity to which they are addressed, and may be confidential under the law. If you have received this email in error please notify the originator of the message.

RULE 58. ENTRY ~~AND NOTICE OF ENTRY~~ OF JUDGMENT

(a) Entry of Judgment. ~~Upon~~

(1) Appropriate Judgment. On the filing of an order for judgment, the prevailing party must submit to the clerk an appropriate form of the judgment. The clerk must sign and file the judgment and enter it in the register of civil actions, at which time the judgment becomes effective.

(2) Failure to Submit Judgment. If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

(3) Judgment for Sum Certain. If the judgment directs the payment of money for a sum certain, or a sum that can be made certain by calculation, the clerk must also docket the judgment in the judgment docket as provided by law.

~~(b) Notice of entry of judgment. Within 14 days after entry of judgment in an action in which an appearance has been made, notice of entry of judgment, and a copy of the judgment or a general description of the nature and amount of relief and damages granted, must be served by the prevailing party on the opposing party and filed. Service of notice of entry of judgment is not required to begin the time for filing a post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry of judgment through the affirmative action of the moving or appealing party.~~

EXPLANATORY NOTE

Rule 58 was amended, effective January 1, 1988; December 19, 1990; March 1, 2000; March 1, 2011; _____.

Subdivision (a) was amended, effective January 1, 1988, to change the document where the judgment must be entered from the judgment book to the register of civil actions.

~~Subdivision~~ Former subdivision (b) on notice of entry of judgment was ~~adopted, effective March 1, 2000. Subdivision (b) was formerly~~ transferred, effective _____, to subdivision (d) of Rule 77.

~~Although subdivision (b) only refers to a judgment, Rule 54(a) defines a judgment as including "any order from which an appeal lies."~~

~~Subdivision (b) incorporates the case law exception holding service of notice of entry of judgment is not required to start the time running for filing a post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry of judgment by the affirmative action of the moving or appealing party. See Gierke v. Gierke, 1998 ND 100, Paras 6-12, 578 N.W.2d 522, 525-26; Thorson v. Thorson, 541 N.W.2d 692, 694-95 (N.D. 1996).~~

~~Subdivision (b) was amended, effective March 1, 2011, to increase the time to serve and file the notice of entry of judgment from 10 to 14 days after entry of judgment.~~

Rule 58 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology

consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of _____; January 26-27, 2012, pages 9-12; September 30, 2011, pages 22-27; April 29-30, 2010, page 15; January 28-29, 2010, page 10; September 24-25, 1998, page 16; September 18-19, 1986, pages 3-4; September 26-27, 1985, pages 3, 9; November 29-30, 1979, pages 17-18.

Cross Reference: N.D.R.Civ.P. 54 (Judgment Costs); N.D.R.Civ.P. 77 (District Courts and Clerks); N.D.R.Ct. 7.1 (Judgments, Orders and Decrees).

RULE 58. ENTRY AND NOTICE OF ENTRY OF JUDGMENT

(a) Entry of Judgment. ~~Upon~~

(1) Appropriate Judgment. On the filing of an order for judgment, the prevailing party must submit to the clerk an appropriate form of the judgment. The clerk must sign and file the judgment and enter it in the register of civil actions, at which time the judgment becomes effective.

(2) Failure to Submit Judgment. If the prevailing party fails to submit to the clerk an appropriate form of the judgment within 30 days after the order for judgment is filed, any party may submit an appropriate form without prejudice to any rights that party may have to challenge it.

(3) Judgment for Sum Certain. If the judgment directs the payment of money for a sum certain, or a sum that can be made certain by calculation, the clerk must also docket the judgment in the judgment docket as provided by law.

(b) Notice of entry of judgment.

(1) Service. Within 14 days after entry of judgment in an action in which an appearance has been made, notice of entry of judgment, and a copy of the judgment or a general description of the nature and amount of relief and damages granted, must be served by the prevailing party on the opposing party ~~and filed~~.

(2) Filing. The prevailing party must file the notice of entry of judgment and a

certificate of service specifying the docket number and date of the judgment noticed. A copy judgment, if served, may not be filed.

(3) Post Judgment Motion or Appeal. Service of notice of entry of judgment is not required to begin the time for filing a post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry of judgment through the affirmative action of the moving or appealing party.

EXPLANATORY NOTE

Rule 58 was amended, effective January 1, 1988; December 19, 1990; March 1, 2000; March 1, 2011; _____.

Subdivision (a) was amended, effective January 1, 1988, to change the document where the judgment must be entered from the judgment book to the register of civil actions.

Subdivision (b) was adopted, effective March 1, 2000. Subdivision (b) was formerly subdivision (d) of Rule 77.

Although subdivision (b) only refers to a judgment, Rule 54(a) defines a judgment as including "any order from which an appeal lies."

Subdivision (b) incorporates the case law exception holding service of notice of entry of judgment is not required to start the time running for filing a post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry of judgment by the affirmative action of the moving or appealing party. ~~See Gierke v. Gierke, 1998 ND 100, Paras 6-12, 578 N.W.2d 522, 525-26; Thorson v. Thorson, 541 N.W.2d 692, 694-95 (N.D. 1996).~~

Subdivision (b) was amended, effective March 1, 2011, to increase the time to serve and file the notice of entry of judgment from 10 to 14 days after entry of judgment.

Subdivision (b) was amended, effective _____, to require the prevailing party to file only the notice of entry and a certificate of service with details about the judgment being noticed.

Rule 58 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of _____; January 26-27, 2012, pages 9-12; September 30, 2011, pages 22-27; April 29-30, 2010, page 15; January 28-29, 2010, page 10; September 24-25, 1998, page 16; September 18-19, 1986, pages 3-4; September 26-27, 1985, pages 3, 9; November 29-30, 1979, pages 17-18.

Cross Reference: N.D.R.Civ.P. 54 (Judgment Costs); N.D.R.Civ.P. 77 (District Courts and Clerks); N.D.R.Ct. 7.1 (Judgments, Orders and Decrees).

RULE 77. DISTRICT COURTS AND CLERKS

(a) When court is open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for trial and other acts. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge elsewhere, without the attendance of the clerk or other court officials.

(c) Clerk's orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for cause, the clerk may:

(1) issue process; and

(2) act on any other matter that does not require the court's action.

(d) ~~[Transferred to Rule 58(b)]~~ Immediately on the filing of an order or decision, or on the entry of a judgment, the court must send a notice of the filing or entry to every party affected or to each party's attorney of record and make a notice in the court records of the sending. Receipt of a notice of entry of judgment is not required to begin the time for filing a post-judgment motion or an appeal if the record clearly evidences actual knowledge of entry of judgment through the affirmative action of the moving or appealing party.

EXPLANATORY NOTE

Rule 77 was amended, effective March 1, 1990; March 1, 1999; March 1, 2000;

March 1, 2002; March 1, 2011: _____.

Subdivision (b) was amended, effective March 1, 2002, to eliminate the phrase addressing judicial acts or proceedings outside the district. See N.D.R.Civ.P. 39.1.

Subdivision (c) was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Subdivision (d) was ~~transferred to Rule 58(b), effective March 1, 2000~~ restored to Rule 77, effective _____, placing the duty to send notice of filing and entry on the court.

Rule 77 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of _____; September 30, 2011, pages 22-27; January 28-29, 2010, page 22; September 28-29, 2000, pages 3-7; September 24-25, 1998, page 16; April 30-May 1, 1998, pages 12-13; April 20, 1989, page 2; December 3, 1987, page 11; January 17-18, 1980, pages 9-10; Fed.R.Civ.P. 77.

Statutes Affected:

Superseded: N.D.C.C. § 27-05-07.

Cross Reference: N.D.R.Civ.P. 39.1 (Change in Location of a Hearing, Proceeding, or Trial; Change of Venue); N.D.R.Civ.P. 58 (Entry of Judgment); N.D.R.App.P. 4 (Appeal

43 When Taken).

[Alt. A]

N.D.R.Civ.P.

RULE 77. DISTRICT COURTS AND CLERKS

(a) When court is open. Every district court is considered always open for filing any paper, issuing and returning process, making a motion, or entering an order.

(b) Place for trial and other acts. Every trial on the merits must be conducted in open court and, so far as convenient, in a regular courtroom. Any other act or proceeding may be done or conducted by a judge elsewhere, without the attendance of the clerk or other court officials.

(c) Clerk's orders. Subject to the court's power to suspend, alter, or rescind the clerk's action for cause, the clerk may:

(1) issue process; and

(2) act on any other matter that does not require the court's action.

(d) ~~[Transferred to Rule 58(b)]~~ Immediately on the entry of an order, decision, or judgment, the court must notify the affected party or the party's attorney of record and make a notice in the court records of the sending.

EXPLANATORY NOTE

Rule 77 was amended, effective March 1, 1990; March 1, 1999; March 1, 2000; March 1, 2002; March 1, 2011;_____.

Subdivision (b) was amended, effective March 1, 2002, to eliminate the phrase

addressing judicial acts or proceedings outside the district. See N.D.R.Civ.P. 39.1.

Subdivision (c) was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Subdivision (d) was ~~transferred to Rule 58(b), effective March 1, 2000~~ restored to Rule 77, effective _____, to require the court to notify parties when an order, decision or judgment is entered. The court may use any appropriate means to provide this notification as long as the notification is received by the parties. Rule 58 requires the prevailing party to serve a formal Notice of Entry of Judgment when a judgment is entered.

Rule 77 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of _____; September 30, 2011, pages 22-27; January 28-29, 2010, page 22; September 28-29, 2000, pages 3-7; September 24-25, 1998, page 16; April 30-May 1, 1998, pages 12-13; April 20, 1989, page 2; December 3, 1987, page 11; January 17-18, 1980, pages 9-10; Fed.R.Civ.P. 77.

Statutes Affected:

Superseded: N.D.C.C. § 27-05-07.

Cross Reference: N.D.R.Civ.P. 39.1 (Change in Location of a Hearing, Proceeding, or Trial; Change of Venue); N.D.R.Civ.P. 58 (Entry of Judgment); N.D.R.App.P. 4 (Appeal

43 When Taken).

RULE 4. APPEAL – WHEN TAKEN

(a) Appeal in civil case.

(1) Time for filing notice of appeal. In a civil case, except as provided in paragraph (a)(4), the notice of appeal required by Rule 3 must be filed with the clerk of district court within 60 days from service of notice of entry of the judgment or order being appealed.

(2) Multiple appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this subdivision, whichever period ends later.

(3) Effect of motion on notice of appeal.

(A) If a party timely files with the clerk of district court any of the following motions under the North Dakota Rules of Civil Procedure, the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is served and filed no later than 28 days

after notice of entry of judgment;

(B) (i) If a party files with the clerk of district court any motion listed in subparagraph (a)(3)(A) after a notice of appeal is filed, the party filing the motion must notify the supreme court clerk in writing, and the court may remand the case to the district court to decide the motion. The supreme court retains jurisdiction on remand unless it expressly dismisses the appeal. If the supreme court remands and retains jurisdiction, the parties must promptly notify the supreme court clerk when the district court has decided the motion on remand.

(ii) A party intending to challenge an order disposing of any motion listed in subparagraph (a)(3)(A), or a judgment's alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal, in compliance with Rule 3(c), within the time prescribed by this rule measured from the service of notice of the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(4) Motion for extension of time.

(A) The district court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by subdivision (a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) If a motion for extension of time is filed, notice must be given to the other parties.

(C) No extension under paragraph (a)(4) may exceed 30 days after the prescribed time.

(b) Appeal in criminal case.

(1) Time for filing notice of appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed with the clerk of district court within 30 days after the entry of the judgment or order being appealed.

(B) If an appeal by the state is authorized by statute, the notice of appeal must be filed with the clerk of district court within 30 days after the entry of the judgment or order being appealed.

(2) Filing before entry of judgment. A notice of appeal filed after the district court announces a decision, sentence, or order, but before the entry of the judgment or order, is treated as filed on the date of and after the entry.

(3) Effect of motion on notice of appeal.

(A) If a defendant timely makes any of the following motions under the North Dakota Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period ends later:

(i) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 30 days after the entry of the judgment;

(ii) for arrest of judgment under Rule 34.

(B) If the defendant files with the clerk of district court any motion listed in subparagraph (b)(3)(A) after a notice of appeal is filed, the defendant must notify the supreme court clerk in writing, and the court may remand the case to the district court for disposition of the motion.

(C) A notice of appeal filed after the district court announces a decision, sentence, or order, but before it disposes of any of the motions referred to in subparagraph (b)(3)(A), becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion;

(ii) the entry of the judgment of conviction.

(D) A valid notice of appeal is effective, without amendment, to appeal from an order disposing of any of the motions referred to in subparagraph (b)(3)(A).

(4) Motion for extension of time. Upon a finding of excusable neglect or good cause, the district court may -- before or after the time has expired, with or without motion and notice -- extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(5) Jurisdiction. The filing of a notice of appeal under this subdivision does not divest a district court of jurisdiction to correct a sentence under Rule 35(a), nor does the filing of a motion under Rule 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under N.D.R.Crim.P. 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry defined. A judgment or order is entered for purposes of this subdivision when it is entered on the criminal docket.

(c) Appeal in Contempt Case. A notice of appeal must be filed with the clerk of district court within 60 days after entry of the judgment or order being appealed. Upon a finding of excusable neglect or for good cause, the district court may, before or after the time

has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(d) Appeal in post-conviction proceeding. A notice of appeal must be filed with the clerk of district court within 60 days of service of notice of entry of the judgment or order being appealed. Upon a finding of excusable neglect or good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(e) Appeal in Proceeding Under Uniform Juvenile Court Act. A notice of appeal must be filed with the clerk of district court within 30 days of service of notice of entry of the judgment, order or decree being appealed. Upon a finding of excusable neglect or good cause, the supreme court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(f) Mistaken filing in supreme court. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the supreme court, the supreme court clerk must note on the notice the date when it was received and send it to the clerk of district court. The notice is then considered filed in the district court on the date so noted.

EXPLANATORY NOTE

Rule 4 was amended, effective March 1, 1986; March 1, 1994; March 1, 1997; March

1, 1998; March 1, 1999; August 1, 2001; March 1, 2003; March 1, 2007; March 1, 2008: March 1, 2011; March 1, 2012:_____.

The time for civil appeals runs from "service of notice of entry" of the order or judgment. However, service of notice of entry of judgment is not necessary to start the time running for filing a post-judgment motion or appeal if the record clearly evidences actual knowledge of entry of judgment by the affirmative action of the moving or appealing party. See N.D.R.Civ.P. ~~58(b)~~ 77(d).

~~The responsibility under subdivision (a) is shifted to counsel to serve the notice and commence the period for appeal. This differs from the federal rule, which provides the time for appeal is to run from "the date of entry."~~

The time limit for taking an appeal does not prevent the taking of an appeal at any time after the entry of the judgment or order and before service of notice of entry.

Subdivision (a) was amended, effective March 1, 1999, to provide the 30 day extension for excusable neglect is to be added to the time for appeal provided by the statute or rule setting the time for appeal. A party seeking an extension of time to appeal should file a notice of appeal with the motion for extension.

Subparagraph (a)(3)(A)(vi) was amended, effective March 1, 2011, to increase the time to file a Rule 60 motion from 15 to 28 days after notice of entry of judgment.

Subparagraph (a)(3)(B) was amended, effective March 1, 2012, to provide that the supreme court retains jurisdiction when remanding a case to the district court to decide a motion unless the supreme court expressly dismisses the appeal.

Subparagraph (a)(3)(B)(ii) was amended, effective March 1, 2011, to track the 2009 amendments to Fed.R.App.P. 4. The amendment changed the phrase "judgment altered or amended" to "judgment's alteration or amendment."

Subdivision (b) was amended, effective March 1, 2003, to increase the time for a criminal defendant to appeal from 10 days to 30 days.

Subdivision (b) was amended, effective March 1, 2008, to clarify that the time for appeal continues to run even if a motion to correct a sentence under N.D.R.Crim.P. 35 is filed.

Subdivision (d) was adopted, effective August 1, 2001, to provide a time for appeal in a post-conviction proceeding.

Subdivision (e) was adopted, effective March 1, 2007, to clarify the time for appeal in a proceeding under the Uniform Juvenile Court Act. Requests for extension of time in juvenile cases must be directed to the supreme court.

Subdivision (f) was adopted, effective March 1, 2003, to provide a procedure to be used when a notice of appeal is mistakenly filed in the supreme court.

Rule 4 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 4. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of _____; April 28-29, 2011, page 18; April 29-30, 2010, page 23; January 25, 2007, page 16; September

22-23, 2005, pages 25-26; April 26-27, 2001, pages 4-5; September 28-29, 2000, pages 10-13; January 27-28, 2000, pages 4-9; September 23-24, 1999, pages 10-12; April 30-May 1, 1998, page 13; January 30, 1997, page 8; January 25-26, 1996, pages 7-10; April 29-30, 1993, pages 2-3, 16-18; November 29, 1984, pages 19-20; April 26, 1984, pages 23-24; January 20, 1984, pages 10-15; September 18-19, 1980, page 20; January 12-13, 1978, page 25; Fed.R.App.P. 4.

Statutes Affected:

Considered: N.D.C.C. § 27-20-56.

Superseded: N.D.C.C. § 28-27-04.

Cross Reference: N.D.R.Civ.P. 77 (District Courts and Clerks).

77.04 NOTICE OF ORDERS OR JUDGMENTS

Immediately upon the filing of an order or decision or entry of a judgment, the court administrator shall serve a notice of the filing or entry by mail upon every party affected thereby or upon such party's attorney of record, whether or not such party has appeared in the action, at the party or attorney's last known address, and shall make a notice in the court records of the mailing, but such notice shall not limit the time for taking an appeal or other proceeding on such order, decision, or judgment.

CASE NOTES

Brown's Bay Marine Corp. v. Skrypec, 271 Minn. 523, 136 N.W.2d 590, 1965 Minn. LEXIS 755 (1965).
Overview: Defendants were permitted to apply for an order staying execution of two judgments until the ultimate resolution of a motion for a new trial that had not been previously addressed by the trial court prior to entry of judgments against defendants.

- A district court has no power to extend the time for appeal from a judgment by vacating the same after the time for appeal has expired and reentering the same, even though the clerk of the district court fails to serve notice of entry of the judgment as required by Minn. R. Civ. P. 77.04. Go To Headnote

Burns v. Ungerman, 2005 Minn. App. LEXIS 209 (Minn. Ct. App. Mar. 1 2005), review denied by 2005 Minn. LEXIS 259, 9 No. 19 Minn. Lawyer 6 (2005).
Overview: (Unpublished Opinion) Litigant had been enjoined from filing suits unless her pleadings were approved by chief judge or signed by lawyer. As her fourth pro se filing disrupted operation of courts, even if judge had been properly removed from the case under Minn. R. Civ. P. 63.03, he was still entitled to dismiss her suit and assess fine and attorney fees against her.

- Where a district court mails an order to the address supplied in a plaintiff's summons and complaint, it has strictly complied with the requirements of Minn. R. Civ. P. 77.04. Go To Headnote

In re Civ. Commitment of Tefera, 2010 Minn. App. Unpub. LEXIS 525 (Minn. Ct. App. June 8 2010).
Overview: (Unpublished Opinion) District court's order that an individual be committed as a mentally ill person under Minn. Stat. § 253B.09, subd. 1(a) was affirmed because the district court sufficiently found, by clear and convincing evidence, that no reasonable alternative disposition existed as the individual refused to cooperate with treatment.

- *The purpose of Minn. R. Civ. P. 77.04 is to ensure that district courts make a good faith effort to serve orders on affected parties. Although the clerk of court lacks discretion to ignore the rule, failure to comply with its terms does not affect the time for filing an appeal. Go To Headnote*

Tombs v. Ashworth, 255 Minn. 55, 95 N.W.2d 423, 1959 Minn. LEXIS 567 (1959).
Overview: The time for appeal commenced to run upon the entry of the judgment and the failure of the clerk of the court to comply with civil procedure rule that required notice of entry of judgment did not affect the parties' time for appealing that judgment.

- *The time for appealing from a judgment commences to run upon the entry thereof and that failure of the clerk to comply with Minn. R. Civ. P. 77.04 with respect to service of notice does not affect the time for appealing. Nor does the trial court, after the expiration of the time for appealing, have any power to set aside and vacate such judgment and reenter it for the purpose of giving a party the right to appeal from a judgment after such right has expired. Go To Headnote*

Kepler v. Kepler, 1995 Minn. App. LEXIS 258 (Minn. Ct. App. Feb. 21 1995).
Overview: (Unpublished Opinion) A trial court erred in suppressing an audiotape of a phone conversation in a domestic violence action which was relevant to the issue of whether the husband made threatening statements during such phone conversation to the wife.

- *Under former Minn. R. Civ. App. P. 104.01 and former Minn. R. Civ. App. P. 104.03, an appeal may be taken from a final order in a special proceeding within thirty days after the adverse party is served with notice of filing of the order. The court administrator is required under Minn. R. Civ. P. 77.04 to serve a notice of the filing of an order on the parties by mail immediately upon the filing of the order. Go To Headnote*

State by Humphrey v. Certified Services, Inc., 432 N.W.2d 494, 1988 Minn. App. LEXIS 1189 (Minn. Ct. App. 1988).
Overview: Where the State filed an appeal over 90 days after entry of judgment, as noticed by the clerk, but within 90 days of the date the clerk in a second notice erroneously notified the State as the date of entry, the appeal was nonetheless untimely.

- *The notice requirements of Minn. R. Civ. P. 77.04 do not relieve the parties of the responsibility of determining the date of entry of judgment. Go To Headnote*

Albert Lea v. Harrer, 381 N.W.2d 499, 1986 Minn. App. LEXIS 4011 (Minn. Ct. App. 1986).
Overview: A City's appeal of the dismissal of drunk driving charges was untimely where the City mailed the appeal eight days after the trial court's order where

the City agreed that the clerk could place the order in a court mailbox instead of mailing it.

- Minn. R. Crim. P. 33.03 requires the clerk immediately upon entry of an order to mail a copy of the order to the parties. The clerk cannot ignore this rule even if inconvenient and burdensome. The clerk is bound by Minn. R. Civ. P. 77.04, which is identical to Minn. R. Crim. P. 33.03, and has no right to ignore it because the burden of sending such notices would amount to a physical impossibility. Go To Headnote

Burns v. Ungerman, 2005 Minn. App. LEXIS 209 (Minn. Ct. App. Mar. 1 2005), review denied by 2005 Minn. LEXIS 259, 9 No. 19 Minn. Lawyer 6 (2005). Overview: (Unpublished Opinion) Litigant had been enjoined from filing suits unless her pleadings were approved by chief judge or signed by lawyer. As her fourth pro se filing disrupted operation of courts, even if judge had been properly removed from the case under Minn. R. Civ. P. 63.03, he was still entitled to dismiss her suit and assess fine and attorney fees against her.

- The purpose of Minn. R. Civ. P. 5.01 and 77.04 is to ensure that district courts make a good faith effort to serve orders on affected parties. If a district court fails to make a good faith effort to serve an order, then parties affected by the order cannot be bound by it. Go To Headnote
- Where a district court mails an order to the address supplied in a plaintiff's summons and complaint, it has strictly complied with the requirements of Minn. R. Civ. P. 77.04. Go To Headnote

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 3, 2012

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

The Committee discussed the Court's amendments to Rule 41 at the January meeting. Staff explained that the Court had decided to require application of a balancing analysis before a court could allow access to a defendant's Internet case records to be restricted. The Committee instructed staff to attempt to draft form documents applying the court's standard that could be used by a defendant seeking to restrict access to Internet case records.

Staff has drafted a proposed notice of motion, motion and brief, and findings of fact/conclusions of law that the Committee can use a starting point in discussing and developing form documents for defendants seeking to restrict Internet access to their records. The proposed forms are attached.

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF _____ CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

vs. **NOTICE OF MOTION**

_____,
Defendant.

TO THE ABOVE NAMED PLAINTIFF AND OTHER INTERESTED PERSONS:

NOTICE IS GIVEN that on _____ the defendant submitted a MOTION TO PROHIBIT PUBLIC INTERNET ACCESS in the above-captioned matter under N.D.Sup.Ct.Admin.R. 41, Section 6, and N.D.R.Ct. 3.2. The motion will be decided on briefs unless oral argument is timely requested.

Dated this_____day of_____,_____.

_____

_____
Defendant

_____
Street Address

_____
City, State, Zip

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STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF _____ CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

vs.

MOTION TO PROHIBIT PUBLIC INTERNET ACCESS AND SUPPORTING BRIEF

_____,
Defendant.

MOTION

The defendant indicated above now moves to prohibit public Internet access to the records in this matter under N.D.Sup.Ct.Admin.R. 41, Section 6(a)(6), because there are sufficient grounds to overcome the presumption of openness of court records and allow access to be prohibited. The defendant requests that this motion be decided on briefs under N.D.R.Ct. 3.2.

BRIEF

The defendant in this matter was charged on _____ with _____. On _____, the charges against the defendant were dismissed / the defendant was acquitted of the charges.

When criminal charges against a defendant are dismissed or the defendant is acquitted,

N.D.Sup.Ct.Admin.R. 41, Section 6(a)(6), allows the court to prohibit public Internet access to the individual defendant's electronic court record if, after conducting a balancing analysis and making findings under N.D.Sup.Ct.Admin.R. 41, Section 6(a), paragraphs (1) through (5), it concludes that the interest of justice will be served.

Under the balancing analysis, the court must decide whether there are sufficient grounds to overcome the presumption of openness of court records and prohibit access according to applicable constitutional, statutory and case law. The court must consider that the presumption of openness may only be overcome by an overriding interest. The court must articulate this interest along with specific findings sufficient to allow a reviewing court to determine whether the closure order was properly entered.

In this case, the reason for dismissal of charges/acquittal was _____. Consequently, the public interest in maintaining open Internet access to the records of this matter is minimal.

In addition, because these records have remained available for open Internet access, the defendant has sustained the following harms:_____. Because these harms are substantial, there is an overriding interest in protecting the defendant from further harm by restricting Internet to the records of this matter.

Based on the minimal interest in maintaining open Internet access in this matter and the substantial harm the defendant has sustained because Internet access has been allowed,

the interest of justice will be served by restricting open Internet access to the defendant's records in this matter.

Dated this_____day of _____, _____.

_____

Defendant

_____

Street Address

_____

City, State, Zip

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[C-8]

STATE OF NORTH DAKOTA IN DISTRICT COURT

COUNTY OF _____ CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

vs.

FINDINGS OF FACT AND CONCLUSIONS OF LAW ON MOTION TO PROHIBIT PUBLIC INTERNET ACCESS

_____,
Defendant.

The defendant indicated above submitted a motion to prohibit public Internet access to the records in this matter under N.D.Sup.Ct.Admin.R. 41, Section 6(a)(6), on _____. The State responded to the motion on _____. The court considered the motion and decided it on briefs under N.D.R.Ct. 3.2.

FINDINGS OF FACT

I

The Court finds there are sufficient grounds to overcome the presumption of openness of court records in this case to allow Internet access to defendant's records to be prohibited.

II

The following specific facts show that the public interest in maintaining open Internet access to the records of this matter is minimal :

A._____
B._____
C._____

III

The following specific facts show that the defendant has sustained the following substantial harms because these records in this matter have remained available for open Internet access:

A._____
B._____
C._____

CONCLUSIONS OF LAW

I

There is an overriding interest in protecting the defendant from further harm by restricting Internet to the records of this matter.

II

There is a minimal interest in maintaining open Internet access to the records in this matter.

Based on the above, the court administrator is ordered to immediately restrict Internet access to the records in this matter.

Dated this _____ day of _____, _____.

_____
District Judge/Magistrate

RULE 41. ACCESS TO COURT RECORDS

Section 1. Purpose.

The purpose of this rule is to provide a comprehensive framework for public access to court records. Every member of the public will have access to court records as provided in this rule.

Section 2. Definitions.

(a) "Court record," regardless of the form, includes:

(1) any document, information, or other thing that is collected, received, or maintained by court personnel in connection with a judicial proceeding;

(2) any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by court personnel that is related to a judicial proceeding; and

(3) information maintained by court personnel pertaining to the administration of the court or clerk of court office and not associated with any particular case.

(b) "Court record" does not include:

(1) other records maintained by the public official who also serves as clerk of court;

(2) information gathered, maintained or stored by a governmental agency or other entity to which the court has access but which is not part of the court record as defined in this rule; and

(3) a record that has been disposed of under court records management rules.

(c) "Public access" means that the public may inspect and obtain a copy of the information in a court record.

(d) "Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

(e) "Bulk distribution" means the distribution of all, or a significant subset, of the information in court records, as is and without modification or compilation.

(f) "Compiled information" means information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record.

(g) "Electronic form" means information in a court record that exists as:

(1) electronic representations of text or graphic documents;

(2) an electronic image, including a video image, of a document, exhibit or other thing;

(3) data in the fields or files of an electronic database; or

(4) an audio or video recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared.

Section 3. General Access Rule.

(a) Public Access to Court Records.

(1) Information in the court record is accessible to the public except as prohibited by this rule.

(2) There must be a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication may not disclose the nature of the information protected.

(3) A court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided for in this rule, nor provide greater access than that provided for in this rule.

(b) When Court Records May Be Accessed.

(1) Court records in a court facility must be available for public access during normal business hours. Court records in electronic form to which the court allows remote access will be available for access subject to technical systems availability.

(2) Upon receiving a request for access to information, the clerk of court ~~shall~~ must respond as promptly as practical. If a request cannot be granted promptly, or at all, an explanation must be given to the requestor as soon as possible. The ~~requesting person~~ requestor has a right to at least the following information: the nature of any problem preventing access and the specific statute, federal law, or court or administrative rule that is the basis of the denial. The explanation must be in writing if desired by the requestor.

(c) Access to Court Records Filed Before March 1, 2009. Court records filed before the adoption of N.D.R.Ct. 3.4 may contain protected information listed under N.D.R.Ct. 3.4(a). This rule does not require the review and redaction of protected information from a court record that was filed before the adoption of N.D.R.Ct. 3.4 on March 1, 2009.

(d) Fees for Access. The court may charge a fee for access to court records in

electronic form, for remote access, for bulk distribution or for compiled information. To the extent that public access to information is provided exclusively through a vendor, the court will ensure that any fee imposed by the vendor for the cost of providing access is reasonable.

Section 4. Methods of Access to Court Records.

(a) Access to Court Records at Court Facility.

(1) Request for Access. Any person desiring to inspect, examine, or copy a court record ~~shall~~ must make an oral or written request to the clerk of court. If the request is oral, the clerk may require a written request if the clerk determines that the disclosure of the record is questionable or the request is so involved or lengthy as to need further definition. The request must clearly identify the record requested so that the clerk can locate the record without doing extensive research. Continuing requests for a document not yet in existence may not be considered.

(2) Response to Request. The clerk of court is not required to allow access to more than ten files per day per requestor, but may do so in the exercise of the clerk's discretion if the access will not disrupt the clerk's primary function. If the request for access and inspection is granted, the clerk may set reasonable time and manner of inspection requirements that ensure timely access while protecting the integrity of the records and preserving the affected office from undue disruption. The inspection area must be within full view of court personnel whenever possible. The person inspecting the records may not leave the court facility until the records are returned and examined for completeness.

(3) Response by Court. If a clerk of court determines there is a question about whether

a record may be disclosed, or if a written request is made under Section 6(b) for a ruling by the court after the clerk denies or grants an access request, the clerk ~~shall~~ must refer the request to the court for determination. The court must use the standards listed in Section 6 to determine whether to grant or deny the access request.

(b) Remote Access to Court Records. The following information in court records must be made remotely accessible to the public if it exists in electronic form, unless public access is restricted under this rule:

(1) litigant/party indexes to cases filed with the court;

(2) listings of new case filings, including the names of the parties;

(3) register of actions showing what documents have been filed in a case;

(4) calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing; and

(5) reports specifically developed for electronic transfer approved by the state court administrator and reports generated in the normal course of business, if the report does not contain information that is excluded from public access under Section 5 or 6.

(c) Requests for Bulk Distribution of Court Records.

(1) Bulk distribution of information in the court record is permitted for court records that are publicly accessible under Section 3(a).

(2) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes ~~where~~ when the identification of specific individuals is ancillary to the

purpose of the inquiry. Prior to the release of information under this subsection the requestor must comply with the provisions of Section 6.

(3) A court may allow a party to a bulk distribution agreement access to birth date, street address, and social security number information if the party certifies that it will use the data for legitimate purposes as permitted by law.

(d) Access to Compiled Information From Court Records.

(1) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already in an existing report. The court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the court, that the resources are available to compile the information and that it is an appropriate use of public resources. The court may delegate to its staff or the clerk of court the authority to make the initial determination to provide compiled information.

(2) Requesting compiled restricted information.

(A) Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.

(B) The request must:

(i) identify what information is sought,

(ii) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and

(iii) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

(C) The court may grant the request and compile the information if it determines that doing so meets criteria established by the court and is consistent with the purposes of this rule, the resources are available to compile the information, and that it is an appropriate use of public resources.

(D) If the request is granted, the court may require the requestor to sign a declaration that:

(i) the data will not be sold or otherwise distributed, directly or indirectly, to third parties, except for journalistic purposes;

(ii) the information will not be used directly or indirectly to sell a product or service to an individual or the general public, except for journalistic purposes; and

(iii) there will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

The court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited.

Section 5. Court Records Excluded From Public Access.

The following information in a court record is not accessible to the public:

(a) ~~Information~~ information that is not accessible to the public under federal law;

(b) ~~Information~~ information that is not accessible to the public under state law, court

rule, case law or court order, including:

(1) affidavits or sworn testimony and records of proceedings in support of the issuance of a search or arrest warrant pending the return of the warrant;

(2) information in a complaint and associated arrest or search warrant to the extent confidentiality is ordered by the court under ~~Section~~ N.D.C.C. §§ 29-05-32 or 29-29-22~~, NDCC~~;

(3) documents filed with the court for in-camera examination pending disclosure;

(4) case information and documents in Child Relinquishment to Identified Adoptive Parent cases brought under N.D.C.C. ch. 14-15.1;

~~(4)~~(5) domestic violence protection order files and disorderly conduct restraining order files when the restraining order is sought due to domestic violence, except for orders of the court;

(6) domestic violence protection order and disorderly conduct restraining order cases in which the initial petition was dismissed by the court without further hearing;

~~(5)~~(7) names of qualified or summoned jurors and contents of jury qualification forms if disclosure is prohibited or restricted by order of the court;

~~(6)~~(8) records of voir dire of jurors, unless disclosure is permitted by court order or rule;

~~(7)~~(9) records of deferred impositions of sentences resulting in dismissal;

~~(8)~~(10) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected information:

~~=~~ (A) except for the last four digits, social security numbers, taxpayer identification

numbers, and financial account numbers,

== (B) except for the year, birth dates, and

== (C) except for the initials, the name of an individual known to be a minor, unless the minor is a party, and there is no statute, regulation, or rule mandating nondisclosure;

~~(9)~~(10) judge and court personnel work material, including personal calendars, communications from law clerks, bench memoranda, notes, work in progress, draft documents and non-finalized documents.

(c) This rule does not preclude access to court records by the following persons in the following situations:

(1) federal, state, and local officials, or their agents, examining a court record in the exercise of their official duties and powers;

(2) parties to an action and their attorneys examining the court file of the action, unless restricted by order of the court, but parties and attorneys may not access judge and court personnel work material in the court file.

(d) A member of the public may request the court to allow access to information excluded under Section 5 as provided in Section 6.

Section 6. Requests to Prohibit Public Access to Information in Court Records or to Obtain Access to Restricted Information.

(a) Request to Prohibit Access.

(1) A request to the court to prohibit public access to information in a court record may be made by any party to a case, by the individual about whom information is present in

the court record, or on the court's own motion, on notice as provided in Section 6(c).

(2) The court must decide whether there are sufficient grounds to overcome the presumption of openness of court records and prohibit access according to applicable constitutional, statutory and case law.

(3) In deciding whether to prohibit access the court must consider that the presumption of openness may only be overcome by an overriding interest. The court must articulate this interest along with specific findings sufficient to allow a reviewing court to determine whether the closure order was properly entered.

(4) The closure of the records must be no broader than necessary to protect the articulated interest. The court must consider reasonable alternatives to closure, such as redaction or partial closure, and the court must make findings adequate to support the closure. The court may not deny access only on the ground that the record contains confidential or closed information.

(5) In restricting access the court must use the least restrictive means that will achieve the purposes of this rule and the needs of the requestor.

(6) If the court concludes, after conducting the balancing analysis and making findings as required by paragraphs (1) through (5), that the interest of justice will be served, it may prohibit public Internet access to an individual defendant's electronic court record in a criminal case:

(A) if the charges against the defendant are dismissed; or

(B) if the defendant is acquitted.

If the court grants a request to prohibit public Internet access to an electronic court record in a criminal case, the search result for the record must display the words "Internet Access Prohibited under N.D.Sup.Ct. Admin.R 41."

(b) Request to Obtain Access.

(1) A request to obtain access to information in a court record to which access is prohibited under Section 4(a), 5 or 6(a) may be made to the court by any member of the public or on the court's own motion on notice as provided in Section 6(c).

(2) In deciding whether to allow access, the court must consider whether there are sufficient grounds to overcome the presumption of openness of court records and continue to prohibit access under applicable constitutional, statutory and case law. In deciding this the court must consider the standards outlined in Section 6(a).

(c) Form of Request.

(1) The request must be made by a written motion to the court.

(2) The requestor shall give notice to all parties in the case.

(3) The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject of the request. When the request is for access to information to which access was previously prohibited under Section 6(a), the court must provide notice to the individual or entity that requested that access be prohibited.

Section 7. Obligations Of Vendors Providing Information Technology Support To A Court To Maintain Court Records.

(a) If the court contracts with a vendor to provide information technology support to gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this rule. For purposes of this section, "vendor" includes a state, county or local governmental agency that provides information technology services to a court.

(b) By contract the vendor will be required to notify the court of any requests for compiled information or bulk distribution of information, including the vendor's requests for such information for its own use.

EXPLANATORY NOTE

Adopted on an emergency basis effective October 1, 1996; Amended and adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1, 2009; March 15, 2009; March 1, 2010; March 1, 2012; Appendix amended effective August 1, 2001, to reflect the name change of State Bar Board to State Board of Law Examiners.

Section 3(c) was adopted, effective March 1, 2010, to state that protected information may be contained in court records filed before the adoption of N.D.R.Ct. 3.4.

Section 4(c) was amended, effective March 15, 2009, to allow parties who enter into bulk distribution agreements with the courts to have access to birth date, street address, and social security number information upon certifying compliance with laws governing the security of protected information. Such laws include the Federal Fair Credit Reporting Act, the Gramm Leach Bliley Act, the USA Patriot Act and the Driver's Privacy Protection Act.

Section 5(b)(8) was amended, effective March 15, 2009, to list types of protected

information open to the public.

The term "financial-account number" in Section 5(b)(8) includes any credit, debit or electronic fund transfer card number, and any other financial account number.

Section 5(b)(8) was amended, effective March 1, 2010, to incorporate the exemptions from redaction contained in N.D.R.Ct. 3.4(b). A document containing protected information that is exempt from redaction under N.D.R.Ct. 3.4(b) is accessible to the public.

Section 6(a)(6) was added, effective March 1, 2012, to provide a method for the court to prohibit public Internet access to an electronic case record when charges against a defendant are dismissed or the defendant is acquitted. A request under Section 6(a)(1) is required before the court can act to prohibit access under Section 6(a)(6).

Nothing in this rule or N.D.R.Ct. 3.4 precludes a clerk of court or the electronic case management system from identifying non-confidential records that match a name and date of birth or a name and social security number.

HISTORY: Joint Procedure Committee Minutes of April 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009, pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13, January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12. Court Technology Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003; Conference of Chief Justices/Conference of State Court Administrators:

Guidelines for Public Access to Court Records.

CROSS REFERENCE: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With the Court).

APPENDIX

Statutes, court rules and policies, and federal regulations making certain records confidential, in whole or in part, include:

ND Century Code

12.1-32-07.2(2) Records and papers concerning deferred imposition of sentence when guilty plea is withdrawn or guilty verdict set aside

12.1-32-09(3) Notice specifying defendant as a dangerous special offender for sentencing purposes

12.1-35-03 Information identifying a child victim of a crime

14-02.1-03.1(3), (4), (11) Records involving judicial authorization for abortion for unmarried minor

14-09.1-06 Mediation proceedings concerning contested child support, custody, or visitation

14-09.2-06 Parent Coordinator proceedings

14-15-16(4) Adoption proceedings

14-15.1 Child Relinquishment to Identified Adoptive Parent proceedings

14-20-54 Paternity proceedings

23-07.6-11 Confinement proceedings for those with communicable diseases

23-02.1-27 Certain information in birth and death certificates

25-03.1-43 Mental health commitments

25-03.3-03 Commitment proceedings for sexually dangerous individuals

27-20-51 Juvenile court records

27-09.1-12(4) Jury selection records

29-10.1-30, -31 Grand jury proceedings

30.1-11-01 Wills deposited for safekeeping

37-01-34 Recorded military discharge papers

50-06-05.1(15) Social-psychological evaluations and predisposition reports provided by department of human services

Court Rules and Policies

N.D.R.Civ.P. 26(c) Protective orders

N.D.R.Crim.P. 32(c) Presentence investigation reports

N.D.R.Crim.P. 32.1 Deferred imposition of sentence records

N.D.R.Crim.P. 44(b) Ex parte application for financial assistance

Administrative Rule 40 Audiotapes of closed or confidential proceedings

Administrative Policy 215 Access to computer-based data

Administrative Policy 402 Access to Juvenile Court Records

Federal Regulations

22 C.F.R. Section 51.33 Passport records

Boards and commissions governed by rules adopted by the Supreme Court include:

Commission for Continuing Legal Education; Disciplinary Board; Judicial Conduct Commission, State Board of Law Examiners.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: March 23, 2012

RE: Rule 9, N.D.R.Crim.P., Warrant or Summons Upon Indictment or Information

Judge Kleven made a motion at the January meeting to delete the requirement in Rule 9 (b)(1) that the clerk sign the warrant. The motion was tabled for research on the requirement.

Rule 4 requires a specific official – the magistrate – to issue and sign the arrest warrant. Rule 9 allows the institution of the court, and its representative the clerk, to issue an arrest warrant or summons on an indictment or information. The magistrate is not mentioned in Rule 9.

The federal rule uses the term "judge" in Rule 4 and "court" in Rule 9. Fed.R.Crim.P 9 appears to contemplate the U.S. attorney bringing an indictment (or an information with an affidavit of probably cause) to the clerk and getting a warrant or summons without having a judge involved. The version of the federal rule that was in place when N.D.R.Crim.P. 9 was drafted even gave the clerk the duty of delivering the warrant or summons to the process server. A copy of the former Fed.R.Crim.P. 9 is attached.

Staff located several federal cases where the defendant tried to prove that a warrant not signed by a judge was defective, but the courts ruled that, if the warrant had been issued under Rule 9, signing by clerk alone was sufficient. It appears that the lower standard under Rule 9 is acceptable because an indictment or information is a more developed document than a complaint.

As written, our Rule 9 may allow the clerk to issue a warrant or summons without action by the magistrate. The explanatory note indicates that prosecution by indictment or information cannot take place unless probable cause has been established, so the magistrate's participation in issuing the warrant or summons seemingly is not necessary. Practice and recent statutory and rule amendments, however, may have blurred the once clearly separate roles of the complaint and the information. Therefore, the Committee may wish to discuss whether a rethinking of Rule 9 is needed to reflect the current role of the indictment, information and complaint. If, in practice, it is the magistrate who issues a warrant or summons under Rule 9, perhaps "magistrate" could be substituted for "court" and "clerk" in the rule.

In the general discussion of criminal rule amendments at the January meeting, State v. Hayes, 2012 ND 9, was brought up. A copy of the case is attached. Under Hayes, a magistrate must make findings before imposing pretrial release conditions. Rule 9(b)(1) allows the "court" to "fix the amount of bail and endorse it on the warrant." This language does not seem appropriate under Hayes, given that bail is a pretrial release condition. Similar language was removed from the federal rule in 2002 because it was considered inconsistent with the 1984 Bail Reform Act. Proposed amendments to Rule 9 that would remove this language are attached.

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) Issuance. The court must issue an arrest warrant for each defendant named in the indictment or information, if it is supported by a showing of probable cause as required in Rule 4(a). The court need not issue a warrant for any defendant who has been held to answer for any offense charged. After a showing of probable cause, the court may issue a summons instead of a warrant on its own motion or at the request of the prosecuting attorney. On like request or on its own motion, the court may issue more than one warrant or summons for the same defendant. The court must issue the arrest warrant or summons to the sheriff or other person authorized by law to execute or serve it. If a defendant fails to appear in response to a summons, the court must issue a warrant.

(b) Form.

(1) Warrant. The warrant must conform to Rule 4(b)(1) except that it must be signed by the clerk, describe the offense charged in the indictment or information, and command that the defendant be arrested and brought before the court. ~~The court may fix the amount of bail and endorse it on the warrant.~~

(2) Summons. The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(c) Execution or service; and return.

(1) Execution or service. The warrant must be executed or the summons served as provided in Rule 4(c)(1) and (2).

(2) Return. A warrant or summons must be returned in accordance with Rule 4(d).

(d) Warrant or Summons by Telephone or Other Means. In accordance with Rule 4.1, the magistrate may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

EXPLANATORY NOTE

Rule 9 was amended, effective March 1, 2006;_____.

Rule 9 is an adaptation of Fed.R.Crim.P. 9, and provides for the issuance of a warrant or summons upon indictment or information. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing... persons...to be seized." If an indictment has been returned, the Fourth Amendment is satisfied and the warrant can issue on request without more, since the indictment is made on the oath of the grand jury. The provision for showing of the "probable cause" as required in Rule 4(a) makes explicit the fact that a warrant or summons can issue on the basis of an information only if the information or affidavit filed with the information shows probable cause for the arrest warrant or summons. Generally, prosecution on information has as a prerequisite a determination of probable cause at a preliminary examination. Exceptions are listed in N.D.C.C. § 29-09-02.

Subdivision (b) incorporates by reference the provisions of Rule 4(b) concerning the form of the warrant or summons. The minor differences reflect the different stage in the proceeding at which the warrant or summons is being issued. The warrant upon an indictment or information must be signed by the clerk and must describe the offense charged in the

indictment or information. The amount of bail may be fixed by the court and endorsed on the warrant. See Rule 46 (Release from Custody).

Paragraph (b)(1) was amended, effective _____, to remove language allowing the bail amount to be endorsed on the warrant. A pretrial release condition, such as bail, can only be imposed when supported by a magistrate's findings.

Subsection (c)(1) incorporates by reference portions of Rule 4(c) dealing with the execution of a warrant and service of a summons.

Subsection (c)(2), dealing with return, is virtually the same as Rule 4(d), providing for return of a warrant or summons issued on the complaint. At the request of the prosecuting attorney, any unexecuted warrant must be returned and canceled. On or before the return day, the person to whom a summons was delivered for service must make a return to the court.

Subdivision (d) was added, effective _____, to allow the magistrate to issue a warrant or summons based on information communicated by telephone or other reliable electronic means under the procedure set out in Rule 4.1.

Rule 9 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of January 26-27, 2012, page 26; January 29-30, 2004, page 26; March 23-25, 1972, pages 16-20; May 15-16, 1969, page 7; May 3-4, 1968, page 7; Fed.R.Crim.P. 9.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-12-03, 29-12-04, 29-12-06, 29-12-08.

Cross Reference: N.D.R.Crim.P. 4 (Arrest Warrant or Summons Upon Complaint); N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 46 (Release from Custody);. N.D.C.C. § 29-09-02 (Prosecution on Information -- In what cases).

Rule 9. Warrant or Summons upon Indictment or Information

(a) **Issuance.** Upon the request of the attorney for the government the court shall issue a warrant for each defendant named in an information supported by a showing of probable cause under oath as is required by Rule 4(a), or in an indictment. Upon the request of the attorney for the government a summons instead of a warrant shall issue. If no request is made, the court may issue either a warrant or a summons in its discretion. More than one warrant or summons may issue for the same defendant. The clerk shall deliver the warrant or summons to the marshal or other person authorized by law to execute or serve it. If a defendant fails to appear in response to the summons, a warrant shall issue.

(b) **Form.**

(1) **Warrant.** The form of the warrant shall be as provided in Rule 4(c)(1) except that it shall be signed by the clerk, it shall describe the offense charged in the indictment or information and it shall command that the defendant be arrested and brought before the court or, if the information or indictment charges a minor offense, before a United States magistrate. The amount of bail may be fixed by the court and endorsed on the warrant.

(2) **Summons.** The summons shall be in the same form as the warrant except that it shall summon the defendant to appear before the court or, if the information or indictment charges a minor offense, before a United States magistrate at a stated time and place.

(c) **Execution or Service; and Return.**

(1) **Execution or Service.** The warrant shall be executed or the summons served as provided in Rule 4(d)(1), (2) and (3). A summons to a corporation shall be served by delivering a copy to an officer or to a managing or general agent or to any other agent authorized by appointment or by law to receive service of process and, if the agent is one authorized by statute to receive service and the statute so requires, by also mailing a copy to the corporation's last known address within the district or at its principal place of business elsewhere in the United States. The officer executing the warrant shall bring the arrested person promptly before the court or before a United States magistrate.

(2) **Return.** The officer executing a warrant shall make return thereof to the court or United States magistrate. At the request of the attorney for the government any unexecuted warrant shall be returned and cancelled. On or before the return day the person to whom a summons was delivered for service shall make return thereof. At the request of the attorney for the government made at any time while the indictment or information is pending, a warrant returned unexecuted and not cancelled or a summons returned unserved or a duplicate thereof may be delivered by the clerk to the marshal or other authorized person for execution or service.

(d) **Remand to United States Magistrate for Trial of Minor Offense.** If the information or indictment charges a minor offense and the return is to a judge of the district court, the case may be remanded to a United States magistrate for further proceedings in accordance with the Rules of Procedure for the Trial of Minor Offenses Before United States Magistrates.

(As amended Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; July 31, 1975, Pub.L. 94–64, § 3(4), 89 Stat. 370; Dec. 12, 1975, Pub.L. 94–149, § 5, 89 Stat. 806; Apr. 30, 1979, eff. Aug. 1, 1979.)

NOTES OF ADVISORY COMMITTEE ON RULES

1. See Note to Rule 4, supra.

2. The provision of Rule 9(a) that a warrant may be issued on the basis of an information only if the latter is supported by oath is necessitated by the Fourth Amendment to the Constitution of the United States. See *Albrecht* v. *United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 71 L.Ed. 505.

3. The provision of Rule 9(b)(1) that the amount of bail may be fixed by the court and endorsed on the warrant states a practice now prevailing in many districts and is intended to facilitate the giving of bail by the defendant and eliminate delays between the arrest and the giving of bail, which might ensue if bail cannot be fixed until after arrest.

1972 AMENDMENT

Subdivision (b) is amended to make clear that the person arrested shall be brought before a United States magistrate if the information or indictment charges a "minor offense" triable by the United States magistrate.

Subdivision (c) is amended to reflect the office of United States magistrate.

Subdivision (d) is new. It provides for a remand to the United States magistrate of cases in which the person is charged with a "minor offense." The magistrate can then proceed in accordance with rule 5 to try the case if the right to trial before a judge of the district court is waived.

1974 AMENDMENT

Rule 9 is revised to give high priority to the issuance of a summons unless a "valid reason" is given for the issuance of an arrest warrant. See a comparable provision in rule 4.

Under the rule, a summons will issue by the clerk unless the attorney for the government presents a valid reason for the issuance of an arrest warrant. Under the old rule, it has been argued that the court must issue an arrest warrant if one is desired by the attorney for the government. See authorities listed in Frankel, Bench Warrants Upon the Prosecutor's Demand: A View From the Bench, 71 Colum.L.Rev. 403, 410 n. 25 (1971). For an expression of the view that this is undesirable policy, see Frankel, *supra*, pp. 410–415.

A summons may issue if there is an information supported by oath. The indictment itself is sufficient to establish the existence of probable cause. See C. Wright, Federal Practice and Procedure: Criminal § 151 (1969); 8 J. Moore, Federal Practice ¶ 9.02[2] at p. 9–4 (2d ed.) Cipes (1969); *Giordenello* v. *United States*, 357 U.S. 480, 78 S.Ct. 1245, 2 L.Ed.2d 1503 (1958). This is not necessarily true in the case of an information. See C. Wright, *supra*, § 151; 8 J. Moore, *supra*, ¶ 9.02. If the government requests a warrant rather than a summons, good practice would obviously require the judge to satisfy himself that there is

probable cause. This may appear from the information or from an affidavit filed with the information. Also a defendant can, at a proper time, challenge an information issued without probable cause.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94-247

A. Amendments Proposed by the Supreme Court. Rule 9 of the Federal Rules of Criminal Procedure is closely related to Rule 4. Rule 9 deals with arrest procedures after an information has been filed or an indictment returned. The present rule gives the prosecutor the authority to decide whether a summons or a warrant shall issue.

The Supreme Court's amendments to Rule 9 parallel its amendments to Rule 4. The basic change made in Rule 4 is also made in Rule 9.

B. Committee Action. For the reasons set forth above in connection with Rule 4, the Committee endorses and accepts the basic change in Rule 9. The Committee made changes in Rule 9 similar to the changes it made in Rule 4.

1975 AMENDMENT

Subd. (b)(1). Pub.L. 94-149 substituted reference to "rule 4(c)(1)" for "rule 4(b)(1)".

Subd. (c)(1). Pub.L. 94-149 substituted reference to "rule 4(d)(1), (2), and (3)" for "rule 4(c)(1), (2), and (3)".

1979 AMENDMENT

Subdivision (a) is amended to make explicit the fact that a warrant may issue upon the basis of an information only if the information or an affidavit filed with the information shows probable cause for the arrest. This has generally been assumed to be the state of the law even though not specifically set out in rule 9; see C. Wright, Federal Practice and Procedure: Criminal § 151 (1969); 8 J. Moore, Federal Practice par. 9.02[2] (2d ed. 1976).

In *Gerstein* v. *Pugh*, 420 U.S. 103 (1975), the Supreme Court rejected the contention "that the prosecutor's decision to file an information is itself a determination of probable cause that furnishes sufficient reason to detain a defendant pending trial," commenting:

> Although a conscientious decision that the evidence warrants prosecution affords a measure of protection against unfounded detention, we do not think prosecutorial judgment standing alone meets the requirements of the Fourth Amendment. Indeed, we think the Court's previous decisions compel disapproval of [such] procedure. In *Albrecht* v. *United States*, 273 U.S. 1, 5, 47 S.Ct. 250, 251, 71 L.Ed. 505 (1927), the Court held that an arrest warrant issued solely upon a United States Attorney's information was invalid because the accompanying affidavits were defective. Although the Court's opinion did not explicitly state that the prosecutor's official oath could not furnish probable cause, that conclusion was implicit in the judgment that the arrest was illegal under the Fourth Amendment.

No change is made in the rule with respect to warrants issuing upon indictments. In *Gerstein*, the Court indicated it was not disturbing the prior rule that "an indictment, 'fair upon its face,' and returned by a 'properly constituted grand jury' conclusively determines the existence of probable cause and requires issuance of an arrest warrant without further inquiry." See *Ex parte United States*, 287 U.S. 241, 250 (1932).

The provision to the effect that a summons shall issue "by direction of the court" has been eliminated because it conflicts with the first sentence of the rule, which states that a warrant "shall" issue when requested by the attorney for the government, if properly supported. However, an addition has been made providing that if the attorney for the government does not make a request for either a warrant or summons, then the court may in its discretion issue either one. Other stylistic changes ensure greater consistency with comparable provisions in rule 4.

State of North Dakota, Plaintiff and Appellee v. Anna Maria Hayes, Defendant and Appellant

Nos. 20110098 - 20110101

SUPREME COURT OF NORTH DAKOTA

2012 ND 9; 2012 N.D. LEXIS 7

January 12, 2012, Filed

NOTICE:

THIS OPINION IS SUBJECT TO PETITION FOR REHEARING AND CANNOT BE CONSIDERED FINAL UNTIL DISPOSITION OF SUCH PETITION FOR REHEARING BY THE COURT OR EXPIRATION OF 14 DAYS FROM THE FILING DATE.

PRIOR HISTORY: [**1]

Appeal from the District Court of Divide County, Northwest Judicial District, the Honorable Joshua B. Rustad, Judge.

DISPOSITION: AFFIRMED IN PART AND REVERSED IN PART.

COUNSEL: Elizabeth L. Pendlay, State's Attorney, Crosby, N.D., for plaintiff and appellee.

Benjamin C. Pulkrabek, Mandan, N.D., for defendant and appellant.

JUDGES: Dale V. Sandstrom, Daniel J. Crothers, Mary Muehlen Maring, Carol Ronning Kapsner, Gerald W. VandeWalle, C.J.

OPINION BY: Dale V. Sandstrom

OPINION

Sandstrom, Justice.

[*P1] As a condition of bail, the district court required Anna Hayes to consent to a warrantless search at any time of her person, vehicle, and residence. Concluding the bail condition was invalid under N.D.R.Crim.P. 46(a)(3), we reverse her convictions of four drug-related charges resulting from the bail-condition search. We affirm her convictions of two prior unaffected charges.

I

[*P2] Divide County Sheriff's Deputy Rob Melby stopped Hayes for driving while her license was suspended on December 1, 2008. Deputy Melby testified he personally recognized Hayes operating a motor vehicle and he knew the Divide County Sheriff's Department included her on its monthly list of suspended drivers. Deputy Melby confirmed the status of Hayes' license with North Dakota [**2] State Radio, and he arrested her for driving while her license was suspended.

[*P3] An inventory search resulted in the discovery of marijuana on Hayes' person as well as $600 in cash. Law enforcement officers also found $2,133 in cash in Hayes' purse. Following her arrest, the sheriff's department released Hayes on a $1,500 cash bond. The State charged her with driving while her license was suspended in violation of N.D.C.C. § 39-06-42, a class B misdemeanor, and with possession of a controlled substance while driving a motor vehicle in violation of N.D.C.C. § 19-03.1-23, a class A misdemeanor. At Hayes' initial appearance on December 10, 2008, the State requested, in addition to a cash bond, that Hayes' bond order require her to submit to random drug-testing and warrantless searches of her person, vehicle, and home. The district court characterized

the random drug-testing as a "standard provision of bond" for a person charged with a drug violation, gave no explanation of the warrantless search requirement, and granted the State's entire request.

*[*P4] Immediately after the district court imposed the bond conditions, law enforcement officers met Hayes outside the courtroom and requested she consent [**3] to a search of her residence. Narcotics Agent Derek Bernier testified he informed Hayes she could consent to a search of her residence or risk violating her bond conditions. Agent Bernier testified Hayes consented to a search of her residence, which she listed on her driver's license as 210 Adams Street in Noonan, North Dakota. Divide County Sheriff Lauren Throntveit, one of the law enforcement officers who met Hayes outside the courtroom, testified, however, that Hayes stated she did not reside at 210 Adams Street. Rather, Hayes testified at the suppression hearing that she informed the officers she resided at 211 Hagerud Street in Noonan and that she consented to a search of that residence, but not to a search of 210 Adams Street. Sheriff Throntveit testified Hayes did not inform the officers of her current residence.*

*[*P5] Law enforcement officers did not search 211 Hagerud Street. Instead, they relied on Hayes' driver's license and their knowledge of her residence to search 210 Adams Street. Upon entering, officers found the name "Anna" affixed to a sign in the garage and an electricity bill in the residence addressed to "Anna Hayes" at "210 Adams Street." Hayes testified she placed [**4] her name on the deed to 210 Adams Street after her mother died, but she had moved out of the residence in September 2008, leaving her sister and her sister's children as the only occupants of the residence.*

*[*P6] As a result of the search, officers found various items of drug paraphernalia. After the search, officers questioned Hayes about her drug use after providing her with the warning required by Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Hayes admitted that she had used methamphetamine approximately two days before the December 10 search and that she would test positive for marijuana use. Hayes also admitted the drug paraphernalia discovered at 210 Adams Street belonged to her and not to her sister.*

*[*P7] After the search, the State brought four additional charges against Hayes: unlawful possession of drug paraphernalia, methamphetamine, in violation of N.D.C.C. § 19-03.4-03, a class A misdemeanor; ingesting a controlled substance, marijuana, in violation of N.D.C.C. § 19-03.1-22, a class A misdemeanor; ingesting a controlled substance, methamphetamine, in violation of N.D.C.C. § 19-03.1-22, a class A misdemeanor; and unlawful possession of drug paraphernalia, marijuana, in violation of N.D.C.C. § 19-03.4-03, [**5] a class A misdemeanor.*

*[*P8] Before trial, Hayes moved to suppress the evidence seized during the December 10 search. She argued the search violated her Fourth Amendment constitutional rights because the bond condition required her to submit to warrantless searches of her person, vehicle, and residence. The district court denied her motion, and a jury thereafter found her guilty of all six charges.*

*[*P9] The district court had jurisdiction under N.D. Const. art. VI, § 8, and N.D.C.C. § 27-05-06. Hayes timely appealed from the criminal judgment under N.D.R.App.P. 4(b). This Court has jurisdiction under N.D. Const. art. VI, §§ 2 and 6, and N.D.C.C. § 29-28-06.*

II

*[*P10] Hayes argues the district court erred in denying her motion to suppress evidence seized during a December 10 warrantless search of 210 Adams Street as a result of pretrial*

*release conditions imposed by the district court. She argues the district court erred in requiring her to consent to warrantless searches of her person, vehicle, and residence as a condition of her bond release. The State contends Hayes does not have standing to contest the search of 210 Adams Street because she did not live at that residence. The State alternatively argues [**6] that if Hayes has standing, the district court properly denied her motion to suppress because the authorization for a warrantless search was constitutional, Hayes consented to the search, and law enforcement officers relied in good faith on the amended bond order. The State also argues the two convictions resulting from the December 1 traffic stop of Hayes should be affirmed because they do not apply to Hayes' argument on appeal.*

*[*P11] Our standard of review of a district court's denial of a motion to suppress evidence is well-established. We "defer to the district court's findings of fact and resolve conflicts in testimony in favor of affirmance." State v. Smith, 2005 ND 21, ¶ 11, 691 N.W.2d 203. We will affirm a district court's decision if "there is sufficient competent evidence fairly capable of supporting the trial court's findings, and the decision is not contrary to the manifest weight of the evidence." City of Fargo v. Thompson, 520 N.W.2d 578, 581 (N.D. 1994). "Questions of law and the ultimate conclusion about whether the facts support a reasonable and articulable suspicion are fully reviewable on appeal." Id. Hayes' argument on appeal implicates constitutional issues, which involve [**7] questions of law. See State v. Burr, 1999 ND 143, ¶ 9, 598 N.W.2d 147.*

A

*[*P12] The State argues the two convictions arising from the December 1, 2008, traffic stop of Hayes should be affirmed because they do not apply to Hayes' argument on appeal.*

*[*P13] Hayes appeals from a criminal judgment after the district court denied her motion to suppress evidence. Law enforcement officers discovered the evidence Hayes hoped to suppress during a search of 210 Adams Street on December 10, 2008, nine days after her initial arrest for a traffic violation. As a result of her arrest for a traffic violation, the State charged her with driving while her license was suspended and with possession of a controlled substance while driving a motor vehicle. Although the district court amended Hayes' cash bond at her December 10 initial appearance to include conditions, Hayes did not argue in her motion to suppress evidence, nor does she argue on appeal, that the district court erroneously admitted evidence discovered from her initial arrest. Rather, Hayes' argument concerns only the conditions of pretrial release the district court imposed upon her at her initial appearance that led to law enforcement officers searching [**8] 210 Adams Street without a warrant. Hayes based her motion to suppress on the four charges resulting from that search, and they are the basis for this appeal. Consequently, we affirm the two convictions arising from her arrest on December 1 because Hayes' motion to suppress evidence did not concern either charge. State v. Prigge, 437 N.W.2d 520, 521 (N.D. 1989) (issues not raised before the district court will not be addressed on appeal). We turn next to Hayes' four other convictions.*

B

*[*P14] As a preliminary matter, the State argues Hayes lacks standing to contest a search of 210 Adams Street because she does not live at that address. The capacity to claim Fourth Amendment protection depends upon whether a person has a legitimate subjective expectation of privacy in the place searched. Minnesota v. Olson, 495 U.S. 91, 95, 110 S. Ct. 1684, 109 L. Ed. 2d 85 (1990).*

*[*P15] At her suppression*

*hearing, Hayes testified that she placed her name on the deed to 210 Adams Street after her mother died and that she moved out of the residence in 2008, leaving only her sister and her sister's children to live at the residence. Additionally, at trial, Sheriff Throntveit testified Hayes told him she pays the taxes for 210 Adams Street. "[L]egitimate [**9] presence in the area searched, possession or ownership of the area searched . . . , prior use of the area searched . . . , ability to control or exclude others' use of the property, and a subjective expectation of privacy" are relevant factors to a privacy expectation. United States v. Lochan, 674 F.2d 960, 965 (1st Cir. 1982). People have the greatest expectation of privacy within their own homes. Payton v. New York, 445 U.S. 573, 585-86, 100 S. Ct. 1371, 63 L. Ed. 2d 639 (1980). In Olson, 495 U.S. at 96-97, the U.S. Supreme Court extended Fourth Amendment protection to overnight guests at another's home. We have held that even a non-overnight guest in a trailer house of another enjoyed a reasonable expectation of privacy. State v. Ackerman, 499 N.W.2d 882, 885 (N.D. 1993). Because the deed to 210 Adams Street is in Hayes' name, she pays the taxes, and she previously used the residence as her own, she enjoyed a subjective expectation of privacy in 210 Adams Street, and as a result, she has standing to contest the warrantless search. See Lochan, 674 F.2d at 965.*

C

*[*P16] Hayes' argument concerning the warrantless search conditions of pretrial release is a question of first impression in North Dakota. In a similar case involving [**10] conditions of pretrial release, however, we vacated a district court order declaring unconstitutional the requirement of N.D.C.C. § 19-03.1-46 for random drug-testing as a condition of bail. See State v. Hansen, 2006 ND 139, 717 N.W.2d 541. We did not decide the constitutionality of the statute because the issue was moot. Id. at ¶ 8. Similarly, in this case, we do not need to decide the constitutionality of the pretrial release conditions imposed by the district court if we conclude it did not comply with N.D.R.Crim.P. 46(a)(3) when imposing conditions of pretrial release. We "refrain from deciding constitutional questions if [we] can decide a dispute on other grounds." Little v. Graff, 507 N.W.2d 55, 59 (N.D. 1993). Further, we need not decide whether such conditions are permissible only where they require probable cause for a search, as the court held in United States v. Scott, 450 F.3d 863 (9th Cir. 2005).[1]*

> *1 This case is more odious because immediately outside the courtroom the State sought to invoke the provision, strongly suggesting it requested the warrantless search condition precisely because it lacked probable cause for the search it wished to conduct.*

*[*P17] The right to bail is [**11] guaranteed to accused persons by the Eighth Amendment of the United States Constitution. Article I, section 11 of the North Dakota Constitution guarantees the same, providing:*

> *All persons shall be bailable by sufficient sureties, unless for capital offenses when the proof is evident or the presumption great. Excessive bail shall not be required, nor excessive fines imposed, nor shall cruel or unusual punishments be inflicted. Witnesses shall not be unreasonably detained, nor be confined in any room where criminals are actually imprisoned.*

*[*P18] An accused released on pretrial bail has not been tried and is presumed innocent. Scott, 450 F.3d at 873. That presumption does not*

*exist for persons convicted of a crime who are released on probation or who are awaiting imprisonment while their case is on appeal. Id. Probation, like incarceration, is a form of criminal punishment. Probationers "do not enjoy 'the absolute liberty to which every citizen is entitled, but only . . . conditional liberty properly dependent on observance of special [probation] restrictions.'" Griffin v. Wisconsin, 483 U.S. 868, 874, 107 S. Ct. 3164, 97 L. Ed. 2d 709 (1987) (quoting Morrissey v. Brewer, 408 U.S. 471, 480, 92 S. Ct. 2593, 33 L. Ed. 2d 484 (1972)); see also State v. Raywalt, 444 N.W.2d 688, 690 (N.D. 1989); [**12] State v. Schlosser, 202 N.W.2d 136, 137-39 (N.D. 1972).*

*[*P19] Relying on Scott, Hayes argues she was entitled to a presumption of innocence before the district court imposed upon her conditions of pretrial release, and as a result, her status differed from that of a probationer released under court-imposed conditions. In Scott, the U.S. Court of Appeals for the Ninth Circuit held warrantless searches, including random drug-testing, imposed on an accused as a condition of pretrial release, required a showing of probable cause even though the accused had signed a pre-release consent form. 450 F.3d at 872. The court reasoned accused persons released on pretrial bail conditions do not lose their Fourth Amendment right to be free from unreasonable searches and seizures. Id. at 868. The court distinguished Griffin and articulated a difference between conditions of pretrial release of an accused and probation conditions of release of a person convicted of a crime. Scott, 450 F.3d at 872. The court explained, "[P]robationers have a lesser expectation of privacy than the public at large." Id. (quoting Ferguson v. City of Charleston, 532 U.S. 67, 80 n.15, 121 S. Ct. 1281, 149 L. Ed. 2d 205 (2001)). "People released pending trial, by [**13] contrast, have suffered no judicial abridgment of their constitutional rights." Scott, at 872.*

*[*P20] Hayes does not specifically argue the district court erred in amending her bond order to include a condition for random drug-testing, but rather she argues she should not have been required to forgo her constitutional rights and consent to warrantless searches of her person, vehicle, and residence. Her argument raises issues about the conditions for pretrial release of an accused under N.D.R.Crim.P. 46(a), which provides, in subdivision (1):*

> *At the initial appearance before a magistrate of a person charged with an offense, the magistrate must order the person released pending trial on the person's personal recognizance or on execution of an unsecured appearance bond . . . unless the magistrate determines . . . that unconditional release will not reasonably assure the appearance of the person as required.*

Rule 46(a)(1), N.D.R.Crim.P., establishes a clear preference for the unconditional release of accused persons on their own personal recognizance or on an unsecured appearance bond to reasonably assure their appearance at trial.

*[*P21] Rule 46(a)(2), N.D.R.Crim.P., grants magistrates the ability to [**14] impose release conditions in lieu of or in addition to the methods of release specified in N.D.R.Crim.P. 46(a)(1). Rule 46(a)(2), N.D.R.Crim.P., uses language to reasonably assure an accused person's appearance at trial and explicitly lists thirteen separate release conditions a magistrate may impose, including:*

> *(A) placing the person in the custody of a designated person or organization agreeing to supervise the*

person;

(B) requiring the person to maintain employment, or, if unemployed, to actively seek employment;

(C) requiring the person to maintain or begin an educational program;

(D) placing restrictions on the travel, association, or place of abode of the person during the period of release;

(E) requiring the person to avoid all contact with an alleged victim of the crime or with a potential witness who may testify concerning the offense;

(F) requiring the person to report on a regular basis to a designated law enforcement agency, or any other agency;

(G) requiring the person to comply with a specified curfew;

(H) requiring the person to refrain from possessing a firearm, destructive device, or other dangerous weapon;

(I) requiring the person to refrain from any use of alcohol, or any [**15] use of a narcotic drug or other controlled substance, as defined in N.D.C.C. ch. 19-03.1, without a prescription by a licensed medical practitioner;

(J) requiring the person to undergo available medical, psychological, or psychiatric treatment, including treatment for drug or alcohol dependency, and to remain in a specified institution if required for that purpose;

(K) requiring the execution of an appearance bond in a specified amount and the deposit with the court of cash or other security as directed, in an amount not to exceed ten percent of the amount of the bond, which deposit must be returned on performance of the release conditions;

(L) requiring the execution of a bail bond with sufficient solvent sureties, or the deposit of cash in lieu of a bail bond; or

(M) imposing any other conditions reasonably necessary to assure appearance as required, including a condition requiring the return of the person to custody after a specified time of day.

Absent from N.D.R.Crim.P. 46(a)(2) is language explicitly granting magistrates the ability to impose warrantless searches as a condition of pretrial release.

[*P22] At Hayes' suppression hearing, the State argued the district court had authority to [**16] impose a pretrial warrantless search provision under the "catch-all" language of N.D.R.Crim.P. 46(a)(2)(M). The district court did not make a specific finding as to which of the thirteen release conditions under N.D.R.Crim.P. 46(a)(2) the warrantless search provision fell. Because the first twelve release conditions under N.D.R.Crim.P. 46(a)(2) do not provide for warrantless searches, however, the district court could only have imposed the pretrial warrantless search provision under N.D.R.Crim.P. 46(a)(2)(M).

[*P23] Rule 46(a)(3), N.D.R.Crim.P., provides seven factors a magistrate "must consider" when imposing pretrial release conditions to reasonably assure the appearance of an accused at trial:

In determining conditions of release that will reasonably assure appearance of a person, the magistrate, on the basis of available

information, must consider:

(A) the nature and circumstances of the offense charged;

(B) the weight of the evidence against the person;

(C) the person's family ties, employment, financial resources, character and mental condition;

(D) the length of the person's residence in the community;

(E) the person's record of convictions;

(F) the person's record of appearance at court [**17] proceedings or of flight to avoid prosecution or failure to appear voluntarily at court proceedings; and

(G) the nature and seriousness of the danger to any person or the community posed by the person's release.

[*P24] The explanatory note to N.D.R.Crim.P. 46 states the rule is an adaptation from Fed.R.Crim.P. 46. N.D.R.Crim.P. 46, Explanatory Note. The note also states N.D.R.Crim.P. 46(a) is adapted from the language of the Bail Reform Act of 1966. Id. Rule 46, N.D.R.Crim.P., adds additional conditions of release from the Bail Reform Act of 1984. Id. Because N.D.R.Crim.P. 46 is adapted from its federal rule counterpart, we find federal interpretations of Fed.R.Crim.P. 46 persuasive. See City of Fargo v. Levine, 2008 ND 64, ¶ 7, 747 N.W.2d 130.

[*P25] In some federal jurisdictions, pretrial release may be properly conditioned on a defendant's agreement to submit to warrantless searches and seizures. See In re York, 9 Cal. 4th 1133, 40 Cal. Rptr. 2d 308, 892 P.2d 804 (Cal. 1995). Such conditions, however, must be supported by probable cause and be justified by the totality of the circumstances because of Fourth Amendment reasonableness and the presumption of innocence enjoyed by an accused. See Scott, 450 F.3d at 872-74. Fourth Amendment [**18] reasonableness requires a search or seizure be supported by probable cause. Skinner v. Railway Labor Executives' Ass'n, 489 U.S. 602, 619, 109 S. Ct. 1402, 103 L. Ed. 2d 639 (1989).

[*P26] Although we do not address the constitutionality of pretrial release conditions such as those imposed on Hayes, we find persuasive the district court's obligation to inquire about the types of release conditions requested by the State and whether the conditions will reasonably assure an accused person's appearance at trial. Rule 46(a)(3), N.D.R.Crim.P., explicitly details a district court's obligation to consider seven factors before imposing pretrial release conditions under N.D.R.Crim.P. 46(a)(2). We hold that additional conditions imposed under N.D.R.Crim.P. 46(a)(2)(M) require an explicit finding of their appropriateness by a neutral and detached magistrate. See Scott, 450 F.3d at 870-71, 874 ("if a defendant is to be released subject to bail conditions that will help protect the community from the risk of crimes he [or she] might commit while on bail" and that will assure his or her appearance at trial, "the conditions must be justified by a showing that [the] defendant poses a heightened risk of misbehaving while on bail" and that the [**19] defendant is unlikely to appear at trial without the conditions).

[*P27] Because N.D.R.Crim.P. 46(a)(2) provides magistrates with discretion in imposing pretrial release conditions after they consider the seven factors under N.D.R.Crim.P. 46(a)(3), their decisions are subject to judicial review under an abuse of discretion standard. See State v. Blunt, 2011 ND 127, ¶ 10, 799 N.W.2d 363 (a district court "has discretion in applying a remedy when a violation of [a] rule has been shown, and the court's decision will not be reversed

on appeal absent an abuse of discretion"). A district court "abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, when it misinterprets or misapplies the law, or when its decision is not the product of a rational mental process leading to a reasoned determination." Id.

*[*P28] At Hayes' initial appearance for the first two charges filed against her by the State after her arrest on December 1, 2008, the State moved to modify her existing cash bond to include the requirements that she submit to random drug-testing and warrantless searches of her person, vehicle, and home. The district court granted the State's request. A review of the [**20] record, however, shows the district court made no findings why such conditions were appropriate under N.D.R.Crim.P. 46(a)(2)(M), when it imposed those conditions of pretrial release on Hayes. The following exchange took place at Hayes' initial appearance:*

> *THE COURT: Very well. Did you -- you put up bail, is that correct?*
>
> *THE DEFENDANT: Yes, Dale Fish put up bail for me.*
>
> *THE COURT: Very well. The Court is inclined to continue the matter until the next appearance, does the State have any input?*
>
> *MS. PENDLAY: Yes, your Honor. And actually she was given a cash bond during the course of this arrest and I would request an amended bond order, your Honor. In addition to the $1,500 ca -- cash bond she posted, I would request a bond order requiring that the Defendant submit to random drug testing including, but not limited to, urinalysis as requested by a law enforcement officer. And that the Defendant submit to searches without a warrant of her person, vehicle or vehicles, and home at the request of law enforcement.*
>
> *THE COURT: Ms. Hayes, when one is charged with a violation of controlled substance, that -- that is a stand --*
>
> *THE DEFENDANT: But I'm -- I'm innocent until proven guilty, I don't understand [**21] why I should have to go through any of this -- items that she just requested.*
>
> *THE COURT: Okay.*
>
> *THE DEFENDANT: I don't see any reason for it.*
>
> *THE COURT: Okay. When -- when a person is charged with violation of the drug statutes in North Dakota, a standard provision of bond is to require drug testing on a random basis. That doesn't mean that it will happen, it means that the law enforcement officials have the right to check you. There's a couple functions for it, one is to keep people clean in the interim. At this junction, we don't know if -- if there's a problem or not. . . . .*
>
> *THE COURT: I am going to, however, modify the bail as it relates to the possession of controlled substance charge, per the request of the State. A new bail will be prepared.*

*[*P29] The record does not reflect that the district court made findings of the appropriateness of the conditions under N.D.R.Crim.P. 46(a)(2)(M). The district court attempted to explain to Hayes its rationale for imposing random drug-testing as a condition of pretrial release, but it did not address its reasoning for imposing the requirement that she submit to warrantless*

searches of her person, vehicle, and residence.

*[*P30] Relying on Scott, Hayes argues [**22] the State failed to provide evidence or testimony at her initial appearance showing that without the amended bond conditions the likelihood of her appearing at trial would decrease. 450 F.3d at 872.*

*[*P31] In Scott, the court held the government failed to produce a connection suggesting a random drug test of Scott without probable cause would increase the likelihood of Scott's appearance at trial. Id. The court stated there are conceivable justifications warranting a random drug test, but the problems are not "common enough to justify intruding on the privacy rights of every single defendant out on pretrial release." Id. at 870. The State did not provide, nor did the district court consider, evidence or testimony at Hayes' initial appearance showing a likelihood Hayes would not appear at trial without the imposition of the warrantless search conditions of pretrial release. N.D.R.Crim.P. 46(a)(1). The State "cannot short-circuit the process by claiming that the arrest itself is sufficient to establish that the [warrantless search] conditions are required." Scott, at 874.*

*[*P32] In Scott, the court interpreted and applied Nevada law. Id. at 870-72. The State attempts to distinguish Nevada law from [**23] North Dakota law. The Scott court reasoned Nevada had not taken the categorical position that drug use among pretrial releasees affected their likelihood of appearance in court, because Nevada allowed release conditions to be determined on an individual basis. Id. at 870-71. The State relies on N.D.C.C. § 19-03.1-46 as proof that North Dakota statutorily allows additional pretrial release conditions other than the conditions articulated in N.D.R.Crim.P. 46(a)(2), including reasonable random drug-testing. That statute, however, concerns only those additional pretrial release conditions a court may consider if the accused is "arrested upon a felony violation" of N.D.C.C. chapters 19-03.1 or 19-03.4, and it does not include warrantless searches. N.D.C.C. § 19-03.1-46. Here, Hayes had not been charged with a felony when the court imposed the pretrial release conditions upon her.*

*[*P33] The State also argues Scott can be distinguished from this case because the court in Scott checked off a standard list of pretrial conditions. The State argues the district court set Hayes' pretrial release conditions only after an individualized evaluation. We have found no such evaluation in the record. The State [**24] concedes the amended bond order it prepared provided for warrantless searches and random drug-testing of Hayes because of her drug-related charges. In Scott, however, the court found the government failed to demonstrate a pattern of drug use leading to Scott's nonappearance in court and failed to show Scott's drug use would likely lead to his future nonappearance in court. 450 F.3d at 872. The court held that the government, in instituting as a bond condition pretrial drug-testing of Scott, "relied on nothing more than a generalized need to protect the community and a blanket assertion that drug-testing is needed to ensure Scott's appearance at trial." Id. Similarly, Hayes argues the State failed to justify its reasons for requesting warrantless searches of her person, vehicle, and residence as a condition of pretrial release. The district court failed to ask the State about those reasons on the record and instead granted its blanket approval of the State's amended bond order, resulting in conditions subjecting Hayes to warrantless searches without a reasonable assurance it would lead to her appearance at trial.*

*[*P34] There is no language in N.D.R.Crim.P. 46(a)(2) explicitly granting magistrates [**25] the ability to impose warrantless searches as a condition of pretrial release.*

Rule 46(a)(2), N.D.R.Crim.P., however, provides that "[t]he magistrate may impose any release condition that will reasonably assure the appearance of the person for trial including: . . . (M) imposing any other conditions reasonably necessary to assure appearance as required. . . ." Before we may consider whether a warrantless search provision falls under N.D.R.Crim.P. 46(a)(2)(M), however, we must be able to review a district court's decision to impose conditions of pretrial release under N.D.R.Crim.P. 46(a)(1) and (2). If a district court determines pretrial conditions of release under N.D.R.Crim.P. 46(a)(2)(M) are necessary to assure a defendant's appearance at trial, we must also be able to review the district court's reasoning to determine whether it abused its discretion in imposing release conditions unnecessarily restrictive to reasonably assure a defendant's appearance at trial. We are unable to do either here.

*[*P35] The district court abused its discretion by improperly imposing pretrial release conditions on Hayes under N.D.R.Crim.P. 46(a)(2)(M) without first adhering to the requirements of N.D.R.Crim.P. 46(a)(3). [**26] A district court's arbitrary action or misapplication of the law is an abuse of discretion. Blunt, 2011 ND 127, ¶ 10, 799 N.W.2d 363.*

D

*[*P36] The State also raises two constitutional arguments to support the district court's decision. It argues the district court properly denied Hayes' motion to suppress evidence because she consented to the search, and officers relied in good faith on the district court's amended bond order. We address each argument in turn.*

*[*P37] First, the State argues the district court properly denied Hayes' motion to suppress evidence because she consented to the warrantless search. The Fourth Amendment of the United States Constitution and article I, section 8 of the North Dakota Constitution prohibit unreasonable searches and seizures. Fourth Amendment reasonableness requires that searches and seizures be supported by probable cause. Scott, 450 F.3d at 868. Law enforcement officers generally must obtain a search warrant from a neutral, detached magistrate before entering and searching a person or his or her house, papers, or effects. Carroll v. United States, 267 U.S. 132, 156, 45 S. Ct. 280, 69 L. Ed. 543, T.D. 3686 (1925); U.S. Const. amend. IV. "Warrantless searches inside a person's home are presumptively [**27] unreasonable." State v. Mitzel, 2004 ND 157, ¶ 11, 685 N.W.2d 120. Evidence seized in violation of the Fourth Amendment must be suppressed under the exclusionary rule. Wong Sun v. United States, 371 U.S. 471, 484-85, 83 S. Ct. 407, 9 L. Ed. 2d 441 (1963); State v. Lunde, 2008 ND 142, ¶ 15, 752 N.W.2d 630.*

*[*P38] There are, however, a few well-delineated exceptions to the warrant requirement. State v. DeCoteau, 1999 ND 77, ¶ 7, 592 N.W.2d 579. One exception is consent. Id. at ¶ 9. A district court must "determine whether the consent was voluntary under the totality of the circumstances." State v. Avila, 1997 ND 142, ¶ 16, 566 N.W.2d 410. "To be voluntary, the consent must not be coerced by explicit or implicit means or by implied threat or covert force." Id. We consider two elements when determining voluntariness: "(1) the characteristics and condition of the accused at the time of the consent, and (2) the details of the setting in which the consent was obtained." Mitzel, 2004 ND 157, ¶ 26, 685 N.W.2d 120.*

*[*P39] Agent Bernier testified he informed Hayes outside the courtroom after her initial appearance she could consent to a search of her residence or risk violating her bond conditions. He also testified Hayes consented to a [**28] search of her residence. Hayes*

testified, however, she consented to a search of 211 Hagerud Street, but not 210 Adams Street. According to the testimony of Agent Bernier, Hayes had two choices when confronted by the officers asking whether they could search her residence: consent to a warrantless search or violate her release conditions and be subject to an arrest warrant for failing to comply with the district court's order. Consent based upon duress or coercion is not voluntary. Id. Under the circumstances, Hayes did not provide voluntary consent to search 210 Adams Street.

[*P40] Second, the State argues the district court properly denied Hayes' motion to suppress evidence because officers relied in good faith on the district court's amended bond order. The State contends the good-faith exception to the warrant requirement, set forth in United States v. Leon, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), can be applied to an officer's enforcement of a bond order. The State, however, cites no authority that extends the application of the good-faith exception to a bond order.

[*P41] The good-faith exception provides that evidence should not be excluded when an officer in good faith objectively relies upon a magistrate's [**29] probable cause determination. Leon, 468 U.S. at 922. A court must decide whether a reasonably well-trained officer would have known the search to be illegal despite the magistrate's determination. Id. at 922 n.23. We have recognized four specific situations when the good-faith exception does not apply, because the officer's reliance on the warrant is not objectively reasonable:

> (1) when the issuing magistrate was misled by false information intentionally or negligently given by the affiant; (2) when the magistrate totally abandoned her judicial role and failed to act in a neutral and detached manner; (3) when the warrant was based on an affidavit "so lacking in indicia of probable cause as to render official belief in its existence entirely unreasonable"; and (4) when a reasonable law enforcement officer could not rely on a facially deficient warrant.

State v. Utvick, 2004 ND 36, ¶ 26, 675 N.W.2d 387 (citing Leon, 468 U.S. at 923).

[*P42] Here the district court's amended bond order provided for warrantless searches of Hayes' person, vehicle, and residence. The State did not attach to the bond order an affidavit showing probable cause, nor did the district court issue or attach a search warrant. [**30] On its face, the bond order lacked indicia of probable cause because it provided for warrantless searches of Hayes' person, vehicle, and residence. The bond order also did not provide for a particular residence to be searched or a particular thing to be seized, as required in a search warrant by the Fourth Amendment of the U.S. Constitution. See Groh v. Ramirez, 540 U.S. 551, 557, 124 S. Ct. 1284, 157 L. Ed. 2d 1068 (2004); United States v. Strand, 761 F.2d 449, 452-54 (8th Cir. 1985).

[*P43] The imposition of a warrantless search provision in a bond order is too remote a circumstance to be compared to a probable cause determination resulting in a search warrant.

III

[*P44] We affirm the judgment of two convictions resulting from the December 1, 2008, traffic stop of Hayes. Because we conclude the district court did not make a specific finding of appropriateness under N.D.R.Crim.P. 46(a)(2)(M) when it imposed conditions of pretrial release on Hayes, we reverse the judgment of

four convictions resulting from a warrantless search of 210 Adams Street.

*[*P45] Dale V. Sandstrom*

Daniel J. Crothers

Mary Muehlen Maring

Carol Ronning Kapsner

Gerald W. VandeWalle, C.J.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: March 23, 2012

RE: Rule 45, N.D.R.Civ.P., Subpoena

The Committee approved proposed changes to Rule 26 at the January meeting. The changes were based on procedures for the discovery of electronically stored information adopted in North Carolina.

As part of its electronic discovery amendments, North Carolina also made changes to its Rule 45. Most of its changes were based on the federal rule amendments, which North Dakota has already adopted. In addition, however, North Carolina adopted language specifying who should bear the costs when a nonparty is ordered to provide "inaccessible" electronic information. Proposed amendments to Rule 45 are attached with this additional language included.

A technical amendment is also proposed for the rule, adding the correct reference to Rule 26(b)(1)(B). The Committee approved changes related to out-of-state subpoenas at the January meeting and these changes are also shown in the draft proposal.

RULE 45. SUBPOENA

(a) In General.

(1) Form and Contents.

(A) Requirements. Every subpoena must:

(i) state the title of the action, the court in which it is pending, and its civil-action number;

(ii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises; and

(iii) set out the text of the notice in Rule 45(f).

(B) Command to Attend a Deposition; Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing or trial or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(D) Command to Produce; Included Obligations. A command in a subpoena to

produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued by Whom. The clerk shall issue a subpoena in the name of the court for the county in which the action is filed, signed and sealed but otherwise blank, to a party who requests it. That party shall complete it before service. An attorney for a party also may issue a subpoena, which must be signed by the attorney, include the attorney's office address and identify the party the attorney represents.

(3) Subpoena in Out-of-State Action.

~~(A) "State" Defined. "State" means a state of the United States, the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States.~~

~~(B) In General. The clerk, may issue a subpoena under seal of the court to a party involved in a civil action pending in another state if:~~

~~(i) the party's attorney files proof of service of notice under Rule 45(b)(2); or~~

~~(ii) the party files a letter of request from a court of the other state.~~

~~(C) Requirements. 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 and limitations as if the action were pending within this state. Any dispute regarding the subpoena, or discovery demanded, needing judicial involvement must be submitted to the court for the county where the subpoena issued.~~

N.D.R.Ct. 5.1 defines the procedure for discovery or depositions in an out-of-state action.

(b) Service; Notice.

(1) Service of Subpoena.

(A) A subpoena to a named person must be served under Rule 4(d). A subpoena may be served at any place within the state.

(B) If the subpoena requires the person's attendance, fees for one day's attendance, mileage and travel expense allowed by law must be tendered. If fees, mileage and travel expense are not tendered with the subpoena, the person need not obey the subpoena. Fees, mileage and travel expense need not be tendered if they are to be paid by the state or a political subdivision.

(2) Service of Notices.

(A) Notice of Deposition. If the subpoena commands a person to attend, give testimony and produce documents, electronically stored information or tangible things at a pretrial deposition, then before the subpoena is served, a notice to take a deposition must be served on each party.

(B) Notice of Demand for Production or Inspection. If a deposition notice has not been served, and if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice of demand for production or inspection must be served on each party.

(C) Notice Mandatory Before Service of Subpoena. The notice required by Rule

45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a pretrial deposition, for pretrial production of documents, electronically stored information, or tangible things or for the inspection of premises may be served.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises or to producing electronically stored information in the form or forms requested. The objection must be received before the earlier of 24 hours before the time specified for compliance or ten days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Location.

(A) Resident Witness. A subpoena may require a resident of this state to attend a deposition only in the county where the person resides, is employed or transacts business in person, or at a convenient place ordered by the issuing court. A resident may be required to attend a hearing or trial any place within this state.

(B) Nonresident Witness. A subpoena may require a nonresident of this state who is served with a subpoena within this state to attend a deposition ,hearing or trial in any county of this state.

(4) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires attendance beyond the location requirements of Rule 45 (c)(3);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information.

(A) Documents. A person responding to a subpoena to produce documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information. If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable

form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule ~~26(b)(2)(A)~~ 26(b)(1)(B). The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3).

(f) Notice. All subpoenas commanding pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises must contain the following notice:

"You may object to this subpoena by sending or delivering a written objection, stating your valid reason, to [Insert the name and address of the party, or attorney representing the party seeking production of documents, electronically stored information, or tangible things or the inspection of premises]. Any objection must be received within ten days after you receive the subpoena. If the time specified in the subpoena for compliance is less than ten

days, any objection must be received at least 24 hours before the time specified for compliance.

If you make a timely objection, you do not need to comply with this subpoena unless the court orders otherwise. You will be notified if the party serving the subpoena seeks a court order compelling compliance with this subpoena. You will then have the opportunity to contest enforcement.

Failure to obey this subpoena, without making a timely objection, and stating a valid reason, may be contempt of court."

EXPLANATORY NOTE

Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1, 2012;_____.

Rule 45 was revised, effective January 1, 1995, in response to the 1991 federal revision. Significant changes to North Dakota's rule include the following: (1) An action must be filed before a subpoena may issue; (2) A subpoena may compel a non-party to produce evidence independent of any deposition; (3) A subpoena may compel the inspection of premises in the possession of a non-party; and (4) Notice must be printed on a subpoena advising of the right to object when pretrial or prehearing production or inspection is commanded. The scope of discovery under Rule 26 is not intended to be altered by the revision.

Rule 45 was amended, effective March 1, 2008, in response to the 2006 federal

revision. Language was added to the rule to clarify that production of electronically stored materials may be demanded by subpoena and to provide guidance in dealing with requests for electronically stored materials.

Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments to Fed.R.Civ.P. 45. 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 (a)(3) was amended, effective ~~March 1, 2012, to define "state" to include the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the United States~~, to direct persons to N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in an action pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for interstate depositions and discovery.

Subdivision (b) was amended, effective March 1, 2007, to eliminate the requirement for parties to serve a separate notice for production when commanding a person to attend a deposition to give testimony and produce documents or things.

Paragraph (b)(2) was amended, effective March 1, 2009, to make it clear that notice must be served on each party in a matter before a subpoena to take testimony or for production is served.

Subdivision (f) was amended, effective March 1, 1999, to allow an objection to a subpoena to be sent via a commercial carrier as an alternative to mail.

Sources: Joint Procedure Committee Minutes of _____; January 26-27,

2012, pages 3-7; September 30, 2011, pages 12-15; April 28-29, 2011, page 25; September 23-24, 2010, pages 32-33; April 24-25, 2008, pages 22-25; September 28-29, 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987, pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P. 45.

Statutes Affected:

Superseded: N.D.C.C. § 31-05-22

Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), and N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions); N.D.R.Crim.P. 17 (Subpoena); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure); N.D.R.Ct. 5.1 (Interstate Depositions and Discovery).

SECTION 6. G.S. 1A-1, Rule 45, reads as rewritten:

"**Rule 45. Subpoena.**

(a) Form; Issuance. –

(1) Every subpoena shall state all of the following:

a. The title of the action, the name of the court in which the action is pending, the number of the civil action, and the name of the party at whose instance the witness is summoned.

b. A command to each person to whom it is directed to attend and give testimony or to produce and permit inspection and copying of designated records, books, papers, documents, electronically stored information, or tangible things in the possession, custody, or control of that person therein specified.

c. The protections of persons subject to subpoenas under subsection (c) of this rule.

d. The requirements for responses to subpoenas under subsection (d) of this rule.

(2) A command to produce ~~evidence~~ records, books, papers, electronically stored information, or tangible things may be joined with a command to appear at trial or hearing or at a deposition, or any subpoena may be issued separately. A subpoena may specify the form or forms in which electronically stored information is to be produced.

(3) A subpoena shall issue from the court in which the action is pending.

(4) The clerk of court in which the action is pending shall issue a subpoena, signed but otherwise blank, to a party requesting it, who shall complete it before service. Any judge of the superior court, judge of the district court, magistrate, or attorney, as officer of the court, may also issue and sign a subpoena.

(b) Service. –

(1) Manner. – Any subpoena may be served by the sheriff, by the sheriff's deputy, by a coroner, or 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 that person or by registered or certified mail, return receipt requested. Service of a subpoena for the attendance of a witness only may also be made by telephone communication with the person named therein only by a sheriff, the sheriff's designee who is not less than 18 years of age and is not a party, or a coroner.

(2) Service of copy. – A copy of the subpoena served under subdivision ~~(1)~~ (b)(1) of this subsection shall also be served upon each party in the manner prescribed by Rule 5(b). ~~This subdivision~~

(3) Subdivision (b)(2) of this subsection does not apply to subpoenas issued under G.S. 15A-801 or G.S. 15A-802.

(c) Protection of Persons Subject to Subpoena. –

(1) Avoid undue burden or expense. – A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing an undue burden or expense on a person subject to the subpoena. The court shall enforce this subdivision and impose upon the party or attorney in violation of this requirement an appropriate sanction that may include compensating the person unduly burdened for lost earnings and for reasonable attorney's fees.

(2) For production of public records or hospital medical records. – Where the subpoena commands any custodian of public records or any custodian of hospital medical records, as defined in G.S. 8-44.1, to appear for the sole purpose of producing certain records in the custodian's custody, the custodian subpoenaed may, in lieu of personal appearance, tender to the court in which the action is pending by registered or certified mail or by personal delivery, on or before the time specified in the subpoena, certified copies of the records requested together with a copy of the subpoena and an affidavit by the custodian testifying that the copies are true and correct copies and that the records were made and kept in the regular course of

business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of ~~records~~records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.
b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.
c. The subpoena subjects a person to an undue ~~burden.~~burden or expense.
d. The subpoena is otherwise unreasonable or oppressive.
e. The subpoena is procedurally defective.

(4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers,

documents, electronically stored information, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoenas. –

(1) Form of response. – A person responding to a subpoena to produce ~~documents~~ records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label ~~the documents~~ them to correspond with the categories in the request.

(2) Form of producing electronically stored information not specified. – If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.

(3) Electronically stored information in only one form. – The person responding need not produce the same electronically stored information in more than one form.

(4) Inaccessible electronically stored information. – The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, after considering the limitations of Rule 26(b)(2). The court may specify conditions for discovery, including requiring the party that seeks discovery from a nonparty to bear the costs of locating, preserving, collecting, and producing the electronically stored information involved.

~~(2)~~(5) Specificity of objection. – When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(d1) Opportunity for Inspection of Subpoenaed Material. – A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

(e) Contempt; Expenses to Force Compliance With Subpoena. –

(1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).

(2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion

was unreasonable or was made for improper purposes such as unnecessary delay."

SECTION 7. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all explanatory comments of the drafters of this act, the North Carolina Bar Association Litigation Section E-Discovery Committee, as the Revisor may deem appropriate.

SECTION 8. This act becomes effective October 1, 2011, and shall apply to actions filed on or after that date.

In the General Assembly read three times and ratified this the 14th day of June, 2011.

s/ Walter H. Dalton
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 11:42 a.m. this 23rd day of June, 2011

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Form and Style Revisions to the Rules of Evidence

On December 1, 2011, form and style revisions to the Federal Rules of Evidence took effect. An explanation of the approach taken by the judicial conference in revising the federal evidence rules is attached.

Under Section 8.1(a) of the Rule on Rules, the Committee is tasked studying and reviewing all rules of pleading, practice and procedure, including the North Dakota Rules of Evidence. Section 8.6 requires the Committee to review each rule at least once every 10 years. Fortunately, since the late 1990s, the federal courts have been engaged in making form and style revisions to their rules of procedure. The Committee has been able to fulfill its responsibilities by reviewing North Dakota's rules in the wake of the federal changes, and has completed form and style revisions to the Rules of Appellate, Criminal and Civil Procedure.

The Committee addressed the 100 and 200 series rules at the January meeting. Proposed revisions to the 300, 400, 600, and 700 series rules are attached.

EXCERPT FROM THE REPORT OF THE JUDICIAL CONFERENCE

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE

TO THE CHIEF JUSTICE OF THE UNITED STATES AND MEMBERS OF THE JUDICIAL CONFERENCE OF THE UNITED STATES:

* * * * *

FEDERAL RULES OF EVIDENCE

Rules Recommended for Approval and Transmission

The Advisory Committee on Evidence Rules submitted proposed "style" amendments to Rules 101 through 1103, with a unanimous recommendation that they be approved and transmitted to the Judicial Conference. The proposed amendments were circulated to the bench and bar for comment in August 2009. Scheduled public hearings on the amendments were cancelled because no one asked to testify.

The comprehensive "style" revision of the Evidence Rules is intended to make the rules clearer and easier to read, without changing substantive meaning. Major bar organizations, including the American Bar Association and the American College of Trial Lawyers, provided substantial input, both before and after the proposals were formally published. Nineteen comments were submitted during the public comment period. Most of the comments received from the bench, bar, and public were favorable and included some very helpful suggestions that further improved the revisions.

The Evidence Rules "restyling" project follows the successful restyling of the Federal Rules of Appellate, Criminal, and Civil Procedure using uniform drafting guidelines prepared by a legal-writing scholar. Those restyling efforts began in the early 1990's. The improvement in the rules resulting from the style revisions led the advisory committee to begin the restyling work on the Evidence Rules.

The advisory committee established the following principles for determining whether a proposed change was "substantive" and therefore beyond the proper ambit of the restyling project. A proposed change was "substantive" if: (1) under existing practice in any circuit, it could lead to a different result on a question of admissibility; (2) under existing practice in any circuit, it could lead to a change in the procedure by which an admissibility decision is made; (3) it changes the structure of a rule or method of analysis in a manner that fundamentally changes how courts and litigants have thought about, or argued about, the rule; or (4) it changes a "sacred phrase" — a phrase that has become so familiar in practice that to alter it would be unduly disruptive to practice and expectations (for example, "unfair prejudice" or "truth of the matter asserted").

The advisory committee and the Committee established extensive procedures that required numerous levels of review to ensure that the style revisions were as clear as possible without changing any substantive meaning. The initial draft was prepared by the Committee's style consultant, Professor R. Joseph Kimble. The advisory committee's reporter, Professor Daniel J. Capra, reviewed each proposed amendment to ensure that no substantive change was made. If the changes raised any questions, the reporter and the advisory committee's consultant, Professor Kenneth Broun, reviewed, researched, and revised the rule, providing a reliable basis for the many drafting decisions the project required. Early drafts were then reviewed by the Committee's style subcommittee to analyze the implications of every proposed change. The advisory committee's chair and reporter and the Committee's style subcommittee refined subsequent revised drafts in a series of reiterative reviews. The revised draft was submitted to the advisory committee, which reviewed every rule carefully for possible inadvertent substantive changes. The process took three years, involved scores of conference calls, and produced more

than 350 documents.

The drafting approaches and style conventions used in the Style Project were the same as those used in the previous restylings of the Appellate, Civil, and Criminal Rules. As noted, the intent was to clarify, simplify, and modernize expression, without changing the substantive meaning of the Evidence Rules. To accomplish these objectives, the advisory committee used formatting changes to achieve clearer presentation, reduced the use of inconsistent and ambiguous words, minimized the use of redundant words and terms, removed words and terms that were outdated or archaic, and removed redundant cross-references.

Formatting changes to the dense, block paragraphs and lengthy sentences of the current rules made them much easier to read. The advisory committee broke the rules down into constituent parts, using progressively indented paragraphs with headings and substituting vertical for horizontal lists. These changes make the structure of the rules graphic and make the rules clearer, even when the words are unchanged.

The restyled rules reduce the use of inconsistent terms that say the same thing in different ways. Years of adding new rules and amending rules had led to inconsistent words and terms. Because different words are presumed to have different meanings, such inconsistencies resulted in confusion and unnecessary litigation. The restyled rules reduce inconsistency by using the same words to express the same meaning. Some variations in expression were carried forward, though, when the context made it appropriate to do so.

The restyled rules also minimize the use of inherently ambiguous words. For example, the word "shall" can mean "must," "may," or "should," depending on context. The potential for confusion is exacerbated by the fact that "shall" is no longer generally used in spoken or clearly written English. The restyled rules replace "shall" with "must," "may," or "should," depending

on which one the context and established interpretation make correct in each rule.

The current rules have numerous "intensifiers," expressions that might seem to add emphasis but instead state the obvious and create negative implications for other rules. For example, some past rules have used the words "the court may, in its discretion." "May" means "has the discretion to"; "in its discretion" is a redundant intensifier. The absence of intensifiers in the restyled rules does not change their substantive meaning.

The restyled rules keep the same numbers to minimize the effect on research. Subdivisions were rearranged in some rules to achieve greater clarity and simplicity. Words and terms that have acquired special status from years of interpretation were retained.

Each rule is accompanied by a Committee Note that explains: "The language of [the relevant rule] has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility." The Notes to some rules are more expansive in explaining a particular change.

The Committee unanimously concurred with the advisory committee's recommendations.

Recommendation: That the Judicial Conference —

Approve the proposed amendments to Evidence Rules 101 through 1103 and transmit them to the Supreme Court for its consideration with a recommendation that they be adopted by the Court and transmitted to Congress in accordance with the law.[1]

* * * * *

[1] After the proposed amendments were initially approved by the Judicial Conference and submitted to the Supreme Court for its consideration, the Judicial Conference approved of a change to the proposed amendment to Rule 408(a)(1)—changing the proposal from "a valuable consideration in order to compromise the claim" to the original language of "a valuable consideration in compromising or attempting to compromise the claim"—and to the proposed amendment to Rule 804(b)(4)(A)—to reinsert the word "adoption" in the phrase "relationship by blood, adoption, or marriage."

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 301, N.D.R.Ev., Presumptions in a Civil Case Generally

Form and style amendments to Rule 301 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The text of Rule 301 is substantially different from the federal rule so the form and style amendments proposed were made by staff. The Committee may wish to discuss whether to substitute the simpler federal language for the unique North Dakota language.

The explanatory note for Rule 301 contains an extended explanation of presumptions. Much of this material is deleted in the proposed amendments. The Committee may wish to consider whether the proposed deletions are appropriate.

RULE 301. PRESUMPTIONS IN ~~GENERAL IN~~ A CIVIL ~~ACTIONS AND PROCEEDINGS~~ CASE GENERALLY

(a) Effect. In ~~all civil actions and proceedings not otherwise provided for by statute or by these rules~~ a civil case, unless a statute or these rules provide otherwise, if facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed.

(b) Rebuttal. ~~until~~ If the trier of fact finds from credible evidence that the fact presumed does not exist, ~~in which event~~ the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

~~(b)~~ (c) Inconsistent presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

EXPLANATORY NOTE

Rule 301 was amended, effective _____.

Rule 301 deals with presumptions, prescribing their effect in all civil proceedings not otherwise provided for by law. It provides that a presumption imposes upon the party against whom it is directed the burden of proving its non existence. Rule 301 differs substantially from Fed.R.Ev. 301.

The term "presumption" has been ascribed various meanings, but in the last analysis

it is found that very little may be said about presumptions that is agreeable to all. Given the effect of presumptions under this rule, a presumption may be stated to be a rule of law that requires the trier of fact to draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of the inference is disproved. ~~Compare the definition of presumption of law found in Black's Law Dictionary at 1349 (rev. 4th ed. 1968).~~

Thus, a presumption is not evidence, it is a legal method of dealing with evidence. Nor may a presumption be said to be a mere inference, for an inference always draws its force from the logical, probative value of facts. A presumption is given its effect because of legal considerations, which may be grounded in probability, but are as likely to be based upon trial expedience, access to evidence, or legal or social policies. For example, the presumption that a letter, duly posted, is received may be said to be based upon probability and also upon the inherent difficulty a party would have in proving receipt by other means. ~~The presumption that a child born into a marriage is legitimate is based largely on the socially desirable policy of avoiding "the visitation upon the child of the sins of the parents." McCormick on Evidence, § 343 at 811 (2d ed. 1972).~~

~~The function of a presumption is often stated in terms of its effect upon the burden of proof at trial. According to one theory, espoused by Morgan (Morgan, Some Problems of Proof, 74-81 (1956)), a presumption operates to "shift" the original burden of proof to the opponent of the presumption.~~

~~Under another theory, espoused by Thayer and often called the "bursting bubble" theory, a presumption imposes upon its opponent a burden of going forward with evidence~~

to rebut the presumption; once this is done, the presumption disappears.

The procedural consequences that result from the application of the two theories are these: Under either theory, a presumption avoids a directed verdict against its proponent at the close of his case and, if no evidence is later introduced to rebut the presumption, entitles the proponent to a directed verdict at the close of all the evidence. The differences arise when some evidence is introduced that is contrary to the presumption.

If the burden of proof is said to be fixed upon the opponent of the presumption, then he must introduce enough evidence to carry his burden. If the trier of fact reaches the conclusion that the opposing "evidence" is equal, then a verdict must be rendered in favor of the proponent of the presumption.

If a presumption is said to impose a burden of going forward with evidence to rebut the presumption, the amount of evidence that must be introduced by the opponent to avoid a directed verdict against him is that amount which convinces the judge that reasonable jurors could find contrary to the presumption. Once this is accomplished, the presumption is of no force and the issue is decided on the probative force of the evidence itself. If the evidence is in even balance, then the party who had the burden of proof, originally, must lose, even though his case may have been initially aided by a presumption.

It should be noted that, in all cases, presumptions are disputable and may be overcome by contrary evidence. "Conclusive presumptions," as contained in N.D.C.C. § 31-11-02, are not presumptions at all, but rather legislative statements of substantive law.

Rule 301, as an expression of the theory expressed by Morgan, provides that a

~~presumption imposes upon the party against whom it is directed the burden of proving its non existence. This comports with the effect given presumptions, by Rule 301, Uniform Rules of Evidence (1974), it gives presumptions a stronger effect than they are given under the comparable Federal Rule of Evidence, which imposes only a burden of producing evidence to rebut a presumption. It was felt that this is desirable, in light of the important social considerations which give rise to presumptions.~~

~~By giving this effect to presumptions, Rule 301 comports with past interpretations of North Dakota law. See Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959); Svihovec v. Woodmen Accident Co., 69 N.D. 259, 285 N.W. 447 (1939). But see Fancher v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 105 (N.D. 1963); Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960). See also North Dakota Jury Instruction 1030 (October 1, 1970).~~

Rule 301 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; June 4, 1976, page 18; June 3, 1976, page 1; October 1, 1975, page 3. Rule 301, Uniform Rules of Evidence (1974); Rule 301, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 31-11-01.

Considered: N.D.C.C. §§ 4-09-05, 4-10-03, 4-10-12, 4-11-19, 4-14-03, 4-14-04, 4-22-15, 6-01-31, 6-03-32, 6-09.4-21, 7-01-12, 7-08-02, 7-08-03, 9-03-04, 9-05-10, 9-07-19, 9-10-04, 10-04-19, 10-07-03, 10-23-13, 10-24-31, 10-28-09, 11-13-08, 11-15-16, 11-18-09, 11-20-01, 11-20-05, 12-44-18, 13-01-06, 14-03-24, 14-07-17, 14-05-16, 14-17-04(2), 15-29-10, 15-51-10, 19-01-10, 19-01-11, 19-02-17, 20.1-13-13, 23-02-40, 23-24-04, 24-07-15, 26-08-07, 26-12-09, 26-12-15, 26-15-04, 26-15-26, 26-29-12, 28-01-07, 28-01-12, 28-20-31, 28-23-12, 31-09-08, 31-11-02, 31-11-03, 31-11-04, 31-11-04.1, 32-03-09.1, 32-04-09, 32-04-18, 32-18-03, 32-19-26, 32-25-03, 33-04-17, 35-05-03, 35-21-05, 35-22-16, 36-09-08, 36-21-12, 36-09-20, 37-01-12, 39-03-15, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-42-01, 40-58-08, 41-03-53, 41-03-66, 41-08-05, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-11-10, 43-17-11, 43-17-23, 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17, 45-07-06, 47-09-06, 47-10-13, 47-11-10, 47-14-03, 47-16-05, 47-16-06, 47-19-06, 47-19-12, 47-19-14.2, 48-02-15, 49-06-14, 49-19-16, 57-02-01, 57-24-29, 57-38-46, 57-40.2-05, 57-40.3-08, 57-52-16, 57-53-06, 59-01-16, 60-01-24, 61-02-34, 61-04-25, 61-05-19, 61-16-06, 62-03-04.

FEDERAL RULES OF EVIDENCE
ARTICLE III. PRESUMPTIONS IN CIVIL CASES

Rule 301. Presumptions in Civil Cases Generally

In a civil case, unless a federal statute or these rules provide otherwise, the party against whom a presumption is directed has the burden of producing evidence to rebut the presumption. But this rule does not shift the burden of persuasion, which remains on the party who had it originally.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1931.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. This rule governs presumptions generally. See Rule 302 for presumptions controlled by state law and Rule 303 [deleted] for those against an accused in a criminal case.

Presumptions governed by this rule are given the effect of placing upon the opposing party the burden of establishing the nonexistence of the presumed fact, once the party invoking the presumption establishes the basic facts giving rise to it. The same considerations of fairness, policy, and probability which dictate the allocation of the burden of the various elements of a case as between the prima facie case of a plaintiff and affirmative defenses also underlie the creation of presumptions. These considerations are not satisfied by giving a lesser effect to presumptions. Morgan and Maguire, Looking Backward and Forward at Evidence, *50 Harv.L.Rev. 909, 913 (1937);* Morgan, Instructing the Jury upon Presumptions and Burdon of Proof, *47 Harv.L.Rev. 59, 82 1933);* Cleary, Presuming and Pleading: An Essay on Juristic Immaturity, *12 Stan.L.Rev. 5 (1959).*

The so-called "bursting bubble" theory, under which a presumption vanishes upon the introduction of evidence which would support a finding of the nonexistence of the presumed fact, even though not believed, is rejected as according presumptions too "slight and evanescent" an effect. Morgan and Maguire, supra, at p. 913.

In the opinion of the Advisory Committee, no constitutional infirmity attends this view of presumptions. In *Mobile, J. & K.C.R. Co. v. Turnipseed, 219 U.S. 35, 31 S.Ct. 136, 55 L.Ed. 78 (1910),* the Court upheld a Mississippi statute which provided that in actions against railroads proof of injury inflicted by the running of trains should be prima facie evidence of negligence by the railroad. The injury in the case had resulted from a derailment. The opinion made the points (1) that the only effect of the statute was to impose on the railroad the duty of producing some evidence to the contrary, (2) that an inference may be supplied by law if there is a rational connection between the fact proved and the fact presumed, as long as the opposite party is not precluded from presenting his evidence to the contrary, and (3) that considerations of public policy arising from the character of the business justified the application in question. Nineteen years later, in *Western & Atlantic R. Co. v. Henderson, 279 U.S. 639, 49 S.Ct. 445, 73 L.Ed. 884 (1929),* the Court overturned a Georgia statute making railroads liable for damages done by trains, unless the railroad made it appear that reasonable care had been used, the presumption being against the railroad. The declaration alleged the death of plaintiff's husband from a grade crossing collision, due to specified acts of negligence by defendant. The jury were instructed that proof of the injury raised a presumption of negligence; the burden shifted to the railroad to prove ordinary care; and unless it did so, they should find for plaintiff. The instruction was held erroneous in an opinion stating (1) that there was no rational connection between the mere fact of collision and negligence on the part of anyone, and (2) that the statute was different from that in Turnipseed in imposing a burden upon the railroad. The reader is left in a state of some confusion. Is the difference between a derailment and a grade crossing collision of no significance? Would the Turnipseed presumption have been bad if it had imposed a burden of persuasion on defendant, although that would in nowise have impaired its "rational connection"? If Henderson forbids imposing a burden of persuasion on defendants, what happens to affirmative defenses?

Two factors serve to explain Henderson. The first was that it was common ground that negligence was indispensable to liability. Plaintiff thought so, drafted her complaint accordingly, and relied upon the presumption. But how in logic could the same presumption establish her alternative grounds of negligence that the engineer was so blind he could not see decedent's truck and that he failed to stop after he saw it? Second, take away the basic assumption of no liability without fault, as Turnipseed intimated might be done ("considerations of public policy arising out of the character of the business"), and the structure of the decision in Henderson fails. No question of logic would have arisen if the statute had simply said: a prima facie case of liability is made by proof of injury by a train; lack of negligence is an affirmative defense, to be pleaded and proved as other affirmative defenses. The problem would be one of economic due process

only. While it seems likely that the Supreme Court of 1929 would have voted that due process was denied, that result today would be unlikely. See, for example, the shift in the direction of absolute liability in the consumer cases. Prosser, The Assault upon the Citadel (Strict Liability to the Consumer), *69 Yale L.J. 1099 (1960).*

Any doubt as to the constitutional permissibility of a presumption imposing a burden of persuasion of the non-existence of the presumed fact in civil cases is laid at rest by *Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959).* The Court unhesitatingly applied the North Dakota rule that the presumption against suicide imposed on defendant the burden of proving that the death of insured, under an accidental death clause, was due to suicide.

"Proof of coverage and of death by gunshot wound shifts the burden to the insurer to establish that the death of the insured was due to his suicide." *359 U.S. at 443, 79 S.Ct. at 925.*

"In a case like this one, North Dakota presumes that death was accidental and places on the insurer the burden of proving that death resulted from suicide." *Id. at 446, 79 S.Ct. at 927.*

The rational connection requirement survives in criminal cases, *Tot v. United States, 319 U.S. 463, 63 S.Ct. 1241, 87 L.Ed. 1519 (1943),* because the Court has been unwilling to extend into that area the greater-includes-the-lesser theory of *Ferry v. Ramsey, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796 (1928).* In that case the Court sustained a Kansas statute under which bank directors were personally liable for deposits made with their assent and with knowledge of insolvency, and the fact of insolvency was prima facie evidence of assent and knowledge of insolvency. Mr. Justice Holmes pointed out that the state legislature could have made the directors personally liable to depositors in every case. Since the statute imposed a less stringent liability, "the thing to be considered is the result reached, not the possibly inartificial or clumsy way of reaching it." *Id. at 94, 48 S.Ct. at 444.* Mr. Justice Sutherland dissented: though the state could have created an absolute liability, it did not purport to do so; a rational connection was necessary, but lacking, between the liability created and the prima facie evidence of it; the result might be different if the basis of the presumption were being open for business.

The Sutherland view has prevailed in criminal cases by virtue of the higher standard of notice there required. The fiction that everyone is presumed to know the law is applied to the substantive law of crimes as an alternative to complete unenforceability. But the need does not extend to criminal evidence and procedure, and the fiction does not encompass them. "Rational connection" is not fictional or artificial, and so it is reasonable to suppose that Gainey should have known that his presence at the site of an illicit still could convict him of being connected with (carrying on) the business, *United States v. Gainey, 380 U.S. 63, 85 S.Ct. 754, 13 L.Ed.2d 658 (1965),* but not that Romano should have known that his presence at a still could convict him of possessing it, *United States v. Romano, 382 U.S. 136, 86 S.Ct. 279, 15 L.Ed.2d 210 (1965).*

In his dissent in Gainey, Mr. Justice Black put it more artistically:

"It might be argued, although the Court does not so argue or hold, that Congress if it wished could make presence at a still a crime in itself, and so Congress should be free to create crimes which are called 'possession' and 'carrying on an illegal distillery business' but which are defined in such a way that unexplained presence is sufficient and indisputable evidence in all cases to support conviction for those offenses. See *Ferry v. Ramsey, 277 U.S. 88, 48 S.Ct. 443, 72 L.Ed. 796.* Assuming for the sake of argument that Congress could make unexplained presence a criminal act, and ignoring also the refusal of this Court in other cases to uphold a statutory presumption on such a theory, see *Heiner v. Donnan, 285 U.S. 312, 52 S.Ct. 358, 76 L.Ed. 772,* there is no indication here that Congress intended to adopt such a misleading method of draftsmanship, nor in my judgment could the statutory provisions if so construed escape condemnation for vagueness, under the principles applied in *Lanzetta v. New Jersey, 306 U.S. 451, 59 S.Ct. 618, 83 L.Ed. 888,* and many other cases." *380 U.S. at 84, n. 12, 85 S.Ct. at 766.*

And the majority opinion in Romano agreed with him:

"It may be, of course, that Congress has the power to make presence at an illegal still a punishable crime, but we find no clear indication that it intended to so exercise this power. The crime remains possession, not presence, and with all due deference to the judgment of Congress, the former may not constitutionally be inferred from the latter." *382 U.S. at 144, 86 S.Ct. at 284.*

The rule does not spell out the procedural aspects of its application. Questions as to when the evidence warrants submission of a presumption and what instructions are proper under varying states of fact are believed to present no particular difficulties.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 301 as submitted by the Supreme Court provided that in all cases a presumption imposes on the party against whom it is directed the burden of proving that the nonexistence of the presumed fact is more probable than its existence. The Committee limited the scope of Rule 301 to "civil actions and proceedings" to effectuate its decision not to deal with the question of presumptions in criminal cases. (See note on [proposed] Rule 303 in discussion of Rules deleted). With respect to the weight to be given a presumption

in a civil case, the Committee agreed with the judgment implicit in the Court's version that the so-called "bursting bubble" theory of presumptions, whereby a presumption vanished upon the appearance of any contradicting evidence by the other party, gives to presumptions too slight an effect. On the other hand, the Committee believed that the Rule proposed by the Court, whereby a presumption permanently alters the burden of persuasion, no matter how much contradicting evidence is introduced -- a view shared by only a few courts -- lends too great a force to presumptions. Accordingly, the Committee amended the Rule to adopt an intermediate position under which a presumption does not vanish upon the introduction of contradicting evidence, and does not change the burden of persuasion; instead it is merely deemed sufficient evidence of the fact presumed, to be considered by the jury or other finder of fact.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. The rule governs presumptions in civil cases generally. Rule 302 provides for presumptions in cases controlled by State law.

As submitted by the Supreme Court, presumptions governed by this rule were given the effect of placing upon the opposing party the burden of establishing the non-existence of the presumed fact, once the party invoking the presumption established the basic facts giving rise to it.

Instead of imposing a burden of persuasion on the party against whom the presumption is directed, the House adopted a provision which shifted the burden of going forward with the evidence. They further provided that "even though met with contradicting evidence, a presumption is sufficient evidence of the fact presumed, to be considered by the trier of fact." The effect of the amendment is that presumptions are to be treated as evidence.

The committee feels the House amendment is ill-advised. As the joint committees (the Standing Committee on Practice and Procedure of the Judicial Conference and the Advisory Committee on the Rules of Evidence) stated: "Presumptions are not evidence, but ways of dealing with evidence." This treatment requires juries to perform the task of considering "as evidence" facts upon which they have no direct evidence and which may confuse them in performance of their duties. California had a rule much like that contained in the House amendment. It was sharply criticized by Justice Traynor in *Speck v. Sarver [20 Cal. 2d 585, 128 P. 2d 16, 21 (1942)]* and was repealed after 93 troublesome years [Cal. Ev. Code 1965 § 600].

Professor McCormick gives a concise and compelling critique of the presumption as evidence rule:

. . . . .

Another solution, formerly more popular than now, is to instruct the jury that the presumption is "evidence", to be weighed and considered with the testimony in the case. This avoids the danger that the jury may infer that the presumption is conclusive, but it probably means little to the jury and certainly runs counter to accepted theories of the nature of evidence. [McCormick, Evidence, 669 (1954); Id. 825 (2d ed. 1972)].

For these reasons the committee has deleted that provision of the House-passed rule that treats presumptions as evidence. The effect of the rule as adopted by the committee is to make clear that while evidence of facts giving rise to a presumption shifts the burden of coming forward with evidence to rebut or meet the presumption, it does not shift the burden of persuasion on the existence of the presumed facts. The burden or persuasion remains on the party to whom it is allocated under the rules governing the allocation in the first instance.

The court may instruct the jury that they may infer the existence of the presumed fact from proof of the basic facts giving rise to the presumption. However, it would be inappropriate under this rule to instruct the jury that the inference they are to draw is conclusive.

Notes of Conference Committee, House Report No. 93-1597. The House bill provides that a presumption in civil actions and proceedings shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut it. Even though evidence contradicting the presumption is offered, a presumption is considered sufficient evidence of the presumed fact to be considered by the jury. The Senate amendment provides that a presumption shifts to the party against whom it is directed the burden of going forward with evidence to meet or rebut the presumption, but it does not shift to that party the burden of persuasion on the existence of the presumed fact.

Under the Senate amendment, a presumption is sufficient to get a party past an adverse party's motion to dismiss made at the end of his case-in-chief. If the adverse party offers no evidence contradicting the presumed fact, the court will instruct the jury that if it finds the basic facts, it may presume the existence of the presumed fact. If the adverse party does offer evidence contradicting the presumed fact, the court cannot instruct the jury that it may presume the existence of the presumed fact from proof of the basic facts. The court may, however, instruct the jury that it may infer the existence of the presumed fact from proof of the basic facts.

The Conference adopts the Senate amendment.

Notes of Advisory Committee on 2011 amendments. The language of Rule 301 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 302, N.D.R.Ev., Effect of State Law on Presumptions in a Civil Case

Form and style amendments to Rule 302 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 302. ~~APPLICABILITY OF FEDERAL LAW IN CIVIL ACTIONS AND PROCEEDINGS~~ APPLYING FEDERAL LAW TO PRESUMPTIONS IN CIVIL CASES

~~In civil actions and proceedings, the effect of a presumptions respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.~~

In a civil case, federal law governs the effect of a presumption regarding a claim or defense for which federal law supplies the rule of decision.

EXPLANATORY NOTE

Rule 301 was amended, effective _____.

~~"Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied." Comment, Rule 302, Uniform Rules of Evidence (1974).~~

Rule 302 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; June 4,

22 1976, page 28; April 8, 1976, page 19. Rule 302, Uniform Rules of Evidence (1974).

FEDERAL RULES OF EVIDENCE
ARTICLE III. PRESUMPTIONS IN CIVIL CASES

Rule 302. Applying State Law to Presumptions in Civil Cases

In a civil case, state law governs the effect of a presumption regarding a claim or defense for which state law supplies the rule of decision.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1931.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. A series of Supreme Court decisions in diversity cases leaves no doubt of the relevance of *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938),* to questions of burden of proof. These decisions are *Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943),* and *Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S.Ct. 921, 3 L.Ed.2d 935 (1959).* They involved burden of proof, respectively, as to status as bona fide purchasers, contributory negligence, and non-accidental death (suicide) of an insured. In each instance the state rule was held to be applicable. It does not follow, however, that all presumptions in diversity cases are governed by state law. In each case cited, the burden of proof question had to do with a substantive element of the claim or defense. Application of the state law is called for only when the presumption operates upon such an element. Accordingly the rule does not apply state law when the presumption operates upon a lesser aspect of the case, i.e. "tactical" presumptions.

The situations in which the state law is applied have been tagged for convenience in the preceding discussion as "diversity cases." The designation is not a completely accurate one since Erie applies to any claim or issue having its source in state law, regardless of the basis of federal jurisdiction, and does not apply to a federal claim or issue, even though jurisdiction is based on diversity. Vestal, Erie R.R. v. Tompkins: A Projection, *48 Iowa L.Rev. 248, 257 (1963);* Hart and Wechsler, The Federal Courts and the Federal System, 697 (1953); 1A Moore, Federal Practice P 0.305[3] (2d ed. 1965); Wright, Federal Courts, 217-218 (1963). Hence the rule employs, as appropriately descriptive, the phrase "as to which state law supplies the rule of decision." See A.L.I. Study of the Division of Jurisdiction Between State and Federal Courts, § 2344(c), p. 40, P.F.D. No. 1 (1965).

Notes of Advisory Committee on 2011 amendments. The language of Rule 302 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 303, N.D.R.Ev., Presumptions in Criminal Cases

Rule 303 is an empty rule whose explanatory note gives directions on how to find the rules for proof and presumptions in criminal cases. A copy of N.D.C.C. 12.1-01-03 is attached for the Committee to consider.

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

[Reserved]

EXPLANATORY NOTE

~~(~~Presumptions in criminal cases are governed by N.D.C.C. § 12.1-01-03~~)~~.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; April 8, 1976, pages 19, 20; October 1, 1975, page 3.

Statutes Affected:

Considered: N.D.C.C. §§ 5-01-08.2, 12.1-01-03, 12.1-28-01, 12.1-29-02, 14-02.2-01, 16-20-08, 19-03.1-37, 19-05-04, 19-20.1-17, 20.1-01-14, 20.1-01-20, 20.1-05-05, 31-01-09, 34-07-04, 36-12-04, 37-01-12.

12.1-01-03. Proof and presumptions.

1. No person may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt. An accused is presumed innocent until proven guilty. The fact that the accused has been arrested, confined, or charged with the offense gives rise to no inference of guilt at the accused's trial. "Element of an offense" means:

a. The forbidden conduct;

b. The attendant circumstances specified in the definition and grading of the offense;

c. The required culpability;

d. Any required result; and

e. The nonexistence of a defense as to which there is evidence in the case sufficient to give rise to a reasonable doubt on the issue.

2. Subsection 1 does not require negating a defense:

a. By allegation in the charging document; or

b. By proof, unless the issue is in the case as a result of evidence sufficient to raise a reasonable doubt on the issue.

Unless it is otherwise provided or the context plainly requires otherwise, if a statute outside this title defining an offense, or a related statute, or a rule or regulation thereunder, contains a provision constituting an exception from criminal liability for conduct which would otherwise be included within the prohibition of the offense, that the defendant came within such exception is a defense.

3. Subsection 1 does not apply to any defense which is explicitly designated an "affirmative defense". An affirmative defense must be proved by the defendant by a preponderance of evidence.

4. When a statute establishes a presumption, it has the following consequences:

a. If there is sufficient evidence of the facts which gave rise to the presumption, the presumed fact is deemed sufficiently proved to warrant submission of the issue to a jury unless the court is satisfied that the evidence as a whole clearly negates the presumed fact.

b. In submitting the issue of the existence of the presumed fact to a jury, the court shall charge that, although the evidence as a whole must establish the presumed fact beyond a reasonable doubt, the jury may arrive at that judgment on the basis of the presumption alone, since the law regards the facts giving rise to the presumption as strong evidence of the fact presumed.

5. When a statute declares that given facts constitute a prima facie case, proof of such facts warrants submission of a case to the jury with the usual instructions on burden of proof and without additional instructions attributing any special probative force to the facts proved.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 401, N.D.R.Ev., Test for Relevant Evidence

Form and style amendments to Rule 401 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 401. ~~DEFINITION OF "~~ TEST FOR RELEVANT EVIDENCE~~"~~

~~"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.~~

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

EXPLANATORY NOTE

Rule 401 was amended, effective _____.

~~This definition of "relevant evidence" has been adopted by the North Dakota Supreme Court. State v. Hendrickson, 240 N.W.2d 846, Syllabus Para2 (N.D. 1976). The definition presents no conceptual departures from traditional thoughts on the subject of relevancy.~~ The language of Rule 401 is intended to reflect the realization that stringent legal standards cannot be meaningfully applied to govern determinations of relevancy and, consequently, that the area is one best left to the wide discretion of the trial court.

~~One point merits attention, and that is that evidence may be relevant even though directed toward a fact that is not in dispute. As stated in the Advisory Committee's Note to Rule 401, Federal Rules of Evidence:~~

~~"While situations will arise which call for the exclusion of evidence offered to prove~~

~~a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding."~~

Rule 401 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; April 8, 1976, page 19; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 401~~, Federal Rules of Evidence~~; Rule 401, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 401. Test for Relevant Evidence

Evidence is relevant if:
(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and
(b) the fact is of consequence in determining the action.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1931.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Problems of relevancy call for an answer to the question whether an item of evidence, when tested by the processes of legal reasoning, possesses sufficient probative value to justify receiving it in evidence. Thus, assessment of the probative value of evidence that a person purchased a revolver shortly prior to a fatal shooting with which he is charged is a matter of analysis and reasoning.

The variety of relevancy problems is coextensive with the ingenuity of counsel in using circumstantial evidence as a means of proof. An enormous number of cases fall in no set pattern, and this rule is designed as a guide for handling them. On the other hand, some situations recur with sufficient frequency to create patterns susceptible of treatment by specific rules. Rule 404 and those following it are of that variety; they also serve as illustrations of the application of the present rule as limited by the exclusionary principles of Rule 403.

Passing mention should be made of so-called "conditional" relevancy. Morgan, Basic Problems of Evidence 45-46 (1962). In this situation, probative value depends not only upon satisfying the basic requirement of relevancy as described above but also upon the existence of some matter of fact. For example, if evidence of a spoken statement is relied upon to prove notice, probative value is lacking unless the person sought to be charged heard the statement. The problem is one of fact, and the only rules needed are for the purpose of determining the respective functions of judge and jury. See Rules 104(b) and 901. The discussion which follows in the present note is concerned with relevancy generally, not with any particular problem of conditional relevancy.

Relevancy is not an inherent characteristic of any item of evidence but exists only as a relation between an item of evidence and a matter properly provable in the case. Does the item of evidence tend to prove the matter sought to be proved? Whether the relationship exists depends upon principles evolved by experience or science, applied logically to the situation at hand. James, Relevancy, Probability and the Law, *29 Calif.L.Rev. 689, 696, n. 15 (1941),* in Selected Writings on Evidence and Trial 610, 615, n. 15 (Fryer ed. 1957). The rule summarizes this relationship as a "tendency to make the existence" of the fact to be proved "more probable or less probable." Compare Uniform Rule 1(2) which states the crux of relevancy as "a tendency in reason," thus perhaps emphasizing unduly the logical process and ignoring the need to draw upon experience or science to validate the general principle upon which relevancy in a particular situation depends.

The standard of probability under the rule is "more * * * probable than it would be without the evidence." Any more stringent requirement is unworkable and unrealistic. As McCormick § 152, p. 317, says, "A brick is not a wall," or, as Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L.Rev. 574, 576 (1956),* quotes Professor McBaine, "* * *[I]t is not to be supposed that every witness can make a home run." Dealing with probability in the language of the rule has the added virtue of avoiding confusion between questions of admissibility and questions of the sufficiency of the evidence.

The rule uses the phrase "fact that is of consequence to the determination of the action" to describe the kind of fact to which proof may properly be directed. The language is that of *California Evidence Code § 210*; it has the advantage of avoiding the loosely used and ambiguous word "material." Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. I. General Provisions), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 10-11 (1964). The fact to be proved may be ultimate, intermediate, or evidentiary; it matters not, so long as it is of consequence in the determination of the action. Cf. Uniform Rule 1(2) which requires that the evidence relate to a "material" fact.

The fact to which the evidence is directed need not be in dispute. While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that

evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding. Charts, photographs, views of real estate, murder weapons, and many other items of evidence fall in this category. A rule limiting admissibility to evidence directed to a controversial point would invite the exclusion of this helpful evidence, or at least the raising of endless questions over its admission. Cf. *California Evidence Code § 210*, defining relevant evidence in terms of tendency to prove a disputed fact.

Notes of Advisory Committee on 2011 amendments. The language of Rule 401 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 402, N.D.R.Ev., General Admissibility of Relevant Evidence

Form and style amendments to Rule 402 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The former language of the rule refers to an "Act of Congress" while the proposed amendments refer to a "federal statute." The Committee may wish to consider whether this is an appropriate updating.

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE ~~GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE~~

~~All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States or the state of North Dakota, by any applicable Act of Congress, by statutes of North Dakota, by these rules, or by other rules adopted by the supreme court of North Dakota. Evidence which is not relevant is not admissible.~~

Relevant evidence is admissible unless any of the following provides otherwise:

– the United States Constitution;

– the North Dakota Constitution;

– a federal statute;

– a North Dakota statute;

– these rules; or

– other rules prescribed by the Supreme Court of North Dakota.

Irrelevant evidence is not admissible.

EXPLANATORY NOTE

Rule 402 was amended, effective _____.

The focal point of this rule is not the statement that all relevant evidence is admissible and irrelevant evidence is inadmissible, but rather that the many exceptions to this general statement are recognized and left undisturbed. Thus, for example, relevant evidence may be excluded to assure the continued recognition of a defendant's constitutional rights in a

criminal action (such as Miranda); to further the socially desirable policies underlying the privileges of Article V of these rules; or to avoid undue delay, prejudice, or confusion of the issues (Rule 403).

Rule 402 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, pages 19, 20; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev.402~~; Federal Rules of Evidence~~; Rule 402, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12-59-04, 12.1-04-05, 23-01-15, 25-13-04, 25-14-01, 27-20-54, 29-29.1-05, 39-06.1-03, 39-16-03, 39-16-11, 41-03-52, 50-09-13, 50-10-08, 50-24-31.1, 65-01-11.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 402. General Admissibility of Relevant Evidence

Relevant evidence is admissible unless any of the following provides otherwise:
- the United States Constitution;
- a federal statute;
- these rules; or
- other rules prescribed by the Supreme Court.

Irrelevant evidence is not admissible.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1931.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The provisions that all relevant evidence is admissible, with certain exceptions, and that evidence which is not relevant is not admissible are "a presupposition involved in the very conception of a rational system of evidence." Thayer, Preliminary Treatise on Evidence 264 (1898). They constitute the foundation upon which the structure of admission and exclusion rests. For similar provisions see *California Evidence Code §§ 350, 351.* Provisions that all relevant evidence is admissible are found in Uniform Rule 7(f); Kansas Code of Civil Procedure § 60-407(f); and New Jersey Evidence Rule 7(f); but the exclusion of evidence which is not relevant is left to implication.

Not all relevant evidence is admissible. The exclusion of relevant evidence occurs in a variety of situations and may be called for by these rules, by the Rules of Civil and Criminal Procedure, by Bankruptcy Rules, by Act of Congress, or by constitutional considerations.

Succeeding rules in the present article, in response to the demands of particular policies, require the exclusion of evidence despite its relevancy. In addition, Article V recognizes a number of privileges; Article VI imposes limitations upon witnesses and the manner of dealing with them; Article VII specifies requirements with respect to opinions and expert testimony; Article VIII excludes hearsay not falling within an exception; Article IX spells out the handling of authentication and identification; and Article X restricts the manner of proving the contents of writings and recordings.

The Rules of Civil and Criminal Procedure in some instances require the exclusion of relevant evidence. For example, Rules 30(b) and 32(a)(3) of the Rules of Civil Procedure, by imposing requirements of notice and unavailability of the deponent, place limits on the use of relevant depositions. Similarly, Rule 15 of the Rules of Criminal Procedure restricts the use of depositions in criminal cases, even though relevant. And the effective enforcement of the command, originally statutory and now found in Rule 5(a) of the Rules of Criminal Procedure, that an arrested person be taken without unnecessary delay before a commissioner of other similar officer is held to require the exclusion of statements elicited during detention in violation thereof. *Mallory v. United States, 354 U.S. 449, 77 S.Ct. 1356, 1 L.Ed.2d 1479 (1957); 18 U.S.C. § 3501(c).*

While congressional enactments in the field of evidence have generally tended to expand admissibility beyond the scope of the common law rules, in some particular situations they have restricted the admissibility of relevant evidence. Most of this legislation has consisted of the formulation of a privilege or of a prohibition against disclosure. *8 U.S.C. § 1202(f)*, records of refusal of visas or permits to enter United States confidential, subject to discretion of Secretary of State to make available to court upon certification of need; *10 U.S.C. § 3693*, replacement certificate of honorable discharge from Army not admissible in evidence; *10 U.S.C. § 8693*, same as to Air Force; *11 U.S.C. § 25(a)(10)*, testimony given by bankrupt on his examination not admissible in criminal proceedings against him, except that given in hearing upon objection to discharge; *11 U.S.C. § 205(a)*, railroad reorganization petition, if dismissed, not admissible in evidence; *11 U.S.C. § 403(a)*, list of creditors filed with municipal composition plan not an admission; *13 U.S.C. § 9(a)*, census information confidential, retained copies of reports privileged; *47 U.S.C. § 605*, interception and divulgence of wire or radio communications prohibited unless authorized by sender. These statutory provisions would remain undisturbed by the rules.

The rule recognizes but makes no attempt to spell out the constitutional considerations which impose basic limitations upon the admissibility of relevant evidence. Examples are evidence obtained by unlawful search and seizure, *Weeks v. United States, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); Katz v. United States, 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967);* incriminating statement elicited from an accused in violation of right to counsel, *Massiah v. United States, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964).*

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 402 as submitted to the Congress contained the phrase "or by other rules adopted by the Supreme Court". To accommodate the view that the Congress should not appear to acquiesce in the Court's judgment that it has authority under the existing Rules Enabling Acts to promulgate Rules of Evidence, the Committee amended the above phrase to read "or by other rules prescribed by the Supreme Court pursuant to statutory authority" in this and other Rules where the reference appears.

Notes of Advisory Committee on 2011 amendments. The language of Rule 402 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 403, N.D.R.Ev., Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

Form and style amendments to Rule 403 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 403. ~~EXCLUSION OF~~ EXCLUDING RELEVANT EVIDENCE ~~ON GROUNDS OF~~ FOR PREJUDICE, CONFUSION, ~~OR~~ WASTE OF TIME, OR OTHER REASONS

~~Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.~~

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

EXPLANATORY NOTE

Rule 403 was amended, effective _____.

Rule 403 is an adaptation of Rule 403 of the Federal Rules of Evidence. ~~It does not change North Dakota law, but rather codifies it. Evidence has been traditionally excluded on grounds of remoteness, see, e.g., In re Graf's Estate, 119 N.W.2d 478 (N.D. 1963), and on grounds that its probative value is not commensurate with the time required for its use as evidence. See Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967).~~ The rule vests wide discretion in the trial court to control the introduction of evidence.

It should be noted that surprise is not listed as a ground for exclusion. ~~It has been stated that granting~~ Granting a continuance is the proper remedy for unfair surprise. ~~See~~

~~Advisory Committee's Note to Rule 403, FRE.~~

Rule 403 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; April 8, 1976, page 20; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev.403~~, Federal Rules of Evidence~~; Rule 403, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 403. Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The case law recognizes that certain circumstances call for the exclusion of evidence which is of unquestioned relevance. These circumstances entail risks which range all the way from inducing decision on a purely emotional basis, at one extreme, to nothing more harmful than merely wasting time, at the other extreme. Situations in this area call for balancing the probative value of and need for the evidence against the harm likely to result from its admission. Slough, Relevancy Unraveled, *5 Kan. L. Rev. 1, 12-15 (1956);* Trautman, Logical or Legal Relevancy -- A Conflict in Theory, *5 Van. L. Rev. 385, 392 (1952);* McCormick § 152, pp. 319-321. The rules which follow in this Article are concrete applications evolved for particular situations. However, they reflect the policies underlying the present rule, which is designed as a guide for the handling of situations for which no specific rules have been formulated.

Exclusion for risk of unfair prejudice, confusion of issues, misleading the jury, or waste of time, all find ample support in the authorities. "Unfair prejudice" within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.

The rule does not enumerate surprise as a ground for exclusion, in this respect following Wigmore's view of the common law. 6 Wigmore § 1849. Cf. McCormick § 152, p. 320, n. 29, listing unfair surprise as a ground for exclusion but stating that it is usually "coupled with the danger of prejudice and confusion of issues." While Uniform Rule 45 incorporates surprise as a ground and is followed in Kansas Code of Civil Procedure § 60-445, surprise is not included in *California Evidence Code § 352* or New Jersey Rule 4, though both the latter otherwise substantially embody Uniform Rule 45. While it can scarcely be doubted that claims of unfair surprise may still be justified despite procedural requirements of notice and instrumentalities of discovery, the granting of a continuance is a more appropriate remedy than exclusion of the evidence. Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 612 (1964). Moreover, the impact of a rule excluding evidence on the ground of surprise would be difficult to estimate.

In reaching a decision whether to exclude on grounds of unfair prejudice, consideration should be given to the probable effectiveness or lack of effectiveness of a limiting instruction. See Rule 106 [now 105] and Advisory Committee's Note thereunder. The availability of other means of proof may also be an appropriate factor.

Notes of Advisory Committee on 2011 amendments. The language of Rule 403 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 404, N.D.R.Ev., Character Evidence; Crimes or Other Acts

Form and style amendments to Rule 404 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The federal rule requires that the defendant request notice from the prosecutor of an intent to use Rule 404(b) evidence. As discussed in the explanatory note, North Dakota does not place any duty to request notice on the defendant – the prosecutor is obligated to provide notice. This approach has been retained in the proposed amendments.

RULE 404. CHARACTER EVIDENCE; ~~NOT ADMISSIBLE TO PROVE CONDUCT;~~ ~~EXCEPTIONS; OTHER~~ CRIMES OR OTHER ACTS

(a) Character Evidence ~~Generally~~. ~~Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:~~

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

~~(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;~~

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

~~(2) Character of victim. Subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first~~

~~aggressor;~~

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

~~(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.~~

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) ~~Other~~ Crimes, Wrongs, or Other Acts. ~~Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.~~

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. The prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

EXPLANATORY NOTE

Rule 404 was amended, effective March 1, 1990, March 1, 1994, March 1, 2008; _____.

~~The general rule that character evidence may not be introduced to show that a person acted in conformity to character is compatible with present North Dakota case law.~~ Character evidence is not admissible when its purpose would be to prove circumstantially how a person acted on a particular occasion. Whenever the character of a person is in issue, as in a defamation case, this exclusion does not apply.

~~Subdivision (a)(1)~~ Paragraph (a)(2) allows the accused to offer circumstantial evidence of character. Traditionally, this has been allowed, for the objection to character evidence in general is not that it has no relevancy but that its probative value, when weighed against possible prejudice, does not warrant admission. If the accused offers such evidence, the issue of prejudice is no longer a factor.

~~Subdivision~~ Paragraph (a)~~(1)~~(2)(B) was amended, effective March 1, 2008, to add

clarifying language on victim character evidence.

~~Except when Rule 412 applies, subdivision (a)(2) allows character evidence of the victim of a crime to be introduced by an accused and evidence of peacefulness of a homicide victim by the prosecution to rebut evidence that the victim was the aggressor.~~

~~Subdivision~~ Paragraph (a)(3) provides that, in dealing with impeachment of a witness, Rules 607, 608, and 609 state the applicable rules. The present rule retains its force, and should be consulted whenever the witness is also a party whose actions are sought to be proved.

Subdivision (b) restates the general rule, but continues to provide that character evidence offered for other purposes, e.g., motive, intent, or identity, is admissible. But the mere labeling of such evidence does not automatically bring admission.

~~Rule 404 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

Subdivision (b) was amended, effective March 1, 1994, to follow the 1991 federal amendment, by adding a pretrial notice requirement in criminal cases. However, unlike the federal rule, North Dakota's amended rule does not place the burden of requesting notice upon the accused. Because the notice requirement serves as a condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met. The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b).

Rule 404 was amended, effective _____, in response to the December 1,

2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 25, 2007, pages 10-11; September 28-29, 2006, pages 13-14; April 29-30, 1993, page 10; January 28-29, 1993, pages 11-12; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 20, 21. Fed.R.Ev. 404; Rule 404, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-20-14, 12.1-20-15, 27-20-33, 27-20-52, 42-02-07.

Cross Reference: N.D.R.Ev. 412 (Admissibility of Alleged Victim's Sexual Behavior or Alleged Sexual Predisposition in Criminal Proceeding), 607 (Who May Impeach), 608 (Evidence of Character and Conduct of Witness), and 609 (Impeachment by Evidence of Conviction of Crime).

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 404. Character Evidence; Crimes or Other Acts

(a) Character Evidence.

(1) *Prohibited Uses.* Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) *Exceptions for a Defendant or Victim in a Criminal Case.* The following exceptions apply in a criminal case:

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor. (3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) Crimes, Wrongs, or Other Acts.

(1) *Prohibited Uses.* Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) *Permitted Uses; Notice in a Criminal Case.* This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident. On request by a defendant in a criminal case, the prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial--or during trial if the court, for good cause, excuses lack of pretrial notice.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932; Oct. 1, 1987; Dec. 1, 1991; Dec. 1, 2000; Dec. 1, 2006.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Subdivision (a). This subdivision deals with the basic question whether character evidence should be admitted. Once the admissibility of character evidence in some form is established under this rule, reference must then be made to Rule 405, which follows, in order to determine the appropriate method of proof. If the character is that of a witness, see Rules 608 and 610 for methods of proof.

Character questions arise in two fundamentally different ways. (1) Character may itself be an element of a crime, claim, or defense. A situation of this kind is commonly referred to as "character in issue." Illustrations are: the chastity of the victim under a statute specifying her chastity as an element of the crime of seduction, or the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver. No problem of the general relevancy of character evidence is involved, and the present rule therefore has no provision on the subject. The only question relates to allowable methods of proof, as to which see Rule 405, immediately following. (2) Character evidence is susceptible of being used for the purpose of suggesting an inference that the person acted on the occasion in question consistently with his character. This use of character is often described as "circumstantial." Illustrations are: evidence of a violent disposition to prove that the person was the aggressor in an affray, or evidence of honesty in disproof of a charge of theft. This circumstantial use of character evidence raises questions of relevancy as well as questions of allowable methods of proof.

In most jurisdictions today, the circumstantial use of character is rejected but with important exceptions: (1) an accused may introduce pertinent evidence of good character (often misleadingly described as "putting his character in issue"), in which event the prosecution may rebut with evidence of bad character; (2) an accused may introduce pertinent evidence of the character of the victim, as in support of a claim of self-defense to a charge of homicide or consent in a case of rape, and the prosecution may introduce similar evidence in rebuttal of the character evidence, or, in a homicide case, to rebut a claim that deceased was the first aggressor, however proved; and (3) the character

of a witness may be gone into as bearing on his credibility. McCormick §§ 155-161. This pattern is incorporated in the rule. While its basis lies more in history and experience than in logic as underlying justification can fairly be found in terms of the relative presence and absence of prejudice in the various situations. Falknor, Extrinsic Policies Affecting Admissibility, 10 Rutger, L.Rev. 574, 584 (1956); McCormick § 157. In any event, the criminal rule is so deeply imbedded in our jurisprudence as to assume almost constitutional proportions and to override doubts of the basic relevancy of the evidence.

The limitation to pertinent traits of character, rather than character generally, in paragraphs (1) and (2) is in accordance with the prevailing view. McCormick § 158, p. 334. A similar provision in Rule 608, to which reference is made in paragraph (3), limits character evidence respecting witnesses to the trait of truthfulness or untruthfulness.

The argument is made that circumstantial use of character ought to be allowed in civil cases to the same extent as in criminal cases, i.e. evidence of good (nonprejudicial) character would be admissible in the first instance, subject to rebuttal by evidence of bad character. Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L.Rev. 574, 581-583 (1956);* Tentative Recommendation and a Study Relating to the Uniform Rules of Evidence (Art. VI. Extrinsic Policies Affecting Admissibility), Cal. Law Revision Comm'n, Rep., Rec. & Studies, 657-658 (1964). Uniform Rule 47 goes farther, in that it assumes that character evidence in general satisfies the conditions of relevancy, except as provided in Uniform Rule 48. The difficulty with expanding the use of character evidence in civil cases is set forth by the California Law Revision Commission in its ultimate rejection of Uniform Rule 47, *Id., 615:*

"Character evidence is of slight probative value and may be very prejudicial. It tends to distract the trier of fact from the main question of what actually happened on the particular occasion. It subtly permits the trier of fact to reward the good man to punish the bad man because of their respective characters despite what the evidence in the case shows actually happened."

Much of the force of the position of those favoring greater use of character evidence in civil cases in dissipated by their support of Uniform Rule 48 which excludes the evidence in negligence cases, where it could be expected to achieve its maximum usefulness. Moreover, expanding concepts of "character," which seem of necessity to extend into such areas as psychiatric evaluation and psychological testing, coupled with expanded admissibility, would open up such vistas of mental examinations as caused the Court concern in *Schlagenhauf v. Holder, 379 U.S. 104, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964).* It is believed that those espousing change have not met the burden of persuasion.

Subdivision (b) deals with a specialized but important application of the general rule excluding circumstantial use of character evidence. Consistently with that rule, evidence of other crimes, wrongs, or acts is not admissible to prove character as a basis for suggesting the inference that conduct on a particular occasion was in conformity with it. However, the evidence may be offered for another purpose, such as proof of motive, opportunity, and so on, which does not fall within the prohibition. In this situation the rule does not require that the evidence be excluded. No mechanical solution is offered. The determination must be made whether the danger of undue prejudice outweighs the probative value of the evidence in view of the availability of other means of proof and other factors appropriate for making decisions of this kind under Rule 403. Slough and Knightly, Other Vices, Other Crimes, *41 Iowa L.Rev. 325 (1956).*

Notes of Committee on the Judiciary, House Report No. 93-650. The second sentence of Rule 404(b) as submitted to the Congress began with the words "This subdivision does not exclude the evidence when offered". The Committee amended this language to read "It may, however, be admissible", the words used in the 1971 Advisory Committee draft, on the ground that this formulation properly placed greater emphasis on admissibility than did the final Court version.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. This rule provides that evidence of other crimes, wrongs, or acts is not admissible to prove character but may be admissible for other specified purposes such as proof of motive.

Although your committee sees no necessity in amending the rule itself, it anticipates that the use of the discretionary word "may" with respect to the admissibility of evidence of crimes, wrongs, or acts is not intended to confer any arbitrary discretion on the trial judge. Rather, it is anticipated that with respect to permissible uses for such evidence, the trial judge may exclude it only on the basis of those considerations set forth in Rule 403, i.e. prejudice, confusion or waste of time.

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

Notes of Advisory Committee on 1991 amendment. Rule 404(b) has emerged as one of the most cited Rules in the Rules of Evidence. And in many criminal cases evidence of an accused's extrinsic acts is viewed as an important asset in the prosecution's case against an accused. Although there are a few reported decisions on use of such

evidence by the defense, see, e.g., *United States v. McClure, 546 F.2nd 670 (5th Cir. 1990)* (acts of informant offered in entrapment defense), the overwhelming number of cases involve introduction of that evidence by the prosecution.

The amendment to Rule 404(b) adds a pretrial notice requirement in criminal cases and is intended to reduce surprise and promote early resolution on the issue of admissibility. The notice requirement thus places Rule 404(b) in the mainstream with notice and disclosure provisions in other rules of evidence. See, e.g., Rule 412 (written motion of intent to offer evidence under rule), Rule 609 (written notice of intent to offer conviction older than 10 years), Rule 803(24) and 804(b)(5) (notice of intent to use residual hearsay exceptions).

The Rule expects that counsel for both the defense and the prosecution will submit the necessary request and information in a reasonable and timely fashion. Other than requiring pretrial notice, no specific time limits are stated in recognition that what constitutes a reasonable request or disclosure will depend largely on the circumstances of each case. Compare *Fla. Stat. Ann § 90.404(2)(b)* (notice must be given at least 10 days before trial) with Tex. R. Evid. 404(b) (no time limit).

Likewise, no specific form of notice is required. The Committee considered and rejected a requirement that the notice satisfy the particularity requirements normally required of language used in a charging instrument. Cf. *Fla. Stat. Ann § 90.404(2)(b)* (written disclosure must describe uncharged misconduct with particularity required of an indictment or information). Instead, the Committee opted for a generalized notice provision which requires the prosecution to apprise the defense of the general nature of the evidence of extrinsic acts. The Committee does not intend that the amendment will supercede other rules of admissibility or disclosure, such as the Jencks Act, *18 U.S.C. § 3500*, et. seq. nor require the prosecution to disclose directly or indirectly the names and addresses of its witnesses, something it is currently not required to do under *Federal Rule of Criminal Procedure 16.*

The amendment requires the prosecution to provide notice, regardless of how it intends to use the extrinsic act evidence at trial, i.e., during its case-in-chief, for impeachment, or for possible rebuttal. The court in its discretion may, under the facts, decide that the particular request or notice was not reasonable, either because of the lack of timeliness or completeness. Because the notice requirement serves as condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met.

Nothing in the amendment precludes the court from requiring the government to provide it with an opportunity to rule in limine on 404(b) evidence before it is offered or even mentioned during trial. When ruling in limine, the court may require the government to disclose to it the specifics of such evidence which the court must consider in determining admissibility.

The amendment does not extend to evidence of acts which are "intrinsic" to the charged offense, see *United States v. Williams, 900 F.2d 823 (5th Cir. 1990)* (noting distinction between 404(b) evidence and intrinsic offense evidence). Nor is the amendment intended to redefine what evidence would otherwise be admissible under Rule 404(b). Finally, the Committee does not intend through the amendment to affect the role of the court and the jury in considering such evidence. See United States v. Huddleston [Huddleston v. United States], *485 U.S. 681, 108 S.Ct 1496 (1988).*

Notes of Advisory Committee on 2000 amendments. Rule 404(a)(1) has been amended to provide that when the accused attacks the character of an alleged victim under subdivision (a)(2) of this Rule, the door is opened to an attack on the same character trait of the accused. Current law does not allow the government to introduce negative character evidence as to the accused unless the accused introduces evidence of good character. *See, e.g., United States v. Fountain, 768 F.2d 790 (7th Cir. 1985)* (when the accused offers proof of self-defense, this permits proof of the alleged victim's character trait for peacefulness, but it does not permit proof of the accused's character trait for violence).

The amendment makes clear that the accused cannot attack the alleged victim's character and yet remain shielded from the disclosure of equally relevant evidence concerning the same character trait of the accused. For example, in a murder case with a claim of self-defense, the accused, to bolster this defense, might offer evidence of the alleged victim's violent disposition. If the government has evidence that the accused has a violent character, but is not allowed to offer this evidence as part of its rebuttal, the jury has only part of the information it needs for an informed assessment of the probabilities as to who was the initial aggressor. This may be the case even if evidence of the accused's prior violent acts is admitted under Rule 404(b), because such evidence can be admitted only for limited purposes and not to show action in conformity with the accused's character on a specific occasion. Thus, the amendment is designed to permit a more balanced presentation of character evidence when an accused chooses to attack the character of the alleged victim.

The amendment does not affect the admissibility of evidence of specific acts of uncharged misconduct offered for a purpose other than proving character under Rule 404(b). Nor does it affect the standards for proof of character by

evidence of other sexual behavior or sexual offenses under Rules 412-415. By its placement in Rule 404(a)(l), the amendment covers only proof of character by way of reputation or opinion.

The amendment does not permit proof of the accused's character if the accused merely uses character evidence for a purpose other than to prove the alleged victim's propensity to act in a certain way. *See United States v. Burks, 470 F.2d 432, 434-5 (D.C.Cir. 1972)* (evidence of the alleged victim's violent character, when known by the accused, was admissible "on the issue of whether or not the defendant reasonably feared he was in danger of imminent great bodily harm"). Finally, the amendment does not permit proof of the accused's character when the accused attacks the alleged victim's character as a witness under Rule 608 or 609.

The term "alleged" is inserted before each reference to "victim" in the Rule, in order to provide consistency with Evidence Rule 412.

Notes of Advisory Committee on 2006 amendments. The Rule has been amended to clarify that in a civil case evidence of a person's character is never admissible to prove that the person acted in conformity with the character trait. The amendment resolves the dispute in the case law over whether the exceptions in subdivisions (a)(1) and (2) permit the circumstantial use of character evidence in civil cases. *Compare Carson v. Polley, 689 F.2d 562, 576 (5th Cir. 1982)* ("when a central issue in a case is close to one of a criminal nature, the exceptions to the Rule 404(a) ban on character evidence may be invoked"), *with SEC v. Towers Financial Corp., 966 F.Supp. 203 (S.D.N.Y. 1997)* (relying on the terms "accused" and "prosecution" in Rule 404(a) to conclude that the exceptions in subdivisions (a)(1) and (2) are inapplicable in civil cases). The amendment is consistent with the original intent of the Rule, which was to prohibit the circumstantial use of character evidence in civil cases, even where closely related to criminal charges. *See Ginter v. Northwestern Mut. Life Ins. Co., 576 F.Supp. 627, 629-30 (D. Ky. 1984)* ("It seems beyond peradventure of doubt that the drafters of *F.R.Evi. 404(a)* explicitly intended that all character evidence, except where 'character is at issue' was to be excluded" in civil cases).

The circumstantial use of character evidence is generally discouraged because it carries serious risks of prejudice, confusion and delay. *See Michelson v. United States, 335 U.S. 469, 476 (1948)* ("The overriding policy of excluding such evidence, despite its admitted probative value, is the practical experience that its disallowance tends to prevent confusion of issues, unfair surprise and undue prejudice."). In criminal cases, the so-called "mercy rule" permits a criminal defendant to introduce evidence of pertinent character traits of the defendant and the victim. But that is because the accused, whose liberty is at stake, may need "a counterweight against the strong investigative and prosecutorial resources of the government." C. Mueller & L. Kirkpatrick, *Evidence: Practice Under the Rules,* pp. 264-5 (2d ed. 1999). See also Richard Uviller, *Evidence of Character to Prove Conduct: Illusion, Illogic, and Injustice in the Courtroom, 130 U. Pa. L. Rev. 845, 855 (1982)* (the rule prohibiting circumstantial use of character evidence "was relaxed to allow the criminal defendant with so much at stake and so little available in the way of conventional proof to have special dispensation to tell the factfinder just what sort of person he really is"). Those concerns do not apply to parties in civil cases.

The amendment also clarifies that evidence otherwise admissible under Rule 404(a)(2) may nonetheless be excluded in a criminal case involving sexual misconduct. In such a case, the admissibility of evidence of the victim's sexual behavior and predisposition is governed by the more stringent provisions of Rule 412.

Nothing in the amendment is intended to affect the scope of Rule 404(b). While Rule 404(b) refers to the "accused," the "prosecution," and a "criminal case," it does so only in the context of a notice requirement. The admissibility standards of Rule 404(b) remain fully applicable to both civil and criminal cases.

Notes of Advisory Committee on 2011 amendments. The language of Rule 404 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 405, N.D.R.Ev., Method of Proving Character

Form and style amendments to Rule 405 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 405. METHODS OF PROVING CHARACTER

~~(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.~~

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

~~(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.~~

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

EXPLANATORY NOTE

Rule 402 was amended, effective March 1, 1990; _____.

Rule 405 deals only with the method of proving character, once the admissibility of the character evidence has been determined. The three methods approved by this rule are (1) reputation, (2) opinion, and (3) specific instances of conduct.

~~Of these three, evidence of a person's general reputation has been admissible to prove character in North Dakota, but there is some case law which implies that opinion evidence is not admissible. See State v. Nierenberg, 80 N.W.2d 104 (N.D. 1956). This rule abolishes the distinction between reputation and opinion evidence. Both are considered acceptable methods of proving character. This change has been advocated by commentators for some time, and is believed to reflect a more accurate view of the relative values of opinion and reputation evidence of character. As Wigmore has stated:~~

~~"The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development, but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.' " VII Wigmore on Evidence § 1986 at 167 (3d ed. 1940).~~

~~The third method of proving character, specific instances of conduct, is perhaps the most probative or revealing of the three, but it is also the most likely to create confusion or undue prejudice in the minds of triers of fact. For this reason, it is allowed only on cross-examination under subdivision (a), or under subdivision (b) in cases in which the character of a person is an essential element of a claim, charge, or defense. This use comports with present law. See McCormick on Evidence, § 187.~~

Subdivision (b) was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 402 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~:~~ of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 22; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 405~~, Federal Rules of Evidence~~; Rule 405, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ev. 404~~, NDREv~~ (Character Evidence; Crimes or Other Acts).

Rule 405. Methods of Proving Character

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The rule deals only with allowable methods of proving character, not with the admissibility of character evidence, which is covered in Rule 404.

Of the three methods of proving character provided by the rule, evidence of specific instances of conduct is the most convincing. At the same time it possesses the greatest capacity to arouse prejudice, to confuse, to surprise, and to consume time. Consequently the rule confines the use of evidence of this kind to cases in which character is, in the strict sense, in issue and hence deserving of a searching inquiry. When character is used circumstantially and hence occupies a lesser status in the case, proof may be only by reputation and opinion. These latter methods are also available when character is in issue. This treatment is, with respect to specific instances of conduct and reputation, conventional contemporary common law doctrine. McCormick § 153.

In recognizing opinion as a means of proving character, the rule departs from usual contemporary practice in favor of that of an earlier day. See 7 Wigmore § 1986, pointing out that the earlier practice permitted opinion and arguing strongly for evidence based on personal knowledge and belief as contrasted with "the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation'." It seems likely that the persistence of reputation evidence is due to its largely being opinion in disguise. Traditionally character has been regarded primarily in moral overtones of good and bad: chaste, peaceable, truthful, honest. Nevertheless, on occasion nonmoral considerations crop up, as in the case of the incompetent driver, and this seems bound to happen increasingly. If character is defined as the kind of person one is, then account must be taken of varying ways of arriving at the estimate. These may range from the opinion of the employer who has found the man honest to the opinion of the psychiatrist based upon examination and testing. No effective dividing line exists between character and mental capacity, and the latter traditionally has been provable by opinion.

According to the great majority of cases, on cross-examination inquiry is allowable as to whether the reputation witness has heard of particular instances of conduct pertinent to the trait in question. *Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1948);* Annot., *47 A.L.R.2d 1258.* The theory is that, since the reputation witness relates what he has heard, the inquiry tends to shed light on the accuracy of his hearing and reporting. Accordingly, the opinion witness would be asked whether he knew, as well as whether he had heard. The fact is, of course, that these distinctions are of slight if any practical significance, and the second sentence of subdivision (a) eliminates them as a factor in formulating questions. This recognition of the propriety of inquiring into specific instances of conduct does not circumscribe inquiry otherwise into the bases of opinion and reputation testimony.

The express allowance of inquiry into specific instances of conduct on cross-examination in subdivision (a) and the express allowance of it as part of a case in chief when character is actually in issue in subdivision (b) contemplate that testimony of specific instances is not generally permissible on the direct examination of an ordinary opinion witness to character. Similarly as to witnesses to the character of witnesses under Rule 608(b). Opinion testimony on direct in these situations ought in general to correspond to reputation testimony as now given, i.e., be confined to the nature and extent of observation and acquaintance upon which the opinion is based. See Rule 701.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 405(a) as submitted proposed to change existing law by allowing evidence of character in the form of opinion as well as reputation testimony. Fearing, among other reasons, that wholesale allowance of opinion testimony might tend to turn a trial into a swearing contest between

conflicting character witnesses, the Committee decided to delete from this Rule, as well as from Rule 608(a) which involves a related problem, reference to opinion testimony.

Notes of Conference Committee, House Report No. 93-1597. The Senate makes two language changes in the nature of conforming amendments. The Conference adopts the Senate amendments.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 405 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 406, N.D.R.Ev., Habit; Routine Practice

Form and style amendments to Rule 406 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Both the federal amendments and the proposed North Dakota amendments omit the words "is relevant" from the rule. Instead, the proposal indicates that evidence of habit or routine practice "may be admitted" under listed circumstances.

RULE 406. HABIT~~;~~ ROUTINE PRACTICE

~~Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.~~

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

EXPLANATORY NOTE

Rule 406 was amended, effective March 1, 1990; _____.

Habit~~, which has been described by McCormick as "one's regular response to a repeated specific situation" (McCormick on Evidence, 196, p. 462 (2d ed. 1972))~~, differs from character in its degree of specificity. Character is general, a summation of traits; habit is specific, an individual response to an individual stimulus. The distinction is important, for Rule 406 allows the use of evidence of habit to show that a person acted in conformity ~~therewith~~ with it, while Rule 404 denies a similar use of character evidence.

~~The rule does away with what has been termed the "eyewitness rule," which, as a general proposition, stated that evidence of habit was admissible only if there was no direct evidence of the act in question. As in other areas of these rules, it was felt that the admission~~

~~of relevant evidence, rather than its exclusion, should be furthered. This represents a change in North Dakota practice, for the Supreme Court, in Glatt v. Feist, 156 N.W.2d 819 (N.D. 1968), adopted a modified eyewitness rule, stating that in cases in which eyewitnesses were present, evidence of habit would be allowed only if the direct evidence was in conflict. This rule admits evidence of habit regardless of the type of direct evidence present in a case.~~

~~Adoption of this rule means another departure from past North Dakota practice. In Haider v. Finken, 239 N.W.2d 508 (N.D. 1976), the North Dakota Supreme Court held that:~~

~~"Where there is no eyewitness, evidence of habit for care is inadmissible to prove the plaintiff's care and freedom from carelessness. Thus, one cannot establish a standard of care for the measurement of his own conduct on the occasion in question by showing that he has used care under similar circumstances on former occasions." Syllabus 6, 239 N.W.2d 508.~~

~~Under this rule, evidence of habit is relevant to show that a person acted in conformity therewith, regardless of whether this evidence tends to prove care or lack of care. This is not to say that evidence of habit must be admitted whenever offered. The rule states only that such evidence is relevant, it may be excluded--as may other relevant evidence--under other of these rules. See, e.g., Rule 403.~~

Rule 406 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, page 22; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 406~~, Federal Rules of Evidence~~; Rule 406, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 406. Habit; Routine Practice

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. An oft-quoted paragraph, McCormick, § 162, p. 340, describes habit in terms effectively contrasting it with character:

"Character and habit are close akin. Character is a generalized description of one's disposition, or of one's disposition in respect to a general trait, such as honesty, temperance, or peacefulness. 'Habit,' in modern usage, both lay and psychological, is more specific. It describes one's regular response to a repeated specific situation. If we speak of character for care, we think of the person's tendency to act prudently in all the varying situations of life, in business, family life, in handling automobiles and in walking across the street. A habit, on the other hand, is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic."

Equivalent behavior on the part of a group is designated "routine practice of an organization" in the rule.

Agreement is general that habit evidence is highly persuasive as proof of conduct on a particular occasion. Again quoting McCormick § 162, p. 341:

"Character may be thought of as the sum of one's habits though doubtless it is more than this. But unquestionably the uniformity of one's response to habit is far greater than the consistency with which one's conduct conforms to character or disposition. Even though character comes in only exceptionally as evidence of an act, surely any sensible man in investigating whether X did a particular act would be greatly helped in his inquiry by evidence as to whether he was in the habit of doing it."

When disagreement has appeared, its focus has been upon the question what constitutes habit, and the reason for this is readily apparent. The extent to which instances must be multiplied and consistency of behavior maintained in order to rise to the status of habit inevitably gives rise to differences of opinion. Lewan, Rationale of Habit Evidence, *16 Syracuse L.Rev. 39, 49 (1964).* While adequacy of sampling and uniformity of response are key factors, precise standards for measuring their sufficiency for evidence purposes cannot be formulated.

The rule is consistent with prevailing views. Much evidence is excluded simply because of failure to achieve the status of habit. Thus, evidence of intemperate "habits" is generally excluded when offered as proof of drunkenness in accident cases, Annot., *46 A.L.R.2d 103,* and evidence of other assaults is inadmissible to prove the instant one in a civil assault action, Annot., *66 A.L.R.2d 806.* In *Levin v. United States, 119 U.S.App.D.C. 156, 338 F.2d 265 (1964),* testimony as to the religious "habits" of the accused, offered as tending to prove that he was at home observing the Sabbath rather than out obtaining money through larceny by trick, was held properly excluded;

"It seems apparent to us that an individual's religious practices would not be the type of activities which would lend themselves to the characterization of 'invariable regularity.' [1 Wigmore 520.] Certainly the very volitional basis of the activity raises serious questions as to its invariable nature, and hence its probative value." Id. at 272.

These rulings are not inconsistent with the trend towards admitting evidence of business transactions between one of the parties and a third person as tending to prove that he made the same bargain or proposal in the litigated situation. Slough, Relevancy Unraveled, *6 Kan.L.Rev. 38-41 (1957).* Nor are they inconsistent with such cases as *Whittemore v. Lockheed Aircraft Corp., 65 Cal.App.2d 737, 151 P.2d 670 (1944),* upholding the admission of evidence that plaintiff's intestate had on four other occasions flown planes from defendant's factory for delivery to his employer airline, offered to prove that he was piloting rather than a guest on a plane which crashed and killed all on board while en route for delivery.

A considerable body of authority has required that evidence of the routine practice of an organization be corroborated as a condition precedent to its admission in evidence. Slough, Relevancy Unraveled, *5 Kan.L.Rev. 404, 449 (1957).* This

requirement is specifically rejected by the rule on the ground that it relates to the sufficiency of the evidence rather than admissibility. A similar position is taken in New Jersey Rule 49. The rule also rejects the requirement of the absence of eyewitnesses, sometimes encountered with respect to admitting habit evidence to prove freedom from contributory negligence in wrongful death cases. For comment critical of the requirements see Frank, J., in *Cereste v. New York, N.H. & H.R. Co., 231 F.2d 50 (2d Cir. 1956)*, cert. denied *351 U.S. 951, 76 S.Ct. 848, 100 L.Ed 1475, 10 Vand.L.Rev. 447 (1957)*; McCormick § 162, p. 342. The omission of the requirement from the California Evidence Code is said to have effected its elimination. Comment, Cal.Ev.Code § 1105.

Notes of Advisory Committee on 2011 amendments. The language of Rule 406 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 407, N.D.R.Ev., Subsequent Remedial Measures

Form and style amendments to Rule 407 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The explanatory note referring to the 1997 federal amendments was lightly edited in the proposal to reflect the changed language of the rule.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

~~Whenever, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove fault, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.~~

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

– negligence;

– culpable conduct;

– a defect in a product or its design; or

– a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or – if disputed – proving ownership, control, or the feasibility of precautionary measures.

EXPLANATORY NOTE

Rule 407 was amended, effective March 1, 2000; March 1, 1990; _____.

Rule 407 was amended, effective March 1, 2000, to follow the 1997 federal amendment. The amendment clarifies: ~~"Evidence~~ that evidence of measures taken by ~~the~~ a

defendant prior to ~~the~~ an "event" causing 'injury or harm' do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of ~~the~~ a product.[22] ~~Rule~~ Fed.R.Ev. 407~~, Fed.R.Evid.~~, 1997 Advisory Committee Notes. The amendment also extends the exclusionary principle of the rule to products liability actions.

Rule 407 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; September 24-25, 1998, pages 2-3; April 30-May 1, 1998, pages 14-15; April 8, 1976, pages 23, 25; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 407~~, Federal Rules of Evidence~~; Rule 407, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 407. Subsequent Remedial Measures

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

- negligence;
- culpable conduct;
- a defect in a product or its design; or
- a need for a warning or instruction.

But the court may admit this evidence for another purpose, such as impeachment or--if disputed--proving ownership, control, or the feasibility of precautionary measures.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1932; Dec. 1, 1997.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The rule incorporates conventional doctrine which excludes evidence of subsequent remedial measures as proof of an admission of fault. The rule rests on two grounds. (1) The conduct is not in fact an admission, since the conduct is equally consistent with injury by mere accident or through contributory negligence. Or, as Baron Bramwell put it, the rule rejects the notion that "because the world gets wiser as it gets older, therefore it was foolish before." *Hart v. Lancashire & Yorkshire Ry. Co., 21 L.T.R. N.S. 261, 263 (1869).* Under a liberal theory of relevancy this ground alone would not support exclusion as the inference is still a possible one. (2) The other, and more impressive, ground for exclusion rests on a social policy of encouraging people to take, or at least not discouraging them from taking, steps in furtherance of added safety. The courts have applied this principle to exclude evidence of subsequent repairs, installation of safety devices, changes in company rules, and discharge of employees, and the language of the present rules is broad enough to encompass all of them. See Falknor, Extrinsic Policies Affecting Admissibility, *10 Rutgers L.Rev. 574, 590 (1956).*

The second sentence of the rule directs attention to the limitations of the rule. Exclusion is called for only when the evidence of subsequent remedial measures is offered as proof of negligence or culpable conduct. In effect it rejects the suggested inference that fault is admitted. Other purposes are, however, allowable, including ownership or control, existence of duty, and feasibility of precautionary measures, if controverted, and impeachment. 2 Wigmore § 283; Annot., *64 A.L.R.2d 1296.* Two recent federal cases are illustrative. *Boeing Airplane Co. v. Brown, 291 F.2d 310* (9th Cir. 1961), an action against an airplane manufacturer for using an allegedly defectively designed alternator shaft which caused a plane crash, upheld the admission of evidence of subsequent design modification for the purpose of showing that design changes and safeguards were feasible. And *Powers v. J. B. Michael & Co., 329 F.2d 674 (6th Cir. 1964),* an action against a road contractor for negligent failure to put out warning signs, sustained the admission of evidence that defendant subsequently put out signs to show that the portion of the road in question was under defendant's control. The requirement that the other purpose be controverted calls for automatic exclusion unless a genuine issue be present and allows the opposing party to lay the groundwork for exclusion by making an admission. Otherwise the factors of undue prejudice, confusion of issues, misleading the jury, and waste of time remain for consideration under Rule 403.

For comparable rules, see Uniform Rule 51; *California Evidence Code § 1151*; Kansas Code of Civil Procedure § 60-451; New Jersey Evidence Rule 51.

Notes of Advisory Committee on 1997 amendments. The amendment to Rule 407 makes two changes in the rule. First, the words "an injury or harm allegedly caused by" were added to clarify that the rule applies only to changes made after the occurrence that produced the damages giving rise to the action. Evidence of measures taken by the defendant prior to the "event" causing "injury or harm" do not fall within the exclusionary scope of Rule 407 even if they occurred after the manufacture or design of the product. See *Chase v. General Motors Corp., 856 F.2d 17, 21-22 (4th Cir. 1988).*

Second, Rule 407 has been amended to provide that evidence of subsequent remedial measures may not be used to prove "a defect in a product or its design, or that a warning or instruction should have accompanied a product." This amendment adopts the view of a majority of the circuits that have interpreted Rule 407 to apply to products liability actions. See *Raymond v. Raymond Corp., 938 F.2d 1518, 1522 (1st Cir. 1991); In re Joint Eastern District and*

Southern District Asbestos Litigation v. Armstrong World Industries, Inc., 995 F.2d 343 (2d Cir. 1993); Cann v. Ford Motor Co., 658 F.2d 54, 60 (2d Cir. 1981), cert. denied, *456 U.S. 960 (1982); Kelly v. Crown Equipment Co., 970 F.2d 1273, 1275 (3d Cir. 1992); Werner v. Upjohn, Inc., 628 F.2d 848 (4th Cir. 1980),* cert. denied, *449 U.S. 1080 (1981); Grenada Steel Industries. Inc. v. Alabama Oxygen Co., Inc., 695 F.2d 883 (5th Cir. 1983); Bauman v. Volkswagenwerk Aktiengesellschaft, 621 F.2d 230, 232 (6th Cir. 1980); Flaminio v. Honda Motor Company. Ltd., 733 F.2d 463, 469 (7th Cir. 1984); Gauthier v. AMF. Inc., 788 F.2d 634, 636-37* (9th Cir. 1986).

Although this amendment adopts a uniform federal rule, it should be noted that evidence of subsequent remedial measures may be admissible pursuant to the second sentence of Rule 407. Evidence of subsequent measures that is not barred by Rule 407 may still be subject to exclusion on Rule 403 grounds when the dangers of prejudice or confusion substantially outweigh the probative value of the evidence.

Notes of Advisory Committee on 2011 amendments. The language of Rule 407 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 407 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 408, N.D.R.Ev., Compromise Offers and Negotiations

Form and style amendments to Rule 408 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

There is language in the federal rule allowing compromise negotiation statements about a "claim" to be used in criminal cases under certain circumstances. This language is highlighted and made part of the proposal for discussion purposes. The Committee decided not to add this language to the rule in 2006 when it considered prior federal amendments.

Here is an excerpt from the Committee's 2006 discussion:

> A member said that there was no reason to accept the proposed amendment relating to use of settlement evidence in criminal cases. The member said that merely carrying on a negotiation with a government representative should not open the door to using evidence from the negotiation in a criminal case.
>
> Mr. Kapsner MOVED to amend page 189, lines 12-16, by returning the material to its original form. Judge Simonson seconded.
>
> A member said that allowing the use of negotiation evidence in a criminal case would have a chilling effect on settlement negotiations with government representatives. The member said there was no reason to make an exception to the rule against

admissibility of settlement evidence in cases where the government was a party.

A member asked whether there was a reason for the exception in the federal rule. Staff explained that the federal amendment was the result of a compromise--the original federal proposal would have allowed admission of settlement negotiation evidence from any civil case in any criminal case.

A member pointed out that N.D.R.Ev.410 and N.D.R.Crim.P. 11 contain standards for the admission of evidence from plea discussions. The member said the proposed amendment reflects the actual practice of federal agencies, such as the Internal Revenue Service, that already warn people engaging in negotiations that what they say can be used in a criminal case.

A member said the motion to restore the former language was a good idea, because it also restored language on otherwise discoverable evidence. The member said this language prevents parties from presenting evidence at a mediation in order to insulate the evidence from being used at trial.

Motion to restore the previous language CARRIED unanimously.

Unique North Dakota language stating that "[t]he court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations" has been moved to the end of subdivision (b) in the proposal rather than being left in a freestanding unlabeled paragraph. The explanatory note discusses what this language is supposed to mean and, as shown above, the Committee considered it to be important to retain this language when it last discussed the rule.

RULE 408. COMPROMISE ~~AND~~ OFFERS ~~TO COMPROMISE~~ AND NEGOTIATIONS

~~(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:~~

(a) Prohibited Uses. Evidence of the following is not admissible – on behalf of any party – either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

~~(1) furnishing, offering, or promising to furnish or accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and~~

(1) furnishing, promising, or offering – or accepting, promising to accept, or offering to accept – a valuable consideration in compromising or attempting to compromise the claim; and

~~(2) conduct or statements made in compromise negotiations is likewise not admissible.~~

(2) conduct or a statement made during compromise negotiations about the claim ~~except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.~~

~~Exclusion of any evidence otherwise discoverable merely because it is presented in~~

~~the course of compromise negotiations is not required.~~

~~(b) Permitted Uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; disproving a contention of undue delay; proving an effort to obstruct a criminal investigation or prosecution.~~

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

EXPLANATORY NOTE

Rule 408 was amended, effective March 1, 2008;_____.

The policy underlying this rule is the furtherance of compromise and settlement of disputes among parties. ~~The general rule as to compromise finds support in North Dakota case law and similar~~ Similar objectives have been fostered in the North Dakota Rules of Civil Procedure and by statute. N.D.R.Civ.P. 68 provides that an unaccepted offer of judgment is inadmissible in a proceeding except to determine costs. N.D.C.C. ch. 32-39 provides that a voluntary partial payment of a claim is inadmissible for the purpose of determining either the amount of a judgment or the liability of a party.

Admissions of independent fact or other evidence of statements or conduct disclosed in the course of a compromise negotiation are likewise protected by this rule. It is thought

that open and effective discussions of compromise may be held only if the parties know in advance that they will not jeopardize their case by fully discussing all aspects of a claim. This does not mean, however, that the mere recital of evidence during a compromise negotiation precludes the admission of that evidence. The rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

Rule 408 was amended, effective March 1, 2008. Subdivision (a) was amended to prohibit the use of statements made in the course of settlement negotiations for impeachment of a witness through prior inconsistent statement or contradiction. A further amendment to subdivision (a) clarifies that a party cannot use its own statements and offers made in settlement negotiations to prove the validity, invalidity or amount of a claim.

Rule 408 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; September 28-29, 2006, pages 14-16; April 8, 1976, page 23; October 1, 1975, page 3. Fed.R.Ev. 408; Rule 408, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 11-26-07.

Considered: N.D.C.C. § 33-08-13.

Cross Reference: N.D.R.Civ.P. 12 (Defenses and Objections-When and How Presented-By Pleading or Motion-Motion for Judgment on the Pleadings); N.D.R.Civ.P. 68 (Offer of Settlement or Confession of Judgment. Tender).

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 408. Compromise Offers and Negotiations

(a) Prohibited Uses. Evidence of the following is not admissible--on behalf of any party--either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

(1) furnishing, promising, or offering--or accepting, promising to accept, or offering to accept--a valuable consideration in compromising or attempting to compromise the claim; and

(2) conduct or a statement made during compromise negotiations about the claim--except when offered in a criminal case and when the negotiations related to a claim by a public office in the exercise of its regulatory, investigative, or enforcement authority.

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1933; Dec. 1, 2006.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. As a matter of general agreement, evidence of an offer to compromise a claim is not receivable in evidence as an admission of, as the case may be, the validity or invalidity of the claim. As with evidence of subsequent remedial measures, dealt with in Rule 407, exclusion may be based on two grounds. (1) The evidence is irrelevant, since the offer may be motivated by a desire for peace rather than from any concession of weakness of position. The validity of this position will vary as the amount of the offer varies in relation to the size of the claim and may also be influenced by other circumstances. (2) a more consistently impressive ground is promotion of the public policy favoring the compromise and settlement of disputes. McCormick §§ 76, 251. While the rule is ordinarily phrased in terms of offers of compromise, it is apparent that a similar attitude must be taken with respect to completed compromises when offered against a party thereto. This latter situation will not, of course, ordinarily occur except when a party to the present litigation has compromised with a third person.

The same policy underlies the provision of *Rule 68 of the Federal Rules of Civil Procedure* that evidence of an unaccepted offer of judgment is not admissible except in a proceeding to determine costs.

The practical value of the common law rule has been greatly diminished by its inapplicability to admissions of fact, even though made in the course of compromise negotiations, unless hypothetical, stated to be "without prejudice," or so connected with the offer as to be inseparable from it. McCormick § 251, pp. 540-541. An inevitable effect is to inhibit freedom of communication with respect to compromise, even among lawyers. Another effect is the generation of controversy over whether a given statement falls within or without the protected area. These considerations account for the expansion of the rule herewith to include evidence of conduct or statements made in compromise negotiations, as well as the offer or completed compromise itself. For similar provisions see *California Evidence Code §§ 1152, 1154.*

The policy considerations which underlie the rule do not come into play when the effort is to induce a creditor to settle an admittedly due amount for a lessor sum. McCormick § 251, p. 540. Hence the rule requires that the claim be disputed as to either validity or amount.

The final sentence of the rule serves to point out some limitations upon its applicability. Since the rule excludes only when the purpose is proving the validity or invalidity of the claim or its amount, an offer for another purpose is not within the rule. The illustrative situations mentioned in the rule are supported by the authorities. As to proving bias or prejudice of a witness, see Annot., 161 A.L.R. 395, contra, *Fenberg v. Rosenthal, 348 Ill. App. 510, 109 N.E.2d 402 (1952),* and negativing a contention of lack of due diligence in presenting a claim, 4 Wigmore § 1061. An effort to "buy off" the prosecution or a prosecuting witness in a criminal case is not within the policy of the rule of exclusion. McCormick § 251, p. 542.

For other rules of similar import, see Uniform Rules 52 and 53; *California Evidence Code § 1152, 1154*; Kansas Code of Civil Procedure §§ 60-452, 60-453; New Jersey Evidence Rules 52 and 53.

Notes of Committee on the Judiciary, House Report No. 93-650. Under existing federal law evidence of conduct and statements made in compromise negotiations is admissible in subsequent litigation between the parties. The second sentence of Rule 408 as submitted by the Supreme Court proposed to reverse that doctrine in the interest of further

promoting non-judicial settlement of disputes. Some agencies of government expressed the view that the Court formulation was likely to impede rather than assist efforts to achieve settlement of disputes. For one thing, it is not always easy to tell when compromise negotiations begin, and informal dealings end. Also, parties dealing with government agencies would be reluctant to furnish factual information at preliminary meetings; they would wait until "compromise negotiations" began and thus hopefully effect an immunity for themselves with respect to the evidence supplied. In light of these considerations, the Committee recast the Rule so that admissions of liability or opinions given during compromise negotiations continue inadmissible, but evidence of unqualified factual assertions is admissible. The latter aspect of the Rule is drafted, however, so as to preserve other possible objections to the introduction of such evidence. The Committee intends no modification of current law whereby a party may protect himself from future use of his statements by couching them in hypothetical conditional form.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. This rule as reported makes evidence of settlement or attempted settlement of a disputed claim inadmissible when offered as an admission of liability or the amount of liability. The purpose of this rule is to encourage settlements which would be discouraged if such evidence were admissible.

Under present law, in most jurisdictions, statements of fact made during settlement negotiations, however, are excepted from this ban and are admissible. The only escape from admissibility of statements of fact made in a settlement negotiation as if the declarant or his representative expressly states that the statement is hypothetical in nature or is made without prejudice. Rule 408 as submitted by the Court reversed the traditional rule. It would have brought statements of fact within the ban and made them, as well as an offer of settlement, inadmissible.

The House amended the rule and would continue to make evidence of facts disclosed during compromise negotiations admissible. It thus reverted to the traditional rule. The House committee report states that the committee intends to preserve current law under which a party may protect himself by couching his statements in hypothetical form [See House Report No. 93-650 above]. The real impact of this amendment, however, is to deprive the rule of much of its salutary effect. The exception for factual admissions was believed by the Advisory Committee to hamper free communication between parties and thus to constitute an unjustifiable restraint upon efforts to negotiate settlements--the encouragement of which is the purpose of the rule. Further, by protecting hypothetically phrased statements, it constituted a preference for the sophisticated, and a trap for the unwary.

Three States which had adopted rules of evidence patterned after the proposed rules prescribed by the Supreme Court opted for versions of rule 408 identical with the Supreme Court draft with respect to the inadmissibility of conduct or statements made in compromise negotiations. [*Nev. Rev. Stats. § 48.105*; N. Mex. Stats. Anno. (1973 Supp.) § 20-4-408; West's Wis. Stats. Anno. (1973 Supp.) § 904.08].

For these reasons, the committee has deleted the House amendment and restored the rule to the version submitted by the Supreme Court with one additional amendment. This amendment adds a sentence to insure that evidence, such as documents, is not rendered inadmissible merely because it is presented in the course of compromise negotiations if the evidence is otherwise discoverable. A party should not be able to immunize from admissibility documents otherwise discoverable merely by offering them in a compromise negotiation.

Notes of Conference Committee, House Report No. 93-1597. The House bill provides that evidence of admissions of liability or opinions given during compromise negotiations is not admissible, but that evidence of facts disclosed during compromise negotiations is not inadmissible by virtue of having been first disclosed in the compromise negotiations. The Senate amendment provides that evidence of conduct or statements made in compromise negotiations is not admissible. The Senate amendment also provides that the rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

The House bill was drafted to meet the objection of executive agencies that under the rule as proposed by the Supreme Court, a party could present a fact during compromise negotiations and thereby prevent an opposing party from offering evidence of that fact at trial even though such evidence was obtained from independent sources. The Senate amendment expressly precludes this result.

The Conference adopts the Senate amendment.

Notes of Advisory Committee on 2006 amendments. Rule 408 has been amended to settle some questions in the courts about the scope of the Rule, and to make it easier to read. First, the amendment provides that Rule 408 does not prohibit the introduction in a criminal case of statements or conduct during compromise negotiations regarding a civil dispute by a government regulatory, investigative, or enforcement agency. *See, e.g., United States v. Prewitt, 34 F.3d 436, 439 (7th Cir. 1994)* (admissions of fault made in compromise of a civil securities enforcement action were admissible against the accused in a subsequent criminal action for mail fraud). Where an individual makes a statement in the presence of government agents, its subsequent admission in a criminal case should not be unexpected. The

individual can seek to protect against subsequent disclosure through negotiation and agreement with the civil regulator or an attorney for the government.

Statements made in compromise negotiations of a claim by a government agency may be excluded in criminal cases where the circumstances so warrant under Rule 403. For example, if an individual was unrepresented at the time the statement was made in a civil enforcement proceeding, its probative value in a subsequent criminal case may be minimal. But there is no absolute exclusion imposed by Rule 408.

In contrast, statements made during compromise negotiations of other disputed claims are not admissible in subsequent criminal litigation, when offered to prove liability for, invalidity of, or amount of those claims. When private parties enter into compromise negotiations they cannot protect against the subsequent use of statements in criminal cases by way of private ordering. The inability to guarantee protection against subsequent use could lead to parties refusing to admit fault, even if by doing so they could favorably settle the private matter. Such a chill on settlement negotiations would be contrary to the policy of Rule 408.

The amendment distinguishes statements and conduct (such as a direct admission of fault) made in compromise negotiations of a civil claim by a government agency from an offer or acceptance of a compromise of such a claim. An offer or acceptance of a compromise of any civil claim is excluded under the Rule if offered against the defendant as an admission of fault. In that case, the predicate for the evidence would be that the defendant, by compromising with the government agency, has admitted the validity and amount of the civil claim, and that this admission has sufficient probative value to be considered as evidence of guilt. But unlike a direct statement of fault, an offer or acceptance of a compromise is not very probative of the defendant's guilt. Moreover, admitting such an offer or acceptance could deter a defendant from settling a civil regulatory action, for fear of evidentiary use in a subsequent criminal action. *See, e.g.,* Fishman, *Jones on Evidence, Civil and Criminal,* § 22:16 at 199, n. 83 (7th ed. 2000) ("A target of a potential criminal investigation may be unwilling to settle civil claims against him if by doing so he increases the risk of prosecution and conviction.").

The amendment retains the language of the original rule that bars compromise evidence only when offered as evidence of the "validity," "invalidity," or "amount" of the disputed claim. The intent is to retain the extensive case law finding Rule 408 inapplicable when compromise evidence is offered for a purpose other than to prove the validity, invalidity, or amount of a disputed claim. *See, e.g., Athey v. Farmers Ins. Exchange, 234 F.3d 357 (8th Cir. 2000)* (evidence of settlement offer by insurer was properly admitted to prove insurer's bad faith); *Coakley & Williams v. Structural Concrete Equip., 973 F.2d 349 (4th Cir. 1992)* (evidence of settlement is not precluded by Rule 408 where offered to prove a party's intent with respect to the scope of a release); *Cates v. Morgan Portable Bldg. Corp., 708 F.2d 683 (7th Cir. 1985)* (Rule 408 does not bar evidence of a settlement when offered to prove a breach of the settlement agreement, as the purpose of the evidence is to prove the fact of settlement as opposed to the validity or amount of the underlying claim); *Uforma/Shelby Bus. Forms, Inc. v. NLRB, 111 F.3d 1284 (6th Cir. 1997)* (threats made in settlement negotiations were admissible; Rule 408 is inapplicable when the claim is based upon a wrong that is committed during the course of settlement negotiations). So for example, Rule 408 is inapplicable if offered to show that a party made fraudulent statements in order to settle a litigation.

The amendment does not affect the case law providing that Rule 408 is inapplicable when evidence of the compromise is offered to prove notice. *See, e.g., United States v. Austin, 54 F.3d 394 (7th Cir. 1995)* (no error to admit evidence of the defendant's settlement with the FTC, because it was offered to prove that the defendant was on notice that subsequent similar conduct was wrongful); *Spell v. McDaniel, 824 F.2d 1380 (4th Cir. 1987)* (in a civil rights action alleging that an officer used excessive force, a prior settlement by the City of another brutality claim was properly admitted to prove that the City was on notice of aggressive behavior by police officers).

The amendment prohibits the use of statements made in settlement negotiations when offered to impeach by prior inconsistent statement or through contradiction. Such broad impeachment would tend to swallow the exclusionary rule and would impair the public policy of promoting settlements. *See McCormick on Evidence* at 186 (5th ed. 1999) ("Use of statements made in compromise negotiations to impeach the testimony of a party, which is not specifically treated in Rule 408, is fraught with danger of misuse of the statements to prove liability, threatens frank interchange of information during negotiations, and generally should not be permitted."). *See also EEOC v. Gear Petroleum, Inc., 948 F.2d 1542 (10th Cir. 1991)* (letter sent as part of settlement negotiation cannot be used to impeach defense witnesses by way of contradiction or prior inconsistent statement; such broad impeachment would undermine the policy of encouraging uninhibited settlement negotiations).

The amendment makes clear that Rule 408 excludes compromise evidence even when a party seeks to admit its own settlement offer or statements made in settlement negotiations. If a party were to reveal its own statement or offer, this could itself reveal the fact that the adversary entered into settlement negotiations. The protections of Rule 408 cannot be waived unilaterally because the Rule, by definition, protects both parties from having the fact of negotiation disclosed to

the jury. Moreover, proof of statements and offers made in settlement would often have to be made through the testimony of attorneys, leading to the risks and costs of disqualification. *See generally Pierce v. F.R. Tripler & Co., 955 F.2d 820, 828 (2d Cir. 1992)* (settlement offers are excluded under Rule 408 even if it is the offeror who seeks to admit them; noting that the "widespread admissibility of the substance of settlement offers could bring with it a rash of motions for disqualification of a party's chosen counsel who would likely become a witness at trial").

The sentence of the Rule referring to evidence "otherwise discoverable" has been deleted as superfluous. *See, e.g.,* Advisory Committee Note to Maine Rule of Evidence 408 (refusing to include the sentence in the Maine version of Rule 408 and noting that the sentence "seems to state what the law would be if it were omitted"); Advisory Committee Note to Wyoming Rule of Evidence 408 (refusing to include the sentence in Wyoming Rule 408 on the ground that it was "superfluous"). The intent of the sentence was to prevent a party from trying to immunize admissible information, such as a pre-existing document, through the pretense of disclosing it during compromise negotiations. *See Ramada Development Co. v. Rauch, 644 F.2d 1097 (5th Cir. 1981).* But even without the sentence, the Rule cannot be read to protect pre-existing information simply because it was presented to the adversary in compromise negotiations.

Notes of Advisory Committee on 2011 amendments. The language of Rule 408 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 408 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

The Committee deleted the reference to "liability" on the ground that the deletion makes the Rule flow better and easier to read, and because "liability" is covered by the broader term "validity." Courts have not made substantive decisions on the basis of any distinction between validity and liability. No change in current practice or in the coverage of the Rule is intended.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 409, N.D.R.Ev., Offers to Pay Medical and Similar Expenses

Form and style amendments to Rule 409 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 409. ~~PAYMENT OF~~ OFFERS TO PAY MEDICAL AND SIMILAR EXPENSES

~~Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove civil or criminal liability for the injury.~~

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

EXPLANATORY NOTE

Rule 409 was amended, effective _____.

The general underpinnings of this rule are the same as those dealt with in Rules 407 and 408. A salutary action, the furnishing of medical or similar expenses is not to be discouraged by attaching to it the liability that would ensue were the fact to be admitted into evidence.

Unlike Rule 408, which protects statements made during compromise even if unrelated to the offer, Rule 409 protects only the act of furnishing or offering or promising to pay medical expenses. Statements made apart from the actual offer are not covered by the rule. There is no need to protect all discussion because discussion is not a necessary part of furnishing medical expenses.

It is likely that admissions will at times be so intertwined with an offer to furnish medical expenses that the two cannot be severed. Whenever this occurs, a choice must be made between admitting the evidence, totally, or excluding it. Balance must be made of the

social policy behind this rule and the need for such evidence.

Note should be made of N.D.C.C. § 32-39-01, which prohibits the use, as evidence of liability, of a voluntary partial payment of a claim. The statute is somewhat broader than this rule as it is not limited to the payment of medical or similar expenses, but applies to payment of any part of a claim.

Rule 409 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, pages 24, 25; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 409~~, Federal Rules of Evidence~~; Rule 409, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 32-39-01, 32-39-02, 32-39-03.

Cross Reference: N.D.R.Ev. 407 (Subsequent Remedial Measures); N.D.R.Ev. 408 (Compromise Offers and Negotiations).

Rule 409. Offers to Pay Medical and Similar Expenses

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1933.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The considerations underlying this rule parallel those underlying Rules 407 and 408, which deal respectively with subsequent remedial measures and offers of compromise. As stated in Annot., *20 A.L.R.2d 291, 293:*

"[G]enerally, evidence of payment of medical, hospital, or similar expenses of an injured party by the opposing party, is not admissible, the reason often given being that such payment or offer is usually made from humane impulses and not from an admission of liability, and that to hold otherwise would tend to discourage assistance to the injured person."

Contrary to Rule 408, dealing with offers of compromise, the present rule does not extend to conduct or statements not a part of the act of furnishing or offering or promising to pay. This difference in treatment arises from fundamental differences in nature. Communication is essential if compromises are to be effected, and consequently broad protection of statements is needed. This is not so in cases of payments or offers or promises to pay medical expenses, where factual statements may be expected to be incidental in nature.

For rules on the same subject, but phrased in terms of "humanitarian motives," see Uniform Rule 52; *California Evidence Code § 1152*; Kansas Code of Civil Procedure § 60-452; New Jersey Evidence Rule 52.

Notes of Advisory Committee on 2011 amendments. The language of Rule 409 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 410, N.D.R.Ev., Pleas, Plea Discussions, and Related Statements

Form and style amendments to Rule 410 consistent with the 2011 federal amendments are proposed. The amendments are not necessarily intended to change any result in any ruling on evidence admissibility.

Under the existing rule, use of statements from plea discussions is allowed for impeachment purposes. This language was based on the original federal rule proposal, which never took effect because Congress amended it in 1975. Under Congress's amendments, use of plea discussion for impeachment is prohibited. Instead, plea discussions can be admitted when fairness requires, such as when the defendant has introduced a statement from a plea discussion and the opposing party wants to rebut it with another statement from the plea discussion.

The federal language is included in the proposal for discussion purposes. If the Committee wants to retain the existing North Dakota approach, paragraph (b)(1) can be amended to read: "for impeachment purposes."

RULE 410. ~~OFFER TO PLEAD GUILTY; NOLO CONTENDERE; WITHDRAWN PLEA OF GUILTY~~ PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

~~Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with and relevant to any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.~~

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Fed.R.Crim.P. 11, N.D.R.Crim.P. 11, or comparable procedure in another state; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

~~This rule does not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement, but only if in any case the statement was made under oath, on the record, and in~~

~~the presence of counsel.~~

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):

(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or

(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

EXPLANATORY NOTE

Rule 410 was amended, effective _____.

Rule 410 governs the admissibility of withdrawn guilty pleas, pleas of nolo contendere, or offers to plead against the person making the plea or offer. The rule prohibits admission of the pleas and offers themselves, and of statements made in connection with and relevant to the withdrawn pleas or offers. ~~The emphasized language was added by the committee to insure that only~~ Only discussion necessary to negotiation is protected.

~~The~~ Rule 410 does not prohibit the use of plea-related statements when offered for impeachment purposes or in a subsequent prosecution against the defendant for perjury or false statement if the statement was made under oath, on the record, and in the presence of counsel.

~~It should be noted that the latest amendment to Rule 410, P.L. 94-149(9), 89 Stat. 805 (1975), does not allow use of plea-related evidence for impeachment purposes, and allows such evidence to be admitted in a subsequent prosecution for perjury or false statement only~~

~~if the statement was made under oath, on the record, and in the presence of counsel.~~

Rule 410 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~:~~ of _____ ; June 4, 1976, page 37; April 8, 1976, page 24; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 410~~, Federal Rules of Evidence~~; Rule 410, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 29-21-38, 33-12-24.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 410. Pleas, Plea Discussions, and Related Statements

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:
(1) a guilty plea that was later withdrawn;
(2) a nolo contendere plea;
(3) a statement made during a proceeding on either of those pleas under *Federal Rule of Criminal Procedure 11* or a comparable state procedure; or
(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. The court may admit a statement described in Rule 410(a)(3) or (4):
(1) in any proceeding in which another statement made during the same plea or plea discussions has been introduced, if in fairness the statements ought to be considered together; or
(2) in a criminal proceeding for perjury or false statement, if the defendant made the statement under oath, on the record, and with counsel present.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1933; Dec. 12, 1975, P.L. 94-149, § 1(9), 89 Stat. 805; Dec. 1, 1980.)
(As amended Dec. 1, 2011.)

Amendments:

1975. Act Dec. 12, 1975 substituted this rule for one which read:
"Rule 410. Offer To Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty
"Except as otherwise provided by Act of Congress, evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer. This rule shall not apply to the introduction of voluntary and reliable statements made in court on the record in connection with any of the foregoing pleas or offers where offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement.
"This rule shall not take effect until August 1, 1975, and shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule, and which takes effect after the date of the enactment of the Act establishing these Federal Rules of Evidence.".

Notes of Advisory Committee on Rules. Withdrawn pleas of guilty were held inadmissible in federal prosecutions in *Kercheval v. United States, 274 U.S. 220, 47 S.Ct. 582, 71 L.Ed. 1009 (1927).* The Court pointed out that to admit the withdrawn plea would effectively set at naught the allowance of withdrawal and place the accused in a dilemma utterly inconsistent with the decision to award him a trial. The New York Court of Appeals, in *People v. Spitaleri, 9 N.Y.2d 168, 212 N.Y.S.2d 53, 173 N.E.2d 35 (1961),* reexamined and overturned its earlier decisions which had allowed admission. In addition to the reasons set forth in Kercheval, which was quoted at length, the court pointed out that the effect of admitting the plea was to compel defendant to take the stand by way of explanation and to open the way for the prosecution to call the lawyer who had represented him at the time of entering the plea. State court decisions for and against admissibility are collected in Annot., *86 A.L.R.2d 326.*

Pleas of nolo contendere are recognized by Rule 11 of the Rules of Criminal Procedure, although the law of numerous States is to the contrary. The present rule gives effect to the principal traditional characteristic of the nolo plea, i.e., avoiding the admission of guilt which is inherent in pleas of guilty. This position is consistent with the construction of Section 5 of the Clayton Act, *15 U.S.C. § 16(a),* recognizing the inconclusive and compromise nature of judgments based on nolo pleas. *General Electric Co. v. City of San Antonio, 334 F.2d 480 (5th Cir. 1964); Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 323 F.2d 412 (7th Cir. 1963),* cert. denied *376 U.S. 939, 84 S.Ct. 794, 11 L.Ed.2d 659;*

Armco Steel Corp. v. North Dakota, 376 F.2d 206 (8th Cir. 1967); City of Burbank v. General Electric Co., 329 F.2d 825 (9th Cir. 1964). See also state court decisions in Annot., *18 A.L.R.2d 1287, 1314.*

Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise. As pointed out in McCormick § 251, p. 543.

"Effective criminal law administration in many localities would hardly be possible if a large proportion of the charges were not disposed of by such compromises."

See also *People v. Hamilton, 60 Cal.2d 105, 32 Cal.Rptr. 4, 383 P.2d 412 (1963),* discussing legislation designed to achieve this result. As with compromise offers generally, Rule 408, free communication is needed, and security against having an offer of compromise or related statement admitted in evidence effectively encourages it.

Limiting the exclusionary rule to use against the accused is consistent with the purpose of the rule, since the possibility of use for or against other persons will not impair the effectiveness of withdrawing pleas or the freedom of discussion which the rule is designed to foster. See A.B.A. Standards Relating to Pleas of Guilty § 2.2 (1968). See also the narrower provisions of New Jersey Evidence Rule 52(2) and the unlimited exclusion provided in *California Evidence Code § 1153.*

Notes of Committee on the Judiciary, House Report No. 93-650. The Committee added the phrase "Except as otherwise provided by Act of Congress" to Rule 410 as submitted by the Court in order to preserve particular congressional policy judgments as to the effect of a plea of guilty or of nolo contendere. See *15 U.S.C. 16(a).* The Committee intends that its amendment refers to both present statutes and statutes subsequently enacted.

Notes of the Committee on the Judiciary, Senate Report No. 93-1277. As adopted by the House, rule 410 would make inadmissible pleas of guilty or nolo contendere subsequently withdrawn as well as offers to make such pleas. Such a rule is clearly justified as a means of encouraging pleading. However, the House rule would then go on to render inadmissible for any purpose statements made in connection with these pleas or offers as well.

The committee finds this aspect of the House rule unjustified. Of course, in certain circumstances such statements should be excluded. If, for example, a plea is vitiated because of coercion, statements made in connection with the plea may also have been coerced and should be inadmissible on that basis. In other cases, however, voluntary statements of an accused made in court on the record, in connection with a plea, and determined by a court to be reliable should be admissible even though the plea is subsequently withdrawn. This is particularly true in those cases where, if the House rule were in effect, a defendant would be able to contradict his previous statements and thereby lie with impunity [See *Harris v. New York, 401 U.S. 222 (1971)].* To prevent such an injustice, the rule has been modified to permit the use of such statements for the limited purposes of impeachment and in subsequent perjury or false statement prosecutions.

Notes of Conference Committee, House Report No. 93-1597. The House bill provides that evidence of a guilty or nolo contendere plea, of an offer of either plea, or of statements made in connection with such pleas or offers of such pleas, is inadmissible in any civil or criminal action, case or proceeding against the person making such plea or offer. The Senate amendment makes the rule inapplicable to a voluntary and reliable statement made in court on the record where the statement is offered in a subsequent prosecution of the declarant for perjury or false statement.

The issues raised by Rule 410 are also raised by proposed *Rule 11(e)(6) of the Federal Rules of Criminal Procedure* presently pending before Congress. This proposed rule, which deals with the admissibility of pleas of guilty or nolo contendere, offers to make such pleas, and statements made in connection with such pleas, was promulgated by the Supreme Court on April 22, 1974, and in the absence of congressional action will become effective on August 1, 1975. The conferees intend to make no change in the presently-existing case law until that date, leaving the courts free to develop rules in this area on a case-by-case basis.

The Conferees further determined that the issues presented by the use of guilty and nolo contendere pleas, offers of such pleas, and statements made in connection with such pleas or offers, can be explored in greater detail during Congressional consideration of *Rule 11(e)(6) of the Federal Rules of Criminal Procedure.* The Conferees believe, therefore, that it is best to defer its effective date until August 1, 1975. The Conferees intend that Rule 410 would be superseded by any subsequent Federal Rule of Criminal Procedure or Act of Congress with which it is inconsistent, if the Federal Rule of Criminal Procedure or Act of Congress takes effect or becomes law after the date of the enactment of the act establishing the rules of evidence.

The conference adopts the Senate amendment with an amendment that expresses the above intentions.

Notes of Advisory Committee on 1979 amendment. Present rule 410 conforms to *rule 11(e)(6) of the Federal Rules of Criminal Procedure.* A proposed amendment to rule 11(e)(6) would clarify the circumstances in which pleas, plea discussions and related statements are inadmissible in evidence; see Advisory Committee Note thereto. The amendment proposed above would make comparable changes in rule 410.

Effective date of 1979 Amendment. Act July 31, 1979, P.L. 96-42, 93 Stat. 326 provided that the effective date of the amendment transmitted to Congress on April 30, 1979, be extended from Aug. 1, 1979 to Dec. 1, 1980.

Notes of Advisory Committee on 2011 amendments. The language of Rule 410 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 411, N.D.R.Ev., Liability Insurance

Form and style amendments to Rule 411 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 411. LIABILITY INSURANCE

~~Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability if offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.~~

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

EXPLANATORY NOTE

Rule 411 was amended, effective March 1, 1990; _____.

~~This general prohibition against disclosure of the fact that a person is or is not insured against liability is a fair statement of present North Dakota law. See, Bischoff v. Koenig, 100 N.W.2d 159 (N.D. 1959); Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918). But, see, James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950), wherein a direct action by a third party against an insurance company was allowed on the grounds that municipal ordinance requiring insurance for the benefit of a public carrier passenger made insurer directly liable. See also, the discussion in Shermoen v. Lindsay, 163 N.W.2d 738 (N.D. 1968).~~

The reason for the rule is that the existence or nonexistence of liability insurance is of low probative value as to the issue of negligence, and may be prejudicial. ~~But see the~~

~~criticism of this rule and the policy underlying it in McCormick on Evidence § 201 (2d ed. 1972).~~

The second sentence of the rule merely states that evidence of insurance need not be excluded if offered for another purpose to which it may be relevant.

Rule 411 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 411 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 411; ~~Federal Rules of Evidence~~; Rule 411, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 39-16-03, 39-16-11, 49-18-33.

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 411. Liability Insurance

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1933; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The courts have with substantial unanimity rejected evidence of liability insurance for the purpose of proving fault, and absence of liability insurance as proof of lack of fault. At best the inference of fault from the fact of insurance coverage is a tenuous one, as is its converse. More important, no doubt, has been the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds. McCormick § 168; Annot., *4 A.L.R.2d 761.* The rule is drafted in broad terms so as to include contributory negligence or other fault of a plaintiff as well as fault of a defendant.

The second sentence points out the limits of the rule, using well established illustrations. Id.

For similar rules see Uniform Rule 54; *California Evidence Code § 1155*; Kansas Code of Civil Procedure § 60-454; New Jersey Evidence Rule 54.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 411 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

Rule 411 previously provided that evidence was not excluded if offered for a purpose not explicitly prohibited by the Rule. To improve the language of the Rule, it now provides that the court may admit evidence if offered for a permissible purpose. There is no intent to change the process for admitting evidence covered by the Rule. It remains the case that if offered for an impermissible purpose, it must be excluded, and if offered for a purpose not barred by the Rule, its admissibility remains governed by the general principles of Rules 402, 403, 801, etc.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 4, 2012

RE: Rule 412, N.D.R.Ev., Sex Offense Cases: The Victim's Sexual Behavior or Predisposition

Form and style amendments to Rule 412 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

One language change is that repeated use of the term "alleged victim" is the rule is eliminated by defining the term "victim" to include "alleged victim."

The federal rule has always applied to both civil and criminal proceedings. This happened because Congress amended the Supreme Court's original proposal, which would have made the rule applicable only to criminal proceedings. The Committee made a deliberate choice to have North Dakota's existing rule apply only to criminal proceedings, but the federal language on civil proceedings has been included in the current proposal for the Committee to discuss.

For what it's worth, the Committee adopted its internal rule requiring a two thirds majority to approve a new or amended rule on first reading as a result of its original discussion of Rule 412. In the end the Committee approved the "criminal only" version of Rule 412 on second reading by an 8-5 vote Excerpts from the Committee's minutes, which discuss the pluses and minuses of the different approaches, are attached.

No discussion or explanatory material was included in the explanatory note, which

may be understandable considering the differences of opinion on the rule when it was approved. The Committee may wish to discuss whether the explanatory note needs to be supplemented in any way.

RULE 412. ~~ADMISSIBILITY OF ALLEGED VICTIM'S SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION IN CRIMINAL PROCEEDING~~ SEX-OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

~~(a) Evidence generally inadmissible. The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):~~

~~(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and~~

~~(2) evidence offered to prove any alleged victim's sexual predisposition.~~

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

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. ~~In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:~~

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

~~(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;~~

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove

that someone other than the defendant was the source of semen, injury, or other physical evidence;

~~(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and~~

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

~~(3) evidence the exclusion of which would violate the constitutional rights of the defendant.~~

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

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

(c) Procedure to Determine Admissibility.

~~(1) A party intending to offer evidence under subdivision (b) must:~~

~~(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and~~

~~(B) serve the motion on all parties and notify the alleged victim or, when appropriate,~~

~~the alleged victim's guardian or representative.~~

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

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

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

(C) serve the motion on all parties; and

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

~~(2) Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.~~

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

EXPLANATORY NOTE

Rule 412 was adopted, effective March 1, 1998. Rule 412 was amended, effective _____.

Rule 412 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule

were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; September 26-27, 1996, pages 2-5; April 25, 1996, pages 12-15. ~~Rule~~ Fed.R.Ev. 412~~, Federal Rules of Evidence~~.

Statutes Affected:

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

FEDERAL RULES OF EVIDENCE
ARTICLE IV. RELEVANCE AND ITS LIMITS

Rule 412. Sex-Offense Cases: The Victim's Sexual Behavior or Predisposition

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:
(1) evidence offered to prove that a victim engaged in other sexual behavior; or
(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions.
(1) *Criminal Cases.* The court may admit the following evidence in a criminal case:
(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical evidence;
(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and
(C) evidence whose exclusion would violate the defendant's constitutional rights.
(2) *Civil Cases.* In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.
(1) *Motion.* If a party intends to offer evidence under Rule 412(b), the party must:
(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;
(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;
(C) serve the motion on all parties; and
(D) notify the victim or, when appropriate, the victim's guardian or representative.
(2) *Hearing.* Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

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

HISTORY:
(Oct. 28, 1978, P.L. 95-540, § 2(a), 92 Stat. 2046; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7046(a), 102 Stat. 4400; Dec. 1, 1994; Sept. 13, 1994, P.L. 103-322, Title IV, Subtitle A, Ch 4, § 40141(b), 109 Stat. 1919.)
(As amended Dec. 1, 2011.)

Amendments:

1988. Act Nov. 18, 1988, in the rule heading, substituted "Sex Offense" for "Rape"; in subsec. (a), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape" and "offense" for "rape or assault"; in subsec. (b), in the introductory matter, substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape" and, in para. (2)(B), substituted "such offense" for "rape or assault"; and, in subsecs. (c)(1) and (d), substituted "an offense under chapter 109A of title 18, United States Code" for "rape or assault with intent to commit rape".

1994. Act Sept. 13, 1994 (effective 12/1/94, as provided by § 40141(a) of such Act) substituted the heading and text for the following:
"Sex Offense Cases; Relevance of Victim's Past Behavior
"(a) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, reputation or opinion evidence of the past sexual behavior of an alleged victim of such offense is not admissible.

"(b) Notwithstanding any other provision of law, in a criminal case in which a person is accused of an offense under chapter 109A of title 18, United States Code, evidence of a victim's past sexual behavior other than reputation or opinion evidence is also not admissible, unless such evidence other than reputation or opinion evidence is--

"(1) admitted in accordance with subdivisions (c)(1) and (c)(2) and is constitutionally required to be admitted; or

"(2) admitted in accordance with subdivision (c) and is evidence of--

"(A) past sexual behavior with persons other than the accused, offered by the accused upon the issue of whether the accused was or was not, with respect to the alleged victim, the source of semen or injury; or

"(B) past sexual behavior with the accused and is offered by the accused upon the issue of whether the alleged victim consented to the sexual behavior with respect to which such offense is alleged.

"(c)

(1) If the person accused of committing an offense under chapter 109A of title 18, United States Code intends to offer under subdivision (b) evidence of specific instances of the alleged victim's past sexual behavior, the accused shall make a written motion to offer such evidence not later than fifteen days before the date on which the trial in which such evidence is to be offered is scheduled to begin, except that the court may allow the motion to be made at a later date, including during trial, if the court determines either that the evidence is newly discovered and could not have been obtained earlier through the exercise of due diligence or that the issue to which such evidence relates has newly arisen in the case. Any motion made under this paragraph shall be served on all other parties and on the alleged victim.

"(2) The motion described in paragraph (1) shall be accompanied by a written offer of proof. If the court determines that the offer of proof contains evidence described in subdivision (b), the court shall order a hearing in chambers to determine if such evidence is admissible. At such hearing the parties may call witnesses, including the alleged victim, and offer relevant evidence. Notwithstanding subdivision (b) of rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue.

"(3) If the court determines on the basis of the hearing described in paragraph (2) that the evidence which the accused seeks to offer is relevant and that the probative value of such evidence outweighs the danger of unfair prejudice, such evidence shall be admissible in the trial to the extent an order made by the court specifies evidence which may be offered and areas with respect to which the alleged victim may be examined or cross-examined.

"(d) For purposes of this rule, the term 'past sexual behavior' means sexual behavior other than the sexual behavior with respect to which an offense under chapter 109A of title 18, United States Code is alleged.".

Applicability of Rule. Act Oct. 28, 1978, P.L. 95-540, § 3, 92 Stat. 2047, provided that this Rule shall apply to trials which begin more than thirty days after the date of the enactment of such Act.

Notes of Advisory Committee on proposed 1994 amendment. Rule 412 has been revised to diminish some of the confusion engendered by the original rule and to expand the protection afforded alleged victims of sexual misconduct. Rule 412 applies to both civil and criminal proceedings. The rule aims to safeguard the alleged victim against the invasion of privacy, potential embarrassment and sexual stereotyping that is associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the factfinding process. By affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Rule 412 seeks to achieve these objectives by barring evidence relating to the alleged victim's sexual behavior or alleged sexual predisposition, whether offered as substantive evidence or for impeachment, except in designated circumstances in which the probative value of the evidence significantly outweighs possible harm to the victim.

The revised rule applies in all cases involving sexual misconduct without regard to whether the alleged victim or person accused is a party to the litigation. Rule 412 extends to "pattern" witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible. When the case does not involve alleged sexual misconduct, evidence relating to a third-party witness' alleged sexual activities is not within the ambit of Rule 412. The witness will, however, be protected by other rules such as Rules 404 and 608, as well as Rule 403.

The terminology "alleged victim" is used because there will frequently be a factual dispute as to whether sexual misconduct occurred. It does not connote any requirement that the misconduct be alleged in the pleadings. Rule 412 does not, however, apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." When this is not the case, as for instance in a defamation action involving statements concerning sexual misconduct in which the evidence is offered to show that the alleged defamatory

statements were true or did not damage the plaintiff's reputation, neither Rule 404 nor this rule will operate to bar the evidence; Rule 401 and 403 will continue to control. Rule 412 will, however, apply in a Title VII action in which the plaintiff has alleged sexual harassment.

The reference to a person "accused" is also used in a non-technical sense. There is no requirement that there be a criminal charge pending against the person or even that the misconduct would constitute a criminal offense. Evidence offered to prove allegedly false prior claims by the victim is not barred by Rule 412. However, this evidence is subject to the requirements of Rule 404.

Subdivision (a). As amended, Rule 412 bars evidence offered to prove the victim's sexual behavior and alleged sexual predisposition. Evidence, which might otherwise be admissible under Rules 402, 404(b), 405, 607, 608, 609, or some other evidence rule, must be excluded if Rule 412 so requires. The word "other" is used to suggest some flexibility in admitting evidence "intrinsic" to the alleged sexual misconduct. Cf. Committee Note to 1991 amendment to Rule 404(b).

Past sexual behavior connotes all activities that involve actual physical conduct, i.e. sexual intercourse and sexual contact, or that imply sexual intercourse or sexual contact. See, e.g. *United States v. Galloway, 937 F.2d 542 (10th Cir. 1991),* cert. denied, *113 S.Ct. 418 (1992)* (use of contraceptives inadmissible since use implies sexual activity); *United States v. One Feather, 702 F.2d 736 (8th Cir. 1983)* (birth of an illegitimate child inadmissible); *State v. Carmichael, 727 P.2d 918, 925 (Kan. 1986)* (evidence of venereal disease inadmissible). In addition, the word "behavior" should be construed to include activities of the mind, such as fantasies or dreams. See 23 C. Wright & K. Graham, Jr., Federal Practice and Procedure, § 5384 at p. 548 (1980) ("While there may be some doubt under statutes that require 'conduct,' it would seem that the language of Rule 412 is broad enough to encompass the behavior of the mind.").

The rule has been amended to also exclude all other evidence relating to an alleged victim of sexual misconduct that is offered to prove a sexual predisposition. This amendment is designed to exclude evidence that does not directly refer to sexual activities or thoughts but that the proponent believes may have a sexual connotation for the factfinder. Admission of such evidence would contravene Rule 412's objectives of shielding the alleged victim from potential embarrassment and safeguarding the victim against stereotypical thinking. Consequently, unless the (b)(2) exception is satisfied, evidence such as that relating to the alleged victim's mode of dress, speech, or life-style will not be admissible.

The introductory phrase in subdivision (a) was deleted because it lacked clarity and contained no explicit reference to the other provisions of law that were intended to be overridden. The conditional clause, "except as provided in subdivisions (b) and (c)" is intended to make clear that evidence of the types described in subdivision (a) is admissible only under the strictures of those sections.

The reason for extending the rule to all criminal cases is obvious. The strong social policy of protecting a victim's privacy and encouraging victims to come forward to report criminal acts is not confined to cases that involve a charge of sexual assault. The need to protect the victim is equally great when a defendant is charged with kidnapping, and evidence is offered, either to prove motive or as background, that the defendant sexually assaulted the victim.

The reason for extending Rule 412 to civil cases is equally obvious. The need to protect alleged victims against invasions of privacy, potential embarrassment, and unwarranted sexual stereotyping, and the wish to encourage victims to come forward when they have been sexually molested do not disappear because the context has shifted from a criminal prosecution to a claim for damages or injunctive relief. There is a strong social policy in not only punishing those who engage in sexual misconduct, but in also providing relief to the victim. Thus, Rule 412 applies in any civil case in which a person claims to be the victim of sexual misconduct, such as actions for sexual battery or sexual harassment.

Subdivision (b). Subdivision (b) spells out the specific circumstances in which some evidence may be admissible that would otherwise be barred by the general rule expressed in subdivision (a). As amended, Rule 412 will be virtually unchanged in criminal cases, but will provide protection to any person alleged to be a victim of sexual misconduct regardless of the charge actually brought against an accused. A new exception has been added for civil cases.

In a criminal case, evidence may be admitted under subdivision (b)(1) pursuant to three possible exceptions, provided the evidence also satisfies other requirements for admissibility specified in the Federal Rules of Evidence, including Rule 403. Subdivisions (b)(1)(A) and (b)(1)(B) require proof in the form of specific instances of sexual behavior in recognition of the limited probative value and dubious reliability of evidence of reputation or evidence in the form of an opinion.

Under subdivision (b)(1)(A), evidence of specific instances of sexual behavior with persons other than the person whose sexual misconduct is alleged may be admissible if it is offered to prove that another person was the source of semen, injury or other physical evidence. Where the prosecution has directly or indirectly asserted that the physical evidence originated with the accused, the defendant must be afforded an opportunity to prove that another person was responsible. See *United States v. Begay, 937 F.2d 515, 523 n. 10 (10th Cir. 1991).* Evidence offered for the specific

purpose identified in this subdivision may still be excluded if it does not satisfy Rules 401 or 403. See, e.g., *United States v. Azure, 845 F.2d 1503, 1505-06 (8th Cir. 1988)* (10 year old victim's injuries indicated recent use of force; court excluded evidence of consensual sexual activities with witness who testified at in camera hearing that he had never hurt victim and failed to establish recent activities).

Under the exception in subdivision (b)(1)(B), evidence of specific instances of sexual behavior with respect to the person whose sexual misconduct is alleged is admissible if offered to prove consent, or offered by the prosecution. Admissible pursuant to this exception might be evidence of prior instances of sexual activities between the alleged victim and the accused, as well as statements in which the alleged victim expressed an intent to engage in sexual intercourse with the accused, or voiced sexual fantasies involving the specific accused. In a prosecution for child sexual abuse, for example, evidence of uncharged sexual activity between the accused and the alleged victim offered by the prosecution may be admissible pursuant to Rule 404(b) to show a pattern of behavior. Evidence relating to the victim's alleged sexual predisposition is not admissible pursuant to this exception.

Under subdivision (b)(1)(C), evidence of specific instances of conduct may not be excluded if the result would be to deny a criminal defendant the protections afforded by the Constitution. For example, statements in which the victim has expressed an intent to have sex with the first person encountered on a particular occasion might not be excluded without violating the due process right of a rape defendant seeking to prove consent. Recognition of this basic principle was expressed in subdivision (b)(1) of the original rule. The United States Supreme Court has recognized that in various circumstances a defendant may have a right to introduce evidence otherwise precluded by an evidence rule under the Confrontation Clause. See, e.g., *Olden v. Kentucky , 488 U.S. 227 (1988)* (defendant in rape cases had right to inquire into alleged victim's cohabitation with another man to show bias).

Subdivision (b)(2) governs the admissibility of otherwise proscribed evidence in civil cases. It employs a balancing test rather than the specific exceptions stated in subdivision (b)(1) in recognition of the difficulty of foreseeing future developments in the law. Greater flexibility is needed to accommodate evolving causes of action such as claims for sexual harassment.

The balancing test requires the proponent of the evidence, whether plaintiff or defendant, to convince the court that the probative value of the proffered evidence "substantially outweighs the danger of harm to any victim and of unfair prejudice of any party." This test for admitting evidence offered to prove sexual behavior or sexual propensity in civil cases differs in three respects from the general rule governing admissibility set forth in Rule 403. First, it reverses the usual procedure spelled out in Rule 403 by shifting the burden to the proponent to demonstrate admissibility rather than making the opponent justify exclusion of the evidence. Second, the standard expressed in subdivision (b)(2) is more stringent than in the original rule; it raises the threshold for admission by requiring that the probative value of the evidence substantially outweigh the specified dangers. Finally, the Rule 412 test puts "harm to the victim" on the scale in addition to prejudice to the parties.

Evidence of reputation may be received in a civil case only if the alleged victim has put his or her reputation into controversy. The victim may do so without making a specific allegation in a pleading. Cf. *Fed.R.Civ.P. 35(a).*

Subdivision (c). Amended subdivision (c) is more concise and understandable than the subdivision it replaces. The requirement of a motion before trial is continued in the amended rule, as is the provision that a late motion may be permitted for good cause shown. In deciding whether to permit late filing, the court may take into account the conditions previously included in the rule: namely whether the evidence is newly discovered and could not have been obtained earlier through the existence of due diligence, and whether the issue to which such evidence relates has newly arisen in the case. The rule recognizes that in some instances the circumstances that justify an application to introduce evidence otherwise barred by Rule 412 will not become apparent until trial.

The amended rule provides that before admitting evidence that falls within the prohibition of Rule 412(a), the court must hold a hearing in camera at which the alleged victim and any party must be afforded the right to be present and an opportunity to be heard. All papers connected with the motion and any record of a hearing on the motion must be kept and remain under seal during the course of trial and appellate proceedings unless otherwise ordered. This is to assure that the privacy of the alleged victim is preserved in all cases in which the court rules that proffered evidence is not admissible, and in which the hearing refers to matters that are not received, or are received in another form.

The procedures set forth in subdivision (c) do not apply to discovery of a victim's past sexual conduct or predisposition in civil cases, which will be continued to be governed by *Fed. R. Civ. P. 26.* In order not to undermine the rationale of Rule 412, however, courts should enter appropriate orders pursuant to *Fed. R. Civ. P. 26 (c)* to protect the victim against unwarranted inquiries and to ensure confidentiality. Courts should presumptively issue protective orders barring discovery unless the party seeking discovery makes a showing that the evidence sought to be discovered would be relevant under the facts and theories of the particular case, and cannot be obtained except through discovery. In an action for sexual harassment, for instance, while some evidence of the alleged victim's sexual behavior and/or

predisposition in the workplace may perhaps be relevant, non-work place conduct will usually be irrelevant. Cf. *Burns v. McGregor Electronic Industries. Inc., 989 F.2d 959, 962-63 (8th Cir. 1993)* (posing for a nude magazine outside work hours is irrelevant to issue of unwelcomeness of sexual advances at work). Confidentiality orders should be presumptively granted as well.

One substantive change made in subdivision (c) is the elimination of the following sentence: "Notwithstanding subdivision (b) of Rule 104, if the relevancy of the evidence which the accused seeks to offer in the trial depends upon the fulfillment of a condition of fact, the court, at the hearing in chambers or at a subsequent hearing in chambers scheduled for such purpose, shall accept evidence on the issue of whether such condition of fact is fulfilled and shall determine such issue." On its face, this language would appear to authorize a trial judge to exclude evidence of past sexual conduct between an alleged victim and an accused or a defendant in a civil case based upon the judge's belief that such past acts did not occur. Such an authorization raises questions of invasion of the right to a jury trial under the Sixth and Seventh Amendments. See 1 S. Saltzburg & M. Martin, Federal Rules Of Evidence Manual, 396-97 (5th ed. 1990).

The Advisory Committee concluded that the amended rule provided adequate protection for all persons claiming to be the victims of sexual misconduct, and that it was inadvisable to continue to include a provision in the rule that has been confusing and that raises substantial constitutional issues.

Excerpt from House Conference Report No. 103-711, relating to Sept. 13, 1994 amendments. House Conference Report No. 103-711, dated Aug. 21, 1994, which was to accompany H.R. 3355 (enacted as Act Sept. 13, 1994, P.L. 103-322), included the following statement concerning the amendments to Rule 412: "Section 40141--House recedes to Senate sections 3251-3254 and 3706 with a modification to substitute the revisions of *Federal Rule of Evidence 412* as transmitted to Congress by the Supreme Court on April 29, 1994 with an additional modification to extend evidentiary protection to civil cases (as proposed by the Judicial Conference of the United States to the Supreme Court on October 25, 1993). The Conferees intend that the Advisory Committee Note on Rule 412, as transmitted by the Judicial Conference of the United States to the Supreme Court on October 25, 1993, applies to Rule 412 as enacted by this section. This section, which modifies *Rule 412 of the Federal Rules of Evidence* as transmitted to the Congress by the United States Supreme Court, is enacted pursuant to the Rules Enabling Act.".

Notes of Advisory Committee on 2011 amendments. The language of Rule 412 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MINUTES OF MEETING
Joint Procedure Committee
April 25, 1996

PROPOSED RULE 412, N.D.R.Ev. - SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION (PAGES 123-150 OF THE AGENDA MATERIAL).

Staff explained a new Rule 412 was adopted by Congress as part of the Violent Crime Control and Law Enforcement Act of 1994. The purpose of the new rule is to expand the protection afforded

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alleged victim's of sexual misconduct and to encourage prosecutions against sexual offenders.

Staff explained Rule 412 went through an expedited rule making process as a preemptive strike against more radical reform by Congress. When the rule was presented to the Supreme Court by the Advisory Committee, the Supreme Court thought the Advisory Committee had gone to far in its attempt to appease Congress. The Supreme Court rejected proposed Rule 412, because the Supreme Court was opposed to extending Rule 412 to civil cases. Instead, the Supreme Court submitted its own version of Rule 412 to Congress, which was applicable only to criminal cases. In turn, Congress rejected the proposal submitted by the Supreme Court and adopted the draft prepared by the Advisory Committee in which Rule 412 is applicable to civil cases.

The Committee considered the proposal patterned after Rule 412, Fed.R.Evid., on page 135. The Committee questioned the types of cases to which the rule would be applicable. For instance would proposed Rule 412 be applicable to sexual harassment cases, intentional infliction of emotional distress cases, personal injury cases with a loss of consortium claim, and divorce cases? Committee members commented the phrase, "alleged sexual misconduct," which governs the applicability of the rule is vague. For instance, does alleged "sexual misconduct" refer to ethically objectionable misconduct or legally sanctionable misconduct? The Committee noted the comments to the federal rules indicate sexual misconduct is not required to be alleged in the pleadings.

Committee members argued in hostile environment sexual harassment cases, evidence of sexual behavior is highly relevant to the issue of whether the advances were welcome or unwelcome. The conduct of the plaintiff needs to be examined to determine if the conduct was welcome, and the psychological makeup of the plaintiff needs to be examined to determine the emotional distress caused by the conduct.

The Committee noted the Supreme Court rejected extending Rule 412 to civil cases because the Court has said evidence of a complainant's "sexually provocative speech or dress" is "obviously relevant" to the issue of welcomeness in a sexual harassment case. See Meritor Savings Bank v.

Vinson, 477 U.S. 57 (1986). Even though the standard in sexual harassment cases is objective, there is still a subjective element. The sexual conduct must in fact be unwelcome to the plaintiff. Committee members commented sexual conduct of the plaintiff unrelated to the workplace should be excluded under Rule 403, N.D.R.Ev.

Committee members also commented, the phrase "sexual predisposition" is vague.

Committee members argued evidence of sexual behavior should be excluded in civil cases just as in criminal cases. Excluding such evidence has worked in criminal cases. Victims in civil proceedings need the same protection as victims in criminal cases. Why should a victim in a criminal proceeding receive more protection when the sanction to the defendant is more severe in a criminal proceeding than in a civil proceeding?

Committee members argued politically correct rules of society do not make good rules of evidence. A number of reasons exit for not applying Rule 412 to civil cases. First, an alleged victim is not a draftee in the war on crime. The plaintiff is seeking to achieve a monetary gain. Second, in a civil proceeding, the person's victimhood is self-certified. There is no preliminary screening as in a criminal case. Third, a defendant does not have the same constitutional protections in a civil case as in a criminal case. Fourth, deference should be given to the Supreme Court's determination that evidence of sexual behavior is relevant in sexual harassment cases.

The Committee also noted the knowledge of a person's susceptibility to distress is a relevant factor in determining whether the conduct is extreme and outrageous in an intentional infliction of emotion distress claim.

Mr. McLean MOVED to adopt Rule 412 as proposed. Ms. Monson seconded. Motion FAILED.

Next, the Committee considered whether to adopt the proposal submitted to Congress by the Supreme Court on page 149. Under that proposal, Rule 412 would only be applicable to criminal cases.

The Committee questioned the difference between the proposal and North Dakota's rape shield statutes. Committee members commented the statutes are limited to sexual imposition. The proposed rule would apply to more criminal offenses such as sexual assault, solicitation of minors, and sexual exploitation by a therapist.

Committee members stated the proposal only applies to criminal proceedings and that adopting this rule would not mean by implication that evidence of sexual behavior is admissible in civil cases.

Mr. Kapsner MOVED to amend the title of Rule 412 as follows:

"Admissibility of Alleged Victim's Sexual Behavior or Alleged Sexual Predisposition in Criminal Proceedings."

Ms. Moore seconded. Motion CARRIED.

The Committee noted other differences between the rule and the rape shield statutes. The statutes address evidence of sexual conduct; whereas the proposed rule is broader and addresses both sexual behavior and sexual predisposition. The Committee also noted the exceptions in Rule 412 only allow specific instance evidence. The rule is clear. Section 12.1-20-14 appears to allow reputation and opinion evidence in certain circumstances. The Committee also noted the statutes limit their protection to the victim of the offense charged. The proposed rule also affords protection to a pattern witness.

The proposed rule makes evidence of a victim's dress inadmissible. Section 12.1-20-15.1 prohibits admission of evidence of a victim's manner of dress only if the probative value is outweighed by prejudice. Committee members also commented, the statutes are not very concrete. The parties end up with a relevancy test in Section 12.1-20-15, N.D.C.C. Committee members liked the fact the proposal sets out the exceptions more clearly.

Mr. McLean MOVED to adopt proposed Rule 412 as amended on pages 149-150. Ms. Moore seconded. The Committee noted its intent to supersede the rape shield laws. The Motion CARRIED. Seven members were in favor of the proposal, 3 were opposed, and 3 did not vote on the grounds they were not well enough informed.

MINUTES OF MEETING
Joint Procedure Committee
September 26-27, 1996

PROPOSED RULE 412, N.D.R.Evid. - SEX OFFENSE CASES; RELEVANCE OF ALLEGED VICTIM'S PAST SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION (PAGES 20-50 OF THE AGENDA MATERIAL).

At the last meeting, the Committee considered and rejected the version of Rule 412 adopted by Congress, effective December 1, 1994, which is applicable to civil and criminal cases. Instead, the Committee adopted the version of Rule 412 submitted to Congress by the Supreme Court which is applicable only to criminal cases.

Rule 412 was put back on the agenda for further consideration because there was inadequate consideration and discussion of Rule 412 at the last meeting. Often, when faced with a difficult and complex amendment or an entirely new rule, the proposal will be reviewed at two meetings.

Justice Sandstrom suggested the Committee consider adopting a standing rule providing for review of new rules at two meetings, unless at the first meeting two-thirds approve the

proposal. Committee members said, they need a chance to think about proposals between meetings.

Staff explained Rule 412, Fed.R.Evid., went through an expedited rule-making process as a preemptive strike against more radical reform by Congress. When the rule was presented to the Supreme Court by the Advisory Committee, the Supreme Court thought the Advisory Committee had gone too far in its attempt to appease Congress. The Supreme Court rejected proposed Rule 412.

The Supreme Court was opposed to extending Rule 412 to civil cases. Extending Rule 412 to civil cases undermines federal case law giving employers a right to introduce evidence of sexual behavior and predisposition in sexual harassment cases. In Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986), the Supreme Court held evidence of a plaintiff's sexual provocative speech or dress is obviously relevant for determining whether sexual advances are welcome in a sexual harassment case.

As a result of its case law, the U.S. Supreme Court rejected proposed Rule 412's application to civil cases and submitted a version of Rule 412 to Congress which was applicable only to criminal cases. In turn, Congress rejected the proposal submitted by the Supreme Court and adopted the draft prepared by the Advisory Committee in which Rule 412 is applicable to civil cases.

On page 33, the Committee reviewed the version of Rule 412 adopted by Congress which is applicable to civil cases.

The Committee questioned what kind of cases the rule would govern. Rule 412 does not apply unless the person against whom the evidence is offered can reasonably be characterized as a "victim of alleged sexual misconduct." See Federal Advisory Committee Notes. The Committee did not think this characterization would make the rule applicable to most divorce cases. The Committee noted Rule 412 applies to sexual harassment cases.

The Committee discussed whether Rule 412 should apply to civil cases. Under Rule 412, evidence of sexual behavior or sexual predisposition would still be admitted in civil cases if the evidence has substantial probative value.

Others argued, the civil exception under Rule 412 makes the admission of evidence of sexual behavior or sexual predisposition too difficult in civil cases. The balancing test in Rule 412 is different than Rule 403's balancing test. The balancing test in Rule 412 creates a strong presumption of exclusion. The burden is shifted to the proponent to demonstrate admissibility.

The threshold for admissibility is raised. The probative value must substantially outweigh the danger of harm to any victim and unfair prejudice to any party. The potential danger

of harm to the victim is also put on the scale with the danger of unfair prejudice to the parties.

Members argued the Committee should follow the lead of the Supreme Court rather than Congress. The Supreme Court will get the last word and will find denying admission of relevant evidence is a denial of due process.

Committee members argued a number of reasons exist for not extending Rule 412 to civil cases. In a civil action, the victim is not a draftee in the war on crime. The plaintiff is seeking to achieve a monetary gain. The person's victimhood is self-certified; there is no preliminary screening. A defendant in a civil action does not get the same constitutional protections as a defendant in a criminal case, such as appointment of counsel, the requirement guilt be proven beyond a reasonable doubt, and the privilege against self-incrimination.

Committee members stated the new rule would create confusion as to when evidence of sexual behavior or sexual predisposition is admissible in a civil case. The determination of what is welcome in a sexual harassment case depends upon the particular person. The Committee noted Rule 403 and Rule 404 already provide safeguards. The admissibility of evidence is easier to understand under the more familiar test in Rule 403.

Members questioned how adoption of the rule will protect privacy as Rule 26 allows discovery of inadmissible evidence. The Committee noted the Federal Advisory Committee Notes provide the purpose of Rule 412 should be considered by the court when deciding whether to order discovery. The note indicates a Rule 26(c) protective order should be given to protect the rationale of Rule 412.

Some Committee members stated they are opposed to extending Rule 412 to all civil cases, but a third option should be available. For instance, a tort victim of rape should have the same protections in a civil case as in a criminal case. In a civil action based on sexual behavior that is also criminal behavior, the civil plaintiff should receive the same protection they receive in a criminal trial.

Judge Hunke MOVED to adopt the version of Rule 412 on pages 33-35 which was adopted by Congress and is applicable to civil cases. Judge Bohlman seconded. Motion failed.

Next, on pages 49-50, the Committee considered whether to adopt the version of Rule 412 submitted to Congress by the Supreme Court which is applicable only to criminal cases. The Committee compared proposed Rule 412 to North Dakota's current statutes on pages 30-32.

The Committee noted, North Dakota's rape shield statute, Section 12.1-20-14, N.D.C.C., is narrower in scope than proposed Rule 412 in some respects. North Dakota's statute only applies to sexual imposition and does not address admissibility of sexual evidence in other criminal prosecutions such as sexual assault, sexual abuse of words, solicitation of minors, and sexual exploitation by a therapist. Also, North Dakota's statute only applies to the alleged victim of the offense charged. Rule 412 applies to any alleged victim including pattern witnesses. Finally, North Dakota's statute only applies to sexual conduct. Rule 412 addresses sexual behavior and sexual predisposition.

In some respects, North Dakota's statute is broader than proposed Rule 412. The statute seems to allow reputation, opinion and specific instance evidence on the issue of consent or as rebuttal evidence. Rule 412's exceptions only allow specific instance evidence. Also, North Dakota's statute allows rebuttable evidence concerning the complaining witnesses sexual conduct if the prosecution first offers evidence of the complaining witnesses sexual conduct.

Committee members commented the language of the statutes is confusing. The rule is helpful because it is more specific as to when evidence of sexual behavior is admissible. For instance, under Rule 412 evidence of a victim's dress is inadmissible sexual predisposition evidence. Under the statutes, it is necessary to engage in a balancing test different than Rule 403's balancing test. Admissibility becomes unclear and confusing.

The Committee voted whether to adopt the version of Rule 412 adopted by the Supreme Court which is only applicable to criminal cases. Eight members were in favor of adopting the proposal, five were opposed.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 601, N.D.R.Ev., Competency to Testify in General

Form and style amendments to Rule 601 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The federal rule contains a sentence the N.D. rule does not: " But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision." This language was added to account for the "Dead Man Statutes" that existed in some states, including North Dakota. The Committee and the Court decided that the N.D. "Dead Man Statutes" should be superseded by the evidence rules, so the additional federal language is not needed.

A "Dead Man Statute" is designed to prevent perjury in a civil case by prohibiting a witness who is an interested party from testifying about communications or transactions with a decedent against the decedent's estate.

RULE 601. ~~GENERAL RULE OF~~ COMPETENCY TO TESTIFY IN GENERAL

~~Every person is competent to be a witness except as otherwise provided in these rules.~~

Every person is competent to be a witness unless these rules provide otherwise.

EXPLANATORY NOTE

Rule 601 was amended, effective _____.

The essential thought underlying this rule is that, generally, the evaluation of a witness should be made by the trier of fact, through a determination of the weight and credibility of that witness' testimony, rather than by the prior imposition of standards of competency. Thus, there are no standards put forth relating to mental or moral competency in these rules. ~~(Cf. State v. Oliver, 78 N.D. 398, 49 N.W.2d 564 (1951), wherein it was held that competency is to be determined as a matter of law, considering the witness' intelligence, ability to discern truth and falsehood, and recognition of the obligation of his oath.) The trial judge will retain a certain amount of control over the "evaluation" of a witness in his review of the sufficiency of the evidence.~~

~~Neither this rule nor any of the rules of this code contain a "Dead Man's" statute. This represents a departure from former North Dakota law. The former "Dead Man's" statute, N.D.C.C. § 31-01-03, and by reference N.D.C.C. § 31-01-04 and N.D.C.C. § 31-01-05, are superseded by adoption of these rules.~~

Rule 601 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule

were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 601~~; Federal Rules of Evidence~~; Rule 601, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-01-01, 31-01-03, 31-01-04, 31-01-05.

Cross Reference: ~~Rule~~ N.D.R.Ev. 501~~; NDREv~~ (Privilege in General).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 601. Competency to Testify in General

Every person is competent to be a witness unless these rules provide otherwise. But in a civil case, state law governs the witness's competency regarding a claim or defense for which state law supplies the rule of decision.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. This general ground-clearing eliminates all grounds of incompetency not specifically recognized in the succeeding rules of this Article. Included among the grounds thus abolished are religious belief, conviction of crime, and connection with the litigation as a party or interested person or spouse of a party or interested person. With the exception of the so-called Dead Man's Acts, American jurisdictions generally have ceased to recognize these grounds.

The Dead Man's Acts are surviving traces of the common law disqualification of parties and interested persons. They exist in variety too great to convey conviction of their wisdom and effectiveness. These rules contain no provision of this kind. For the reasoning underlying the decision not to give effect to state statutes in diversity cases, see the Advisory Committee's Note to Rule 501.

No mental or moral qualifications for testifying as a witness are specified. Standards of mental capacity have proved elusive in actual application. A leading commentator observes that few witnesses are disqualified on that ground. Weihofen, Testimonial Competence and Credibility, *34 Geo. Wash.L.Rev. 53 (1965).* Discretion is regularly exercised in favor of allowing the testimony. A witness wholly without capacity is difficult to imagine. The question is one particularly suited to the jury as one of weight and credibility, subject to judicial authority to review the sufficiency of the evidence. 2 Wigmore §§ 501, 509. Standards of moral qualification in practice consist essentially of evaluating a person's truthfulness in terms of his own answers about it. Their principal utility is in affording an opportunity on voir dire examination to impress upon the witness his moral duty. This result may, however, be accomplished more directly, and without haggling in terms of legal standards, by the manner of administering the oath or affirmation under Rule 603.

Admissibility of religious belief as a ground of impeachment is treated in Rule 610. Conviction of crime as a ground of impeachment is the subject of Rule 609. Marital relationship is the basis for privilege under Rule 505. Interest in the outcome of litigation and mental capacity are, of course, highly relevant to credibility and require no special treatment to render them admissible along with other matters bearing upon the perception, memory, and narration of witnesses.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 601 as submitted to the Congress provided that "Every person is competent to be a witness except as otherwise provided in these rules." One effect of the Rule as proposed would have been to abolish age, mental capacity, and other grounds recognized in some State jurisdictions as making a person incompetent as a witness. The greatest controversy centered around the Rule's rendering inapplicable in the federal courts the so-called Dead Man's Statutes which exist in some States. Acknowledging that there is substantial disagreement as to the merit of Dead Man's Statutes, the Committee nevertheless believed that where such statutes have been enacted they represent State policy which should not be overturned in the absence of a compelling federal interest. The Committee therefore amended the Rule to make competency in civil actions determinable in accordance with State law with respect to elements of claims or defenses as to which State law supplies the rule of decision. Cf. *Courtland v Walston & Co., Inc., 340 F.Supp. 1076, 1087-1092 (S.D.N.Y. 1972).*

Notes of Committee on the Judiciary, Senate Report No. 93-1277. The amendment to rule 601 parallels the treatment accorded rule 501 discussed immediately above.

Notes of Conference Committee, House Report No. 93-1597. Rule 601 deals with competency of witnesses. Both the House and Senate bills provide that federal competency law applies in criminal cases. In civil actions and proceedings, the House bill provides that state competency law applies "to an element of a claim or defense as to which State law supplies the rule of decision." The Senate bill provides that "in civil actions and proceedings arising under *28 U.S.C. § 1332* or *28 U.S.C. § 1335*, or between citizens of different States and removed under *28 U.S.C. § 1441(b)* the competency of a witness, person, government, State or political subdivision thereof is determined in accordance with State law, unless with respect to the particular claim or defense, Federal law supplies the rule of decision."

The wording of the House and Senate bills differs in the treatment of civil actions and proceedings. The rule in the House bill applies to evidence that relates to "an element of a claim or defense." If an item of proof tends to support or defeat a claim or defense, or an element of a claim or defense, and if state law supplies the rule of decision for that claim or defense, then state competency law applies to that item of proof.

For reasons similar to those underlying its action on Rule 501, the Conference adopts the House provision.

Notes of Advisory Committee on 2011 amendments. The language of Rule 601 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 602, N.D.R.Ev., Need for Personal Knowledge

Form and style amendments to Rule 602 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 602. ~~LACK OF~~ NEED FOR PERSONAL KNOWLEDGE

~~A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.~~

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

EXPLANATORY NOTE

Rule 602 was amended, effective March 1, 1990; _____.

This rule deals with the competency of a witness, but only in a most basic sense. The requirement of personal knowledge is deeply embedded in the common law ~~(See, generally, McCormick on Evidence, § 10 (2d ed. 1972)), and is established in North Dakota case law. See Teegarden v. Dahl, 138 N.W.2d 668, 46 A.L.R.3d 708 (N.D. 1965)~~.

The rule states that a witness may ~~not~~ testify ~~"unless evidence is introduced sufficient to support a finding"~~ "if evidence is introduced sufficient to support a finding" that the witness has personal knowledge. This gives the trial judge the power to reject testimony if the judge finds, as a matter of law, that no reasonable juror could believe that the witness perceived the event about which the witness is testifying.

The last sentence is intended to avoid any confusion which might otherwise arise concerning the relative requirements of this rule and Rule 703. This rule is subordinate to Rule 703, which does not require that an expert opinion be based on the expert's own perception.

Rule 602 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 602 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 602; ~~Federal Rules of Evidence~~; Rule 602, SBAND proposal.

Rule 602. Need for Personal Knowledge

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934; Oct. 1, 1987; Nov. 1, 1988.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. "* * *[T]he rule requiring that a witness who testifies to a fact which can be perceived by the senses must have had an opportunity to observe, and must have actually observed the fact" is a "most pervasive manifestation" of the common law insistence upon "the most reliable sources of information." McCormick § 10, p. 19. These foundation requirements may, of course, be furnished by the testimony of the witness himself; hence personal knowledge is not an absolute but may consist of what the witness thinks he knows from personal perception. 2 Wigmore § 650. It will be observed that the rule is in fact a specialized application of the provisions of Rule 104(b) on conditional relevancy.

This rule does not govern the situation of a witness who testifies to a hearsay statement as such, if he has personal knowledge of the making of the statement. Rules 801 and 805 would be applicable. This rule would, however, prevent him from testifying to the subject matter of the hearsay statement, as he has no personal knowledge of it.

The reference to Rule 703 is designed to avoid any question of conflict between the present rule and the provisions of that rule allowing an expert to express opinions based on facts of which he does not have personal knowledge.

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

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2011 amendments. The language of Rule 602 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 603, N.D.R.Ev., Oath or Affirmation to Testify Truthfully

Form and style amendments to Rule 603 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

~~Before testifying, every witness must be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.~~

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

EXPLANATORY NOTE

Rule 603 was amended, effective March 1, 1990; _____.

Rule 603 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 603 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 603; ~~Federal Rules of Evidence~~; Rule 603, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ct. 6.10~~, N.D.R.Ct~~ (Courtroom Oaths).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 603. Oath or Affirmation to Testify Truthfully

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The rule is designed to afford the flexibility required in dealing with religious adults, atheists, conscientious objectors, mental defectives, and children. Affirmation is simply a solemn undertaking to tell the truth; no special verbal formula is required. As is true generally, affirmation is recognized by federal law. "Oath" includes affirmation, *1 U.S.C. § 1*; judges and clerks may administer oaths and affirmations, *28 U.S.C. §§ 459, 953*; and affirmations are acceptable in lieu of oaths under *Rule 43(d) of the Federal Rules of Civil Procedure.* Perjury by a witness is a crime, *18 U.S.C. § 1621.*

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 603 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 604, N.D.R.Ev., Interpreter

Form and style amendments to Rule 604 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 604. INTERPRETERS

~~An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.~~

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

EXPLANATORY NOTE

Rule 604 was amended, effective March 1, 1990; _____.

This rule merely includes within the evidence code that which exists in North Dakota law. N.D.C.C. § 31-01-11 provides for the appointment of interpreters and for their oath; ~~Rule 28(b), NDRCrimP provides for the appointment of interpreters~~.

Rule 604 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 604 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~:~~ of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 604; ~~Federal Rules of Evidence~~; Rule 604, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 31-01-11, 31-01-12.

Cross Reference: N.D.R.Crim.P. 28 (Interpreters); N.D.Sup.Ct.Admin.R. 50 (Court Interpreter Qualifications and Procedures).

Rule 604. Interpreter

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The rule implements *Rule 43(f) of the Federal Rules of Civil Procedure* and *Rule 28(b) of the Federal Rules of Criminal Procedure*, both of which contain provisions for the appointment and compensation of interpreters.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 604 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 605, N.D.R.Ev., Judge's Competency as a Witness

Form and style amendments to Rule 605 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 605. JUDGE'S COMPETENCY ~~OF JUDGE~~ AS A WITNESS

~~The judge presiding at the trial may not testify in that trial as a witness. No objection need be made in order to preserve the point.~~

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

EXPLANATORY NOTE

Rule 605 was amended, effective _____.

This rule provides that a judge is wholly incompetent to testify in a trial over which ~~he~~ the judge is presiding. ~~This changes the North Dakota practice, which allowed the judge to testify and gave the judge the discretion to order the trial to be held before another judge or jury. N.D.C.C. § 31-01-10. This concept of "discretionary" incompetency was rejected as involving practical problems in the conduct of a trial should the judge decide to continue hearing the case, e.g., can the judge rule on his own testimony? It was also felt that, in the words of McCormick, a judge's "role as a witness is manifestly inconsistent with his customary role of impartiality in the adversary system of trial." McCormick on Evidence § 68, p. 147 (2d ed. 1972).~~

Rule 605 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____: January 29, 1976, page 12; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 605~~, Federal Rules of Evidence~~; Rule 605, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-10.

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 605. Judge's Competency as a Witness

The presiding judge may not testify as a witness at the trial. A party need not object to preserve the issue.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. In view of the mandate of *28 U.S.C. § 455* that a judge disqualify himself in "any case in which he * * * is or has been a material witness," the likelihood that the presiding judge in a federal court might be called to testify in the trial over which he is presiding is slight. Nevertheless the possibility is not totally eliminated.

The solution here presented is a broad rule of incompetency, rather than such alternatives as incompetency only as to material matters, leaving the matter to the discretion of the judge, or recognizing no incompetency. The choice is the result of inability to evolve satisfactory answers to questions which arise when the judge abandons the bench for the witness stand. Who rules on objections? Who compels him to answer? Can he rule impartially on the weight and admissibility of his own testimony? Can he be impeached or cross-examined effectively? Can he, in a jury trial, avoid conferring his seal of approval on one side in the eyes of the jury? Can he, in a bench trial, avoid an involvement destructive of impartiality? The rule of general incompetency has substantial support. See Report of the Special Committee on the Propriety of Judges Appearing as Witnesses, *36 A.B.A.J. 630 (1950);* cases collected in Annot. 157 A.L.R. 311; McCormick § 68, p. 147; Uniform Rule 42; *California Evidence Code § 703*; Kansas Code of Civil Procedure § 60-442; New Jersey Evidence Rule 42. Cf. 6 Wigmore § 1909, which advocates leaving the matter to the discretion of the judge, and statutes to that effect collected in Annot. 157 A.L.R. 311.

The rule provides an "automatic" objection. To require an actual objection would confront the opponent with a choice between not objecting, with the result of allowing the testimony, and objecting, with the probable result of excluding the testimony but at the price of continuing the trial before a judge likely to feel that his integrity had been attacked by the objector.

Notes of Advisory Committee on 2011 amendments. The language of Rule 605 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 606, N.D.R.Ev., Juror's Competency as a Witness

Form and style amendments to Rule 606 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

In North Dakota, jurors may testify about whether "the verdict was arrived at by chance." This is not part of the federal rule. The explanatory note states that "it is felt that reaching a verdict by chance is an extreme irregularity which replaces deliberation rather than being a part of it and, as such, should be disclosed."

RULE 606: JUROR'S COMPETENCY ~~OF JUROR~~ AS A WITNESS

~~(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party must be afforded an opportunity to object out of the presence of the jury.~~

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

~~(b) Inquiry into validity of verdict or indictment.~~

~~Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.~~

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

~~However, a juror may testify about (1) whether extraneous prejudicial information was~~

~~improperly brought to the jury's attention, (2) whether any outside influence was improperly brought to bear upon any juror, (3) whether the verdict of the jury was arrived at by chance, or (4) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.~~

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror;

(C) the verdict was arrived at by chance; or

(D) a mistake was made in entering the verdict on the verdict form.

EXPLANATORY NOTE

Rule 606 was amended, effective March 1, 1990, March 1, 2008;_____.

Subdivision (a) prohibits a juror from testifying in a case in which that juror is sitting. Many of the practical and theoretical problems that are present when a judge testifies are also present when a juror does so. The impartiality with which the trier of fact should consider evidence is immeasurably damaged whenever a juror presents evidence for one of the parties to a lawsuit. ~~This rule represents a change from prior law which allowed a juror to testify (N.D.C.C. § 31-01-10), but will likely have little effect on practice, as the process of jury selection has kept out of the jury box those who possess information relative to the determination of a lawsuit.~~

Subdivision (b) ~~comports with existing North Dakota law by prohibiting~~ prohibits a

juror from testifying as to the mental processes inherent in arriving at a verdict but ~~allowing~~ allows jurors to testify as to whether outside influences were brought to bear upon a juror, or whether the verdict was arrived at by chance.

Subdivision (b) was amended, effective March 1, 2008, to allow juror testimony about mistakes in entering the verdict on the verdict form.

The rationale of this rule is to further free deliberation in the jury room by protecting from disclosure the manner in which a verdict was reached, and to promote finality of verdicts. At the same time considerations much be given to the arrival of a just result in each particular case. Where a verdict is reached because of extraneous, prejudicial information or outside influence, much of the reason for disallowing a juror to testify disappears, and the balance is weighted in favor of obtaining justice in the individual case. Justice also requires disclosure whenever a verdict is arrived at by chance, including a "quotient" verdict, in which the jurors agree in advance to be bound. Although the view has been criticized, it is felt that reaching a verdict by change is an extreme irregularity which replaces deliberation rather than being a part of it and, as such, should be disclosed.

Rule 606 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 606 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes of _____; September 28-29, 2006, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, page 13; October 1, 1975, page 4. Fed.R.Ev. 606; Rule 606, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-21-18, 31-01-10.

Cross Reference: N.D.R.Civ.P. 59 (New Trials-Amendment of Judgments).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 606. Juror's Competency as a Witness

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

(b) During an Inquiry into the Validity of a Verdict or Indictment.
(1) *Prohibited Testimony or Other Evidence.* During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
(2) *Exceptions.* A juror may testify about whether:
(A) extraneous prejudicial information was improperly brought to the jury's attention;
(B) an outside influence was improperly brought to bear on any juror; or
(C) a mistake was made in entering the verdict on the verdict form.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934; Dec. 12, 1975, P.L. 94-149, § 1(10), 89 Stat. 805; Oct. 1, 1987; Dec. 1, 2006.)
(As amended Dec. 1, 2011.)

Amendments:

1975. Act Dec. 12, 1975, in subsec. (b), substituted "about which" for "about what".

Notes of Advisory Committee on Rules. Subdivision (a). The considerations which bear upon the permissibility of testimony by a juror in the trial in which he is sitting as juror bear an obvious similarity to those evoked when the judge is called as a witness. See Advisory Committee's Note to Rule 605. The judge is not, however in this instance so involved as to call for departure from usual principles requiring objection to be made; hence the only provision on objection is that opportunity be afforded for its making out of the presence of the jury. Compare Rule 605.

Subdivision (b). Whether testimony, affidavits, or statements of jurors should be received for the purpose of invalidating or supporting a verdict or indictment, and if so, under what circumstances, has given rise to substantial differences of opinion. The familiar rubric that a juror may not impeach his own verdict, dating from Lord Mansfield's time, is a gross oversimplification. The values sought to be promoted by excluding the evidence include freedom of deliberation, stability and finality of verdicts, and protection of jurors against annoyance and embarrassment. *McDonald v. Piess, 238 U.S. 264, 35 S.Ct. 785, 59 L.Ed. 1300 (1915).* On the other hand, simply putting verdicts beyond effective reach can only promote irregularity and injustice. The rule offers an accommodation between these competing considerations.

The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. See *Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964).* The authorities are in virtually complete accord in excluding the evidence. Fryer, Note on Disqualification of Witnesses, Selected Writings on Evidence and Trial 345, 347 (Fryer ed. 1957); Maguire, Weinstein, et al., Cases on Evidence 887 (5th ed. 1965); 8 Wigmore § 2340 (McNaughton Rev. 1961). As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. 8 Wigmore § 2354 (McNaughton Rev. 1961). However, the door of the jury room is not necessarily a satisfactory dividing point, and the Supreme Court has refused to accept it for every situation. *Mattox v. United States, 146 U.S. 140, 13 S.Ct. 50, 36 L.Ed. 917 (1892).*

Under the federal decisions the central focus has been upon insulation of the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show a compromise verdict, *Hyde v. United States, 225 U.S. 347, 382 (1912);* a

quotient verdict, *McDonald v. Piess, 238 U.S. 264 (1915);* speculation as to insurance coverage, *Holden v. Porter, 495 F.2d 878 (10th Cir.1969), Farmers Coop. Elev. Ass'n v. Strand, 382 F.2d 224, 230 (8th Cir. 1967),* cert. denied *389 U.S. 1014;* misinterpretations of instructions, *Farmers Coop. Elev. Ass'n v. Strand, supra;* mistake in returning verdict, *United States v. Chereton, 309 F.2d 197 (6th Cir. 1962);* interpretation of guilty plea by one defendant as implicating others, *United States v. Crosby, 294 F.2d 928, 949 (2d Cir. 1961).* The policy does not, however, foreclose testimony by jurors as to prejudicial extraneous information or influences injected into or brought to bear upon the deliberative process. Thus a juror is recognized as competent to testify to statements by the bailiff or the introduction of a prejudicial newspaper account into the jury room, *Mattox v. United States, 146 U.S. 140 (1892).* See also *Parker v. Gladden, 385 U.S. 363 (1966).*

This rule does not purport to specify the substantive grounds for setting aside verdicts for irregularity; it deals only with the competency of jurors to testify concerning those grounds. Allowing them to testify as to matters other than their own inner reactions involves no particular hazard to the values sought to be protected. The rules is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

See also *Rule 6(e) of the Federal Rules of Criminal Procedure* and *18 U.S.C. § 3500,* governing the secrecy of grand jury proceedings. The present rules does not relate to secrecy and disclosure but to the competency of certain witnesses and evidence.

Notes of Committee on the Judiciary, House Report No. 93-650. As proposed by the Court, Rule 606(b) limited testimony by a juror in the course of an inquiry into the validity of a verdict or indictment. He could testify as to the influence of extraneous prejudicial information brought to the jury's attention (e.g. a radio newscast or a newspaper account) or an outside influence which improperly had been brought to bear upon a juror (e.g. a threat to the safety of a member of his family), but he could not testify as to other irregularities which occurred in the jury room. Under this formulation a quotient verdict could not be attacked through the testimony of a juror, nor could a juror testify to the drunken condition of a fellow juror which so disabled him that he could not participate in the jury's deliberations.

The 1969 and 1971 Advisory Committee drafts would have permitted a member of the jury to testify concerning these kinds of irregularities in the jury room. The Advisory Committee note in the 1971 draft stated that "* * * the door of the jury room is not a satisfactory dividing point, and the Supreme Court has refused to accept it." The Advisory Committee further commented that--

The trend has been to draw the dividing line between testimony as to mental processes, on the one hand, and as to the existence of conditions or occurrences of events calculated improperly to influence the verdict, on the other hand, without regard to whether the happening is within or without the jury room. * * * The jurors are the persons who know what really happened. Allowing them to testify as to matters other than their own reactions involves no particular hazard to the values sought to be protected. The rule is based upon this conclusion. It makes no attempt to specify the substantive grounds for setting aside verdicts for irregularity.

Objective jury misconduct may be testified to in California, Florida, Iowa, Kansas, Nebraska, New Jersey, North Dakota, Ohio, Oregon, Tennessee, Texas, and Washington.

Persuaded that the better practice is that provided for in the earlier drafts, the Committee amended subdivision (b) to read in the text of those drafts.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. As adopted by the House, this rule would permit the impeachment of verdicts by inquiry into, not the mental processes of the jurors, but what happened in terms of conduct in the jury room. This extension of the ability to impeach a verdict is felt to be unwarranted and ill-advised.

The rule passed by the House embodies a suggestion by the Advisory Committee of the Judicial Conference that is considerably broader than the final version adopted by the Supreme Court, which embodies long-accepted Federal law. Although forbidding the impeachment of verdicts by inquiry into the jurors' mental processes, it deletes from the Supreme Court version the proscription against testimony "as to any matter or statement occurring during the course of the jury's deliberations." This deletion would have the effect of opening verdicts up to challenge on the basis of what happened during the jury's internal deliberations, for example, where a juror alleged that the jury refused to follow the trial judge's instructions or that some of the jurors did not take part in deliberations.

Permitting an individual to attack a jury verdict based upon the jury's internal deliberations has long been recognized as unwise by the Supreme Court. In McDonald v. Pless, the Court stated:

* * * * *

[L]et it once be established that verdicts solemnly made and publicly returned into court can be attacked and set aside on the testimony of those who took part in their publication and all verdicts could be, and many would be, followed by an inquiry in the hope of discovering something which might invalidate the finding. Jurors would be harassed and beset by the defeated party in an effort to secure from them evidence of facts which might establish

misconduct sufficient to set aside a verdict. If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation--to the destruction of all frankness and freedom of discussion and conference *[238 U.S. 264, at 267 (1914)]*.

* * * * *

As it stands then, the rule would permit the harassment of former jurors by losing parties as well as the possible exploitation of disgruntled or otherwise badly-motivated ex-jurors.

Public policy requires a finality to litigation. And common fairness requires that absolute privacy be preserved for jurors to engage in the full and free debate necessary to the attainment of just verdicts. Jurors will not be able to function effectively if their deliberations are to be scrutinized in post-trial litigation. In the interest of protecting the jury system and the citizens who make it work, rule 606 should not permit any inquiry into the internal deliberations of the jurors.

Notes of Conference Committee, House Report No. 93-1597. Rule 606(b) deals with juror testimony in an inquiry into the validity of a verdict or indictment. The House bill provides that a juror cannot testify about his mental processes or about the effect of anything upon his or another juror's mind as influencing him to assent to or dissent from a verdict or indictment. Thus, the House bill allows a juror to testify about objective matters occurring during the jury's deliberation, such as the misconduct of another juror or the reaching of a quotient verdict. The Senate bill does not permit juror testimony about any matter or statement occurring during the course of the jury's deliberations. The Senate bill does provide, however, that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention and on the question whether any outside influence was improperly brought to bear on any juror.

The Conference adopts the Senate amendment. The Conferees believe that jurors should be encouraged to be conscientious in promptly reporting to the court misconduct that occurs during jury deliberations.

Notes of Advisory Committee on 1987 amendments to Rules. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 2006 amendments. Rule 606(b) has been amended to provide that juror testimony may be used to prove that the verdict reported was the result of a mistake in entering the verdict on the verdict form. The amendment responds to a divergence between the text of the Rule and the case law that has established an exception for proof of clerical errors. *See, e.g., Plummer v. Springfield Term. Ry., 5 F.3d 1, 3 (1st Cir. 1993)* ("A number of circuits hold, and we agree, that juror testimony regarding an alleged clerical error, such as announcing a verdict different than that agreed upon, does not challenge the validity of the verdict or the deliberation of mental processes, and therefore is not subject to Rule 606(b)."); *Teevee Toons, Inc., v. MP3.Com, Inc., 148 F.Supp.2d 276, 278 (S.D.N.Y. 2001)* (noting that Rule 606(b) has been silent regarding inquiries designed to confirm the accuracy of a verdict).

In adopting the exception for proof of mistakes in entering the verdict on the verdict form, the amendment specifically rejects the broader exception, adopted by some courts, permitting the use of juror testimony to prove that the jurors were operating under a misunderstanding about the consequences of the result that they agreed upon. *See, e.g., Attridge v. Cencorp Div. of Dover Techs. Int'l, Inc., 836 F.2d 113, 116 (2d Cir. 1987); Eastridge Development Co., v. Halpert Associates, Inc., 853 F.2d 772 (10th Cir. 1988).* The broader exception is rejected because an inquiry into whether the jury misunderstood or misapplied an instruction goes to the jurors' mental processes underlying the verdict, rather than the verdict's accuracy in capturing what the jurors had agreed upon. *See, e.g., Karl v. Burlington Northern R.R., 880 F.2d 68, 74 (8th Cir. 1989)* (error to receive juror testimony on whether verdict was the result of jurors' misunderstanding of instructions: "The jurors did not state that the figure written by the foreman was different from that which they agreed upon, but indicated that the figure the foreman wrote down was intended to be a net figure, not a gross figure. Receiving such statements violates Rule 606(b) because the testimony relates to how the jury interpreted the court's instructions, and concerns the jurors' 'mental processes,' which is forbidden by the rule."); *Robles v. Exxon Corp., 862 F.2d 1201, 1208 (5th Cir. 1989)* ("the alleged error here goes to the substance of what the jury was asked to decide, necessarily implicating the jury's mental processes insofar as it questions the jury's understanding of the court's instructions and application of those instructions to the facts of the case"). Thus, the exception established by the amendment is limited to cases such as "where the jury foreperson wrote down, in response to an interrogatory, a number different from that agreed upon by the jury, or mistakenly stated that the defendant was 'guilty' when the jury had actually agreed that the defendant was not guilty." *Id.*

It should be noted that the possibility of errors in the verdict form will be reduced substantially by polling the jury. Rule 606(b) does not, of course, prevent this precaution. *See* 8 C. Wigmore, *Evidence,* § 2350 at 691 (McNaughten ed. 1961) (noting that the reasons for the rule barring juror testimony, "namely, the dangers of uncertainty and of tampering with the jurors to procure testimony, disappear in large part if such investigation as may be desired is *made by the judge* and takes place *before the jurors' discharge* and separation") (emphasis in original). Errors that come to light after

polling the jury "may be corrected on the spot, or the jury may be sent out to continue deliberations, or, if necessary, a new trial may be ordered." C. Mueller & L. Kirkpatrick, *Evidence Under the Rules* at 671 (2d ed. 1999) (citing *Sincox v. United States, 571 F.2d 876, 878-79 (5th Cir. 1978)).*

Notes of Advisory Committee on 2011 amendments. The language of Rule 606 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 607, N.D.R.Ev., Who May Impeach a Witness

Form and style amendments to Rule 607 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The explanatory note contained a long discussion of the old "voucher rule." Deletion of this discussion is proposed.

RULE 607. WHO MAY IMPEACH A WITNESS

~~The credibility of a witness may be attacked by any party, including the party calling the witness.~~

Any party, including the party that called the witness, may attack the witness's credibility.

EXPLANATORY NOTE

Rule 607 was amended, effective March 1, 1990; _____.

This rule does away with the prohibition against impeaching one's own witness. ~~The rule against impeaching one's own witness has long been criticized (see 3 Weinstein's Evidence Para 607(01) at 607-7, 607-8 (1975)) and was abandoned at the federal level as being "based on false premises. A party does not hold out his witness as worthy of belief, since he rarely has a free choice in selecting them." Advisory Committee Note to Rule 607, FRE. Furthermore, the abolition of the rule in criminal cases is probably constitutionally required. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).~~

~~Allowing a party to impeach its own witness represents a change from past North Dakota cases, although the Supreme Court has strongly indicated its disfavor with the "voucher" rule.~~

~~"While North Dakota has recognized the 'voucher rule' that one is presumed to vouch for the truthfulness of his own witness (George v. Triplett, 5 N.D. 50, 63 N.W. 891 (1895))~~

~~we have permitted cross-examination of one's own witnesses in case of surprise (George v. Triplett, supra), and contradiction of one's own witnesses by other witnesses (Jacobson v. Mutual Benefit H. & A. Association, 70 N.D. 566, 296 N.W. 545 (1941)), as well as the calling of a witness as a court witness, thereby permitting cross-examination by both sides. See Hefty v. Aldrich, 220 N.W.2d 840 (N.D. 1974). The 'voucher rule' will be rejected entirely if the newly-proposed Federal Rules of Evidence are adopted. See 607. It should be. Wigmore calls it 'a primitive notion, resting on no reason whatever, but upon mere tradition * * *.' IIIA Wigmore on Evidence, Chadbourn Edition, Sec. 898.~~

~~"The true extent of the 'voucher rule' is probably simply that the party calling a witness is likely to be held responsible for the testimony of that witness in the eyes of the judge or jury, and jury arguments to that effect can be made, but the rule should never be used to prevent cross-examination of a witness who is adverse or hostile or one whom a party is required to call by the necessities of the case." State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974).~~

Rule 607 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 607 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27; January 29, 1976, page 13. ~~Rule~~ Fed.R.Ev. 607~~; Federal Rules of Evidence~~; Rule 607, SBAND proposal.

~~Rules:~~

~~Considered: Rule 43(b), NDRCivP.~~

Cross Reference: ~~Rules~~ N.D.R.Ev. 404 (Character Evidence; Crimes or Other Acts), N.D.R.Ev. 608 (A Witness's Character for Truthfulness or Untruthfulness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), ~~NDREv~~; N.D.R.Civ.P. 43 (Evidence).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 607. Who May Impeach a Witness

Any party, including the party that called the witness, may attack the witness's credibility.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1934; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The traditional rule against impeaching one's own witness is abandoned as based on false premises. A party does not hold out his witnesses as worthy of belief, since he rarely has a free choice in selecting them. Denial of the right leaves the party at the mercy of the witness and the adversary. If the impeachment is by a prior statement, it is free from hearsay dangers and is excluded from the category of hearsay under Rule 801(d)(1). Ladd, Impeachment of One's Own Witness--New Developments *4 U.Chi.L.Rev. 69 (1936);* McCormick § 38; 3 Wigmore §§ 896-918. The substantial inroads into the old rule made over the years by decisions, rules, and statutes are evidence of doubts as to its basic soundness and workability. Cases are collected in 3 Wigmore § 905. Revised *Rule 32(a)(1) of the Federal Rules of Civil Procedure* allows any party to impeach a witness by means of his deposition, and Rule 43(b) has allowed the calling and impeachment of an adverse party or person identified with him. Illustrative statutes allowing a party to impeach his own witness under varying circumstances are Ill.Rev. Stats.1967, c. 110, § 60; Mass.Laws Annot. 1959, c. 233 § 23; 20 *N.M.Stats. Annot. 1953, § 20-2-4*; *N.Y. CPLR § 4514* (McKinney 1963); 12 Vt.Stats. Annot. 1959, §§ 1641a, 1642. Complete judicial rejection of the old rule is found in *United States v. Freeman, 302 F.2d 347 (2d Cir. 1962).* The same result is reached in Uniform Rule 20; *California Evidence Code § 785*; Kansas Code of Civil Procedure § 60-420. See also New Jersey Evidence Rule 20.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 607 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 608, N.D.R.Ev., A Witness's Character for Truthfulness or Untruthfulness

Form and style amendments to Rule 608 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The federal rulemakers decided not to put the language on self-incrimination into a separate subdivision, instead leaving it in a freestanding paragraph. Because our Rule 608 already had a subdivision on self-incrimination, the proposal retains this structure. The proposal also includes the language the federal rulemakers finally accepted, but their original proposal read: "A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness." The Committee may wish to discuss which language is clearer.

RULE 608. ~~EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS~~

A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

~~(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.~~

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

~~(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in N.D.R.Ev. 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.~~

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

(c) Privilege Against Self-incrimination. ~~The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters relating only to character for truthfulness.~~ By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

EXPLANATORY NOTE

Rule 608 was amended, effective March 1, 1990, March 1, 2005;_____.

Rule 608 is taken from Rule 608, Federal Rules of Evidence. It develops the exception stated in Rule 404 to the general prohibition against use of character evidence by allowing evidence of a witness' truthful or untruthful character to support or attack the witness' character for truthfulness. ~~As stated in the explanatory note to Rule 405, allowing the use of~~

~~opinion evidence of character represents a change in North Dakota practice.~~

Rule 608 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 608 was amended, effective March 1, 2005, to substitute the term "character for truthfulness" for the term "credibility" in subdivisions (b) and (c).

Rule 608 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29-30, 2004, page 21; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 608~~, Federal Rules of Evidence~~; Rule 608, SBAND proposal.

Cross Reference: ~~Rules~~ N.D.R.Ev. 404 (Character Evidence; Crimes or Other Acts), N.D.R.Ev. 607 (Who May Impeach a Witness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), ~~NDREv~~.

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 608. A Witness's Character for Truthfulness or Untruthfulness

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609, extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

By testifying on another matter, a witness does not waive any privilege against self-incrimination for testimony that relates only to the witness's character for truthfulness.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1935; Oct. 1, 1987; Nov. 1, 1988; Dec. 1, 2003.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Subdivision (a). In Rule 404(a) the general position is taken that character evidence is not admissible for the purpose of proving that the person acted in conformity therewith, subject, however, to several exceptions, one of which is character evidence of a witness as bearing upon his credibility. The present rule develops that exception.

In accordance with the bulk of judicial authority, the inquiry is strictly limited to character for veracity, rather than allowing evidence as to character generally. The result is to sharpen relevancy, to reduce surprise, waste of time, and confusion, and to make the lot of the witness somewhat less unattractive. McCormick § 44.

The use of opinion and reputation evidence as means of proving the character of witnesses is consistent with Rule 405(a). While the modern practice has purported to exclude opinion witnesses who testify to reputation seem in fact often to be giving their opinions, disguised somewhat misleadingly as reputation. See McCormick § 44. And even under the modern practice, a common relaxation has allowed inquiry as to whether the witnesses would believe the principal witness under oath. *United States v. Walker, 313 F.2d 236 (6th Cir. 1963),* and cases cited therein; McCormick § 44, pp. 94-95, n. 3.

Character evidence in support of credibility is admissible under the rule only after the witness' character has first been attacked, as has been the case at common law. Maguire, Weinstein, et al., Cases on Evidence 295 (5th ed. 1965); McCormick § 49, p. 105; 4 Wigmore § 1104. The enormous needless consumption of time which a contrary practice would entail justifies the limitation. Opinion or reputation that the witness is untruthful specifically qualifies as an attack under the rule, and evidence or misconduct, including conviction of crime, and of corruption also fall within this category. Evidence of bias or interest does not. McCormick § 49; 4 Wigmore §§ 1106, 1107. Whether evidence in the form of contradiction is an attack upon the character of the witness must depend §§ 1108, 1109.

As to the use of specific instances on direct by an opinion witness, see the Advisory Committee's Note to Rule 405, supra.

Subdivision (b). In conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is an issue in the case, the present rule generally bars evidence of specific instances of conduct of a witness for the purpose of attacking or supporting his credibility. There are, however, two exceptions: (1) specific instances are provable when they have been the subject of criminal conviction, and (2) specific instances may be inquired into on cross-examination of the principal witness or of a witness giving an opinion of his character for truthfulness.

(1) Conviction of crime as a technique of impeachment is treated in detail in Rule 609, and here is merely recognized as an exception to the general rule excluding evidence of specific incidents for impeachment purposes.

(2) Particular instances of conduct, though not the subject of criminal conviction, may be inquired into on cross-examination of the principal witness himself or of a witness who testifies concerning his character for truthfulness. Effective cross-examination demands that some allowance be made for going into matters of this kind, but the possibilities of abuse are substantial. Consequently safeguards are erected in the form of specific requirements that the instances inquired into be probative of truthfulness or its opposite and not remote in time. Also, the overriding protection of Rule 403 requires that probative value not be outweighed by danger of unfair prejudice, confusion of issues, or misleading the jury, and that of Rule 611 bars harassment and undue embarrassment.

The final sentence constitutes a rejection of the doctrine of such cases as *People v. Sorge, 301 N.Y. 198, 93 N.E.2d 637 (1950),* that any past criminal act relevant to credibility may be inquired into on cross-examination, in apparent disregard of the privilege against self-incrimination. While it is clear that an ordinary witness cannot make a partial disclosure of incriminating matter and then invoke the privilege on cross-examination, no tenable contention can be made that merely by testifying he waives his right to foreclose inquiry on cross-examination into criminal activities for the purpose of attacking his credibility. So to hold would reduce the privilege to a nullity. While it is true that an accused, unlike an ordinary witness, has an option whether to testify, if the option can be exercised only at the price of opening up inquiry as to any and all criminal acts committed during his lifetime, the right to testify could scarcely be said to possess much vitality. In *Griffin v. California, 380 U.S. 609, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965),* the Court held that allowing comment on the election of an accused not to testify exacted a constitutionally impermissible price, and so here. While no specific provision in terms confers constitutional status on the right of an accused to take the stand in his own defense, the existence of the right is so completely recognized that a denial of it or substantial infringement upon it would surely be of due process dimensions. See *Ferguson v. Georgia, 365 U.S. 570, 81 S.Ct. 756, 5 L.Ed.2d 783 (1961);* McCormick § 131; 8 Wigmore § 2276 (McNaughton Rev. 1961). In any event, wholly aside from constitutional considerations, the provision represents a sound policy.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 608(a) as submitted by the Court permitted attack to be made upon the character for truthfulness or untruthfulness of a witness either by reputation or opinion testimony. For the same reasons underlying its decision to eliminate the admissibility of opinion testimony in Rule 405(a), the Committee amended Rule 608(a) to delete the reference to opinion testimony.

The second sentence of Rule 608(b) as submitted by the Court permitted specific instances of misconduct of a witness to be inquired into on cross-examination for the purpose of attacking his credibility, if probative of truthfulness or untruthfulness, "and not remote in time". Such cross-examination could be of the witness himself or of another witness who testifies as to "his" character for truthfulness or untruthfulness.

The Committee amended the Rule to emphasize the discretionary power of the court in permitting such testimony and deleted the reference to remoteness in time as being unnecessary and confusing (remoteness from time of trial or remoteness from the incident involved?). As recast, the Committee amendment also makes clear the antecedent of "his" in the original Court proposal.

Notes of Conference Committee, House Report No. 93-1597. The Senate amendment adds the words "opinion or" to conform the first sentence of the rule with the remainder of the rule.

The Conference adopts the Senate amendment.

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

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2003 amendments. The Rule has been amended to clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness' character for truthfulness. See *United States v. Abel, 469 U.S. 45 [83 L. Ed. 2d 450]* (1984); *United States v. Fusco, 748 F.2d 996 (5th Cir. 1984)* (Rule 608(b) limits the use of evidence "designed to show that the witness has done things, unrelated to the suit being tried, that make him more or less believable per se"); Ohio R.Evid. 608(b). On occasion the Rule's use of the overbroad term "credibility" has been read "to bar extrinsic evidence for bias, competency and contradiction impeachment since they too deal with credibility." American Bar Association Section of Litigation, *Emerging Problems Under the Federal Rules of Evidence* at 161 (3d ed. 1998). The amendment conforms the language of the Rule to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness' character for veracity. See Advisory Committee Note to Rule 608(b) (stating that the Rule is "[i]n conformity with Rule 405, which forecloses use of evidence of specific incidents as proof in chief of character unless character is in issue in the case . . .").

By limiting the application of the Rule to proof of a witness' character for truthfulness, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (such as contradiction, prior inconsistent

statement, bias and mental capacity) to Rules 402 and 403. See, e.g., *United States v. Winchenbach, 197 F.3d 548 (1st Cir. 1999)* (admissibility of a prior inconsistent statement offered for impeachment is governed by Rules 402 and 403, not Rule 608(b)); *United States v. Tarantino, 846 F.2d 1384 (D.C. Cir. 1988)* (admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403); *United States v. Lindemann, 85 F.3d 1232 (7th Cir. 1996)* (admissibility of extrinsic evidence of bias is governed by Rules 402 and 403).

It should be noted that the extrinsic evidence prohibition of Rule 608(b) bars any reference to the consequences that a witness might have suffered as a result of an alleged bad act. For example, Rule 608(b) prohibits counsel from mentioning that a witness was suspended or disciplined for the conduct that is the subject of impeachment, when that conduct is offered only to prove the character of the witness. See *United States v. Davis, 183 F.3d 231, 257 n.12 (3d Cir. 1999)* (emphasizing that in attacking the defendant's character for truthfulness "the government cannot make reference to Davis's forty-four day suspension or that Internal Affairs found that he lied about" an incident because "[s]uch evidence would not only be hearsay to the extent it contains assertion of fact, it would be inadmissible extrinsic evidence under Rule 608(b)"). See also Stephen A. Saltzburg, *Impeaching the Witness: Prior Bad Acts and Extrinsic Evidence, 7 Crim. Just. 28, 31 (Winter 1993)* ("counsel should not be permitted to circumvent the no-extrinsic-evidence provision by tucking a third person's opinion about prior acts into a question asked of the witness who has denied the act").

For purposes of consistency the term "credibility" has been replaced by the term "character for truthfulness" in the last sentence of subdivision (b). The term "credibility" is also used in subdivision (a). But the Committee found it unnecessary to substitute "character for truthfulness" for "credibility" in Rule 608(a), because subdivision (a)(1) already serves to limit impeachment to proof of such character. Rules 609(a) and 610 also use the term "credibility" when the intent of those Rules is to regulate impeachment of a witness' character for truthfulness. No inference should be derived from the fact that the Committee proposed an amendment to Rule 608(b) but not to Rules 609 and 610.

Notes of Advisory Committee on 2011 amendments. The language of Rule 608 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee is aware that the Rule's limitation of bad-act impeachment to "crossexamination" is trumped by Rule 607, which allows a party to impeach witnesses on direct examination. Courts have not relied on the term "on cross-examination" to limit impeachment that would otherwise be permissible under Rules 607 and 608. The Committee therefore concluded that no change to the language of the Rule was necessary in the context of a restyling project.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 609, N.D.R.Ev., Impeachment by Evidence of a Criminal Conviction

Form and style amendments to Rule 609 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The federal rule contains a subdivision (e) indicating that a conviction that is pending on appeal can still be used to impeach. The North Dakota drafters decided not to include this provision because it was already the law in N.D. that such a conviction could be used to impeach. The proposal includes the federal language because it seems to make sense to provide practitioners with information on this issue in the rule rather than requiring further research into other sources.

Another difference between the N.D. and federal rules is that the federal rule allows a court, under certain conditions, to extend the ten-year deadline for allowing admission of a conviction for impeachment. The N.D. drafters decided that the ten-year deadline should be absolute. The federal language is contained in the proposal for discussion by the Committee.

RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION ~~OF CRIME~~

~~(a) General rule. For the purpose of attacking the character for truthfulness of a witness;~~

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

~~(1) evidence that a witness other than an accused has been convicted of a crime must be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime must be admitted if the court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused; and~~

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

~~(2) evidence that any witness has been convicted of a crime must be admitted regardless of the punishment, if the elements of the crime required proof or admission of an~~

~~act of dishonesty or false statement by the witness.~~

(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving – or the witness's admitting – a dishonest act or false statement.

~~(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from any confinement imposed for that conviction, whichever is the later date unless the witness is still in confinement for that conviction.~~

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:

(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and

(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

~~(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction is vacated or has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other~~

~~equivalent procedure based on a finding of innocence.~~

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been vacated or is the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

~~(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. However, the court, in a criminal case, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.~~

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

EXPLANATORY NOTE

Rule 609 was amended, effective March 1, 1990, January 1, 1995, March 1, 2008; _____.

Rule 609 is taken from the Uniform Rules of Evidence (1974) ~~and has been modified only for the purpose of clarification. In subdivision (b), the phrase "unless the witness is still in confinement for that conviction" was added to make it clear that where there is no release the expiration of the ten-year period will not bring a confined witness under this section.~~

Subdivision (c) was modified by adding the words "~~is~~ vacated" in paragraph (1). This was done to assure that cases involving deferred imposition of sentences would be covered.

~~This rule varies from Federal Rule 609 in that the Federal rule gives a court discretion, in subdivision (b), to extend the ten-year period during which evidence of a conviction may be admitted. Under this rule, the court has no discretion in the matter.~~

Rule 609 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Subdivision (a) was amended, effective January 1, 1995, to track the 1990 federal amendment.

Subdivision (a) was amended, effective March 1, 2008. The amendment states the circumstances under which evidence of a conviction of a crime involving dishonesty or false statement may be admitted.

Rule 609 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; of September 28-29, 2006, pages 16-18; September 23-24, 1993, page 21; November 7-8, 1991, pages 4-5; October 25-26, 1990, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; April 26-27, 1979, page 9; April 8, 1976, pages 28-29; October 1, 1975, page 5. Fed.R.Ev. 609; Rule 609, SBAND proposal; Rule 609, Uniform Rules of Evidence (1974).

Rule 609. Impeachment by Evidence of a Criminal Conviction

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:
(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:
(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and
(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and
(2) for any crime regardless of the punishment, the evidence must be admitted if the court can readily determine that establishing the elements of the crime required proving--or the witness's admitting--a dishonest act or false statement.

(b) Limit on Using the Evidence After 10 Years. This subdivision (b) applies if more than 10 years have passed since the witness's conviction or release from confinement for it, whichever is later. Evidence of the conviction is admissible only if:
(1) its probative value, supported by specific facts and circumstances, substantially outweighs its prejudicial effect; and
(2) the proponent gives an adverse party reasonable written notice of the intent to use it so that the party has a fair opportunity to contest its use.

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:
(1) the conviction has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or
(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:
(1) it is offered in a criminal case;
(2) the adjudication was of a witness other than the defendant;
(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and
(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1935; Oct. 1, 1987; Dec. 1, 1990; Dec. 1, 2006.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. As a means of impeachment, evidence of conviction of crime is significant only because it stands as proof of the commission of the underlying criminal act. There is little dissent from the general proposition that at least some crimes are relevant to credibility but much disagreement among the cases and commentators about which crimes are usable for this purpose. See McCormick § 43; 2 Wright, Federal Practice and Procedure; Criminal § 416 (1969). The weight of traditional authority has been to allow use of felonies generally, without regard to the nature of the particular offense, and of *crimen falsi* without regard to the grade of the offense. This is the view accepted by Congress in the 1970 amendment of *§ 14-305 of the District of Columbia Code*, P.L. 91-358, 84 Stat. 473. Uniform Rule 21 and Model Code Rule 106 permit only crimes involving "dishonesty or false statement." Others have thought that the trial judge should have discretion to exclude convictions if the probative value of the evidence of the crime is substantially outweighed by the danger of unfair prejudice. *Luck v. United States, 121*

U.S.App.D.C. 151, 348 F.2d 763 (1965); McGowan, Impeachment of Criminal Defendants by Prior Convictions, 1970 Law & Soc. Order 1. Whatever may be the merits of those views, this rule is drafted to accord with the Congressional policy manifested in the 1970 legislation.

The proposed rule incorporates certain basic safeguards, in terms applicable to all witnesses but of particular significance to an accused who elects to testify. These protections include the imposition of definite time limitations, giving effect to demonstrated rehabilitation, and generally excluding juvenile adjudications.

Subdivision (a). For purposes of impeachment, crimes are divided into two categories by the rule: (1) those of what is generally regarded as felony grade, without particular regard to the nature of the offense, and (2) those involving dishonesty or false statement, without regard to the grade of the offense. Provable convictions are not limited to violations of federal law. By reason of our constitutional structure, the federal catalog of crimes is far from being a complete one, and resort must be had to the laws of the states for the specification of many crimes. For example, simple theft as compared with theft from interstate commerce. Other instances of borrowing are the Assimilative Crimes Act, making the state law of crimes applicable to the special territorial and maritime jurisdiction of the United States, *18 U.S.C. § 13*, and the provision of the Judicial Code disqualifying persons as jurors on the grounds of state as well as federal convictions, *28 U.S.C. § 1865*. For evaluation of the crime in terms of seriousness, reference is made to the congressional measurement of felony (subject to imprisonment in excess of one year) rather than adopting state definitions which vary considerably. See *28 U.S.C. § 1865*, supra, disqualifying jurors for conviction in state or federal court of crime punishable by imprisonment for more than one year.

Subdivision (b). Few statutes recognize a time limit on impeachment by evidence of conviction. However, practical considerations of fairness and relevancy demand that some boundary be recognized. See Ladd, Credibility Tests--Current Trends, *89 U.Pa.L.Rev. 166, 176-177 (1940).* This portion of the rule is derived from the proposal advanced in Recommendation Proposing in Evidence Code, § 788(5), p. 142, Cal.Law Rev.Comm'n (1965), though not adopted. See *California Evidence Code § 788.*

Subdivision (c). A pardon or its equivalent granted solely for the purpose of restoring civil rights lost by virtue of a conviction has no relevance to an inquiry into character. If, however, the pardon or other proceeding is hinged upon a showing of rehabilitation the situation is otherwise. The result under the rule is to render the conviction inadmissible. The alternative of allowing in evidence both the conviction and the rehabilitation has not been adopted for reasons of policy, economy of time, and difficulties of evaluation.

A similar provision is contained in *California Evidence Code § 788.* Cf. A.L.I. Model Penal Code, Proposed Official Draft § 306.6(3)(e) (1962), and discussion in A.L.I. Proceedings 310 (1961).

Pardons based on innocence have the effect, of course, of nullifying the conviction ab initio.

Subdivision (d). The prevailing view has been that a juvenile adjudication is not usable for impeachment. *Thomas v. United States, 74 App.D.C. 167, 121 F.2d 905 (1941); Cotton v. United States, 355 F.2d 480 (10th Cir. 1966).* This conclusion was based upon a variety of circumstances. By virtue of its informality, frequently diminished quantum of required proof, and other departures from accepted standards for criminal trials under the theory of parens patriae, the juvenile adjudication was considered to lack the precision and general probative value of the criminal conviction. While *In re Gault, 387 U.S. 1, 87 S.Ct. 1428, 18 L.Ed.2d 527 (1967),* no doubt eliminates these characteristics insofar as objectionable, other obstacles remain. Practical problems of administration are raised by the common provisions in juvenile legislation that records be kept confidential and that they be destroyed after a short time. While Gault was skeptical as to the realities of confidentiality of juvenile records, it also saw no constitutional obstacles to improvement. *387 U.S. at 25, 87 S.Ct. 1428.* See also Note, Rights and Rehabilitation in the Juvenile Courts, *67 Colum.L.Rev. 281, 289 (1967).* In addition, policy considerations much akin to those which dictate exclusion of adult convictions after rehabilitation has been established strongly suggest a rule of excluding juvenile adjudications. Admittedly, however, the rehabilitative process may in a given case be a demonstrated failure, or the strategic importance of a given witness may be so great as to require the overriding of general policy in the interests of particular justice. See *Giles v. Maryland, 386 U.S. 66, 87 S.Ct. 793, 17 L.Ed.2d 737 (1967).* Wigmore was outspoken in his condemnation of the disallowance of juvenile adjudications to impeach, especially when the witness is the complainant in a case of molesting a minor. 1 Wigmore § 196; 3 Id. §§ 924a, 980. The rule recognizes discretion in the judge to effect an accommodation among these various factors by departing from the general principle of exclusion. In deference to the general pattern and policy of juvenile statutes, however, no discretion is accorded when the witness is the accused in a criminal case.

Subdivision (e). The presumption of correctness which ought to attend judicial proceedings supports the position that pendency of an appeal does not preclude use of a conviction for impeachment. *United States v. Empire Packing Co., 174 F.2d 16 (7th Cir.1949),* cert. denied *337 U.S. 959, 69 S.Ct. 1534, 93 L.Ed. 1758; Bloch v. United States, 226 F.2d 185* (9th Cir.1955), cert. denied *350 U.S. 948, 76 S.Ct. 323, 100 L.Ed. 826* and *353 U.S. 959, 77 S.Ct. 868, 1 L.Ed.2d 910;* and see *Newman v. United States, 331 F.2d 968 (8th Cir.1964),* Contra, *Campbell v. United States, 85*

U.S.App.D.C. 133, 176 F.2d 45 (1949). The pendency of an appeal is, however, a qualifying circumstance properly considerable.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 609(a) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(1), enacted in 1970. The Rule provided that:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible but only if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involved dishonesty or false statement regardless of the punishment.

As reported to the Committee by the Subcommittee, Rule 609(a) was amended to read as follows:

For the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime is admissible only if the crime (1) was punishable by death or imprisonment in excess of one year, unless the court determines that the danger of unfair prejudice outweighs the probative value of the evidence of the conviction, or (2) involved dishonesty or false statement.

In full committee, the provision was amended to permit attack upon the credibility of a witness by prior conviction only if the prior crime involved dishonesty or false statement. While recognizing that the prevailing doctrine in the federal courts and in most States allows a witness to be impeached by evidence of prior felony convictions without restriction as to type, the Committee was of the view that, because of the danger of unfair prejudice in such practice and the deterrent effect upon an accused who might wish to testify, and even upon a witness who was not the accused, cross-examination by evidence of prior conviction should be limited to those kinds of convictions bearing directly on credibility, i.e., crimes involving dishonesty or false statement.

Rule 609(b) as submitted by the Court was modeled after Section 133(a) of Public Law 91-358, 14 D.C. Code 305(b)(2)(B), enacted in 1970. The Rule provided:

Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of the release of the witness from confinement imposed for his most recent conviction, or the expiration of the period of his parole, probation, or sentence granted or imposed with respect to his most recent conviction, whichever is the later date.

Under this formulation, a witness' entire past record of criminal convictions could be used for impeachment (provided the conviction met the standard of subdivision (a)), if the witness had been most recently released from confinement, or the period of his parole or probation had expired, within ten years of the conviction.

The Committee amended the Rule to read in the text of the 1971 Advisory Committee version to provide that upon the expiration of ten years from the date of a conviction of a witness, or of his release from confinement for that offense, that conviction may no longer be used for impeachment. The Committee was of the view that after ten years following a person's release from confinement (or from the date of his conviction) the probative value of the conviction with respect to that person's credibility diminished to a point where it should no longer be admissible.

Rule 609(c) as submitted by the Court provided in part that evidence of a witness' prior conviction is not admissible to attack his credibility if the conviction was the subject of a pardon, annulment, or other equivalent procedure, based on a showing of rehabilitation, and the witness has not been convicted of a subsequent crime. The Committee amended the Rule to provide that the "subsequent crime" must have been "punishable by death or imprisonment in excess of one year", on the ground that a subsequent conviction of an offense not a felony is insufficient to rebut the finding that the witness has been rehabilitated. The Committee also intends that the words "based on a finding of the rehabilitation of the person convicted" apply not only to "certificate of rehabilitation, or other equivalent procedure," but also to "pardon" and "annulment."

Notes of Committee on the Judiciary, Senate Report No. 93-1277. As proposed by the Supreme Court, the rule would allow the use of prior convictions to impeach if the crime was a felony or a misdemeanor if the misdemeanor involved dishonesty or false statement. As modified by the House, the rule would admit prior convictions for impeachment purposes only if the offense, whether felony or misdemeanor, involved dishonesty or false statement.

The committee has adopted a modified version of the House-passed rule. In your committee's view, the danger of unfair prejudice is far greater when the accused, as opposed to other witnesses, testifies, because the jury may be prejudiced not merely on the question of credibility but also on the ultimate question of guilt or innocence. Therefore, with respect to defendants, the committee agreed with the House limitation that only offenses involving false statement or dishonesty may be used. By that phrase, the committee means crimes such as perjury or subordination of perjury, false statement, criminal fraud, embezzlement or false pretense, or any other offense, in the nature of crimen falsi the commission of which involves some element of untruthfulness, deceit, or falsification bearing on the accused's propensity to testify truthfully.

With respect to other witnesses, in addition to any prior conviction involving false statement or dishonesty, any other felony may be used to impeach if, and only if, the court finds that the probative value of such evidence outweighs its prejudicial effect against the party offering that witness.

Notwithstanding this provision, proof of any prior offense otherwise admissible under rule 404 could still be offered for the purposes sanctioned by that rule. Furthermore, the committee intends that notwithstanding this rule, a defendant's misrepresentation regarding the existence or nature of prior convictions may be met by rebuttal evidence, including the record of such prior convictions. Similarly, such records may be offered to rebut representations made by the defendant regarding his attitude toward or willingness to commit a general category of offense, although denials or other representations by the defendant regarding the specific conduct which forms the basis of the charge against him shall not make prior convictions admissible to rebut such statement.

In regard to either type of representation, of course, prior convictions may be offered in rebuttal only if the defendant's statement is made in response to defense counsel's questions or is made gratuitously in the course of cross-examination. Prior convictions may not be offered as rebuttal evidence if the prosecution has sought to circumvent the purpose of this rule by asking questions which elicit such representations from the defendant.

One other clarifying amendment has been added to this subsection, that is, to provide that the admissibility of evidence of a prior conviction is permitted only upon cross-examination of a witness. It is not admissible if a person does not testify. It is to be understood, however, that a court record of a prior conviction is admissible to prove that conviction if the witness has forgotten or denies its existence.

Although convictions over ten years old generally do not have much probative value, there may be exceptional circumstances under which the conviction substantially bears on the credibility of the witness. Rather than exclude all convictions over 10 years old, the committee adopted an amendment in the form of a final clause to the section granting the court discretion to admit convictions over 10 years old, but only upon a determination by the court that the probative value of the conviction supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

It is intended that convictions over 10 years old will be admitted very rarely and only in exceptional circumstances. The rules provide that the decision be supported by specific facts and circumstances thus requiring the court to make specific findings on the record as to the particular facts and circumstances it has considered in determining that the probative value of the conviction substantially outweighs its prejudicial impact. It is expected that, in fairness, the court will give the party against whom the conviction is introduced a full and adequate opportunity to contest its admission.

Notes of Conference Committee, House Report No. 93-1597. Rule 609 defines when a party may use evidence of a prior conviction in order to impeach a witness. The Senate amendments make changes in two subsections of Rule 609.

The House bill provides that the credibility of a witness can be attacked by proof of prior conviction of a crime only if the crime involves dishonesty or false statement. The Senate amendment provides that a witness' credibility may be attacked if the crime (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted or (2) involves dishonesty or false statement, regardless of the punishment.

The Conference adopts the Senate amendment with an amendment. The Conference amendment provides that the credibility of a witness, whether a defendant or someone else, may be attacked by proof of a prior conviction but only if the crime: (1) was punishable by death or imprisonment in excess of one year under the law under which he was convicted and the court determines that the probative value of the conviction outweighs its prejudicial effect to the defendant; or (2) involved dishonesty or false statement regardless of the punishment.

By the phrase "dishonesty and false statement" the Conference means crimes such as perjury or subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully.

The admission of prior convictions involving dishonesty and false statement is not within the discretion of the Court. Such convictions are peculiarly probative of credibility and, under this rule, are always to be admitted. Thus, judicial discretion granted with respect to the admissibility of other prior convictions is not applicable to those involving dishonesty or false statement.

With regard to the discretionary standard established by paragraph (1) of rule 609(a), the Conference determined that the prejudicial effect to be weighed against the probative value of the conviction is specifically the prejudicial effect to the defendant. The danger of prejudice to a witness other than the defendant (such as injury to the witness' reputation in his community) was considered and rejected by the Conference as an element to be weighed in determining admissibility. It was the judgment of the Conference that the danger of prejudice to a nondefendant witness is outweighed by the need for the trier of fact to have as much relevant evidence on the issue of credibility as possible. Such evidence should only be excluded where it presents a danger of improperly influencing the outcome of the trial by persuading the trier of fact to convict the defendant on the basis of his prior criminal record.

The House bill provides in subsection (b) that evidence of conviction of a crime may not be used for impeachment purposes under subsection (a) if more than ten years have elapsed since the date of the conviction or the date the witness was released from confinement imposed for the conviction, whichever is later. The Senate amendment permits the use of convictions older than ten years, if the court determines, in the interests of justice, that the probative value of the conviction, supported by specific facts and circumstances, substantially outweighs its prejudicial effect.

The Conference adopts the Senate amendment with an amendment requiring notice by a party that he intends to request that the court allow him to use a conviction older than ten years. The Conferees anticipate that a written notice, in order to give the adversary a fair opportunity to contest the use of the evidence, will ordinarily include such information as the date of the conviction, the jurisdiction, and the offense or statute involved. In order to eliminate the possibility that the flexibility of this provision may impair the ability of a party-opponent to prepare for trial, the Conferees intend that the notice provision operate to avoid surprise.

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

Notes of Advisory Committee on 1990 amendment. The amendment to Rule 609(a) makes two changes in the rule. The first change removes from the rule the limitation that the conviction may only be elicited during cross-examination, a limitation that virtually every circuit has found to be inapplicable. It is common for witnesses to reveal on direct examination their convictions to "remove the sting" of the impeachment. See e.g., *United States v. Bad Cob, 560 F.2d 877 (8th Cir. 1977).* The amendment does not contemplate that a court will necessarily permit proof of prior convictions through testimony, which might be time-consuming and more prejudicial than proof through a written record. Rules 403 and 611(a) provide sufficient authority for the court to protect against unfair or disruptive methods of proof.

The second change effected by the amendment resolves an ambiguity as to the relationship of Rules 609 and 403 with respect to impeachment of witnesses other than the criminal defendant. The amendment does not disturb the special balancing test for the criminal defendant who chooses to testify. Thus, the rule recognizes that, in virtually every case in which prior convictions are used to impeach the testifying defendant, the defendant faces a unique risk of prejudice--i.e., the danger that convictions that would be excluded under *Fed. R. Evid. 404* will be misused by a jury as propensity evidence despite their introduction solely for impeachment purposes. Although the rule does not forbid all use of convictions to impeach a defendant, it requires that the government show that the probative value of convictions as impeachment evidence outweighs their prejudicial effect.

Prior to the amendment, the rule appeared to give the defendant the benefit of the special balancing test when defense witnesses other than the defendant were called to testify. In practice, however, the concern about unfairness to the defendant is most acute when the defendant's own convictions are offered as evidence. Almost all of the decided cases concern this type of impeachment, and the amendment does not deprive the defendant of any meaningful protection, since Rule 403 now clearly protects against unfair impeachment of any defense witness other than the defendant. There are cases in which a defendant might be prejudiced when a defense witness is impeached. Such cases may arise, for example, when the witness bears a special relationship to the defendant such that the defendant is likely to suffer some spill-over effect from impeachment of the witness.

The amendment also protects other litigants from unfair impeachment of their witnesses. The danger of prejudice from the use of prior convictions is not confined to criminal defendants. Although the danger that prior convictions will be misused as character evidence is particularly acute when the defendant is impeached, the danger exists in other situations as well. The amendment reflects the view that it is desirable to protect all litigants from the unfair use of prior convictions, and that the ordinary balancing test of Rule 403, which provides that evidence shall not be excluded unless its prejudicial effect substantially outweighs its probative value, is appropriate for assessing the admissibility of prior convictions for impeachment of any witness other than a criminal defendant.

The amendment reflects a judgment that decisions interpreting Rule 609(a) as requiring a trial court to admit convictions in civil cases that have little, if anything, to do with credibility reach undesirable results. See, e.g., *Diggs v. Lyons, 741 F.2d 577 (3d Cir. 1984),* cert. denied, *105 S. Ct. 2157 (1985).* The amendment provides the same protection against unfair prejudice arising from prior convictions used for impeachment purposes as the rules provide for other evidence. The amendment finds support in decided cases. See, e.g., *Petty v. Ideco, 761 F.2d 1146 (5th Cir. 1985); Czaka v. Hickman, 703 F.2d 317 (8th Cir. 1983).*

Fewer decided cases address the question whether Rule 609(a) provides any protection against unduly prejudicial prior convictions used to impeach government witnesses. Some courts have read Rule 609(a) as giving the government no protection for its witnesses. See, e.g., *United States v. Thorne, 547 F.2d 56 (8th Cir. 1976); United States v. Nevitt, 563 F.2d 406* (9th Cir. 1977), cert. denied, *444 U.S. 847 (1979).* This approach also is rejected by the amendment. There are cases in which impeachment of government witnesses with prior convictions that have little, if anything, to do with credibility may result in unfair prejudice to the government's interest in a fair trial and unnecessary embarrassment to a

witness. *Fed. R. Evid. 412* already recognizes this and excluded certain evidence of past sexual behavior in the context of prosecutions for sexual assaults.

The amendment applies the general balancing test of Rule 403 to protect all litigants against unfair impeachment of witnesses. The balancing test protects civil litigants, the government in criminal cases, and the defendant in a criminal case who calls other witnesses. The amendment addresses prior convictions offered under Rule 609, not for other purposes, and does not run afoul, therefore, of *Davis v. Alaska, 415 U.S. 308 (1974).* Davis involved the use of a prior juvenile adjudication not to prove a past law violation, but to prove bias. The defendant in a criminal case has the right to demonstrate the bias of a witness and to be assured a fair trial, but not to unduly prejudice a trier of fact. See generally Rule 412. In any case in which the trial court believes that confrontation rights require admission of impeachment evidence, obviously the Constitution would take precedence over the rule.

The probability that prior convictions of an ordinary government witness will be unduly prejudicial is low in most criminal cases. Since the behavior of the witness is not the issue in dispute in most cases, there is little chance that the trier of fact will misuse the convictions offered as impeachment evidence as propensity evidence. Thus, trial courts will be skeptical when the government objects to impeachment of its witnesses with prior convictions. Only when the government is able to point to a real danger of prejudice that is sufficient to outweigh substantially the probative value of the conviction for impeachment purposes will the conviction be excluded.

The amendment continues to divide subdivision (a) into subsections (1) and (2). The Committee recommended no substantive change in subdivision (a)(2), even though some cases raise a concern about the proper interpretation of the words "dishonesty or false statement." These words were used but not explained in the original Advisory Committee Note accompanying Rule 609. Congress extensively debated the rule, and the Report of the House and Senate Conference Committee states that "[b]y the phrase 'dishonesty and false statement,' the Conference means crimes such as perjury, subordination of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of crimen falsi, commission of which involves some element of deceit, untruthfulness, or falsification bearing on the accused's propensity to testify truthfully." The Advisory Committee concluded that the Conference Report provides sufficient guidance to trial courts and that no amendment is necessary, notwithstanding some decisions that arguably take an unduly broad view of "dishonesty," admitting convictions such as for bank robbery or bank larceny. Subsection (a)(2) continues to apply to any witness, including a criminal defendant.

Finally, the Committee determined that it was unnecessary to add to the rule language stating that, when a prior conviction is offered under Rule 609, the trial court is to consider the probative value of the prior conviction for impeachment, not for other purposes. The Committee concluded that the title of the rule, its first sentence, and its placement among the impeachment rules clearly establish that evidence offered under Rule 609 is offered only for purposes of impeachment.

Notes of Advisory Committee on 2006 amendments. The amendment provides that Rule 609(a)(2) mandates the admission of evidence of a conviction only when the conviction required the proof of (or in the case of a guilty plea, the admission of) an act of dishonesty or false statement. Evidence of all other convictions is inadmissible under this subsection, irrespective of whether the witness exhibited dishonesty or made a false statement in the process of the commission of the crime of conviction. Thus, evidence that a witness was convicted for a crime of violence, such as murder, is not admissible under Rule 609(a)(2), even if the witness acted deceitfully in the course of committing the crime.

The amendment is meant to give effect to the legislative intent to limit the convictions that are to be automatically admitted under subdivision (a)(2). The Conference Committee provided that by "dishonesty and false statement" it meant "crimes such as perjury, subornation of perjury, false statement, criminal fraud, embezzlement, or false pretense, or any other offense in the nature of *crimen falsi,* the commission of which involves some element of deceit, untruthfulness, or falsification bearing on the [witness's] propensity to testify truthfully." Historically, offenses classified as *crimina falsi* have included only those crimes in which the ultimate criminal act was itself an act of deceit. *See* Green, *Deceit and the Classification of Crimes: Federal Rule of Evidence 609(a)(2) and the Origins of* Crimen Falsi, *90 J. Crim. L. & Criminology 1087 (2000).*

Evidence of crimes in the nature of *crimina falsi* must be admitted under Rule 609(a)(2), regardless of how such crimes are specifically charged. For example, evidence that a witness was convicted of making a false claim to a federal agent is admissible under this subdivision regardless of whether the crime was charged under a section that expressly references deceit (e.g., *18 U.S.C. § 1001*, Material Misrepresentation to the Federal Government) or a section that does not (*e.g., 18 U.S.C. § 1503*, Obstruction of Justice).

The amendment requires that the proponent have ready proof that the conviction required the factfinder to find, or the defendant to admit, an act of dishonesty or false statement. Ordinarily, the statutory elements of the crime will indicate whether it is one of dishonesty or false statement. Where the deceitful nature of the crime is not apparent from the

statute and the face of the judgment--as, for example, where the conviction simply records a finding of guilt for a statutory offense that does not reference deceit expressly--a proponent may offer information such as an indictment, a statement of admitted facts, or jury instructions to show that the factfinder had to find, or the defendant had to admit, an act of dishonesty or false statement in order for the witness to have been convicted. *Cf. Taylor v. United States, 495 U.S. 575, 602 (1990)* (providing that a trial court may look to a charging instrument or jury instructions to ascertain the nature of a prior offense where the statute is insufficiently clear on its face); *Shepard v. United States, 125 S.Ct. 1254 (2005)* (the inquiry to determine whether a guilty plea to a crime defined by a nongeneric statute necessarily admitted elements of the generic offense was limited to the charging document's terms, the terms of a plea agreement or transcript of colloquy between judge and defendant in which the factual basis for the plea was confirmed by the defendant, or a comparable judicial record). But the amendment does not contemplate a "mini-trial" in which the court plumbs the record of the previous proceeding to determine whether the crime was in the nature of *crimen falsi.*

The amendment also substitutes the term "character for truthfulness" for the term "credibility" in the first sentence of the Rule. The limitations of Rule 609 are not applicable if a conviction is admitted for a purpose other than to prove the witness's character for untruthfulness. *See, e.g., United States v. Lopez, 979 F.2d 1024 (5th Cir. 1992)* (Rule 609 was not applicable where the conviction was offered for purposes of contradiction). The use of the term "credibility" in subdivision (d) is retained, however, as that subdivision is intended to govern the use of a juvenile adjudication for any type of impeachment.

Notes of Advisory Committee on 2011 amendments. The language of Rule 609 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 610, N.D.R.Ev., Religious Beliefs or Opinions

Form and style amendments to Rule 610 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

~~Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.~~

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

EXPLANATORY NOTE

Rule 610 was amended, effective March 1, 1990; _____.

This rule is adopted from ~~Rule~~ Fed.R.Ev. 610 ~~of the Federal Rules of Evidence. It should be noted that the~~ The rule prohibits admission of evidence of religious beliefs only if offered to affect credibility. Such evidence may be offered for other purposes, such as showing bias.

Rule 610 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 610 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; March 24-25, 1988, page 12; December 3, 1987, page 15; June 3, 1976, page 2; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 610~~, Federal Rules of Evidence~~; Rule 610, SBAND proposal.

Rule 610. Religious Beliefs or Opinions

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1936; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. While the rule forecloses inquiry into the religious beliefs or opinions of a witness for the purpose of showing that his character for truthfulness is affected by their nature, an inquiry for the purpose of showing interest or bias because of them is not within the prohibition. Thus disclosure of affiliation with a church which is a party to the litigation would be allowable under the rule. Cf. *Tucker v. Reil, 51 Ariz. 357, 77 P.2d 203 (1938).* To the same effect, though less specifically worded, is *California Evidence Code § 789.* See 3 Wigmore § 936.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 610 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 611, N.D.R.Ev., Mode and Order of Examining Witnesses and Presenting Evidence

Form and style amendments to Rule 611 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The explanatory note contained an item on how the court could allow the use of an anatomically correct doll in a child's testimony. This note is deleted in the proposal because it seems out of place.

RULE 611. MODE AND ORDER OF ~~INTERROGATION AND PRESENTATION~~ EXAMINING WITNESSES AND PRESENTING EVIDENCE

~~(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.~~

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

~~(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court, in the exercise of discretion, may permit inquiry into additional matters as if on direct examination.~~

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

~~(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily,~~

~~leading questions should be permitted on cross-examination. Whenever a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.~~

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

EXPLANATORY NOTE

Rule 610 was amended, effective March 1, 1990; _____.

Rule 611 is substantially the same as ~~Rule~~ Fed.R.Ev. 611 ~~of the Federal Rules of Evidence~~. The rule gives the court wide discretion over the mode and order of presenting evidence. ~~This comports with established North Dakota case law. See Killmer v. Duchscherer, 72 N.W.2d 650 (N.D. 1955).~~

~~The trial judge may allow a child witness to use an anatomically correct doll if a proper foundation is laid. The doll may not be used in a suggestive manner and the nonverbal testimony must be relevant. See, State v. Jenkins, 326 N.W.2d 67 (N.D. 1982).~~

Subdivision (c) was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 611 was amended, effective _____, in response to the December 1,

2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____: March 24-25, 1988, page 12; December 3, 1987, pages 15-16; May 21-22, 1987, pages 18-19; February 19-20, 1987, pages 10-12; June 3, 1976, page 2; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 611~~, Federal Rules of Evidence~~; Rule 611, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 31-04-01, 31-04-04, 31-04-05.

~~Rules:~~

~~Considered: Rules 30, 31, 32, 43(b), NDRCivP.~~

Cross Reference: N.D.R.Civ.P. 30 (Depositions by Oral Examination), N.D.R.Civ.P. 31 (Depositions by Written Questions), N.D.R.Civ.P. 43 (Evidence).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:
(1) make those procedures effective for determining the truth;
(2) avoid wasting time; and
(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:
(1) on cross-examination; and
(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1936; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Subdivision (a). Spelling out detailed rules to govern the mode and order of interrogating witnesses presenting evidence is neither desirable nor feasible. The ultimate responsibility for the effective working of the adversary system rests with the judge. The rule sets forth the objectives which he should seek to attain.

Item (1) restates in broad terms the power and obligation of the judge as developed under common law principles. It covers such concerns as whether testimony shall be in the form of a free narrative or responses to specific questions, McCormick § 5, the order of calling witnesses and presenting evidence, 6 Wigmore § 1867, the use of demonstrative evidence, McCormick § 179, and the many other questions arising during the course of a trial which can be solved only by the judge's common sense and fairness in view of the particular circumstances.

Item (2) is addressed to avoidance of needless consumption of time, a matter of daily concern in the disposition of cases. A companion piece is found in the discretion vested in the judge to exclude evidence as a waste of time in Rule 403(b).

Item (3) calls for a judgment under the particular circumstances whether interrogation tactics entail harassment or undue embarrassment. Pertinent circumstances include the importance of the testimony, the nature of the inquiry, its relevance to credibility, waste of time, and confusion. McCormick § 42. In *Alford v. United States, 282 U.S. 687, 694, 51 S.Ct. 218, 75 L.Ed. 624 (1931),* the Court pointed out that, while the trial judge should protect the witness from questions which "go beyond the bounds of proper cross-examination merely to harass, annoy or humiliate," this protection by no means forecloses efforts to discredit the witness. Reference to the transcript of the prosecutor's cross-examination in *Berger v. United States, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 1314 (1935),* serves to lay at rest any doubts as to the need for judicial control in this area.

The inquiry into specific instances of conduct of a witness allowed under Rule 608(b) is, of course, subject to this rule.

Subdivision (b). The tradition in the federal courts and in numerous state courts has been to limit the scope of cross-examination to matters testified to on direct, plus matters bearing upon the credibility of the witness. Various reasons have been advanced to justify the rule of limited cross-examination. (1) A party vouches for his own witness but only to the extent of matters elicited on direct. *Resurrection Gold Mining Co. v. Fortune Gold Mining Co., 129 F. 668, 675 (8th Cir. 1904),* quoted in Maguire, Weinstein, et al., Cases on Evidence 277, n. 38 (5th ed. 1965). But the concept of vouching is discredited, and Rule 607 rejects it. (2) A party cannot ask his own witness leading questions. This is a problem properly solved in terms of what is necessary for a proper development of the testimony rather than by a mechanistic formula similar to the vouching concept. See discussion under subdivision (c). (3) A practice of limited cross-examination promotes orderly presentation of the case. *Finch v. Weiner, 109 Conn. 616, 145 A. 31 (1929).* While this latter reason has merit, the matter is essentially one of the order of presentation and not one in which involvement at

the appellate level is likely to prove fruitful. See for example, *Moyer v. Aetna Life Ins. Co., 126 F.2d 141 (3rd Cir. 1942); Butler v. New York Central R. Co., 253 F.2d 281 (7th Cir. 1958); United States v. Johnson, 285 F.2d 35 (9th Cir. 1960); Union Automobile Indemnity Ass'n. v. Capitol Indemnity Ins. Co., 310 F.2d 318 (7th Cir. 1962).* In evaluating these considerations, McCormick says:

"The foregoing considerations favoring the wide-open or restrictive rules may well be thought to be fairly evenly balanced. There is another factor, however, which seems to swing the balance overwhelmingly in favor of the wide-open rule. This is the consideration of economy of time and energy. Obviously, the wide-open rule presents little or no opportunity for dispute in its application. The restrictive practice in all its forms, on the other hand, is productive in many court rooms, of continual bickering over the choice of the numerous variations of the 'scope of the direct' criterion, and of their application to particular cross-questions. These controversies are often reventilated on appeal, and reversals for error in their determination are frequent. Observance of these vague and ambiguous restrictions is a matter of constant and hampering concern to the cross-examiner. If these efforts, delays and misprisions were the necessary incidents to the guarding of substantive rights or the fundamentals of fair trial, they might be worth the cost. As the price of the choice of an obviously debatable regulation of the order of evidence, the sacrifice seems misguided. The American Bar Association's Committee for the Improvement of the Law of Evidence for the year 1937-38 said this:

"The rule limiting cross-examination to the precise subject of the direct examination is probably the most frequent rule (except the Opinion rule) leading in the trial practice today to refined and technical quibbles which obstruct the progress of the trial, confuse the jury, and give rise to appeal on technical grounds only. Some of the instances in which Supreme Courts have ordered new trials for the mere transgression of this rule about the order of evidence have been astounding.

"We recommend that the rule allowing questions upon any part of the issue known to the witness * * * be adopted * * *' " McCormick, § 27, p. 51. See also 5 Moore's Federal Practice P 43.10 (2nd ed. 1964).

The provision of the second sentence, that the judge may in the interests of justice limit inquiry into new matters on cross-examination, is designed for those situations in which the result otherwise would be confusion, complication, or protraction of the case, not as a matter of rule but as demonstrable in the actual development of the particular case.

The rule does not purport to determine the extent to which an accused who elects to testify thereby waives his privilege against self-incrimination. The question is a constitutional one, rather than a mere matter of administering the trial. Under *Simmons v. United States, 390 U.S. 377, 88 S.Ct. 967, 19 L.Ed.2d 1247 (1968),* no general waiver occurs when the accused testifies on such preliminary matters as the validity of a search and seizure or the admissibility of a confession. Rule 104(d), supra. When he testifies on the merits, however, can he foreclose inquiry into an aspect or element of the crime by avoiding it on direct? The affirmative answer given in *Tucker v. United States, 5 F.2d 818 (8th Cir. 1925),* is inconsistent with the description of the waiver as extending to "all other relevant facts" in *Johnson v. United States, 318 U.S. 189, 195, 63 S.Ct. 549, 87 L.Ed. 704 (1943).* See also *Brown v. United States, 356 U.S. 148, 78 S.Ct. 622, 2 L.Ed.2d 589 (1958).* The situation of an accused who desires to testify on some but not all counts of a multiple-count indictment is one to be approached, in the first instance at least, as a problem of severance under *Rule 14 of the Federal Rules of Criminal Procedure. Cross v. United States, 118 U.S.App.D.C. 324, 335 F.2d 987 (1964).* Cf. *United States v. Baker, 262 F.Supp. 657, 686 (D.D.C. 1966).* In all events, the extent of the waiver of the privilege against self-incrimination ought not to be determined as a by-product of a rule on scope of cross-examination.

Subdivision (c). The rule continues the traditional view that the suggestive powers of the leading question are as a general proposition undesirable. Within this tradition, however, numerous exceptions have achieved recognition: The witness who is hostile, unwilling, or biased; the child witness or the adult with communication problems; the witness whose recollection is exhausted; and undisputed preliminary matters. 3 Wigmore §§ 774-778. An almost total unwillingness to reverse for infractions has been manifested by appellate courts. See cases cited in 3 Wigmore § 770. The matter clearly falls within the area of control by the judge over the mode and order of interrogation and presentation and accordingly is phrased in words of suggestion rather than command.

The rule also conforms to tradition in making the use of leading questions on cross-examination a matter of right. The purpose of the qualification "ordinarily" is to furnish a basis for denying the use of leading questions when the cross-examination is cross-examination in form only and not in fact, as for example the "cross-examination" of a party by his own counsel after being called by the opponent (savoring more of re-direct) or of an insured defendant who proves to be friendly to the plaintiff.

The final sentence deals with categories of witnesses automatically regarded and treated as hostile. *Rule 43(b) of the Federal Rules of Civil Procedure* has included only "an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party." This limitation virtually to persons whose statements would stand as admissions is believed to be an unduly narrow concept of those who may safely be regarded as hostile without further demonstration. See, for example, *Maryland Casualty Co. v. Kador, 225 F.2d 120 (5th Cir. 1955),* and *Degelos v. Fidelity and Casualty Co., 313 F.2d 809 (5th Cir. 1963),* holding despite the

language of rule 43(b) that an insured fell within it, though not a party in an action under the Louisiana direct action statute. The phrase of the rule, "witness identified with" an adverse party, is designed to enlarge the category of persons thus callable.

Notes of Committee on the Judiciary, House Report No. 93-650. As submitted by the Court, Rule 611(b) provided:

A witness may be cross-examined on any matter relevant to any issue in the case, including credibility. In the interests of justice, the judge may limit cross-examination with respect to matters not testified to on direct examination.

The Committee amended this provision to return to the rule which prevails in the federal courts and thirty-nine State jurisdictions. As amended, the Rule is in the text of the 1969 Advisory Committee draft. It limits cross-examination to credibility and to matters testified to on direct examination, unless the judge permits more, in which event the cross-examiner must proceed as if on direct examination. This traditional rule facilitates orderly presentation by each party at trial. Further, in light of existing discovery procedures, there appears to be no need to abandon the traditional rule.

The third sentence of Rule 611(c) as submitted by the Court provided that:

In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions.

The Committee amended this Rule to permit leading questions to be used with respect to any hostile witness, not only an adverse party or person identified with such adverse party. The Committee also substituted the word "When" for the phrase "In civil cases" to reflect the possibility that in criminal cases a defendant may be entitled to call witnesses identified with the government, in which event the Committee believed the defendant should be permitted to inquire with leading questions.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. Rule 611(b) as submitted by the Supreme Court permitted a broad scope of cross-examination: "cross-examination on any matter relevant to any issue in the case" unless the judge, in the interests of justice, limited the scope of cross-examination.

The House narrowed the Rule to the more traditional practice of limiting cross-examination to the subject matter of direct examination (and credibility), but with discretion in the judge to permit inquiry into additional matters in situations where that would aid in the development of the evidence or otherwise facilitate the conduct of the trial.

The committee agrees with the House amendment. Although there are good arguments in support of broad cross-examination from perspectives of developing all relevant evidence, we believe the factors of insuring an orderly and predictable development of the evidence weigh in favor of the narrower rule, especially when discretion is given to the trial judge to permit inquiry into additional matters. The committee expressly approves this discretion and believes it will permit sufficient flexibility allowing a broader scope of cross-examination whenever appropriate.

The House amendment providing broader discretionary cross-examination permitted inquiry into additional matters only as if on direct examination. As a general rule, we concur with this limitation, however, we would understand that this limitation would not preclude the utilization of leading questions if the conditions of subsection (c) of this rule were met, bearing in mind the judge's discretion in any case to limit the scope of cross-examination [see McCormick on Evidence, §§ 24-26 (especially 24) (2d ed. 1972)].

Further, the committee has received correspondence from Federal judges commenting on the applicability of this rule to section 1407 of title 28. It is the committee's judgment that this rule as reported by the House is flexible enough to provide sufficiently broad cross-examination in appropriate situations in multidistrict litigation.

As submitted by the Supreme Court, the rule provided: "In civil cases, a party is entitled to call an adverse party or witness identified with him and interrogate by leading questions."

The final sentence of subsection (c) was amended by the House for the purpose of clarifying the fact that a "hostile witness"--that is a witness who is hostile in fact--could be subject to interrogation by leading questions. The rule as submitted by the Supreme Court declared certain witnesses hostile as a matter of law and thus subject to interrogation by leading questions without any showing of hostility in fact. These were adverse parties or witnesses identified with adverse parties. However, the wording of the first sentence of subsection (c) while generally, prohibiting the use of leading questions on direct examination, also provides "except as may be necessary to develop his testimony." Further, the first paragraph of the Advisory Committee note explaining the subsection makes clear that they intended that leading questions could be asked of a hostile witness or a witness who was unwilling or biased and even though that witness was not associated with an adverse party. Thus, we question whether the House amendment was necessary.

However, concluding that it was not intended to affect the meaning of the first sentence of the subsection and was intended solely to clarify the fact that leading questions are permissible in the interrogation of a witness, who is hostile in fact, the committee accepts that House amendment.

The final sentence of this subsection was also amended by the House to cover criminal as well as civil cases. The committee accepts this amendment, but notes that it may be difficult in criminal cases to determine when a witness is "identified with an adverse party," and thus the rule should be applied with caution.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 611 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 612, N.D.R.Ev., Writing or Object Used to Refresh a Witness's Memory

Form and style amendments to Rule 612 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

This rule is significantly reorganized and condensed, with the essential elements preserved in a tighter form. The Committee may wish to examine the rule closely to make sure nothing was lost in condensation. Allowing the use of an object to refresh memory is retained, even though this is not included in the federal rule.

RULE 612. WRITING ~~OR OBJECT~~ USED TO REFRESH A WITNESS'S MEMORY

~~(a) While testifying. If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.~~

~~(b) Before testifying. If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.~~

~~(c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court~~

~~in its discretion determines that the interests of justice so require, declaring a mistrial.~~

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. But if production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If the producing party claims that a writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing or Object. If a writing or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or – if justice so requires – declare a mistrial.

EXPLANATORY NOTE

Rule 612 was amended, effective March 1, 1990; _____.

Rule 612 is identical to Rule 612 of the Uniform Rules of Evidence, (1974). The rule

varies from its federal counterpart in ~~structure, and in~~ that it applies to objects as well as to writings. It was felt that objects used to refresh the memory of a witness, such as a recording tape, should be subject to production. This rule also departs from the federal rule by explicitly providing for inspection of writing or object at its location if production of the writing or object at trial is impracticable.

Subdivisions (a) and (b) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 612 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 3. Fed.R.Ev. 612; Rule 612, Uniform Rules of Evidence (1974); Rule 612, SBAND proposal.

~~Rules:~~

~~Considered: Rule 16(h), NDRCrimP.~~

Cross Reference: N.D.R.Crim.P. 16 (Discovery and Inspection).

Rule 612. Writing Used to Refresh a Witness's Memory

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing to refresh memory:
(1) while testifying; or
(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. Unless *18 U.S.C. § 3500* provides otherwise in a criminal case, an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. If the producing party claims that the writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing. If a writing is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or--if justice so requires--declare a mistrial.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1936; Oct. 1, 1987.)

Notes of Advisory Committee on Rules. The treatment of writings used to refresh recollection while on the stand is in accord with settled doctrine. McCormick § 9, p. 15. The bulk of the case law has, however, denied the existence of any right to access by the opponent when the writing is used prior to taking the stand, though the judge may have discretion in the matter. *Goldman v. United States, 316 U.S. 129, 62 S.Ct. 993, 86 L.Ed. 1322 (1942); Needelman v. United States, 261 F.2d 802 (5th Cir. 1958),* cert. dismissed *362 U.S. 600, 80 S.Ct. 960, 4 L.Ed.2d 980,* rehearing denied *363 U.S. 858, 80 S.Ct. 1606, 4 L.Ed.2d 1739,* Annot., *82 A.L.R.2d 473, 562* and *7 A.L.R.3d 181, 247.* An increasing group of cases has repudiated the distinction, *People v. Scott, 29 Ill.2d 97, 193 N.E.2d 814 (1963); State v. Mucci, 25 N.J. 423, 136 A.2d 761 (1957); State v. Hunt, 25 N.J. 514, 138 A.2d 1 (1958); State v. Desolvers, 40 R.I. 89, 100,* A. 64 (1917), and this position is believed to be correct. As Wigmore put it, "the risk of imposition and the need of safeguard is just as great" in both situations. 3 Wigmore § 762, p. 111. To the same effect is McCormick § 9, p. 17.

The purpose of the phrase "for the purpose of testifying" is to safeguard against using the rule as a pretext for wholesale exploration of an opposing party's files and to insure that access is limited only to those writings which may fairly be said in fact to have an impact upon the testimony of the witness.

The purpose of the rule is the same as that of the Jencks statute, *18 U.S.C. § 3500*: to promote the search of credibility and memory. The same sensitivity to disclosure of government files may be involved; hence the rule is expressly made subject to the statute, subdivision (a) of which provides: "In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) shall be the subject of a subpena, discovery, or inspection until said witness has testified on direct examination in the trial of the case." Items falling within the purview of the statute are producible only as provided by its terms, *Palermo v. United States, 360 U.S. 343, 351 (1959),* and disclosure under the rule is limited similarly by the statutory conditions. With this limitation in mind, some differences of application may be noted. The Jencks statute applies only to statements of witnesses; the rule is not so limited. The statute applies only to criminal cases; the rule applies to all cases. The statute applies only to government witnesses; the rule applies to all witnesses. The statute contains no requirement that the statement be consulted for purposes of refreshment before or while testifying; the rule so requires. Since many writings would qualify under either statute or rule, a substantial overlap exists, but the identity of procedures makes this of no importance.

The consequences of nonproduction by the government in a criminal case are those of the Jencks statute, striking the testimony or in exceptional cases a mistrial. *18 U.S.C. § 3500(d).* In other cases these alternatives are unduly limited, and such possibilities as contempt, dismissal, finding issues against the offender, and the like are available. See *Rule 16(g) of the Federal Rules of Criminal Procedure* and *Rule 37(b) of the Federal Rules of Civil Procedure* for appropriate sanctions.

Notes of Committee on the Judiciary, House Report No. 93-650. As submitted to Congress, Rule 612 provided that except as set forth in *18 U.S.C. 3500*, if a witness uses a writing to refresh his memory for the purpose of testifying, "either before or while testifying," an adverse party is entitled to have the writing produced at the hearing, to inspect it, to cross-examine the witness on it, and to introduce in evidence those portions relating to the witness' testimony. The Committee amended the Rule so as still to require the production of writings used by a witness while testifying, but to render the production of writings used by a witness to refresh his memory before testifying discretionary with the court in the interests of justice, as is the case under existing federal law. See *Goldman v. United States, 316 U.S. 129 (1942).* The Committee considered that permitting an adverse party to require the production of writings used before testifying could result in fishing expeditions among a multitude of papers which a witness may have used in preparing for trial.

The Committee intends that nothing in the Rule be construed as barring the assertion of a privilege with respect to writings used by a witness to refresh his memory.

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 612 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 613, N.D.R.Ev., Witness's Prior Statement

Form and style amendments to Rule 613 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The discussion of Queen Caroline's Case in the explanatory note is deleted in the proposal.

RULE 613. ~~PREVIOUS STATEMENTS OF WITNESSES~~ WITNESS'S PRIOR STATEMENT

~~(a) Examining witness concerning previous statement. In examining a witness concerning a previous statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same must be shown or disclosed to opposing counsel.~~

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

~~(b) Extrinsic evidence of previous inconsistent statement of witness. Extrinsic evidence of a previous inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admission of a party-opponent as defined in Rule 801(d)(2).~~

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing

party's statement under Rule 801(d)(2).

EXPLANATORY NOTE

Rule 613 was amended, effective March 1, 1990; _____.

Rule 613 is ~~an adoption of~~ based on ~~Rule~~ Fed.R.Ev. 613 ~~of the Federal Rules of Evidence. The rule has been specifically approved by the North Dakota Supreme Court:~~

~~"The rule requiring a predicate for impeachment by prior inconsistent statements, sometimes called the rule in Queen Caroline's Case, is gradually disappearing. See McCormick, § 37; 3 Weinstein, Evidence, p. 613-3 (1975). As we have stated, it does not apply to admissions by parties. As to other witnesses, the requirement has been eliminated in many recent revisions of the rules of evidence. The new Federal Rules of Evidence eliminate the requirement of prior opportunity to explain or deny. Instead, they provide that the witness must have the opportunity at some time to explain or deny, but that the judge may dispense with the requirement if the interests of justice require. Rule 613(b). They also provide that the witness need not be shown a contradictory statement, but it must be shown or disclosed to his counsel on request. Rule 613(a). We believe these rules represent the best available reconciliation of conflicting interests, and we specifically approve them." Starr v. Morsette, 236 N.W.2d 183, 188, n. 2 (N.D. 1975).~~

Rule 613 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 613 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule

were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 4; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 613~~, Federal Rules of Evidence~~; Rule 613, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-07.

~~Rules:~~

~~Considered: Rule 32(c), NDRCivP; Rule 15(e), NDRCrimP.~~

Cross Reference: ~~Rule~~ N.D.R.Ev. 801~~(d)(2), NDREv.~~ (Definitions the Apply to This Article; Exclusions from Hearsay); N.D.R.Civ.P. 32 (Using Depositions in Court Proceedings); N.D.R.Crim.P. 15 (Depositions).

Rule 613. Witness's Prior Statement

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1936; Oct. 1, 1987; Nov. 1, 1988.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Subdivision (a). The Queen's Case, 2 Br. & B. 284, *129 Eng. Rep. 976 (1820),* laid down the requirement that a cross-examiner, prior to questioning the witness about his own prior statement in writing, must first show it to the witness. Abolished by statute in the country of its origin, the requirement nevertheless gained currency in the United States. The rule abolishes this useless impediment, to cross-examination. Ladd, Some Observations on Credibility: Impeachment of Witnesses, *52 Cornell L.Q. 239, 246-247 (1967);* McCormick § 28; 4 Wigmore §§ 1259-1260. Both oral and written statements are included.

The provision for disclosure to counsel is designed to protect against unwarranted insinuations that a statement has been made when the fact is to the contrary.

The rule does not defeat the application of Rule 1002 relating to production of the original when the contents of a writing are sought to be proved. Nor does it defeat the application of Rule 26(b)(3) of the Rules of Civil Procedure, as revised, entitling a person on request to a copy of his own statement, though the operation of the latter may be suspended temporarily.

Subdivision (b). The familiar foundation requirement that an impeaching statement first be shown to the witness before it can be proved by extrinsic evidence is preserved but with some modifications. See Ladd, Some Observations on Credibility: Impeachment of Witnesses, *52 Cornell L.Q. 239, 247 (1967).* The traditional insistence that the attention of the witness be directed to the statement on cross-examination is relaxed in favor of simply providing the witness an opportunity to explain and the opposite party an opportunity to examine on the statement, with no specification of any particular time or sequence. Under this procedure, several collusive witnesses can be examined before disclosure of a joint prior inconsistent statement. See Comment to *California Evidence Code § 770.* Also, dangers of oversight are reduced.

See McCormick § 37, p. 68.

In order to allow for such eventualities as the witness becoming unavailable by the time the statement is discovered, a measure of discretion is conferred upon the judge. Similar provisions are found in *California Evidence Code § 770* and New Jersey Evidence Rule 22(b).

Under principles of expression unius the rule does not apply to impeachment by evidence of prior inconsistent conduct. The use of inconsistent statements to impeach a hearsay declaration is treated in Rule 806.

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

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2011 amendments. The language of Rule 613 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 614, N.D.R.Ev., Court's Calling or Examining a Witness

Form and style amendments to Rule 614 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 614. COURT'S CALLING ~~AND INTERROGATION OF WITNESSES BY COURT~~ OR EXAMINING A WITNESS

~~(a) Calling by court. The court, on its own motion or at the suggestion of a party, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.~~

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

~~(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.~~

(b) Examining. The court may examine a witness regardless of who calls the witness.

~~(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it or to specific questions by it may be made at the time or at the next available opportunity when the jury is not present.~~

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

EXPLANATORY NOTE

Rule 614 was amended, effective _____.

This rule is ~~an adoption of~~ based on ~~Rule~~ Fed.R.Ev. 614 ~~of the Federal Rules of Evidence. The calling by the court of a witness, who may then be cross-examined by both sides, is established in Rule 28, NDRCrimP (as to experts and interpreters), and is approved by the North Dakota Supreme Court. See State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974).~~

Rule 614 provides that objections to interrogation by the court or to the calling of a witness by the court may be made out of the jury's presence so as to avoid any possible prejudice to the objecting party.

Rule 614 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of _____; June 3, 1976, page 5; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 614~~, Federal Rules of Evidence~~; Rule 614, SBAND proposal.

Cross Reference: N.D.R.Crim.P. 28 (Interpreters).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 614. Court's Calling or Examining a Witness

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to crossexamine the witness.

(b) Examining. The court may examine a witness regardless of who calls the witness.

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Subdivision (a). While exercised more frequently in criminal than in civil cases, the authority of the judge to call witnesses is well established. McCormick § 8, p. 14; Maguire, Weinstein, et al., Cases on Evidence 303-304 (5th ed. 1965); 9 Wigmore § 2484. One reason for the practice, the old rule against impeaching one's own witness, no longer exists by virtue of Rule 607, supra. Other reasons remain, however, to justify the continuation of the practice of calling court's witnesses. The right to cross-examine, with all it implies, is assured. The tendency of juries to associate a witness with the party calling him, regardless of technical aspects of vouching, is avoided. And the judge is not imprisoned within the case as made by the parties.

Subdivision (b). The authority of the judge to question witnesses is also well established. McCormick § 8, pp. 12-13; Maguire, Weinstein, et al., Cases on Evidence 737-739 (5th ed. 1965); 3 Wigmore § 784. The authority is, of course, abused when the judge abandons his proper role and assumes that of advocate, but the manner in which interrogation should be conducted and the proper extent of its exercise are not susceptible of formulation in a rule. The omission in no sense precludes courts of review from continuing to reverse for abuse.

Subdivision (c). The provision relating to objections is designed to relieve counsel of the embarrassment attendant upon objecting to questions by the judge in the presence of the jury, while at the same time assuring that objections are made in apt time to afford the opportunity to take possible corrective measures. Compare the "automatic" objection feature of Rule 605 when the judge is called as a witness.

Notes of Advisory Committee on 2011 amendments. The language of Rule 614 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 615, N.D.R.Ev., Excluding Witnesses

Form and style amendments to Rule 615 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

A new part (d) prevents exclusion of "a person authorized by statute to be present." This was added to the federal statute in 1998 in response to the Victim's Rights and Restitution Act. N.D.C.C. § 29-07-14, which is already referenced in the rule, lists people who cannot be excluded from a preliminary examination. N.D.C.C. § 12.1-34-02 specifically references a victim's right to be present throughout the trial "except as provided by Rule 615." A copy of this statute is attached. The 1998 federal language is included in the proposal for the Committee's discussion.

RULE 615. ~~EXCLUSION OF~~ EXCLUDING WITNESSES

~~At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (i) a party who is a natural person, or (ii) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (iii) a person whose presence is shown by a party to be essential to the presentation of the party's cause.~~

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

EXPLANATORY NOTE

Rule 615 was amended, effective March 1, 1990; _____.

Rule 615 is ~~taken from~~ based on ~~Rule~~ Fed.R.Ev. 614 ~~of the Federal Rules of Evidence~~. It provides that it is mandatory for a court to exclude witnesses when so requested

by a party, subject to stated exceptions. ~~The mandatory demand of this rule marks a departure from prior North Dakota law, which was that the exclusion of witnesses was a matter within the court's discretion. Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956).~~

Rule 615 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 615 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 5; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 615~~, Federal Rules of Evidence~~; Rule 615, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-34-02, 29-07-13, 29-07-14.

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

Rule 615. Excluding Witnesses

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony. Or the court may do so on its own. But this rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Oct. 1, 1987; Nov. 1, 1988; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7075(a), 102 Stat. 4405; Dec. 1, 1998.)

(As amended Dec. 1, 2011.)

Amendments:

1988. Act Nov. 18, 1988 inserted "a" before "party which is not a natural person".

Notes of Advisory Committee on Rules. The efficacy of excluding or sequestering witnesses has long been recognized as a means of discouraging and exposing fabrication, inaccuracy, and collusion. 6 Wigmore §§ 1837-1838. The authority of the judge is admitted, the only question being whether the matter is committed to his discretion or one of right. The rule takes the latter position. No time is specified for making the request.

Several categories of persons are excepted. (1) Exclusion of persons who are parties would raise serious problems of confrontation and due process. Under accepted practice they are not subject to exclusion. 6 Wigmore § 1841. (2) As the equivalent of the right of a natural-person party to be present, a party which is not a natural person is entitled to have a representative present. Most of the cases have involved allowing a police officer who has been in charge of an investigation to remain in court despite the fact that he will be a witness. *United States v. Infanzon, 235 F.2d 318 (2d Cir. 1956); Portomene v. United States, 221 F.2d 582 (5th Cir. 1955); Powell v. United States, 208 F.2d 618 (6th Cir. 1953); Jones v. United States, 252 F.Supp. 781 (W.D.Okl. 1966).* Designation of the representative by the attorney rather than by the client may at first glance appear to be an inversion of the attorney-client relationship, but it may be assumed that the attorney will follow the wishes of the client, and the solution is simple and workable. See *California Evidence Code § 777.* (3) The category contemplates such persons as an agent who handled the transaction being litigated or an expert needed to advise counsel in the management of the litigation. See 6 Wigmore § 1841, n. 4.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. Many district courts permit government counsel to have an investigative agent at counsel table throughout the trial although the agent is or may be a witness. The practice is permitted as an exception to the rule of exclusion and compares with the situation defense counsel finds himself in--he always has the client with him to consult during the trial. The investigative agent's presence may be extremely important to government counsel, especially when the case is complex or involves some specialized subject matter. The agent, too, having lived with the case for a long time, may be able to assist in meeting trial surprises where the best-prepared counsel would otherwise have difficulty. Yet, it would not seem the Government could often meet the burden under rule 615 of showing that the agent's presence is essential. Furthermore, it could be dangerous to use the agent as a witness as early in the case as possible, so that he might then help counsel as a nonwitness, since the agent's testimony could be needed in rebuttal. Using another, nonwitness agent from the same investigative agency would not generally meet government counsel's needs.

This problem is solved if it is clear that investigative agents are within the group specified under the second exception made in the rule, for "an officer or employee of a party which is not a natural person designated as its representative by its attorney." It is our understanding that this was the intention of the House committee. It is certainly this committee's construction of the rule.

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

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1998 amendments. The amendment is in response to: (1) the Victim's Rights and Restitution Act of 1990, *42 U.S.C. § 10606*, which guarantees, within certain limits, the right of a crime victim to attend the trial; and (2) the Victim Rights Clarification Act of 1997 (*18 U.S.C. § 3510*).

Notes of Advisory Committee on 2011 amendments. The language of Rule 615 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

CHAPTER 12.1-34
FAIR TREATMENT OF VICTIMS AND WITNESSES

12.1-34-01. Definitions. In this chapter, unless the context or subject matter otherwise requires:

1. "Court" means a forum established by law for the adjudication of juvenile petitions, criminal complaints, informations, or indictments.
2. "Crime" includes all felony offenses; class A misdemeanors, excluding violations of section 6-08-16.1 for no-account checks; all violations of chapters 12.1-17 and 12.1-20, including all corresponding violations of municipal ordinances; and any of the offenses in this subsection that may result in adjudication of delinquency.
3. "Crime of violence" means any crime in which force, as defined by section 12.1-01-04, or threat of force was used against the victim.
4. "Custodial authority" includes city jail, county jail, juvenile detention center, regional corrections center, halfway house, state penitentiary or Missouri River correctional center, state hospital, or any other inpatient mental health or treatment facility to which a criminal defendant may be sentenced or referred.
5. "Disposition" means the sentencing or determination of penalty or punishment to be imposed upon a person convicted of a crime or found delinquent or against whom a finding of sufficient facts for conviction or finding of delinquency is made.
6. "Family member" includes a spouse, child, sibling, parent, grandparent, legal guardian, or custodian of a victim.
7. "Prosecuting attorney" includes city attorney, state's attorney, attorney general, or their assistants.
8. "Registered victim" or "registered witness" means a victim or witness registered with the statewide automated victim information and notification system.
9. "System" means the statewide automated victim information and notification system.
10. "Victim" means a natural person who has suffered direct or threatened physical, financial, or emotional harm where there is probable cause to believe that the harm has been caused by the commission of a criminal act. The term "victim" includes the family members of a minor, incompetent, incapacitated, or deceased person.
11. "Witness" means any person who has been or is expected to be summoned to testify for the prosecution whether or not any action or proceeding has yet been commenced.

12.1-34-02. Fair treatment standards for victims and witnesses. Victims and witnesses of crime must be afforded the following rights where applicable:

1. Informed by those entities that have contact with the victim or witness as to the availability of and the methods available for registration with the statewide automated victim information and notification system. Those entities include law enforcement, prosecuting attorneys, the courts, and custodial authorities. A victim or witness who clearly objects to registration may not be required to register with the system.
2. Informed as to status of investigation. Victims and witnesses, upon request, must be informed by law enforcement authorities investigating a criminal case of the status of the investigation, except where the prosecuting attorney or law enforcement authority determines that to disclose such information would unreasonably interfere with the investigation, until such time as the alleged offender is apprehended or the investigation is closed.
3. Informed as to criminal charges filed. Victims must be promptly informed by the prosecuting attorney of any criminal charges, arising from an incident in which the person was a victim, filed against any person arrested. The prosecuting attorney shall also provide a brief statement in nontechnical language of the procedural steps involved in the processing of a criminal case. Victims must also be informed by the prosecuting attorney of the pretrial status of each person arrested, including bail and any pretrial release conditions.
4. Notice of pretrial release.
   a. Registered victims must be given prompt notice of any hearing in which the arrested person's pretrial release status will be determined. If the alleged offender

is scheduled to be released prior to an appearance in court, prompt notice must be given to the registered victim and witness.

b. Victims who are not registered must be given prompt notice, by the law enforcement agency that has made an arrest in any case involving a crime of violence, of any hearing in which the arrested person's pretrial release status will be determined. If the alleged offender in a crime of violence is scheduled to be released before an appearance in court, the custodial authority shall give prompt notice to the victim and witness or, if unavailable, to the arresting law enforcement agency, which shall provide the notice to the victim or witness. The law enforcement agency or custodial authority may fulfill its obligation to notify by registering the victim with the system.

c. Victims and witnesses must be informed by the prosecuting attorney of the methods for enforcing any pretrial release conditions including information as to the level of protection available from law enforcement in the case of harm, threats, or intimidation made to the victim or witness.

5. Notice as to victims' and witnesses' participation in court proceedings. Victims must be informed by the prosecuting attorney of all court proceedings in a reasonable time prior to the proceedings. Witnesses must be informed by the prosecuting attorney of all court proceedings at which their presence is required in a reasonable time prior to the proceedings and informed in nontechnical language of the procedural steps involved in the processing of a criminal case. Victims and witnesses must be notified by the prosecuting attorney of the cancellation of any scheduled court proceeding in sufficient time to prevent an unnecessary appearance in court. All victims and witnesses shall provide the prosecuting attorney with current information as to address and telephone number, such information to be kept confidential subject to other provisions of this chapter. The notice given by the prosecuting attorney to the victims and witnesses must be given by any means reasonably calculated to give prompt notice.

6. Services available. Victims and witnesses must be informed by the prosecuting attorney and arresting law enforcement agency of all appropriate and available public or private programs that provide counseling, treatment, or support for victims and witnesses, including rape crisis centers, victim and witness assistance programs, elderly victim services, victim assistance hotlines, social service agencies, and domestic violence programs. The prosecuting attorney and law enforcement authority shall advise victims eligible for services of the relevant provisions of chapter 54-23.4.

7. Employer intercession. Victims and witnesses upon request must be provided by the prosecuting attorney with appropriate employer intercession services to ensure that employers of victims and witnesses will cooperate with the criminal justice process in order to minimize an employee's loss of pay and other benefits resulting from court appearances.

8. Witness fee. Witnesses must be informed by the prosecuting attorney or the court of the procedures to be followed in order to apply for and receive any witness fee to which they are entitled under law.

9. Return of property. Victims shall have any personal property that was stolen or taken for evidentiary purposes, except contraband, property subject to evidentiary analysis, and property the ownership of which is disputed, returned by the court, prosecuting attorney, or law enforcement agency within ten days after its taking or recovery if it is not needed for law enforcement, prosecution, or defense purposes or as expeditiously as possible when the property is no longer needed for law enforcement, prosecution, or defense purposes. If there is a defendant, the prosecuting attorney shall notify the defendant of the intent to return the property to the owner. Upon a motion made by the defendant and upon good cause shown that the property contains exculpatory evidence of the defendant's innocence, the court may order the law enforcement personnel in possession of the property not to release it to the owner.

10. Waiting area. Victims and witnesses must be provided by prosecuting attorneys and defense attorneys as assisted by the court with a waiting area separate from the

defendant, defendant's relatives and friends, and defense witnesses if such an area is available and the use of the area is practical. If a separate waiting area is not available or practical, the court shall provide other safeguards to minimize the victims' and witnesses' contact with the defendant, defendant's relatives and friends, and defense witnesses during court proceedings.

11. Protection of identifying information. Victims and witnesses may not be compelled to testify at any pretrial proceeding or at trial for purposes of identifying the victims' or witnesses' address, telephone number, place of employment, or other personal identification except for name without the victims' or witnesses' consent, unless there is a showing of good cause as determined by the court.
12. Right to be present throughout trial. The victim must be informed by the prosecuting attorney of the victim's right to be present throughout the trial of the defendant, except as provided by rule 615 of the North Dakota Rules of Evidence.
13. Prompt disposition of case. Victims and witnesses must be informed by the prosecuting attorney of their rights to a prompt disposition of the cases in which they are involved as victims or witnesses as defined by the docket currency standards of the North Dakota supreme court.
14. Notice as to scheduling of hearing. Registered victims must be informed of the date, time, and place of hearing at which a plea of guilty or not guilty will be entered and of a sentencing hearing. Victims who are not registered must be given the same information by the prosecuting attorney. The prosecuting attorney shall explain to and consult with the victim in nontechnical language details of any potential plea agreement or verdict.
15. Victim impact statement. The victim must be informed by the prosecuting attorney, prior to sentencing, of the victim's right to submit or make a written impact statement to the court in any criminal case. If a presentence investigation is ordered, the probation officer assigned the report shall include this information in the report. This statement may include an explanation by the victim of the nature and extent of any physical, psychological, or emotional harm or trauma suffered by the victim; an explanation of the extent of any economic loss or property damage suffered by the victim; an opinion of the need for and extent of restitution; and the victim's recommendation for an appropriate sentence. The prosecuting attorney shall advise all victims that the presentence report is subject to review by the defendant and that the report will include the victim's statement. If the sentencing court does not order a presentence investigation, the victim may submit a written impact statement, under oath, to the office of the state's attorney which statement must be submitted to the sentencing court. The victim of violent crime may appear in court to make an oral crime impact statement at the sentencing of the defendant in appropriate circumstances at the discretion of the judge. This oral statement must be made under oath and is subject to cross-examination.
16. Notice of final disposition and parole procedures. Registered victims and witnesses must be informed of the final disposition of any criminal case. Victims who are not registered must be given the same notice by the prosecuting attorney. The prosecuting attorney shall explain to the victim the parole process and pardon process and further advise the victim of the necessity of advising the custodial authority and the parole board and the pardon clerk of the victim's address in order for the victim to receive further information under other provisions of this chapter.
17. Prompt notice of custodial release. Registered victims and witnesses must be informed whenever a criminal defendant receives a temporary, provisional, or final release from custody or whenever the defendant escapes from custody. Victims who are not registered must be given the same notice by the appropriate custodial authority. Notification must include the transfer of the defendant to a work-release program, a community residential program, or transfer to a mental health facility. All notices to the registered victim and witnesses concerning this release information must be within a reasonable time prior to the defendant's release or transfer. The notice

given by the custodial authority must be given by any means reasonably calculated to give prompt notice.

18. Participation in parole board and pardon decision. Victims may submit a written statement for consideration by the parole board, the governor, or the pardon advisory board, if one has been appointed, prior to the parole board, the governor, or the pardon advisory board taking any action on a defendant's request for parole or pardon. A victim statement made under this subsection is a confidential record and may be disclosed only to the parole board, the governor, the pardon advisory board, or their authorized representative. Victims of violent crimes may at the discretion of the parole board, the governor, or the pardon advisory board personally appear and address the parole board, the governor, or the pardon advisory board. Victim testimony and written statements under this subsection are confidential and may be disclosed only to the parole board, the governor, the pardon advisory board, or their authorized representative. Notice must be given by the parole board or pardon clerk informing the registered victim of the pending review. The registered victim must be provided notice of the decision of the parole board or of the governor and the recommendations of the pardon advisory board, if any, and, if applicable, notice of the date of the prisoner's release on parole or the prisoner's pardon, conditional pardon, reprieve, commutation, or remission of fine. Notice must be given within a reasonable time after the parole board or the governor makes a decision but in any event before the parolee's or pardoned prisoner's release from custody.
19. Victims and witnesses of crimes committed by juveniles are entitled to the same rights under this chapter in juvenile delinquency proceedings as in any other proceeding. In addition, every victim or a witness who is a minor is entitled to have that person's spouse, parent, guardian, and no more than two other designated adults present with that person during any juvenile delinquency proceedings.

12.1-34-03. Responsibilities of victims and witnesses.

Victims and witnesses have all of the following responsibilities to aid in the prosecution of crime:

1. To make a timely report of the crime.
2. To cooperate with law enforcement authorities throughout the investigation, prosecution, and trial.
3. To testify at trial.
4. To notify the system, law enforcement authorities, prosecuting attorney, custodial authority, parole board, pardon clerk, and court, where appropriate, of any change of contact information. Except for release to a domestic violence sexual assault organization as defined in section 14-07.1-01, all contact information provided must be kept confidential.

12.1-34-04. Victim and witness services.

Each prosecuting attorney is responsible for securing for victims and witnesses of crime the rights and services described in this chapter. Those services include all of the following:

1. Court appearance notification services, including cancellations of appearances.
2. Informational services relative to the availability of the collection of witness fees, victim compensation, or restitution.
3. Escort and other transportation services related to the investigation or prosecution of the case, if necessary.
4. Case process notification services.
5. Employer intercession services.
6. Expedited return of property services.
7. Protection services.
8. Family support services, including child and other dependent care services.
9. Waiting facilities.
10. Social service and other public or private agency referrals.

12.1-34-05. Cause of action for damages or injunctive relief.

Nothing in this chapter may be construed as creating a cause of action for money damages or injunctive relief against the state, county, municipality, or any of their agencies, instrumentalities, or employees. Furthermore, the failure to provide a right, privilege, or notice to a victim under this chapter is not grounds for the defendant to seek to have the conviction or sentence set aside. This chapter does not limit any rights to which victims and witnesses of crime are otherwise entitled.

12.1-34-06. Statewide automated victim information and notification system.

1. The information technology department may establish a statewide automated victim information and notification system that must:
   a. Permit a victim to register or update the victim's registration information for the system by calling a toll-free telephone number or accessing a public website.
   b. Notify a registered victim by telephone, mail, or e-mail in accordance with this chapter.
   c. Notify a registered victim by telephone, mail, or e-mail when the offender has a scheduled court proceeding, a parole or pardon review, or a change in the status of the offender's parole or probation status, including a change in the offender's address.
   d. Notify a registered victim by telephone, mail, or e-mail when a registered sexual offender has updated the offender's registration information or failed to comply with any registration requirement.
   e. Notify a registered victim by telephone, mail, or e-mail when a protective order requested by the victim has been served upon the respondent.
   f. Permit a victim to receive a status report for an offender under the supervision or in the custody of the department of corrections and rehabilitation or other correctional facility or for a registered sexual offender by calling the system on a toll-free telephone number or by accessing the system through a public website.
2. If a statewide automated victim information and notification system is established, the provision of offender and case data on a timely basis to the automated victim information and notification system satisfies any obligation under this chapter to notify a registered victim of an offender's custody and the status of the offender's scheduled court proceedings.
3. If a statewide automated victim information and notification system is established, the user agency shall ensure that an offender's information contained in the system is updated to timely notify a victim that an offender has been released or discharged or has escaped. The failure of the system to provide notice to the victim does not establish a cause of action by the victim against the state or any custodial authority.
4. All affected entities, including custodial authorities, prosecuting attorneys, law enforcement agencies, courts, the attorney general's office, the pardon board, and the parole clerk, shall cooperate with the system operator in establishing and maintaining the statewide automated victim information and notification system.

12.1-34-07. Medical screening and acute forensic medical examinations costs - Reimbursement by attorney general - Use of evidence.

1. An acute forensic medical examination is an examination performed on an alleged victim of criminal sexual conduct for the purpose of gathering evidence of an alleged crime and is performed within ninety-six hours after the alleged crime unless good cause is shown for the delay in performing the examination. When an acute forensic medical examination is performed, the costs incurred by a health care facility or health care professional for performing the acute forensic medical examination or any preliminary medical screening examination may not be charged, either directly or through a third-party payer, to the alleged victim.
2. A child forensic medical examination is an examination performed on an alleged child victim of criminal sexual conduct for the purpose of gathering evidence of an alleged crime. When a child forensic medical examination is performed, the costs incurred by a health care facility or health care professional for performing the child forensic

medical examination or any preliminary medical screening examination may not be charged, either directly or through a third-party payer, to the alleged child victim or the child's parent, guardian, or custodian.

3. Upon submission of appropriate documentation, the attorney general, within the limits of legislative appropriations, shall reimburse the health care facility or a health care professional for the reasonable costs incurred in performing the medical screening and acute forensic medical examination.
4. Evidence obtained during a medical examination under this section may not be used against an alleged victim for the prosecution of the alleged victim for a separate offense.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 701, N.D.R.Ev., Opinion Testimony by Lay Witnesses

Form and style amendments to Rule 701 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

As part of the 2000 amendments, language was added to the federal rule "to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing." The proposal includes this language as part (c) for the Committee's discussion. If the Committee accepts the language, the explanatory note will need to be amended to reflect the change.

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

~~If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.~~

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception;

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and

~~(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.~~

EXPLANATORY NOTE

Rule 701 was amended, effective March 1, 1990; _____.

Rule 701 is an adoption of based on Fed.R.Ev. ~~Rule~~ 701 ~~of the Federal Rules of Evidence. It presents no new practice to North Dakota.~~

Rule 701 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 701 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule

were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of _____; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6;~~Rule~~ Fed.R.Ev. 701~~, Federal Rules of Evidence~~; Rule 701, SBAND proposal.

Cross Reference: N.D.R.Ev. 702 (Testimony by Expert Witnesses).

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 701. Opinion Testimony by Lay Witnesses

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:
(a) rationally based on the witness's perception;
(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue; and
(c) not based on scientific, technical, or other specialized knowledge within the scope of Rule 702.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Oct. 1, 1987; Dec. 1, 2000.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The rule retains the traditional objective of putting the trier of fact in possession of an accurate reproduction of the event.

Limitation (a) is the familiar requirement of firsthand knowledge or observation.

Limitation (b) is phrased in terms of requiring testimony to be helpful in resolving issues. Witnesses often find difficulty in expressing themselves in language which is not that of an opinion or conclusion. While the courts have made concessions in certain recurring situations, necessity as a standard for permitting opinions and conclusions has proved too elusive and too unadaptable to particular situations for purposes of satisfactory judicial administration. McCormick § 11. Moreover, the practical impossibility of determining by rule what is a "fact," demonstrated by a century of litigation of the question of what is a fact for purposes of pleading under the Field Code, extends into evidence also. 7 Wigmore § 1919. The rule assumes that the natural characteristics of the adversary system will generally lead to an acceptable result, since the detailed account carries more conviction than the broad assertion, and a lawyer can be expected to display his witness to the best advantage. If he fails to do so, cross-examination and argument will point up the weakness. See Ladd, Expert Testimony, *5 Vand.L.Rev. 414, 415-417 (1952)*. If, despite these considerations, attempts are made to introduce meaningless assertions which amount to little more than choosing up sides, exclusion for lack of helpfulness is called for by the rule.

The language of the rule is substantially that of Uniform. Rule 56(1). Similar provisions are *California Evidence Code § 800*; Kansas Code of Civil Procedure § 60-456(a); New Jersey Evidence Rule 56(1).

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

Notes of Advisory Committee on 2000 amendments. Rule 701 has been amended to eliminate the risk that the reliability requirements set forth in Rule 702 will be evaded through the simple expedient of proffering an expert in lay witness clothing. Under the amendment, a witness' testimony must be scrutinized under the rules regulating expert opinion to the extent that the witness is providing testimony based on scientific, technical, or other specialized knowledge within the scope of Rule 702. *See generally Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190 (3d Cir. 1995)*. By channeling testimony that is actually expert testimony to Rule 702, the amendment also ensures that a party will not evade the expert witness disclosure requirements set forth in *Fed.R.Civ.P. 26* and *Fed.R.Crim.P. 16* by simply calling an expert witness in the guise of a layperson. *See Joseph, Emerging Expert Issues Under the 1993 Disclosure Amendments to the Federal Rules of Civil Procedure, 164 F.R.D. 97, 108 (1996)* (noting that "there is no good reason to allow what is essentially surprise expert testimony," and that "the Court should be vigilant to preclude manipulative conduct designed to thwart the expert disclosure and discovery process"). See also *United States v. Figueroa-Lopez, 125 F.3d 1241, 1246* (9th Cir. 1997) (law enforcement agents testifying that the defendant's conduct was consistent with that of a drug trafficker could not testify as lay witnesses; to permit such testimony under Rule 701 "subverts the requirements of *Federal Rule of Criminal Procedure 16(a)(1)(E)*").

The amendment does not distinguish between expert and lay witnesses, but rather between expert and lay testimony. Certainly it is possible for the same witness to provide both lay and expert testimony in a single case. *See, e.g., United States v. Figueroa-Lopez, 125 F.3d 1241, 1246* (9th Cir. 1997) (law enforcement agents could testify that the defendant was acting suspiciously, without being qualified as experts; however, the rules on experts were applicable where the agents testified on the basis of extensive experience that the defendant was using code words to refer to drug quantities and prices). The amendment makes clear that any part of a witness' testimony that is based upon scientific, technical, or

other specialized knowledge within the scope of Rule 702 is governed by the standards of Rule 702 and the corresponding disclosure requirements of the Civil and Criminal Rules.

The amendment is not intended to affect the "prototypical example[s] of the type of evidence contemplated by the adoption of Rule 701 relat[ing] to the appearance of persons or things, identity, the manner of conduct, competency of a person, degrees of light or darkness, sound, size, weight, distance, and an endless number of items that cannot be described factually in words apart from inferences." *Asplundh Mfg. Div. v. Benton Harbor Eng'g, 57 F.3d 1190, 1196 (3d Cir. 1995).*

For example, most courts have permitted the owner or officer of a business to testify to the value or projected profits of the business, without the necessity of qualifying the witness as an accountant, appraiser, or similar expert. *See, e.g., Lightning Lube, Inc. v. Witco Corp. 4 F.3d 1153 (3d Cir. 1993)* (no abuse of discretion in permitting the plaintiffs owner to give lay opinion testimony as to damages, as it was based on his knowledge and participation in the day-to-day affairs of the business). Such opinion testimony is admitted not because of experience, training or specialized knowledge within the realm of an expert, but because of the particularized knowledge that the witness has by virtue of his or her position in the business. The amendment does not purport to change this analysis. Similarly, courts have permitted lay witnesses to testify that a substance appeared to be a narcotic, so long as a foundation of familiarity with the substance is established. *See, e.g., United States v. Westbrook, 896 F.2d 330 (8th Cir. 1990)* (two lay witnesses who were heavy amphetamine users were properly permitted to testify that a substance was amphetamine; but it was error to permit another witness to make such an identification where she had no experience with amphetamines). Such testimony is not based on specialized knowledge within the scope of Rule 702, but rather is based upon a layperson' s personal knowledge. If, however, that witness were to describe how a narcotic was manufactured, or to describe the intricate workings of a narcotic distribution network, then the witness would have to qualify as an expert under Rule 702. *United States v. Figueroa-Lopez, supra.*

The amendment incorporates the distinctions set forth in *State v. Brown, 836 S.W.2d 530, 549 (1992),* a case involving former Tennessee Rule of Evidence 701, a rule that precluded lay witness testimony based on "special knowledge." In Brown, the court declared that the distinction between lay and expert witness testimony is that lay testimony "results from a process of reasoning familiar in everyday life," while expert testimony "results from a process of reasoning which can be mastered only by specialists in the field." The court in Brown noted that a lay witness with experience could testify that a substance appeared to be blood, but that a witness would have to qualify as an expert before he could testify that bruising around the eyes is indicative of skull trauma. That is the kind of distinction made by the amendment to this Rule.

Notes of Advisory Committee on 2011 amendments. The language of Rule 701 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 702, N.D.R.Ev., Excluding Witnesses

Form and style amendments to Rule 702 consistent with the 2011 federal amendments are proposed. Through these amendments, the federal rulemakers have clarified the provisions added to Rule 702 in the 2000 federal amendments that followed the Supreme Court's rulings in Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993), and Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137 (1999).

The Committee considered the Daubert amendments to Rule 702 in 2004-2005, first approving them by a 10-8 vote at the September 2004 meeting, then declining to approve them by a 4-11 vote at the September 2005 meeting. Excerpts from these minutes are attached for the Committee's review.

One of the reasons the Committee did not approve the Daubert amendments was because our Supreme Court had not previously adopted Daubert. However, in State v. Hernandez, 2005 ND 214, ¶ 6, (decided after the Committee's discussion) the court stated that it would not adopt the Daubert rule changes by opinion. Specifically, the Court said:

> This Court has never explicitly adopted Daubert and Kumho Tire. See Howe v. Microsoft Corp., 2003 ND 12, ¶ 27 n. 1, 656 N.W.2d 285. Contrary to Hernandez's assertion, this Court is not required to follow Daubert and Kumho Tire, which involved admissibility of expert testimony in federal courts under the federal rules of evidence. **This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and**

> **we decline Hernandez's invitation to adopt Daubert by judicial decision.** See State v. Osier, 1997 ND 170, ¶ 5 n. 1, 569 N.W.2d 441 (refusing to adopt procedural rule by opinion in litigated appeal).

Hernandez, ¶ 6 (emphasis added). A copy of this case is attached.

As the Court stated, it is the Committee's responsibility to consider whether the Daubert amendments should be part of North Dakota's rules. The amendments are included in the proposal for the Committee's discussion.

Hernandez is the latest North Dakota case to reference Daubert. There has been substantial federal case law development of the Daubert amendments to Rule 702 in the 12 years since they took effect. If the Committee needs any additional information or research on these amendments, staff can obtain this on the Committee's direction.

The explanatory note will need to be amended if the Committee decides to approve the amendments to Rule 702.

RULE 702. TESTIMONY BY ~~EXPERTS~~ WITNESSES

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

~~(b) the testimony is based on sufficient facts or data;~~

~~(c) the testimony is the product of reliable principles and methods; and~~

~~(d) the expert has reliably applied the principles and methods to the facts of the case.~~

EXPLANATORY NOTE

Rule 702 was amended, effective March 1, 2007;_____.

Rule 702 states the general rule governing expert testimony.

Rule 702 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of _____: September 22-23, 2005, pages 2-6; June 3, 1976, page 6; ~~Rule~~ Fed.R.Ev. 702~~, Federal Rules of Evidence~~.

Cross Reference: N.D.R.Ev. 703 (Bases of Opinion Testimony by Experts).

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 702. Testimony by Expert Witnesses

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

(a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;

(b) the testimony is based on sufficient facts or data;

(c) the testimony is the product of reliable principles and methods; and

(d) the expert has reliably applied the principles and methods to the facts of the case.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Dec. 1, 2000.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. An intelligent evaluation of facts is often difficult or impossible without the application of some scientific, technical, or other specialized knowledge. The most common source of this knowledge is the expert witness, although there are other techniques for supplying it.

Most of the literature assumes that experts testify only in the form of opinions. The assumption is logically unfounded. The rule accordingly recognizes that an expert on the stand may give a dissertation or exposition of scientific or other principles relevant to the case, leaving the trier of fact to apply them to the facts. Since much of the criticism of expert testimony has centered upon the hypothetical question, it seems wise to recognize that opinions are not indispensable and to encourage the use of expert testimony in non-opinion form when counsel believes the trier can itself draw the requisite inference. The use of opinions is not abolished by the rule, however. It will continue to be permissible for the experts to take the further step of suggesting the inference which should be drawn from applying the specialized knowledge to the facts. See Rules 703 to 705.

Whether the situation is a proper one for the use of expert testimony is to be determined on the basis of assisting the trier. "There is no more certain test for determining when experts may be used than the common sense inquiry whether the untrained layman would be qualified to determine intelligently and to the best possible degree the particular issue without enlightenment from those having a specialized understanding of the subject involved in the dispute." Ladd, Expert Testimony, *5 Vand.L.Rev. 414, 418 (1952).* When opinions are excluded, it is because they are unhelpful and therefore superfluous and a waste of time. 7 Wigmore § 1918.

The rule is broadly phrased. The fields of knowledge which may be drawn upon are not limited merely to the "scientific" and "technical" but extend to all "specialized" knowledge. Similarly, the expert is viewed, not in a narrow sense, but as a person qualified by "knowledge, skill, experience, training or education." Thus within the scope of the rule are not only experts in the strictest sense of the word, e.g., physicians, physicists, and architects, but also the large group sometimes called "skilled" witnesses, such as bankers or landowners testifying to land values.

Committee notes on proposed revision. This revision is intended to limit the use, but increase the utility and reliability, of party-initiated opinion testimony bearing on scientific and technical issues.

The use of such testimony has greatly increased since enactment of the Federal Rules of Evidence. This result was intended by the drafters of the rule, who were responding to concerns that the restraints previously imposed on expert testimony were artificial and an impediment to the illumination of technical issues in dispute. See, e.g., McCormick on Evidence, § 203 (3d ed., 1984). While much expert testimony now presented is illuminating and useful, much is not. Virtually all is expensive, if not to the proponent then to adversaries. Particularly in civil litigation with high financial stakes, large expenditures for marginally useful expert testimony has become commonplace. Procurement of expert testimony is occasionally used as a trial technique to wear down adversaries. In short, while testimony from experts may be desirable if not crucial in many cases, excesses cannot be doubted and should be curtailed.

While concern for the quality and even integrity of hired testimony is not new, *Winans v. New York & Erie R.R., 62 U.S. 88, 101 (1858);* Hand, Historical and Practical Considerations Regarding Expert Testimony, *15 Harv. L. Rev. 40 (1901),* the hazards to the judicial process have increased as more technical evidence is presented:

When the evidence relates to highly technical matters and each side has shopped for experts favorable to its position, it is naive to expect the jury to be capable of assessing the validity of dramatically opposed testimony.

3J. WEINSTEIN & M. BERGER, WEINSTEIN'S EVIDENCE, § 706[01] at 706-07 (1985).

While the admissibility of such evidence is, and remains, subject to the general principles of Rule 403, the revision requires that expert testimony be "reasonably reliable" and "substantially assist" the fact-finder. The rule does not mandate a return to the strictures of *Frye v. United States, 293 F.2d 1013* (D.C. Cir., 1923) (requiring general acceptance of the scientific premises on which the testimony is based). However, the court is called upon to reject testimony that is based upon premises lacking any significant support and acceptance within the scientific community, or that otherwise would be only marginally helpful to the fact-finder. In civil cases the court is authorized and expected under revised *Rule 26(c)(4) of the Federal Rules of Civil Procedure* to impose in advance of trial appropriate restrictions on the use of expert testimony. In exercising this responsibility, the court should not only consider the potential admissibility of the testimony under Rule 702 but also weigh the need and utility of the testimony against the time and expense involved.

In deciding whether the opinion evidence is reasonably reliable and will substantially assist the trier of fact, as well as in deciding whether the proposed witness has sufficient expertise to express such opinions, the court, as under present Rule 702, is governed by Rule 104(a).

The rule is also revised to complement changes in the Federal Rules of Civil Procedure requiring pretrial disclosure of the expert testimony to be presented at trial. The rule precludes the offering on direct examination in civil actions of expert opinions, or the reasons or bases for opinions, that have not been adequately and timely disclosed in advance of trial. It has not been unusual for the testimony given at trial by an expert to vary substantially from that provided under former *Fed. R. Civ. P. 26(b)(4)(A)(i)* or at a deposition of the expert. At a minimum, any significant changes in an expert's expected testimony should be disclosed before trial, and this revision of Rule 702 provides an appropriate incentive for such disclosure in addition to those contained in the Rules of Civil Procedure.

Additions or other changes to an expert's opinions must, under *Fed. R. Civ. P. 26(e)(1)*, be disclosed no later than the time the proponent is required to disclose its witnesses and exhibits that are to be used at trial. Unless the court has specified another time, these revisions must be disclosed at least 30 days before trial.

Of course, a witness should not be required to testify contrary to the person's oath or affirmation. If the witness is unable, consistent with the oath or affirmation, to testify in a manner consistent with the earlier disclosure, then--unless the court grants leave to deviate from the earlier testimony--the witness should not testify.

By its terms the new sentence applies only in civil cases. The consequences of the failure to make disclosures of expert testimony which may be required under new *Fed. R. Crim. P. 16(a)(1)(E)* and *16(b)(1)(C)* will be determined in accordance with the principles that govern enforcement of the requirements of *Fed. R. Crim. P. 16*.

Notes of Advisory Committee on 2000 amendments. Rule 702 has been amended in response to *Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 [125 L. Ed. 2d 469]* (1993), and to the many cases applying *Daubert,* including *Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167 (1999).* In *Daubert* the Court charged trial judges with the responsibility of acting as gatekeepers to exclude unreliable expert testimony, and the Court in *Kumho* clarified that this gatekeeper function applies to all expert testimony, not just testimony based in science. *See also Kumho, 119 S.Ct. at 1178* (citing the Committee Note to the proposed amendment to Rule 702, which had been released for public comment before the date of the *Kumho* decision). The amendment affirms the trial court's role as gatekeeper and provides some general standards that the trial court must use to assess the reliability and helpfulness of proffered expert testimony. Consistently with Kumho, the Rule as amended provides that all types of expert testimony present questions of admissibility for the trial court in deciding whether the evidence is reliable and helpful. Consequently, the admissibility of all expert testimony is governed by the principles of Rule 104(a). Under that Rule, the proponent has the burden of establishing that the pertinent admissibility requirements are met by a preponderance of the evidence. *See Bourjaily v. United States, 483 U.S. 171 [97 L. Ed. 2d 144]* (1987).

Daubert set forth a non-exclusive checklist for trial courts to use in assessing the reliability of scientific expert testimony. The specific factors explicated by the *Daubert* Court are (1) whether the expert's technique or theory can be or has been tested--that is, whether the expert's theory can be challenged in some objective sense, or whether it is instead simply a subjective, conclusory approach that cannot reasonably be assessed for reliability; (2) whether the technique or theory has been subject to peer review and publication; (3) the known or potential rate of error of the technique or theory when applied; (4) the existence and maintenance of standards and controls; and (5) whether the technique or theory has been generally accepted in the scientific community. The Court in *Kumho* held that these factors might also be applicable in assessing the reliability of non-scientific expert testimony, depending upon "the particular circumstances of the particular case at issue." *119 S.Ct. at 1175.*

No attempt has been made to "codify" these specific factors. Daubert itself emphasized that the factors were neither exclusive nor dispositive. Other cases have recognized that not all of the specific Daubert factors can apply to every type of expert testimony. In addition to *Kumho, 119 S.Ct. at 1175, see Tyus v. Urban Search Management, 102 F.3d 256 (7th*

Cir. 1996) (noting that the factors mentioned by the Court in *Daubert* do not neatly apply to expert testimony from a sociologist). *See also Kannankeril v. Terminix Int'l, Inc., 128 F.3d 802, 809 (3d Cir. 1997)* (holding that lack of peer review or publication was not dispositive where the expert's opinion was supported by "widely accepted scientific knowledge"). The standards set forth in the amendment are broad enough to require consideration of any or all of the specific Daubert factors where appropriate.

Courts both before and after *Daubert* have found other factors relevant in determining whether expert testimony is sufficiently reliable to be considered by the trier of fact. These factors include:

(1) Whether experts are "proposing to testify about matters growing naturally and directly out of research they have conducted independent of the litigation, or whether they have developed their opinions expressly for purposes of testifying." *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317* (9th Cir. 1995).

(2) Whether the expert has unjustifiably extrapolated from an accepted premise to an unfounded conclusion. *See General Elec. Co. v. Joiner, 522 U.S. 136 [139 L. Ed. 2d 508],* 146 (1997) (noting that in some cases a trial court "may conclude that there is simply too great an analytical gap between the data and the opinion proffered").

(3) Whether the expert has adequately accounted for obvious alternative explanations. *See Claar v. Burlington N.R.R., 29 F.3d 499* (9th Cir. 1994) (testimony excluded where the expert failed to consider other obvious causes for the plaintiffs condition). *Compare Ambrosini v. Labarraque, 101 F.3d 129 (D.C.Cir. 1996)* (the possibility of some uneliminated causes presents a question of weight, so long as the most obvious causes have been considered and reasonably ruled out by the expert).

(4) Whether the expert "is being as careful as he would be in his regular professional work outside his paid litigation consulting." *Sheehan v. Daily Racing Form, Inc., 104 F.3d 940, 942 (7th Cir. 1997). See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176 (1999)* (*Daubert* requires the trial court to assure itself that the expert "employs in the courtroom the same level of intellectual rigor that characterizes the practice of an expert in the relevant field").

(5) Whether the field of expertise claimed by the expert is known to reach reliable results for the type of opinion the expert would give. *See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1175 (1999)* (Daubert's general acceptance factor does not "help show that an expert's testimony is reliable where the discipline itself lacks reliability, as, for example, do theories grounded in any so-called generally accepted principles of astrology or necromancy."); *Moore v. Ashland Chemical, Inc., 151 F.3d 269 (5th Cir. 1998)* (en banc) (clinical doctor was properly precluded from testifying to the toxicological cause of the plaintiffs respiratory problem, where the opinion was not sufficiently grounded in scientific methodology); *Sterling v. Velsicol Chem. Corp., 855 F.2d 1188 (6th Cir. 1988)* (rejecting testimony based on "clinical ecology" as unfounded and unreliable).

All of these factors remain relevant to the determination of the reliability of expert testimony under the Rule as amended. Other factors may also be relevant. *See Kumho, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176* ("[W]e conclude that the trial judge must have considerable leeway in deciding in a particular case how to go about determining whether particular expert testimony is reliable."). Yet no single factor is necessarily dispositive of the reliability of a particular expert's testimony. *See, e.g., Heller v. Shaw Industries, Inc., 167 F.3d 146, 155 (3d Cir. 1999)* ("not only must each stage of the expert's testimony be reliable, but each stage must be evaluated practically and flexibly without bright-line exclusionary (or inclusionary) rules."); *Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1317, n.5* (9th Cir. 1995) (noting that some expert disciplines "have the courtroom as a principal theatre of operations" and as to these disciplines "the fact that the expert has developed an expertise principally for purposes of litigation will obviously not be a substantial consideration.").

A review of the caselaw after *Daubert* shows that the rejection of expert testimony is the exception rather than the rule. *Daubert* did not work a "seachange over federal evidence law," and "the trial court's role as gatekeeper is not intended to serve as a replacement for the adversary system." *United States v. 14.38 Acres of Land Situated in Leflore County, Mississippi, 80 F.3d 1074, 1078 (5th Cir. 1996).* As the Court in Daubert stated: "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *509 U.S. at 595.* Likewise, this amendment is not intended to provide an excuse for an automatic challenge to the testimony of every expert. *See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176 (1999)* (noting that the trial judge has the discretion "both to avoid unnecessary 'reliability' proceedings in ordinary cases where the reliability of an expert's methods is properly taken for granted, and to require appropriate proceedings in the less usual or more complex cases where cause for questioning the expert's reliability arises.").

When a trial court, applying this amendment, rules that an expert's testimony is reliable, this does not necessarily mean that contradictory expert testimony is unreliable. The amendment is broad enough to permit testimony that is the product of competing principles or methods in the same field of expertise. *See, e.g., Heller v. Shaw Industries, Inc., 167*

F.3d 146, 160 (3d Cir. 1999) (expert testimony cannot be excluded simply because the expert uses one test rather than another, when both tests are accepted in the field and both reach reliable results). As the court stated in *In re Paoli R.R. Yard PCB Litigation, 35 F.3d 717, 744 (3d Cir. 1994),* proponents "do not have to demonstrate to the judge by a preponderance of the evidence that the assessments of their experts are correct, they only have to demonstrate by a preponderance of evidence that their opinions are reliable. . . . The evidentiary requirement of reliability is lower than the merits standard of correctness." *See also Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1318* (9th Cir. 1995) (scientific experts might be permitted to testify if they could show that the methods they used were also employed by "a recognized minority of scientists in their field."); *Ruiz-Troche v. Pepsi Cola, 161 F.3d 77, 85 (1st Cir. 1998)* ("*Daubert* neither requires nor empowers trial courts to determine which of several competing scientific theories has the best provenance.").

The Court in *Daubert* declared that the "focus, of course, must be solely on principles and methodology, not on the conclusions they generate." *509 U.S. at 595.* Yet as the Court later recognized, "conclusions and methodology are not entirely distinct from one another." *General Elec. Co. v. Joiner, 522 U.S. 136 [139 L. Ed. 2d 508],* 146 (1997). Under the amendment, as under *Daubert,* when an expert purports to apply principles and methods in accordance with professional standards, and yet reaches a conclusion that other experts in the field would not reach, the trial court may fairly suspect that the principles and methods have not been faithfully applied. *See Lust v. Merrell Dow Pharmaceuticals, Inc., 89 F.3d 594, 598* (9th Cir. 1996). The amendment specifically provides that the trial court must scrutinize not only the principles and methods used by the expert, but also whether those principles and methods have been properly applied to the facts of the case. As the court noted in *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 745 (3d Cir. 1994),* "any step that renders the analysis unreliable . . . renders the expert's testimony inadmissible. *This is true whether the step completely changes a reliable methodology or merely misapplies that methodology."*

If the expert purports to apply principles and methods to the facts of the case, it is important that this application be conducted reliably. Yet it might also be important in some cases for an expert to educate the factfinder about general principles, without ever attempting to apply these principles to the specific facts of the case. For example, experts might instruct the factfinder on the principles of thermodynamics, or bloodclotting, or on how financial markets respond to corporate reports, without ever knowing about or trying to tie their testimony into the facts of the case. The amendment does not alter the venerable practice of using expert testimony to educate the factfinder on general principles. For this kind of generalized testimony, Rule 702 simply requires that: (1) the expert be qualified; (2) the testimony address a subject matter on which the factfinder can be assisted by an expert; (3) the testimony be reliable; and (4) the testimony "fit" the facts of the case.

As stated earlier, the amendment does not distinguish between scientific and other forms of expert testimony. The trial court's gatekeeping function applies to testimony by any expert. *See Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1171 (1999)* ("We conclude that Daubert's general holding--setting forth the trial judge's general 'gatekeeping' obligation--applies not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge."). While the relevant factors for determining reliability will vary from expertise to expertise, the amendment rejects the premise that an expert's testimony should be treated more permissively simply because it is outside the realm of science. An opinion from an expert who is not a scientist should receive the same degree of scrutiny for reliability as an opinion from an expert who purports to be a scientist. *See Watkins v. Telsmith, Inc., 121 F.3d 984, 991 (5th Cir. 1997)* ("[I]t seems exactly backwards that experts who purport to rely on general engineering principles and practical experience might escape screening by the district court simply by stating that their conclusions were not reached by any particular method or technique."). Some types of expert testimony will be more objectively verifiable, and subject to the expectations of falsifiability, peer review, and publication, than others. Some types of expert testimony will not rely on anything like a scientific method, and so will have to be evaluated by reference to other standard principles attendant to the particular area of expertise. The trial judge in all cases of proffered expert testimony must find that it is properly grounded, well-reasoned, and not speculative before it can be admitted. The expert's testimony must be grounded in an accepted body of learning or experience in the expert's field, and the expert must explain how the conclusion is so grounded. See, e.g., American College of Trial Lawyers, *Standards and Procedures for Determining the Admissibility of Expert Testimony after Daubert, 157 F.R.D. 571, 579 (1994)* ("[W]hether the testimony concerns economic principles, accounting standards, property valuation or other non-scientific subjects, it should be evaluated by reference to the 'knowledge and experience' of that particular field.").

The amendment requires that the testimony must be the product of reliable principles and methods that are reliably applied to the facts of the case. While the terms "principles" and "methods" may convey a certain impression when applied to scientific knowledge, they remain relevant when applied to testimony based on technical or other specialized knowledge. For example, when a law enforcement agent testifies regarding the use of code words in a drug transaction, the principle used by the agent is that participants in such transactions regularly use code words to conceal the nature of

their activities. The method used by the agent is the application of extensive experience to analyze the meaning of the conversations. So long as the principles and methods are reliable and applied reliably to the facts of the case, this type of testimony should be admitted.

Nothing in this amendment is intended to suggest that experience alone--or experience in conjunction with other knowledge, skill, training or education--may not provide a sufficient foundation for expert testimony. To the contrary, the text of Rule 702 expressly contemplates that an expert may be qualified on the basis of experience. In certain fields, experience is the predominant, if not sole, basis for a great deal of reliable expert testimony. *See, e.g., United States v. Jones, 107 F.3d 1147 (6th Cir. 1997)* (no abuse of discretion in admitting the testimony of a handwriting examiner who had years of practical experience and extensive training, and who explained his methodology in detail); *Tassin v. Sears Roebuck, 946 F.Supp. 1241, 1248 (M.D.La. 1996)* (design engineer's testimony can be admissible when the expert's opinions "are based on facts, a reasonable investigation, and traditional technical/mechanical expertise, and he provides a reasonable link between the information and procedures he uses and the conclusions he reaches"). See also *Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1178 (1999)* (stating that "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience.").

If the witness is relying solely or primarily on experience, then the witness must explain how that experience leads to the conclusion reached, why that experience is a sufficient basis for the opinion, and how that experience is reliably applied to the facts. The trial court's gatekeeping function requires more than simply "taking the expert's word for it." *See Daubert v. Merrell Dow Pharmaceuticals, Inc., 43 F.3d 1311, 1319* (9th Cir. 1995) ("We've been presented with only the experts' qualifications, their conclusions and their assurances of reliability. Under *Daubert*, that's not enough."). The more subjective and controversial the expert's inquiry, the more likely the testimony should be excluded as unreliable. *See O'Conner v. Commonwealth Edison Co., 13 F.3d 1090 (7th Cir. 1994)* (expert testimony based on a completely subjective methodology held properly excluded). *See also Kumho Tire Co. v. Carmichael, [143 L. Ed. 2d 238,] 119 S.Ct. 1167, 1176 (1999)* ("[I] will at times be useful to ask even of a witness whose expertise is based purely on experience, say, a perfume tester able to distinguish among 140 odors at a sniff, whether his preparation is of a kind that others in the field would recognize as acceptable.").

Subpart (1) of Rule 702 calls for a quantitative rather than qualitative analysis. The amendment requires that expert testimony be based on sufficient underlying "facts or data." The term "data" is intended to encompass the reliable opinions of other experts. See the original Advisory Committee Note to Rule 703. The language "facts or data" is broad enough to allow an expert to rely on hypothetical facts that are supported by the evidence. *Id.*

When facts are in dispute, experts sometimes reach different conclusions based on competing versions of the facts. The emphasis in the amendment on "sufficient facts or data" is not intended to authorize a trial court to exclude an expert's testimony on the ground that the court believes one version of the facts and not the other.

There has been some confusion over the relationship between Rules 702 and 703. The amendment makes clear that the sufficiency of the basis of an expert's testimony is to be decided under Rule 702. Rule 702 sets forth the overarching requirement of reliability, and an analysis of the sufficiency of the expert's basis cannot be divorced from the ultimate reliability of the expert's opinion. In contrast, the "reasonable reliance" requirement of Rule 703 is a relatively narrow inquiry. When an expert relies on inadmissible information, Rule 703 requires the trial court to determine whether that information is of a type reasonably relied on by other experts in the field. If so, the expert can rely on the information in reaching an opinion. However, the question whether the expert is relying on a sufficient basis of information--whether admissible information or not--is governed by the requirements of Rule 702.

The amendment makes no attempt to set forth procedural requirements for exercising the trial court's gatekeeping function over expert testimony. *See* Daniel J. Capra, *The Daubert Puzzle, 38 Ga.L.Rev. 699, 766 (1998)* ("Trial courts should be allowed substantial discretion in dealing with Daubert questions; any attempt to codify procedures will likely give rise to unnecessary changes in practice and create difficult questions for appellate review."). Courts have shown considerable ingenuity and flexibility in considering challenges to expert testimony under Daubert, and it is contemplated that this will continue under the amended Rule. *See, e.g., Cortes-Irizarry v. Corporacion Insular, 111 F.3d 184 (1st Cir. 1997)* (discussing the application of Daubert in ruling on a motion for summary judgment); *In re Paoli R.R. Yard PCB Litig., 35 F.3d 717, 736, 739 (3d Cir. 1994)* (discussing the use of in limine hearings); *Claar v. Burlington N.R.R., 29 F.3d 499, 502-05* (9th Cir. 1994) (discussing the trial court's technique of ordering experts to submit serial affidavits explaining the reasoning and methods underlying their conclusions).

The amendment continues the practice of the original Rule in referring to a qualified witness as an "expert." This was done to provide continuity and to minimize change. The use of the term "expert" in the Rule does not, however, mean that a jury should actually be informed that a qualified witness is testifying as an "expert." Indeed, there is much to be said for a practice that prohibits the use of the term "expert" by both the parties and the court at trial. Such a practice "ensures that trial courts do not inadvertently put their stamp of authority" on a witness's opinion, and protects against

the jury's being "overwhelmed by the so-called 'experts'." Hon. Charles Richey, *Proposals to Eliminate the Prejudicial Effect of the Use of the Word "Expert" Under the Federal Rules of Evidence in Criminal and Civil Jury Trials, 154 F.R.D. 537, 559 (1994)* (setting forth limiting instructions and a standing order employed to prohibit the use of the term "expert" in jury trials).

Notes of Advisory Committee on 2011 amendments. The language of Rule 702 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

RULE 702, N.D.R.Ev. - TESTIMONY BY EXPERTS (PAGES 117-135 OF THE AGENDA MATERIAL)

Staff explained that the model for Rule 702, Fed.R.Ev. 702, had been amended in 2000 and the Committee had not yet considered whether to include the amendments in the state rule. Staff explained that the proposal before the Committee contained the federal amendments, which were developed in response to Daubert v. Merrell Dow Pharmaceuticals, 509 U.S. 579 (1993) and Kumho Tire Co. v. Carmichael, 526 U.S. 137 (1999).

Mr. Plambeck MOVED for approval of Rule 702 as amended. Judge Schmalenberger seconded.

A member observed that North Dakota had not adopted a version of Fed.R.Ev. 703. The member said that Rule 703 is more important than Rule 702 and that the Committee should consider the changes to both rules together. The member said that if the Committee adopted the proposed changes to Rule 702, it would essentially be telling the Supreme Court to adopt Daubert.

A member said that the proposed changes should not be adopted because the changes are not supported by the decisions of the Supreme Court, which has not adopted Daubert. The member also said that at least 90 percent of the experts in North Dakota courts are physicians, accountants, custody evaluators and real estate appraisers. The member said none of these experts really can be evaluated under Daubert standards.

A member said the changes should be adopted because they would provide additional guidance to the trial courts. The member said that while the Supreme Court had not yet adopted Daubert it had also not rejected it. The member said that Daubert and Kumho Tire were interpretations of Fed.R.Ev. 702, which had been adopted unchanged in North Dakota. The member said that, traditionally, the Supreme Court has found federal interpretations of rules to be persuasive guidance in interpreting similar North Dakota rules.

The member said commentators do not agree whether Daubert and Kumho Tire will

limit the admission of expert testimony or open the door to more expert testimony. The member suggested that the opinions may close the door to some junk science and open the door to novel ideas that are supported by science. The member said there is a tendency to misread Daubert and that the change to Fed.R.Ev. 702 clarified the standards that courts need to apply in regard to expert testimony. The member said the rule change puts the focus back on the reliability of the expert testimony and is a worthwhile change.

A member said that adoption of Daubert principles in North Dakota is not appropriate. The member said the rule we have works. The member also said state courts handle matters foreign to federal court, such as custody disputes. The member said these cases involve psychologists and custody evaluators who are allowed to testify based on having a license, which is informal, but works. The member said the Daubert criteria better fits matters like accident cases, where accident reconstructors may have limited credentials.

A member replied that the situation in custody cases provides an argument for change. The member said many experts in domestic relations cases provide testimony that is not based on any kind of science or learning, including psychologists, play therapists, and related experts. The member said the changes should be adopted.

A member said such problem experts could be eliminated under the standards of present rule 702. A member replied this was not possible if 702 needs to be interpreted in a liberal manner.

A member said North Dakota's Stein case adopted the essential reliability element of the Daubert test, but that Stein came out before the formal adoption of N.D.R.Ev. 702 and is not an interpretation of that rule. The member also said the proposed changes to Rule 702 were not a blanket adoption of Daubert and Kumho Tire but an articulation of a reliability test similar to the Stein test.

A member said that there are good arguments for having a tool to get rid of junk science in the court system, but the way the proposed amendments are structured requires judges to make judgments they are not qualified to make. The member said that judges are not qualified to decide expert testimony matters based on scientific training so they instead decide based on their own predilections about how the tort system should work. The member guessed that if North Dakota's district judges were surveyed, most would not want to adopt Daubert.

The motion to approve Rule 702 as amended CARRIED 10-8. Because the motion to approve gained less than a two-thirds majority, the rule will not be sent to the Supreme Court but considered again at a future meeting.

MINUTES OF MEETING
Joint Procedure Committee
September 22-23, 2005

RULE 702, N.D.R.Ev. - TESTIMONY BY EXPERTS; RULE 703, N.D.R.Ev. - BASES OF OPINION TESTIMONY BY EXPERTS (PAGES 26-92 OF THE AGENDA MATERIAL)

Staff explained that the Committee had addressed proposed amendments to Rule 702 at its September 2004 meeting, but that the rule was back for a second look because the Committee did not approve the amendments to the rule by a 2/3 vote. Staff also presented an alternative Rule 702 proposal with amendments to the explanatory note only.

Mr. Plambeck MOVED to approve the amendments to Rule 702. Mr. Kuntz seconded.

A member said that if the amendment was adopted North Dakota lawyers would be required to argue federal law in trying to exclude evidence because there was no foundation of state law on the issue. The member said that the Daubert standard as originally adopted was probably sound, but that lower federal courts have interpreted the standard to be more restrictive than the Frye standard and have used it to exclude evidence that should have been admitted.

The member said the federal rule allows judges to determine what evidence is reliable in terms of scientific and technical knowledge and whether this evidence is reliably applied to the facts of the case. The member said this should be the province of the jury and that the rule takes away from the jury certain fact-finding rights. The member said that many federal courts operating under Fed.R.Ev. 702 language require evidentiary hearingmini-trials overseen by the judgeon the admissibility of expert testimony.

The member said that it would not be a good idea to adopt the federal language, especially since the North Dakota Supreme Court has avoided adopting the Daubert standard.

A member said that the existing rule language has not prevented lawyers from citing the Daubert factors in attempting to exclude evidence. The member said that judges have great discretion to exclude evidence under the current rule. The member said that if the proposed amendments were not adopted, lawyers might not feel free to seek exclusion of evidence based on the Daubert factors. The member said that some experts in criminal and domestic cases should not be allowed to testify because they base their testimony on social science rather than hard science. The member said that by leaving Rule 702 unchanged, the Committee may be leaving the door open for unreliable testimony to come in.

A member said that it was not Fed.R.Ev. 702 that created the need for pre-trial evidentiary hearings in federal court. The member said another federal rule gives judges the authority to hold hearings on the admissibility of evidence. The member said the proposed change instead would give judges more guidance on how to decide whether to admit evidence. The member said that Rule 702 was derived from the federal rule it was appropriate to amend it to match the federal rule so that judges and practitioners could obtain guidance from federal court decisions interpreting the rule.

The member said the Daubert decision provided a helpful and nonexclusive list of factors for courts to consider when evaluating expert evidence. The member said the proposed amendment would provide additional useful guidance.

A member responded that it would be hubris on the Committee's part to adopt the amendment when the Supreme Court had not adopted Daubert. The member added that the

Daubert factors were not useful in evaluating the kind of expert witnesses commonly seen in North Dakota courtrooms, like treating physicians. The member said that in Minnesota's federal courts, Daubert procedures have developed that are time consuming and wasteful. The member said this could be a reason why the State of Minnesota had declined to revise its rules to reflect Daubert.

A member said that there was nothing objectionable about the three standards that would be added to the rule if the amendment was approved. The member said the current rule was too broad. The member said that every lawyer could point to occasions where an unqualified expert was allowed to testify.

A member said that the reach of Daubert had been broadened far beyond what was originally intendedevaluating expert testimony in the scientific context. The member said that if the proposal was adopted, the Daubert rationale would apply to all categories of expert witnesses and that this seemed to be going too far.

A member responded that the U.S. Supreme Court had extended the Daubert rationale to other categories. The member said that the Daubert factors were nonexclusive and not every factor would apply to all kinds of testimony. The member said that sometimes even the testimony of a treating physician must be subjected to scrutiny for reliability and the Daubert factors are tools to do this.

A member replied that the amendments to the rule were different from the Daubert factors because they would have to be applied to all cases where expert testimony was offered.

A member said that, in practice, North Dakota lawyers and judges borrow from federal cases to make threshold determinations on what goes into evidence. The member suggested that this could continue even if the proposed amendments were not adopted. A member replied that the proposed amendments were consistent with the federal rule and consistent with the case law being developed in the federal system. The member said that the proposed language and the developing case law all give clues about how to determine whether offered evidence is reliable.

A member said that the proposed language would have a limiting effect on the admission of expert testimony. The member said Rule 702 in its current form gives attorneys more flexibility to make arguments for and against the admission of expert testimony, and it gives judges more flexibility in making decisions.

A member suggested that if the Committee rejected the amendments some might view

this as a rejection of the Daubert factors. The member said this was not the case. The member said that the current language leaves things wide open and offers no guidance at all on the standards for admitting or rejecting evidence. The member said the proposed language at least offers some guidance and some standards, which would be useful both to lawyers and judges.

A member suggested that the proposal could be tabled permanently so that no one could leap to any conclusions about the validity of Daubert based on the Committee's actions.

A member said the Committee should approve the proposed amendments so that North Dakota could stay on track with and continue to be guided by the decisions being made in federal courts under Fed.R.Ev. 702.

A member observed that the Committee was an advisory group that had no power to set precedent and that what the Committee decided should have no impact on actions taken by trial judges considering evidence questions.

Mr. Plambeck's motion to adopt changes to Rule 702 FAILED 4-11.

Ms. Schmitz MOVED to adopt the alternate version of Rule 702 with amendments to the explanatory note only. Mr. Kapsner seconded.

A member said that the language of the rule describing how it was based on Fed.R.Ev. 702 was no longer correct.

Mr. Kapsner MOVED to amend language at line 10 to delete the words "is taken from Fed.R.Ev. 702, and." Ms. Schmitz seconded.

A member commented that the proposal would delete the history of the rule.

Motion CARRIED 14-1.

Ms. Schmitz's motion to adopt the proposed changes to Rule 702's explanatory note CARRIED 14-1.

Staff explained that the proposal to amend Rule 703 was before the Committee because a member requested that the Rule 703 amendments be considered with the Rule 702 amendments.

Mr. Kapsner MOVED to adopt the amendments to Rule 703. Judge Kleven seconded.

A member said that, if the proposed amendment was made, experts who review the entirety of a record will be able to use the record as a basis for their opinion but will be barred from disclosing any excluded portions of the record. The member said that physicians especially will

often say things in a medical record that are purely an opinion. This portion of the record can be excluded as hearsay unless the physician comes and testifies. The proposed rule amendment will prevent experts who review records from regurgitating excluded hearsay as part of their opinions.

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

State of North Dakota, Plaintiff and Appellee v. Luis Ignacio Hernandez, Sr., Defendant and Appellant

No. 20050047

SUPREME COURT OF NORTH DAKOTA

2005 ND 214*; *707 N.W.2d 449*; *2005 N.D. LEXIS 256

December 20, 2005, Filed

SUBSEQUENT HISTORY: Post-conviction relief denied at *Hernandez v. State, 2007 ND 92, 2007 N.D. LEXIS 104 (June 26, 2007)*

DISPOSITION: AFFIRMED.

COUNSEL: Birch P. Burdick (argued), State's Attorney, and Charles B. Neff, Jr. (appeared), third-year law student, under the Rule on Limited Practice of Law by Law Students, Fargo, N.D., for plaintiff and appellee.

Dennis D. Fisher, Stefanson, Plambeck, Foss & Fisher, Moorhead, MN, for defendant and appellant.

JUDGES: Dale V. Sandstrom, Carol Ronning Kapsner, Mary Muehlen Maring, Gerald W. VandeWalle, C.J. Opinion of the Court by Sandstrom, Justice. Crothers, Justice, concurring specially.

OPINION BY: Dale V. Sandstrom

OPINION

[**452] **Sandstrom, Justice.**

[*P1] Luis I. Hernandez, Sr., appeals from a judgment entered after a jury found him guilty of gross sexual imposition, and from an order denying his motions for a new trial. We hold the trial court did not abuse its discretion in allowing the State's handwriting expert to identify Hernandez as the author of a letter handwritten [***2] in Spanish, the court did not obviously err in permitting the jury to see an unredacted copy of an English translation of the letter, the court did not abuse its discretion in admitting testimony about Hernandez's prior sexual abuse of the complainant, and the court did not err in admitting testimony and a report that non-motile sperm was found in a swab taken from the complainant during an examination by an emergency room pediatrician. We affirm.

I

[*P2] The State charged Hernandez with gross sexual imposition under *N.D.C.C. § 12.1-20-03* for allegedly engaging in a sexual act with the complainant, the twelve-year-old daughter of his former girlfriend. At trial, the State presented evidence that Hernandez picked up the complainant after school on May 22, 2003; and took her to a Fargo motel, where he engaged in sexual acts with her. The complainant testified Hernandez ultimately drove her to her mother's home, where the complainant told her mother that Hernandez had raped her. The complainant's mother testified she found a letter handwritten in Spanish in the screen door of her house about a day or two after Hernandez was arrested. The letter [***3] was not addressed to a recipient and was not signed by its author. The State introduced an English translation of the letter, which stated "she went to the hotel with me and we had sex and that I didn't rape her" and "I don't deny that I got involved with her but she gave it to me voluntarily." The State also introduced expert testimony that identified Hernandez as the author of the handwritten letter.

[*P3] Hernandez claimed the complainant's mother manipulated her daughter to fabricate the prosecution against him. There was evidence that Hernandez and the complainant's mother had a stormy relationship over the previous ten years. [**453] They were never married, but they had a son together in 1994. According to Hernandez, the complainant's mother did not approve of his relationship with his current girlfriend, and in May 2003, his physical mobility was severely limited by a February 2003 automobile accident and a "halo" device he wore as part of his rehabilitation for a spinal cord injury. Hernandez testified he met his son, the complainant's mother, and the complainant at a Fargo motel on May 22, 2003. According to Hernandez, his son and the complainant went swimming in the motel [***4] pool, and the complainant's mother then tried to engage in sexual activity with him in the motel room. Hernandez testified the two children subsequently returned from swimming and then showered, and everyone left the motel together. He claimed he did not engage in any

sexual activity with the complainant on May 22, 2003. A jury found Hernandez guilty of gross sexual imposition. The trial court denied Hernandez's motion and amended motion for a new trial.

[*P4] The trial court had jurisdiction under *N.D. Const. art. VI, § 8*, and *N.D.C.C. § 27-05-06*. Hernandez's appeal is timely under *N.D.R.App.P. 4(b)*. This Court has jurisdiction under *N.D. Const. art. VI, §§ 2* and *6*, and *N.D.C.C. § 29-28-06*.

II

[*P5] Hernandez argues the trial court erred in permitting a licensed private investigator to testify as a handwriting expert without properly exercising the gatekeeping functions required by *Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)*, and *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)*. Hernandez claims this Court must follow [***5] the *Daubert* and *Kumho Tire* decisions. Hernandez also argues the private investigator lacked the qualifications, proficiency, and scientific methodology to analyze the writing in the Spanish letter, and the court erred in allowing him to testify that Hernandez wrote the letter.

[*P6] This Court has never explicitly adopted *Daubert* and *Kumho Tire*. *See Howe v. Microsoft Corp., 2003 ND 12, P27 n.1, 656 N.W.2d 285*. Contrary to Hernandez's assertion, this Court is not required to follow *Daubert* and *Kumho Tire*, which involved admissibility of expert testimony in federal courts under the federal rules of evidence. This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and we decline Hernandez's invitation to adopt *Daubert* by judicial decision. *See State v. Osier, 1997 ND 170, P5 n.1, 569 N.W.2d 441* (refusing to adopt procedural rule by opinion in litigated appeal).

[*P7] Under North Dakota law, the admission of expert testimony is governed by *N.D.R.Ev. 702*, which provides:

> If scientific, technical, or other specialized [***6] knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

[*P8] *Rule 702, N.D.R.Ev.*, envisions generous allowance of the use of expert testimony if the witness is shown to have some degree of expertise in the field in which the witness is to testify. *Gonzalez v. Tounjian, 2003 ND 121, P24, 665 N.W.2d 705*. An expert need not be a specialist in a highly particularized field if the expert's knowledge, training, education, and experience will assist the trier of fact. *Myer v. Rygg, 2001 ND 123, P14, 630 N.W.2d 62*. A trial court has broad [**454] discretion to determine whether a witness is qualified as an expert and whether the witness's testimony will assist the trier of fact. *Harfield v. Tate, 2004 ND 45, P21, 675 N.W.2d 155*. A trial court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, its decision is not the product of a rational mental process leading to a reasoned decision, or it misinterprets [***7] or misapplies the law. *Rygg, at P8*. We have said we are reluctant to interfere with the broad discretion given to a trial court to decide the qualifications and usefulness of expert witnesses. *Id.* A trial court does not abuse its discretion in admitting expert testimony whenever the expert's specialized knowledge will assist the trier of fact, even if the expert does not possess a particular expertise or special certification. *Id. at P15*.

[*P9] This Court has implicitly recognized the admissibility of expert opinions about handwriting. *See State v. Noorlun, 2005 ND 189, PP15-19, 705 N.W.2d 819*; *Timmerman Leasing, Inc. v. Christianson, 525 N.W.2d 659, 663 (N.D. 1994)*; *In re Peterson, 178 N.W.2d 738, 740-41 (N.D. 1970)*; *Klundt v. Pfeifle, 77 N.D. 132, 139-41, 41 N.W.2d 416, 420-21 (1950)*. Here, the private investigator testified he had worked as an agent for the North Dakota Bureau of Criminal Investigation for almost 30 years, and in 1981 he received training for comparing questioned writing with known writing. He testified he had assisted in analyzing handwriting in 100 to 200 cases. Under our standard for the [***8] allowance of expert testimony, we conclude the trial court did not act arbitrarily, unreasonably, or unconscionably, or misinterpret or misapply the law in determining the private investigator was qualified as an expert in handwriting analysis and deciding his testimony would assist the jury. We therefore hold the court did not abuse its discretion in determining the private investigator was qualified to testify as an expert and his testimony would assist the jury.

III

[*P10] Hernandez argues the trial court erred in admitting into evidence an unredacted English translation of the Spanish letter. He argues the unredacted English translation of the letter included statements about prior uncharged sexual misconduct by him and violated the parties' agreement to redact references to prior sexual

contact between him and the complainant in all documents submitted to the jury. Hernandez specifically cites and emphasizes the following passage from the English translation of the letter:

> *Do you remember when she went with me before that in the red truck and she came back with a smile from ear to ear because that day she was able to get it off twice and she was really happy.* [***9] *If I had raped her she wouldn't have been happy when I left her at the house. She would have been mad and she would have told you that I raped her but I didn't rape her she just put out willingly. She should say that we had sex not that I raped her.* And if they ask you if you want to press charges say no. My lawyer wants me to tell the court that you were seeing me after the charges. And already checked the hotels where we were seeing each other and that you had the yellow car then I gave you the truck because a lot of people saw me in the truck but if I tell them that Child Protection will take the children away from you I don't want that. *You better tell her that it was really voluntary sex not rape and you shouldn't press charges because if you don't do it they want to give me 20 years 15 at least.* And if I say that you were seeing me I could do less and that you were my [**455] accomplice they can lock you up too because you didn't call the police on me. I don't want that to happen. Take care of it between you and her.

[*P11] The English translation of the Spanish letter was not specifically identified as a document subject to the State's proposed redaction agreement, [***10] and it was admitted into evidence without an objection by Hernandez. Moreover, before the exhibits were submitted to the jury, the court noted the State had redacted parts of some exhibits. The court then asked defense counsel whether there were any objections to the exhibits, and counsel responded that he did not have any objections.

[*P12] A party may not assert alleged irregularities during a trial unless the party objects when they occur and allows the trial court an opportunity to take appropriate action to remedy any prejudice that may result from the alleged irregularities. *State v. Lee, 2004 ND 176, P10, 687 N.W.2d 237.* A party, not the trial judge, must take the initiative to object to offered evidence. *Id.* A party's failure to object to evidence admitted at trial generally waives the party's right to complain on appeal about the admission of the evidence. *Id.* The rationale for that rule precludes a defendant from inviting error in the hope that if the defendant does not prevail in the trial court, he will prevail upon appellate review of the invited error. *Id. at P11.*

[*P13] Here, Hernandez did more than not object to the admission [***11] of the unredacted portion of the letter cited by him; his counsel specifically indicated he did not object to the letter. Because Hernandez did not object to the admission of the unredacted letter at trial, our standard of review requires a showing of obvious error under *N.D.R.Crim.P. 52(b). See State v. Olander, 1998 ND 50, P11, 575 N.W.2d 658.* We exercise our power to consider obvious error cautiously and only in exceptional situations in which the defendant has suffered a serious injustice. *Id. at P12.* A defendant has the burden of establishing obvious error by showing error that is plain and affects substantial rights. *Id. at P15.* An error is not obvious unless there is a "clear deviation from an applicable legal rule under current law." *Id. at P14.* A clear deviation from an applicable rule also must affect substantial rights, which requires the defendant to show the error was prejudicial, or affected the outcome of the proceeding. *Id. at P15.* In *Olander, at P16* (quoting *United States v. Olano, 507 U.S. 725, 736, 113 S. Ct. 1770, 123 L. Ed. 2d 508 (1993))*, this Court explained that once an accused establishes an obvious error affects substantial [***12] rights, an appellate court has discretion to correct the error and should correct it if it "'seriously affects the fairness, integrity or public reputation of judicial proceedings.'"

[*P14] The context of the English translation of the Spanish letter indicates the letter was intended for the complainant's mother and referred to the immediate circumstances culminating in this criminal charge against Hernandez. The interpreter's note for the English translation of the letter indicates the Spanish version of the letter was notable for its lack of punctuation, incorrect spelling, and illegible handwriting. Immediately before the part of the letter cited by Hernandez, the letter provides:

> The day of Court I got a letter making fun of me like always that I am here because of you and that I am here for this and for that, If all of you give me the opportunity I want to do things right where I did things wrong I don't want to live the way I am living I want things to be like they were when I got out of jail the last time. And for the two of us to

[**456] get ahead. But for that to happen she has to tell the truth, that she went to the hotel with me and we had sex and that I didn't [***13] rape her. She told me to come up I told her that I couldn't she went up but she couldn't get it off by herself and that I should come up but when I went up my right hand was hurting and it went to sleep on me She got mad and tried to throw me to one side and I fell on top of her and I hit her in the face with the (illegible) She got mad, I told her that we couldn't do it anymore She even told me that she wanted (illegible) we were going to stop. She made fun of me and told me that after the accident I was not good for sex anymore. I told her that I wanted to tell you and she told me that I had better not ever tell you because you were not going to believe me I told her that even so I was going to tell you when we got to the house She was mad and scared that I was going to tell you about the sex.

She went and told you and the police She told me on the way that if I told you she was going to kill herself. That you were going to believe me but (illegible) her instead because blood is thicker than water and that is what happened. You caught her talking on the telephone and you heard her telling me that blood is thicker than water that you were not going to believe me just [***14] her But what were you going to believe if I didn't tell you any thing. That is why I think she was mad about what happened in the room and what I told her that I was going to tell you She got scared of what you were going to say that is why she said what she said. I don't deny that I got involved with her but she gave it to me voluntarily.

[*P15] Although the language about "remembering when she went with me before that in the red truck" suggests prior acts, the context of the entire letter indicates Hernandez was discussing the circumstances of the conduct charged in this action. The letter states Hernandez's belief that the twelve-year-old complainant voluntarily engaged in sexual relations with him. *Section 12.1-20-03, N.D.C.C.*, makes it a crime to have sexual contact with a person who is less than 15 years old regardless of consent. *See State v. Schill, 406 N.W.2d 660 (N.D. 1987)*. In the context of the English translation of the entire letter, we conclude Hernandez has not demonstrated that any error in failing to ensure redaction of the language cited by him affected his substantial rights, or that correcting any such [***15] error would preserve the fairness, integrity, or public reputation of judicial proceedings. We therefore conclude Hernandez has failed to show obvious error under *N.D.R.Crim.P. 52(b)*.

IV

[*P16] Hernandez argues the trial court erred in allowing two pediatricians to testify that the complainant reported she had been sexually abused by Hernandez on numerous occasions over the previous seven years. The trial court initially granted Hernandez's motion in limine to suppress testimony about specific incidences of prior sexual misconduct by him against the complainant. At trial, an emergency room pediatrician, Dr. Anila Jacob, testified on direct examination by the State that she tested the complainant for sexually transmitted diseases on May 22, 2003, and the complainant tested positive for gonorrhea. On cross-examination by Hernandez, Dr. Jacob testified it takes about five days after a person has been exposed to gonorrhea to become infected. On re-examination by the State, Dr. Jacob testified the complainant reported she had been sexually abused by Hernandez on numerous occasions over the past seven years and had been sexually abused by Hernandez about [**457] a week before May 22. [***16] The State also elicited testimony from Dr. Alonna Norberg, a pediatrician who examined the complainant about six days after the May 22 examination. Dr. Norberg testified the complainant reported she had been sexually assaulted by Hernandez one week before May 22 and there had been other prior assaults by him.

[*P17] Hernandez argues the trial court erred in admitting the pediatricians' testimony that the complainant reported there had been prior sexual abuse of the complainant by him. The State argues Hernandez failed to preserve this issue at trial because he did not object to the State's initial question about tests for sexually transmitted diseases and gonorrhea. The State also argues the trial court properly exercised its discretion in allowing the pediatricians' testimony, because Hernandez opened the door for limited testimony about his prior misconduct against the complainant when he asked Dr. Jacob how long it took for gonorrhea to incubate and she responded it took five days.

[*P18] We conclude Hernandez's failure to object to the State's questions about tests for sexually transmitted diseases and gonorrhea did not waive his right to raise the issue about [***17] the pediatricians'

subsequent testimony regarding prior sexual misconduct by him against the complainant. Hernandez objected to the pediatricians' testimony when it was elicited during trial, and the issue is whether Hernandez opened the door for the pediatricians' testimony about his prior sexual acts with the complainant.

[*P19] Evidence of prior bad acts or crimes is generally not admissible under *N.D.R.Ev. 404(b)* to show the defendant acted in conformity therewith, but may be admissible for some other purpose. *See State v. Anderson, 2003 ND 30, PP13-14, 657 N.W.2d 245. Rule 404(b), N.D.R.Ev.*, acknowledges the inherent prejudicial effect that prior bad act evidence may have on the trier of fact. *State v. Micko, 393 N.W.2d 741, 744 (N.D. 1986). Rule 404(b), N.D.R.Ev.*, excludes evidence of other acts and crimes committed by a defendant when they are independent of the charged crime and do not fit into one of the rule's exceptions. *Anderson, at P14.*

[*P20] This Court also has considered the admissibility of otherwise inadmissible evidence after the opposing party opened the door for the admission of that evidence. *State v. Jensen, 2000 ND 28, PP5-14, 606 N.W.2d 507* [***18] (concluding trial court did not abuse discretion in refusing to allow defendant to introduce evidence of prior anal intercourse and rough sex between defendant and victim because limited introduction of evidence regarding prior sex between defendant and victim did not open door for evidence offered by defendant); *State v. Purdy, 491 N.W.2d 402, 409-10 (N.D. 1992)* (holding no obvious error to allow questioning of defendant about arrest at clinic because defendant opened door for that evidence during testimony on direct examination); *State v. Flynn, 479 N.W.2d 477, 479-80 (N.D. 1992)* (holding no error in allowing police officer's rebuttal testimony regarding use of multiple social security numbers because defendant opened door for officer's testimony by attempting to show person writing check had used different social security number); *State v. Jensen, 282 N.W.2d 55, 64-69 (N.D. 1979)* (allowing admission of otherwise inadmissible evidence about prior altercation between defendant and another because defendant opened door for evidence during examination of witnesses).

[*P21] The common thread in those decisions is that a trial [***19] court is vested [**458] with discretion to decide whether a party has opened the door for the admission of otherwise inadmissible evidence. *See* 2 Clifford S. Fishman, *Jones on Evidence, Civil and Criminal* § 11:34 (7th ed. 1994); 1 John Henry Wigmore, *Evidence in Trials at Common Law* § 15, at 746-47 (Tillers rev. 1983); 1 John W. Strong, *McCormick on Evidence* § 57 (5th ed. 1999). In *Jensen, 2000 ND 28, PP11-14, 606 N.W.2d 507*, this Court specifically recognized the concept of opening the door for the admission of otherwise inadmissible evidence was not unlimited, and a trial court's decision about the extent of an opened door was reviewed under the abuse-of-discretion standard. That abuse-of-discretion standard comports with this Court's standard of review of evidentiary rulings. *State v. Christensen, 1997 ND 57, P5, 561 N.W.2d 631.*

[*P22] Here, issues about opening the door for evidence about Hernandez's prior sexual misconduct against the complainant initially arose during the testimony of both the complainant and the complainant's mother. During cross-examination of the complainant, defense counsel indicated the complainant [***20] had not called her mother after the May 22, 2003, incident. Outside the presence of the jury, the trial court indicated defense counsel had opened the door for the State to ask why the complainant had not called her mother and for the complainant to respond that she had not planned on telling her mother this had been going on for several years. The complainant subsequently testified she did not call her mother after the May 22, 2003, incident, because she did not plan on telling her mother she had been raped. During cross-examination of the complainant's mother, defense counsel asked her if Hernandez had always treated the complainant with respect before May 22, 2003, and the complainant's mother responded "not exactly." After a discussion outside the presence of the jury, the court allowed defense counsel to withdraw that question and response, but the court admonished counsel "one more time, if there's anything that gets remotely close to opening this door that is partway open now, I'm going to take the prosecutor's position on this." Thereafter, the jury heard testimony that the complainant tested positive for gonorrhea and the incubation period for gonorrhea was five days. When [***21] the State asked the emergency room pediatrician, Dr. Jacob, about the complainant's history, the court said it would allow the State a "reasonable opportunity to rebut [the] implication" the complainant had some other kind of sexual activity that caused the gonorrhea. The State thereafter elicited Dr. Jacob's testimony that the complainant reported she had been sexually abused by Hernandez on numerous occasions over the past seven years and most recently about a week before May 22. The State subsequently elicited Dr. Norberg's testimony that the complainant reported she had been sexually assaulted by Hernandez one week before May 22 and there had been other prior assaults by him.

[*P23] In the context of the proceedings in this case, we conclude the trial court's determination that Hernandez had opened the door for limited testimony about his prior sexual misconduct against the

complainant was the product of a rational mental process leading to a reasoned decision and was not an abuse of discretion. In response to testimony about the five-day incubation period for gonorrhea, the trial court limited the State to a "reasonable opportunity to rebut [the] implication" the [***22] complainant had some other kind of sexual activity that caused the gonorrhea. The pediatricians' testimony about prior sexual assaults by Hernandez, with the most recent assault about one week before May [**459] 22, was within the parameters of the door opened by Hernandez. Although the reference to assaults over the previous seven years may have stretched the temporal limits of the opened door, we are not persuaded any possible error in that limited reference to seven years was reversible error. The trial court instructed the jury about the use of that evidence:

> The State of North Dakota charged this defendant with Gross Sexual Imposition occurring on or about May 22, 2003, for a specific occurrence between the defendant and [the complainant]. [The complainant] did not testify about any other past incidents that occurred with this defendant.
>
> However, pursuant to certain questions asked of Dr. Anila Jacob, and her answers, the question arose as to how [the complainant] acquired gonorrhea, which takes five days to incubate. In order to present one possible explanation as to how [the complainant] acquired gonorrhea, Dr. Anila Jacob and Dr. Alonna Norberg were allowed [***23] to testify as to the medical history provided to them by [the complainant]. The testimony of Dr. Jacob and Dr. Norberg was offered for this specific purpose only. This testimony should not be considered by you in your determination of the ultimate fact as to whether or not the defendant is guilty of the crime charged in the Information on the date in question, May 22, 2003.

[*P24] A jury is generally presumed to follow instructions, and a curative instruction to disregard certain evidence is generally sufficient to remove improper prejudice. *State v. Ellis, 2001 ND 84, P23, 625 N.W.2d 544*; *State v. Asbridge, 555 N.W.2d 571, 575 (N.D. 1996)*. Here, the jury was specifically instructed about the limited use of the testimony by Dr. Jacob and Dr. Norberg. During closing argument, the State did not unduly focus on their testimony about Hernandez's prior sexual misconduct against the complainant. Rather, the State briefly argued it charged Hernandez with "an assault occurring on May 22, 2003, not something that happened before that, so we're asking you to focus on what happened on May 22, 2003, but you needed to have a perspective on how [the [***24] complainant] might have gotten the gonorrhea that the doctors found."

[*P25] This case involved two conflicting theories of the event. The State presented evidence that Hernandez committed gross sexual imposition and Hernandez claimed that he did not engage in any sexual activity with the complainant on May 22, 2003. Although this case involved conflicting factual theories and credibility issues, from our review of the record, we are not persuaded the pediatricians' limited testimony about Hernandez's prior sexual activity with the complainant was reversible error. Dr. Jacob testified the complainant suffered bruising inside the vulva area, which she testified was consistent with forced sexual contact. The English translation of Hernandez's Spanish letter includes incriminating statements that he admitted to sexual acts with the complainant and he viewed those sexual acts with the twelve-year-old girl as consensual. *Section 12.1-20-03, N.D.C.C.*, makes it a crime to have sexual contact with a person who is less than 15 years old regardless of consent. *See Schill, 406 N.W.2d at 660*. We have carefully reviewed the entire record [***25] in this case, and we are not persuaded the trial court abused its discretion in admitting limited testimony about Hernandez's prior sexual activity with the complainant, which was admitted in response to Hernandez's question about the incubation period for gonorrhea. Moreover, in the context of this record and the court's curative instruction, [**460] we are not persuaded any error in the limited reference to prior sexual abuse was reversible error.

V

[*P26] Hernandez argues the trial court erred in allowing the State to introduce testimony that non-motile sperm was collected from the complainant on May 22, 2003, during the emergency room examination at MeritCare Hospital. Hernandez claims the State permitted the destruction of potentially exculpatory evidence.

[*P27] A sexual assault kit was performed on the complainant by MeritCare personnel on May 22, 2003. According to MeritCare personnel, after "debris" collected for the sexual assault kit was gathered and the sexual assault kit had been completed, Dr. Jacob noted dry secretions on the complainant and Dr. Jacob collected a swab from the complainant under MeritCare's

internal procedures in sexual assault cases. According [***26] to MeritCare personnel, the swab was in addition to the usual sexual assault kit. The swab was taken to MeritCare's lab for testing, and a MeritCare technician found non-motile sperm. After that test, the technician destroyed the sample.

[*P28] Hernandez argues he was not able to test the sample, and without a DNA analysis, the report and testimony that the sample contained non-motile sperm should have been excluded under *N.D.R.Ev. 403*. Hernandez also argues the destruction of the sample was sanctioned by the State and violated his due process rights under *California v. Trombetta, 467 U.S. 479, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984)*. The State responds the evidence was relevant and admissible under *N.D.R.Ev. 403*, and Hernandez failed to prove the evidence was destroyed in bad faith.

[*P29] Under *N.D.R.Ev. 403*, a trial court has broad discretion to balance the probative value of evidence against the risk of unfair prejudice, and we review the trial court's decision under the abuse-of-discretion standard. *State v. Bell, 2002 ND 130, P14, 649 N.W.2d 243*. We conclude the trial court did not act arbitrarily, unreasonably, or unconscionably in balancing [***27] the probative value of the report and testimony about the results of MeritCare's internal tests against the risk of unfair prejudice.

[*P30] We also conclude this record does not establish the State violated Hernandez's due process rights. In *Trombetta, 467 U.S. at 488, 491*, the United States Supreme Court held there was no due process violation for a State's failure to preserve breath samples for a defendant charged with driving under the influence. The Court held there was no evidence of bad faith by the police, the breath samples did not possess an exculpatory value that was apparent before the sample was destroyed, and the sample was not of such a nature that the defendant was unable to obtain comparable evidence by other reasonably available means. *Id. at 488-90*.

[*P31] In *Arizona v. Youngblood, 488 U.S. 51, 58, 109 S. Ct. 333, 102 L. Ed. 2d 281 (1988)*, the United States Supreme Court held that unless a defendant can show bad faith by the police, the failure to preserve potentially useful evidence does not constitute a denial of due process. In *Youngblood, at 56-57*, the preservation of semen samples was at issue. The Court [***28] explained the "possibility that the semen samples could have exculpated respondent if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*," and the "exculpatory value of the evidence must be apparent '*before* the evidence was destroyed.'" [**461] *Youngblood, at 56-57* (quoting *Trombetta, 467 U.S. at 489*). The Court said the semen samples were "simply an avenue of investigation that might have led in any number of directions," and the "presence or absence of bad faith by the police for purposes of the *Due Process Clause* must necessarily turn on the police's knowledge of the exculpatory value of the evidence at the time it was lost or destroyed." *Youngblood, at 57*.

[*P32] In *State v. Steffes, 500 N.W.2d 608, 613 (N.D. 1993)*, this Court defined bad faith, as used in cases involving destroyed evidence, to mean the evidence was deliberately destroyed by or at the direction of a State agent who intended to thwart and to deprive the defense of information. Hernandez has not marshaled any evidence to show bad faith by the State. *See Steffes, at 613-14*. Moreover, "the possibility that the [***29] semen samples could have exculpated [Hernandez] if preserved or tested is not enough to satisfy the standard of constitutional materiality in *Trombetta*." *Youngblood, 488 U.S. at 56*. We reject Hernandez's due process argument.

VI

[*P33] Hernandez argues a search warrant to extract bodily fluid and tissue samples from him was defective. The court initially issued a search warrant authorizing law enforcement to extract bodily fluid and tissue samples from Hernandez; however, hospital personnel refused to take samples from Hernandez without a specific court order authorizing them to take the samples. The State ultimately obtained a court order directing the hospital to take the samples. Hernandez argues the court's later order, issued without an additional affidavit, and the samples taken from him violated his rights under *N.D.R.Crim.P. 41* and the warrant requirements of the state and federal constitutions.

[*P34] Hernandez raised this issue in his pretrial motion in limine, and the trial court denied his motion. Hernandez did not raise this issue in his motion for new trial, or his first amended motion for new trial. This Court has said that [***30] although a motion for new trial is not necessary for appellate review, when a new trial is sought, the party making the motion is limited on appeal to the grounds presented to the trial court in the motion for a new trial. *State v. Jordheim, 508 N.W.2d 878, 880-81 (N.D. 1993)*. We conclude Hernandez has not preserved issues about the search warrant for appellate review.

VII

[*P35] We affirm the conviction and the order denying Hernandez's motions for a new trial.

[*P36] Dale V. Sandstrom

Carol Ronning Kapsner

Mary Muehlen Maring

Gerald W. VandeWalle, C.J.

CONCUR BY: Daniel J. Crothers

CONCUR

Crothers, Justice, concurring specially.

[*P37] I concur in the result reached in Part II and join the majority in the remainder of its opinion. I write separately because of my belief it is time we consider adopting *Daubert* and its progeny as the law in North Dakota.

[*P38] I agree with that portion of Part II rejecting Hernandez's contention that the *supremacy clause of United States Constitution* requires this Court to follow *Daubert v. Merrell Dow Pharms., 509 U.S. 579, 113 S. Ct. 2786, 125 L. Ed. 2d 469 (1993)* and *Kumho Tire Co., Ltd. v. Carmichael, 526 U.S. 137, 119 S. Ct. 1167, 143 L. Ed. 2d 238 (1999)* [***31] when determining admissibility [**462] of expert testimony. However, I disagree with the remainder of the majority's opinion regarding *Daubert* and would accept Hernandez's invitation to adopt the federal court's rationale and analysis for determining admissibility of expert testimony.

[*P39] "Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking shaky but admissible evidence." *Daubert, 509 U.S. at 596.* The question of what constitutes "admissible evidence" is determined by the court, in reliance on the rules of evidence. *N.D.R.Ev. 104(a).* The rules of evidence, in turn, exist to provide a predictable groundwork for admission of evidence, presentation of witnesses, and the conduct of trials. *N.D.R.Ev. 101* and *102.*

[*P40] The problem developing in North Dakota is that the handling of expert testimony is tending toward anything but predictable because, as explained below, this Court, the district courts, and the practicing bar appear adrift with uncertainty whether proceedings are controlled by the *Frye* test, the plain reading of *N.D.R.Ev.* [***32] *104(a)* and *702*, *Daubert*, *Daubert* and *Kumho*, or any combination of the above.

[*P41] Admission of expert testimony in North Dakota courts is fundamentally governed by *N.D.R.Ev. 702*, which provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.

Rule 702 is read in conjunction with *N.D.R.Ev. 104(a)*, which requires that the court address "preliminary questions concerning the qualification of a person to be a witness."

[*P42] The majority refuses to adopt current federal analysis for expert testimony, instead stating in paragraph 6, "This Court has a formal process for adopting procedural rules after appropriate study and recommendation by the Joint Procedure Committee, and we decline Hernandez's invitation to adopt *Daubert* by judicial decision."

[*P43] I am troubled by the majority's conclusion for at least two reasons. First, the version of *Fed. R. Evid. 702* [***33] considered in *Daubert* and *Kumho* was identical to North Dakota's current *Rule 702. See Daubert, 509 U.S. at 588* ("Here there is a specific Rule that speaks to the contested issue. *Rule 702*, governing expert testimony, provides: 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.'") and *Kumho, 526 U.S. at 147* ("*Rule 702* itself says: 'If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.'").

[*P44] *Rule 702, Fed. R. Evid.*, was amended after *Daubert*, and, in fact, in response to *Daubert. See Fed. R. Evid. 702* advisory committee's note. However, the 2000 amendments to *Fed. R. Evid. 702* [***34] cannot be used to cloud the fact it was *Rule 702* itself--and not the *Daubert* decision--that changed the federal analytical approach to admission of expert testimony. [**463] *Daubert, 509 U.S. at 589* and *589 n.6* (*Frye* test was "displaced" and "superseded" by Rules of Evidence). This conclusion was acknowledged by our own Court in *City of Fargo v. McLaughlin, 512 N.W.2d 700, 705 n.2 (N.D. 1994)* ("The United States Supreme Court has recently held that the *Frye* test, requiring general acceptance within the relevant scientific community, has been superseded by FREv 702."). From this, I conclude the changes embodied in *Daubert* and *Kumho* were the

result of rules of evidence that were identical to North Dakota's rules. I am therefore further compelled to conclude that the decision whether to adopt *Daubert* and its progeny is more appropriately a judicial function for this Court than an assignment to the Joint Procedures Committee.

[*P45] Secondly, this Court's failure to follow the federal analysis departs from our long-standing and often stated practice that "we are guided by and give deference [***35] to" federal case law interpreting the federal rule when we construe our rule. *Gruebele v. Gruebele, 338 N.W.2d 805, 811 n.5 (N.D. 1983). See Malchose v. Kalfell, 2003 ND 75, P5, 664 N.W.2d 508* ("Because *N.D.R.Ev. 901* is taken from the Federal Rules of Evidence, with minor revision, we also consider federal cases to help interpret our rule.") and *State v. Forsland, 326 N.W.2d 688, 692 (N.D. 1982)* ("*Rule 404(b)* was adopted from the Federal Rules of Evidence, and as such the construction and interpretation placed upon the rule by the federal authorities are entitled to appreciable weight.").

[*P46] Given the common text and origin of North Dakota's *Rule 702* and the version of Federal *Rule 702* applied in *Daubert* and *Kumho*, I see no reasonable basis for this Court's reluctance to at least consider, if not embrace, the federal interpretation.

[*P47] I also have trouble with the majority's inflexibility on this issue because of this Court's evidentiary rules and opinions that contain or have incorporated, in whole or in part, significant portions of the *Daubert* and *Kumho* doctrines. The *Daubert* Court [***36] focused on the admissibility of scientific expert testimony and held that such testimony is admissible only if it is both relevant and reliable. *509 U.S. at 589*. It further held that the federal rules of evidence "assign to the trial judge the task of ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand." *Id. at 597*.

[*P48] In *Kumho*, the Court extended *Daubert* to include all expert testimony, holding, "In *Daubert*, this Court held that *Federal Rule of Evidence 702* imposes a special obligation upon a trial judge to 'ensure that any and all scientific testimony . . . is not only relevant, but reliable.' The initial question before us is whether this basic gatekeeping obligation applies only to 'scientific' testimony or to all expert testimony. We, like the parties, believe that it applies to all expert testimony." *Kumho, 526 U.S. at 147* (internal citations omitted).

[*P49] *Rule 104(a), N.D.R.Ev.*, imposes a "gatekeeper" function much like that discussed in *Daubert* and *Kumho*. Not surprisingly, opinions from this [***37] Court recognize as much. *See State v. Zimmerman, 516 N.W.2d 638, 642 (N.D. 1994)* ("Whether a blood test was fairly administered is a preliminary question of admissibility left to the discretion of the trial judge.") and *State v. Miller, 466 N.W.2d 128, 131 (N.D. 1991)* ("The trial court controls admission and exclusion of evidence.").

[*P50] The North Dakota Rules of Evidence and cases from this Court also require as a prerequisite to admissibility that an expert's testimony be both relevant and [**464] reliable. *See N.D.R.Ev. 402* ("All relevant evidence is admissible . . . . Evidence which is not relevant is not admissible.") and *State v. Burke, 2000 ND 25, P18, 606 N.W.2d 108* ("DNA test results may be inadmissible if the means used in the particular case were not sufficiently reliable.").

[*P51] My reading of both our rules of evidence and these cases suggests that this Court should act on calls to decide whether North Dakota will adopt, in whole or in part, the so-called *Daubert* and *Kumho* doctrine. Our failure to do so leaves a void that is not in keeping with *Rule 102, N.D.R.Ev.*, requiring construction of [***38] the rules of evidence "to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined."

[*P52] Daniel J. Crothers

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 703, N.D.R.Ev., Bases of an Expert's Opinion Testimony

Form and style amendments to Rule 703 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY ~~BY EXPERTS~~

~~The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissable shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.~~

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

EXPLANATORY NOTE

Rule 703 was amended, effective March 1, 1990, March 1, 2007;_____.

Rule 703 is based on Rule 703 of the Federal Rules of Evidence.

Rule 703 was amended, effective March 1, 1990. The amendments are technical in

nature and no substantive change is intended.

Rule 703 was amended, effective March 1, 2007, to incorporate the 2000 amendments to Fed.R.Ev. 703.

Rule 703 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of _____; September 22-23, 2005, pages 2-6; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6. Rule 703, Federal Rules of Evidence.

Cross Reference: N.D.R.Ev. 702 (Testimony by Experts).

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 703. Bases of an Expert's Opinion Testimony

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1937; Oct. 1, 1987; Dec. 1, 2000.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Facts or data upon which expert opinions are based may, under the rule, be derived from three possible sources. The first is the firsthand observation of the witness, with opinions based thereon traditionally allowed. A treating physician affords an example. Rheingold, The Basis of Medical Testimony, *15 Vand. L. Rev. 473, 489 (1962).* Whether he must first relate his observations is treated in Rule 705. The second source, presentation at the trial, also reflects existing practice. The technique may be the familiar hypothetical question or having the expert attend the trial and hear the testimony establishing the facts. Problems of determining what testimony the expert relied upon, when the latter technique is employed and the testimony is in conflict, may be resolved by resort to Rule 705. The third source contemplated by the rule consists of presentation of data to the expert outside of court and other than by his own perception. In this respect the rule is designed to broaden the basis for expert opinions beyond that current in many jurisdictions and to bring the judicial practice into line with the practice of the experts themselves when not in court. Thus a physician in his own practice bases his diagnosis on information from numerous sources and of considerable variety, including statements by patients and relatives, reports and opinions from nurses, technicians and other doctors, hospital records, and X rays. Most of them are admissible in evidence, but only with the expenditure of substantial time in producing and examining various authenticating witnesses. The physician makes life-and-death decisions in reliance upon them. His validation, expertly performed and subject to cross-examination, ought to suffice for judicial purposes. Rheingold, supra, at 531; McCormick § 15. A similar provision is *California Evidence Code § 801(b).*

The rule also offers a more satisfactory basis for ruling upon the admissibility of public opinion poll evidence. Attention is directed to the validity of the techniques employed rather than to relatively fruitless inquiries whether hearsay is involved. See Judge Feinberg's careful analysis in *Zippo Mfg. Co. v. Rogers Imports, Inc., 216 F.Supp. 670 (S.D.N.Y. 1963)* See also Blum et al, The Art of Opinion Research: A Lawyer's Appraisal of an Emerging Service, *24 U.Chi.L.Rev. 1 (1956);* Bonynge, Trademark Surveys and Techniques and Their Use in Litigation, *48 A.B.A.J. 329 (1962);* Zeisel, The Uniqueness of Survey Evidence, *45 Cornell L.Q. 322 (1960);* Annot., *76 A.L.R.2d 919.*

If it be feared that enlargement of permissible data may tend to break down the rules of exclusion unduly, notice should be taken that the rule requires that the facts or data "be of a type reasonably relied upon by experts in the particular field." The language would not warrant admitting in evidence the opinion of an "accidentologist" as to the point of impact in an automobile collision based on statements of bystanders, since this requirement is not satisfied. See Comment, Cal.Law Rev.Comm'n, Recommendation Proposing an Evidence Code 148-150 (1965).

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

Notes of Advisory Committee on 2000 amendments. Rule 703 has been amended to emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted. Courts have reached different results on how to treat inadmissible information when it is reasonably relied upon by an expert in forming an opinion or drawing an inference. *Compare United States v. Rollins, 862 F.2d 1282 (7th Cir. 1988)* (admitting, as part of the basis of an FBI agent's expert opinion on the meaning of code language, the hearsay statements of an informant), with *United States v. 0.59 Acres of Land, 109 F.3d 1493* (9th Cir. 1997) (error to admit hearsay offered as the basis of an expert opinion, without a limiting instruction). Commentators have also taken differing views. *See, e.g.,* Ronald Carlson, *Policing the Bases of Modern Expert Testimony, 39 Vand.L.Rev. 577 (1986)* (advocating limits on the jury's consideration of otherwise inadmissible

evidence used as the basis for an expert opinion); Paul Rice, *Inadmissible Evidence as a Basis for Expert Testimony. A Response to Professor Carlson, 40 Vand.L.Rev. 583 (1987)* (advocating unrestricted use of information reasonably relied upon by an expert).

When information is reasonably relied upon by an expert and yet is admissible only for the purpose of assisting the jury in evaluating an expert's opinion, a trial court applying this Rule must consider the information's probative value in assisting the jury to weigh the expert's opinion on the one hand, and the risk of prejudice resulting from the jury's potential misuse of the information for substantive purposes on the other. The information may be disclosed to the jury, upon objection, only if the trial court finds that the probative value of the information in assisting the jury to evaluate the expert's opinion substantially outweighs its prejudicial effect. If the otherwise inadmissible information is admitted under this balancing test, the trial judge must give a limiting instruction upon request, informing the jury that the underlying information must not be used for substantive purposes. *See* Rule 105. In determining the appropriate course, the trial court should consider the probable effectiveness or lack of effectiveness of a limiting instruction under the particular circumstances.

The amendment governs only the disclosure to the jury of information that is reasonably relied on by an expert, when that information is not admissible for substantive purposes. It is not intended to affect the admissibility of an expert's testimony. Nor does the amendment prevent an expert from relying on information that is inadmissible for substantive purposes.

Nothing in this Rule restricts the presentation of underlying expert facts or data when offered by an adverse party. *See* Rule 705. Of course, an adversary's attack on an expert's basis will often open the door to a proponent's rebuttal with information that was reasonably relied upon by the expert, even if that information would not have been discloseable initially under the balancing test provided by this amendment. Moreover, in some circumstances the proponent might wish to disclose information that is relied upon by the expert in order to "remove the sting" from the opponent's anticipated attack, and thereby prevent the jury from drawing an unfair negative inference. The trial court should take this consideration into account in applying the balancing test provided by this amendment.

This amendment covers facts or data that cannot be admitted for any purpose other than to assist the jury to evaluate the expert's opinion. The balancing test provided in this amendment is not applicable to facts or data that are admissible for any other purpose but have not yet been offered for such a purpose at the time the expert testifies.

The amendment provides a presumption against disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert. In a multi-party case, where one party proffers an expert whose testimony is also beneficial to other parties, each such party should be deemed a "proponent" within the meaning of the amendment.

Notes of Advisory Committee on 2011 amendments. The language of Rule 703 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 5, 2012

RE: Rule 704, N.D.R.Ev., Opinion on an Ultimate Issue

Form and style amendments to Rule 704 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The federal rule has language that was not made part of the North Dakota Rule. This language is included in the proposal in subdivision (b) for the Committee's discussion. The Committee previously considered this language in 1986 and again in 2006, rejecting it both times. An excerpt from the April 2006 minutes is attached for review.

The language in Fed.R.Ev. 704(b) was added to the rule in accordance with the Insanity Defense Reform Act of 1984. The Court discussed this provision briefly in State v. Schmidkunz, 2006 ND 192, remarking on the Committee's decision not to recommend this language for Rule 704. The Court also indicates that North Dakota law does allow expert testimony that may embrace the ultimate issue in criminal cases. A copy of Schmidkunz is attached.

RULE 704. OPINION ON AN ULTIMATE ISSUE

~~Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.~~

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

~~(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are for the trier of fact alone.~~

EXPLANATORY NOTE

Rule 704 was amended, effective _____.

This rule is ~~taken from Rule~~ based on Fed.R.Ev. 704 ~~of the Federal Rules of Evidence~~. It should be noted that this rule applies to the opinions of lay witnesses, whenever admissible, as well as to opinions of experts.

Rule 704 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes ~~of~~ _____; June 3, 1976, page 7. ~~Rule~~ Fed.R.Ev. 704~~, Federal Rules of Evidence~~; Rule 704, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 704. Opinion on an Ultimate Issue

(a) In General--Not Automatically Objectionable. An opinion is not objectionable just because it embraces an ultimate issue.

(b) Exception. In a criminal case, an expert witness must not state an opinion about whether the defendant did or did not have a mental state or condition that constitutes an element of the crime charged or of a defense. Those matters are 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.)
(As amended Dec. 1, 2011.)

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.".

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).

Notes of Advisory Committee on 2011 amendments. The language of Rule 704 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology

consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

RULE 704, N.D.R.Ev. - OPINION ON ULTIMATE ISSUE (PAGES 179-195 OF THE AGENDA MATERIAL)

Staff explained that attorney Thomas Dickson had proposed an amendment to N.D.R.Ev. 704 that would make the rule consistent with Fed.R.Ev. 704.

Ms. Moore MOVED for approval of the proposal. Mr. McLean seconded.

A member said that, under the present rule, a judge has the authority to limit the testimony of an expert witness regarding the ultimate issue of whether the defendant had the mental state to commit the crime charged. The member said that a party can ask for limits to be placed on such testimony under the present rule.

A member said that the Committee was correct to reject the proposed language when it addressed the amendment to the federal rule in 1986.

A member said the proposal was a good idea. A member said that, in a criminal case, an expert should not be allowed to testify on the ultimate issue of mental state. The member said that the fact that the court can limit such testimony based on other rules does not guarantee that a judge will actually limit such testimony. The member said that having a specific standard in the rule is appropriate.

A member said that the amendment was necessary on the federal level to conform with the federal insanity defense. The member said that the state insanity defense was not necessarily parallel to the federal defense. The member said that opinions on the ultimate issue of mental state can be excluded under N.D.R.Ev. 702.

A member said that there was a jury instruction that advised an expert's opinion could be disregarded.

A member said that the use of the term "inference" in the proposed language could allow a court to completely exclude an expert's testimony on mental state. A member agreed that if the proposal was approved it would create significant line-drawing problems for the court because almost anything an expert said about mental state could be objectionable. The member said that use of a jury instruction is the best way to address expert testimony.

The motion to approve the new language was DEFEATED 2-13.

State of North Dakota, Plaintiff and Appellee v. Zachary Schmidkunz, Defendant and Appellant

No. 20050141

SUPREME COURT OF NORTH DAKOTA

2006 ND 192; 721 N.W.2d 387; 2006 N.D. LEXIS 195

September 13, 2006, Filed

PRIOR HISTORY: [***1] Appeal from the District Court of Ward County, Northwest Judicial District, the Honorable Gerald H. Rustad, Judge.

DISPOSITION: AFFIRMED.

COUNSEL: John P. Van Grinsven III, State's Attorney, Minot, N.D., for plaintiff and appellee.

Chad Rory McCabe, Bismarck, N.D., for defendant and appellant.

JUDGES: Carol Ronning Kapsner, Mary Muehlen Maring, Daniel J. Crothers, Dale V. Sandstrom, Gerald W. VandeWalle, C.J. Opinion of the Court by Kapsner, Justice.

OPINION BY: Carol Ronning Kapsner

OPINION

[**390] **Kapsner, Justice.**

[*P1] Zachary Schmidkunz appealed from a criminal judgment entered after a jury found him guilty of murder, a Class AA Felony. We conclude the prosecutor's improper comments during closing arguments did not constitute obvious error, the district court did not abuse its discretion in admitting testimony by the State's expert witness, and the district court did not abuse its discretion in making comments to the jury before deliberations or in permitting the State's expert to testify regarding [***2] his competency evaluation of Schmidkunz. We affirm.

I

[*P2] On November 17, 2003, Minot police were dispatched to Schmidkunz's parents' residence after his parents contacted police upon discovering the body of a dead woman in their basement. Police officers determined the woman had been shot with a shotgun. Further investigation revealed a shotgun belonging to Zachary Schmidkunz on a bed in the basement. Zachary Schmidkunz was not at his parents' house, and his mother indicated she had last spoken with him by telephone earlier that day.

[*P3] Later that evening Schmidkunz surrendered to Jamestown law enforcement officers and claimed to have shot a woman in Minot. Upon confirming that a shooting had occurred in Minot, Jamestown law enforcement officers placed Schmidkunz under arrest. Schmidkunz was interviewed and gave a handwritten statement to Jamestown law enforcement officers, providing information and details implicating him in the shooting. A typed transcript of Schmidkunz's interview with Jamestown law enforcement officers was received at his subsequent trial, as well as his handwritten statement and his sketch of the basement.

[*P4] The State charged [***3] Schmidkunz with Class AA Felony murder. During trial, Schmidkunz presented expert testimony from Dr. Maureen Hackett. Dr. Hackett testified that, in her opinion, "Schmidkunz was in a state of mind of an 'automaton' that was induced by extreme physiologic excitement fueled by a reaction to a medication withdrawal that created an extreme worsening of his psychiatric symptoms and a sudden onset of novel rage resulting in a prolonged episode of extreme emotional disturbance." The State provided rebuttal testimony from Dr. Joseph Belanger and Dr. James Roerig addressing Dr. Hackett's testimony about Schmidkunz's competency. A jury convicted Schmidkunz of the charge of murder. Schmidkunz appealed from the criminal judgment entered upon the jury verdict.

II

[*P5] Schmidkunz argues the prosecutor's improper comments during closing argument constitute obvious error and require reversal of his conviction. Schmidkunz argues the prosecutor referred to taped recordings by Schmidkunz's expert witness, Dr. Hackett, which were made during her interviews of Schmidkunz and were not admitted into evidence. Schmidkunz concedes, however,

he did not object to the prosecutor's comments during [***4] closing argument and our review of this issue is for obvious error.

[*P6] "This Court exercises its authority to notice obvious error cautiously and only in exceptional circumstances in which the defendant has suffered a serious injustice." *State v. Clark, 2004 ND 85, P6, 678 N.W.2d 765* (citing *State v. Anderson, 2003 ND 30, P8, 657 N.W.2d 245*, and *State v. Evans, 1999 ND 70, P9, 593 N.W.2d 336*). In analyzing obvious error claims under North Dakota law, we have [**391] applied a plain error framework, explaining an appellate court may notice a claimed error that was not brought to the district court's attention if there was "(1) error, (2) that is plain, and (3) affects substantial rights." *State v. Olander, 1998 ND 50, PP13-14, 575 N.W.2d 658*. Once the defendant establishes that a forfeited plain error affects substantial rights, this Court has discretion to correct the error, and should correct the error where it seriously affects the fairness, integrity or public reputation of judicial proceedings. *Id. at P16*.

[*P7] In controlling the scope of closing argument, the district court is vested with discretion, [***5] and absent a clear showing of an abuse of discretion, we will not reverse on grounds the prosecutor exceeded the scope of permissible closing argument. *Clark, 2004 ND 85, P7, 678 N.W.2d 765*. Unless the error is fundamental, a defendant must demonstrate a prosecutor's comments during closing argument were improper and prejudicial. *Id.* In order to be prejudicial, the improper closing argument must have "stepped beyond the bounds of any fair and reasonable criticism of the evidence, or any fair and reasonable argument based upon any theory of the case that has support in the evidence." *Id.* (citing *Evans, 1999 ND 70, P11, 593 N.W.2d 336*).

[*P8] Here, Schmidkunz's expert witness, Dr. Hackett, tape-recorded approximately six and a half hours of her interviews with him. In cross-examining Dr. Hackett, the prosecutor played a portion of those taped interviews. The recordings themselves, however, were not admitted into evidence.

[*P9] During closing argument, the prosecutor argued:

> [Dr. Hackett] testified in direct she liked to make these tapes because she could go back and review them. Remember I told you in my opening [***6] statement a lot of this information the State didn't get until three weeks before trial, inundated with material. Had to pour through them.
>
> But we made time to listen to the tapes. And the thing that stuck out in my mind--you read her report, the first report. Nowhere in that tape or in that report, excuse me, does she mention that he advised her on the tape he took a pill on Sunday.
>
> That was important because, you know, you heard in this discontinuation syndrome, which was their defense, that the best thing you can do is reintroduce the drug. And within 24 hours it will--things were going to get better. But somehow that didn't make it in here. She said I obviously would have put it in there.
>
> Was it an oversight or was it because it just didn't fit? That is your call. But it doesn't help the theory. Certainly it doesn't.
>
> *And we played the tape. I would have played the tape all day. There were other things I would have liked to have shown on the tape.*

(Emphasis added.)

[*P10] Schmidkunz argues the prosecutor's comments were improper because the State cannot rely or comment on facts not in evidence during closing argument. It is undisputed that [***7] the actual recordings of Dr. Hackett's interviews with Schmidkunz were not admitted into evidence so the evidence was limited to the portion of the tape actually heard by the jury. We have previously expressed our concern when a prosecutor comments personally on evidence "because he or she is acting as an unsworn witness for the prosecution who is not subject to cross-examination and who may be perceived as an expert witness." [**392] *State v. Skorick, 2002 ND 190, P15, 653 N.W.2d 698* (citing *State v. Schimmel, 409 N.W.2d 335, 343 (N.D. 1987))*. We have also stated that a prosecutor's improper statements of fact not supported by the evidence "are presumed to be prejudicial unless harmless in themselves." *Evans, 1999 ND 70, P12, 593 N.W.2d 336* (quoting *State v. Mehralian, 301 N.W.2d 409, 418 (N.D. 1981))*. In *Evans*, the prosecutor argued that the defendants had been identified on tape, without evidentiary support in the record. *Evans, at P12*. The issue of identification was disputed at trial, and the prosecutor's comments suggested the prosecutor knew of evidence that supported the charges but was not presented to the [***8] jury. *Id.* However, in *Evans*, the

prejudicial effect of the prosecutor's improper comments was compounded by the district court's failure to admonish the jury to disregard the prosecutor's comments about the identification issue, which were not supported by any evidence. *Evans, at P13.*

[*P11] Here, the district court instructed the jury that statements by counsel were not to be considered evidence, any statements by counsel concerning facts not supported by the evidence were to be disregarded, and jury members were to rely on their own recollection or observation. *See, e.g., Clark, 2004 ND 85, P11, 678 N.W.2d 765* (concluding any possible prejudice was minimized by the court's cautionary instruction and any isolated improper statements were not obvious error). Moreover, although the prosecutor's comments in closing arguments regarding the tapes were improper in suggesting they provided more evidence not heard by the jury, we cannot conclude that the comments were so prejudicial as to affect Schmidkunz's substantial rights. The evidence against Schmidkunz was overwhelming, and we cannot say that the prosecutor's single comment, which did not [***9] state any specific evidentiary facts, carried with it enough weight to impact the jury's verdict and Schmidkunz's ability to receive a fair trial. Schmidkunz has failed to demonstrate the prosecutor's remarks affected his substantial rights.

[*P12] Based upon our review of the record, we are unable to conclude the State's improper comment in closing argument prejudiced Schmidkunz. We therefore, conclude Schmidkunz was not denied a fair trial by the prosecutor's comment and the claimed error does not rise to the level of obvious error requiring reversal.

III

[*P13] Schmidkunz argues the district court committed reversible error by allowing the State's expert witness, Dr. Joseph Belanger, to testify to an element of the criminal charge. The State argues Dr. Belanger's testimony regarding criminal responsibility was appropriate under the circumstances.

[*P14] *Rules 702 through 706 of the North Dakota Rules of Evidence* govern the admissibility of expert testimony. "The test for admission of expert testimony is whether or not such testimony will assist the trier of fact to understand the evidence or to determine a fact in issue and whether or not the witness [***10] is qualified as an expert." *State v. Fontaine, 382 N.W.2d 374, 377 (N.D. 1986).* Under *N.D.R.Ev. 702*, an expert may testify to scientific, technical, or other specialized knowledge which will assist the trier of fact. *Rule 704, N.D.R.Ev.*, specifically provides: "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." Thus, an expert is authorized to give his opinion even though it embraces an ultimate issue of fact to be decided by [**393] the trier of fact. *See State v. Steinbach, 1998 ND 18, P12, 575 N.W.2d 193. Rule 702, N.D.R.Ev.*, envisions "generous allowance" of the use of expert witness testimony where a witness is shown to have some degree of expertise in the field of which the expert testifies. *Steinbach, at P12*; *Anderson v. A.P.I. Co. of Minnesota, 1997 ND 6, P9, 559 N.W.2d 204.*

[*P15] The ultimate decision whether to admit expert witness testimony rests within the district court's sound discretion. *Steinbach, 1998 ND 18, P12, 575 N.W.2d 193*; *Fontaine, 382 N.W.2d at 377.* We will [***11] not reverse the district court's decision on appeal unless the court has abused its discretion. *Steinbach, at P12*; *Fontaine, at 377.* "An abuse of discretion by the district court is never assumed, and the burden is on the party seeking relief affirmatively to establish it." *Nesvig v. Nesvig, 2006 ND 66, P12, 712 N.W.2d 299.* "The district court abuses its discretion only when it acts in an arbitrary, unreasonable, or unconscionable manner, or when its decision is not the product of a rational mental process leading to a reasoned determination." *Id.*

[*P16] Schmidkunz argues that Dr. Belanger improperly testified to the essential elements of murder and definitions of "intentionally" and "knowingly." Schmidkunz claims the district court erred in allowing Dr. Belanger to testify that Schmidkunz's conduct was insufficient to meet the mental disease and defect standard because Dr. Belanger "just read what it means to be knowingly." Schmidkunz asserts the testimony the State solicited from Dr. Belanger wrongfully invaded the province of the jury to determine Schmidkunz's mental state and guilt or innocence because that testimony addressed the essential [***12] elements of murder, the definitions of intentionally and knowingly, and his opinion that Schmidkunz's conduct was insufficient to meet the appropriate standard for a mental disease and defect.

[*P17] Schmidkunz's argument relies on cases applying language from *Fed. R. Evid. 704(b)*, which provides:

> 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 the defense thereto. Such ultimate issues are matters for the trier of fact alone.

In 1984, Congress amended *Fed. R. Evid. 704* to include that subsection. *See United States v. Alexander, 805 F.2d 1458, 1460 n.1, 1461 (11th Cir. 1986)* (explaining *Rule 704* was amended by *section 406* of the Insanity Defense Reform Act of 1984, Pub. L. No. 98-473, 98 Stat. 2057, 2067, which is chapter IV of Title II of the Comprehensive Crime Control Act of 1984, Pub. L. No. 98-473, 98 Stat. 1976). That subsection, however, has never [***13] been adopted in North Dakota, and the Joint Procedure Committee has specifically declined to recommend amending *N.D.R.Ev. 704* to include that language. *See Minutes of the Joint Procedure Comm.* 19-20 (April 27-28, 2006); *Minutes of the Joint Procedure Comm.* 4 (Jan. 23, 1986). We decline to adopt that language by judicial decision. *See State v. Osier, 1997 ND 170, P5 n.1, 569 N.W.2d 441* (declining to adopt procedural rule by opinion in litigated appeal).

[*P18] We agree with the State's observation that *N.D.C.C. §§ 12.1-04.1-03, 12.1-04.1-04, 12.1-04.1-13*, and *N.D.R.Crim.P. 12.2*, specifically authorize the admission of evidence at trial relating to issues of lack of criminal responsibility or lack of state of mind as an element required for the alleged offense. Under those statutes, that type of testimony may be relevant and admissible, despite embracing [**394] an ultimate issue for the trier of fact. In *State v. Jensen, 251 N.W.2d 182, 189 (N.D. 1977)*, this Court stated:

> Psychiatrists and other experts may testify as to their conclusions, [***14] even though based upon reports of psychologists not in evidence. *N.D.R.Ev. 703*; *Minot Sand & Gravel Co. v. Hjelle, 231 N.W.2d 716 (N.D. 1975).*
>
> Psychiatrists and other experts may be allowed to testify to their opinions on the ultimate fact to be determined by the jury, namely, whether the defendant, at the time of the offense, had substantial capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law as of the time of the alleged offense. It is not a proper objection that an expert is testifying to an ultimate fact. *N.D.R.Ev. 704. Minot Sand & Gravel Co. v. Hjelle, supra.*

[*P19] Dr. Belanger's testimony was given in the rebuttal phase of the trial after the defense had presented its case. Dr. Belanger testified after Dr. Hackett testified and provided evidence relating to Schmidkunz's intent, referring to the specific terms in the statute defining the elements for the charged offense and Schmidkunz's state of mind for his criminal responsibility.

[*P20] Under *N.D.R.Ev. 704*, Dr. Belanger's testimony is the type of testimony that would assist the trier of fact even though [***15] it may embrace an ultimate issue to be decided by the jury. We conclude the district court did not abuse its discretion in admitting Dr. Belanger's expert testimony.

IV

[*P21] Schmidkunz argues the district court's comments to the jury before deliberations caused a forced or coerced verdict. At the close of evidence the district court told the jury:

> Let me further advise that in all likelihood we will not have the attorneys' closing arguments today. We will start with those at nine o'clock tomorrow morning. Now, on the assumption that process will be over about noon, you will then be in charge of the bailiffs, and you will start your deliberations. You will have to give up your telephones for as long as it takes you. And it is my policy to the extent possible for you to continue deliberation right through until you reach a verdict or until the time gets too unreasonable.
>
> The reason I am telling you all this is so you can plan your Friday or alert those people that you may have to alert that potential exists that you will be working after five o'clock on Friday. I don't know if that will be necessary. But you have a right to plan your lives.

After the [***16] final jury instructions, the court said:

> I will advise you that I have no way of knowing how long the deliberations will take. It is my intention that you will in all likelihood receive or start deliberations some time mid-forenoon. And it is my intention that you will deliberate--getting a chance to have a noon break or noon food brought in, or something--but deliberate until you come up with a verdict. I advise you this so that you might know that deliberations, if it takes that long, [are] not going to stop at five o'clock tomorrow night, and you can consequently notify your families of that

potential.

Schmidkunz claims the verdict was forced or coerced because after an almost two-week trial, the jury returned a verdict in about three hours. Schmidkunz did not object to either comment. Thus we are limited to a review for obvious error. *See* [**395] *State v. Bertram, 2006 ND 10, P17, 708 N.W.2d 913.*

[*P22] The district court has broad discretion over the conduct of a trial, which includes scheduling the time for jury deliberations, but the court must exercise its discretion in a manner that best comports with substantial justice. *State v. Parisien, 2005 ND 152, P11, 703 N.W.2d 306.* [***17] "[T]he mere length of time a jury is kept in deliberations, in itself, does not establish that a verdict was coerced. . . ." *Id.* (internal quotation omitted).

[*P23] In our view, the court's statements to the jury merely informed the jury of the anticipated schedule for deliberations so the members of the jury could "plan your lives." Nothing in this record supports Schmidkunz's claims that the jury's verdict was forced or coerced. Based upon our review of the record, we conclude the district court did not coerce or force a verdict and did not abuse its discretion in advising the jury of the schedule for deliberations. Because we conclude the district court did not abuse its discretion, Schmidkunz cannot demonstrate an error under the obvious error analysis.

V

[*P24] Schmidkunz argues the district court erred in admitting Dr. Belanger's testimony and his reports because his evaluation of Schmidkunz was audio-recorded, but not video-recorded.

[*P25] In support of his argument, Schmidkunz relies on language in *N.D.C.C. § 12.1-04.1-08(1)*, which provides:

> An examination of the defendant conducted under *section 12.1-04.1-05* [***18] must be audio-recorded and, if ordered by the court, video-recorded. The manner of recording may be specified by rule or by court order in individual cases.

[*P26] Before trial, the district court had ordered that the State's examination of Schmidkunz be both audio-recorded and video-recorded. In August 2004, the State was notified by personnel at the State Hospital that the Hospital did not have the capability to videotape the examination and evaluation of Schmidkunz. The State sent a letter to the State Hospital indicating an audio-recording would be sufficient. The letter indicates it was also sent to Schmidkunz's counsel and filed with the court. In the State's supplemental discovery responses filed in October 2004, Dr. Belanger was listed as an expert witness for trial regarding the issue of lack of criminal responsibility or the requisite state of mind.

[*P27] During trial and just before Dr. Belanger's testimony, Schmidkunz objected to Dr. Belanger's testimony and reports, arguing that evidence was inadmissable because of the lack of a video-taped examination. The district court ruled that, "in spite of the fact the order was not strictly [***19] complied with," the State had provided timely notification upon learning video-recording capacity was not available and, further, that Schmidkunz had waived his right to object to the lack of a video-taped recording by failing to object, or take appropriate and timely action, to that procedure before trial.

[*P28] We conclude the district court's decision to admit Dr. Belanger's testimony was not arbitrary, unreasonable, or unconscionable and was the product of a rational mental process. We therefore conclude the court did not abuse its discretion in admitting Dr. Belanger's testimony and reports into evidence.

VI

[*P29] The district court judgment is affirmed.

[**396] [*P30] Carol Ronning Kapsner

Mary Muehlen Maring

Daniel J. Crothers

Dale V. Sandstrom

Gerald W. VandeWalle, C.J.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 6, 2012

RE: Rule 705, N.D.R.Ev., Disclosing the Facts or Data Underlying an Expert's Opinion

Form and style amendments to Rule 705 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

RULE 705. ~~DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION~~ DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

~~The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.~~

Unless the court orders otherwise, an expert may state an opinion – and give the reasons for it – without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

EXPLANATORY NOTE

Rule 705 was amended, effective March 1, 1990; March 1, 1997;_____.

Rule 705 is based on Fed.R.Ev. 705.

Rule 705 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; September 28-29, 1995, pages 18-19; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 7. ~~Rule~~ Fed.R.Ev. 705~~; Federal Rules of Evidence~~; Rule 705, SBAND

proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE VII. OPINIONS AND EXPERT TESTIMONY

Rule 705. Disclosing the Facts or Data Underlying an Expert's Opinion

Unless the court orders otherwise, an expert may state an opinion--and give the reasons for it--without first testifying to the underlying facts or data. But the expert may be required to disclose those facts or data on cross-examination.

HISTORY:
(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1938; Oct. 1, 1987; Dec. 1, 1993.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The hypothetical question has been the target of a great deal of criticism as encouraging partisan bias, affording an opportunity for summing up in the middle of the case, and as complex and time consuming. Ladd, Expert Testimony, *5 Vand.L.Rev. 414, 426-427 (1952).* While the rule allows counsel to make disclosure of the underlying facts or data as a preliminary to the giving of an expert opinion, if he chooses, the instances in which he is required to do so are reduced. This is true whether the expert bases his opinion on data furnished him at secondhand or observed by him at firsthand.

The elimination of the requirement of preliminary disclosure at the trial of underlying facts or data has a long background of support. In 1937 the Commissioners on Uniform State Laws incorporated a provision to this effect in the Model Expert Testimony Act, which furnished the basis for Uniform Rules 57 and 58. Rule 4515, N.Y. CPLR (McKinney 1963), provides:

"Unless the court orders otherwise, questions calling for the opinion of an expert witness need not be hypothetical in form, and the witness may state his opinion and reasons without first specifying the data upon which it is based. Upon cross-examination, he may be required to specify the data . . .".

See also *California Evidence Code § 802*; Kansas Code of Civil Procedure §§ 60-456, 60-457; New Jersey Evidence Rules 57, 58.

If the objection is made that leaving it to the cross-examiner to bring out the supporting data is essentially unfair, the answer is that he is under no compulsion to bring out any facts or data except those unfavorable to the opinion. The answer assumes that the cross-examiner has the advance knowledge which is essential for effective cross-examination. This advance knowledge has been afforded, though imperfectly, by the traditional foundation requirement. Rule 26(b)(4) of the Rules of Civil Procedure, as revised, provides for substantial discovery in this area, obviating in large measure the obstacles which have been raised in some instances to discovery of findings, underlying data, and even the identity of the experts. Friedenthal, Discovery and Use of an Adverse Party's Expert Information, *14 Stan.L.Rev. 455 (1962).*

These safeguards are reinforced by the discretionary power of the judge to require preliminary disclosure in any event.

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

Notes of Advisory Committee on 1993 amendments. This rule, which relates to the manner of presenting testimony at trial, is revised to avoid an arguable conflict with revised *Rules 26(a)(2)(B) and 26(a)(1) of the Federal Rules of Civil Procedure* or with revised *Rule 16 of the Federal Rules of Criminal Procedure*, which require disclosure in advance of trial of the basis and reasons for an expert's opinions.

If a serious question is raised under Rule 702 or 703 as to the admissibility of expert testimony, disclosure of the underlying facts or data on which opinions are based may, of course, be needed by the court before deciding whether, and to what extent, the person should be allowed to testify. This rule does not preclude such an inquiry.

Notes of Advisory Committee on 2011 amendments. The language of Rule 705 has been amended as part of the general restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

The Committee deleted all reference to an "inference" on the grounds that the deletion made the Rule flow better and easier to read, and because any "inference" is covered by the broader term "opinion." Courts have not made substantive decisions on the basis of any distinction between an opinion and an inference. No change in current practice is intended.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 6, 2012

RE: Rule 706, N.D.R.Ev., Court-Appointed Expert Witnesses

Form and style amendments to Rule 706 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Under the amendments, subdivision (a) is split into two subdivisions.

Subdivision (c) of the federal rule allows public compensation in civil matters only in Fifth Amendment just compensation cases. The North Dakota rule was broader, allowing public compensation in civil cases when allowed by law. The proposal retains this approach.

RULE 706. COURT-APPOINTED EXPERTS WITNESSES

~~(a) Appointment. The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness may not be appointed by the court unless the witness consents to act.~~

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

~~A witness so appointed must be informed of the witness' duties by the court in writing, a copy of which must be filed with the clerk, or at a conference in which the parties have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness is subject to cross-examination by each party, including a party calling the witness.~~

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

~~(b) Compensation. Expert witnesses so appointed are entitled to a reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law. In civil actions where no funds are provided by law, the compensation shall be paid by the parties in such proportion and at such times as the court directs and thereafter charged in like manner as other costs.~~

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case when the law allows it, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs – and the compensation is then charged like other costs.

~~(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.~~

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

~~(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.~~

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling

its own experts.

EXPLANATORY NOTE

Rule 706 was amended, effective March 1, 1990; _____.

~~With only a minor change, this rule is an adoption of Rule 706 of the Federal Rules of Evidence. It comports with present North Dakota practice, but is a more detailed statement of the procedure involved whenever a court appoints an expert than presently exists in North Dakota law. Cf. Rule 28, NDRCrimP.~~

Rule 706 is based on Fed.R.Ev. 706.

Subdivision (a) was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 706 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, pages 7, 8; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 706~~, Federal Rules of Evidence~~; Rule 706, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 28-26-06(5).

~~Rules:~~

~~Considered: Rules 16(4), 26, 35, NDRCivP; Rule 28(a), NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 16 (Pretrial Conferences; Scheduling; Management), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 35 (Physical and Mental Examination); N.D.R.Crim.P. 28 (Interpreters).

Rule 706. Court-Appointed Expert Witnesses

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;
(2) may be deposed by any party;
(3) may be called to testify by the court or any party; and
(4) may be cross-examined by any party, including the party that called the expert.

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case or in a civil case involving just compensation under the Fifth Amendment, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs--and the compensation is then charged like other costs.

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1938; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The practice of shopping for experts, the venality of some experts, and the reluctance of many reputable experts to involve themselves in litigation, have been matters of deep concern. Though the contention is made that court appointed experts acquire an aura of infallibility to which they are not entitled. Levy, Impartial Medical Testimony--Revisited, *34 Temple L.Q. 416 (11961),* the trend is increasingly to provide for their use. While experience indicates that actual appointment is a relatively infrequent occurrence, the assumption may be made that the availability of the procedure in itself decreases the need for resorting to it. The ever-present possibility that the judge may appoint an expert in a given case must inevitably exert a sobering effect on the expert witness of a party and upon the person utilizing his services.

The inherent power of a trial judge to appoint an expert of his own choosing is virtually unquestioned. *Scott v. Spanjer Bros., Inc., 298 F.2d 928 (2d Cir. 1962); Danville Tobacco Assn. v. Bryant-Buckner Associates, Inc., 333 F.2d 202 (4th Cir. 1964);* Sink, The Unused Power of a Federal Judge to Call His Own Expert Witnesses, *29 S.Cal.L.Rev. 195 (1956);* 2 Wigmore § 563, 9 Id. § 2484; Annot., *95 A.L.R.2d 383.* Hence the problem becomes largely one of detail.

The New York plan is well known and is described in Report by Special Committee of the Association of the Bar of the City of New York: Impartial Medical Testimony (1956). On recommendation of the Section of Judicial Administration, local adoption of an impartial medical plan was endorsed by the American Bar Association. *82 A.B.A.Rep. 184-185 (1957).* Descriptions and analyses of plans in effect in various parts of the country are found in *Van Dusen, A United States District Judge's View of the Impartial Medical Expert System, 322 F.R.D. 498 (1963);* Wick and Kightlinger, Impartial Medical Testimony Under the Federal Civil Rules: A Tale of Three Doctors, *34 Ins. Counsel J. 115 (1967);* and numerous articles collected in Klein, Judicial Administration and the Legal Profession 393 (1963). Statutes and rules include *California Evidence Code §§ 730-733*; Illinois Supreme Court Rule 215(d), Ill.Rev.Stat.1969, c. 110A, § 215(d); Burns Indiana Stats. 1956, § 9-1702; Wisconsin Stats.Annot.1958, § 957.27.

In the federal practice, a comprehensive scheme for court appointed experts was initiated with the adoption of *Rule 28 of the Federal Rules of Criminal Procedure* in 1946. The Judicial Conference of the United States in 1953 considered court appointed experts in civil cases, but only with respect to whether they should be compensated from public funds, a proposal which was rejected. Report of the Judicial Conference of the United States 23 (1953). The present rule expands the practice to include civil cases.

Subdivision (a) is based on *Rule 28 of the Federal Rules of Criminal Procedure*, with a few changes, mainly in the interest of clarity. Language has been added to provide specifically for the appointment either on motion of a party or on the judge's own motion. A provision subjecting the court appointed expert to deposition procedures has been incorporated. The rule has been revised to make definite the right of any party, including the party calling him, to cross-examine.

Subdivision (b) combines the present provision for compensation in criminal cases with what seems to be a fair and feasible handling of civil cases, originally found in the Model Act and carried from there into Uniform Rule 60. See also *California Evidence Code §§ 730-731*. The special provision for Fifth Amendment compensation cases is designed to guard against reducing constitutionally guaranteed just compensation by requiring the recipient to pay costs. See Rule 71A(*l*) of the Rules of Civil Procedure.

Subdivision (c) seems to be essential if the use of court appointed experts is to be fully effective. Uniform Rule 61 so provides.

Subdivision (d) is in essence the last sentence of *Rule 28(a) of the Federal Rules of Criminal Procedure.*

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

Notes of Advisory Committee on 2011 amendments. The language of Rule 706 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 9, 2012

RE: Rule 707, N.D.R.Ev., Analytical Report Admission; Confrontation

No form and style amendments are proposed for Rule 707, which is a fairly new and unique North Dakota rule.

The Supreme Court created Rule 707 in response to the Melendez-Diaz case and sent it to the Committee for review. The Committee made some amendments and returned it to the Court. The Court then made further amendments and the rule in place now reflects those amendments.

A copy of the current rule is attached – the amendments made by the Court are highlighted. A copy of the legislative version of the rule showing deleted language is also attached. There has been some controversy at the trial court level about the meaning of the revised language in subdivision (b).

Federal amendments dealing with Melendez-Diaz have been circulated for comment. A copy of these amendments, which would add a notice requirement to Rule 803, are attached.

RULE 707. ANALYTICAL REPORT ADMISSION; CONFRONTATION

(a) Notification to defendant. If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney at least 30 days before the trial.

(b) Objection. At least 14 days before the trial, the defendant may object in writing to the introduction of the report and identify the name or job title of the witness to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.

(c) Waiver. If the defendant does not timely object to the introduction of the report, the defendant's right to confront the person who prepared the report is waived.

(d) Juvenile proceedings. This procedure applies to juvenile proceedings that involve analytical reports issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20.

EXPLANATORY NOTE

Rule 707 was adopted effective February 1, 2010. Rule 707 was amended, effective March 1, 2011.

Rule 707 requires the prosecution to notify a defendant if it intends to introduce an

analytical report in a criminal trial. If the defendant objects to the admission of the report, the defendant must identify the witness it seeks to examine about the report at trial and the prosecution must produce the witness.

Some examples of analytical reports include: a certified copy of an analytical report of a blood, urine, or saliva sample from the director of the state crime laboratory or the director's designee; a certified copy of the checklist and test records from a certified breath test operator; or a certified copy of an analytical report signed by the director of the state crime laboratory or the director's designee of the results of the analytical findings involving the analysis of a controlled substance or sample.

Under North Dakota law, if the person who prepared the report does not testify at trial, a certified copy of an analytical report must be accepted as prima facie evidence of the results of a chemical analysis. See N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8), and 39-24.1-08(6).

Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 10-13; Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

Statutes Affected:

Superseded: N.D.C.C. §§ 19-03.1-37(5), 20.1-13.1-10(7), 20.1-15-11(9), 39-20-07(9), and 39-24.1-08(7).

Considered: N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8), and 39-24.1-08(6).

N.D.R.Ev.

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MEMORANDUM

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sidney A. Fitzwater, Chair, Advisory Committee on Federal Rules of Evidence

DATE: April 8, 2011 (Revised June 6, 2011)

RE: Report of the Evidence Rules Advisory Committee

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 1, 2011 in Philadelphia at The University of Pennsylvania Law School.

The Committee seeks approval of one proposal for release for public comment: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—that is intended to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

* * * * *

II. Action Item

Proposed Amendment to Evidence Rule 803(10)

In June 2009 the Supreme Court decided *Melendez-Diaz v. Massachusetts*. The Court held that certificates reporting the results of forensic tests conducted by analysts are "testimonial" within the meaning of the Confrontation Clause, as construed in *Crawford v. Washington.* Consequently, admitting such certificates in lieu of in-court testimony violates the accused's right of confrontation. The Committee has concluded that, in a criminal case, *Melendez-Diaz* also precludes the admission under Rule 803(10) of certificates offered to prove the *absence* of a public record. Like the certificates at issue in *Melendez-Diaz,* certificates proving the *absence* of public records are prepared with the sole motivation that they be used at trial as a substitute for live testimony. Lower courts after *Melendez-Diaz* have recognized that admitting a certificate of the absence of a public record under Rule 803(10), where the certificate is prepared for use in court, violates the accused's right of confrontation.

The Committee at its Fall 2010 meeting discussed the possibility of amending Rule 803(10) to correct this constitutional infirmity, and it voted unanimously to consider a proposed amendment at the Spring meeting. The Reporter suggested adding a "notice-and-demand" procedure to the Rule that would require production of the person who prepared the certificate only if, after receiving notice from the government of intent to introduce a certificate, the defendant made a timely pretrial demand for production of the witness. The Court in *Melendez-Diaz* specifically approved a state version of a notice-and-demand procedure. The Committee directed the Reporter to work with the Justice Department to review all the possible viable alternatives for a notice-and-demand procedure, including ones that added procedural details such as providing for continuances. After consulting with the DOJ, the Reporter prepared proposed amendments to Rule 803(10).

At its Spring meeting, the Committee voted unanimously to refer a proposed amendment to Rule 803(10), and the Committee Note, to the Standing Committee, with the recommendation that the amendment be released for public comment. The proposed Rule and Committee Note are set out in an appendix to this report.* As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

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* The proposed Rule was slightly restyled after the June 2011 Standing Committee meeting to account for suggestions made by the Standing Committee's style consultant.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved for release for public comment.

* * * * *

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE**

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

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

* * * * *

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

(A) the testimony or certification is admitted to prove that

(~~A~~ i) the record or statement does not

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

***Incorporates amendments that are due to take effect on December 1, 2011, if Congress takes no action otherwise.

exist; or

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

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice — unless the court sets a different time for the notice or the objection.

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts*, 129 S. Ct. 2527 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand"

procedure that was approved by the *Melendez-Diaz* Court. *See* Tex. Code Crim. P. Ann., art. 38.41.