

AGENDA

JOINT PROCEDURE COMMITTEE

September 27, 2012
Bismarck, N.D.

	<u>Page</u>
I. Roll Call and Preliminaries	
II. Minutes of April 26-27, 2012, Meeting	1
III. Old Business	
A. <u>Rule 41, N.D. Sup. Ct. Admin. R., Access to Court Records</u> The Committee will consider form documents for people seeking to limit Internet access to records of dismissed criminal cases and acquittals.	
1. Memorandum on Rule 41	34
2. Proposed Affidavit of Service	35
3. Proposed Affidavit of Mailing	36
4. Proposed Notice of Motion	37
5. Proposed Motion and Brief	38
6. Proposed Affidavit in Support of Motion	41
7. Proposed Findings of Fact and Conclusions of Law	43
8. N.D. Sup. Ct. Admin. R. 41	45
B. <u>Rule 604, N.D. R. Ev., Interpreter</u> The Committee will consider whether additional supplemental materials should be considered in amending the evidence rule on interpreters.	
1. Memorandum on Rule 604	58
2. Proposed N.D. R. Ev. 604	59
3. Fed. R. Ev. 604	61
4. N.D. Sup. Ct. Admin. R. 50	62
5. N.D. C. C. § 31-01-11	64
6. N.D. C. C. ch. 28-33	65
C. <u>Rule 704, N.D. R. Ev., Opinion on an Ultimate Issue</u> The Committee will consider whether proposed changes to Rule 704 are consistent with existing North Dakota law.	
1. Memorandum on Rule 704	67
2. Proposed N.D. R. Ev. 704	69
3. Proposed N.D. R. Ev. 704 (alternate draft)	70
4. Fed. R. Ev. 704	72
5. State v. Schmidkunz	74
6. N.D. C. C. §§ 12.1-04.1-03, 12.1-04.1-04, 12.1-04.1-13	79

- D. Rule 707, N.D.R.Ev., Analytical Report Admission; Confrontation
 The Committee will consider whether Rule 707 should be amended to reflect developments in case law on analytical reports.

1	Memorandum on N.D.R.Ev. 707	80
2.	N.D.R.Ev. 707	81
3.	State ex rel. Roseland v. Herauf	83
4.	Analysis of Williams v. Illinois	96

IV. New Business

- A. Rule 4, N.D.R.Civ.P., Persons Subject to Jurisdiction; Process; Service
 The Committee will consider whether to amend Rule 4 to include provisions on service of nonresident motor vehicle users.

1.	Memorandum on Rule 4	99
2.	E-mail from Judge David Nelson	101
3.	N.D.R.Civ.P. 4	102
4.	N.D.C.C. §§ 39-01-11, 39-01-12, 39-01-13, 39-01-14	120
5.	<u>Messmer v. Olstad</u>	121

- B. Rule 45, N.D.R.Civ.P., Subpoena
 The Committee will consider proposed amendments to Rule 45 relating to requirements for a deposition subpoena.

1.	Memorandum on Rule 45	126
2.	E-mail from Kent Reiersen	128
3.	Proposed N.D.R.Civ.P. 45, alt. A	129
4.	Proposed N.D.R.Civ.P. 45, alt. B	140
5.	Excerpt from January 1994 minutes	151

- C. Rule 11, N.D.R.Crim.P., Pleas
 The Committee will consider proposed amendments to Rule 11 relating to Alford pleas.

1.	Memorandum on Rule 11	153
2.	Proposed N.D.R.Crim.P. 11	155
3.	Fed.R.Crim.P. 11	166
4.	Excerpt from September 2004 minutes	188
5.	<u>North Carolina v. Alford</u>	192
6.	<u>State v. McKay</u>	208
7.	<u>Kooser v. State</u>	218
8.	Fla.R.Crim.P. 3.172	223

- D. Rule 3.1, N.D.R.Ct., Pleadings
 The Committee will consider proposed amendments to Rule 3.1 concerning when it is necessary to file proof of service with a pleading.

1.	Memorandum on Rule 3.1	225
2.	Proposed N.D.R.Ct. 3.1	226
3.	Proposed amendments to N.D.R.Civ.P. 5	230

E.	<u>Order 16, N.D.Sup.Ct.Admin.O., Electronic Filing in the District Courts</u> The Committee will consider proposed amendments to Order 16 relating to who is authorized to file a document with an electronic signature.	
1.	Memorandum on Order 16	239
2.	Proposed N.D.Sup.Ct.Admin.O. 16	241
3.	Email from William Lewis	244
F.	<u>Form and Style Revisions to the Rules of Evidence</u> The Committee will consider form and style revisions to the Rules of Evidence.	
1.	Memorandum on N.D.R.Ev. 801	247
2.	Proposed N.D.R.Ev. 801	248
3.	Fed.R.Ev. 801	254
4.	Memorandum on N.D.R.Ev. 802	260
5.	Proposed N.D.R.Ev. 802	261
7.	Fed.R.Ev. 802	262
8.	Memorandum on N.D.R.Ev. 803	263
9.	Proposed N.D.R.Ev. 803	264
10.	Fed.R.Ev. 803	280
11.	Memorandum on N.D.R.Ev. 804	296
12.	Proposed N.D.R.Ev. 804	297
13.	Fed.R.Ev. 804	304
14.	Memorandum on N.D.R.Ev. 805	313
15.	Proposed N.D.R.Ev. 805	314
16.	Fed.R.Ev. 805	315
17.	Memorandum on N.D.R.Ev. 806	316
18.	Proposed N.D.R.Ev. 806	317
19.	Fed.R.Ev. 806	319
20.	Memorandum on N.D.R.Ev. 807	321
21.	Proposed N.D.R.Ev. 807	322
22.	Fed.R.Ev. 807	324
23.	Memorandum on N.D.R.Ev. 901	325
24.	Proposed N.D.R.Ev. 901	326
25.	Fed.R.Ev. 901	332
26.	Memorandum on N.D.R.Ev. 902	335
27.	Proposed N.D.R.Ev. 902	336
28.	Fed.R.Ev. 902	343
29.	18 U.S.C. § 3505	346
30.	Memorandum on N.D.R.Ev. 903	347
31.	Proposed N.D.R.Ev. 903	348
32.	Fed.R.Ev. 903	349
33.	N.D.C.C. § 31-08-02	350

34.	Memorandum on N.D.R.Ev. 1001	351
35.	Proposed N.D.R.Ev. 1001	352
36.	Fed.R.Ev. 1001	358
37.	Memorandum on N.D.R.Ev. 1002	360
38.	Proposed N.D.R.Ev. 1002	361
39.	Fed.R.Ev. 1002	364
40.	Memorandum on N.D.R.Ev. 1003	365
41.	Proposed N.D.R.Ev. 1003	366
42.	Fed.R.Ev. 1003	369
43.	Memorandum on N.D.R.Ev. 1004	370
44.	Proposed N.D.R.Ev. 1004	371
45.	Fed.R.Ev. 1004	376
46.	Memorandum on N.D.R.Ev. 1005	377
47.	Proposed N.D.R.Ev. 1005	378
48.	Fed.R.Ev. 1005	381
49.	Memorandum on N.D.R.Ev. 1006	382
50.	Proposed N.D.R.Ev. 1006	383
51.	Fed.R.Ev. 1006	386
52.	Memorandum on N.D.R.Ev. 1007	387
53.	Proposed N.D.R.Ev. 1007	388
54.	Fed.R.Ev. 1007	390
55.	Memorandum on N.D.R.Ev. 1008	391
56.	Proposed N.D.R.Ev. 1008	392
57.	Fed.R.Ev. 1008	397

JUSTICES OF THE NORTH DAKOTA
SUPREME COURT

Chief Justice
Gerald W. VandeWalle

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

JOINT PROCEDURE COMMITTEE
MEMBERS AND STAFF

Judiciary Members
Mary Muehlen Maring, Chair, Justice
Laurie Fontaine, District Judge
John E. Greenwood, District Judge
William A. Herauf, District Judge
Debbie Gordon Kleven, District Judge
Steven L. Marquart, District Judge
Steven McCullough, District Judge
William W. McLees, District Judge
Thomas E. Merrick, District Judge
David E. Reich, District Judge

Bar Members
Bradley J. Beehler
Larry L. Boschee
Daniel Dunn
Robert Hoy
Margaret Moore Jackson
Richard H. McGee
Lonnie Olson
Joanne Hager Ottmar
Bruce D. Quick
Kent A. Reiersen

Staff Attorney
Michael Hagburg

MINUTES OF MEETING

Joint Procedure Committee
April 26-27, 2012

TABLE OF CONTENTS

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 3
Rule 41, N.D.Sup.Ct.Admin.R., Access to Court Records 8
Rule 9, N.D.R.Crim.P., Warrant or Summons Upon Indictment or Information 9
Rule 45, N.D.R.Civ.P., Subpoena 10
Form and Style Amendments to the North Dakota Rules of Evidence 11
Rule 301, N.D.R.Ev., Presumptions in a Civil Case Generally 12
Rule 302, N.D.R.Ev., Effect of State Law on Presumptions in a Civil Case 13
Rule 303, N.D.R.Ev., Presumptions in Criminal Cases 13
Rule 401, N.D.R.Ev., Test for Relevant Evidence 13
Rule 402, N.D.R.Ev., General Admissibility of Relevant Evidence 13
Rule 403, N.D.R.Ev., Excluding Relevant Evidence for Prejudice, Confusion, Waste of
Time, or Other Reasons 14
Rule 404, N.D.R.Ev., Character Evidence; Crimes or Other Acts 15
Rule 405, N.D.R.Ev., Method of Proving Character 15
Rule 406, N.D.R.Ev., Habit; Routine Practice 15
Rule 407, N.D.R.Ev., Subsequent Remedial Measures 16
Rule 408, N.D.R.Ev., Compromise Offers and Negotiations 16
Rule 409, N.D.R.Ev., Offers to Pay Medical and Similar Expenses 17
Rule 410, N.D.R.Ev., Pleas, Plea Discussions, and Related Statements 17
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 19
Rule 411, N.D.R.Ev., Liability Insurance 20
Rule 412, N.D.R.Ev., Sex Offense Cases: Victim's Sexual Behavior or Predisposition 20
Rule 601, N.D.R.Ev., Competency to Testify in General 22
Rule 602, N.D.R.Ev., Need for Personal Knowledge 22
Rule 603, N.D.R.Ev., Oath or Affirmation to Testify Truthfully 22
Rule 604, N.D.R.Ev., Interpreter 23
Rule 605, N.D.R.Ev., Judge's Competency as a Witness 23
Rule 606, N.D.R.Ev., Juror's Competency as a Witness 24
Rule 607, N.D.R.Ev., Who May Impeach a Witness 24
Rule 608, N.D.R.Ev., A Witness's Character for Truthfulness or Untruthfulness 24
Rule 609, N.D.R.Ev., Impeachment by Evidence of a Criminal Conviction 25

Rule 610, N.D.R.Ev., Religious Beliefs or Opinions	26
Rule 611, N.D.R.Ev., Examining Witnesses and Presenting Evidence	26
Rule 612, N.D.R.Ev., Writing or Object Used to Refresh a Witness's Memory	26
Rule 613, N.D.R.Ev., Witness's Prior Statement	27
Rule 614, N.D.R.Ev., Court's Calling or Examining a Witness	27
Rule 615, N.D.R.Ev., Excluding Witnesses	27
Rule 701, N.D.R.Ev., Opinion Testimony by Lay Witnesses	29
Rule 702, N.D.R.Ev., Testimony by Experts	30
Rule 703, N.D.R.Ev., Bases of an Expert's Opinion Testimony	31
Rule 704, N.D.R.Ev., Opinion on an Ultimate Issue	32
Rule 705, N.D.R.Ev., Disclosing the Facts or Data Underlying an Expert's Opinion ..	32
Rule 706, N.D.R.Ev., Court-Appointed Expert Witnesses	33
Rule 707, N.D.R.Ev., Analytical Report Admission; Confrontation	33

CALL TO ORDER

The meeting was called to order at 1:00 p.m., on April 26, 2012, by the Chair, Justice Mary Muehlen Maring.

ATTENDANCE

Present:

- Justice Mary Muehlen Maring, Chair
- Honorable Laurie Fontaine
- Honorable William A. Herauf
- Honorable Debbie Kleven
- Honorable Steven L. Marquart
- Honorable Steven McCullough
- Honorable William McLees
- Honorable Thomas E. Merrick
- Honorable David E. Reich
- Mr. Bradley Beehler
- Mr. Daniel Dunn
- Mr. Robert Hoy
- Prof. Margaret Moore Jackson
- Mr. Lonnie Olson
- Mr. Bruce D. Quick
- Mr. Kent Reiersen

Absent:

Honorable John Greenwood
Mr. Larry L. Boschee
Mr. Richard H. McGee
Ms. Joanne Hager Ottmar

Staff:

Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

The Chair discussed the schedule for the meeting and welcomed new members, Mr. Beehler and Prof. Moore Jackson. The chair introduced Ms. Bev Demers and Ms. Cindy Schmitz, who were at the meeting to represent the clerks of court.

APPROVAL OF MINUTES

Mr. Hoy MOVED to approve the minutes. Judge Herauf seconded. A member pointed out several typographical errors, which were corrected with the unanimous consent of the Committee. The motion to approve the minutes CARRIED unanimously.

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 34-64 OF THE AGENDA MATERIAL)

Staff explained that Rule 58 and 77 were back before the Committee after being discussed at the September 2011 and January 2012 meetings. Staff provided alternative versions of the proposed rule amendments that would retain the requirement that attorneys serve the notice of entry of judgment.

Judge McCullough provided a handout to members explaining what the new Odyssey interface for attorneys is going to look like and how it will function. Judge McCullough said the new interface can be set to show all an attorney's active cases and attorneys will also be able to receive case alerts on new documents docketed in a case. Judge McCullough said the new interface should be online by November 1 and its features should address attorneys' concerns regarding getting notice of entry in cases.

The Chair drew the Committee's attention to the problems that had been created in some districts by the clerks mailing out formal notices of entry. The Chair said that some

attorneys had neglected to send required Rule 58 Notice of Entry of Judgment in cases when they had received a formal notice of entry from the clerk. A member said this should not be a problem in the future as no district is currently mailing out formal notices of entry. A member said judges are sending out memos when an order for judgment is generated from a judicial chamber.

Judge McCullough MOVED to adopt the alternative version of the proposed amendments to Rule 58. Judge Kleven seconded.

A member said that the proposal addresses the issue that brought Rule 58 before the Committee in a commonsense way. The member said the proposal allowed the duplicate judgment problem to be solved efficiently.

Ms. Demers said in her office, the duplicate judgment is attached to the notice of entry of judgment so that there is one electronically filed document. She said under the proposal, clerks will need to return any duplicate judgments that are submitted. Staff said that was the intent of the proposal, based on the preference of the Odyssey user group that a duplicate judgment not be filed.

The Chair said that the previous discussion on Rule 58 had shown that attorneys were concerned that if the judgment served was not filed with the notice of entry then questions could be raised about whether the judgment that was served was the actual judgment in the case. The proposal addresses this by ensuring that the judgment being noticed is clearly identified by date and docket number.

Staff said that clerks are being allowed to file attached judgments with the notice of entry as a single electronic document. Staff said that this was an exception to Odyssey policy, which generally requires separate electronic entries for each separate document filed. Staff said that the Odyssey user group concluded that having the served judgment filed with the notice of entry was a better solution than filing the served judgment as a separate entry, which could cause confusion because then two items would be listed as judgments in the Odyssey file with two different docket dates.

A member said that, in Odyssey, exhibits to motions do need to be filed separately because they are difficult to find otherwise. The member said that the same rationale does not apply to simple motions with proposed judgments attached because it is not difficult to find the different parts of the document if they are filed together in Odyssey, and it is easier to both prepare and handle such a document if it is a single item.

The Chair asked how the certificate of service mentioned in the proposal would be

docketed. Staff said it would likely be docketed as a separate document. The Chair said it might be better if the docket number and date of service of the judgment were incorporated into the notice of entry of judgment rather than being part of a separate certificate of service.

Judge Reich MOVED to amend the proposal at lines 21-22 on pages 45-46 to require the judgment docket number and date to be included in the notice of entry. Mr. Beehler seconded.

A member asked whether the reference to the certificate of service should be retained, given that a certificate of service is required by other rules. Members replied that the certificate of service requirement was not always fulfilled by parties and attorneys.

A member asked what would happen if an attorney attempted to file a copy of the judgment in violation of the rule. A member replied that the judgment would be returned to the attorney and not filed. A member said the clerk might just throw away a paper copy judgment, but if it was e-filed the whole filing would be rejected. A member said that this process would educate the attorney that filing a copy of the judgment with the notice of entry was no longer allowed.

Ms. Demers informed the Committee that Odyssey currently has a built in attorney notification system. She said that if the system worked correctly, the clerk would only need to check a box and the attorney would be notified every time something was filed in Odyssey. She said the system does not work consistently and she is working with the help desk to find out why it doesn't work.

Several judge members of the Committee indicated that, when they worked in cases outside their districts, they received Odyssey generated alerts of new items entered in these cases. The members said these notices were very useful. Some attorneys said they had also received case alert notices, so the system must work in some cases. A member suggested that the failure of the notification system to work in all cases could be a training issue.

A member said that the structure of the proposal seemed flawed. The member said that (b)(1) talked about the contents of a notice of entry that should be served. The member said that the revised (b)(2) seemed to be talking about a different notice of entry. The member said that the subdivision needed restructuring so that it would be clear, perhaps by defining what should be in the notice of entry first and then talking about service and filing.

A member said that the rule should make clear from the beginning that the notice of entry needs to contain the docket number and date of the judgment. A member said that it would be good to rewrite the subdivision to define the contents of the notice of entry first and

then follow with the service and filing procedures.

Judge Herauf MOVED to table for staff to restructure the notice of entry provision. Judge McLees seconded. Motion CARRIED.

Staff explained that Rule 77 had been tabled at the January meeting and that an alternative to the tabled version of Rule 77 had been prepared as a companion to the Rule 58 alternative. Staff said that neither version of Rule 77 needed to be considered by the Committee unless it desired to impose a notice of entry requirement on the court.

Mr. Hoy MOVED to adopt the proposed amendments to Rule 77. Mr. Dunn seconded.

A member said that the proposal was not feasible because it would change longstanding practice. The member said that the court had never been required to send notice of entry under North Dakota's rules. The member said in a default judgment situation, the proposal would require the court to send notice to every party affected. The member said that the court would need to do extensive research to do this. The member said that if a notice requirement was imposed on the court, there should be a companion rule that prohibits the clerk from accepting any document unless the filing party provides an address for each defendant.

A member said that the problem is orders are being entered every day, especially in Cass County, that attorneys are not made aware of. The member said what attorneys want is to be made aware of the orders that are entered, whether by email or whatever way is most convenient. The member said sometimes competing are orders before the court and the parties do not know what has been signed or when. The member said that attorneys have to search online to see whether orders have been entered, and sometimes they discover that they were entered days ago and the deadline to act on the order is already running.

A member said that the upcoming changes to Odyssey would correct the problem of attorneys not receiving notice of orders and other documents entered in a case. A member said attorneys can now get reports in Cass County of all orders entered in a given category of cases. A member said that the Committee needs to remember that some pro se parties and attorneys who have made appearances but are not involved day-to-day in a case may not have access to Odyssey and will not be getting notice through the system.

The Chair said that apparently automatic notices could be sent through Odyssey right now to attorneys but the technology does not always work. The Chair said that even if Odyssey worked and notice was sent to attorneys, pro se litigants would not receive them.

A member said that pro se litigants should be required to provide an email address so they can receive notice and if they do not, the burden is on them to search the case file for orders.

A member said that providing an email address would not solve the problem because if a party is not on Odyssey they will not get an automatic notice. The clerk would need to manually send them a notice by looking up their email and sending.

Ms. Demers said that clerks in many districts notify parties when an order or judgment is entered. Ms. Demers said that the clerks object to the proposed rule requirement placing the burden of sending out formal notices of entry of judgment on the clerks.

A member said that it would be fine to continue to require attorneys to send out the formal notice of entry of judgment required by Rule 58. The member said that Cass County at least has stopped sending attorneys any notice of orders and judgments entered so attorneys do not know whether they should be acting in a given case. The member said that any party or attorney who has appeared in a case should get some notification when an order or judgment is entered in a case.

A member said that the clerks have never been required to send out notice of entry, even though many courts have done this as a courtesy. The member said that adding such a requirement as proposed in the amendments to Rule 77 would be a major change in North Dakota practice.

A member said that it has been the commonsense practice almost everywhere in the state for either the judge or the clerks to send out some sort of notification when an order is issued and, regardless of what happens with rule amendments, this will continue. A member said that in places where this was not the practice, like Cass County, attorneys would call the courthouse to find out whether a pending order had been entered.

A member said that by the time a rule requiring notices of entry to be sent by the court could be in place, the new notice system under Odyssey will be running and attorneys will be getting notice if they are not now. A member said, in addition, that the proposal's requirement that the court send out formal notice of entry of judgment was burdensome and this should continue to be an attorney responsibility.

Ms. Demers pointed out that if the current notification system under Odyssey could be fixed, attorneys would be notified of any orders or documents entered in a matter.

The motion to adopt the amendments to Rule 77 FAILED 2-13.

Ms. Demers and Ms. Schmitz departed the meeting.

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 65-87 OF THE AGENDA MATERIAL)

Staff explained that the Committee had reviewed the Supreme Court's final amendments to Rule 41 at the January 2012 meeting and requested staff to draft proposed forms to be used by people seeking to limit Internet access to certain criminal records. Staff presented a set of draft forms to the Committee.

Mr. Quick MOVED to adopt the proposed Rule 41 forms. Judge Herauf seconded.

A member said that a notice to the state's attorney who handled the case, as recommended by Pierce County State's Attorney Galen Mack, should be required for motions to restrict public access. A member wondered how likely it was that a prosecutor would respond to a motion to restrict. A member said it would depend on the facts of the case—a dismissed minor in consumption charge might not merit a response while a charge against someone with a criminal history might require some attention. The member said part of open records and sunshine law is allowing the public to see charges brought by prosecutors. The member said in domestic cases especially, an alleged perpetrator will have relationships with other people in the future who deserve to have the opportunity to look at charging history.

A member said that an attorney who served a motion to restrict public access would send notice to the prosecutor as a matter of course, but pro se litigants do not have the knowledge of the system or even awareness of the need to give notice. A member said that pro se litigants would typically go directly to the judge. Committee members said that a form affidavit of service should be part of the form package so that a party seeking to serve a motion to restrict would understand that proof of service is required.

A member said that an affidavit with the facts or evidence should be required because just filing a brief that asserts certain facts is inadequate. A member agreed that a party seeking to restrict access should be required to submit facts supporting their motion. A member said the court should not be required to sift through prior proceedings to determine whether the motion should be granted. A member said that an affidavit should be required.

A member said that the party submitting the motion should also be required to supply an email address if they have one.

A member said that an order should be made part of the package as a separate

document.

Mr. Quick MOVED to table so that staff can draft additional documents as suggested by the Committee. Judge Herauf seconded. Motion CARRIED.

RULE 9, N.D.R.Crim.P., WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION (PAGES 88-107 OF THE AGENDA MATERIAL)

Staff explained that Judge Kleven made a motion at the January meeting to delete the requirement in Rule 9 (b)(1) that the clerk sign the warrant, but the motion was tabled for additional research. Staff presented research showing the origin and intent of the clerk signature requirement. Staff also presented a proposed amendment to delete the option to endorse the bail amount on a warrant.

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

A member said that when the complaint is the initial charging document, the information is not prepared until later and the magistrate signs the warrant of arrest. The member explained that clerks do not sign warrants. A member said that in counties where the information is the initial charging document, the magistrate still is the one who signs the arrest warrant, clerks do not sign them. No member could think of a county where clerks sign warrants.

Mr. Quick MOVED to amend at line 14 on page 90, substituting "magistrate" for "clerk." Judge Marquart seconded.

A member said that clerks can be magistrates, but that a clerk appointed as a magistrate would be required to go through special training. The member said that magistrate training might need to be modified based on the proposed change.

A member said that the language of the rule already references Rule 4(b)(1), which talks about how a warrant must be signed by the magistrate. The member said that it might make more sense to simply delete the reference to signing in Rule 9(b)(1) and allow parties to refer to Rule 4(b)(1) for that information.

Judge McLees MOVED to amend the motion to delete the language "be signed by the clerk" from lines 13-14 on page 90. Mr. Quick seconded.

Motion to amend CARRIED.

A member asked why it was proposed to remove language at lines 15-16 on page 90 regarding fixing the amount of bail on the warrant. A member said that bail was a pretrial release condition that arguably could be set only after a hearing under State v. Hayes. A member said that bail schedules would probably be eliminated if this rule was followed. A member said that if a magistrate sets a bail amount after review of the affidavit of probable cause this arguably would be appropriate review under State v. Hayes.

Mr. Quick MOVED to further amend the motion to retain the existing language at lines 15-16 on page 90. Judge Herauf seconded. Motion to amend CARRIED.

Motion as amended CARRIED.

By unanimous consent, staff was instructed to modify the explanatory note to conform with the amendments made by the Committee.

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

RULE 45, N.D.R. CIV. P., SUBPOENA (PAGES 108-123 OF THE AGENDA MATERIAL)

Staff explained that the Committee approved proposed changes to Rule 26 related to the discovery of electronically stored evidence at the January meeting. Staff presented proposed amendments to Rule 45 on assessing costs for nonparty electronic evidence discovery.

Judge Marquart MOVED to adopt the proposed amendments to Rule 45. Judge Herauf seconded.

The Chair asked whether any members had any issues with electronic discovery. A member said that getting electronic discovery information is incredibly expensive. Experts need to be hired and paid outrageous fees. The member said that the proposed rule amendment is appropriate for situations when parties attempt to extract electronic discovery information from nonparties who may have to bear expenses up front.

A member said that the proposed new language seems to give a blank check to nonparties to claim expenses. The member said a reasonableness test should be applied to the claimed costs that might be taxed to a party. The member said the court should have the ability to determine that claimed costs are unreasonable in a given case.

Mr. Dunn MOVED to amend at line 139 on page 115 to insert "reasonable" between

“the” and “costs.” Mr. Beehler seconded.

A member said that the proposal requires a party seeking information from a nonparty to pay the costs. The member asked what would happen if the nonparty was not an “innocent” nonparty but was actively evading cooperation perhaps in collusion with another party in the case. The member said the party seeking discovery should not have to pay in such a case, and the court should be allowed to levy the costs on whoever was responsible for the costs.

Judge Fontaine MOVED to amend the motion to add a new sentence at line 140 on page 115: “Under appropriate circumstances, the costs may be allocated among the parties.” Judge Kleven seconded.

A member said the first part of the sentence beginning at 137 on page 115, which states that the court may specify conditions for discovery, gives the court discretion to do whatever it needs to do to tax or distribute costs. A member said that because the word “including” was used in the proposed amendment, the court’s discretion is still unlimited. The proposed amendment simply gives possible options for the court to follow. A member replied that the additional language was unnecessary because the court has discretion.

Motion to amend the motion CARRIED.

A member said adding the language as proposed would cause confusion because attorneys are not going to read the first words giving the court discretion but instead are going to claim that assessment of costs as allowed by the amended language is required. The member said that the proposed language should not be adopted.

The main motion to approve the rule as amended FAILED 5-10.

FORM AND STYLE AMENDMENTS TO THE NORTH DAKOTA RULES OF EVIDENCE (PAGES 124-128 OF THE AGENDA MATERIAL)

Staff explained that the Committee had begun its review of the form and style revisions to the Federal Rules of Evidence at the January 2012 meeting. Staff explained that the proposed changes to the evidence rules were designed to make the rules more easily understood and to make style and terminology consistent throughout the rules without changing any result in any ruling on evidence admissibility.

RULE 301, N.D.R.Ev., PRESUMPTIONS IN A CIVIL CASE GENERALLY (PAGES 129-137 OF THE AGENDA MATERIAL)

Staff presented proposed form and style amendments to Rule 301, which were drafted consistently with the amendments to the federal rules.

Judge Herauf MOVED to adopt the proposed amendments to Rule 301. Judge Marquart seconded.

The Chair pointed out that the explanatory note discusses the differences between North Dakota and federal case law on presumptions. The Chair said presumptions often are an issue in employment law cases. The Chair said the Supreme Court had long been challenged by trying to reconcile tests for employment discrimination under state and federal case law. The Chair said some federal burden shifting does not fit with North Dakota's interpretation of presumptions because the state views presumptions as evidentiary. The Chair said the note as currently written explains the two different ways of interpreting presumptions.

Mr. Quick MOVED to retain lines 33-75 on pages 131-133. Mr. Hoy seconded.

A member said the state rule is substantially different from the federal rule and the explanatory note language is valuable because it explains the reasons for the differences.

Motion CARRIED.

The Chair said that some of the case law referenced in the explanatory note is very old and has been superseded by more recent cases. The consensus of the Committee was that staff should update the explanatory note with more recent cases and determine whether the pattern jury instruction on presumptions has been updated.

A member said the updated language at lines 4-5 on page 130 did not seem to have the same meaning as the old language. Staff said the changed language was taken from the updated federal rule, which previously had the same language used in the North Dakota rule.

The main 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 302, N.D.R.Ev., EFFECT OF STATE LAW ON PRESUMPTIONS IN A CIVIL CASE (PAGES 138-141 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 302 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to Rule 302. Judge Marquart seconded.

The main 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 303, N.D.R.Ev., PRESUMPTIONS IN CRIMINAL CASES (PAGES 142-144 OF THE AGENDA MATERIAL)

Staff explained that Rule 303 had no content except for an explanatory note pointing the statutes governing presumptions in criminal cases.

RULE 401, N.D.R.Ev., TEST FOR RELEVANT EVIDENCE (PAGES 145-149 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 401 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 401. Judge Fontaine seconded.

The main 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 402, N.D.R.Ev., GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE (PAGES 150-154 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 402 based on the amendments to the federal rule.

Judge Kleven MOVED to adopt the proposed amendments to Rule 402. Judge Marquart seconded.

The Chair asked about the dashes used in the rule draft to set out segments. Staff

explained that these would be printed as bullets in the published version of the rule. A member said that it would be preferable to use numbers rather than bullets. A member said that it is difficult to reference to a specific bullet. Staff asked whether the Committee desired to retain the standard labeling hierarchy, which would be to use lowercase letters first, followed by numbers. The Committee's consensus was that staff should replace dashes/bullets in the evidence rule drafts with the appropriate letter or number under the circumstances.

The main 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 403, N.D.R.Ev., EXCLUDING RELEVANT EVIDENCE FOR PREJUDICE, CONFUSION, WASTE OF TIME, OR OTHER REASONS (PAGES 155-158 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 403 based on the amendments to the federal rule.

Judge Fontaine MOVED to adopt the proposed amendments to Rule 403. Mr. Dunn seconded.

Mr. Dunn MOVED to make an enumerated list using lower-case letters after the colon in line 9 on page 156. Judge McCullough seconded.

A member said using letters and a list format would allow people citing the rule to be more specific about the point they are referencing.

Motion CARRIED.

The Chair asked about the use of the word "adaptation" at line 14 on page 156 in the explanatory. Staff said that the words "based on" instead of adaptation would be more consistent with the language in other rules. The consensus of the Committee was to replace "adaptation" with "based on" on line 14.

The main 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 404, N.D.R.Ev., CHARACTER EVIDENCE; CRIMES OR OTHER ACTS (PAGES 159-168 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 404 based on the amendments to the federal rule.

Mr. Hoy MOVED to adopt the proposed amendments to Rule 404. Judge McLees seconded.

The main 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 405, N.D.R.Ev., METHOD OF PROVING CHARACTER (PAGES 169-174 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 405 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to Rule 405. Mr. Beehler seconded.

The main 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 406, N.D.R.Ev., HABIT; ROUTINE PRACTICE (PAGES 175-180 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 406 based on the amendments to the federal rule.

Judge Marquart MOVED to adopt the proposed amendments to Rule 406. Judge Kleven seconded.

Mr. Quick MOVED to retain lines 19-37 on pages 176-177. Mr. Olson seconded.

A member said that the discussion in the explanatory note provides some useful history and shows how the rule was a departure from previous case law. The member said the explanatory note language seemed substantive.

Motion CARRIED.

The main 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 407, N.D.R.Ev., SUBSEQUENT REMEDIAL MEASURES (PAGES 181-185 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 407 based on the amendments to the federal rule.

Mr. Quick MOVED to adopt the proposed amendments to Rule 407. Judge Herauf seconded.

Mr. Dunn MOVED to amend at line page 182, line 12, to replace "negligence" with "fault." Judge McLees SECONDED. Motion CARRIED.

The Committee discussed the use of dashes in the rules under the federal evidence rule revisions. The consensus of the Committee was that it would prefer commas instead of dashes.

The main 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 408, N.D.R.Ev., COMPROMISE OFFERS AND NEGOTIATIONS (PAGES 186-195 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 408 based on the amendments to the federal rule.

Mr. Quick MOVED to adopt the proposed amendments to Rule 408. Mr. Beehler seconded.

Mr. Quick MOVED to strike language at lines 18-20 on page 88, excluding language based on the federal rule regarding negotiations related to claims. Judge McCullough seconded.

A member said that the federal rule language allowing evidence from negotiations of claims was directed specifically to evidence from IRS settlement negotiations.

Motion CARRIED.

A member asked why the term "liability" was part of the previous language but not used in the proposed amendments. A member suggested that the concept of liability was implied in the term "validity" that was used in the proposed amendments. A member said that the federal advisory notes indicated that the "liability" was part of "validity."

Mr. Dunn MOVED to add additional language to the explanatory note based on the federal advisory note's discussion of the removal of "liability" from the rule. Judge Herauf seconded. Motion CARRIED.

A member said the language of paragraph (a)(1) at lines 14-16 on page 188 was confusing with its use of multiple clauses set off by dashes and commas. A member suggested the clauses could be turned into a list with letters. A member said that this would put the rule into a different form than the federal rule and make cross-referencing between the two rules difficult. A member suggested that omitting the "ors" and the hyphens would make the sentence read better.

Judge McCullough MOVED to amend lines 14-16 on page 188 to read: "furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and" Mr. Dunn seconded. Motion CARRIED.

The main 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 409, N.D.R.Ev., OFFERS TO PAY MEDICAL AND SIMILAR EXPENSES
(PAGES 196-199 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 409 based on the amendments to the federal rule.

Judge Marquart MOVED to adopt the proposed amendments to Rule 409. Mr. Reiersen seconded.

The main 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 410, N.D.R.Ev., PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS
(PAGES 200-206 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 410 based on the amendments to the

federal rule. Staff explained that the North Dakota rule allows use of statements from plea discussions for impeachment purposes while the federal rule places tighter limits on the use of plea discussions.

Mr. Quick MOVED to adopt the proposed amendments to Rule 410. Mr. Beehler seconded.

A member pointed out that the proposed federal language used the words "has been introduced" at line 25 on page 202, which is a different standard than "has been admitted." The member said that the federal standard as a whole might allow the admission of additional information from a plea conference that would not necessarily be considered impeaching. The member said it seemed similar to the standard for admission of a portion of a writing, where if one party wants part of a writing admitted, the other party can ask for the rest to show context.

A member said that North Dakota's old language is more clear than the proposed rewritten language. The member said that the meaning of the proposed language is not clear even on multiple readings. A member replied that the federal language seemed to give the defendant and the state more leeway to bring in material from plea proceedings.

Judge Fontaine MOVED to retain existing language at lines 18-22 on pages 201-202 and to strike proposed new language at lines 23-28 on page 202. Judge Kleven seconded. Motion CARRIED.

A member drew the Committee's attention to language at line 22 on page 202 requiring that a statement be made in the presence of counsel as a prerequisite to its use. The member said that this requirement did not take into account self-represented litigants and would prohibit the use of statements by self-represented litigants in perjury prosecutions.

Mr. Olson MOVED to amend lines 21-22 on pages 201-202 to end the sentence after "on the record." Judge McLees seconded.

A member said removing the counsel requirement would be a substantial change to the rule.

Motion CARRIED.

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

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

April 27, 2012 - Friday

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

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 34-64 OF THE AGENDA MATERIAL)

Staff explained that proposed new language for Rule 58 had been drafted based on the Committee's suggestions at the Thursday session.

Judge McCullough MOVED to amend Rule 58 to include amended language as follows:

(1) In General. A notice of entry of judgment must identify the docket number and the date of the judgment noticed.

(2) Service. Within 14 days after entry of judgment in an action in which an appearance has been made, notice of entry of judgment in compliance with Rule 58(b)(1); 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. A copy of the judgment must be served with the notice of entry.

(3) Filing. The prevailing party must file the notice of entry of judgment. The copy of the judgment may not be filed.

Judge Marquart seconded.

A member said the language about the date of the judgment "noticed" was unclear. The member said use of "noticed" was awkward and said that there should be more specifics on what "date" needed to be included. A member said it should specify the date the judgment was "signed." A member said this is technically referred to as the date the judgment was "issued." A member wondered whether "entered" would be better because this would be the date it became a part of the file. A member said referring to the date "signed" would be more clear.

By unanimous consent, the proposed language of paragraph (1) was amended to read: "A notice of entry of judgment must identify the docket number and the date the judgment was signed."

Motion to add new language CARRIED.

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

RULE 411, N.D.R.Ev., LIABILITY INSURANCE (PAGES 207-210 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 411 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to Rule 411. Judge McLees seconded.

The main 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 412, N.D.R.Ev., SEX OFFENSE CASES: VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION (PAGES 211-227 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 412 based on the amendments to the federal rule.

Judge Kleven MOVED to adopt the proposed amendments to Rule 412. Prof. Moore Jackson seconded.

Mr. Reiersen MOVED to add language to line 59 on page 215 to add a definition of the term "victim" as used in the federal rule. Judge Herauf seconded. Motion CARRIED.

Staff said in the Committee's previous discussion when the rule was originally addressed in 1996, there was a controversy about whether language making the rule applicable to both civil and criminal cases should be included. Staff said the Committee was not certain how the rule would be applied in a civil case and chose to make the rule applicable only in criminal cases. Staff said the rule proposal before the Committee included language based on the federal rule making the rule applicable in both civil and criminal cases.

A member asked what the practical effect would be of applying the rule in a civil sexual harassment case. A member replied that the proponent of evidence about the victim's alleged sexual behavior would have to provide justification about why admission of the

evidence would be relevant. The member said that sexual behavior evidence may be uncovered during discovery, but such evidence may be tangential to the relevant issue of whether the alleged harassing behavior was welcome. If admission of the evidence is designed to intimidate the plaintiff or to embarrass them, the evidence should not be admitted. The member said the proposed amendments to the rule would provide a forum ahead of time where admission of such evidence can be discussed and decisions on admission made before trial. The member said allowing the rule to apply to civil cases could eliminate some of the more egregious attempts to put the plaintiff in a bad light.

A member said that without the proposed amendments making the rule applicable to civil cases, the plaintiff would be limited to objecting under N.D.R.Ev. 403. The member said the standard for admission under the proposed amendments would still be a Rule 403 standard, but requiring pretrial notice of an intent to admit sexual behavior evidence against a plaintiff would be a change from current procedure.

A member said that it seemed like including the proposed civil case language would be beneficial to plaintiffs. A member said that the standard for allowing sexual conduct evidence in civil cases seemed to be looser than in criminal cases. A member said the criminal standard is more stringent, but that the pretrial notice and motion procedure for civil cases is an advantage over the current procedure. A member said that simply having the same standard apply in criminal and civil cases would make more sense.

A member said that issues in criminal and civil cases are different. A member said one reason the civil and criminal standards are different is because consent is not a defense in the civil situation; instead the standard is "welcome-ness." The member said sometimes there are facts about welcoming the conduct that a court might feel should be admitted. The member said that identity can be an issue in a criminal case but not in civil cases. The member said the law is developing as to what evidence should be admitted in a sexual harassment case and case law has not set firm standards. The member said the standards are much clearer in a criminal case.

A member said that federal laws forbid sex discrimination in employment, and claims under these laws can be made in state court, but it becomes very confusing when the evidence standards are different even if the intent is similar. A member said that the proposed changes, from a practitioner's standpoint, would give both sides a clear understanding of what the admission standards and procedures would be for this evidence. A member said the comments to the federal rule explain why a different standard was chosen for criminal and civil cases.

The main motion CARRIED. The rule proposal will be made part of the Evidence

Rules Package, which will be sent to the Supreme Court when complete.

The Chair instructed staff to prepare an explanatory note for the rule.

RULE 601, N.D.R.Ev., COMPETENCY TO TESTIFY IN GENERAL (PAGES 228-232 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 601 based on the amendments to the federal rule.

Judge Marquart MOVED to adopt the proposed amendments to Rule 601. Judge Herauf seconded.

The main 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 602, N.D.R.Ev., NEED FOR PERSONAL KNOWLEDGE (PAGES 233-236 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 602 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to Rule 602. Mr. Beehler seconded.

The main 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 603, N.D.R.Ev., OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY (PAGES 237-239 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 603 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 603. Judge McLees seconded.

The main 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 604, N.D.R.Ev., INTERPRETER (PAGES 240-243 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 604 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to Rule 604. Mr. Olson seconded.

A member asked about the contents of N.D.C.C. § 31-01-11 and whether the rule is superseded by N.D.Sup.Ct.Admin.R. 50 on interpreters. Staff said that there seemed to be overlap between the content of the statute and the administrative rule. A member said that there was also a statute for certification of interpreters for the deaf that should be referenced in the explanatory note. Staff was instructed to perform additional research on the interpreter statutes and their relationship to the court's interpreter rules.

The main 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 605, N.D.R.Ev., JUDGE'S COMPETENCY AS A WITNESS (PAGES 244-247 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 605 based on the amendments to the federal rule.

Judge McLees MOVED to adopt the proposed amendments to Rule 605. Prof. Moore Jackson seconded.

A member said that the term "presiding judge" has a particular meaning in North Dakota and its use in the proposed amended language might cause confusion.

Judge McCullough MOVED to retain the first sentence at line 3 on page 245 and delete the proposed new sentence at line 5 on page 245. Judge Herauf seconded. Motion CARRIED.

The main 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 606, N.D.R.Ev., JUROR'S COMPETENCY AS A WITNESS (PAGES 248-256 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 606 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to Rule 606. Mr. Beehler seconded.

A member suggested that the Minnesota approach may have some advantages in terms of clarity. The member said that some attorneys seem unaware of what is allowed in seeking testimony from jurors and that continuing legal education on this topic could be useful.

The main 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 607, N.D.R.Ev., WHO MAY IMPEACH A WITNESS (PAGES 257-261 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 607 based on the amendments to the federal rule.

Mr. Olson MOVED to adopt the proposed amendments to Rule 607. Judge Herauf seconded.

The main 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 608, N.D.R.Ev., A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS (PAGES 262-268 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 608 based on the amendments to the federal rule. Staff pointed out that the federal revisors had considered two versions of language on self-incrimination and adopted the sentence: "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." Staff said this language was included in the rule proposal at line 33-35 on page 264.

Judge Reich MOVED to adopt the proposed amendments to Rule 608. Judge McCullough seconded.

A member said the version of the self-incrimination language that the federal revisors chose not to adopt seemed clearer than the language in the proposal.

Judge Merrick MOVED to delete the proposed new language at line 33-35 on page 264 and substitute "A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness." Judge McLees seconded. Motion CARRIED.

The main 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 609, N.D.R.Ev., IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION (PAGES 269-281 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 609 based on the amendments to the federal rule. Staff explained that under the proposed amendments there would be a subdivision (e) on use of convictions pending on appeal added to the rule and amendments to subdivision (b) that would require a balancing test when the court decides whether to allow admission of old criminal convictions.

Judge McCullough MOVED to adopt the proposed amendments to Rule 609 EXCEPT FOR the balancing test amendments to subdivision (b). Judge Herauf seconded.

A member asked about the phrase "readily determine" at line 24 on page 271. The member said this imposed an unnecessary requirement—if the elements of an offense do not clearly require proof of a dishonest act or false statement, that offense should not be admitted under paragraph (a)(2).

Mr. Reierson MOVED to amend to delete the words "court can readily determine that establishing the" at line 24 on page 271. Judge Marquart seconded.

A member said federal courts had likely adopted the "readily determine" requirement so that federal courts would have a standard to use when dealing with state statutes and laws with which they may be unfamiliar. A member said that if a party was seeking to have such past crime evidence admitted, it was the party's responsibility to establish the dishonest act or false statement element of the crime.

Motion CARRIED.

The main 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 610. N.D.R.Ev., RELIGIOUS BELIEFS OR OPINIONS (PAGES 282-285 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 610 based on the amendments to the federal rule.

Judge Fontaine MOVED to adopt the proposed amendments to Rule 610. Judge Marquart seconded.

The main 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 611. N.D.R.Ev., EXAMINING WITNESSES AND PRESENTING EVIDENCE (PAGES 286-293 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 611 based on the amendments to the federal rule.

Mr. Quick MOVED to adopt the proposed amendments to Rule 611. Mr. Beehler seconded.

The main 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 612. N.D.R.Ev., WRITING OR OBJECT USED TO REFRESH A WITNESS'S MEMORY (PAGES 294-299 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 612 based on the amendments to the federal rule. Staff explained that the federal rule does not allow the use of an object to refresh memory but that the previous North Dakota language on use of an object was retained in the proposal.

Judge Kleven MOVED to adopt the proposed amendments to Rule 612. Mr. Beehler seconded.

By unanimous consent, the Committee decided that the words "or object" should be retained in the rule's title.

The Chair said that courts were seeing more text messages being presented and that these might qualify as “objects” under the rule.

The main 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 613, N.D.R.Ev., WITNESS’S PRIOR STATEMENT (PAGES 300-304 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 613 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 613. Judge Reich seconded.

The main 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 614, N.D.R.Ev., COURT’S CALLING OR EXAMINING A WITNESS (PAGES 305-308 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 614 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 614. Mr. Olson seconded.

The Committee discussed whether the rule is ever applied in North Dakota. A member suggested that a custody investigator in a domestic case may be called by the court. A member said when a special master is appointed, this witness is called by the court. Members said that domestic cases and commercial cases were the most likely cases in which the court could call a witness.

The main 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 615, N.D.R.Ev., EXCLUDING WITNESSES (PAGES 309-319 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 615 based on the amendments to the

federal rule. Staff explained that the proposal contains a new subdivision (d), based on the federal language, preventing exclusion of a witness authorized by statute to be present.

Mr. Quick MOVED to adopt the proposed amendments to Rule 615. Judge Herauf seconded.

A member said the previous language referring to a party's "cause" seemed preferable to new language at line 16 on page 310 referring to a party's "claim and defense." The member said in a complicated prosecution, it is sometimes necessary to have a case agent on hand with experience in the investigation to keep track of documents and testimony. The member said the use of the "claim or defense" terminology seems more limiting than presentation of the party's cause, which might cause a court to hesitate to allow assistance by a case agent or to give the defense an argument against use of a case agent.

Mr. Olson MOVED to amend line 16 on page 310 to restore the previous "cause" terminology. Judge McLees seconded.

A member said there was really no difference between "cause" and "claim or defense." A member responded that "cause" embraces all the issues in a case while "claim or defense" relates to a single issue. The member said that because a "claim or defense" is more specific, a court might restrict the use and presence of a case agent to a specific part of the case when the specific "claim or defense" is litigated. A member suggested the word "evidence" be added to line 16 on page 310 to clarify that a person could be present in the court room to help present a party's evidence. A member said that use of this term could be used to justify exclusion of a case agent during closing argument, which does not involve presentation of evidence.

A member said it would be preferable to use the federal "claim or defense" language to ensure that no argument could be made that federal case law on the rule does not apply to aid in interpretation of the state rule. Staff said the prior federal rule used "cause" and the federal rulemakers did not intend to change the meaning of the rule by using "claim or defense" in the revision.

A member said that normally any law officer will be sequestered when they are not on the stand. A member replied that the prosecution is allowed to designate a case officer to assist in presentation of evidence. A member said the federal explanatory note discusses the importance of allowing an investigative agent to be present throughout trial and that the language at lines 13-14 on page 310 specifically allows this.

Motion FAILED.

A member questioned the grammar of the sentence "Or the court may do so on its own," at line 10 on page 210. The member suggested there were better ways to express this idea.

Judge Fontaine MOVED to amend line 10 on page 310 to replace the period after "testimony" with a comma and to lowercase the word "or." Judge McLees seconded. Motion CARRIED.

Mr. Dunn MOVED to amend line 10 on page 310 to delete the word "but" and capitalize the word "this." Judge Herauf seconded. Motion CARRIED.

The main 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 701, N.D.R.Ev., OPINION TESTIMONY BY LAY WITNESSES (PAGES 320-324 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 701 based on the amendments to the federal rule, including an amendment that would limit lay opinion testimony based on scientific, technical or specialized knowledge.

Mr. Quick MOVED to adopt the proposed amendments to Rule 701. Judge McLees seconded.

A member questioned the proposed amendment to limit lay witness testimony based on scientific, technical or specialized knowledge. The member said that even lay witnesses were likely to have knowledge of this kind and should be able to testify based on it. A member said that, based on the federal commentary, law officers would be limited from testifying as lay witnesses under the proposed amendment and would need to be disclosed as expert witnesses. The member said that the treating physician may also need to be listed as an expert too under the proposed amendments.

A member said there was a lot of overlap between expert testimony and factual testimony. A member said that, under the proposed amendments, every time a witness testified about something they did not see, hear, smell or touch, there would be an issue about whether that witness was testifying as an expert. The member said the proposed amendments would create an unworkable rule. A member gave as an example of an oil field case, in which people working in the field would have specialized knowledge and would naturally use that knowledge in providing factual testimony. The member said such witnesses could be excluded under the proposed amendments if not listed as experts.

Judge McCullough MOVED to delete lines 12-13 on page 321. Judge Herauf seconded.

A member said the proposed amendments are problematic because law enforcement personnel, doctors, and health care workers would all probably need to be classified as experts. The member said the motion should carry because the proposed amendments would create confusion. A member said that even a witness with no particular expertise, testifying about what they saw and interpreting it based on their experience, could be challenged under the proposed amendments and stopped from testifying.

A member said that the proposed amendments do provide protection to a party who did not know ahead of time that an opposing lay witness, called as a fact witness, would be using their specialized knowledge when providing "factual" testimony. A member said that the proposal would provide clarity about how a particular witness should be characterized and whether the witness should be disclosed as an expert.

Motion CARRIED.

The main 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 702, N.D.R.Ev., TESTIMONY BY EXPERTS (PAGES 325-349 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 702 based on the amendments to the federal rule, including amendments based on changes to the federal rule adopted after Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

Judge Kleven MOVED to adopt the proposed amendments to Rule 702. Judge Herauf seconded.

A member said it would be useful to know how many states have adopted the Daubert principles. A member replied that it is not a simple issue, because some states have adopted part and not all of the Daubert reasoning. The member said some states had acted through judicial decisions and some through rulemaking.

A member said that adopting the proposed Daubert amendments would represent a significant change in practice in state courts. The member said it would create an explosion in pretrial practice and increase the cost of litigation for all sides. The member said federal court does not handle the same types of cases as state court. The member said it would be

in the kinds of cases that are not handled in federal court, such as family law cases, where the Daubert fights would be seen.

Mr. Dunn MOVED to delete lines 11-13 on page 327, removing the proposed Daubert amendments. Mr. Beehler seconded.

A member said this was an issue that applies to everyone in court and the proposed rule change would create problems for plaintiffs and defendants in state court. A member said based on brief research that 30 states have adopted some form of the Daubert rules. A member said that if the motion carries, the standard for expert testimony will continue to be the same as the state has followed for years and this would be appropriate.

A member said that adoption of the proposed Daubert amendments would give courts a tool to get rid of junk science. The member said that the proposed specific standards are helpful. A member replied that courts would be required to spend more time before trial deciding motions on expert qualifications if the proposed changes are adopted. A member said such issues usually come up pretrial rather than at trial.

Motion CARRIED.

By unanimous consent, the Committee decided that the word "expert" should be restored to the title.

The main 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 703, N.D.R.Ev., BASES OF AN EXPERT'S OPINION TESTIMONY (PAGES 350-354 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 703 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 703. Judge Herauf seconded.

The main 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 704, N.D.R.Ev., OPINION ON AN ULTIMATE ISSUE (PAGES 355-364 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 704 based on the amendments to the federal rule, including an amendment that would prohibit an expert from testifying on whether a defendant's mental state satisfied an element of a crime.

Mr. Olson MOVED to adopt the proposed amendments to Rule 704. Mr. Quick seconded.

Staff explained that experts in North Dakota are currently allowed to testify about a defendant's mental state as it relates to the "ultimate issue" in a criminal case. A member said that making a change consistent with the federal change would be inconsistent with state case law and statutes. The member said a key question was how the proposed change would interact with statutes on the issue.

Judge Fontaine MOVED to table the rule until the September meeting so that staff can conduct additional research on how the proposed change would interact with state statutes. Judge McCullough seconded. Motion CARRIED.

RULE 705, N.D.R.Ev., DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION (PAGES 365-368 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 705 based on the amendments to the federal rule.

Mr. Quick MOVED to adopt the proposed amendments to Rule 705. Judge Herauf seconded.

A member asked why the word "but" was used at the beginning of the second sentence of the rule. The member said the word was unnecessary and its use did not seem appropriate grammatically.

Judge McCullough MOVED to delete the word "but" in line 9 on page 366. Mr. Dunn seconded. Motion CARRIED.

The main 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 706, N.D.R.Ev., COURT-APPOINTED EXPERT WITNESSES (PAGES 369-375 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 706 based on the amendments to the federal rule.

Judge Kleven MOVED to adopt the proposed amendments to Rule 706. Mr. Quick seconded.

The main 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 707, N.D.R.Ev., ANALYTICAL REPORT ADMISSION; CONFRONTATION (PAGES 376-386 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court had made several changes to Rule 707 since the Committee had the opportunity to review it. Staff said that some new language in the rule had created disagreements between defense and prosecuting attorneys.

The Chair said the Supreme Court was currently considering a case in which the defense had requested under the rule that the prosecution produce a nurse who drew blood for a blood alcohol test. A member said that the issue of who could be requested to testify about an analytical report had been raised in other cases. A member said that the language in the rule's subdivision (b) did not seem to require that the person requested to testify about the report be a specific person. A member said that many different persons could have knowledge about an analytical report. The Chair said that the U.S. Supreme Court also had an analytical report confrontation clause case before it that had not yet been decided.

Judge McCullough MOVED to table the rule until the September meeting so that the current pending court decisions could be decided. Mr. Quick seconded. Motion CARRIED.

The meeting adjourned at approximately 11:45 a.m., on April 27, 2012.



Michael J. Hagburg

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: August 30, 2012
RE: Rule 41, N.D.Sup.Ct.Admin.R., Access to Court Records

The committee has requested that staff prepare draft forms to be used to request restrictions on Internet access to criminal records when charges have been dismissed or when an acquittal has been obtained.

At the April meeting, the committee discussed the proposed notice of motion, motion and brief, and findings of fact/conclusions of law forms. Based on its discussions, the committee decided that additional forms would be needed. In response to the committee's instructions, staff has prepared a draft affidavit in support of motion, an affidavit of mailing, and an affidavit of personal service.

The proposed forms are attached.

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

AFFIDAVIT OF SERVICE

vs.

_____,
Defendant.

I swear that I am at least 18 years of age, not a party to or interested in the above action, and that on the time and date shown above, I personally served a true copy of the Notice of Motion, the Motion to Prohibit Public Internet Access and Supporting Brief, and the Affidavit in Support of Motion in this case, at the offices of _____, the state's attorney for the county in which this matter was prosecuted.

Affiant's Signature

Subscribed and sworn to before me this _____
day of _____ 20____.

Clerk or Notary Public

_____ County, North Dakota
If notary, my commission expires: _____

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

**AFFIDAVIT OF SERVICE
BY MAIL**

vs.

_____,
Defendant.

I swear that I am at least 18 years of age, and that at the time and on the date shown above, I deposited a true copy of the Notice of Motion, the Motion to Prohibit Public Internet Access and Supporting Brief, and the Affidavit in Support of Motion in this case, securely enclosed in an envelope with Restricted Delivery, Return Receipt postage duly prepaid, addressed to _____, the state's attorney for the county in which this matter was prosecuted, at a United States Post Office.

Affiant's Signature

Subscribed and sworn to before me this _____
day of _____ 20____.

Clerk or Notary Public
_____ County, North Dakota
If notary, my commission expires: _____

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

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

**MOTION TO PROHIBIT
PUBLIC INTERNET ACCESS
AND SUPPORTING BRIEF**

vs.

_____,
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

STATE OF NORTH DAKOTA

IN DISTRICT COURT

COUNTY OF _____

CRIMINAL CASE NO. _____

THE STATE OF NORTH DAKOTA
Plaintiff,

**AFFIDAVIT IN SUPPORT
OF MOTION TO PROHIBIT
PUBLIC INTERNET ACCESS**

vs.

_____,
Defendant.

The undersigned, being first sworn, on their oath states as follows:

1. I was charged on _____ with _____.

2. On _____, the charges against me were dismissed / I was
acquitted of the charges.

3. The reason for the dismissal of charges / acquittal was

(attach additional sheets if necessary).

4. Because the record of this case has remained available for open Internet access, I
h a v e s u s t a i n e d t h e f o l l o w i n g h a r m s :

(attach additional sheets if necessary).

Affiant's Signature

Subscribed and sworn to before me this _____

day of _____ 20 _____.

Clerk or Notary Public

_____ County, North Dakota

If notary, my commission expires: _____

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.

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

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

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

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

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

33 (1) electronic representations of text or graphic documents;

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

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

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

39 Section 3. General Access Rule.

40 (a) Public Access to Court Records.

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

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

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

49 (b) When Court Records May Be Accessed.

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

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

59 (c) Access to Court Records Filed Before March 1, 2009. Court records filed before
60 the adoption of N.D.R.Ct. 3.4 may contain protected information listed under N.D.R.Ct.
61 3.4(a). This rule does not require the review and redaction of protected information from a
62 court record that was filed before the adoption of N.D.R.Ct. 3.4 on March 1, 2009.

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

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

67 Section 4. Methods of Access to Court Records.

68 (a) Access to Court Records at Court Facility.

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

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

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

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

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

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

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

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

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

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

100 (c) Requests for Bulk Distribution of Court Records.

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

103 (2) A request for bulk distribution of information not publicly accessible can be made
104 to the court for scholarly, journalistic, political, governmental, research, evaluation or
105 statistical purposes 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
107 comply with the provisions of Section 6.

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

111 (d) Access to Compiled Information From Court Records.

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

119 (2) Requesting compiled restricted information.

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

123 (B) The request must:

124 (i) identify what information is sought,

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

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

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

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

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

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

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

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

144 Section 5. Court Records Excluded From Public Access.

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

- 146 (a) information that is not accessible to the public under federal law;
- 147 (b) information that is not accessible to the public under state law, court rule, case law

or court order, including:

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

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

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

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

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

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

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

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

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

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

166 (A) except for the last four digits, social security numbers, taxpayer identification
167 numbers, and financial account numbers,

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

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

171 (11) judge and court personnel work material, including personal calendars,
172 communications from law clerks, bench memoranda, notes, work in progress, draft
173 documents and non-finalized documents.

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

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

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

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

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

185 (a) Request to Prohibit Access.

186 (1) A request to the court to prohibit public access to information in a court record
187 may be made by any party to a case, by the individual about whom information is present in
188 the court record, or on the court's own motion on notice as provided in Section 6(c).

189 (2) The court must decide whether there are sufficient grounds to overcome the

191 presumption of openness of court records and prohibit access according to applicable
192 constitutional, statutory and case law.

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

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

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

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

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

209 (B) if the defendant is acquitted.

210 If the court grants a request to prohibit public Internet access to an electronic court
211 record in a criminal case, the search result for the record must display the words "Internet

211 Access Prohibited under N.D.Sup.Ct. Admin.R 41."

212 (b) Request to Obtain Access.

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

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

220 (c) Form of Request.

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

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

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

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

230 (a) If the court contracts with a vendor to provide information technology support to
231 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

253 electronic fund transfer card number, and any other financial account number.

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

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

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

264 Source: Joint Procedure Committee Minutes of April 28-29, 2011, pages 9-12;
265 September 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009,
266 pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6; January 24,
267 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September
268 22-23, 2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13,
269 January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003,
270 pages 6-12. Court Technology Committee Minutes of June 18, 2004; March 19, 2004;
271 September 12, 2003; Conference of Chief Justices/Conference of State Court Administrators:
272 Guidelines for Public Access to Court Records.

273 Cross Reference: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With the Court).

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: August 30, 2012
RE: Rule 604, N.D.R.Ev., Interpreter

The committee discussed the proposed form and style amendments to Rule 604 at the April meeting. During the discussion, the committee suggested that a cross-reference to N.D.C.C. ch. 28-33 be included in the amendments to the rule. This has been added and the supplemented rule proposal is attached.

The committee also suggested that staff should research whether Admin. Rule 50 on interpreters supersedes the interpreter statutes. After examination of the statutes and the admin rule, it appears that they are complimentary: N.D.C.C. § 31-01-11 provides basic guidelines on when an interpreter should be obtained and how the interpreter should be sworn in; Admin Rule 50 provides more details on how an interpreter should be used and how a party can seek removal of an interpreter. Meanwhile, chapter 28-33 focuses primarily on unique considerations for appointment and use of interpreters for the deaf. Copies of these rules and statutes are attached.

RULE 604. INTERPRETERS

~~An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.~~

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

EXPLANATORY NOTE

Rule 604 was amended, effective March 1, 1990; _____.

This rule merely includes within the evidence code Rules of Evidence that which exists in North Dakota law. N.D.C.C. § 31-01-11 provides for the appointment of interpreters and for their oath while N.D.C.C. ch. 28-33 provides additional standards for interpreters for deaf persons; ~~Rule 28(b), NDR Crim P 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: _____; April 26-

27, 2012, pages 22-23; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8,
23 1976, page 27. Rule Fed.R.Ev. 604, ~~Federal Rules of Evidence~~; Rule 604, SBAND proposal.

24 Statutes Affected:

25 Considered: N.D.C.C. ch. 28-33; §§ 31-01-11, 31-01-12.

26 Cross Reference: N.D.R.Crim.P. 28 (Interpreters); N.D.R.Ct. 6.10 (Courtroom Oaths);

27 N.D.Sup.Ct.Admin.R. 50 (Court Interpreter Qualifications and Procedures).

FEDERAL RULES OF EVIDENCE
ARTICLE VI. WITNESSES

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.

Rule 50. Court Interpreter Qualifications and Procedures

Section 1. Policy.

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

Section 2. Court Interpreter qualifications.

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

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

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

Section 3. Qualifications Exception.

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

Section 4. General Procedures -- Requirements.

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

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

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

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

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

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

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

- (1) is unable to adequately interpret the proceedings;
- (2) knowingly makes a false interpretation;

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

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

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

Section 5. Effective Date.

This rule is effective March 1, 2005.

HISTORY: Adopted effective February 9, 2005.

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

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

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

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

the following:

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

31-01-12. Fees for interpreters.

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

CHAPTER 28-33 INTERPRETERS FOR DEAF PERSONS

28-33-01. Definitions.

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

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

28-33-02. Interpreter required.

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

28-33-03. Proof of disability.

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

28-33-04. Oath of interpreter.

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

28-33-05. Compensation.

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

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

28-33-06. Privileged communications.

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

28-33-07. Visual recording.

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

28-33-08. Coordination of interpreter requests.

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

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 5, 2012
RE: Rule 704, N.D.R.Ev., Opinion on an Ultimate Issue

The committee considered form and style amendments to Rule 704 at the April meeting. In particular, the committee discussed language included in the federal rule that was not made part of the North Dakota Rule. The committee requested that staff do additional research to determine whether adding the federal language would be inconsistent with North Dakota law.

The language at issue, which would bar an expert from testifying about whether a defendant had a mental state constituting an element of a crime or a defense, was added to the federal rule in accordance with the Insanity Defense Reform Act of 1984. The Supreme Court discussed the federal provision briefly in State v. Schmidkunz, 2006 ND 192, stating that its previous opinions and North Dakota statutory law allow expert testimony that may embrace the ultimate "state of mind" issue in criminal cases. A copy of Schmidkunz is attached.

The statutes cited in Schmidkunz are N.D.C.C. §§ 12.1-04.1-03 (Notice of defense of lack of criminal responsibility); 12.1-04.1-04. (Notice regarding expert testimony on lack of state of mind as element of alleged offense); and 12.1-04.1-13 (Notice of expert witnesses). Copies of these statutes are attached. While these statutes do not directly address what evidence is admissible at trial, they all assume that experts may be called to testify on ultimate "state of mind" issues and they require notice when this is planned.

A copy of the proposed amended rule as presented at the April meeting (including the

federal restriction on ultimate issue testimony) is attached. Also attached is an alternate draft that is intended to be consistent with the current rule and the statutes and case law cited in Schmidkunz. The alternate draft also includes expanded explanatory note language and a cross-reference to the statutes discussed above.

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.~~

2 RULE 704. OPINION ON AN ULTIMATE ISSUE

3 ~~Testimony in the form of an opinion or inference otherwise admissible is not~~
4 ~~objectionable because it embraces an ultimate issue to be decided by the trier of fact.~~

5 An opinion is not objectionable just because it embraces an ultimate issue.

6 EXPLANATORY NOTE

7 Rule 704 was amended, effective _____.

8 This rule is taken from Rule based on Fed.R.Ev. 704 of the Federal Rules of Evidence.

9 It should be noted that this rule applies to the opinions of lay witnesses, whenever admissible,
10 as well as to opinions of experts.

11 This rule omits the language found in Fed.R.Ev. 704 (b), which bars opinion
12 testimony in a criminal case on whether the defendant had a "mental state or condition that
13 constitutes an element of the crime charged or of a defense." This rule does not bar this type
14 of testimony.

15 Rule 704 was amended, effective _____, in response to the December 1,
16 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
17 were changed to make the rule more easily understood and to make style and terminology
18 consistent throughout the rules. There is no intent to change any result in any ruling on
19 evidence admissibility.

20 Sources: Joint Procedure Committee Minutes: of _____; June 3, 1976,
21 page 7. Rule Fed.R.Ev. 704, Federal Rules of Evidence; Rule 704, SBAND proposal.

22

Statutes Affected:

23

Considered: N.D.C.C. §§ 12.1-04.1-03, 12.1-04.1-04, 12.1-04.1-13.

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.

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 inadmissible 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.

12.1-04.1-03. Notice of defense of lack of criminal responsibility.

1. If the defendant intends to assert the defense of lack of criminal responsibility, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court. The notice must indicate whether the defendant intends to introduce at trial evidence obtained from examination of the defendant by a mental health professional after the time of the alleged offense.
2. The defendant shall file the notice within the time prescribed for pretrial motions or at such earlier or later time as the court directs. For cause shown, the court may allow late filing of the notice and grant additional time to the parties to prepare for trial or may make other appropriate orders.
3. If the defendant fails to give notice in accordance with this section, lack of criminal responsibility may not be asserted as a defense.

12.1-04.1-04. Notice regarding expert testimony on lack of state of mind as element of alleged offense.

1. If the defendant intends to introduce at trial evidence obtained from examination of the defendant by a mental health professional after the time of the alleged offense to show that the defendant lacked the state of mind required for the alleged offense, the defendant shall notify the prosecuting attorney in writing and file a copy of the notice with the court.
2. The defendant shall file the notice within the time prescribed for pretrial motions or at such earlier or later time as the court directs. For cause shown, the court may allow late filing of the notice and grant additional time to the parties to prepare for trial or may make other appropriate orders.

12.1-04.1-13. Notice of expert witnesses.

Not less than twenty days before trial, each party shall give written notice to the other of the name and qualifications of each mental health professional or other individual the respective party intends to call as an expert witness at trial on the issue of lack of criminal responsibility or requisite state of mind as an element of the crime charged. For good cause shown, the court may permit later addition to or deletion from the list of individuals designated as expert witnesses.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: September 6, 2012

RE: Rule 707, N.D.R.Ev., Analytical Report Admission; Confrontation

The committee briefly discussed Rule 707 at the April meeting, but decided to defer any action on the rule until the U.S. and North Dakota Supreme Courts had the opportunity to rule on pending cases involving analytical reports. These courts have now ruled.

In State ex rel Roseland v. Herauf, the North Dakota Supreme Court held that, because a signed statement attesting that a blood sample was properly drawn is required before an analytical report can be admitted into evidence, the defendant may require the state to produce the person who drew the sample to testify under Rule 707. A copy of the case is attached.

In Williams v. Illinois, the United States Supreme Court (in a split plurality decision) held that an expert witness could use a DNA profile to develop opinion testimony without the technician who produced the profile being required to testify about the profile first. Justice Thomas's concurrence, which provided the winning vote, stated that the DNA profile was not sufficiently "formal" or "solemn" to qualify as "testimonial," so the Confrontation Clause was not implicated when the profile was used by the expert witness. An analysis of the Williams opinion is attached.

A copy of Rule 707 is attached. No amendments are proposed, but the committee may wish to discuss whether any additions to the rule or the explanatory note should be made based on these recent court rulings.

1
2 RULE 707. ANALYTICAL REPORT ADMISSION; CONFRONTATION

3 (a) Notification to defendant. If the prosecution intends to introduce an analytical
4 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
5 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing
6 of its intent to introduce the report and must also serve a copy of the report on the defendant
7 or the defendant's attorney at least 30 days before the trial.

8 (b) Objection. At least 14 days before the trial, the defendant may object in writing
9 to the introduction of the report and identify the name or job title of the witness to be
10 produced to testify about the report at trial. If objection is made, the prosecutor must produce
11 the person requested. If the witness is not available to testify, the court must grant a
12 continuance.

13 (c) Waiver. If the defendant does not timely object to the introduction of the report,
14 the defendant's right to confront the person who prepared the report is waived.

15 (d) Juvenile proceedings. This procedure applies to juvenile proceedings that involve
16 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,
17 39-06.2, or 39-20.

18 EXPLANATORY NOTE

19 Rule 707 was adopted effective February 1, 2010. Rule 707 was amended, effective
20 March 1, 2011.

21 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
23 defendant must identify the witness it seeks to examine about the report at trial and the
24 prosecution must produce the witness.

25 Some examples of analytical reports include: a certified copy of an analytical report
26 of a blood, urine, or saliva sample from the director of the state crime laboratory or the
27 director's designee; a certified copy of the checklist and test records from a certified breath
28 test operator; or a certified copy of an analytical report signed by the director of the state
29 crime laboratory or the director's designee of the results of the analytical findings involving
30 the analysis of a controlled substance or sample.

31 Under North Dakota law, if the person who prepared the report does not testify at trial,
32 a certified copy of an analytical report must be accepted as prima facie evidence of the results
33 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-
34 20-07(8), and 39-24.1-08(6).

35 Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 10-13;
36 *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009)

37 Statutes Affected:

38 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),
39 and 39-24.1-08(7).

40 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),
41 and 39-24.1-08(6).



North Dakota Supreme Court Opinions

State, ex rel. Roseland v. Herauf, 2012 ND 151

This opinion is subject to petition for rehearing.
[\[Go to Documents\]](#)

Filed July 26, 2012

[\[Download as WordPerfect Concurring and Dissenting opinion filed.\]](#)

- HOME
- OPINIONS
- SEARCH
- INDEX
- GUIDES
- LAWYERS
- RULES
- RESEARCH
- COURTS
- CALENDAR
- NOTICES
- NEWS
- FORMS
- SUBSCRIBE
- CUSTOMIZE
- COMMENTS

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2012 ND 151

State of North Dakota, ex rel. Aaron W. Roseland in his capacity as Adams County State's Attorney, Petitioner

v.

The Honorable William A. Herauf, in his capacity as Judge of the District Court, Southwest Judicial District, and Gwen Bohmbach, Respondents

No. 20120170

Petition for Supervisory Writ.

SUPERVISORY WRIT DENIED.

Opinion of the Court by VandeWalle, Chief Justice.

Aaron W. Roseland, State's Attorney, P.O. Box 390, Hettinger, ND 58639, for petitioner.

Ashley E. Holmes, 513 Elks Drive, Dickinson, ND 58601, for respondent Gwen Bohmbach.

Nicholas D. Thornton, Fargo Public Defender Office, 912 3rd Ave. S., Fargo, ND 58103-1707, for amicus curiae North Dakota Association of Criminal Defense Lawyers; submitted on brief.

State ex rel. Roseland v. Herauf

No. 20120170

VandeWalle, Chief Justice.

[¶1] The State of North Dakota, through Adams County State's Attorney Aaron Roseland, petitioned for a supervisory writ directing the district court to withdraw its pretrial order holding N.D.R.Ev. 707 required the State to produce at trial the person who drew Gwen Bohmbach's blood on the charge of driving under the influence. We conclude this is an appropriate case in which to exercise our supervisory jurisdiction. Because we hold N.D.R.Ev. 707, when construed with N.D.C.C. § 39-20-07, requires the State to produce at trial the individual who drew Bohmbach's blood, we deny the State's petition.

I.

[¶2] Bohmbach was arrested for driving under the influence and submitted to a blood draw, which was conducted by a nurse. The State notified Bohmbach that it intended to introduce the analytical report at trial. Bohmbach sent the State a subpoena to serve on the nurse who drew her blood. The State moved to quash the subpoena, arguing N.D.R.Ev. 707 did not require it to produce the nurse who drew Bohmbach's blood because the nurse had no knowledge of the analytical report. The district court, after a hearing on the motion, concluded the State was required to produce the nurse at trial.

II.

[¶3] This Court's authority to issue supervisory writs under N.D. Const. art. VI, § 2 and N.D.C.C. § 27-02-04 is a discretionary authority exercised on a case-by-case basis. State v. Holte, 2001 ND 133, ¶ 5, 631 N.W.2d 595. We exercise this discretionary authority rarely and cautiously and only to rectify errors and prevent injustice in extraordinary cases in which no adequate alternative remedy exists. Id. We generally will decline to exercise supervisory jurisdiction if the proper remedy is an appeal. Id.

[¶4] We conclude this is an appropriate case to exercise our supervisory jurisdiction because the State lacks another adequate remedy. The State's ability to appeal is limited. See N.D.C.C. § 29-28-07. If Bohmbach were found not guilty by a jury, the State could not appeal. See State v. Bernsdorf, 2010 ND 123, ¶ 5, 784 N.W.2d 126; State v. Deutscher, 2009 ND 98, ¶ 7, 766 N.W.2d 442; City of Bismarck v. Uhden, 513 N.W.2d 373, 379 (N.D. 1994). If Bohmbach were found guilty by a jury, she would not likely raise the issue on appeal and the possibility that the State could raise it is remote. See Holte, 2001 ND 133, ¶ 6, 631 N.W.2d 595; State v. Sabinash, 1998 ND 32, ¶ 19, 574 N.W.2d 827.

[¶5] Bohmbach and the North Dakota Association of Criminal Defense Lawyers, as amicus curiae, argue the State has two adequate alternative remedies. The first suggested remedy, which would have the State proceed to trial under N.D.C.C. § 39-08-01(1)(b) based solely on the officer's testimony, is inadequate because it limits the State to proceed under one theory of driving under the influence when generally it can present the jury with two separate theories. Under N.D.C.C. § 39-08-01(1)(a), the per se violation, a person can be convicted of driving under the influence based on the results of a chemical test. Section 39-08-01(1)(b), N.D.C.C., provides a person can be convicted of driving under the influence of intoxicating liquor regardless of the driver's blood alcohol level if the State proves the person drove a motor vehicle on a public way lacking "the clearness of intellect and control of himself that he would otherwise have." State v. Knowels, 2003 ND 180, ¶ 8, 671 N.W.2d 816 (quoting State

v. Whitney, 377 N.W.2d 132, 133 (N.D. 1985)). The second suggested remedy, to produce the nurse at trial or depose her and offer her deposition in lieu of testimony, requires the State to comply with the district court order and, seemingly, reserve any challenge to the order for appeal. However, as discussed above, the State is unlikely to be able to raise the issue on appeal, making this remedy inadequate.

III.

[¶6] The State argues the district court misinterpreted N.D.R.Ev. 707 to conclude the State was required to produce the nurse at trial. The State asserts the rule only requires it to produce those persons who have knowledge about the analytical report, and the nurse who drew the blood sample has no knowledge about the report.

[¶7] We interpret rules of court, including the rules of evidence, in accordance with principles of statutory construction. Walker v. Schneider, 477 N.W.2d 167, 172 (N.D. 1991); State v. Manke, 328 N.W.2d 799, 801 (N.D. 1982). Statutory interpretation is a question of law, which is fully reviewable on appeal. Nelson v. Johnson, 2010 ND 23, ¶ 12, 778 N.W.2d 773. Words used in statutes are to be understood in their ordinary sense unless a contrary intention is apparent. N.D.C.C. § 1-02-02. Statutes should be harmonized to give meaning to related provisions and to avoid conflicts between statutes. Great Western Bank v. Willmar Poultry Co., 2010 ND 50, ¶ 7, 780 N.W.2d 437; N.D.C.C. § 1-02-07. When construing statutes, this Court considers "the context of the statutes and the purposes for which they were enacted." Great Western Bank, at ¶ 7 (quoting Falcon v. State, 1997 ND 200, ¶ 9, 570 N.W.2d 719). Statutes and rules are presumed to be constitutional and courts will construe them to be constitutional if possible. Paluck v. Bd. of Cnty. Comm'rs, Stark Cnty., 307 N.W.2d 852, 857 (N.D. 1981); N.D.C.C. § 1-02-38(1). "[I]f a statute is susceptible of two constructions, one which will be compatible with constitutional provisions or one which will render the statute unconstitutional, we must adopt the construction which will make the statute valid." Paluck, 307 N.W.2d at 856.

[¶8] Rule 707, N.D.R.Ev., provides in part:

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.

[¶9] Rule 707, N.D.R.Ev., was adopted in response to Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009). See N.D.R.Ev. 707, Explanatory Note. In Melendez-Diaz, the United States Supreme Court held that certificates of analysis, which showed the results of forensic analysis performed on seized substances, were testimonial statements for confrontation purposes. Melendez-Diaz, 129 S.Ct. at 2531-32. The Court outlined what qualifies as testimonial:

ex parte in-court testimony or its functional equivalent-- that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially; extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions; statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.

Id. at 2531 (quoting Crawford v. Washington, 541 U.S. 36, 51-52 (2004)). The Court concluded the certificates constituted affidavits and therefore were testimonial because they were "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving some fact." Melendez-Diaz, 129 S.Ct. at 2532 (quoting Crawford, 541 U.S. at 51). Additionally, the certificates were made under circumstances which would lead an objective, reasonable witness to believe the certificates would later be used at trial, and "under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance[.]" Melendez-Diaz, 129 S.Ct. at 2532 (quoting Mass. Gen. Laws, ch. 111, § 13 (2004)) (emphasis in original). See Williams v. Illinois, 2012 WL 2202981, at **10, 41 (U.S. June 18, 2012) (plurality opinion) (Kagan, J., dissenting) (reaffirming the testimonial nature of the certificates in Melendez-Diaz because they were created solely to provide evidence against the defendant). Absent a showing that the analysts who prepared the certificates of analysis were unavailable for trial and the defendant had a prior opportunity to cross-examine them, the defendant was entitled to confront the analysts at trial. Melendez-Diaz, 129 S.Ct. at 2532. The Court clarified its holding:

Contrary to the dissent's suggestion, . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that "[i]t is the obligation of the prosecution to establish the chain of custody," . . . this does not mean that everyone who laid hands on the evidence must be called.

Id. at 2532, n.1. The Court also held that a defendant's ability to subpoena an analyst does not abrogate the prosecutor's obligation under the Confrontation Clause to produce the analyst. Id. at 2540. The Court acknowledged the validity of notice-and-demand statutes, which require the prosecution to notify the defendant of its intent to introduce an analytical report, after which the defendant may object to admission of the report without the analyst's appearance at trial. Id. at 2541.

[¶10] The Supreme Court recently revisited Melendez-Diaz in Bullcoming v. New Mexico, 131 S.Ct. 2705 (2011). In Bullcoming, the defendant was arrested for driving under the influence. Bullcoming, 131 S.Ct. at 2709. At trial, the State presented a forensic lab report certifying the defendant's blood-alcohol concentration was over the legal limit. Id. Rather than calling the analyst who prepared and signed the certification, the State called a different analyst who was familiar with the lab's testing procedures but did not participate in or observe the test performed on the defendant's blood sample. Id. The Court held this procedure violated the defendant's confrontation right because the certified report was testimonial and the State did not produce the analyst who certified the report. Id. at 2710. The Court rejected the argument that the report was nontestimonial because it determined the report was created for an evidentiary purpose as part of a police investigation. Id. at 2717. See Williams, 2012 WL 2202981, at **11, 41 (plurality opinion) (Kagan, J., dissenting) (reiterating that the report in Bullcoming was testimonial because it was a signed document created to prove facts in a criminal proceeding). The Court also concluded the fact that the report was unsworn was not dispositive in determining if the report was testimonial, and the formalities accompanying the report, including the preparer's signature, were more than adequate to make the report testimonial. Bullcoming, 131 S.Ct. at 2717.

[¶11] Rule 707, N.D.R.Ev., must be interpreted in light of N.D.C.C. § 39-20-07, which governs the admission of analytical reports into evidence, because the rule and the statute are interconnected regarding analytical reports, as demonstrated by the language of the rule. See N.D.R.Ev. 707(a) (referencing N.D.C.C. ch. 39-20 as one of the chapters under which an analytical report may be introduced into evidence). Significantly, the legislature intertwined analytical

reports and blood draws within N.D.C.C. § 39-20-07, requiring us to include blood draws, as well as analytical reports, in our interpretation of N.D.R.Ev. 707.

[¶12] Section 39-20-07, N.D.C.C., provides in part:

Interpretation of chemical tests. Upon the trial of any civil or criminal action or proceeding arising out of acts alleged to have been committed by any individual while driving or in actual physical control of a motor vehicle while under the influence of intoxicating liquor, drugs, or a combination thereof, evidence of the amount of alcohol concentration or presence of other drugs, or a combination thereof, in the individual's blood, breath, or urine at the time of the act alleged as shown by a chemical analysis of the blood, breath, or urine is admissible. For the purpose of this section:

....
5. The results of the chemical analysis must be received in evidence when it is shown that the sample was properly obtained and the test was fairly administered, and if the test is shown to have been performed according to methods and with devices approved by the director of the state crime laboratory or the director's designee, and by an individual possessing a certificate of qualification to administer the test issued by the director of the state crime laboratory or the director's designee. The director of the state crime laboratory or the director's designee is authorized to approve satisfactory devices and methods of chemical analysis and determine the qualifications of individuals to conduct such analysis, and shall issue a certificate to all qualified operators who exhibit the certificate upon demand of the individual requested to take the chemical test.

....
8. A certified copy of the analytical report of a blood or urine analysis referred to in subsection 5 and which is issued by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of a chemical analysis performed under this chapter. The certified copy satisfies the directives of subsection 5.

....
10. A signed statement from the individual medically qualified to draw the blood sample for testing as set forth in subsection 5 is prima facie evidence that the blood sample was properly drawn and no further foundation for the admission of this evidence may be required.

N.D.C.C. § 39-20-07(5), (8), and (10). Under this statute, an analytical report is admissible if the State can establish: (1) the blood sample was properly obtained; (2) the blood test was fairly

administered; (3) the method and devices used in testing the sample were approved by the State Toxicologist; and (4) the blood test was performed by an authorized individual or by a person certified by the State Toxicologist as qualified to perform the test. N.D.C.C. § 39-20-07(5); Schlosser v. N.D. Dep't of Transp., 2009 ND 173, ¶ 9, 775 N.W.2d 695.

[¶13] Prior to Melendez-Diaz and N.D.R.Ev. 707, an analytical report could be received into evidence without testimony under N.D.C.C. § 39-20-07. See State v. Schwab, 2008 ND 94, ¶ 8, 748 N.W.2d 696; State v. Jordheim, 508 N.W.2d 878, 881 (N.D. 1993). The Court noted in Jordheim:

The report of a blood-test must be admitted under NDCC 39-20-07(8), even without the testimony of the chemist performing the test, if the proper foundation is developed. . . . For a blood-alcohol test, the technician who drew the blood need not testify, if a written statement of the technician is introduced showing that the sample was drawn according to the methods approved by the State Toxicologist. NDCC 39-20-07(5) and (10).

Jordheim, 508 N.W.2d at 881. Melendez-Diaz established that a defendant was entitled to confront the individual who prepared the analytical reports because the reports were testimonial statements. Melendez-Diaz, 129 S.Ct. at 2532. That holding essentially negates the shortcut provisions of N.D.C.C. § 39-20-07(5) and (8) as to the admission of an analytical report if the defendant objects to the admission of the report without the analyst's testimony, as exemplified by the adoption of N.D.R.Ev. 707.

[¶14] But, under the statute, a prerequisite to admission of an analytical report is a signed statement from the individual medically qualified to draw the blood sample that the blood sample was properly drawn. N.D.C.C. § 39-20-07(5) and (10); Schlosser, 2009 ND 173, ¶ 9, 775 N.W.2d 695. Section 39-20-07(10), N.D.C.C., provides: "[a] signed statement from the individual medically qualified to draw the blood sample for testing as set forth in [N.D.C.C. § 39-20-07] subsection 5 is prima facie evidence that the blood sample was properly drawn[.]" Rather than a foundational requirement, see State v. Gietzen, 2010 ND 82, ¶¶ 16-19, 786 N.W.2d 1, State v. Friedt, 2007 ND 108, ¶¶ 7, 10-11, 13, 735 N.W.2d 848, we conclude the "signed statement" contemplated under N.D.C.C. § 39-20-07(10) constitutes a testimonial statement. The signed statement is akin to an affidavit, which is testimonial, see Crawford, 541 U.S. at 51-52, because it is a "solemn declaration or affirmation made for the purpose of establishing or proving" that the blood sample was properly obtained. Melendez-Diaz, 129 S.Ct. at 2532 (quoting Crawford, 541 U.S. at 51). The fact that the signed statement is unsworn is not dispositive in determining if the statement is testimonial. Bullcoming, 131 S.Ct. at 2717. Also, as in

Melendez-Diaz, the sole purpose of the signed statement in subsection 10 is to establish prima facie evidence that the blood sample was properly drawn. N.D.C.C. § 39-20-07(10); see Melendez-Diaz, 129 S.Ct. at 2532.

[¶15] The signed statement contemplated under N.D.C.C. § 39-20-07(10) is a testimonial statement. See Crawford, 541 U.S. at 51-52. Therefore, the individual who signs such a statement is a witness for confrontation purposes and the defendant is entitled to be confronted with that individual at trial unless the individual is unavailable and the defendant had a prior opportunity for cross-examination. Melendez-Diaz, 129 S.Ct. at 2532. We presume statutes and rules are constitutional, and we will construe them to be constitutional if possible. Paluck, 307 N.W.2d at 857; N.D.C.C. § 1-02-38(1). Statutes and rules should be harmonized to give meaning to related provisions. Great Western Bank, 2010 ND 50, ¶ 7, 780 N.W.2d 437; N.D.C.C. § 1-02-07. With these principles in mind, we conclude N.D.R.Ev. 707, when construed with N.D.C.C. § 39-20-07 and the constitutional rights it provides, requires the State to produce the individual who drew the defendant's blood sample if the defendant objects under N.D.R.Ev. 707(b) and identifies the individual who drew the defendant's blood as a witness to be produced at trial. We note this area of jurisprudence has continued to develop since N.D.R.Ev. 707 was adopted in 2011. See Bullcoming, 131 S.Ct. 2705; Williams, 2012 WL 2202981. To the extent our previous cases, such as Gietzen, 2010 ND 82, 786 N.W.2d 1, and Friedt, 2007 ND 108, 735 N.W.2d 848, are inconsistent with our holding today, they are overruled.

[¶16] The Nebraska Supreme Court recently analyzed the same issue under its statutory framework. State v. Sorensen, 283 Neb. 932 (Neb. 2012). Nebraska's relevant statutes are similar to North Dakota's laws. In Nebraska, the admission of a certificate of the individual who collects a defendant's blood sample is governed by Neb. Rev. Stat. 60-6, 202, which provides in part:

Driving under influence of alcoholic liquor or drugs; blood test; withdrawing requirements; damages; liability; when.

(1) Any physician, registered nurse, other trained person employed by a licensed health care facility or health care service defined in the Health Care Facility Licensure Act, a clinical laboratory certified pursuant to the federal Clinical Laboratories Improvement Act of 1967, as amended, or Title XVIII or XIX of the federal Social Security Act, as amended, to withdraw human blood for scientific or medical purposes, or a hospital shall be an agent of the State of Nebraska when performing the act of withdrawing blood at the request of a peace officer pursuant to sections 60-6, 197 and 60-6, 211.02. . . .

(2) Any person listed in subsection (1) of this section withdrawing a blood specimen for purposes of section 60-

6, 197 or 60-6, 211.02 shall, upon request, furnish to any law enforcement agency or the person being tested a certificate stating that such specimen was taken in a medically acceptable manner. The certificate shall be signed under oath before a notary public and shall be admissible in any proceeding as evidence of the statements contained in the certificate.

Neb. Rev. Stat. § 60-6, 202 (2010). Compare N.D.C.C. §§ 39-20-02, 39-20-07(5) and (10). Nebraska also has a statute similar to N.D.C.C. § 39-20-07(5) and (8):

Driving under influence of alcoholic liquor or drugs; chemical test; violation of statute or ordinance; results; competent evidence; permit; fee.

(1) Any test made under section 60-6, 197, if made in conformity with the requirements of this section, shall be competent evidence in any prosecution under a state statute or city or village ordinance involving operating a motor vehicle while under the influence of alcoholic liquor or drugs or involving driving or being in actual physical control of a motor vehicle when the concentration of alcohol in the blood or breath is in excess of allowable levels.

....
(3) To be considered valid, tests of blood, breath, or urine made under section 60-6, 197 or tests of blood or breath made under section 60-6, 211.02 shall be performed according to methods approved by the Department of Health and Human Services and by an individual possessing a valid permit issued by such department for such purpose, except that a physician, registered nurse, or other trained person employed by a licensed health care facility or health care service . . . to withdraw human blood for scientific or medical purposes, acting at the request of a peace officer, may withdraw blood for the purpose of a test to determine the alcohol concentration or the presence of drugs and no permit from the department shall be required for such person to withdraw blood pursuant to such an order. The department may approve satisfactory techniques or methods to perform such tests and may ascertain the qualifications and competence of individuals to perform such tests and issue permits which shall be subject to termination or revocation at the discretion of the department.

Neb. Rev. Stat. § 60-6, 201(1) and (3) (2010).

[¶17] In Sorensen, the Nebraska Supreme Court considered whether the defendant's right to confrontation was violated when the certificate of the nurse who drew the defendant's blood was admitted at trial without the nurse's testimony. Sorensen, 283 Neb. at *1. The

defendant was arrested for driving under the influence and submitted to a blood draw, which was conducted by a nurse. Id. at *2. After the blood draw, the nurse filled out a certificate indicating the following: the nurse's name; the sample was taken at the request of law enforcement; the name, date, and time of the subject; the sample was taken in a medically acceptable manner; the nurse was qualified to draw the sample under Nebraska law; the antiseptic solution used was nonalcoholic; the sample was collected in a clean container that contained an anticoagulant-preservative substance; the container was labeled appropriately and initialed by the nurse; and the container was sealed after collection of the sample. Id. The defendant's blood sample was tested and found to have a blood alcohol content over the legal limit. Id. The State offered the nurse's certificate at trial, and the defendant objected on confrontation and hearsay grounds. Id. The objection was overruled and the certificate was admitted into evidence. Id. The nurse did not appear as a witness. Id. On appeal, the Nebraska Supreme Court held that the nurse's certificate was testimonial and the defendant's right to confrontation was violated when the State was not required to produce the nurse at trial. Id. at *4. The court reasoned:

the nurse's Certificate in this case was clearly testimonial. To begin, it is, at its essence, an affidavit. It was admitted to prove the facts in it, namely that the blood draw was performed in a medically acceptable manner[.] . . . Here, the Certificate was the statement of the nurse who actually performed Sorensen's blood draw. This blood was then tested, and those results were used against Sorensen to convict him of DUI. The Certificate itself was filled out at the request of law enforcement under authority of Neb. Rev. Stat. § 60-6, 202 (Reissue 2010), which expressly provides that either law enforcement or the defendant may request such a certificate when a blood draw is performed in connection with an arrest under Neb. Rev. Stat. § 60-6, 197 (Reissue 2010)--one of the charged violations in this case. Section 60-6, 202(2) further provides that the certificate "shall be admissible in any proceeding as evidence of the statements contained in the certificate." Given this, . . . it cannot be said that this Certificate and its statements were too attenuated to be testimonial.

Id. This reasoning is consistent with our decision and is particularly supportive given the similarities between North Dakota's statutes and Nebraska's laws.

[¶18] Rule 707, N.D.R.Ev., which we interpret with N.D.C.C. § 39-20-07, requires the State to produce at trial the individual who drew the defendant's blood sample to satisfy the constitutional requirements of N.D.C.C. § 39-20-07.

IV.

[¶19] The State's petition for a writ of supervision directing the district court to withdraw its pretrial order that held the State was required to produce at trial the individual who drew Bohmbach's blood under N.D.R.Ev. 707 is denied.

[¶20]

Gerald W. VandeWalle, C.J.
Carol Ronning Kapsner
Mary Muehlen Maring

Crothers, Justice, concurring in part and dissenting in part.

[¶21] I concur with Part II of the majority opinion determining this matter is appropriate for exercising our supervisory jurisdiction because the State lacks an adequate remedy for reviewing the question presented. Majority Opinion at ¶ 4. I respectfully dissent from the remainder of the decision concluding N.D.R.Ev. 707 and the United States Constitution Confrontation Clause require the State to produce at trial the nurse who drew blood from defendant, Gwen Bohmbach.

[¶22] The majority, of course, correctly explains the recent history of the Confrontation Clause. See Majority Opinion at ¶¶ 9-10. Those developments from the United States Supreme Court resulted in this Court adopting Rule 707, N.D.R.Ev. Our rule was adopted to bring North Dakota law in compliance with the standard set in Melendez-Diaz: an analytical report is a testimonial statement, and analysts who prepare an analytical report are witnesses for confrontation purposes and must be produced at trial unless they are unavailable and the defendant had a prior opportunity to cross-examine them. Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527, 2531-32 (2009); Bullcoming v. New Mexico, 131 S.Ct. 2705, 2710 (2011); see N.D.R.Ev. 707, Explanatory Note ("Sources: Joint Procedure Committee Minutes of September 23-24, 2010, pages 10-13; Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)"). However, the confrontation requirements announced by the United States Supreme Court are not without limits. That Court made clear:

"Contrary to the dissent's suggestion, . . . we do not hold, and it is not the case, that anyone whose testimony may be relevant in establishing the chain of custody, authenticity of the sample, or accuracy of the testing device, must appear in person as part of the prosecution's case. While the dissent is correct that '[i]t is the obligation of the prosecution to establish the chain of custody,' . . . this does not mean that everyone who laid hands on the evidence must be called."

Melendez-Diaz, at 2532 n.1; see also State v. Gietzen, 2010 ND 82, ¶ 17, 786 N.W.2d 1.

[¶23] Rule 707, N.D.R.Ev., reflects this limitation in the Melendez-Diaz holding and does not extend a defendant's confrontation rights to include individuals whose statements "serve the evidentiary function of establishing the propriety of [a defendant's] blood draw [.]" Gietzen, 2010 ND 82, ¶17, 786 N.W.2d 1; Melendez-Diaz, 129 S.Ct. at 2532 n.1. Notwithstanding the limiting language in Melendez-Diaz and notwithstanding our Rule 707 being adopted to conform with and incorporate that limitation, the majority reaches its decision by a combined reading of Rule 707 and N.D.C.C. § 39-20-07(10).

[¶24] Section 39-20-07(10) provides, "A signed statement from the individual medically qualified to draw the blood sample for testing as set forth in subsection 5 is prima facie evidence that the blood sample was properly drawn and no further foundation for the admission of this evidence may be required." We have long recognized the procedures in N.D.C.C. § 39-20-07 are "to ease the requirements for the admissibility of chemical test results while assuring that the test upon which the results are based is fairly administered." See City of Bismarck v. Bosch, 2005 ND 12, ¶6, 691 N.W.2d 260, reh'g denied, cert. denied, 545 U.S. 1141 (2005) (citing Lee v. North Dakota Dep't of Transp., 2004 ND 7, ¶10, 673 N.W.2d 245). Our case law confirms N.D.C.C. § 39-20-07(10) is aimed at easing the foundational requirements connected with prosecuting driving under the influence of alcohol cases. Those foundational requirements are just the type of "chain of custody, authenticity of the sample, or accuracy of the testing device" concerns that the United States Supreme Court said in Melendez-Diaz did not implicate the Confrontation Clause. Melendez-Diaz, 129 S.Ct. at 2532 n.1.

[¶25] I also note we have specifically rejected the argument that a defendant's confrontation rights under Melendez-Diaz include confrontation of the nurse who drew the defendant's blood. Gietzen, 2010 ND 82, ¶19, 786 N.W.2d 1 ("The district court did not err in admitting Form 104 [containing the nurse's statements] or the deputy state toxicologist's certification because those evidentiary documents laid a foundation for the admission of [defendant's] chemical analysis and because they did not attempt to directly prove an element of the charged offense."). We should not voluntarily retreat from our holding, and I do not read either Melendez-Diaz or Bullcoming as requiring us to do so.

[¶26] Rule 707, N.D.R.Ev., speaks specifically to the analytical report, and the amendment to the rule was intended to include individuals who worked on the analytical report. Those requirements are consistent with the holdings in both Melendez-Diaz and Bullcoming. By concluding otherwise, I believe the majority has vaulted from following the United States Supreme Court's interpretation of the Constitution to joining Nebraska in breaking a

trail into uncharted wilderness. See State v. Sorensen, 814 N.W.2d 371 (Neb. 2012); Majority Opinion at ¶¶ 16-17. By following Nebraska, I believe the majority goes beyond the constitutional requirements established in Melendez-Diaz and Bullcoming, and it unnecessarily elevates the evidentiary dignity of the nurse's signed writing to the level of a "testimonial" document. Doing so, the majority opens the door to arguments that the Confrontation Clause applies to acts in a criminal case where a signature or attestation is required or used in handling evidence--such as United States mail return receipts, commercial overnight package delivery confirmations or even evidentiary chain of custody logs. Those arguments were rejected at the federal level in Melendez-Diaz, 129 S.Ct. at 2532 n.1, but apparently have been given new life in North Dakota's effort to apply that same law.

[¶27] I would grant the petition for a supervisory writ and direct the district court to vacate the portion of its pretrial order holding N.D.R.Ev. 707 requires the State to produce at trial the nurse who drew Bohmbach's blood.

[¶28]

Daniel J. Crothers
Dale V. Sandstrom

[Top](#) [Home](#) [Opinions](#) [Search](#) [Index](#) [Lawyers](#) [Rules](#) [Research](#) [Courts](#) [Calendar](#) [Comments](#)

The holdings and implications of *Williams v. Illinois*

Justice William Brennan was famous for saying that the most important rule in constitutional law is how to count to five. Rarely is close attendance to that rule more important than with respect to Monday's four-one-four opinion in *Williams v. Illinois*.

Williams is the latest of the Court's decisions involving the application of the Confrontation Clause to forensic evidence. It involved a forensic analyst testifying, based on part on a DNA profile performed by someone else, that DNA found inside a rape victim matched DNA taken from the defendant. To understand the issue this fact-pattern presented, it is necessary first to give a bit of background.

The Confrontation Clause guarantees the accused the right "to be confronted with the witnesses against him." Because "witnesses" are people to give testimony, a broad coalition of Justices held in *Crawford v. Washington* (2004) that the Confrontation Clause prohibits the prosecution from introducing out-of-court "testimonial" statements without putting the declarants on the stand.

In *Melendez-Diaz v. Massachusetts* (2009), the Court held that forensic reports that certify incriminating test results are testimonial. The case, however, was a closely fought five-to-four decision. And last Term, in *Bullcoming v. New Mexico* (2011), a five-Justice majority reaffirmed *Melendez-Diaz* and made clear that when the prosecution wishes to introduce a certified forensic report, it does not suffice to call a supervisor or other "surrogate" witness to the stand in place of the actual author of the report.

The *Bullcoming* decision nonetheless left open whether the prosecution could introduce an analyst's testimonial forensic report (or transmit its substance) through an *expert* witness. The Court granted certiorari in *Williams* to answer that question, electing to review the Illinois Supreme Court's holding that the prosecution may introduce testimonial statements in the forensic reports through expert witnesses because statements introduced to show the basis for an expert opinion are not introduced for the truth of the matter asserted.

The five Justices from the *Bullcoming* majority rejected this reasoning. Concurring in Monday's judgment in *Williams* and agreeing with the four dissenters (Justice Kagan, writing also for Justices Scalia, Ginsburg, and Sotomayor), Justice Thomas explained that "[t]here is

no meaningful distinction between disclosing an out-of-court statement so that a factfinder may evaluate the expert's opinion and disclosing that statement for its truth."

This conclusion is the most important aspect of *Williams*. Before the Court's decision, numerous state and federal courts had held that the prosecution could introduce testimonial statements not only through forensic experts, but also through mental health experts, "gang experts," and other experts. 130 The Confrontation Clause now prohibits this practice.

But as is sometimes the case, prevailing on the question presented was not enough for the petitioner to prevail in the case. That was because Justice Thomas also determined that the forensic report at issue in the case – a DNA profile derived from a vaginal swab from a rape victim – was not testimonial. Justice Thomas reasoned that, unlike the reports in *Melendez-Diaz* and *Bullcoming*, the report in *Williams* was not sufficiently "formal" or "solemn" to rank as testimonial.

Justice Alito's plurality opinion (on behalf of the four dissenters from *Melendez-Diaz* and *Bullcoming*) agreed that the DNA profile was not testimonial. Reciting many of the arguments advanced in the *Melendez-Diaz* and *Bullcoming* dissents, that opinion emphasized that the report did not accuse a targeted individual of a crime and that the report, for various reasons, appeared reliable. But Justice Thomas rejected the plurality's reasoning in its totality. So it is his opinion (the narrowest in terms of assessing whether forensic reports are testimonial) that will control future cases involving forensic evidence.

So where, in practical terms, does this leave us? In the realm of forensic evidence, the Confrontation Clause continues to deem *formal* forensic reports testimonial. That means that drug, blood alcohol, fingerprint, ballistics, autopsies, and related reports that typically involve testing by one person and that are incriminating on their face will continue to be inadmissible without the testimony of their authors (or some other method of satisfying the Confrontation Clause). Even if some laboratories or jurisdictions are tempted to try to make such reports less formal (imagine a ballistics report in crayon or on a cocktail napkin!) in order to fall within Justice Thomas's test, his opinion makes clear in footnote 5 that such efforts would be in vain. That footnote says that "informal statements" are also testimonial when made to "evade the formalize process" previously used to generate such statements.

By contrast, statements made as part of a lab's internal work product or in a subsidiary report used to generate a final incriminating report will generally not be testimonial. Such statements are not typically formal or solemn. Thus, in forensic testing involving multiple

steps, it will often be enough for the prosecution to call to the stand the author of the final report or at least those who performed the key steps.

None of this sorting is meant to suggest that *Williams* does not sow any confusion or leave us with any big questions. But the biggest one I see is outside of the context of forensic evidence – namely, will Justice Thomas’s formality test come to control whether statements besides forensic reports are testimonial? In *Hammon v. Indiana* (decided in conjunction with *Davis v. Washington*), an eight-Justice majority – all *except* Justice Thomas – held that statements made for the “primary purpose” of “establish[ing] or prov[ing] past events potentially relevant to a criminal prosecution” are testimonial, even when the statements are not part of formalized dialogue. Thus, calling the case a relatively “eas[y]” one, the Court held that statements made by a victim of a completed domestic assault to a responding police officer were testimonial.

The *Williams* plurality, in footnote 13, expressly accepted *Hammon* as “binding precedent[.]” But at least some members of the plurality have clearly since soured on the *Crawford* doctrine and may be willing to reconsider even their own previous votes in order to curtail its reach.

That would be pretty dramatic turn of events, and time will tell. For now, the *Crawford* revolution – as some have called it – lives on. But its foothold also appears to be somewhat more tenuous than before.

Posted in [*Williams v. Illinois*](#), [Featured](#), [Merits Cases](#)

Recommended Citation: Jeffrey Fisher, *The holdings and implications of Williams v. Illinois*, SCOTUSBLOG (Jun. 20, 2012, 2:20 PM), <http://www.scotusblog.com/2012/06/the-holdings-and-implications-of-williams-v-illinois/>

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 11, 2012
RE: Rule 4, N.D.R.Civ.P., Persons Subject to Jurisdiction; Process; Service

Judge Nelson has requested that the committee take a look at N.D.C.C. § 39-01-11 and consider whether to include it in Rule 4.

N.D.C.C. § 39-01-11 deals with service on nonresident motor vehicle users. It provides that nonresidents who use roads in the state appoint the director of the DOT as their agent for service of process in any action growing out of a motor vehicle accident in the state. It provides a procedure for service on the DOT and establishes a fee for this service.

N.D.C.C. §§ 39-01-12, 39-01-13 and 39-01-14 support N.D.C.C. § 39-01-11 by establishing requirements for the plaintiff to provide notice of the service on the DOT, for the DOT to keep records of the service and for the defendant's rights to be protected when served in this manner. A copy of these statutes is attached.

The Supreme Court dealt with these statutes in Messmer v. Olstad, 539 N.W.2d 873 (N.D. 1995), a copy of which is attached. The case explains how the statutes work and how the plaintiff failed to make proper service under the statutes because he did not provide adequate proof that he mailed the N.D.C.C. § 39-01-12 notice.

These statutes deal tangentially with personal jurisdiction and directly with process and service, so they are "procedural" statutes that are subject to being superseded by court rule. A copy of Rule 4 is attached for the committee's review, but staff has not drafted any proposed amendments. The committee may wish to discuss whether it would be appropriate

to integrate these statutes into Rule 4 and, if it decides to move forward with amendments, it may provide staff with guidance on what approach to take. Staff can then prepare draft amendments for consideration at the next meeting.

Hagburg, Mike

From: Maring, Justice Mary
Sent: Wednesday, December 07, 2011 3:12 PM
To: Hagburg, Mike; Nelson, David
Subject: RE: Joint Procedure and 39-01-11

We will take a look at it.
Mary

Mary Muehlen Maring
North Dakota Supreme Court
600 E. Blvd. Ave.
Bismarck, North Dakota 58505
701-328-4207

From: Hagburg, Mike
Sent: Wednesday, December 07, 2011 2:55 PM
To: Nelson, David
Cc: Maring, Justice Mary
Subject: RE: Joint Procedure and 39-01-11

I will see about putting it on the January agenda. Mike

From: Nelson, David
Sent: Wednesday, December 07, 2011 2:55 PM
To: Hagburg, Mike
Cc: Maring, Justice Mary
Subject: Joint Procedure and 39-01-11

I had my first use of NDCC 39-01-11 today. I was wondering if this would be better suited to be in Rule 4 of the Rules of Civil Procedure?

Thanks, David

2 RULE 4. PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE

3 (a) Definition of person. As used in this rule, "person," whether or not a citizen or
4 domiciliary of this state and whether or not organized under the laws of this state, includes:

5 (1) an individual, executor, administrator or other personal representative;

6 (2) any other fiduciary;

7 (3) any two or more persons having a joint or common interest;

8 (4) a partnership;

9 (5) an association;

10 (6) a corporation; and

11 (7) any other legal or commercial entity.

12 (b) Personal jurisdiction.

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

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

22 (A) transacting any business in this state;

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

24 (C) committing a tort within or outside this state causing injury to another person or
25 property within this state;

26 (D) committing a tort within this state, causing injury to another person or property
27 within or outside this state;

28 (E) having an interest in, using, or possessing property in this state;

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

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

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

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

35 (3) Limitation on jurisdiction based on contacts. If jurisdiction over a person is based
36 solely on paragraph (2) of this subdivision, only a claim for relief arising from bases
37 enumerated in paragraph (2) may be asserted against that person.

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

42 (5) Inconvenient forum. If the court finds, in the interest of substantial justice the

43 action should be heard in another forum, the court may stay or dismiss the action in whole
44 or in part on any condition that may be just.

45 (c) Process.

46 (1) Contents of summons. The summons must:

47 (A) specify the venue of the court in which the action is brought;

48 (B) contain the title of the action specifying the names of the parties;

49 (C) be directed to the defendant;

50 (D) state the time within which these rules require the defendant to appear and defend;

51 (E) notify the defendant that, if the defendant fails to appear and defend, default
52 judgment will be rendered against the defendant for the relief demanded in the complaint;

53 and

54 (F) be dated and subscribed by the plaintiff or the plaintiff's attorney and include the
55 post office address of the plaintiff or plaintiff's attorney.

56 (G) If the action involves real estate and service is by publication, include the
57 additional information required by Rule 4(e)(8).

58 ~~(2) Summons served with Copy of Complaint.~~ A copy of the complaint must be served
59 with the summons, except when service is by publication under Rule 4(e).

60 ~~(3) Summons served and complaint not filed. Demand to file the complaint.~~ The
61 defendant may serve a written demand on the plaintiff to file the complaint as follows:

62 ~~(A) service of the demand must be made under Rule 5(b) on the plaintiff's attorney~~
63 ~~or under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney;~~

64 ~~(B) in cases with multiple defendants, service of a demand by one defendant is~~
65 ~~effective for all the defendants;~~

66 ~~(C) if the plaintiff does not file the complaint within 20 days after service of the~~
67 ~~demand, service of the summons is void; and~~

68 ~~(D) the demand must contain notice that if the complaint is not filed within 20 days,~~
69 ~~service of the summons is void under this rule, unless, after motion made within 60 days after~~
70 ~~service of the demand for filing, the court finds excusable neglect.~~

71 ~~(4) The defendant may file the summons and complaint, and the costs incurred on~~
72 ~~behalf of the plaintiff may be taxed as provided in Rule 54(c).~~

73 (d) Personal service.

74 (1) By whom service of all process may be made:

75 (A) within the state by any person of legal age and not a party to nor interested in the
76 action; and

77 (B) outside the state by any person who may make service under the law of this state
78 or under the law of the place where service is made, or by a person who is designated by a
79 court of this state.

80 (2) How service of process is made within the state.

81 (A) Serving an individual fourteen years of age and older. Service must be made on
82 an individual 14 or more years of age by:

83 (i) delivering a copy of the summons to the individual personally;

84 (ii) leaving a copy of the summons at the individual's dwelling or usual place of

residence in the presence of a person of suitable age and discretion who resides there;

86 (iii) delivering, at the office of the process server, a copy of the summons to the
87 individual's spouse if the spouses reside together;

88 (iv) delivering a copy of the summons to the individual's agent authorized by
89 appointment or by law to receive service of process; or

90 (v) any form of mail or third-party commercial delivery addressed to the individual
91 to be served and requiring a signed receipt and resulting in delivery to that individual.

92 (B) Serving an individual under the age of fourteen. Service must be made on an
93 individual under the age of 14 by delivering a copy of the summons to:

94 (i) the individual's guardian, if the individual has one within the state;

5 (ii) the individual's parent or any person or agency having the individual's care or
96 control, or with whom the individual resides, if the individual does not have a guardian
97 within the state; or

98 (iii) the person designated by court order, if service cannot be made under (i) or (ii).

99 (C) Serving an incompetent individual or appointed guardian. Service must be made
100 on an individual who has been judicially adjudged incompetent or for whom a guardian of
101 the individual's person or estate has been appointed in this state, by delivering a copy of the
102 summons to the individual's guardian. If a general guardian and a guardian ad litem have
103 been appointed, both must be served.

104 (D) Serving a corporation, partnership, or association. Service must be made on a
95 domestic or foreign corporation or on a partnership or other unincorporated association, by:

106 (i) delivering a copy of the summons to an officer, director, superintendent or
107 managing or general agent, or partner, or associate, or to an agent authorized by appointment
108 or by law to receive service of process on its behalf, or to one who acted as an agent for the
109 defendant with respect to the matter on which the plaintiff's claim is based and who was an
110 agent of the defendant at the time of service;

111 (ii) if the sheriff's return indicates no person upon whom service may be made can be
112 found in the county, then service may be made by leaving a copy of the summons at any
113 office of the domestic or foreign corporation, partnership, or unincorporated association
114 within this state with the person in charge of the office; or

115 (iii) any form of mail or third-party commercial delivery addressed to any of the
116 foregoing persons and requiring a signed receipt and resulting in delivery to that person.

117 (E) Serving a municipal or public corporation. Service must be made on a city,
118 township, school district, park district, county, or any other municipal or public corporation,
119 by delivering a copy of the summons to any member of its governing board.

120 (F) Serving the state and its agencies.

121 (i) State. Service must be made on the state, by delivering a copy of the summons to
122 the governor or attorney general or an assistant attorney general.

123 (ii) State agency. Service must be made on an agency of the state, such as the Bank
124 of North Dakota or the North Dakota Mill and Elevator Association, by delivering a copy of
125 the summons to the managing head of the agency or to the attorney general or an assistant
126 attorney general.

127 (G) Serving an agent not authorized to receive process. If service is made on an agent
128 who is not expressly authorized by appointment or by law to receive service of process on
129 behalf of the defendant, a copy of the summons and complaint must be mailed or delivered
130 via a third-party commercial carrier to the defendant with return receipt requested not later
131 than ten days after service by depositing a copy of the summons and complaint, with postage
132 or shipping prepaid, in a post office or with a commercial carrier in this state and directed to
133 the defendant to be served at the defendant's last reasonably ascertainable address.

134 (3) How service of process is made outside the state. Service on any person subject
135 to the personal jurisdiction of the courts of this state may be made outside the state:

136 (A) in the manner as service within this state, with the force and effect as though
137 service had been made within this state;

138 (B) under the law of the place where service is made for service in that place in an
139 action in any of its courts of general jurisdiction; or

140 (C) as directed by court order.

141 (e) Service by publication.

142 (1) When service by publication permitted. A defendant, whether known or unknown,
143 who has not been served personally under subdivision (d) of this rule may be served by
144 publication in one or more of the following situations only if:

145 (A) the claim for relief is based on one or more grounds for the exercise of personal
146 jurisdiction under paragraph (2) of subdivision (b) of this rule;

147 (B) the subject of the action is real or personal property in this state, and:

148 (i) the defendant has or claims a lien or other interest in the property, whether vested
149 or contingent,

150 (ii) the relief demanded against the defendant consists wholly or partly in excluding
151 the defendant from that lien or interest or in defining, regulating, or limiting that lien or
152 interest, or

153 (iii) the action otherwise affects the title to the property;

154 (C) the action is to foreclose a mortgage, cancel a contract for sale, or to enforce a lien
155 on or a security interest in real or personal property in this state;

156 (D) the plaintiff has acquired a lien on the defendant's property or credits within this
157 state by attachment, garnishment, or other judicial processes and the property or credit is the
158 subject matter of the litigation or the underlying claim for relief relates to the property or
159 credits;

160 (E) the action is for divorce, separation or annulment of a marriage of a state resident;

161 (F) the action is to determine parenting rights and responsibilities of an individual
162 subject to the court's jurisdiction; or

163 (G) the action is to award, partition, condemn, or escheat real or personal property in
164 this state.

165 (2) Filing of complaint and affidavit for service by publication. Before service of the
166 summons by publication is authorized, a complaint and affidavit must be filed with the clerk
167 of court where the action is venued. The complaint must set forth a claim in favor of the
168 plaintiff and against the defendant and be based on one or more of the situations specified

169 in paragraph (e)(1). The affidavit must be executed by the plaintiff or the plaintiff's attorney
170 and must state one or more of the following:

171 (A) that after diligent inquiry personal service of the summons cannot be made on the
172 defendant in this state to the best knowledge, information, and belief of the affiant;

173 (B) that the defendant is a domestic corporation that has forfeited its charter or right
174 to do business in this state or has failed to file its annual report as required by law;

175 (C) that the defendant is a domestic or foreign corporation and has no officer, director,
176 superintendent, managing agent, business agent, or other agent authorized by appointment
177 or by law on whom service of process can be made on its behalf in this state; or

178 (D) that all persons having or claiming an estate or interest in, or lien or encumbrance
179 on, the real property described in the complaint, whether as heirs, devisees, legatees, or
180 personal representative of a deceased person, or under any other title or interest, and not in
181 possession, nor appearing of record in the office of the register of deeds, the clerk of the
182 district court, or the county auditor of the county in which the real property is situated, to
183 have a claim, title or interest in the property, are proceeded against as unknown persons
184 defendant under N.D.C.C. Chs. 32-17 or 32-19 and stating facts necessary to satisfy the
185 requirements of those chapters.

186 (3) Number of publications. Service of the summons by publication may be made by
187 publishing the summons three times, once each week for three successive weeks, in a
188 newspaper published in the county where the action is pending. If no newspaper is published
189 in that county, publication may be made in a newspaper having a general circulation in the

190 county.

191 (4) Mailing or delivering summons and complaint. A copy of the summons and
192 complaint, at any time after the filing of the affidavit for publication and no later than 14
193 days after the first publication of the summons, must be deposited in a post office or with a
194 third-party commercial carrier in this state, postage or shipping prepaid, and directed to the
195 defendant to be served at the defendant's last reasonably ascertainable address.

196 (5) Personal service outside state is equivalent to publication. After the affidavit for
197 publication and the complaint in the action are filed, personal service of the summons and
198 complaint on the defendant outside the state is equivalent to and has the same force and
199 effect as the publication and mailing or delivery provided for in paragraphs (e)(3) and (4).

200 (6) Time when first publication or service outside state must be made. The first
201 publication of the summons, or personal service of the summons and complaint on the
202 defendant outside the state, must be made within 60 days after the filing of the affidavit for
203 publication. If not made, the action is considered discontinued as to any defendant not served
204 within that time.

205 (7) When defendant served by publication is permitted to defend.

206 (A) The defendant who is served by publication, or the defendant's representative, on
207 application and sufficient cause shown at any time before judgment, must be allowed to
208 defend the action.

209 (B) Except in an action for divorce, the defendant who is served by publication, or the
210 defendant's representative, on just terms, may be allowed to defend at any time within three

2 years after entry of judgment if the defendant files an affidavit with the court that states:

212 (i) the defendant has a good and meritorious defense to the action; and

213 (ii) the defendant had no actual notice or knowledge of the action to enable the
214 defendant to make application to defend before the entry of judgment.

215 (C) If the defense is successful and the judgment, or any part of the judgment, has
216 been collected or otherwise enforced, restitution may be ordered by the court, but the title to
217 property sold under the judgment to a purchaser in good faith may not be affected.

218 (D) A defendant is considered to have had notice of the action and of the judgment
219 if the defendant:

220 (i) receives a copy of the summons in the action by mail or delivery under paragraph
221 (e)(4); or

222 (ii) is personally served the summons outside the state under paragraph (e)(5).

223 (8) Additional information to be published for real property. In all cases in which
224 publication of summons is made in an action that the title to, or an interest in or lien on, real
225 property is involved, the publication must also contain a description of the real property and
226 a statement of the object of the action.

227 (f) Serving a person in a foreign country. Unless otherwise provided by law, an
228 individual, other than a minor or an incompetent person, may be served at a place not within
229 any judicial district of the United States:

230 (1) by any internationally agreed means of service that is reasonably calculated to give
231 notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial

232 and Extrajudicial Documents;

233 (2) if there is no internationally agreed means, or if an international agreement allows
234 but does not specify other means, by a method that is reasonably calculated to give notice:

235 (A) as prescribed by the foreign country's law for service in that country in an action
236 in its courts of general jurisdiction;

237 (B) as the foreign authority directs in response to a letter rogatory or letter of request;

238 or

239 (C) unless prohibited by the foreign country's law by:

240 (i) delivering a copy of the summons and the complaint to the individual personally;

241 or

242 (ii) using any form of mail or third-party commercial delivery that the clerk addresses
243 and sends to the individual and that requires a signed receipt; or

244 (3) by other means not prohibited by international agreement, as the court orders.

245 (4) Serving a minor or incompetent person. Unless otherwise provided by law, service
246 must be made on a minor or an incompetent person in a place not within any judicial district
247 of the United States in the manner prescribed by paragraphs (2)(A), (2)(B), and (3).

248 (5) Serving a foreign corporation, partnership, or association. Unless otherwise
249 provided by law, service must be made on a foreign corporation, partnership or other
250 unincorporated association, that is subject to suit under a common name, in a place not within
251 any judicial district of the United States in the manner prescribed for individuals in this
252 subdivision except personal delivery under paragraph (2)(C)(i).

254 (g) When service by publication or outside state is complete. Service by publication
255 is complete fifteen days after the first publication of the summons. Personal service of the
256 summons and complaint upon the defendant outside the state is complete fifteen days after
the date of service.

257 (h) Amendment of process or proof of service. The court may allow any process or
258 proof of service to be amended at any time on notice and just terms, unless it clearly appears
259 that the substantial rights of the party against whom the process was issued would be
260 materially prejudiced.

261 (i) Proof of service. Proof of service of the summons and the complaint or notice, if
262 any, accompanying the summons or of other process, must be made as follows:

263 (1) if served by the sheriff or other officer, by the officer's certificate of service;

264 (2) if served by any other person, by the server's affidavit of service;

265 (3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06
266 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of
267 a copy of the summons and complaint under paragraph (e)(4), if the summons and complaint
268 has been deposited;

269 (4) in any other case of service by mail or delivery via a third-party commercial carrier
270 resulting in delivery under paragraph (d)(2) or (d)(3), by an affidavit of mailing or an
271 affidavit of delivery of a copy of the summons and complaint or other process, with return
272 receipt attached; or

273 (5) by the written admission of the defendant.

274 (j) Contents of proof of service.

275 (1) The certificate, affidavit, or admission of service mentioned in subdivision (i) must

276 state the date, time, place, and manner of service.

277 (2) If the process, pleading, order of court, or other paper is served personally by a

278 person other than the sheriff or person designated by law, the affidavit of service must also

279 state that:

280 (A) the server is of legal age and not a party to the action nor interested in the action,

281 and

282 (B) the server knew the person served to be the person named in the papers served and

283 the person intended to be served.

284 (k) Contents of affidavit of mailing or delivery via a third-party commercial carrier.

285 An affidavit of mailing or delivery required by this rule must:

286 (1) state a copy of the process, pleading, order of court, or other paper to be served

287 was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-

288 party commercial carrier and directed to the party shown in the affidavit to be served at the

289 party's last reasonably ascertainable address;

290 (2) contain the date and place of deposit;

291 (3) indicate the affiant is of legal age; and

292 (4) contain the return receipt, if any, attached to the affidavit.

293 (l) Effect of mail or delivery refusal. If a summons and complaint or other process is

294 mailed or sent with delivery restricted and requiring a receipt signed by the addressee, the

addressee's refusal to accept the mail or delivery constitutes delivery. Return of the mail or
delivery bearing an official indication on the cover that delivery was refused by the addressee
is prima facie evidence of the refusal. Service is complete on the date of refusal.

(m) Service under statute. If a statute requires service and does not specify a method of
service, service must be made under this rule.

EXPLANATORY NOTE

Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977; January 1,
1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1998;
March 1, 1999; March 1, 2004; March 1, 2007; August 1, 2009; March 1, 2011;

Rule 4 governs civil jurisdiction and service of process. In contrast, Rule 5 applies to
service of papers other than process.

Rule 4 was amended, effective March 1, 1999, to allow delivery via a third-party
commercial carrier as an alternative to the Postal Service. The requirement for a "third-party"
is consistent with the rule's requirement for personal service by a person not a party to nor
interested in the action. The requirement for a "commercial carrier" means it must be the
regular business of the carrier to make deliveries for profit. A law firm may not act as its own
commercial carrier service for service of process. Finally, the phrase "commercial carrier"
is not intended to include or authorize electronic delivery. Service via e-mail or facsimile
transmission is not permitted by Rule 4.

Originally, Rule 4 concerned process, with no mention of jurisdiction. In 1971, what

316 are now subdivisions (a) [Definition of Person] and (b) [Jurisdiction over Person] were
317 added. They were taken from the Uniform Interstate and International Procedure Act. Many
318 changes were also made to subdivision (d) [previously (c)] concerning personal service,
319 several of which were taken from that Act.

320 Subdivision (c) was amended, effective March 1, 1998, to provide a defendant with
321 the means to compel the plaintiff to file the action.

322 Paragraph (c)(2) was amended, effective March 1, 2007, to require the complaint to
323 be served with the summons under most circumstances.

324 Paragraph (c)(3) ~~was amended, effective March 1, 2007. The amendment allows a~~
325 ~~demand to file the complaint to be served on an attorney using N.D.R. Civ.P. 5 procedure.~~
326 ~~The amendment clarifies that, in a multiple defendant case, service of a demand by one~~
327 ~~defendant is effective for all defendants. The amendment provides an exception for excusable~~
328 ~~neglect in responding to a demand to file complaint. on making a demand to file the~~
329 ~~complaint was transferred to Rule 5, effective _____.~~

330 Subdivision (d) was amended, effective March 1, 1998, to allow personal service by
331 delivering a copy of the summons to an individual's spouse. The time of service for an item
332 served by mail or third-party commercial carrier under subdivision (d) is the time the item
333 is delivered to or refused by the recipient. A problem may arise with service by mail or
334 delivery by third-party commercial carrier, under subdivisions (d)(2) or (d)(3)(C) when the
335 person to be served refuses delivery. This refusal Refusal of delivery is tantamount to receipt
336 of the mail or delivery for purposes of service. On the other hand, if the mail or delivery is

337 unclaimed, no service is made. Subdivision (l) was added in 1983, effective September 1,
338 1983, to make it clear that refusal of delivery by the addressee constitutes delivery.

339 Paragraph (d)(4) was deleted and subdivision (m) was added, effective March 1, 2004,
340 to clarify that, when a statute requires service and no method of service is specified, service
341 must be made under this rule. Statutes governing special procedures often conflict with these
342 rules. As an example, N.D.C.C. § 32-19-32 concerning the time period for mailing the
343 summons and complaint after publication in a mortgage foreclosure conflicts with Rule 4
344 (e)(4).

345 Paragraph (e)(4) was amended, effective March 1, 2011, to increase the time to
346 deposit a copy of the summons and complaint with a post office or third-party commercial
347 carrier from 10 to 14 days after the first publication of the summons.

348 A new subdivision (f) was added, effective March 1, 1996, to provide procedures for
349 service upon a person in a foreign country. The new procedures follow Rule 26(f),
350 Fed.R.Civ.P.

351 Rule 4 was amended, effective March 1, 2011, in response to the December 1, 2007,
352 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
353 were changed to make the rule more easily understood and to make style and terminology
354 consistent throughout the rules.

355 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 12-13;
356 April 29-30, 2010, pages 5-6; May 21-22, 2009, pages 44-45; April 27-28, 2006, pages 11-
357 14; January 30-31, 2003, pages 6-10; September 26-27, 2002, pages 15-18; April 30-May 1,

358 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997, page
359 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16; January 26-27,
360 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages 1-4 and 11; May 21-22,
361 1987, page 5; November 29, 1984, pages 3-5; September 30-October 1, 1982, pages 15-18;
362 April 15-16, 1982, pages 2-5; December 11-12, 1980, page 2; October 30-31, 1980, page 31;
363 January 17-18, 1980, pages 1-3; November 29-30, 1979, page 2; October 27-28, 1977, page
364 10; April 8-9, 1976, pages 5-9; Fed.R.Civ.P. 4.

365 Statutes Affected:

366 Superseded: N.D.C.C. chs. 28-06, 28-06.1.

367 Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers),
368 N.D.R.Civ.P. 6 (Time); N.D.R.Civ.P. 12 (Defenses and objections - When and how
369 presented - By pleading or motion - Motion for judgment on pleadings); N.D.R.Civ.P. 45
370 (Subpoena), and N.D.R.Civ.P. 81 (Applicability--In General); N.D.R.Ct. 8.4 (Summons in
371 Action for Divorce or Separation).

39-01-11. Nonresident motor vehicle user - Service upon.

The use and operation by a resident of this state or that person's agent, or by a nonresident or that person's agent, of a motor vehicle upon or over the highways of this state must be deemed an appointment by such resident when that person has been absent from this state continuously for six months or more following an accident or by such nonresident at any time, of the director of the department of transportation of this state to be the person's true and lawful attorney upon whom may be served all legal process in any action or proceeding against the person growing out of the use or operation of the motor vehicle resulting in damages or loss to person or property, whether the damage or loss occurs upon a public highway or upon public or private property, and such use or operation constitutes an agreement that any such process in any action against the person which is so served has the same legal force and effect as if served upon the person personally, or, in case of the person's death, that such process has the same legal force and effect as if served upon the administrator of the person's estate. Service of the summons in such case may be made by delivering a copy thereof to the director with a fee of ten dollars.

39-01-12. Mailing notice to defendant upon service of nonresident motor vehicle user.

Within ten days after service of summons as provided in section 39-01-11, notice of such service together with a copy of the summons and complaint in the action must be sent by the plaintiff to the defendant at the defendant's last-known address by registered or certified mail with return receipt requested, and proof of such mailing must be attached to the summons.

39-01-13. Director to keep record of process received for nonresident motor vehicle users.

The director shall keep a record of all process served upon the director under the provisions of section 39-01-11. Such record must show the day and hour of service. If any defendant served under section 39-01-11 has made proof of financial responsibility by filing a certificate of insurance coverage, as provided in section 39-16.1-09, the director shall mail a copy of such summons and complaint to the insurance carrier named in such certificate.

39-01-14. Protecting rights of defendant served as nonresident motor vehicle user.

When service has been made as provided in section 39-01-11, the court, before entering default judgment, or at any stage of the proceeding, may order such continuance as may be necessary to afford the defendant reasonable opportunity to defend any action against the defendant.



North Dakota Supreme Court Opinions ◀▲□/?

Messmer v. Olstad, 529 N.W.2d 873 (N.D. 1995)

[Go to Documents]

Filed Apr. 13, 1995

- HOME
- OPINIONS
- SEARCH
- INDEX
- GUIDES
- LAWYERS
- RULES
- RESEARCH
- COURTS
- CALENDAR
- NOTICES
- NEWS
- FORMS
- SUBSCRIBE
- CUSTOMIZE
- COMMENTS

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

Kevin John Messmer, Plaintiff and Appellant

v.

John Charles Olstad, Defendant and Appellee

Civil No. 940302

Appeal from the District Court for Grand Forks County, Northeast Central Judicial District, the Honorable Kirk Smith, Judge.

AFFIRMED.

Opinion of the Court by Levine, Justice.

Jon J. Jensen of Pearson, Christensen, Larivee and Fischer, Grand Forks, for plaintiff and appellant.

No appearance for defendant and appellee.

Messmer v. Olstad

Civil No. 940302

Levine, Justice.

Kevin J. Messmer appeals from a district court order denying his motion to vacate an order dismissing without prejudice his action against John Charles Olstad for failure to prosecute. We affirm.

Messmer, a North Dakota resident, and Olstad, a Minnesota resident, were involved in a collision on December 22, 1983, in Grand Forks. Messmer instituted this negligence action on December 29, 1989. Unable to locate Olstad to serve him personally, Messmer's attorney served a copy of the summons and complaint on the North Dakota Highway Commissioner (Commissioner) and argued that he mailed a copy of the summons, complaint, and affidavit of service upon the Commissioner by certified mail to Olstad at his

[529 N.W.2d 874]

last-known address in Alexandria, Minnesota. See NDCC 39-01-12, infra. The envelope was returned to Messmer marked "forward expired."

No further action was taken in this case until October 15, 1991, when the district court gave notice of its intention to dismiss the action without prejudice, under Rule 40(e) of the North Dakota Rules of Civil Procedure, for failure to prosecute, unless the parties requested it do otherwise. Messmer's counsel received the court's letter on October 17, 1991. That same day, he mailed a letter on behalf of Messmer to the district court, requesting it not to dismiss because of a statute of limitations problem. Apparently, the district court never received Messmer's letter and, consequently, dismissed the action without prejudice on November 12, 1991.

Although the order of dismissal was Filed, there is no indication in the record that Messmer was ever sent notice of entry of the dismissal order. Messmer's counsel first discovered that the case had been dismissed on June 2, 1994, during a review of Messmer's court file. Counsel immediately Filed this motion to vacate the order of dismissal, under Rule 60(b)(1), NDR CivP, alleging that the case had been dismissed inadvertently or mistakenly.

The district court held a hearing on Messmer's motion to vacate the order of dismissal. Messmer's attorney attempted to explain the mistake or inadvertence of the dismissal. He submitted an affidavit to the court and explained orally, at the hearing, that he received the district court's notice of its intention to dismiss on October 17, 1991, and submitted a copy of the letter he sent to the district court, requesting that the action not be dismissed. He further explained that he had not received notice of the November 12, 1991, order of dismissal and that the order first came to his attention on June 2, 1994, during a review of Messmer's file.

During the hearing, the district court raised the issue of whether original service on Olstad had been effected. The district court was concerned that Messmer had not provided the court with proof of service by mail upon Olstad in Minnesota as required under NDCC 39-01-12. Subsequent to the hearing, Messmer's attorney provided the court with a photocopy of a certified envelope addressed to Olstad's last-known address and marked "forward expired."

The district court denied Messmer's motion to vacate and issued a memorandum opinion. The district court found that although inadvertence had likely occurred, in that it never received, nor considered, Messmer's letter requesting that the action not be dismissed, Messmer had failed to establish that Olstad had been originally served with notice of the action. The district court noted that Messmer had failed to submit an affidavit of mailing or other proof of service and concluded that, without proof of service, it could not exercise personal jurisdiction over Olstad.

Messmer moved for reconsideration of the order and attempted to establish proof of mailing by providing the court with the original

certified mail envelope containing copies of the summons, complaint, and proof of service on the Commissioner, addressed to Olstad's last known address, and stamped "forward expired." The district court considered the motion on briefs only and issued a second order and memorandum opinion, confirming its previous order denying Messmer's motion to vacate. The court reasoned that the returned envelope and its contents only proved that Olstad had never received actual notice of the lawsuit. The district court concluded that without either actual delivery of service or proof of mailing sufficient to show constructive notice, the court had no personal jurisdiction over Olstad under either Rule 4, NDR CivP, or NDCC 39-01-12.

Messmer appeals, arguing that the district court abused its discretion by requiring him to prove actual delivery of service to Olstad and for refusing to vacate the dismissal order. We disagree.

Messmer misapprehends the substance of the district court's two memorandum opinions. In its first opinion, the district court found that Messmer had failed to provide proof of service on Olstad. We believe the district court was correct in this regard.

[529 N.W.2d 875]

Rule 4(d)(4), NDR CivP, directs whenever a statute provides for service of a summons upon a party not an inhabitant or found within the state, "service must be made under the circumstances and in the manner prescribed by the statute . . . or in any manner permitted by these rules and not precluded by the statute"

Section 39-01-12, NDCC, permits service upon nonresident motor vehicle users in the following manner:

"Within ten days after service of summons as provided in section 39-01-11,1 notice of such service together with a copy of the summons and complaint in the action must be sent by the plaintiff to the defendant at his last known address by registered or certified mail with return receipt requested, and proof of such mailing must be attached to the summons."

Section 39-01-12, NDCC, requires that a copy of the summons and complaint, and proof of service on the Commissioner, be sent to the "last known address" of the defendant by registered or certified mail. It also requires that plaintiff attach proof of that mailing to the summons. NDCC 39-01-12.

Although NDCC 39-01-12 does not define what the "proof of mailing" should entail, when words or phrases are not defined by our statutes, we may rely on their meaning in the North Dakota Rules of Civil Procedure. State v. Wolff, 512 N.W.2d 670 (N.D. 1994);

Sande v. State, 440 N.W.2d 264 (N.D. 1989). Rule 4, NDR CivP, defines "proof of service" by mail in the following manner:

"(h) Proof of service of the summons and of the complaint or notice, if any, accompanying the same or of other process, must be made as follows:

(4) in any case of service by mailing resulting in delivery in accordance with paragraph (2) or (3) of subdivision (d) of this rule, by an affidavit of the mailing of a copy of the summons and complaint or other process, with return receipt attached;

.....

"(j) Content of Affidavit of Mailing. An affidavit of mailing required by this rule must state that a copy of the process, pleading, order of court, or other paper to be served was deposited by the affiant, with postage prepaid, in the United States mail and directed to the party shown in the affidavit to be served at the party's last reasonably ascertainable post office address, showing the date and place of depositing and that the affiant is of legal age and having attached thereto the return receipt, if any."

Messmer submitted no affidavit of mailing showing that he deposited in the mail, with postage prepaid, a copy of the summons and complaint and proof of service upon the Commissioner, as required by section 39-01-12. Rather, following his motion to vacate the order of dismissal, Messmer submitted only a photocopy of an envelope as proof of mailing. When he submitted his motion to reconsider, he attached the original envelope, its contents, and an affidavit verifying the contents of the returned envelope. These papers, without an affidavit complying with the requirements of Rule 4(j), do not constitute

[529 N.W.2d 876]

proof of mailing as contemplated by the statute.

In Messmer's motion to reconsider, he attempted to show the district court that he had complied with the mailing requirement of section 39-01-12 by submitting to the court the original certified envelope addressed to Olstad and its contents. However, the district court was not persuaded. It concluded that not only had Messmer failed to provide proof of substituted service on Olstad, but the returned envelope established that service on Olstad had not been completed in accordance with the Rule 4, NDR CivP, requirements either.

When a statute sets out requirements for making service, parties must strictly comply with the provisions authorizing and permitting

such service. Bernhardt v. Dittus, 265 N.W.2d 684 (N.D. 1978); Farrington v. Swenson, 210 N.W.2d 82 (N.D. 1973). The objective of substituted service statutes, such as NDCC 39-01-12, is to provide notice reasonably calculated to apprise interested parties of the pending action and afford them an opportunity to present objections. Berg v. Burke, 46 N.W.2d 786 (N.D. 1951). See also Bickel v. Jackson, ___ N.W.2d ___ (N.D. 1995). Strict compliance may be excused if the party can demonstrate that actual service has been accomplished. E.g., Berg, 46 N.W.2d 786.

In this case, it is undisputed that Olstad has never received actual notice of this action. Because Messmer failed to comply with that portion of section 39-01-12 requiring him to provide proof of mailing to the court, the trial court could not conclude that Olstad received any form of constructive notice "reasonably calculated" to apprise him of this action. The trial court did not abuse its discretion in refusing to vacate its order dismissing this action.

AFFIRMED.

Beryl J. Levine

William A. Neumann

Dale V. Sandstrom

Herbert L. Meschke

Gerald W. VandeWalle, C.J.

Footnote:

1 Section 39-01-11, NDCC, says:

"The use and operation by a resident of this state or his agent, or by a nonresident or his agent, of a motor vehicle upon or over the highways of this state must be deemed an appointment by such resident when he has been absent from this state continuously for six months or more following an accident or by such nonresident at any time, of the highway commissioner of this state to be his true and lawful attorney upon whom may be served all legal process in any action or proceeding against him growing out of the use or operation of the motor vehicle resulting in damages or loss to person or property, whether the damage or loss occurs upon a public highway or upon public or private property, and such use or operation constitutes an agreement that any such process in any action against him which is so served has the same legal force and effect as it served upon him personally, or, in case of his death, that such process has the same legal force and effect as if served upon the administrator of his estate. Service of the summons in such case may be made by delivering a copy thereof to the commissioner together with a fee of ten dollars."

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 6, 2012
RE: Rule 45, N.D.R.Civ.P., Subpoena

Mr. Reiersen has raised an issue regarding Rule 45 and the objection notice requirement. A copy of his email explaining his concerns is attached. He points out that Rule 45(a)(1)(A)(iii) requires a copy of the notice with "every subpoena" while Rule 45(f) limits the notice requirement to "subpoenas commanding pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises."

Mr. Reiersen suggests that the requirements of Rule 45(a) and Rule 45(f) are inconsistent and that some sort of amendment needs to be made so that the rule is clear. Two alternate drafts of Rule 45 are attached for the Committee's review: Alt. A contains a proposed amendment to Rule 45(a) that would limit the notice requirement to subpoenas demanding production; Alt. B contains a proposed amendment to Rule 45(f) that would extend the notice requirement to all subpoenas.

The notice requirement is not part of the federal rule. It was added to Rule 45 as part of the 1995 amendments. An excerpt of the Committee's January 1994 minutes is attached to provide some background on the rationale behind the notice requirement. The minutes say that the purpose of the requirement was to advise non-lawyers of their right to object to a subpoena and the procedure for making an objection. The Committee members amended the original objection notice proposal to limit it to pretrial or prehearing production and to require a valid reason for the objection to be stated.

The language in Rule 45(a) requiring the objection notice to be included in all subpoenas was added as part of the March 1, 2009, amendments to the rule. These amendments were designed to be consistent with the federal form and style amendments. The committee addressed Rule 45 before addressing the other civil rules because concerns had been raised that subpoena power was being abused. The main concern was that non-parties were being served with subpoenas without notice to all the parties and attorneys involved in a case. There is no record in the minutes of the new language in Rule 45(a) being specifically discussed.

If the Committee decides that Rule 45 should be amended, it should also consider whether any proposed amendment should be immediately to the Supreme Court so that it can be considered with the proposed amendments to the rule that are currently pending as part of the annual rules package. These amendments are included in the attached proposals.

Hagburg, Mike

From: Kent Reierson [kreierson@crowleyfleck.com]
Sent: Friday, May 25, 2012 9:53 AM
To: Hagburg, Mike
Subject: Rule 45 NDR CivP

Mike,

I was working with rule 45 subpoena issues on a case and found it confusing in terms of what is required to be stated in a deposition subpoena. 45(a)(1)(iii) requires the notice under 45(f) regarding objecting to the subpoena be included in all subpoena's yet it appears that 45 (f) does not apply to a subpoena to appear for a deposition, hearing or trial. It appears there are two procedures if one is subpoenaed. One if records or access is required then 45(f) objection applies and the once there is an objection the burden falls upon the party serving the subpoena to get an order to compel. The second procedure is if there is no requirement to produce documents just to appear to be deposed or for a hearing or trial that the subpoenaed party must bring a protective order and cannot just object.

There are two issues I see if I am understanding the rule correctly; 1) The notice under 45(f) is required even if it is a deposition, hearing or trial subpoena even though the party cannot use that objection provision for such a subpoena thus creating confusion for a subpoenaed party and 2) this seems to value documents more that people in that a party can simply object to producing the documents and the burden shifts to the party serving the subpoena to compel the production but if it forces them to personally appear at a deposition in their county or at a hearing or trial anywhere in the state the subpoenaed party must seek a protective order or order to quash.

Would you, at some time and no hurry, be able to confirm if my understanding is correct and if it is then I would like to see it discussed by the Jt Pro Committee in terms of not requiring the 45(f) language on a deposition that does not seek documents or access or better yet require that method of objecting for all non-parties and shift the burden to the party seeking the appearance and serving the subpoena to compel compliance with the subpoena. There are problems with the procedure either way as often it would result in cancellation of a scheduled deposition and more court hearings, but it also seems to burden non-party deponents to obtain an attorney to seek to quash a subpoena. I would appreciate your thoughts on this situation. Thanks and have a great long weekend.

Kent

KENT REIERSON
CROWLEY FLECK PLLP
PO Box 1206
111 East Broadway
Williston, ND 58802-1206
Phone 701.572.2200 Fax 701.572.7072
www.crowleyfleck.com

CROWLEY | FLECK
ATTORNEYS

This electronic Mail Transmission may constitute an Attorney-Client communication that is privileged at law. It is not intended for the transmission to, or receipt by, any unauthorized persons. If you have received this electronic transmission in error, please delete it from your system without copying it, and notify the sender by reply e-mail or by calling Crowley Fleck PLLP, 701.572.2200 so that our address record can be corrected. Thank you.

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) if the subpoena seeks pretrial or prehearing production of documents, electronically stored information, or tangible things, 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

22 may be set out in a separate subpoena. A subpoena may specify the form or forms in which
23 electronically stored information is to be produced.

24 (D) Command to Produce; Included Obligations. A command in a subpoena to
25 produce documents, electronically stored information, or tangible things requires the
26 responding party to permit inspection, copying, testing, or sampling of the materials.

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

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

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

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

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

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

40 ~~(C) Requirements. The subpoena must be issued in the name of the court for the~~
41 ~~county where the subpoena will be served. The subpoena may be used and discovery~~
42 ~~obtained within this state in the same manner and subject to the same conditions and~~

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

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

48 (b) Service; Notice.

49 (1) Service of Subpoena.

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

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

57 (2) Service of Notices.

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

62 (B) Notice of Demand for Production or Inspection. If a deposition notice has not
63 been served, and if the subpoena commands the production of documents, electronically

64 stored information, or tangible things or the inspection of premises before trial, then before
65 it is served, a notice of demand for production or inspection must be served on each party.

66 (C) Notice Mandatory Before Service of Subpoena. The notice required by Rule
67 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a
68 pretrial deposition, for pretrial production of documents, electronically stored information,
69 or tangible things or for the inspection of premises may be served.

70 (c) Protecting a Person Subject to a Subpoena.

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

76 (2) Command to Produce Materials or Permit Inspection.

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

81 (B) Objections. A person commanded to produce documents or tangible things or to
82 permit inspection may serve on the party or attorney designated in the subpoena a written
83 objection to inspecting, copying, testing or sampling any or all of the materials or to
84 inspecting the premises or to producing electronically stored information in the form or forms

85 requested. The objection must be received before the earlier of 24 hours before the time
86 specified for compliance or ten days after the subpoena is served. If an objection is made, the
87 following rules apply:

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

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

93 (3) Location.

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

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

101 (4) Quashing or Modifying a Subpoena.

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

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

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

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

108 (iv) subjects a person to undue burden.

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

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

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

116 (C) Specifying Conditions as an Alternative. In the circumstances described in Rule
117 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance
118 or production under specified conditions if the serving party:

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

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

122 (d) Duties in Responding to a Subpoena.

123 (1) Producing Documents or Electronically Stored Information.

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

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

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

134 (D) Inaccessible Electronically Stored Information. The person responding need not
135 provide discovery of electronically stored information from sources that the person identifies
136 as not reasonably accessible because of undue burden or cost. On motion to compel discovery
137 or to quash, the person from whom discovery is sought must show that the information
138 sought is not reasonably accessible because of undue burden or cost. If that showing is made,
139 the court may nonetheless order discovery from such sources if the requesting party shows
140 good cause, considering the limitations of Rule ~~26(b)(2)(A)~~ 26(b)(1)(B). The court may
141 specify conditions for discovery.

142 (2) Claiming Privilege or Protection.

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

145 (i) expressly make the claim; and

146 (ii) describe the nature of the withheld documents, communications, or tangible things
147 in a manner that, without revealing information itself privileged or protected, will enable the

parties to assess the claim.

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

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

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

166 "You may object to this subpoena by sending or delivering a written objection, stating
167 your valid reason, to [Insert the name and address of the party, or attorney representing the
168 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

169 receive the subpoena. If the time specified in the subpoena for compliance is less than ten
170 days, any objection must be received at least 24 hours before the time specified for
171 compliance.

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

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

178 EXPLANATORY NOTE

179 Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995;
180 March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1,
181 2012; _____.

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

188 Rule 45 was amended, effective March 1, 2008, in response to the 2006 federal
191 revision. Language was added to the rule to clarify that production of electronically stored
192 materials may be demanded by subpoena and to provide guidance in dealing with requests
193 for electronically stored materials.

194 Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments
195 to Fed.R.Civ.P. 45. The language and organization of the rule were changed to make the rule
196 more easily understood and to make style and terminology consistent throughout the rules.

197 Paragraph (a)(3) was amended, effective ~~March 1, 2012~~, to define "state" to include
198 ~~the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally~~
199 ~~recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the~~
200 ~~United States~~ _____, to direct persons to N.D.R.Ct. 5.1 for information about how
201 to proceed with discovery in this state in an action pending in an out-of-state court. N.D.R.Ct.
202 5.1 outlines procedure for interstate depositions and discovery.

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

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

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

211 Sources: Joint Procedure Committee Minutes of _____; January 26-
212 27, 2012, pages 3-7; September 30, 2011, pages 12-15; April 28-29, 2011, page 25;
213 September 23-24, 2010, pages 32-33; April 24-25, 2008, pages 22-25; September 28-29,
214 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January
215 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8,
216 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987,
217 pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P.
218 45.

219 Statutes Affected:

220 Superseded: N.D.C.C. § 31-05-22

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

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.

22 (D) Command to Produce; Included Obligations. A command in a subpoena to
23 produce documents, electronically stored information, or tangible things requires the
24 responding party to permit inspection, copying, testing, or sampling of the materials.

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

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

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

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

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

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

38 ~~(C) Requirements. The subpoena must be issued in the name of the court for the~~
39 ~~county where the subpoena will be served. The subpoena may be used and discovery~~
40 ~~obtained within this state in the same manner and subject to the same conditions and~~
41 ~~limitations as if the action were pending within this state. Any dispute regarding the~~
42 ~~subpoena, or discovery demanded, needing judicial involvement must be submitted to the~~

43 court for the county where the subpoena issued.

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

46 (b) Service; Notice.

47 (1) Service of Subpoena.

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

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

55 (2) Service of Notices.

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

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

64 (C) Notice Mandatory Before Service of Subpoena. The notice required by Rule
65 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a
66 pretrial deposition, for pretrial production of documents, electronically stored information,
67 or tangible things or for the inspection of premises may be served.

68 (c) Protecting a Person Subject to a Subpoena.

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

74 (2) Command to Produce Materials or Permit Inspection.

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

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

85 following rules apply:

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

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

91 (3) Location.

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

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

99 (4) Quashing or Modifying a Subpoena.

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

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

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

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

106 (iv) subjects a person to undue burden.

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

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

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

114 (C) Specifying Conditions as an Alternative. In the circumstances described in Rule
115 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance
116 or production under specified conditions if the serving party:

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

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

120 (d) Duties in Responding to a Subpoena.

121 (1) Producing Documents or Electronically Stored Information.

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

125 (B) Form for Producing Electronically Stored Information. If a subpoena does not
126 specify a form for producing electronically stored information, the person responding must

127 produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable
128 form or forms.

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

132 (D) Inaccessible Electronically Stored Information. The person responding need not
133 provide discovery of electronically stored information from sources that the person identifies
134 as not reasonably accessible because of undue burden or cost. On motion to compel discovery
135 or to quash, the person from whom discovery is sought must show that the information
136 sought is not reasonably accessible because of undue burden or cost. If that showing is made,
137 the court may nonetheless order discovery from such sources if the requesting party shows
138 good cause, considering the limitations of Rule ~~26(b)(2)(A)~~ 26(b)(1)(B). The court may
139 specify conditions for discovery.

140 (2) Claiming Privilege or Protection.

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

143 (i) expressly make the claim; and

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

147 (B) Information Produced. If information is produced in response to a subpoena that

148 is subject to a claim of privilege or of protection as trial-preparation material, the person
149 making the claim may notify any party that received the information of the claim and the
150 basis for it. After being notified, a receiving party must promptly return, sequester, or destroy
151 the specified information and any copies it has; must not use or disclose the information until
152 the claim is resolved; must take reasonable steps to retrieve the information if the receiving
153 party disclosed it before being notified; and may promptly present the information to the
154 court under seal for a determination of the claim. The person who produced the information
155 must preserve the information until the claim is resolved.

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

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

163 "You may object to this subpoena by sending or delivering a written objection, stating
164 your valid reason, to [Insert the name and address of the party, or attorney representing the
165 party ~~seeking production of documents, electronically stored information, or tangible things~~
166 ~~or the inspection of premises~~ that issued the subpoena]. Any objection must be received
167 within ten days after you receive the subpoena. If the time specified in the subpoena for
168 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

190 materials may be demanded by subpoena and to provide guidance in dealing with requests
191 for electronically stored materials.

192 Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments
193 to Fed.R.Civ.P. 45. The language and organization of the rule were changed to make the rule
194 more easily understood and to make style and terminology consistent throughout the rules.

195 Paragraph (a)(3) was amended, effective ~~March 1, 2012~~, to define “state” to include
196 ~~the District of Columbia, Puerto Rico, the United States Virgin Islands, a federally~~
197 ~~recognized Indian tribe, or any territory or insular possession subject to the jurisdiction of the~~
198 ~~United States~~ _____, to direct persons to N.D.R.Ct. 5.1 for information about how
199 to proceed with discovery in this state in an action pending in an out-of-state court. N.D.R.Ct.
200 5.1 outlines procedure for interstate depositions and discovery.

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

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

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

209 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 3-7;
210 September 30, 2011, pages 12-15; April 28-29, 2011, page 25; September 23-24, 2010, pages

211 32-33; April 24-25, 2008, pages 22-25; September 28-29, 2006, pages 25-27; April 27-28,
212 2006, pages 14-15; January 29-30, 1998, page 20; January 25-26, 1996, page 20; January
213 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages
214 2-7; May 21-22, 1987, page 3; February 19-20, 1987, pages 3-4; October 30-31, 1980, pages
215 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P. 45.

216 Statutes Affected:

217 Superseded: N.D.C.C. § 31-05-22

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

EXCERPT FROM MINUTES OF MEETING

Joint Procedure Committee

January 27-28, 1994

RULE 45, N.D.R.Civ.P. - SUBPOENA (PAGES 84-98 OF THE AGENDA MATERIAL)

The Committee considered the proposed notice contained in subdivision (f) on lines 212 through 233 on pages 93 and 94. The purpose of the notice is to advise a layperson of their right to object and the procedure for objecting. The question was raised as to how a layperson will know whether documents are privileged, and that they must include a description of the nature of the documents when making an objection based on privilege. The danger is that if an objection is improperly made, the layperson may waive their claim of privilege.

Committee members commented that they have no sympathy for laypersons acting on their own without the advice of an attorney. Other Committee members commented that the layperson who receives a subpoena is often not a party and they need to be protected.

-15-

Some Committee members suggested including a form that the person being subpoenaed could sign in order to object. Other Committee members were concerned about the subpoena process being undermined by making it too easy to object. Committee members were concerned about people making groundless objections for the purpose of nullifying a subpoena when the return date on the subpoena does not allow sufficient time to get a court order. Committee members suggested that the right to object should be limited to pretrial or prehearing production and inspection. Otherwise an objection will have the effect of cancelling the trial or the hearing, or the party will not be able to get the needed information due to insufficient return time.

Committee members argued that people should be required to explain why they are objecting. Committee members commented that the reason people will give for objecting is that they are too busy or that they do not want to attend. Committee members suggested changing line 231 through 233 to require a "valid reason" for objecting. Committee members questioned how a layperson is to know whether their objection is valid and whether the terminology "valid objection" means that the person must prevail at the hearing.

Mr. McLean MOVED that line 231-233 be amended to provide as follows: "Failure to obey this subpoena without making a timely objection, and stating a valid reason, may be deemed contempt of court." Ms. Schmitz seconded. A vote was not called on the motion. Committee members argued that an objection should not be required to be "valid." A "valid" objection is one that prevails. Other Committee members noted that the court will have discretion as to whether to impose contempt sanctions.

Committee members suggested that an objection should be required to be received at least 24 hours before the time specified for compliance. Committee members also argued that 14 days is too long a period to allow for making an objection. Committee members suggested that only 7 days should be allowed for making an objection. Other Committee members argued that 7 days is not a long enough time period. If the objection is to be "received" within 7 days after service of the subpoena, the witness may only have 4 days to get the objection to the attorney seeking discovery. The Committee agreed to a 10 day time period because 3 days are not added for mailing. The rule as amended will require objections to be "received" in 10 days. Committee members noted that cutting the number of days for objecting from 14 days to 10 days is a significant reduction. Ten days is actually less than 10 days because the party objecting will need to allow for mailing time. Mr. McLean MOVED to amend subdivision (f) with the changes following:

"(f) Notice. All subpoenas commanding pretrial or prehearing production, inspection or copying must

-16-

contain the following notice: 'You may object to this subpoena by mailing 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, inspection or copying]. Any objection must be ~~made~~ received within 14 10 days after the date on which the subpoena was mailed or delivered. If the time specified in the subpoena for compliance is less than 14 10 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 deemed contempt of court."

Ms. Schmitz seconded. Motion CARRIED. Committee members noted that staff will need to change subparagraph (b) on page 89 so that it is consistent with the requirement that objections be "received" within "10" days on page 94.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 7, 2012
RE: Rule 11, N.D.R.Crim.P., Pleas

The Supreme Court recently released an opinion in Kooser v. State, a case that involved a defendant's claim that the trial court erred when it declined to allow him to withdraw his Alford plea. When the Court discussed Kooser, the question of whether allowing Alford pleas is consistent with Rule 11 was raised. The Chair has requested that the Committee address this issue.

Rule 11 is based on the federal rule. As the attached notes to Fed.R.Crim.P. 11 point out, an Alford plea is considered a nolo contendere plea in the federal system and the federal rule allows these pleas. The original criminal rules committee proposed that North Dakota allow nolo pleas under Rule 11, but the Court rejected this when it ultimately approved the rule. This Committee discussed adding nolo pleas to Rule 11 when it reviewed the criminal rules in 2004, but it declined to do so. An excerpt from the Committee's September 2004 minutes is attached so the Committee can review the nolo plea discussion.

The original case of North Carolina v. Alford, 400 U.S. 25 (1970), involved a guilty plea, not a nolo plea. Mr. Alford was charged with first degree murder and faced the death penalty. While he maintained that he was innocent, he pled guilty to second degree murder to avoid a possible death sentence. He later tried to withdraw his guilty plea. In analyzing Mr. Alford's claims that his plea was invalid, the court said "[a]n individual accused of crime may voluntarily, knowingly and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." After finding that Mr. Alford's plea was voluntary and that the state had

presented strong evidence of his guilt, the Alford court held that his plea was valid. A copy of the case is attached.

The North Dakota Supreme Court has allowed Alford pleas since State v. McKay, 243 N.W.2d 853 (N.D. 1975), in which it was guided by the language from Alford quoted above. McKay involved a defendant who could not remember whether he committed the crime or not. The McKay court pointed out the two key factors involved in a valid Alford plea (or any guilty plea): "The decision on how to plead must be based on an understanding of the evidence against him and of the consequences of his plea. The trial court must ensure that the facts on which defendant will base his decision are accurate and properly presented." A copy of McKay is attached.

In Kooser, the defendant sought to withdraw his Alford plea based on his claim that, because he denied a key element of the offense, the factual basis to his plea was inadequate. This seems to be a common argument among defendants seeking to withdraw Alford pleas. The Kooser court analyzed the facts supporting the plea as presented by the state and rejected Mr. Kooser's argument. The court's rationale was similar to that of McKay and it quoted the same language from Alford discussed above. A copy of Kooser is attached.

The Court is concerned that defendants in general do not understand that a guilty plea can be valid even if they do not admit guilt. The Court would like the Committee to discuss whether it might be appropriate to have some language in Rule 11 that would make it clear that an admission of guilt is not a required component of a guilty plea. One approach could be to follow the federal rule and adopt the nolo plea. Another possibility would be to add language to Rule 11 that would address the question of whether a guilty plea was being made as admission of guilt or as a convenience.

For the purposes of discussion, proposed amendments to Rule 11 are attached that include language based on the Florida guilty plea rule. A copy of the Florida rule is also attached.

RULE 11. PLEAS

(a) Entering a plea.

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

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

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

(b) Advice to defendant.

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

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

(B) the right to a jury trial;

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

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

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

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

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

25 (H) any mandatory minimum penalty; and

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

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

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

35 (4) Acknowledgment by Defendant. Before entering judgment on a guilty plea, the
36 court must determine that the defendant either:

37 (A) acknowledges his or her guilt; or

38 (B) acknowledges that he or she feels the plea to be in his or her best interest, while
39 maintaining his or her innocence.

40 (c) Plea agreement procedure.

41 (1) In general. The prosecuting attorney and the defendant's attorney, or the defendant
42 when acting pro se, may discuss and reach a plea agreement. The court must not participate

43 in these discussions. If the defendant pleads guilty to either a charged offense or a lesser or
44 related offense, the plea agreement may specify that the prosecuting attorney will:

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

46 (B) recommend, or agree not to oppose the defendant's request, that a particular
47 sentence is appropriate; or

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

50 (2) Disclosing a plea agreement. The parties must disclose the plea agreement in open
51 court when the plea is offered, unless the court for good cause allows the parties to disclose
52 the plea agreement in camera.

53 (3) Judicial consideration of a plea agreement.

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

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

60 (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must
61 inform the defendant that, to the extent the plea agreement is of the type specified in Rule
62 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

63 (5) Rejecting a plea agreement. If the court rejects a plea agreement containing

64 provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following
65 on the record and in open court:

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

67 (B) advise the defendant personally that the court is not required to follow the plea
68 agreement and give the defendant an opportunity to withdraw the plea; and

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

72 (6) Time of plea agreement procedure. Except for good cause shown, notification to
73 the court of the existence of a plea agreement must be given at the arraignment or at such
74 other time, prior to trial, as may be fixed by the court.

75 (d) Withdrawing a guilty plea.

76 (1) In general. A defendant may withdraw a plea of guilty:

77 (A) before the court accepts the plea, for any reason or no reason; or

78 (B) after the court accepts the plea, but before it imposes sentence if:

79 (i) the court rejects a plea agreement under Rule 11(c)(5); or

80 (ii) the defendant can show a fair and just reason for the withdrawal.

81 (2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is necessary
82 to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court
83 has imposed sentence.

84 (3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced

85 by reliance on the defendant's plea, the court may deny a plea withdrawal request.

86 (e) Admissibility or inadmissibility of a plea, plea discussions, and related statements.

87 The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is
88 governed by N.D.R.Ev. 410.

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

92 (g) Defendant's presence at plea proceeding. A plea of guilty may be made only by the
93 defendant, in open court, unless the defendant is a corporation, in which case it may be made
94 by counsel; or in a non-felony case, the defendant may petition to enter a plea of guilty as
95 provided in Rule 43(b).

96 EXPLANATORY NOTE

97 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996;
98 March 1, 2006; June 1, 2006; March 1, 2010;_____.

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

105 Rule 11 was amended, effective March 1, 2006, in response to the December 1, 2002,

106 revision of the Federal Rules of Criminal Procedure. The language and organization of the
107 rule were changed to make the rule more easily understood and to make style and
108 terminology consistent throughout the rules.

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

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

118 Subdivision (b) prescribes the advice which the court must give to the defendant as
119 a prerequisite to the acceptance of a plea of guilty. The court is required to determine that a
120 plea is made with an understanding of the nature of the charge and the consequences of the
121 plea. Subdivision (b) also establishes the requirement that the court address the defendant
122 personally.

123 Paragraph (b)(1) requires the court to determine if the defendant understands the
124 nature of the charge and requires the court to inform the defendant of and determine that the
125 defendant understands the mandatory minimum punishment, if any, and the maximum
126 possible punishment. The objective is to insure that the defendant knows what minimum

127 sentence the judge MUST impose and the maximum sentence the judge MAY impose and,
128 further, to explain the consecutive sentencing possibilities when the defendant pleads to more
129 than one offense. This provision is included so that the judicial warning effectively serves
130 to overcome subsequent objections by the defendant that the defendant's counsel gave the
131 defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the
132 defendant waives by a plea of guilty and ensures a knowing and intelligent waiver of counsel
133 is made. A similar requirement is found in Rule 5(b) governing the initial appearance.

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

138 Paragraph (b)(2) requires the court to determine that a plea of guilty is voluntary
139 before accepting it. Paragraph (b)(2), together with subdivision (c), affords the court an
140 adequate basis for rejecting an improper plea agreement induced by threats or inappropriate
141 promises. The rule specifies that the court personally address the defendant in determining
142 the voluntariness of the plea.

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

145 Paragraph (b)(4) was added to the rule, effective _____, and requires the
146 court to obtain an acknowledgment from the defendant about whether the defendant is
147 admitting guilt or pleading guilty based on the defendant's best interest.

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

157 Paragraph (c)(1) specifies that both the attorney for the prosecution and the attorney
158 for the defense, or the defendant when acting pro se, participate in plea discussions. It also
159 makes clear that there are three possible concessions that may be made in a plea agreement:
160 first, the charge may be reduced to a lesser or related offense; second, the attorney for the
161 prosecution may agree not to recommend or not oppose the imposition of a particular
162 sentence; or third, the attorney for the prosecution may promise to move for a dismissal of
163 other charges. The court is not permitted to participate in plea discussions because of the
164 possibility that the defendant would believe that the defendant would not receive a fair trial,
165 if no agreement had been reached or the court rejected the agreement, and a subsequent trial
166 ensued before the same judge.

167 Paragraph (c)(2) provides that the parties must disclose any plea agreement in open
168 court or, for good cause, in camera.

169 Paragraph (c)(3) gives the court, upon notice of the plea agreement, the option of
170 accepting or rejecting the agreement or deferring its decision until receipt of the presentence
171 report. The court must inform the defendant that it may choose not to accept a sentence
172 recommendation made as part of a plea agreement. Decisions on plea agreements are left to
173 the discretion of the individual trial judge.

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

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

184 Paragraph (c)(6) requires that the court be notified of the existence of a plea
185 agreement at the arraignment or at another time prior to trial fixed by the court unless it can
186 be shown that for good cause this was not done. Having a plea entered at this stage provides
187 a reasonable time for the defendant to consult with counsel and for counsel to complete any
188 plea discussions with the attorney for the prosecution. The objective of the provision is to
189 make clear that the court has authority to require a plea agreement to be disclosed sufficiently

190 in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

191 A new subdivision (d) on plea withdrawal was transferred to Rule 11 from Rule 32
192 effective March 1, 2010.

193 Subdivision (e) makes it clear that N.D.R.Ev. 410 governs the admissibility of plea
194 discussions.

195 Subdivision (f) requires that a verbatim record be kept of the proceedings. The record
196 is important in the event of a post-conviction attack.

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

203 Rule 11 does not include a subdivision entitled harmless error and differs from the
204 1983 amendment to Fed.R.Crim.P. 11(h) in that respect. Rule 52(a), Harmless Error, is
205 intended to have general application to all the criminal rules of procedure.

206 Sources: Joint Procedure Committee Minutes of _____; January 29-
207 30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005,
208 pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-
209 27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12;
210 April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26,

211 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17,
212 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973,
213 pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20,
214 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

215 Statutes Affected:

216 Superseded: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-
217 16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23, 29-14-24, 29-14-
218 26, 29-14-27, 33-12-17, 33-12-18.

219 Considered: N.D.C.C. § 31-13-03.

220 Cross Reference: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right
221 to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo Contendere;
222 Withdrawn Plea of Guilty); N.D.Sup.Ct.Admin.R. 52 (Interactive Television).

FEDERAL RULES OF CRIMINAL PROCEDURE
TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 11. Pleas

(a) Entering a Plea.

(1) *In general*. A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea*. With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea*. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea*. If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant*. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

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

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

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

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

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

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under *18 U.S.C. § 3553(a)*; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary*. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

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

(c) Plea Agreement Procedure.

(1) *In General*. An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

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

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

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

(3) *Judicial Consideration of a Plea Agreement.*

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

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

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

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

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

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

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

(d) *Withdrawing a Guilty or Nolo Contendere Plea.* A defendant may withdraw a plea of guilty or nolo contendere:

(1) before the court accepts the plea, for any reason or no reason; or

(2) after the court accepts the plea, but before it imposes sentence if:

(A) the court rejects a plea agreement under Rule 11(c)(5); or

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) *Finality of a Guilty or Nolo Contendere Plea.* After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) *Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements.* The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by *Federal Rule of Evidence 410*.

(g) *Recording the Proceedings.* The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) *Harmless Error.* A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

HISTORY:

(Amended July 1, 1966; July 31, 1975, P.L. 94-64, §§ 2, 3(5)-(10), 89 Stat. 371, 372; Dec. 1, 1975; Aug. 1, 1979; Dec. 1, 1980; Aug. 1, 1982; Aug. 1, 1983; Aug. 1, 1985; Aug. 1, 1987; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7076, 102 Stat. 4406; Dec. 1, 1989.)

(As amended Dec. 1, 1999; Dec. 1, 2002; Dec. 1, 2007.)

Amendments:

1975. Act July 31, 1975, § 3(5)-(9) (effective 12/1/75, as provided by § 2 of such Act, which appears as a note to Rule 4), substituted subsecs. (c) and (e)(1)-(4) for ones which read:

"(c) Advice to defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

"(1) the nature of the charge to which the plea is offered; and

"(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

"(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

"(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

"(e) Plea agreement procedure.

(1) In general. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

"(2) Notice of such agreement. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

"(3) Acceptance of plea. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

"(4) Rejection of plea. If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement."

Such Act further (effective 8/1/75, as provided by § 2 of such Act, which appears as a note to Rule 4), substituted subsec. (e)(6) for one which read: "(6) Inadmissibility of plea discussions. 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 proceeding against the person who made the plea or offer."

1988. Act Nov. 18, 1988, in subsec. (c)(1), inserted "or term of supervised release".

Notes of Advisory Committee. 1. This rule is substantially a restatement of existing law and practice, 18 U.S.C. [former] § 564 (Standing mute); *Fogus v United States*, 34 F.2d 97, (C.C.A. 4th) (Duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts, *Hudson v United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347; *United States v Norris*, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076. The use of the plea is recognized by the Probation Act, 18 U.S.C. [former] § 724 [see § 3651]. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

Notes of Advisory Committee on 1966 amendments. The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. United States Attorney Statistical Report, Fiscal Year 1964, p 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all the federal costs.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States v Diggs*, 304 F.2d 929 (6th Cir. 1962); *Domenica v United States*, 292 F.2d 483 (1st Cir. 1961); *Gundlach v United States*, 262 F.2d 72 (4th Cir. 1958), cert den 360 U.S. 904, 3 L.Ed.2d 1255, 79 S.Ct. 1283 (1959); and *Julian v United States*, 236 F.2d 155 (6th Cir. 1956), which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks v United States*, 298 F.2d 204 (5th Cir. 1962); *Nunley v United States*, 294 F.2d 579 (10th Cir. 1961), cert den 368 U.S. 991, 7 L.Ed. 2d 527, 82 S.Ct. 607 (1962); and *United States v Von der Heide*, 169 F. Supp. 560 (D.D.C. 1959).

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., *Von Moltke v Gillies*, 332 U.S. 708, 724, 92 L.Ed. 309, 68 S.Ct. 316 (1948); *Kerchevel v United States*, 274 U.S. 220, 223, 71 L.Ed. 1009, 47 S.Ct. 582 (1927); *Munich v United States*, 337 F.2d 356 (9th Cir. 1964);

Pilkington v United States, 315 F.2d 204 (4th Cir. 1963); *Smith v United States*, 324 F.2d 436 (D.C. Cir. 1963); but cf. *Marvel v United States*, 335 F.2d 101 (5th Cir. 1964).

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann. § 28.1058 (1954); Mich. Sup. Ct. Rules 35A; *In re Valle*, 364 Mich. 471, 110 N.W.2d 673 (1961); *People v Barrows*, 358 Mich. 267, 99 N.W.2d 347 (1959); *People v Bumpus*, 355 Mich. 374, 94 N.W.2d 854 (1959); *People v Coates*, 337 Mich. 56, 59 N.W.2d 83 (1953). See also *Stinson v United States*, 316 F.2d 554 (5th Cir. 1963). The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. The new third sentence is not, therefore, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See, e.g., *Lott v United States*, 367 U.S. 421, 426, 6 L.Ed.2d 940, 81 S.Ct. 1563 (1961).

Notes of Advisory Committee on 1974 amendments. The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the views of the prosecution and of the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, *Hudson v. United States*, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926), the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, *Nolo Contendere in North Carolina*, 34 N.C.L.Rev. 280, 290-291 (1956), with Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 Neb.L.Rev. 428, 434 (1954), favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of the plea. ABA, *Standards Relating to Pleas of Guilty* § 1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the nolo plea in *North Carolina v. Alford*, 400 U.S. 25, 35-36 n. 8, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). Note, *The Nature and Consequences of the Plea of Nolo Contendere*, 33 Neb.L.Rev. 428, 430 (1954). A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L.J. 1255, 1265 (1942). Unlike a plea of guilty, however, it cannot be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore § 1066(4), at 58 (3d ed. 1940, Supp. 1970); *Rules of Evidence for United States Courts and Magistrates*, rule 803(22) (Nov. 1971). See Lenvin and Meyers, *Nolo Contendere: Its Nature and Implications*, 51 Yale L.J. 1255 (1942); ABA *Standards Relating to Pleas of Guilty* §§ 1.1(a) and (b), Commentary at 15-18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit the plea of nolo contendere vary. Compare *United States v. Bagliore*, 182 F.Supp. 714, 716 (E.D.N.Y. 1960), where the view is taken that the plea should be rejected unless a compelling reason for acceptance is established, with *United States v. Jones*, 119 F.Supp. 288, 290 (S.D.Cal. 1954), where the view is taken that the plea should be accepted in the absence of a compelling reason to the contrary.

A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilty or innocence either for correctional purposes or for reasons of subsequent litigation. ABA *Standards Relating to Pleas of Guilty* § 1.1(b) Commentary at 16-18

(Approved Draft, 1968). Under subdivision (b) of the new rule the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969), which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Subdivision (c) retains the requirement that the court address the defendant personally. See *McCarthy v. United States*, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969). There is also an amendment to rule 43 to make clear that a defendant must be in court at the time of the plea.

Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA Standards Relating to Pleas of Guilty § 1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402(a)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(a)(1). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, *The Judge's Responsibility on a Plea of Guilty* 62 *W.Va.L.Rev.* 213, 220 (1960); Resolution of Judges of U.S. District Court for D.C., June 24, 1959.

Former rule 11 required the court to inform the defendant of the "consequences of the plea." Subdivision (c)(2) changes this and requires instead that the court inform the defendant of and determine that he understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered." The objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty.

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty. *Durant v. United States*, 410 F.2d 689 (1st Cir. 1969), held that a defendant must be informed of his ineligibility for parole. *Trujillo v. United States*, 377 F.2d 266 (5th Cir. 1967), cert denied 389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967), held that advice about eligibility for parole is not required. It has been suggested that a defendant be advised that a jury might find him guilty only of a lesser included offense. C. Wright, *Federal Practice and Procedure: Criminal* § 173 at 374 (1969). See contra *Dorrough v. United States*, 385 F.2d 887 (5th Cir. 1967). The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant. Currently, certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant. For example, the judge may impose a sentence under 18 U.S.C. § 4202 making the defendant eligible for parole when he has served one third of the judicially imposed maximum; or, under 18 U.S.C. § 4208(a)(1), making parole eligibility after a specified period of time less than one third of the maximum; or, under 18 U.S.C. § 4208(a)(2), leaving eligibility to the discretion of the parole board. At the time the judge is required to advise the defendant of the consequences of his plea, the judge will usually not have seen the presentence report and thus will have no basis for giving a defendant any very realistic advice as to when he might be eligible for parole. Similar complications exist with regard to other, particularly collateral, consequences of a plea of guilty in a given case.

Subdivisions (c)(3) and (4) specify the constitutional rights that the defendant waives by a plea of guilty or nolo contendere. These subdivisions are designed to satisfy the requirements of understanding waiver set forth in *Boykin v. Alabama*, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). Subdivision (c)(3) is intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment rights. The rule takes the position that the defendant's right not to incriminate himself is best explained in terms of his right to plead not guilty and to persist in that plea if it has already been made. This is language identical to that adopted in Illinois for the same purpose. See Illinois Supreme Court Rule 402(a)(3) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402(a)(3).

Subdivision (c)(4) assumes that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who though knowing they have waived trial by jury, are

under the mistaken impression that some kind of trial will follow. Illinois has recently adopted similar language. Illinois Supreme Court Rule 402(a)(4) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402(a)(4). In explaining to a defendant that he waives his right to trial, the judge may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify. What is required, in this respect, to conform to *Boykin* is left to future case-law development.

Subdivision (d) retains the requirement that the court determine that a plea of guilty or nolo contendere is voluntary before accepting it. It adds the requirement that the court also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior plea discussions between the attorney for the government and the defendant or his attorney. See *Santobello v. New York*, 404 U.S. 257, 261-262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971): "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." Subdivisions (d) and (e) afford the court adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises.

The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea. By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack. . . . Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. *McCarthy v. United States*, 394 U.S. 459, 466, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).

Subdivision (e) provides a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge.

Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1-2 (Approved Draft, 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); L. Weinreb, Criminal Process 437 (1969); Note, Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964).

There is increasing acknowledgement of both the inevitability and the propriety of plea agreements. See, e.g., ABA Standards Relating to Pleas of Guilty § 3.1 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402.

In *Brady v. United States*, 397 U.S. 742, 752-753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), the court said:

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

In *Santobello v. New York*, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971), the court said:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report. The Courts 9 (1967); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865 (1964). But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. *Santobello v. New York*, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427. This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty § 1.8 (Approved Draft, 1968); the ABA Standards Relating to The Prosecution Function and The Defense Function pp. 243-253 (Approved Draft, 1971); and the ABA Standards Relating to the Function of the Trial Judge, § 4.1 (App.Draft, 1972). The Supreme Court of California recently recognized the propriety of plea bargaining. See *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970). A plea agreement procedure has recently been decided in the District of Columbia Court of General Sessions upon the recommendation of the *United States Attorney*. See 51 F.R.D. 109 (1971).

Where the defendant by his plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. Cf. Note, The Influence of the Defendant's Plea on Judicial

Determination of Sentence, 66 *Yale L.J.* 204, 211 (1956). Where the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct, it has been thought proper to recognize this in sentencing. See also ALI, Model Penal Code § 7.01 (P.O.D. 1962); NPPA Guides for Sentencing (1957). Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, chs. 2 and 3 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 *U.Pa.L.Rev.* 865, 881 (1964).

Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge.

We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record [The Bench Book prepared by the Federal Judicial Center for use by United States District Judges now suggests that the defendant be asked by the court "if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive." Bench Book for United States District Judges, Federal Judicial Center (1969) at 1.05.3.] and publicly disclosed. *United States v. Williams*, 407 F.2d 940 (4th Cir. 1969). . . . In the future we think that the district judges should not only make the general inquiry under Rule 11 as to whether the plea of guilty has been coerced or induced by promises, but should specifically inquire of counsel whether plea bargaining has occurred. Logically the general inquiry should elicit information about plea bargaining, but it seldom has in the past. *Raines v. United States*, 423 F.2d 526, 530 (4th Cir. 1970).

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115 (1967). There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated. ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60-69 (Approved Draft 1968); Task Force Report: The Courts 9. Consequently, there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness. See ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60 et seq.; Task Force Report: The Courts 9-13.

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Subdivision (e)(1) specifies that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may" participate in plea discussions. The inclusion of "the defendant when acting pro se" is intended to reflect the fact that there are situations in which a defendant insists upon representing himself. It may be desirable that an attorney for the government not enter plea discussions with a defendant personally. If necessary, counsel can be appointed for purposes of plea discussions. (Subdivision (d) makes it mandatory that the court inquire of the defendant whether his plea is the result of plea discussions between him and the attorney for the government. This is intended to enable the court to reject an agreement reached by an unrepresented defendant unless the court is satisfied that acceptance of the agreement adequately protects the rights of the defendant and the interests of justice.) This is substantially the position of the ABA Standards Relating to Pleas of Guilty § 3.1(a), Commentary at 65-66 (Approved Draft, 1968). Apparently, it is the practice of most prosecuting attorneys to enter plea discussions only with defendant's counsel. Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 *U.Pa.L.Rev.* 865, 904 (1964). Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See *Anderson v. North Carolina*, 221 F.Supp. 930, 935 (W.D.N.C.1963); *Shape v. Sigler*, 230 F.Supp. 601, 606 (D.Neb. 1964).

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 *U.Pa.L.Rev.* 865, 898 (1964).

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32-52, 78-104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891, 905 (1964).

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72-74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, 112 U.Pa.L.Rev. 865, 891-892 (1964); Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, 32 U.Chi.L.Rev. 167, 180-183 (1964); Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."). 51 A.B.A.J. 444 (1965). As has been recently pointed out:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, as once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. *United States ex rel. Elksnis v. Gilligan*, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117-118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(1). As to what may constitute "participation," contrast *People v. Earegood*, 12 Mich.App. 256, 268-269, 162 N.W.2d 802, 809-810 (1968), with *Kruse v. State*, 47 Wis.2d 460, 177 N.W.2d 322 (1970).

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In *People v. West*, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970), the court said:

[T]he basis of the bargain should be disclosed to the court and incorporated in the record. . . .

Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. 91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted. For a discussion of the use of conditional plea acceptance, see ABA Standards Relating to Pleas of Guilty § 3.3(b), Commentary at 74-76, and Supplement, Proposed Revisions § 3.3(b) at 2-3 (Approved Draft, 1968); Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(2).

The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.

Subdivision (e)(3) makes it mandatory, if the court decides to accept the plea agreement, that it inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This serves the purpose of informing the defendant immediately that the agreement will be implemented.

Subdivision (e)(4) requires the court, if it rejects the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw his plea and must be advised that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to him than that contemplated by the plea agreement. That

the defendant should have the opportunity to withdraw his plea if the court rejects the plea agreement is the position taken in ABA Standards Relating to Pleas of Guilty, Supplement, Proposed Revisions § 2.1(a)(ii)(5) (Approved Draft, 1968). Such a rule has been adopted in Illinois. Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(2).

If the court rejects the plea agreement and affords the defendant the opportunity to withdraw the plea, the court is not precluded from accepting a guilty plea from the same defendant at a later time, when such plea conforms to the requirements of rule 11.

Subdivision (e)(5) makes it mandatory that, except for good cause shown, the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the government. ABA Standards Relating to Pleas of Guilty § 1.3 (Approved Draft, 1968). The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

Subdivision (e)(6) is taken from rule 410, Rules of Evidence for United States Courts and Magistrates (Nov. 1971). See Advisory Committee Note thereto. See also the ABA Standards Relating to Pleas of Guilty § 2.2 (Approved Draft, 1968); Illinois Supreme Court Rule 402(f) (1970), Ill. Rev. Stat. 1973, ch. 110A, § 402(f).

Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea. The draft does not specify that any particular type of inquiry be made. See *Santobello v. New York*, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); "Fed.Rule Crim.Proc. 11, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case. This is the position of the ABA Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968). Where inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath. With regard to a determination that there is a factual basis for a plea of guilty to a "lessor or related offense," compare ABA Standards Relating to Pleas of Guilty § 3.1(b)(ii), Commentary at 67-68 (Approved Draft, 1968), with ALI, Model Penal Code § 1.07(5) (P.O.D. 1962). The rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence. *North Carolina v. Alford*, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970). The procedure in such case would seem to be to deal with this as a plea of nolo contendere, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with "the interest of the public in the effective administration of justice" [new rule 11(b)]. The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions. The rule is intended to make clear that a judge may reject a plea of nolo contendere and require the defendant either to plead not guilty or to plead guilty under circumstances in which the judge is able to determine that the defendant is in fact guilty of the crime to which he is pleading guilty.

Subdivision (g) requires that a verbatim record be kept of the proceedings. If there is a plea of guilty or nolo contendere, the record must include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea. Such a record is important in the event of a post-conviction attack. ABA Standards Relating to Pleas of Guilty § 1.7 (Approved Draft, 1968). A similar requirement was adopted in Illinois: Illinois Supreme Court Rule 402(e) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(e).

Notes of Committee on the Judiciary on 1975 amendments (House Report No. 94-247). A. Amendments Proposed by the Supreme Court. *Rule 11 of the Federal Rules of Criminal Procedure* deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant may plead guilty, not guilty, or nolo contendere. The Supreme Court's amendments to Rule 11(b) provide that a nolo contendere plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

The Supreme Court amendments to Rule 11(c) spell out the advice that the court must give to the defendant before accepting the defendant's plea of guilty or nolo contendere. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take to insure that a guilty or nolo contendere plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach

concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court amendments to Rule 11(g) require that a verbatim record be kept of the proceedings at which the defendant enters a plea.

B. Committee Action. The proposed amendments to Rule 11, particularly those relating to the plea negotiating procedure, have generated much comment and criticism. No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with. The Committee accepts the basic structure and provisions of Rule 11(e).

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements. [Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, e.g., the remarks of United States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289-90.]

Proposed Rule 11(e) contemplates 4 different types of plea agreements. First, the defendant can plead guilty or nolo contendere in return for the prosecutor's reducing the charge to a less serious offense. Second, the defendant can plead guilty or nolo contendere in return for the prosecutor dropping, or not bringing, a charge or charges relating to other offenses. Third, the defendant can plead guilty or nolo contendere in return for the prosecutor's recommending a sentence. Fourth, the defendant and prosecutor can agree that a particular sentence is the appropriate disposition of the case. [It is apparent, though not explicitly stated, that Rule 11(e) contemplates that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. For example, the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement.]

The Committee added language in subdivisions (e)(2) and (e)(4) to permit a plea agreement to be disclosed to the court, or rejected by it, in camera. There must be a showing of good cause before the court can conduct such proceedings in camera. The language does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is left for the courts to resolve on a case-by-case basis. These changes in subdivisions (e)(2) and (e)(4) will permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement.

The Committee added an exception to subdivision (e)(6). That subdivision provides:

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 proceeding against the person who made the plea or offer.

The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes that, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. [The Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.]

The Committee recast the language of Rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that *Boykin v. Alabama*, 395 U.S. 238 (1969), said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought it only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

Notes of Conference Committee on 1975 amendments (House Report No. 94-414). Subdivision (c). Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or

nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Subdivision (e)(1). Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Subdivision (e)(6). Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

Notes of Advisory Committee on 1979 amendments. *Note to Subdivision (e)(2).* The amendment to rule 11(e)(2) is intended to clarify the circumstances in which the court may accept or reject a plea agreement, with the consequences specified in subdivisions (e)(3) and (4). The present language has been the cause of some confusion and has led to results which are not entirely consistent. Compare *United States v. Sarubbi*, 416 F.Supp. 633 (D.N.J. 1976); with *United States v. Hull*, 413 F.Supp. 145 (E.D.Tenn. 1976).

Rule 11(e)(1) specifies three types of plea agreements, namely, those in which the attorney for the government might

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

A (B) type of plea agreement is clearly of a different order than the other two, for an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do. By comparison, critical to a type (A) or (C) agreement is that the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable, nor is there a need for rejection with opportunity for withdrawal under subdivision (e)(4) in light of the fact that the defendant knew the nonbinding character of the recommendation or request. *United States v. Henderson*, 565 F.2d 1119 (9th Cir. 1977); *United States v. Savage*, 561 F.2d 554 (4th Cir. 1977).

Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness. This provision conforms to ABA Standards Relating to Pleas of Guilty § 1.5 (Approved Draft, 1968), which provides that "the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."

Sometimes a plea agreement will be partially but not entirely of the (B) type, as where a defendant, charged with counts 1, 2 and 3, enters into an agreement with the attorney for the government wherein it is agreed that if defendant pleads guilty to count 1, the prosecutor will recommend a certain sentence as to that count and will move for dismissal of counts 2 and 3. In such a case, the court must take particular care to ensure that the defendant understands which components of the agreement involve only a (B) type recommendation and which do not. In the above illustration, that part of the agreement which contemplates the dismissal of counts 2 and 3 is an (A) type agreement, and thus under rule 11(e) the court must either accept the agreement to dismiss these counts or else reject it and allow the defendant to withdraw his plea. If rejected, the defendant must be allowed to withdraw the plea on count 1 even if the type (B) promise to recommend a certain sentence on that count is kept, for a multi-faceted plea agreement is nonetheless a single agreement. On the other hand, if counts 2 and 3 are dismissed and the sentence recommendation is made, then the defendant is not entitled to withdraw his plea even if the sentence recommendation is not accepted by the court, for the defendant received all he was entitled to under the various components of the plea agreement.

Note to Subdivision (e)(6). The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See *United States v Herman*, 544 F.2d 791 (5th Cir. 1977), discussed herein.

Fed.R.Ev. 410, as originally adopted by Pub.L. 93-595, provided in part that "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 was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise." The amendment of *Fed.R.Crim.P. 11*, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to" the inadmissible pleas or offers. Pub.L. 94-64; *Fed.R.Ev. 410* was then amended to conform. Pub.L. 94-149.)

While this history shows that the purpose of *Fed.R.Ev. 410* and *Fed.R.Crim.P. 11(e)(6)* is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See *United States v Herman*, 544 F.2d 791 (5th Cir. 1977) (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not "in position" to make any deals in this regard; held, defendant's statement inadmissible under rule 11(e)(6) because the defendant "made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea"); *United States v Brooks*, 536 F.2d 1137 (6th Cir. 1976) (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made "in the course of any proceedings under this rule regarding" either a plea of guilty later withdrawn or a plea of nolo contendere, and also statements "made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arrestment Procedure art. 140 and § 150.2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if "a law enforcement officer induces any person to make a statement by promising leniency"). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the per se rule of 11 (e)(6) and thus must be resolved by that body of law dealing with police interrogations.

If there has been a plea of guilty later withdrawn or a plea of nolo contendere, subdivision (e)(6)(C) makes inadmissible statements made "in the course of any proceedings under this rule" regarding such pleas. This includes, for example, admissions by the defendant when he makes his plea in court pursuant to rule 11 and also admissions made to provide the factual basis pursuant to subdivision (f). However, subdivision (e)(6)(C) is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, as

authorized by subdivision (e)(2), statements made to the probation officer in connection with the preparation of that report would come within this provision.

This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arrest Procedure § 350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968) both provide:

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. *State v Christian*, 245 S.W.2d 895 (Mo. 1952). If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif.R.Crim.P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances "no discussion between the parties or statement by the defendant or his lawyer under this Rule," i.e., the rule providing "the parties may meet to discuss the possibility of pretrial diversion . . . or of a plea agreement," are admissible. The amendment is likewise consistent with the typical state provision on this subject; see, e.g., Ill.S.Ct. Rule 402(f).

The language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinions in *United States v Herman*, 544 F.2d 791 (5th Cir. 1977), concerning the meanings and effect of the phrases "connection to" and "relevant to" in the present rule. Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment ensures "that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." *United States v Brooks*, 536 F.2d 1137 (6th Cir. 1976).

The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in *Fed.R.Evid. 106*, as the considerations involved are very similar.

The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which it is offered. The change makes it clear that the latter construction is correct. No change is intended with respect to provisions making evidence rules inapplicable in certain situations. See, e.g., *Fed.R.Evid. 104(a)* and *1101(d)*.

Unlike ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arrest Procedure § 350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible "in favor of" the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as *United States v Verdoorn*, 528 F.2d 103 (8th Cir. 1976), holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

Effective date of 1979 amendment of subsec. (e)(6). The amendment of subsec. (e)(6) by Order of the United States Supreme Court of April 30, 1979, is effective 12/1/80 as provided by Act July 31, 1979, P.L. 96-42, § 1(1), 93 Stat. 326, which appears as *18 USCS § 3771* note.

Notes of Advisory Committee on 1982 amendments. *Note to Subdivision (c)(1)*. Subdivision (c)(1) has been amended by specifying "the effect of any special parole term" as one of the matters about which a defendant who has tendered a plea of guilty or nolo contendere is to be advised by the court. This amendment does not make any change in

the law, as the courts are in agreement that such advice is presently required by Rule 11. See, e.g., *Moore v. United States*, 592 F.2d 753 (4th Cir. 1979); *United States v. Eaton*, 579 F.2d 1181 (10th Cir. 1978); *Richardson v. United States*, 577 F.2d 447 (8th Cir. 1978); *United States v. Del Prete*, 567 F.2d 928 (9th Cir. 1978); *United States v. Watson*, 548 F.2d 1058 (D.C. Cir. 1977); *United States v. Crusco*, 536 F.2d 21 (2d Cir. 1976); *United States v. Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *United States v. Wolak*, 510 F.2d 164 (6th Cir. 1975). In *United States v. Timmreck*, 441 U.S. 780 (1979), 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979), the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure. As noted in *Moore v. United States*, *supra*:

Special parole is a significant penalty. . . . Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty provided by law."

As the aforesaid cases indicate, in the absence of specification of the requirement in the rule, it has sometimes happened that such advice has been inadvertently omitted from Rule 11 warnings.

The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved, although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen. *Moore v. United States*, *supra*, recommends that in an appropriate case the judge inform the defendant and determine that he understands the following:

- (1) that a special parole term will be added to any prison sentence he receives;
- (2) the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;
- (3) that special parole is entirely different from--and in addition to--ordinary parole; and
- (4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

The amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief. See *United States v. Timmreck*, *supra*. Likewise, the amendment makes no change in the existing law to the effect that many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned. *Bunker v. Wise*, 550 F.2d 1155, 1158 (9th Cir. 1977).

Note to Subdivision (c)(4). The amendment to subdivision (c)(4) is intended to overcome the present conflict between the introductory language of subdivision (c), which contemplates the advice being given "[b]efore accepting a plea of guilty or nolo contendere," and thus presumably after the plea has been tendered, and the "if he pleads" language of subdivision (c)(4) which suggests the plea has not been tendered.

As noted by Judge Doyle in *United States v. Sinagub*, 468 F.Supp. 353 (W.D.Wis. 1979):

Taken literally, this wording of subsection (4) of 11(c) suggests that before eliciting any plea at an arraignment, the court is required to insure that a defendant understands that if he or she pleads guilty or nolo contendere, the defendant will be waiving the right to trial. Under subsection (3) of 11(c), however, there is no requirement that at this pre-plea stage, the court must insure that the defendant understands that he or she enjoys the right to a trial and, at trial, the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself. It would be incongruous to require that at the pre-plea stage the court insure that the defendant understands that if he enters a plea of guilty or nolo contendere he will be waiving a right, the existence and nature of which need not be explained until after such a plea has been entered. I conclude that the insertion of the words "that if he pleads guilty or nolo contendere," as they appear in subsection (4) of 11(c), was an accident of draftsmanship which occurred in the course of Congressional rewriting of 11(c) as it has been approved by the Supreme Court. Those words are to be construed consistently with the words "Before accepting a plea of guilty or nolo contendere," as they appear in the opening language of 11(c), and consistently with the omission of the words "that if he pleads" from subsections (1), (2), and (3) of 11(c). That is, as they appear in subsection (4) of 11(c), the words, "that if he pleads guilty or nolo contendere" should be construed to mean "that if his plea of guilty or nolo contendere is accepted by the court."

Although this is a very logical interpretation of the present language, the amendment will avoid the necessity to engage in such analysis in order to determine the true meaning of subdivision (c)(4).

Note to Subdivision (c)(5). Subdivision (c)(5), in its present form, may easily be read as contemplating that in every case in which a plea of guilty or nolo contendere is tendered, warnings must be given about the possible use of defendant's statements, obtained under oath, on the record and in the presence of counsel, in a later prosecution for perjury or false statement. The language has prompted some courts to reach the remarkable result that a defendant who pleads guilty or nolo contendere without receiving those warnings must be allowed to overturn his plea on appeal even though he was never questioned under oath, on the record, in the presence of counsel about the offense to which he pleaded. *United States v. Artis*, No. 78-5012 (4th Cir. March 12, 1979); *United States v. Boone*, 543 F.2d 1090 (4th Cir. 1976). Compare *United States v. Michaelson*, 552 F.2d 472 (2d Cir. 1977) (failure to give subdivision (c)(5) warnings not a basis for reversal, "at least when, as here, defendant was not put under oath before questioning about his guilty plea"). The present language of subdivision (e)(5) may also have contributed to the conclusion, not otherwise supported by the rule, that "Rule 11 requires that the defendant be under oath for the entirety of the proceedings" conducted pursuant to that rule and that failure to place the defendant under oath would itself make necessary overturning the plea on appeal. *United States v. Aldridge*, 553 F.2d 922 (5th Cir. 1977).

When questioning of the kind described in subdivision (c)(5) is not contemplated by the judge who is receiving the plea, no purpose is served by giving the (c)(5) warnings, which in such circumstances can only confuse the defendant and detract from the force of the other warnings required by Rule 11. As correctly noted in *United States v. Sinagub*, *supra*,

subsection (5) of section (c) of Rule 11 is qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made, nor to whether the plea should be accepted and judgment entered. Rather, it does go to the possible consequences of an event which may or may not occur during the course of the arraignment hearing itself, namely, the administration of an oath to the defendant. Whether this event is to occur is wholly within the control of the presiding judge. If the event is not to occur, it is pointless to inform the defendant of its consequences. If a presiding judge intends that an oath not be administered to a defendant during an arraignment hearing, but alters that intention at some point, only then would the need arise to inform the defendant of the possible consequences of the administration of the oath.

The amendment to subdivision (c)(5) is intended to make it clear that this is the case.

The amendment limits the circumstances in which the warnings must be given, but does not change the fact, as noted in *Sinagub*, that these warnings are "qualitatively distinct" from the other advice required by Rule 11(c). This being the case, a failure to give the subdivision (c)(5) warnings even when the defendant was questioned under oath, on the record and in the presence of counsel would in no way affect the validity of the defendant's plea. Rather, this failure bears upon the admissibility of defendant's answers pursuant to subdivision (e)(6) in a later prosecution for perjury or false statement.

Notes of Advisory Committee on 1983 amendments. Subdivision (a). There are many defenses, objections and requests which a defendant must ordinarily raise by pretrial motion. See, e.g., 18 U.S.C. § 3162(a)(2); *Fed.R.Crim.P.12(b)*. Should that motion be denied, interlocutory appeal of the ruling by the defendant is seldom permitted. See *United States v. MacDonald*, 435 U.S. 850 (1978) (defendant may not appeal denial of his motion to dismiss based upon Sixth Amendment speedy trial grounds); *DiBella v. United States*, 369 U.S. 121 (1962) (defendant may not appeal denial of pretrial motion to suppress evidence); compare *Abney v. United States*, 431 U.S. 651 (1977) (interlocutory appeal of denial of motion to dismiss on double jeopardy grounds permissible). Moreover, should the defendant thereafter plead guilty or nolo contendere, this will usually foreclose later appeal with respect to denial of the pretrial motion. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson*, 411 U.S. 258, (1973). Though a nolo plea differs from a guilty plea in other respects, it is clear that it also constitutes a waiver of all nonjurisdictional defects in a manner equivalent to a guilty plea. *Lott v. United States*, 367 U.S. 421 (1961).

As a consequence, a defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review. This results in a waste of prosecutorial and judicial resources, and causes delay in the trial of other cases, contrary to the objectives underlying the Speedy Trial Act of 1974, 18 U.S.C. § 3161 et seq. These unfortunate consequences may be avoided by the conditional plea device expressly authorized by new subdivision (a)(2).

The development of procedures to avoid the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections has been consistently favored by the commentators. See ABA Standards Relating to the Administration of Criminal Justice, standard 21-1.3(c) (2d ed. 1978); Model Code of Pre-Arraignment Procedure § SS 290.1(4)(b) (1975); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974); 1 C. Wright, Federal Practice and Procedure--Criminal § 175 (1969); 3 W. LaFare, Search and Seizure § 11.1 (1978). The Supreme Court

has characterized the New York practice, whereby appeals from suppression motions may be appealed notwithstanding a guilty plea, as a "commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz v. Newsome*, 420 U.S. 283, 293 (1975). That Court has never discussed conditional pleas as such, but has permitted without comment a federal appeal on issues preserved by a conditional plea. *Jaben v. United States*, 381 U.S. 214 (1965). In the absence of specific authorization by statute or rule for a conditional plea, the circuits have divided on the permissibility of the practice. Two circuits have actually approved the entry of conditional pleas, *United States v. Burke*, 517 F.2d 377 (2d Cir. 1975); *United States v. Moskow*, 588 F.2d 882 (3d Cir. 1978); and two others have praised the conditional plea concept, *United States v. Clark*, 459 F.2d 977 (8th Cir. 1972); *United States v. Dorsey*, 449 F.2d 1104 (D.C.Cir. 1971). Three circuits have expressed the view that a conditional plea is logically inconsistent and thus improper, *United States v. Brown*, 499 F.2d 829 (7th Cir. 1974); *United States v. Sepe*, 472 F.2d 784, aff'd en banc, 486 F.2d 1044 (5th Cir. 1973); *United States v. Cox*, 464 F.2d 937 (6th Cir. 1972); three others have determined only that conditional pleas are not now authorized in the federal system, *United States v. Benson*, 579 F.2d 508 (9th Cir. 1978); *United States v. Nooner*, 565 F.2d 633 (10th Cir. 1977); *United States v. Matthews*, 472 F.2d 1173 (4th Cir. 1973); while one circuit has reserved judgment on the issue, *United States v. Warwar*, 478 F.2d 1183 (1st Cir. 1973). (At the state level, a few jurisdictions by statute allow appeal from denial of a motion to suppress notwithstanding a subsequent guilty plea, *Cal. Penal Code* § 1538.5(m); *N.Y.Crim. Proc. Law* § 710.20(1); *Wis.Stat. Ann.* § 971.31(10), but in the absence of such a provision the state courts are also in disagreement as to whether a conditional plea is permissible; see cases collected in Comment, 26 *U.C.L.A.L.Rev.* 360, 373 (1978).)

The conditional plea procedure provided for in subdivision (a)(2) will, as previously noted, serve to conserve prosecutorial and judicial resources and advance speedy trial objectives. It will also produce much needed uniformity in the federal system on this matter; see *United States v. Clark*, *supra*, noting the split of authority and urging resolution by statute or rule. Also, the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects. See *United States v. Nooner*, *supra* (defendant sought appellate review of denial of pretrial suppression motion, despite his prior unqualified guilty plea, claiming the Second Circuit conditional plea practice led him to believe a guilty plea did not bar appeal of pretrial issues).

The obvious advantages of the conditional plea procedure authorized by subdivision (a)(2) are not outweighed by any significant or compelling disadvantages. As noted in Comment, *supra*, at 375: "Four major arguments have been raised by courts disapproving of conditioned pleas. The objections are that the procedure encourages a flood of appellate litigation, militates against achieving finality in the criminal process, reduces effectiveness of appellate review due to the lack of a full trial record, and forces decision on constitutional questions that could otherwise be avoided by invoking the harmless error doctrine." But, as concluded therein, those "arguments do not withstand close analysis." *Ibid.*

As for the first of those arguments, experience in states which have permitted appeals of suppression motions notwithstanding a subsequent plea of guilty is most relevant, as conditional pleas are likely to be most common when the objective is to appeal that kind of pretrial ruling. That experience has shown that the number of appeals has not increased substantially. See Comment, 9 *Hous.L.Rev.* 305, 315-19 (1971). The minimal added burden at the appellate level is certainly a small price to pay for avoiding otherwise unnecessary trials.

As for the objection that conditional pleas conflict with the government's interest in achieving finality, it is likewise without force. While it is true that the conditional plea does not have the complete finality of the traditional plea of guilty or *nolo contendere* because "the essence of the agreement is that the legal guilt of the defendant exists only if the prosecution's case" survives on appeal, the plea

continues to serve a partial state interest in finality, however, by establishing admission of the defendant's factual guilt. The defendant stands guilty and the proceedings come to an end if the reserved issue is ultimately decided in the government's favor.

Comment, 26 *U.C.L.A.L.Rev.* 360, 378 (1978).

The claim that the lack of a full trial record precludes effective appellate review may on occasion be relevant. Cf. *United States v. MacDonald*, *supra* (holding interlocutory appeal not available for denial of defendant's pretrial motion to dismiss on speedy trial grounds, and noting that "most speedy trial claims . . . are best considered only after the relevant facts have been developed at trial"). However, most of the objections which would likely be raised by pretrial motion and preserved for appellate review by a conditional plea are subject to appellate resolution without a trial record. Certainly this is true as to the very common motion to suppress evidence, as is indicated by the fact that appellate courts presently decide such issues upon interlocutory appeal by the government.

With respect to the objection that conditional pleas circumvent application of the harmless error doctrine, it must be acknowledged that "[a]bsent a full trial record, containing all the government's evidence against the defendant, invocation of the harmless error rule is arguably impossible." Comment, *supra*, at 380. But, the harmless error standard with respect to constitutional objections is sufficiently high, see *Chapman v. California*, 386 U.S. 18 (1967), that relatively few appellate decisions result in affirmance upon that basis. Thus it will only rarely be true that the conditional plea device will cause an appellate court to consider constitutional questions which could otherwise have been avoided by invocation of the doctrine of harmless error.

To the extent that these or related objections would otherwise have some substance, they are overcome by the provision in Rule 11(a)(2) that the defendant may enter a conditional plea only "with the approval of the court and the consent of the government." (In this respect, the rule adopts the practice now found in the Second Circuit.) The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial; cf. *United States v. MacDonald*, *supra*. As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. Although it was suggested in *United States v. Moskowitz*, *supra*, that the government should have no right to prevent the entry of a conditional plea because a defendant has no comparable right to block government appeal of a pretrial ruling pursuant to 18 U.S.C. § 3731, that analogy is unconvincing. That statute requires the government to certify that the appeal is not taken for purposes of delay. Moreover, where the pretrial ruling is case-dispositive, § 3731 is the only mechanism by which the government can obtain appellate review, but a defendant may always obtain review by pleading not guilty.

Unlike the state statutes cited earlier, Rule 11 (a)(2) is not limited to instances in which the pretrial ruling the defendant wishes to appeal was in response to defendant's motion to suppress evidence. Though it may be true that the conditional plea device will be most commonly employed as to such rulings, the objectives of the rule are well served by extending it to other pretrial rulings as well. See, e.g., ABA Standards, *supra* (declaring the New York provision "should be enlarged to include other pretrial defenses"); Uniform Rules of Criminal Procedure, rule 444 (d) (Approved Draft, 1974) ("any pretrial motion which, if granted, would be dispositive of the case").

The requirement that the conditional plea be made by the defendant "reserving in writing the right to appeal from the adverse determination of any specified pretrial motion," though extending beyond the Second Circuit practice, will ensure careful attention to any conditional plea. It will document that a particular plea was in fact conditional, and will identify precisely what pretrial issues have been preserved for appellate review. By requiring this added step, it will be possible to avoid entry of a conditional plea without the considered acquiescence of the government (see *United States v. Burke*, *supra*, holding that failure of the government to object to entry of a conditional plea constituted consent) and post-plea claims by the defendant that his plea should be deemed conditional merely because it occurred after denial of his pretrial motions (see *United States v. Nooner*, *supra*).

It must be emphasized that the only avenue of review of the specified pretrial ruling permitted under a rule 11(a)(2) conditional plea is an appeal, which must be brought in compliance with *Fed.R.App.P. 4(b)*. Relief via 28 U.S.C. § 2255 is not available for this purpose.

The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. *Menna v. New York*, 423 U.S. 61 (1975) (double jeopardy violation); *Blackledge v. Perry*, 417 U.S. 21 (1974) (due process violation by charge enhancement following defendant's exercise of right to trial de novo). Subdivision 11(a)(2) has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application.

Note to Subdivision (h). Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11. The provision does not, however, attempt to define the meaning of "harmless error," which is left to the case law. Prior to the amendments which took effect on Dec. 1, 1975, Rule 11 was very brief; it consisted of but four sentences. The 1975 amendments increased significantly the procedures which must be undertaken when a defendant tenders a plea of guilty or nolo contendere, but this change was warranted by the "two principal objectives" then identified in the Advisory Committee Note: (1) ensuring that the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into the open in court. An inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.

This being so, it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance. As stated in *United States v. Scarf*, 551 F.2d 1124 (8th Cir. 1977), concerning amended Rule 11: "It is a salutary rule, and district courts are required to act in substantial compliance with it although . . . ritualistic compliance is not required." As similarly pointed out in *United States v. Saft*, 558 F.2d 1073 (2d Cir. 1977),

the Rule does not say that compliance can be achieved only by reading the specified items in haec verba. Congress meant to strip district judges of freedom to decide what they must explain to a defendant who wishes to plead guilty, not to tell them precisely how to perform this important task in the great variety of cases that would come before them. While a judge who contents himself with literal application of the Rule will hardly be reversed, it cannot be supposed that Congress preferred this to a more meaningful explanation, provided that all the specified elements were covered.

Two important points logically flow from these sound observations. One concerns the matter of construing Rule 11: it is not to be read as requiring a litany or other ritual which can be carried out only by word-for-word adherence to a set "script." The other, specifically addressed in new subdivision (h), is that even when it may be concluded Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.

Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations. In large part, this is attributable to uncertainty as to the continued vitality and the reach of *McCarthy v. United States*, 394 U.S. 459 (1969). In *McCarthy*, involving a direct appeal from a plea of guilty because of noncompliance with Rule 11, the Court concluded

that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew

McCarthy has been most frequently relied upon in cases where, as in that case, the defendant sought relief because of a Rule 11 violation by the avenue of direct appeal. It has been held that in such circumstances a defendant's conviction must be reversed whenever the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," *United States v. Boone*, 543 F.2d 1090 (4th Cir. 1976), and that in this context any reliance by the government on the Rule 52(a) harmless error concept "must be rejected." *United States v. Journet*, 544 F.2d 633 (2d Cir. 1976). On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea. *United States v. Peters*, No. 77-1700 (4th Cir., Dec. 22, 1978) (where judge failed to comply fully with Rule 11(c)(1), in that defendant not correctly advised of maximum years of special parole term but was told it is at least 3 years, and defendant thereafter sentenced to 15 years plus 3-year special parole term, government's motion for summary affirmance granted, as "the error was harmless"); *United States v. Coronado*, 554 F.2d 166 (5th Cir. 1977) (court first holds that charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then finds no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that Coronado understood them").

But this conflict has not been limited to cases involving nothing more than a direct appeal following defendant's plea. For example, another type of case is that in which the defendant has based a post-sentence motion to withdraw his plea on a Rule 11 violation. Rule 32(d) says that such a motion may be granted "to correct manifest injustice," and some courts have relied upon this latter provision in holding that post-sentence plea withdrawal need not be permitted merely because Rule 11 was not fully complied with and that instead the district court should hold an evidentiary hearing to determine "whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand." *United States v. Scarf*, 551 F.2d 1124 (8th Cir. 1977). Others, however, have held that *McCarthy* applies and prevails over the language of Rule 32(d), so that "a failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice." *United States v. Cantor*, 469 F.2d 435 (3d Cir. 1972).

Disagreement has also existed in the context of collateral attack upon pleas pursuant to 28 U.S.C. § 2255. On the one hand, it has been concluded that "[n]ot every violation of Rule 11 requires that the plea be set aside" in a § 2255 proceeding, and that "a guilty plea will be set aside on collateral attack only where to not do so would result in a miscarriage of justice, or where there exists exceptional circumstances justifying such relief." *Evers v. United States*, 579 F.2d 71 (10th Cir. 1978). The contrary view was that *McCarthy* governed in § 2255 proceedings because "the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11." *Timmreck v. United States*, 577 F.2d 377 (6th Cir. 1978). But a unanimous Supreme Court resolved this conflict in *United States v. Timmreck*, 441 U.S.

780 (1979), where the Court concluded that the reasoning of *Hill v. United States*, 368 U.S. 424 (1962) (ruling a collateral attack could not be predicated on a violation of Rule 32(a))

is equally applicable to a formal violation of Rule 11. . . .

Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the *Hill* case. For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.

"Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

This interest in finality is strongest in the collateral attack context the Court was dealing with in *Timmreck*, which explains why the Court there adopted the *Hill* requirement that in a § 2255 proceeding the rule violation must amount to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." The interest in finality of guilty pleas described in *Timmreck* is of somewhat lesser weight when a direct appeal is involved (so that the *Hill* standard is obviously inappropriate in that setting), but yet is sufficiently compelling to make unsound the proposition that reversal is required even where it is apparent that the Rule 11 violation was of the harmless error variety.

Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that *McCarthy* dealt only with the much simpler pre-1975 version of Rule 11, which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a truly harmless error (which was not involved in *McCarthy* in any event, as the judge made no inquiry into the defendant's understanding of the nature of the charge, and the government had presented only the extreme argument that a court "could properly assume that petitioner was entering that plea with a complete understanding of the charge against him" merely from the fact he had stated he desired to plead guilty) are much greater under present Rule 11 than under the version before the Court in *McCarthy*. It also means that the more elaborate and lengthy procedures of present Rule 11, again as compared with the version applied in *McCarthy*, make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather "a grave and solemn act," which is "accepted only with care and discernment." *United States v. Barker*, 514 F.2d 208 (D.C. Cir. 1975), quoting from *Brady v. United States*, 397 U.S. 742 (1970). A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

Secondly, while *McCarthy* involved a situation in which the defendant's plea of guilty was before the court of appeals on direct appeal, the Supreme Court appears to have been primarily concerned with § 2255-type cases, for the Court referred exclusively to cases of that kind in the course of concluding that a per se rule was justified as to Rule 11 violations because of "the difficulty of achieving [rule 11's] purposes through a post-conviction voluntariness hearing." But that reasoning has now been substantially undercut by *United States v. Timmreck*, *supra*, for the Court there concluded § 2255 relief "is not available when all that is shown is a failure to comply with the formal requirements of the Rule," at least absent "other aggravating circumstances," which presumably could often only be developed in the course of a later evidentiary hearing.

Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would not be harmless error under subdivision (h) where, for example, as in *McCarthy*, there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty. Likewise, it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." *United States v. Crook*, 526 F.2d 708 (5th Cir. 1976).

Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. *United States v. Coronado*, *supra*. Illustrative are: where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness

of that element, see *United States v. Coronado*, *supra*; where the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings, see *United States v. Peters*, *supra*; and where the judge completely failed to comply with subdivision (c)(5), which of course has no bearing on the validity of the plea itself, cf. *United States v. Sinagub*, *supra*.

The second cautionary note is that subdivision (h) should not be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in *McCarthy*, that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice, as it will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Subdivision (h) makes no change in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

It must also be emphasized that a harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings. Thus, the addition of subdivision (h) should not be read as suggesting that Rule 52(a) does not apply in other circumstances because of the absence of a provision comparable to subdivision (h) attached to other rules.

Notes of Advisory Committee on 1985 amendments. Note to Subdivision (c)(1). Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982), adds 18 U.S.C. § 3579, providing that when sentencing a defendant convicted of a Title 18 offense or of violating various subsections of the Federal Aviation Act of 1958, the court "may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense." Under this law restitution is favored; if the court "does not order restitution, or orders only partial restitution, . . . the court shall state on the record the reasons therefor." Because this restitution is deemed an aspect of the defendant's sentence, S. Rept. No. 97-532, 97th Cong., 2d Sess., 30-33 (1982), it is a matter about which a defendant tendering a plea of guilty or nolo contendere should be advised.

Because this new legislation contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea. Failure of a court to advise a defendant of the possibility of a restitution order would constitute harmless error under subdivision (h) if no restitution were thereafter ordered.

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

Notes of Advisory Committee on 1989 amendments. The Committee believes that a technical change, adding the words "or supervised release," is necessary to recognize that defendants sentenced under the guideline approach will be concerned about supervised release rather than special parole. See 18 U.S.C. 3583, and 3624(e). The words "special parole" are left in the rule, since the district courts continue to handle pre-guideline cases.

The amendment mandates that the district court inform a defendant that the court is required to consider any applicable guidelines but may depart from them under some circumstances. This requirement assures that the existence of guidelines will be known to a defendant before a plea of guilty or nolo contendere is accepted. Since it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts, the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant. The advice that the court is required to give cannot guarantee that a defendant who pleads guilty will not later claim a lack of understanding as to the importance of guidelines at the time of the plea. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines. A defendant represented by competent counsel will be in a position to enter an intelligent plea.

The amended rule does not limit the district court's discretion to engage in a more extended colloquy with the defendant in order to impart additional information about sentencing guidelines or to inquire into the defendant's knowledge concerning guidelines. The amended rule sets forth only the minimum advice that must be provided to the defendant by the court.

Notes of Advisory Committee on 1999 amendments. *Note to Subdivision (a).* The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in 18 U.S.C. § 18.

Note to Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

Note to Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. Second, under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it. As is the situation under the current Rule, the court retains absolute discretion whether to accept a plea agreement.

Notes of Advisory Committee on 2002 amendments. The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The Committee determined to expand upon the incomplete listing in the current rule of the elements of the "maximum possible penalty" and any "mandatory minimum" penalty to include advice as to the maximum or minimum term of imprisonment, forfeiture, fine, and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release. The outmoded reference to a term of "special parole" has been eliminated.

Amended Rule 11(b)(2), formerly Rule 11(d), covers the issue of determining that the plea is voluntary, and not the result of force, threats, or promises (other than those in a plea agreement). The reference to an inquiry in current Rule 11(d) whether the plea has resulted from plea discussions with the government has been deleted. That reference, which was often a source of confusion to defendants who were clearly pleading guilty as part of a plea agreement with the government, was considered unnecessary.

Rule 11(c)(1)(A) includes a change, which recognizes a common type of plea agreement -- that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. See, e.g., *United States v. Torres*, 999 F.2d 376, 378 (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. See *United States v. Hyde*, 520 U.S. 670 [137 L. Ed. 2d 935] (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be

separated in time."). Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of the defendant to withdraw a plea. See *United States v. Hyde, supra*.

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

The reference to a "motion under 28 U.S.C. § 2255" has been changed to the broader term "collateral attack" to recognize that in some instances a court may grant collateral relief under provisions other than § 2255. See *United States v. Jeffers, 234 F.3d 277 (5th Cir. 2000)* (petition under § 2241 may be appropriate where remedy under § 2255 is ineffective or inadequate).

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an ongoing investigation in a related case. In the end, the Committee believed that, on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Finally, revised Rule 11(f), which addresses the issue of admissibility or inadmissibility of pleas and statements made during the plea inquiry, cross references *Federal Rule of Evidence 410*.

Notes of Advisory Committee on 2007 amendments. *Note to subdivision (b)(1)(M)*. The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker, 543 U.S. 220 (2005)*. *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. § 3553(b)(1) (Supp.2004), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. § 3553(a)(4) (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id. at 245-46*. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

EXCERPT FROM MINUTES OF MEETING
Joint Procedure Committee
September 23-24, 2004

RULE 11, N.D.R.Crim.P. - PLEAS (PAGES 39-60 OF THE AGENDA MATERIAL)

Staff reviewed the actions taken by the Committee on Rule 11 at the April 2004 meeting and pointed out the changes that had been made to the Rule 11 proposal.

The Chair explained that the Committee was considering the rule as part of its survey of all the criminal rules and that, if the proposed changes were approved, the rule would be presented to the Supreme Court with the rest of the amended criminal rules as part of the criminal rules package.

Mr. Sturdevant MOVED for approval of the rule as amended. Mr. Kuntz seconded.

The Committee discussed correction of a typographical error in the proposal. Without objection, the Committee approved correction of the error.

A member asked whether the harmless error provision in the rule was necessary, since case law already holds that errors in plea procedure are not automatically reversible errors.

A member asked whether adopting the federal nolo contendere plea would be appropriate. The member observed that North Dakota already had accepted the Alford plea.

-5-

A member announced opposition to adoption of the nolo contendere plea, indicating that it would serve no purpose. The member said the plea was an easy way out for offenders who do not want to admit they did anything wrong, in particular sex offenders. The member said that allowing offenders to escape admission of wrongdoing was harmful to rehabilitation and to victims.

A member said that the nolo contendere plea was acceptable in the federal system because of the greater number of white collar crimes under federal law. The member said it would be a problem allowing sex offenders to make nolo contendere pleas under state law.

A member said that not allowing a defendant to plead guilty when facts are questionable is preferable to allowing nolo contendere or Alford pleas.

A member asked why there was an exception in the proposed rule allowing organizational defendants to avoid appearances to enter pleas. A member responded that the amendment seemed to be an expansion of the original North Dakota rule, which specifically allowed a corporation, not the more generic organization, to avoid being present to enter a plea.

A member said that no organization, including a corporation, should be able to avoid being absent at a court proceeding. A member responded that the rule proposal did not bar a judge from requiring a corporation's presence at a plea proceeding.

Mr. Hoffman MOVED to strike language on page 40, lines 11-12, regarding organizational defendants. Judge Leclerc seconded.

A member said the proposed language made sense because entry of a not-guilty plea triggers significant events in the case calendar and should not be automatic.

The motion CARRIED unanimously.

A member said the old rule language on page 40, lines 14-17, was superior to the proposed language because, even when a defendant does not appear personally, the defendant should be advised of the listed rights in the Rule 43 statement, Form 17. The member said the old language made this clear.

Mr. Hoffman MOVED to reinstate page 40, lines 14-17, delete the proposed new language at lines 18-21, and renumber accordingly. Judge Leclerc seconded.

A member said that Form 17 seemed to inform defendants of all necessary

-6-

information. A member said that the proposed new language was cleaner than the old language and conveyed the same meaning.

The motion CARRIED 11-7.

The Committee discussed how the rule should be renumbered to reflect the approved change and without objection decided the restored language should be renumbered as paragraph (b)(1).

A member said that some elements of the revised federal rule should be adopted to replace the former items at page 41, lines 22-33. The member said the federal language was cleaner and more logical.

Mr. Hoffman MOVED to delete page 41, lines 22-33, and replace with language from the federal rule's paragraph (b)(1)(B), (C), (D), (E), (F), (G), (H), (I), and (K) and renumber accordingly, with language in (F) referring to "or nolo contendere" not to be included. Judge Leclerc seconded.

A member asked whether exclusion of certain federal provisions from a state plea proceeding could be attacked under federal habeas corpus law. A member responded that it was unlikely since the state handled some things, like forfeiture, differently from the federal government.

A member asked whether it was necessary to advise of the possibility of forfeiture proceedings or of prosecution for perjury if the defendant lies. A member said that courts did not advise defendants about everything and that guilty plea proceedings could last for days if the court was required to advise a defendant about every conceivable consequence of a guilty plea.

A member pointed out that the Supreme Court had recently stated that defendants need to be advised whether they will have to register as sex offenders if they plead guilty. A member said the Committee should attempt to be inclusive in determining what advice to require courts to provide defendants. The member said that the federal list was developed based on exhaustive research and inclusive because giving a defendant full advice best serves the interest of justice.

A member said that the better approach is to have general requirements for guilty plea proceedings. A member said that compiling specific requirements that must be recited in every case, regardless of whether applicable, just wastes time. The member also said that parallel changes to Rule 5 on initial appearances need to be made to match any change made

-7-

to Rule 11.

A member observed that the federal courts in North Dakota only have a few hundred guilty plea proceedings a year while state courts handle many thousands, so it doesn't necessarily make sense to include all the federal requirements or a lot of too specific requirements.

A member said that requiring courts to cover too much questionably relevant material in a guilty plea proceeding takes the focus off of the important items that need to be covered. The member said defendants may tune information out if too much is presented. The member said the law is clear on the basic things defendants need to be told.

A member agreed it would be better to limit the number of items courts are required to discuss with defendants to those things that are of real importance so that defendants will be able to hear and focus on the important information.

A member said that the federal language is clearer than the language in the present rule. The member said that the federal list contained some items that were not applicable in state court and that those items were not part of the pending motion.

Judge Hagerty MOVED to substitute federal rule paragraph (b)(1)(H) with some language regarding supervised release stricken and the term "mandatory fee" added. Judge Nelson seconded.

A member asked why the supervised release language should be deleted. A member explained that North Dakota does not have supervised release.

The motion to substitute CARRIED 18-1.

Mr. Hoffman's motion, with substituted language, CARRIED 14-5.

Mr. Hoffman MOVED to add a new paragraph (C) to page 42 after line 55 incorporating language from the federal rule regarding sentencing range. Judge Bohlman seconded.

A member asked whether the language regarding types of plea bargains needed to be separated into (A), (B) and now a proposed (C). The member said that, in practice, the various types of plea bargains that the proposed rule categorizes are often combined together.

The motion CARRIED 18-1.

-8-

Mr. Hoffman MOVED to strike page 45, lines 119-120. Ms. Moore seconded.

A member said the harmless error section was not useful--that whether a given error was harmless needed to be decided by the courts. A member replied that the section was important because it made clear that substantive rights needed to be implicated before an error would cause reversal.

A member said that, by having the section, the definition of harmless error was not expanded--instead, the section simply made it clear that error needed to impact substantive rights before there could be a reversal.

The motion DEFEATED 5-14.

A member commented that adoption of a new type of plea agreement in subparagraph (c)(1)(C) and division of plea agreements into types under paragraph (c)(1) was unnecessary and might lead to the end of oral plea agreements and create a need for a written plea agreement requirement. The member said the proposed new requirements were way too complicated.

A member said that plea agreements could encompass all the different types categorized under paragraph (c)(1) and that this could create a confusing situation for the courts and defendants. A member responded that it should be possible for a court to explain the impact of a given plea agreement to a defendant.

The motion to adopt proposed changes and include the rule in the criminal rules package CARRIED 16-4.

Syllabus

NORTH CAROLINA v. ALFORD

APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 14. Argued November 17, 1969—Reargued October 14, 1970—
Decided November 23, 1970

Appellee was indicted for the capital crime of first-degree murder. At that time North Carolina law provided for the penalty of life imprisonment when a plea of guilty was accepted to a first-degree murder charge; for the death penalty following a jury verdict of guilty, unless the jury recommended life imprisonment; and for a penalty of from two to 30 years' imprisonment for second-degree murder. Appellee's attorney, in the face of strong evidence of guilt, recommended a guilty plea, but left the decision to appellee. The prosecutor agreed to accept a plea of guilty to second-degree murder. The trial court heard damaging evidence from certain witnesses before accepting a plea. Appellee pleaded guilty, although disclaiming guilt, because of the threat of the death penalty, and was sentenced to 30 years' imprisonment. The Court of Appeals, on an appeal from a denial of a writ of habeas corpus, found that appellee's guilty plea was involuntary because it was motivated principally by fear of the death penalty. *Held*: The trial judge did not commit constitutional error in accepting appellee's guilty plea. Pp. 31-39.

(a) A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty. *Brady v. United States*, 397 U.S. 742. P. 31.

(b) *Hudson v. United States*, 272 U. S. 451, which held that a federal court may impose a prison sentence after accepting a plea of *nolo contendere*, implicitly recognized that there is no constitutional bar to imposing a prison sentence upon an accused who is unwilling to admit guilt but who is willing to waive trial and accept the sentence. Pp. 35-36.

(c) An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his

guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. Pp. 37-38.

(d) The Fourteenth Amendment and the Bill of Rights do not prohibit the States from accepting pleas to lesser included offenses. P. 39.

405 F. 2d 340, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment, *post*, p. 39. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 39.

Jacob L. Safron reargued the cause for appellant. With him on the briefs were *Robert Morgan*, Attorney General of North Carolina, and *Andrew A. Vanore, Jr.*, joined in and adopted by the Attorneys General for their respective States as follows: *Joe Purcell* of Arkansas, *David P. Buckson* of Delaware, *William J. Scott* of Illinois, *John B. Breckinridge* of Kentucky, *Joe T. Patterson* of Mississippi, and *Robert L. Woodahl* of Montana; by the Government of the Virgin Islands; and by the National District Attorneys Association.

Doris R. Bray, by appointment of the Court, 394 U. S. 1010, reargued the cause and filed briefs for appellee.

Jack Greenberg, *James M. Nabrit III*, *Michael Meltsner*, *Norman C. Amaker*, *Charles Stephen Ralston*, *Anthony G. Amsterdam*, *J. LeVonne Chambers*, and *James E. Ferguson II* filed a brief for Albert Bobby Childs et al. as *amici curiae*.

MR. JUSTICE WHITE delivered the opinion of the Court.

On December 2, 1963, Alford was indicted for first-degree murder, a capital offense under North Carolina

law.¹ The court appointed an attorney to represent him, and this attorney questioned all but one of the various witnesses who appellee said would substantiate his claim of innocence. The witnesses, however, did not support Alford's story but gave statements that strongly indicated his guilt. Faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence, Alford's attorney recommended that he plead guilty, but left the ultimate decision to Alford himself. The prosecutor agreed to accept a plea of guilty to a charge of second-degree murder, and on December 10, 1963, Alford pleaded guilty to the reduced charge.

¹ Under North Carolina law, first-degree murder is punished with death unless the jury recommends that the punishment shall be life imprisonment:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14-17 (1969).

At the time Alford pleaded guilty, North Carolina law provided that if a guilty plea to a charge of first-degree murder was accepted by the prosecution and the court, the penalty would be life imprisonment rather than death. The provision permitting guilty pleas in capital cases was repealed in 1969. See *Parker v. North Carolina*, 397 U. S. 790, 792-795 (1970). Though under present North Carolina law it is not possible for a defendant to plead guilty to a capital charge, it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge.

Before the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State's case. Two other witnesses besides Alford were also heard. Although there was no eyewitness to the crime, the testimony indicated that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out the killing. After the summary presentation of the State's case, Alford took the stand and testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so.² In response to the questions of his counsel, he acknowledged that his counsel had informed him of the difference between second- and first-degree

² After giving his version of the events of the night of the murder, Alford stated:

"I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."

In response to questions from his attorney, Alford affirmed that he had consulted several times with his attorney and with members of his family and had been informed of his rights if he chose to plead not guilty. Alford then reaffirmed his decision to plead guilty to second-degree murder:

"Q [by Alford's attorney]. And you authorized me to tender a plea of guilty to second degree murder before the court?"

"A. Yes, sir.

"Q. And in doing that, that you have again affirmed your decision on that point?"

"A. Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

murder and of his rights in case he chose to go to trial.³ The trial court then asked appellee if, in light of his denial of guilt, he still desired to plead guilty to second-degree murder and appellee answered, "Yes, sir. I plead guilty on—from the circumstances that he [Alford's attorney] told me." After eliciting information about Alford's prior criminal record, which was a long one,⁴ the trial court sentenced him to 30 years' imprisonment, the maximum penalty for second-degree murder.⁵

Alford sought post-conviction relief in the state court. Among the claims raised was the claim that his plea of guilty was invalid because it was the product of fear and coercion. After a hearing, the state court in 1965 found that the plea was "willingly, knowingly, and understandingly" made on the advice of competent counsel and in the face of a strong prosecution case. Subsequently, Alford petitioned for a writ of habeas corpus, first in the United States District Court for the Middle District of North Carolina, and then in the Court of Appeals for the Fourth Circuit. Both courts denied the writ on the basis of the state court's findings that Alford voluntarily

³ At the state court hearing on post-conviction relief, the testimony confirmed that Alford had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty. Since the record in this case affirmatively indicates that Alford was aware of the consequences of his plea of guilty and of the rights waived by the plea, no issues of substance under *Boyle v. Alabama*, 395 U. S. 238 (1969), would be presented even if that case was held applicable to the events here in question.

⁴ Before Alford was sentenced, the trial judge asked Alford about prior convictions. Alford answered that, among other things, he had served six years of a ten-year sentence for murder, had been convicted nine times for armed robbery, and had been convicted for transporting stolen goods, forgery, and carrying a concealed weapon. App. 9-11.

⁵ See n. 1, *supra*.

and knowingly agreed to plead guilty. In 1967, Alford again petitioned for a writ of habeas corpus in the District Court for the Middle District of North Carolina. That court, without an evidentiary hearing, again denied relief on the grounds that the guilty plea was voluntary and waived all defenses and nonjurisdictional defects in any prior stage of the proceedings, and that the findings of the state court in 1965 clearly required rejection of Alford's claim that he was denied effective assistance of counsel prior to pleading guilty. On appeal, a divided panel of the Court of Appeals for the Fourth Circuit reversed on the ground that Alford's guilty plea was made involuntarily. 405 F. 2d 340 (1968). In reaching its conclusion, the Court of Appeals relied heavily on *United States v. Jackson*, 390 U. S. 570 (1968), which the court read to require invalidation of the North Carolina statutory framework for the imposition of the death penalty because North Carolina statutes encouraged defendants to waive constitutional rights by the promise of no more than life imprisonment if a guilty plea was offered and accepted. Conceding that *Jackson* did not require the automatic invalidation of pleas of guilty entered under the North Carolina statutes, the Court of Appeals ruled that Alford's guilty plea was involuntary because its principal motivation was fear of the death penalty. By this standard, even if both the judge and the jury had possessed the power to impose the death penalty for first-degree murder or if guilty pleas to capital charges had not been permitted, Alford's plea of guilty to second-degree murder should still have been rejected because impermissibly induced by his desire to eliminate the possibility of a death sentence.⁶ We noted

⁶ Thus if Alford had entered the same plea in the same way in 1969 after the statute authorizing guilty pleas to capital charges had been repealed, see n. 1, *supra*, the result reached by the Court of Appeals should have been the same under that court's reasoning.

probable jurisdiction. 394 U. S. 956 (1969). We vacate the judgment of the Court of Appeals and remand the case for further proceedings.

We held in *Brady v. United States*, 397 U. S. 742 (1970), that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See *Boylkin v. Alabama*, 395 U. S. 238, 242 (1969); *Machibroda v. United States*, 368 U. S. 487, 493 (1962); *Kercheval v. United States*, 274 U. S. 220, 223 (1927). That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage. The standard fashioned and applied by the Court of Appeals was therefore erroneous and we would, without more, vacate and remand the case for further proceedings with respect to any other claims of Alford which are properly before that court, if it were not for other circumstances appearing in the record which might seem to warrant an affirmance of the Court of Appeals.

As previously recounted, after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford denied that he had committed the murder but reaffirmed his desire to plead guilty to avoid a possible death sentence and to limit the penalty to the 30-year maximum provided for second-degree murder.

Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment. See *Brady v. United States*, *supra*, at 748; *McCarthy v. United States*, 394 U. S. 459, 466 (1969). Here Alford entered his plea but accompanied it with the statement that he had not shot the victim.

If Alford's statements were to be credited as sincere assertions of his innocence, there obviously existed a factual and legal dispute between him and the State. Without more, it might be argued that the conviction entered on his guilty plea was invalid, since his assertion of innocence negated any admission of guilt, which, as we observed last Term in *Brady*, is normally "[c]entral to the plea and the foundation for entering judgment against the defendant . . ." 397 U. S., at 748.

In addition to Alford's statement, however, the court had heard an account of the events on the night of the murder, including information from Alford's acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intention. Nor had Alford wavered in his desire to have the trial court determine his guilt without a jury trial. Although denying the charge against him, he nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it,

the trial court proceeded to convict and sentence Alford for second-degree murder.

State and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. Some courts, giving expression to the principle that "[o]ur law only authorizes a conviction where guilt is shown," *Harris v. State*, 76 Tex. Cr. R. 126, 131, 172 S. W. 975, 977 (1915), require that trial judges reject such pleas. See, e. g., *Hulsey v. United States*, 369 F. 2d 284, 287 (CA5 1966); *United States ex rel. Elksnis v. Gilligan*, 256 F. Supp. 244, 255-257 (SDNY 1966); *People v. Morrison*, 348 Mich. 88, 81 N. W. 2d 667 (1957); *State v. Reali*, 26 N. J. 222, 139 A. 2d 300 (1958); *State v. Leyba*, 80 N. M. 190, 193, 453 P. 2d 211, 214 (1969); *State v. Stacy*, 43 Wash. 2d 358, 361-364, 261 P. 2d 400, 402-403 (1953). But others have concluded that they should not "force any defense on a defendant in a criminal case," particularly when advancement of the defense might "end in disaster . . ." *Tremblay v. Overholser*, 199 F. Supp. 569, 570 (DC 1961). They have argued that, since "guilt, or the degree of guilt, is at times uncertain and elusive," "[a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . ." *McCoy v. United States*, 124 U. S. App. D. C. 177, 179, 363 F. 2d 306, 308 (1966). As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, . . . [and] [h]e must be permitted to judge for himself in this respect." *State v. Kaufman*, 51 Iowa 578, 580, 2 N. W. 275, 276 (1879) (dictum). Accord, e. g., *Griffin v. United States*, 132 U. S. App. D. C. 108,

405 F. 2d 1378 (1968); *Bruce v. United States*, 126 U. S. App. D. C. 336, 342-343, 379 F. 2d 113, 119-120 (1967); *City of Burbank v. General Electric Co.*, 329 F. 2d 825, 835 (CA9 1964) (dictum); *State v. Martinez*, 89 Idaho 129, 138, 403 P. 2d 597, 602-603 (1965); *People v. Hetherington*, 379 Ill. 71, 39 N. E. 2d 361 (1942); *State ex rel. Crossley v. Takash*, 263 Minn. 299, 307-308, 116 N. W. 2d 666, 672 (1962); *Commonwealth v. Cottrell*, 433 Pa. 177, 249 A. 2d 294 (1969). Cf. *United States ex rel. Brown v. LaVallee*, 424 F. 2d 457 (CA2 1970).⁷

This Court has not confronted this precise issue, but prior decisions do yield relevant principles. In *Lynch v. Overholser*, 369 U. S. 705 (1962), Lynch, who had been charged in the Municipal Court of the District of Columbia with drawing and negotiating bad checks, a misdemeanor punishable by a maximum of one year in jail, sought to enter a plea of guilty, but the trial judge refused to accept the plea since a psychiatric report in the judge's possession indicated that Lynch had been suffering from "a manic depressive psychosis, at the time of the crime charged," and hence might have been not guilty by reason of insanity. Although at the subsequent trial Lynch did not rely on the insanity defense, he was found not guilty by reason of insanity and committed for an indeterminate period to a mental institution. On habeas corpus, the Court ordered his release, construing the congressional legislation seemingly authorizing the commitment as not reaching a case where the accused preferred a guilty plea to a plea of insanity. The Court expressly refused to rule that Lynch had an absolute right to have his

⁷ A third approach has been to decline to rule definitively that a trial judge must either accept or reject an otherwise valid plea containing a protestation of innocence, but to leave that decision to his sound discretion. See *Maxwell v. United States*, 368 F. 2d 735, 738-739 (CA9 1966).

guilty plea accepted, see *id.*, at 719, but implied that there would have been no constitutional error had his plea been accepted even though evidence before the judge indicated that there was a valid defense.

The issue in *Hudson v. United States*, 272 U. S. 451 (1926), was whether a federal court has power to impose a prison sentence after accepting a plea of *nolo contendere*, a plea by which a defendant does not expressly admit his guilt, but nonetheless waives his right to a trial and authorizes the court for purposes of the case to treat him as if he were guilty.³ The Court held

³ Courts have defined the plea of *nolo contendere* in a variety of different ways, describing it, on the one hand, as "in effect, a plea of guilty," *United States v. Food & Grocery Bureau*, 43 F. Supp. 974, 979 (SD Cal. 1942), aff'd, 139 F. 2d 973 (CA9 1943), and on the other, as a query directed to the court to determine the defendant's guilt. *State v. Hopkins*, 27 Del. 306, 88 A. 473 (1913). See generally *Lott v. United States*, 367 U. S. 421, 426-427 (1961), *id.*, at 427-430 (Clark, J., dissenting), 21 Am. Jur. 2d, Criminal Law § 497. As a result, it is impossible to state precisely what a defendant does admit when he enters a *nolo* plea in a way that will consistently fit all the cases.

Hudson v. United States, *supra*, was also ambiguous. In one place, the Court called the plea "an admission of guilt for the purposes of the case," *id.*, at 455, but in another, the Court quoted an English authority who had defined the plea as one "where a defendant, in a case not capital, doth not directly own himself guilty . . ." *Id.*, at 453, quoting 2 W. Hawkins, *Pleas of the Crown* 466 (8th ed. 1824).

The plea may have originated in the early medieval practice by which defendants wishing to avoid imprisonment would seek to make an end of the matter (*finem facere*) by offering to pay a sum of money to the king. See 2 F. Pollock & F. Maitland, *History of English Law* 517 (2d ed. 1909). An early 15th-century case indicated that a defendant did not admit his guilt when he sought such a compromise, but merely "that he put himself on the grace of our Lord, the King, and asked that he might be allowed to pay a fine (*petit se admittit per finem*)." *Anon.*, Y. B. Hil. 9 Hen. 6, f. 59, pl. 8 (1431). A 16th-century authority noted that a

that a trial court does have such power, and, except for the cases which were rejected in *Hudson*,⁹ the federal courts have uniformly followed this rule, even in cases involving moral turpitude. *Bruce v. United States*, *supra*, at 343 n. 20, 379 F. 2d, at 120 n. 20 (dictum). See, e. g., *Lott v. United States*, 367 U. S. 421 (1961) (fraudulent evasion of income tax); *Sullivan v. United States*, 348 U. S. 170 (1954) (*ibid.*); *Farnsworth v. Zerbst*, 98 F. 2d 541 (CA5 1938) (espionage); *Pharr v. United States*, 48 F. 2d 767 (CA6 1931) (misapplication of bank funds); *United States v. Bagliore*, 182 F. Supp. 714 (EDNY 1960) (receiving stolen property). Implicit in the *nolo contendere* cases is a recognition that the Constitution does not bar imposition of a prison sentence upon an accused who is unwilling expressly to admit his guilt but who, faced with grim alternatives, is willing to waive his trial and accept the sentence.

defendant who so pleaded "putteth hym selfe in *Gratiam Reginae* without anye more, or by Protestation that hee is not guiltie . . .," W. Lambard, *Eirenarcha* 427 (1581), while an 18th-century case distinguished between a *nolo* plea and a jury verdict of guilty, noting that in the former the defendant could introduce evidence of innocence in mitigation of punishment, whereas in the latter such evidence was precluded by the finding of actual guilt. *Queen v. Templeman*, 1 Salk. 55, 91 Eng. Rep. 54 (K. B. 1702).

Throughout its history, that is, the plea of *nolo contendere* has been viewed not as an express admission of guilt but as a consent by the defendant that he may be punished as if he were guilty and a prayer for leniency. Fed. Rule Crim. Proc. 11 preserves this distinction in its requirement that a court cannot accept a guilty plea "unless it is satisfied that there is a factual basis for the plea"; there is no similar requirement for pleas of *nolo contendere*, since it was thought desirable to permit defendants to plead *nolo* without making any inquiry into their actual guilt. See Notes of Advisory Committee to Rule 11.

⁹ *Blum v. United States*, 196 F. 269 (CA7 1912); *Shapiro v. United States*, 196 F. 268 (CA7 1912); *Tucker v. United States*, 196 F. 260 (CA7 1912).

These cases would be directly in point if Alford had simply insisted on his plea but refused to admit the crime. The fact that his plea was denominated a plea of guilty rather than a plea of *nolo contendere* is of no constitutional significance with respect to the issue now before us, for the Constitution is concerned with the practical consequences, not the formal categorizations, of state law. See *Smith v. Bennett*, 365 U. S. 708, 712 (1961); *Jones v. United States*, 362 U. S. 257, 266 (1960). Cf. *Kermarec v. Compagnie Generale Transatlantique*, 358 U. S. 625, 630-632 (1959). Thus, while most pleas of guilty consist of both a waiver of trial and an express admission of guilt, the latter element is not a constitutional requisite to the imposition of criminal penalty. An individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime.

Nor can we perceive any material difference between a plea that refuses to admit commission of the criminal act and a plea containing a protestation of innocence when, as in the instant case, a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt. Here the State had a strong case of first-degree murder against Alford. Whether he realized or disbelieved his guilt, he insisted on his plea because in his view he had absolutely nothing to gain by a trial and much to gain by pleading. Because of the overwhelming evidence against him, a trial was precisely what neither Alford nor his attorney desired. Confronted with the choice between a trial for first-degree murder, on the one hand, and a plea of guilty to second-degree murder, on the other, Alford quite reasonably chose the latter and thereby limited the maximum penalty to a 30-year term. When his plea is viewed in light

of the evidence against him, which substantially negated his claim of innocence and which further provided a means by which the judge could test whether the plea was being intelligently entered, see *McCarthy v. United States, supra*, at 466-467 (1969),¹⁰ its validity cannot be seriously questioned. In view of the strong factual basis for the plea demonstrated by the State and Alford's clearly expressed desire to enter it despite his professed belief in his innocence, we hold that the trial judge did not commit constitutional error in accepting it.¹¹

Relying on *United States v. Jackson, supra*, Alford now argues in effect that the State should not have allowed

¹⁰ Because of the importance of protecting the innocent and of insuring that guilty pleas are a product of free and intelligent choice, various state and federal court decisions properly caution that pleas coupled with claims of innocence should not be accepted unless there is a factual basis for the plea, see, e. g., *Griffin v. United States*, 132 U. S. App. D. C. 108, 110, 405 F. 2d 1378, 1380 (1968); *Bruce v. United States, supra*, at 342, 379 F. 2d, at 119 (1967); *Commonwealth v. Cottrell*, 433 Pa. 177, 249 A. 2d 294 (1969); and until the judge taking the plea has inquired into and sought to resolve the conflict between the waiver of trial and the claim of innocence. See, e. g., *People v. Serrano*, 15 N. Y. 2d 304, 308-309, 206 N. E. 2d 330, 332 (1965); *State v. Branner*, 149 N. C. 559, 563, 63 S. E. 169, 171 (1908). See also *Kreuter v. United States*, 201 F. 2d 33, 36 (CA10 1952).

In the federal courts, Fed. Rule Crim. Proc. 11 expressly provides that a court "shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea."

¹¹ Our holding does not mean that a trial judge must accept every constitutionally valid guilty plea merely because a defendant wishes so to plead. A criminal defendant does not have an absolute right under the Constitution to have his guilty plea accepted by the court, see *Lynch v. Overholser*, 369 U. S., at 719 (by implication), although the States may by statute or otherwise confer such a right. Likewise, the States may bar their courts from accepting guilty pleas from any defendants who assert their innocence. Cf. Fed. Rule Crim. Proc. 11, which gives a trial judge discretion to "refuse to accept a plea of guilty . . ." We need not now delineate the scope of that discretion.

him this choice but should have insisted on proving him guilty of murder in the first degree. The States in their wisdom may take this course by statute or otherwise and may prohibit the practice of accepting pleas to lesser included offenses under any circumstances.¹² But this is not the mandate of the Fourteenth Amendment and the Bill of Rights. The prohibitions against involuntary or unintelligent pleas should not be relaxed, but neither should an exercise in arid logic render those constitutional guarantees counterproductive and put in jeopardy the very human values they were meant to preserve.

The Court of Appeals for the Fourth Circuit was in error to find Alford's plea of guilty invalid because it was made to avoid the possibility of the death penalty. That court's judgment directing the issuance of the writ of habeas corpus is vacated and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

It is so ordered.

MR. JUSTICE BLACK, while adhering to his belief that *United States v. Jackson*, 390 U. S. 570, was wrongly decided, concurs in the judgment and in substantially all of the opinion in this case.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

Last Term, this Court held, over my dissent, that a plea of guilty may validly be induced by an unconstitutional threat to subject the defendant to the risk of death, so long as the plea is entered in open court and the defendant is represented by competent counsel who is aware of the threat, albeit not of its unconstitutionality. *Brady v. United States*, 397 U. S. 742, 745-758

¹² North Carolina no longer permits pleas of guilty to capital charges but it appears that pleas of guilty may still be offered to lesser included offenses. See n. 1, *supra*.

(1970); *Parker v. North Carolina*, 397 U. S. 790, 795 (1970). Today the Court makes clear that its previous holding was intended to apply even when the record demonstrates that the actual effect of the unconstitutional threat was to induce a guilty plea from a defendant who was unwilling to admit his guilt.

I adhere to the view that, in any given case, the influence of such an unconstitutional threat "must necessarily be given weight in determining the voluntariness of a plea." *Parker v. North Carolina*, 397 U. S., at 805 (dissent). And, without reaching the question whether due process permits the entry of judgment upon a plea of guilty accompanied by a contemporaneous denial of acts constituting the crime,¹ I believe that at the very least such a denial of guilt is also a relevant factor in determining whether the plea was voluntarily and intelligently made. With these factors in mind, it is sufficient in my view to state that the facts set out in the majority opinion demonstrate that Alford was "so gripped by fear of the death penalty"² that his decision to plead guilty was not voluntary but was "the product of duress as much so as choice reflecting physical constraint." *Haley v. Ohio*, 332 U. S. 596, 606 (1948) (opinion of Frankfurter, J.). Accordingly, I would affirm the judgment of the Court of Appeals.

¹ The courts of appeals have expressed varying opinions on this question. Compare *McCoy v. United States*, 124 U. S. App. D. C. 177, 179-180, 363 F. 2d 306, 308-309 (1966); *Bruce v. United States*, 126 U. S. App. D. C. 336, 342 n. 17, 379 F. 2d 113, 119 n. 17 (1967); *Griffin v. United States*, 132 U. S. App. D. C. 108, 109-110, 405 F. 2d 1373, 1379-1380 (1968); *Maxwell v. United States*, 368 F. 2d 735, 739 n. 3 (CA9 1966) (court may accept guilty plea from defendant unable or unwilling to admit guilt), with *United States ex rel. Crosby v. Brierley*, 404 F. 2d 790, 801-802 (CA3 1968); *Bailey v. MacDougall*, 392 F. 2d 155, 158 n. 7 (CA4 1968); *Hulsey v. United States*, 369 F. 2d 284, 287 (CA5 1966) (guilty plea is infirm if accompanied by denial of one or more elements of offense).

² *Brady v. United States*, 397 U. S., at 750.



North Dakota Supreme Court Opinions ◀▲□/?

State v. McKay, 234 N.W.2d 853 (N.D. 1975)

[\[Go to Documents\]](#)

Filed Oct. 22, 1975

- HOME
- OPINIONS
- SEARCH
- INDEX
- GUIDES
- LAWYERS
- RULES
- RESEARCH
- COURTS
- CALENDAR
- NOTICES
- NEWS
- FORMS
- SUBSCRIBE
- CUSTOMIZE
- COMMENTS

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff, Appellee

v.

Floyd McKay, Defendant, Appellant

Crim. No. 517.

[234 N.W.2d 855]

Syllabus of the Court

1. The right to counsel guaranteed by the Sixth Amendment of the United States Constitution does not mean errorless counsel nor counsel judged ineffective by hindsight, but counsel reasonably likely to render, and rendering, reasonably effective assistance.
2. Where identification of the defendant is made by the victim-witness during routine police investigation and identification procedures prior to indictment or its equivalent, such identification will not be subject to the exclusionary rule.
3. The defendant has failed to show that, under the current standard for effective counsel, the failure of his counsel to object to the identification procedure used here has deprived him of his right to effective counsel.
4. Counsel is presumed to be competent and adequate and the burden of proof to show inadequacy or incompetency of counsel lies upon the defendant.
5. Where the facts show that an in-court identification of the defendant was based on a previous viewing by the victim-witness, independent of a police station identification in conjunction with police investigatory processes, pre-indictment or its equivalent, at which the defendant was not represented by counsel, admission of the in-court identification is not reversible error.
6. An individual accused of a crime may voluntarily, knowingly, and understandingly plead guilty to a crime even if he is unable to admit his Participation in the acts constituting the crime, provided evidence is introduced from which it can be concluded that defendant committed the crime.
7. Where the record shows that the court complied with Rule 11, N.D.R.Crim.P., in insuring that the plea of guilty was knowingly and voluntarily made and that the evidence showed that there was a factual basis for the plea, the decision of the trial court to accept the

plea of guilty will be affirmed on appeal.

Appeal from an Order of the District Court of Ramsey County, the Honorable Douglas B. Heen, Judge.

AFFIRMED.

Opinion of the Court by Sand, Judge.

Ralph R. LePera (on the briefs and pleadings) and South Jane Bickford, 3315 Airport Road, Bismarck, for defendant, appellant; argued by Jeffrey Edelman (appearance permitted by special motion).

Lewis C. Jorgenson, Assistant State's Attorney, Ramsey County Courthouse, Devils Lake, for plaintiff, appellee.

State v. McKay

Crim. No. 517

Sand, Judge.

The defendant-appellant, Floyd McKay, pleaded guilty to robbery in the second degree and was sentenced by the district court of Ramsey County on June 21, 1974, to not less than eight years nor more than ten years in the State Penitentiary.

Thereafter, defendant applied to the same trial court for post-conviction relief under Chapter 29-32, North Dakota

[234 N.W.2d 856]

Century Code. The defendant made a motion, which was granted, to amend and supplement the original application. The State responded to both the original and the amended or supplemented application. The trial court considered the matter without holding a hearing and, on October 16, 1974, issued its order dismissing the application, from which the defendant appeals.

The defendant was originally charged with robbery in the first degree. He was represented at the trial by court-appointed counsel. The defendant pleaded not guilty to the charge of first degree robbery but offered to Plead guilty to robbery in the second degree. Before accepting the plea of guilty, the trial court, pursuant to Rule 11, North Dakota Rules of Civil Procedure, questioned the defendant to determine if the plea was voluntarily and knowingly given. Defendant claimed that because of his state of intoxication at the time of the alleged robbery he could remember none of the events of that day. Because the defendant did not remember any of the acts constituting the crime to which he was offering to plead guilty, the court conducted an Alford 1 hearing to determine if there was a factual basis for accepting the plea by the court and to ensure that

the defendant's plea was knowingly and intelligently made, and to give defendant an opportunity to judge for himself if he should plead guilty to second degree robbery.

After the presentation of evidence, McKay was again asked if he wished to plead guilty to robbery in the second degree. He reaffirmed his plea of guilty. The plea of guilty was accepted by the court and sentence was passed.

The defendant asserts as error the following:

- (1) The defendant was denied effective assistance of counsel due to the failure to object at the hearing to a suggestive in-court identification based on a prejudicial out-of-court identification and the failure to "probe, impeach, and investigate."
- (2) The guilty plea entered into by defendant should not have been accepted by the court as it was based on misleading, conflicting, and contradictory testimony.
- (3) There was not sufficient evidence to substantiate a factual basis for acceptance of such a guilty plea.
- (4) The guilty plea is in fact void because the defendant was not made entirely aware of all the consequences of entering such a plea.

The defendant asks that the charges be dismissed and that a hearing be held to determine the issues presented, or that a trial by jury be ordered.

The defendant's first contention is that he was denied effective counsel at the hearing.

The proceeding or hearing held by the trial court before the plea was accepted was not a trial to determine guilt or innocence. Its purpose was to present evidence so that defendant could understandingly, knowingly, and intelligently make his plea, and to provide evidence for the court to determine if it should accept a plea. Defendant claims that because his counsel failed to object to certain testimony and to further probe and investigate, he was not given an accurate picture of the evidence against him; therefore, his guilty plea was not knowingly made.

The right to effective counsel at trial is granted by the Sixth Amendment of the United States Constitution, and applies to State courts through the Fourteenth Amendment of the United States Constitution. Gideon v. Wainwright, 372 U.S. 335, 85 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Lack of counsel at trial will render a judgment void and require reversal of a conviction. State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949).

[234 N.W.2d 857]

Ineffective, incompetent, or inadequate representation is the same as no counsel at all, and, as such, will equal a denial of due process. State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929).

This court in State v. Bragg, 221 N.W.2d 793 (N.D. 1974), set the following standard, as stated in West v. State of Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973):

"We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

Defendant points to discrepancies in the testimony which counsel failed to object to or to probe into, and claims these affected his decision to plead guilty. The fact that counsel did not object to the introduction and admission of several items of evidence does not show incompetency. Under the circumstances it could have been considered good strategy. As the State pointed out in its brief, one of the purposes of the hearing was to present evidence for the benefit of the defendant. In such a situation, counsel for the defendant is concerned with discovering as much of the State's case as he can. Objections to testimony would not serve any purpose. Counsel can better determine the strength of the State's case by letting it present everything it has. After the presentation he can evaluate the evidence and inform his client what the best course would be. Counsel's decision in this situation not to object to the discrepancies in the testimony does not constitute a showing that defendant has been deprived of effective counsel.

Counsel is presumed to be competent and adequate and the burden of proof to show inadequacy or incompetency of counsel lies upon the defendant. State v. Berger, 148 N.W.2d 331 (N.D. 1966). Defendant has not met that burden.

Defendant claims, however, that under Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972), counsel's failure to object to the in-court identification of the defendant shows lack of effectiveness of counsel. The court in Saltys found reversible error in counsel's failure to object to the admission of an incorrect identification based upon an illegal out-of-court identification, without which the defendant could not have been convicted. Victim Wilson had first pointed out McKay as his robber at the police station and later identified him at the trial.

Defendant claims that under the holding of United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and United States v. Gilbert, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), such an identification would not be allowed at trial, and that counsel's failure to object to it at the hearing influenced the defendant in his decision to plead guilty. Wade held that courtroom identification of the accused would be excluded from evidence whenever the accused was exhibited to the witness before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's counsel. The Court in Wade also said that the government must be given an opportunity to establish by clear and convincing evidence that the in-court identification was based upon observation of the suspect under other than lineup identification. In the instant case there is ample evidence that the victim's identification of the defendant was based upon his personal observation, which will be stated later, and was not the result of identification at the police station. The Court in Wade listed as factors to be considered in application of the test the prior opportunity of the witness to observe the crime, the existence of any discrepancy between any prelineup description and the defendant's actual description, and the lapse of time between the act and the identification.

The Alford hearing brought out the following evidence:

[234 N.W.2d 858]

The victim of the robbery, Fred Wilson, testified at the hearing that on May 20, 1974, at approximately 5:00 p.m., he was in the basement of the Presbyterian church at Devils Lake and as he was coming up the stairway to the entry he saw the defendant. The defendant came to him, grabbed him and threatened to kill him unless he gave defendant some money. When he tried to escape, defendant held and choked him. The defendant held his arm to prevent him from escaping, walked him across the street and half a block down the street to an alley into which he was forced. He did not remember what happened after that because he was "out." When he (Wilson) "came to" he noticed that his glasses were gone and that he had been beaten. L. A. Braunagel testified that he was across the street from the alley and saw Wilson with another man who had a cast on his hand and was wearing a powder blue coat. Braunagel stated that Wilson was bleeding and had told him that this man wanted to take his money and to kill him. Braunagel then took Wilson to the police station, where Wilson told police what he "remembered happening." Defendant, McKay was picked up by the police from the description given to the police. He had in his possession a watch and ring belonging to Wilson. Wilson testified that approximately forty-five minutes after his initial trip to the police station he returned to identify the defendant. The defendant was in a cell at the station at that time and was without counsel. Wilson stated that he identified the defendant at the jail from the cast

on his right hand and from his face.

The fact that Wilson had a chance to closely observe the defendant for several minutes, had talked to him, had given a description to the police of the man who had robbed him which fit the defendant, and had identified him shortly after the crime, are sufficient to show that Wilson's in-court identification of the defendant was not based on a suggestive viewing of him at the police station, but had a basis independent of that viewing. In this instance the defendant was picked up by police on the description given by the victim. The question of whether the police station showing was suggestive or whether defendant had a right to counsel at the show-up need not be discussed any further here because any technical error in procedure would be harmless error. Counsel's failure to object to the identification has not harmed defendant in any way.

The comments and observations in Smith v. Paderick, 519 F.2d 70 (4th Cir. 1975), made by the Fourth Circuit Court have application to the instant case on the question whether testimony relating to prior identification by the witness should have been admitted. The Court said:

"Had Smith's state trial been to a jury we would be inclined to agree with him that failure to exclude it amounted to reversible error. But Smith's case was tried to a judge, and that makes a difference. The line between an identification that is admissible but likely to carry little weight, and one that is inadmissible under Stoval because it is so untrustworthy as to violate due process, is not a bright one. See Foster v. California, 394 U.S. 440, 442, n.2, 82 S.Ct. 1127, 22 L.Ed.2d 402 (1969). The Supreme Court has suggested approximate coordinates of the line in several jury trial cases, but has not indicated whether the line lies in the same place for both judge and jury trials. We think it does not.

"We have previously expressed our awareness of the danger and our confidence in experienced trial judges to guard against it. United States v. Levi, 405 F.2d 380, 383 (4th Cir. 1968). Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically. An experienced trial judge will doubtless receive it skeptically, and accord it no more weight than it deserves."

[234 N.W.2d 859]

In the instant case the trial judge was an experienced and highly qualified jurist.

In Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), the United States Supreme Court refused to apply the Wade exclusionary rule of law to routine police investigation and identification procedures prior to indictment or its equivalent. The holding in the Kirby case has application to the instant situation as this was a routine Police investigation and identification process, rather than an identification after indictment or its equivalent.

With reference to the victim's alleged discrepancies regarding the identification of the defendant, we have examined the record and find that there are minor variances, but of no significance. These variances comport with human nature. We must realize that a person under the trying circumstances in which the victim found himself in this instance does not give attention to exact detail in every respect as a general rule. Exact detailed description is not a necessary requirement for identification purposes.

Defendant contends that his plea of guilty to robbery in the second degree should not have been accepted by the court because it was not voluntarily and knowingly made and there was no factual basis for the court to accept it. Because a plea of guilty results in a waiver of the privilege of self-incrimination, the right to jury trial, and the right to confront one's accusers, the utmost care must be taken to ensure that the accused has a full understanding of what his plea connotes and of its consequences. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Rust v. State, 218 N.W.2d 482 (S.D. 1974);

[234 N.W.2d 861]

Singletary v. State, 227 N.W.2d 424 (S.D. 1975).

Rule 11 of the Rules of Criminal Procedure details the procedure to be followed and determinations that must be made by the court before accepting a plea of guilty. The procedure was followed and proper determinations were made by the trial court.

The trial court, before asking the defendant to plead, explained at length and in detail the effect of a plea of guilty and the consequences thereof. The trial court even went beyond the requirements of Rule 11 and also explained to the defendant the possible effect a plea of guilty could have on future employment.

After the Alford hearing, the court again briefly advised the defendant the effect of a plea of guilty to the crime of robbery in the second degree and the sentence that may be imposed. The court specifically asked Mr. McKay if he understood the effect of the plea of guilty, to which McKay responded, "Yes, sir." The court then asked, "Is this what you want to do?" McKay responded, "Yes."

"THE COURT: You have conferred with Mr. Rutten and talked this matter over? "McKAY: Yes, sir.

"THE COURT: Mr. Rutten, what is your position with respect to defendant's plea of guilty to the crime of Robbery in the Second Degree?

"MR. RUTTEN: Your Honor, we have discussed the facts and we believe that this would be in the best interest since we feel that if there was a trial the chances of conviction on even Robbery in the First Degree are very good."

The court again addressed the defendant:

"THE COURT: Do you stand with your plea of guilty to Robbery in the Second Degree, or do you withdraw your plea of guilty to that charge?

"MR. McKAY: I will stay with guilty please, sir.

"THE COURT: Mr. Rutten?

"MR. RUTTEN: That is correct."

Defendant's plea of guilty was accompanied by a statement that he did not remember committing the crime, but this does not render the Plea of guilty invalid.

"An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a

[234 N.W.2d 860]

prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, 171 (1970).

See also, State v. Tahash, 116 N.W.2d 666 (Minn. 1962); State v. Fisher, 193 N.W.2d 819 (Minn. 1972).

An accused who cannot remember committing the crime may be convinced by the evidence against him that he did do it, and that he may be able to get a better deal by pleading guilty. He should not be forced to defend against a suit he cannot win. In Alford, supra, defendant did not merely claim "no recollection," but professed innocence, but the Court concluded that a plea of guilty could stand. In the instant case defendant merely claims no recollection.

The decision on how to plead must be based on an understanding of the evidence against him and of the consequences of his plea. The trial court must ensure that the facts on which defendant will base his decision are accurate and properly presented. Boykin, supra.

This court on appeal must look at the record to determine if defendant's plea met the requirements of Rule 11 and Alford. The record shows that defendant was informed of his rights and the consequences of a plea of guilty. Defendant was present at the hearing and was assisted by experienced and competent counsel. No coercion has been shown.

By pleading guilty to second degree robbery defendant was able to escape possible conviction for robbery in the first degree.

The evidence presented at the Alford hearing was sufficient to support the finding of the court that the plea was knowingly and voluntarily given and that there was a factual basis for accepting the plea.

A charge of incompetent counsel is easily made, but difficult to defend against. Even though precaution is exercised, nevertheless the hindsight thought processes unconsciously seep ever so quietly into the mental process where retrospective evaluation is involved. In retrospect, it is always easier to suggest what should have been done because as a subjunctive proposition it is not necessary to carry out what would have resulted and seldom, if ever, is it recognized that if something were done in a certain manner something else would have been done in a different manner, which puts the entire matter in an "iffy" situation.

Counsel is not expected to perform superhuman efforts or miracles. The defendant and his appellate counsel failed to come up with any single item of evidence which would have been beneficial to the defendant at the time of the hearing on his plea of guilty, or now, which should have been discovered or uncovered by due diligence by the original counsel appointed for the defendant at the time of the Alford hearing. Appellant's counsel, we presume, had the opportunity to investigate and would have presented any exculpatory evidence if there in fact were any.

The memorandum opinion of the trial judge dated October 15, 1974, which served as a basis for the order dated October 16, 1974, dismissing defendant's application for post-conviction relief, stated in part that defendant's appointed counsel "is experienced counsel and the record is barren of any inferences that defendant was not competently represented."

As to the other points raised on appeal, they have been adequately discussed herein and are not deserving of any further attention.

The order of the district court is affirmed.

Paul M. Sand
Ralph J. Erickstad, C.J.
William L. Paulson
Robert Vogel
Vernon R. Pederson

Footnotes:

1. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

2. The district court so stated in its Memorandum Opinion dated 15 October 1975.

[Top](#) [Home](#) [Opinions](#) [Search](#) [Index](#) [Lawyers](#) [Rules](#) [Research](#) [Courts](#) [Calendar](#) [Comments](#)



North Dakota Supreme Court Opinions ◀▲□/?

Kooser v. State, 2012 ND 101

[\[Go to Documents\]](#)

Filed May 17, 2012

[\[Download as WordPerfect\]](#)

HOME
OPINIONS
SEARCH
INDEX
GUIDES
LAWYERS
RULES
RESEARCH
COURTS
CALENDAR
NOTICES
NEWS
FORMS
SUBSCRIBE
CUSTOMIZE
COMMENTS

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2012 ND 101

Douglas James Kooser, Petitioner and Appellant

v.

State of North Dakota, Respondent and Appellee

No. 20120058

Appeal from the District Court of Ward County, Northwest Judicial District, the Honorable Gary H. Lee, Judge.

AFFIRMED.

Opinion of the Court by Crothers, Justice.

Kent M. Morrow (argued), 411 North 4th Street, P.O. Box 2155, Bismarck, ND 58502-2155, for petitioner and appellant.

Kelly Ann Dillon (argued), Assistant State's Attorney, Ward County Courthouse, P.O. Box 5005, Minot, ND 58702-5005, for respondent and appellee.

Kooser v. State

No. 20120058

Crothers, Justice.

[¶1] Douglas James Kooser appeals a district court order denying his application for postconviction relief. Kooser argues the district court erred by denying Kooser's request to withdraw his Alford plea and by finding Kooser received effective assistance of counsel. We affirm.

I

[¶2] In May 2007, Kooser was charged with class AA felony gross sexual imposition for engaging in a sexual act with a 7-year-old girl. The State alleged Kooser touched the girl's vagina with his hand and penetrated her vagina with his finger. On February 21, 2008, the State filed an amended information charging Kooser with class A felony gross sexual imposition for the same conduct. On February 28, 2008, Kooser entered an Alford plea to class A felony gross

sexual imposition. Kooser was sentenced to ten years incarceration with four years suspended for five years of supervised probation.

[¶3] In May 2011, Kooser filed a pro se application for postconviction relief specifying eight grounds for relief. Kooser requested postconviction counsel, and counsel was appointed. In July 2011, Kooser filed an amended application, alleging the district court erred by accepting his Alford plea and his trial attorney was ineffective. The State moved to summarily dismiss the application. The district court denied the State's motion. In November 2011, the district court held an evidentiary hearing on Kooser's application for postconviction relief. In December 2011, the district court denied the application.

II

[¶4] "Post-conviction relief proceedings are civil in nature and governed by the North Dakota Rules of Civil Procedure." Sambursky v. State, 2008 ND 133, ¶ 7, 751 N.W.2d 247. Under N.D.R.Civ.P. 52(a)(6), a district court's findings will not be set aside unless clearly erroneous. "A finding of fact is clearly erroneous if it is induced by an erroneous view of the law, if it is not supported by any evidence, or if, although there is some evidence to support the finding, a reviewing court is left with a definite and firm conviction a mistake has been made." Sambursky, at ¶ 7 (quotation omitted). "Questions of law are fully reviewable on appeal of a post-conviction proceeding." Wong v. State, 2011 ND 201, ¶ 4, 804 N.W.2d 382 (quotation omitted).

III

[¶5] Kooser argues the district court erred by denying his request to withdraw his guilty plea because it was accepted without an adequate factual basis. The State responds the State's offer of proof at the change of plea hearing established the factual basis for Kooser's Alford plea.

[¶6] An applicant's attempt to withdraw a guilty plea under the Uniform Postconviction Procedure Act, N.D.C.C. ch. 29-32.1, generally is treated as a motion to withdraw a guilty plea under N.D.R.Crim.P. 11(d). See Abdi v. State, 2000 ND 64, ¶ 10, 608 N.W.2d 292. A defendant who has been sentenced may not withdraw a guilty plea "[u]nless the defendant proves that withdrawal is necessary to correct a manifest injustice[.]" N.D.R.Crim.P. 11(d)(2). "The decision whether a manifest injustice exists for withdrawal of a guilty plea lies within the trial court's discretion and will not be reversed on appeal except for an abuse of discretion." State v. Jones, 2011 ND 234, ¶ 8 (quotation omitted). "A court abuses its discretion when it acts in an arbitrary, unreasonable, or unconscionable manner, or it misinterprets or misapplies the law."

Id. (quotation omitted).

[¶7] In North Carolina v. Alford, 400 U.S. 25, 37 (1970), the United States Supreme Court held an individual may enter a voluntary guilty plea without admitting guilt when the "defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt." We have held Alford pleas may be accepted in North Dakota. See State v. Hagemann, 326 N.W.2d 861, 869-70 (N.D. 1982).

[¶8] Before accepting Kooser's Alford plea, the district court determined Kooser understood his rights, determined Kooser's plea was voluntary and asked the State to provide a factual basis for the plea. See N.D.R.Crim.P. 11(b)(1)-(3). The district court and Kooser's attorney explained the nature of an Alford plea to Kooser, and the district court asked Kooser if he wished to enter an Alford plea:

"THE COURT: Okay. Mr. Kooser, do you understand with my explanation, which I think is pretty close to what [your attorney's] was, that—what an Alford plea is, and you're prepared to go forward and accept the plea on an Alford plea basis, correct?

"THE DEFENDANT: Yes. But I'd like to let you know that I did not touch her vagina. I did not go down in her pants. I did touch her stomach, but that was it."

[¶9] Kooser argues the district court did not have an adequate factual basis for his plea because he denied touching the girl's vagina. Rule 11(b)(3), N.D.R.Crim.P., requires a district court accepting a guilty plea to "determine that there is a factual basis for the plea." The factual basis for a guilty plea may be established in multiple ways:

"First, the court [can] inquire directly of the defendant concerning the performance of the acts which constituted the crime. Secondly, the court [can] allow the defendant to describe to the court in his own words what had occurred and then the court could question the defendant. Thirdly, the court [can] have the prosecutor make an offer of proof concerning the factual basis for the charge."

Kaiser v. State, 417 N.W.2d 175, 178 (N.D. 1987). A defendant entering an Alford plea need not personally provide the factual basis for the plea. Hagemann, 326 N.W.2d at 870. The State may establish the factual basis for an Alford plea by providing an offer of proof supporting the charge. Hagemann, at 871.

[¶10] At the change of plea hearing, the district court found the State's offer of proof established an adequate factual basis for the charge and proved Kooser was likely to be convicted if his case

proceeded to trial. Kooser agrees the offer of proof addressed all the elements of gross sexual imposition and established Kooser would likely be convicted, but he asserts the district court should not have accepted his plea in the face of his protestations of innocence. If we accepted Kooser's argument, we would effectively reverse our holding that Alford pleas may be accepted in this state. We decline to do so. The district court did not abuse its discretion by denying Kooser's motion to withdraw his Alford plea.

IV

[¶11] Kooser argues his trial attorney was ineffective. The State responds Kooser failed to prove ineffective assistance of counsel.

[¶12] The Sixth Amendment of the United States Constitution guarantees a criminal defendant's right to effective assistance of trial counsel. Klose v. State, 2005 ND 192, ¶ 9, 705 N.W.2d 809. We apply the test established by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), to ineffective assistance of counsel claims. Sambursky, 2008 ND 133, ¶ 8, 751 N.W.2d 247. To prove counsel was ineffective, an applicant for postconviction relief has the "heavy burden" of proving: "(1) counsel's representation fell below an objective standard of reasonableness, and (2) the defendant was prejudiced by counsel's deficient performance." Id. (quotation omitted). "A court need not address both prongs of the ineffective assistance of counsel standard if a defendant clearly fails to meet his burden on one of the prongs." Klose, at ¶ 10. "Whether a petitioner received ineffective assistance of counsel is a mixed question of law and fact and is fully reviewable on appeal." Sambursky, at ¶ 7.

[¶13] Courts considering ineffective assistance of counsel claims apply a strong presumption that counsel's conduct fell "within the wide range of reasonable professional assistance." Mathre v. State, 2000 ND 201, ¶ 3, 619 N.W.2d 627. "In determining whether counsel's performance was deficient, the court must consider all circumstances and decide whether there were errors so serious that defendant was not accorded that 'counsel' guaranteed by the Sixth Amendment." Id. To prove prejudice, a defendant who pleads guilty must prove that "but for counsel's errors, the defendant would not have pled guilty and would have insisted on going to trial." Abdi, 2000 ND 64, ¶ 29, 608 N.W.2d 292 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

[¶14] The district court found Kooser failed to prove his attorney's representation fell below an objective standard of reasonableness. Kooser argues the finding was erroneous for three reasons. First, Kooser argues his attorney advised him to plead guilty so he could receive medical care in prison. The district court found that any expectation Kooser had about receiving medical care was the result

of his own subjective belief, not his attorney's advice. That finding was supported by testimony at the evidentiary hearing and is not clearly erroneous. Second, Kooser argues that given his inability to read and write, his attorney failed to adequately explain the nature and consequences of the Alford plea. The district court found Kooser's attorney was aware Kooser could not read and write and took adequate steps to ensure Kooser understood the proceedings, including meeting with Kooser on a number of occasions, reading documents to Kooser and discussing the nature of the case and the plea offers with Kooser. That finding also was supported by testimony at the evidentiary hearing and is not clearly erroneous. Finally, Kooser argues his attorney was ineffective for allowing him to enter a plea when he maintained his innocence. Kooser's attorney was not ineffective for allowing Kooser to enter a voluntary Alford plea to a reduced charge. The district court did not err by finding Kooser failed to prove his attorney's representation fell below an objective standard of reasonableness. Because Kooser failed to prove the first Strickland prong, we need not consider the second.

V

[¶15] We affirm the district court order denying Kooser's application for postconviction relief.

[¶16]

Daniel J. Crothers
Mary Muehlen Maring
Carol Ronning Kapsner
Gerald W. VandeWalle, C.J.

I concur in the result.
Dale V. Sandstrom

[Top](#) [Home](#) [Opinions](#) [Search](#) [Index](#) [Lawyers](#) [Rules](#) [Research](#) [Courts](#) [Calendar](#) [Comments](#)

Rule 3.172. Acceptance of Guilty or Nolo Contendere Plea

(a) **Voluntariness; Factual Basis.** Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists. Counsel for the prosecution and the defense shall assist the trial judge in this function.

(b) **Open Court.** All pleas shall be taken in open court, except that when good cause is shown a plea may be taken in camera.

(c) **Determination of Voluntariness.** Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:

(1) the nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;

(2) if not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, an attorney will be appointed to represent him or her;

(3) the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial a defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself;

(4) that upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;

(5) that if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he or she waives the right to a trial;

(6) that if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against him or her in prosecution for perjury;

The complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result;

(8) that if he or she pleads guilty or nolo contendere or she is not a United States citizen, the plea subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases; and

(9) that if the defendant pleads guilty or nolo contendere and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense; or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated, as this admonition shall be given to all defendants in all cases.

(10) that if the defendant pleads guilty or nolo contendere and the offense to which the defendant is pleading is one for which automatic, mandatory driver's license suspension or revocation is required by law to be imposed (either by the court or by a separate agency), the plea will provide the basis for the suspension or revocation of the defendant's driver's license.

(d) **DNA Evidence Inquiry.** Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.

(e) **Acknowledgment by Defendant.** Before the trial judge accepts a guilty or nolo contendere plea, the judge must determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.

(f) **Proceedings of Record.** The proceedings at which a defendant pleads guilty or nolo contendere shall be of record.

(g) **Withdrawal of Plea Offer or Negotiation.** No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification.

(h) **Withdrawal of Plea When Judge Does Not Concur.** If the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn.

(i) **Evidence.** Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(j) **Prejudice.** Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

Amended Sept. 24, 1992; effective Jan. 1, 1993 (606 So.2d 227); Nov. 27, 1996; effective Jan. 1, 1997 (685 So.2d 1253); Sept. 1, 2005, effective Oct. 1, 2005 (911 So.2d 763); Sept. 21, 2006 (938 So.2d 978); March 29, 2007 (953 So.2d 513); Oct. 1, 2009 (20 So.3d 376); Nov. 19, 2009, effective Jan. 1, 2010 (26 So.3d 534).

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 7, 2012
RE: Rule 3.1, N.D.R.Ct., Pleadings

In January, the committee approved amendments to Rule 3.1, modifying longstanding language requiring parties to “attach” proof of service to documents presented for filing with new language requiring that proof of service “accompany” documents submitted for filing.

This amendment has created some degree of confusion and concern among the clerks of court, in part because the old requirement that proof of service be attached to filed documents was not being followed in all counties. The clerks have pointed out that in some cases, specifically small claims court matters, pleadings must be filed before they are served.

In its proposed amendments to N.D.R.Civ.P. 5, which are now pending before the court, the committee included language requiring proof of service to be filed with documents submitted for filing “unless otherwise authorized by rule or statute.” The committee did not include this language in Rule 3.1 because the intent of the changes to the rule was to modernize it, not to change it.

In order to address the concerns expressed by the clerks, proposed amendments to Rule 3.1 are attached that would insert language in the rule similar to the language the committee approved for inclusion in N.D.R.Civ.P. 5.

The committee may wish to consider whether to send the amendments to Rule 3.1, if approved, directly to the Court, given that similar amendments to N.D.R.Civ.P. 5 are now before it.

RULE 3.1. PLEADINGS

(a) Legibility and Numbering. All pleadings and other documents must be typewritten, printed, or reproduced and easily readable. Each sheet must be separately numbered. Pleadings and other documents filed with the court, except as otherwise permitted by the court, must be prepared on 8 1/2 x 11 inch white paper.

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

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

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

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

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

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

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

32 (i) Privacy Protection. Parties must follow privacy protection instructions in N.D.R.Ct.
33 3.4 when making filings with the court. Court personnel have no duty to review documents
34 for compliance with N.D.R.Ct. 3.4.

35 (j) Non-Conforming Documents.

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

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

40 EXPLANATORY NOTE

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

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

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

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

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

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

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

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

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

64 2012, pages 16-17; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April
65 26-27, 2007, page 31; September 22-23, 2005, pages 16-17; September 23-24, 2004, pages
66 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30, 2004, pages 3-8; September 16-17,
67 2003, pages 2-11; April 24-25, 2003, pages 6-12; January 29-30, 1998, page 22; September
68 29-30, 1994, pages 6-7.

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

70 Cross Reference: N.D.R. Civ.P. 5 (Service and Filing of Pleadings and Other Papers);
71 N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court); N.D.Sup.Ct.Admin.R.
72 41 (Access to Judicial Records).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service--When required.

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

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

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

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

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

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

and

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

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

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

22 it was seized.

23 (b) Service -- How made.

24 (1) Serving an attorney. If a party is represented by an attorney, service under this rule
25 must be made on the attorney unless the court orders service on the party. If an attorney is
26 providing limited representation under Rule 11(e), service must be made on the party and on
27 the attorney for matters within the scope of the limited representation.

28 (2) Service in general. A paper is served under this rule by:

29 (A) handing it to the person;

30 (B) leaving it:

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

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

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

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

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

42 (F) sending it by electronic means if the person consented in writing, in which event

43 service is complete on transmission, but is not effective if the serving party learns that it did
44 not reach the person to be served; or

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

46 (c) Serving numerous defendants.

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

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

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

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

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

56 (d) Filing.

57 (1) In general. Unless a statute, these rules, or court order provides otherwise, all
58 papers in an action must be filed with the clerk.

59 (2) Initiating pleading.

60 (A) The Summons and Complaint.

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

64 proof of service must be filed with the initiating pleading.

65 ~~(B)~~ (ii) The plaintiff must serve notice of filing the complaint or initiating pleading
66 on the defendant or respondent.

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

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

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

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

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

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

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

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

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

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

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

89 (4) Return of discovery materials.

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

92 (i) depositions;

93 (ii) interrogatories;

94 (iii) requests for admission;

95 (iv) requests for interrogatories;

96 (v) requests for production of documents; and

97 (vi) answers and responses to the above documents.

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

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

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

104 (6) Failure to comply. If a party fails to comply with this subdivision, the court, on
105 motion of any party or its own motion, may order the papers to be filed. If the order is not

106 obeyed, the court may order them to be regarded as stricken and their service to be
107 ineffective.

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

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

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

119 EXPLANATORY NOTE

120 Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988;
121 March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995;
122 March 1, 1998; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2009; March 1,
123 2011;_____.

124 Rule 5 applies to service of papers other than "process." In contrast, Rule 4 governs
125 civil jurisdiction and service of process. When a statute or rule requiring service does not
126 pertain to service of process, nor require personal service under Rule 4, nor specify how

127 service is to be made, service may be made as provided in Rule 5(b).

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

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

136 Paragraph (b)(2) was amended, effective March 1, 2009, to provide for service by
137 electronic means and to improve organization. Parties seeking to serve papers by electronic
138 means must consult N.D.Sup.Crt.Admin. Order 16 for electronic service instructions.

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

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

148 Subparagraph (d)(2)(A) was amended, effective _____, to require that proof
149 of service be provided and filed by a party seeking to file an initiating pleading. Under Rule
150 3, an action is commenced on service of the initiating pleading, not on filing. Unless a rule
151 specifically provides otherwise, service under Rule 4 must be accomplished before any
152 pleadings in an action may be filed.

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

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

159 Rule 5 was amended, effective March 1, 2011, in response to the December 1, 2007,
160 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
161 were changed to make the rule more easily understood and to make style and terminology
162 consistent throughout the rules.

163 Sources: Joint Procedure Committee Minutes of January 26-27, 2012, pages 13-16;
164 September 24-25, 2009, pages 12-13; April 24-25, 2008, pages 18-21; January 24, 2008,
165 pages 2-7; October 11-12, 2007, pages 20-27; April 26-27, 2007, pages 19-22; September
166 27-28, 2001, pages 11-12; April 30-May 1, 1998, page 3; January 29-30, 1998, page 18;
167 September 26-27, 1996, pages 16-17, 20; September 23-24, 1993, pages 19-20; April 29-30,
168 1993, pages 20-21; November 7-8, 1991, page 3; October 25-26, 1990, pages 10-12; April

169 20, 1989, page 2; December 3, 1987, page 11; May 21-22, 1987, pages 17-18; February 19-
170 20, 1987, page 4; September 18-19, 1986, page 8; November 30, 1984, pages 26-27; October
171 18, 1984, pages 8-11; November 29-30, 1979, page 2; September 20-21, 1979, pages 4-5;
172 Fed.R.Civ.P. 5.

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

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: September 10, 2012

RE: Order 16, N.D.Sup.Ct.Admin.O., Electronic Filing in the District Courts

The Supreme Court amended Administrative Order 16 effective July 1. The amendments consolidate the court's orders on district court electronic filing in one place. In addition, they make e-filing and e-service mandatory for attorneys in district court effective April 1, 2013.

The Chair has asked that the committee review the amendments to Order 16. In addition, several issues have been raised in the wake of the amendments that the committee may wish to discuss.

1. AO16 specifically authorizes attorneys and parties to electronically sign documents filed with the court. The Court Administrator has inquired whether court reporters may electronically sign transcripts. The Ward County State's Attorney has inquired whether judges have authority electronically sign orders and warrants. The Odyssey working group has reviewed this issue and decided that electronically signed documents should be accepted from court reporters and judges. An amendment is attached to extend the AO16 e-signature authorization to anyone who electronically files documents.

2. When a document is submitted for filing and service to Odyssey, it is reviewed for proper form by the clerk staff. Once approved, the document is e-filed and e-service is accomplished. This process can take minutes, hours or days depending on how busy the clerk staff is. If approved, a document is considered filed at the time it was received, but it is not electronically sent to the person it was served on until approved. So a document can

be in a queue at the court for days without the other party knowing it exists. On the other hand, if a document is not approved, it will be returned to the submitting party to be fixed, and it is not considered filed or served until it is re-submitted and approved. So, the submitting party could easily miss a deadline based on a review/approval delay.

AO 16 was amended to include a provision intended to help a party who encounters "technical issues" that delay filing of a document. Here is the text: "On a showing of good cause, the court may grant appropriate relief if electronic filing or electronic service was not completed due to technical problems." The committee may wish to discuss whether this provision needs to be expanded or amended so that parties can obtain relief for any problems related to the time lag that appears to be built into the Odyssey file and serve system.

3. Bill Lewis of the Grand Forks County Sheriff's Office has submitted a series of questions to the Court Administrator on electronic filing. These questions are attached. Some of them deal with electronic service of the summons and complaint or of subpoenas. Electronic service of these documents is not yet allowed. Another question, however, relates to whether electronic service on people who are "outside" of a case should be possible.

Mr. Lewis asks about the possibility of electronically serving a mental health order on the many persons who need to receive it — petitioner, doctor, treatment facility, etc. N.D.R.Civ.P. 4(m) provides: "If a statute requires service and does not specify a method of service, service must be made under this rule." N.D.C.C. ch. 25-03.1 requires service of the initial commitment petition but it does not specifically require formal service of subsequent orders on the nonparties who need to be given notice of these orders. Apparently, current practice is to mail copies of these orders out. The committee may wish to discuss whether it would be appropriate to provide in AO16 for electronic "service" of such orders on nonparties who consent to receive them by electronic means.

ORDER 16. ELECTRONIC FILING IN THE DISTRICT COURTS

A. Electronic Filing.

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

2. In any matter filed after April 1, 2013, all documents after the initiating pleadings must be filed electronically except for documents filed by self-represented litigants and prisoners. On a showing of good cause, an attorney may be granted leave of court to file paper documents. Initiating pleadings may be filed electronically in non-criminal cases.

3. A document filed electronically has the same legal effect as a paper document.

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

B. Filing Formats.

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

2. All paragraphs must be numbered in documents filed electronically. Reference to material in such documents must be to paragraph number, not page number.

C. Time of Filing.

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

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

25 3. Any required filing fee must be paid by credit card or debit card at the time the
26 document is filed.

27 D. Confidentiality. In documents prepared for filing with the court, information that
28 would otherwise be included in the document but required by N.D.R.Ct. 3.4 to be redacted
29 in court documents must be separately filed in a reference sheet (confidential information
30 form, see appendix) and may be included in those documents only by reference. Any
31 document not complying with this order is subject to N.D.R.Ct. 3.4(g).

32 E. Electronic Service.

33 1. A party who files a document electronically must serve the document by electronic
34 means if the recipient consents to accept documents served electronically. In any matter filed
35 after April 1, 2013, all documents after the initiating pleadings must be served electronically
36 through the Odyssey® system except for documents served on or by self-represented litigants
37 and prisoners. On a showing of good cause, an attorney may be granted leave of court to
38 serve paper documents or to be exempt from receiving electronic service.

39 2. Electronic service is not effective if the party making service learns that the
40 attempted service did not reach the person to be served.

41 3. After April 1, 2013, any party not exempt from electronic filing must designate an
42 e-mail address for accepting electronic service.

43 4. For purposes of computation of time, any document electronically served must be
44 treated as if it were mailed on the date of transmission.

45 F. Technical Issues; Relief. On a showing of good cause, the court may grant
46 appropriate relief if electronic filing or electronic service was not completed due to technical
47 problems.

48 G. Effective Date. This Order is effective March 1, 2006, and remains in effect until
49 further order of the Court.

50 EXPLANATORY NOTE

51 Adopted effective March 1, 2006. This order was amended, effective March 1, 2008;
52 March 1, 2009; August 1, 2010; March 1, 2011; July 1, 2012.

53 Order 16 was amended, effective July 2012, to incorporate the provisions of the Order
54 16 Addendum (Filing in the District Court where Odyssey(R) Electronic Filing is Available)
55 and Order 18 (Filing in Counties Using the Odyssey(R) Case Management System). The
56 Order 16 Addendum and Order 18 were repealed, effective July 1, 2012.

57 Sources: Joint Procedure Committee Minutes of April 29-30, 2010, page 21; April 24-
58 25, 2008, pages 12-16; October 11-12, 2007, pages 3-5; April 26-27, 2007, pages 16-18;
59 January 25, 2007, pages 15-16; Sept 23-24, 2004, pages 18-27.

Hagburg, Mike

From: Holewa, Sally
Sent: Monday, September 10, 2012 11:48 AM
To: Hagburg, Mike
Subject: FW: Inquiry to Information

From: Bill Lewis [mailto:bill.lewis@gfcounty.org]
Sent: Tuesday, September 04, 2012 5:19 AM
To: Holewa, Sally
Subject: RE: Inquiry to Information

I have a couple of more questions please.

Concerning Odyssey File & Serve functions.

Does this allow for documents filed with the Court to be served by E-mail at the same time thus not requiring service by Sheriff or Process Server? Example: A Treatment hearing is held. An Order for Less Restrictive Treatment is issued. The Order is filed electronically and served by E-mailed to the Doctor/s, Petitioner/s, treatment facilities, defendant, etc.? Those not having a valid E-mail would still require service by Sheriff or Process Server.?

Concerning Odyssey Service function only.

Will all electronically served documents be required to be served through this Odyssey function or may they be served, by file attachment, through standard E-mail service? Example: An Attorney has a Summons and Complaint to be served. He/she has not filed for a case number with the court. (We get these a lot) May the Attorney E-mail the documents directly to the defendant outside the Court's Odyssey system?

William Lewis
Work: 701-780-8280
Cell: 218-791-5608
bill.lewis@gfcounty.org

From: Holewa, Sally [SHolewa@ndcourts.gov]
Sent: Friday, August 31, 2012 4:23 PM
To: Bill Lewis
Subject: RE: Inquiry to Information

Bill,

I can answer some of your questions and referred some others to someone else. Please see the response below.

Sally A. Holewa
State Court Administrator
700 E. Boulevard, Mail Stop 160
Bismarck, ND 58505-0530
Phone: 701-328-4216

Fax: 701-328-2092

E-Mail: sholewa@ndcourts.gov

From: Bill Lewis [<mailto:bill.lewis@gfcounty.org>]

Sent: Friday, August 31, 2012 10:32 AM

To: Holewa, Sally

Subject: RE: Inquiry to Information

Administrative Order 16 - ELECTRONIC FILING IN THE DISTRICT COURTS

A. Electronic Filing.

When documents have been served, who is responsible for Electronically Filing/Updating the Odyssey system with the affidavit of service? Would it be the process server, the person requiring service of the document, or Clerk of Court? The person who would normally send the paper copy to the clerk is the one who is responsible for e-filing it.

Can there be an additional fee added for E-Filing an Affidavit of Service? The court does not charge any extra fees for e-filing. It is up to the Sheriff's department if you want to add extra fees on your end.

Is there an electronic way to notarize an electronic document and/or will certain electronic documents no longer require notary? I don't know the answer to this and have referred the question to our staff attorneys.

E. Electronic Service.

When will Electronic Service be added to RULE 4. PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE? The administrative order's effective date was March 1, 2006. Rule 4 had not been updated and I know of no Process Servers or Sheriff's Departments that were aware of an electronic service option. I have referred this to our staff attorney for the Joint Procedure Committee.

Can a document be served by Email directly from the originating agency/person to the person to be served? One example would be the States Attorney emailing a Subpoena in a mental health case to the doctor involved in the case. The States Attorney would file his own affidavit of service by Email. This would be similar to Certified Mail service. We have two functions in Odyssey for e-service. File & Serve allows you to electronically serve a document at the same time you submit it for filing with the clerk. Serve only allows you to electronically serve another party without filing anything with the clerk.

Who do I contact for changes to RULE 4? Mike Hagburg, staff attorney for Joint Procedure Committee. His email address is: mhagburg@ndcourts.gov or you can call him at 701-328-4216.

Thanks for your help

Bill

William Lewis

Work: 701-780-8280

Cell: 218-791-5608

bill.lewis@gfcounty.org

From: Holewa, Sally [SHolewa@ndcourts.gov]

Sent: Thursday, August 30, 2012 4:19 PM

To: Bill Lewis
Subject: FW: Inquiry to Information

You can send your question to me and if it is something my office can answer, I will route it to the correct person.

Sally A. Holewa
State Court Administrator
600 E. Boulevard, Mail Stop 160
Bismarck, ND 58505-0530
Phone: 701-328-4216
Fax: 701-328-2092
E-Mail: sholewa@ndcourts.gov

From: (SUP) Information
Sent: Thursday, August 30, 2012 3:59 PM
To: Holewa, Sally
Subject: FW: Inquiry to Information

From: Bill Lewis [<mailto:bill.lewis@gfcounty.org>]
Sent: Thursday, August 30, 2012 10:39 AM
To: (SUP) Information
Subject: Inquiry to Information

I was at N.D. Sup. Ct. Admin. Order 16 - Electronic Filing in the District Courts ([url http://www.ndcourts.gov/court/rules/Administrative/AO16.htm](http://www.ndcourts.gov/court/rules/Administrative/AO16.htm)) and I have this inquiry:

Who do I contact for clarification on these new rules?

Thanks
Bill
William Lewis
Deputy Sheriff
Grand Forks County

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 11, 2012
RE: Rule 801, N.D.R.Ev., Definitions

Form and style amendments to Rule 801 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The North Dakota rule has always differed from the federal rule in that it allows prior inconsistent statements to be used as substantive evidence in civil cases and, if the prior statement was made under oath, in criminal cases. This formulation has been retained and it differs from the federal rule because the federal rule requires that the prior statement be made under oath in all cases.

Additional language was added to the federal rule in 1997. This language is at the very end of the proposed rule and is highlighted. The federal rule was amended in response to a conspiracy case. The notes to the federal rule explain that the amendment is designed to provide "that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question." The committee may wish to discuss whether the 1997 federal language should be added to Rule 801.

The proposed amendments are attached.

1
2 RULE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM
3 HEARSAY

4 ~~The following definitions apply under this Article:~~

5 ~~(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal~~
6 ~~conduct of a person, if it is intended by the person as an assertion.~~

7 (a) Statement. "Statement" means a person's oral assertion, written assertion, or
8 nonverbal conduct, if the person intended it as an assertion.

9 ~~(b) Declarant. A "declarant" is a person who makes a statement.~~

10 (b) Declarant. "Declarant" means the person who made the statement.

11 ~~(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while~~
12 ~~testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.~~

13 (c) Hearsay. "Hearsay" means a statement that:

14 (1) the declarant does not make while testifying at the current trial or hearing; and

15 (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

16 ~~(d) Statements which are not hearsay. A statement is not hearsay if:~~

17 (d) Statements That Are Not Hearsay. A statement that meets the following
18 conditions is not hearsay:

19 ~~(1) Prior statement by witness. The declarant testifies at the trial or hearing and is~~
20 ~~subject to cross-examination concerning the statement, and the statement is (i) inconsistent~~
21 ~~with the declarant's testimony but, if offered in a criminal proceeding, was given under oath~~

22 ~~and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition,~~
23 ~~or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied~~
24 ~~charge against the declarant of recent fabrication or improper influence or motive, or (iii) one~~
25 ~~of identification of a person made after perceiving the person; or~~

26 (1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to
27 cross-examination about a prior statement, and the statement:

28 (A) is inconsistent with the declarant's testimony and, if offered in a criminal
29 proceeding, was given under penalty of perjury at a trial, hearing, or other proceeding or in
30 a deposition;

31 (B) is consistent with the declarant's testimony and is offered to rebut an express or
32 implied charge that the declarant recently fabricated it or acted from a recent improper
33 influence or motive in so testifying; or

34 (C) identifies a person as someone the declarant perceived earlier.

35 ~~(2) Admission by party-opponent. The statement is offered against a party and is (i)~~
36 ~~the party's own statement, in either an individual or a representative capacity, (ii) a statement~~
37 ~~of which the party has manifested an adoption or belief in its truth, (iii) a statement by a~~
38 ~~person authorized by the party to make a statement concerning the subject, (iv) a statement~~
39 ~~by the party's agent or servant concerning a matter within the scope of the agency or~~
40 ~~employment, made during the existence of the relationship, or (v) a statement by a co-~~
41 ~~conspirator of a party during the course and in furtherance of the conspiracy.~~

42 (2) An Opposing Party's Statement. The statement is offered against an opposing party

43 and:

44 (A) was made by the party in an individual or representative capacity;

45 (B) is one the party manifested that it adopted or believed to be true;

46 (C) was made by a person whom the party authorized to make a statement on the
47 subject;

48 (D) was made by the party's agent or employee on a matter within the scope of that
49 relationship and while it existed; or

50 (E) was made by the party's coconspirator during and in furtherance of the conspiracy.

51 The statement must be considered but does not by itself establish the declarant's
52 authority under (C); the existence or scope of the relationship under (D); or the existence of
53 the conspiracy or participation in it under (E).

54 EXPLANATORY NOTE

55 Rule 801 was amended, effective July 1, 1981; March 1, 1990; _____.

56 The definition of hearsay contained in this rule is dependent, in part, upon the
57 definition of a statement contained in subdivision (a). In this regard, it should be noted that
58 nonverbal conduct, to be a statement, and thus hearsay, must be intended by the party to be
59 an assertion. Nonassertive conduct is not a statement and therefore not objectionable as
60 hearsay. Thus, pointing out a suspect in response to the question, "Who did it?" is assertive
61 conduct and, if it otherwise falls within the definition, hearsay. Conversely, the act of
62 opening an umbrella is not intended to be assertive, is not hearsay, and may be offered as
63 substantive evidence that rain was falling at a certain place and time.

64 Hearsay is defined in subdivision (c) as a statement made by a declarant, other than
65 one made at the trial or hearing offered to prove the truth of the matter asserted. This
66 definition is of two distinct parts. The first is that the statement is one not made at the trial
67 in which it is offered. The second is that the statement must be offered to prove the truth of
68 its content, i.e., the matter asserted in the statement. If offered for other purposes, e.g., to
69 show that the declarant in fact made a statement – any statement – and, thus, was conscious
70 at a particular time, the statement is not objectionable as hearsay. ~~See e.g., Chester v.~~
71 ~~Einaron, 76 N.D. 205, 34 N.W.2d 418 (1948).~~ The reason for this requirement is that it is
72 only when a statement is offered to prove the truth of the matter asserted that there is a lack
73 of the safeguards used to insure credibility of the declarant. It is this lack of an oath and
74 cross-examination of the declarant that warrants the exclusion of evidence as hearsay.

75 ~~It should be noted that subdivision (c) does not define as hearsay statements made out~~
76 ~~of the presence of a party against whom offered. The presence or absence of a party is not,~~
77 ~~nor has it ever been, a criterion by which hearsay is defined. It should be discarded as a~~
78 ~~"remarkably persistent bit of courthouse folklore." McCormick on Evidence, § 246 at 586~~
79 ~~(2d ed. 1972).~~

80 Subdivision (d) exempts from the hearsay definition, and allows as substantive
81 evidence, two types of statements which are technically hearsay. The reason for the
82 exemptions are that the dangers normally attendant to receiving hearsay statements are at
83 least partially removed in the exempted situations. In subdivision paragraph (d)(1), the
84 opportunity to cross-examine the declarant is present. In subdivision paragraph (d)(2), the

85 nature of the adversary system strengthens the reliability of ~~an admission by a party-opponent~~
86 a statement by an opposing party.

87 Subdivision Paragraph (d)(1)(i) follows Rule 801, Uniform Rules of Evidence,
88 allowing prior inconsistent statements always to be used as substantive evidence in civil
89 cases and, if the prior statement was made under oath in criminal cases. This varies from
90 Rule 801 of the Federal Rules of Evidence, which requires that the prior statement be made
91 under oath in all cases. See the discussion of Rule 801, Federal Rules of Evidence, in State
92 v. Igoe, 206 N.W.2d 291 (N.D. 1973).

93 ~~Subdivision (d)(1)(iii) Subparagraph (d)(1)(C)~~ was added, [effective July 1, 1981],
94 to comply with the federal rule. This provision was omitted from the original promulgation
95 of the Federal Rules of Evidence but was added soon thereafter.

96 ~~Subdivision (d)(2), for the reasons stated above, exempts from the hearsay definition~~
97 ~~admissions of a party-opponent. This comports, generally, with the philosophy expressed by~~
98 ~~the North Dakota Supreme Court. See the discussion of the comparable federal rules in Starr~~
99 ~~v. Morsette, 236 N.W.2d 183 (N.D. 1975).~~

100 Rule 801 was amended, effective March 1, 1990. The amendment is technical in
101 nature and no substantive change is intended.

102 Rule 801 was amended, effective _____, in response to the December 1,
103 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
104 were changed to make the rule more easily understood and to make style and terminology
105 consistent throughout the rules. There is no intent to change any result in any ruling on

106 evidence admissibility.

107 Sources: Joint Procedure Committee Minutes: of _____; March 24-25,
108 1988, pages 15-16; December 3, 1987, pages 6-7 and 15; May 21-22, 1987, pages 6-7;
109 February 19-20, 1987, pages 10-17; September 18-19, 1980, pages 18-20; March 27-28,
110 1980, pages 11-12; January 29, 1976, page 18; October 1, 1975, page 6; Rule Fed.R.Ev. 801,
111 Federal Rules of Evidence; Rule 801, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 801. Definitions That Apply to This Article; Exclusions from Hearsay

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

(b) Declarant. "Declarant" means the person who made the statement.

(c) Hearsay. "Hearsay" means a statement that:

- (1) the declarant does not make while testifying at the current trial or hearing; and
- (2) a party offers in evidence to prove the truth of the matter asserted in the statement.

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

(1) *A Declarant-Witness's Prior Statement*. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

(2) *An Opposing Party's Statement*. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed;

or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1938; Oct. 16, 1975, P.L. 94-113, § 1, 89 Stat. 576; Oct. 1, 1987; Dec. 1, 1997.)

(As amended Dec. 1, 2011.)

Amendments:

1975. Act Oct. 16, 1975 (effective on the fifteenth day after the date of enactment), in subsec. (d)(1), added cl (C).

Notes of Advisory Committee on Rules. Subdivision (a). The definition of "statement" assumes importance because the term is used in the definition of hearsay in subdivision (c). The effect of the definition of "statement" is to exclude from the operation of the hearsay rule all evidence of conduct, verbal or nonverbal, not intended as an assertion. The key to the definition is that nothing is an assertion unless intended to be one.

It can scarcely be doubted that an assertion made in words is intended by the declarant to be an assertion. Hence verbal assertions readily fall into the category of "statement." Whether nonverbal conduct should be regarded as a statement for purposes of defining hearsay requires further consideration. Some nonverbal conduct, such as the act of pointing to identify a suspect in a lineup, is clearly the equivalent of words, assertive in nature, and to be regarded as a statement. Other nonverbal conduct, however, may be offered as evidence that the person acted as he did because of his belief in the existence of the condition sought to be proved, from which belief the existence of the condition may be inferred. This sequence is, arguably, in effect an assertion of the existence of the condition and hence properly includable within the hearsay concept. See Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 *Harv.L. Rev.* 177, 214, 217 (1948), and the elaboration in Finman, *Implied Assertions as Hearsay: Some Criticisms of*

the Uniform Rules of Evidence, 14 *Stan.L.Rev.* 682 (1962). Admittedly evidence of this character is untested with respect to the perception, memory, and narration (or their equivalents) of the actor, but the Advisory Committee is of the view that these dangers are minimal in the absence of an intent to assert and do not justify the loss of the evidence on hearsay grounds. No class of evidence is free of the possibility of fabrication, but the likelihood is less with nonverbal than with assertive verbal conduct. The situations giving rise to the nonverbal conduct are such as virtually to eliminate questions of sincerity. Motivation, the nature of the conduct, and the presence or absence of reliance will bear heavily upon the weight to be given the evidence. Falknor, *The "Hear-Say" Rule as a "See-Do" Rule: Evidence of Conduct*, 33 *Rocky Mt.L.Rev.* 133 (1961). Similar considerations govern nonassertive verbal conduct and verbal conduct which is assertive but offered as a basis for inferring something other than the matter asserted, also excluded from the definition of hearsay by the language of subdivision (c).

When evidence of conduct is offered on the theory that it is not a statement, and hence not hearsay, a preliminary determination will be required to determine whether an assertion is intended. The rule is so worded as to place the burden upon the party claiming that the intention existed; ambiguous and doubtful cases will be resolved against him and in favor of admissibility. The determination involves no greater difficulty than many other preliminary questions of fact. Maguire, *The Hearsay System: Around and Through the Thicket*, 14 *Vand.L.Rev.* 741, 765-767 (1961).

For similar approaches, see Uniform Rule 62(1); *California Evidence Code* §§ 225, 1200; Kansas Code of Civil Procedure § 60-459(a); New Jersey Evidence Rule 62(1)

Subdivision (c). The definition follows along familiar lines in including only statements offered to prove the truth of the matter asserted. McCormick § 225; 5 *Wigmore* § 1361, 6 *id.* § 1766. If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay. *Emich Motors Corp. v. General Motors Corp.*, 181 *F.2d* 70 (7th Cir. 1950), *rev'd* on other grounds 340 *U.S.* 558, 71 *S.Ct.* 408, 95 *L.Ed.* 534, letters of complaint from customers offered as a reason for cancellation of dealer's franchise, to rebut contention that franchise was revoked for refusal to finance sales through affiliated finance company. The effect is to exclude from hearsay the entire category of "verbal acts" and "verbal parts of an act," in which the statement itself affects the legal rights of the parties or is a circumstance bearing on conduct affecting their rights.

The definition of hearsay must, of course, be read with reference to the definition of statement set forth in subdivision (a).

Testimony given by a witness in the course of court proceedings is excluded since there is compliance with all the ideal conditions for testifying.

Subdivision (d). Several types of statements which would otherwise literally fall within the definition are expressly excluded from it:

(1) Prior statement by witness. Considerable controversy has attended the question whether a prior out-of-court statement by a person now available for cross-examination concerning it, under oath and in the presence of the trier of fact, should be classed as hearsay. If the witness admits on the stand that he made the statement and that it was true, he adopts the statement and there is no hearsay problem. The hearsay problem arises when the witness on the stand denies having made the statement or admits having made it but denies its truth. The argument in favor of treating these latter statements as hearsay is based upon the ground that the conditions of oath, cross-examination, and demeanor observation did not prevail at the time the statement was made and cannot adequately be supplied by the later examination. The logic of the situation is troublesome. So far as concerns the oath, its mere presence has never been regarded as sufficient to remove a statement from the hearsay category; and it receives much less emphasis than cross-examination as a truth-compelling device. While strong expressions are found to the effect that no conviction can be had or important right taken away on the basis of statements not made under fear of prosecution for perjury, *Bridges v. Wixon*, 326 *U.S.* 135, 65 *S.Ct.* 1443, 89 *L.Ed.* 2103 (1945), the fact is that, of the many common law exceptions to the hearsay rule, only that for reported testimony has required the statement to have been made under oath. Nor is it satisfactorily explained why cross-examination cannot be conducted subsequently with success. The decisions contending most vigorously for its inadequacy in fact demonstrate quite thorough exploration of the weaknesses and doubts attending the earlier statement. *State v. Saporen*, 205 *Minn.* 358, 285 *N.W.* 898 (1939); *Ruhala v. Roby*, 379 *Mich.* 102, 150 *N.W.2d* 146 (1967); *People v. Johnson*, 68 *Cal.2d* 646, 68 *Cal.Rptr.* 599, 441 *P.2d* 111 (1968). In respect to demeanor, as Judge Learned Hand observed in *Di Carlo v. United States*, 6 *F.2d* 364 (2d Cir. 1925), when the jury decides that the truth is not what the witness says now, but what he said before, they are still deciding from what they see and hear in court. The bulk of the case law nevertheless has been against allowing prior statements of witnesses to be used generally as substantive evidence. Most of the writers and Uniform Rule 63(1) have taken the opposite position.

The position taken by the Advisory Committee in formulating this part of the rule is founded upon an unwillingness to countenance the general use of prior prepared statements as substantive evidence, but with a recognition that

particular circumstances call for a contrary result. The judgment is one more of experience than of logic. The rule requires in each instance, as a general safeguard, that the declarant actually testify as a witness, and it then enumerates three situations in which the statement is excepted from the category of hearsay. Compare Uniform Rule 63(1) which allows any out-of-court statement of a declarant who is present at the trial and available for cross-examination.

(A) Prior inconsistent statements traditionally have been admissible to impeach but not as substantive evidence. Under the rule they are substantive evidence. As has been said by the California Law Revision Commission with respect to a similar provision:

"Section 1235 admits inconsistent statements of witnesses because the dangers against which the hearsay rule is designed to protect are largely nonexistent. The declarant is in court and may be examined and cross-examined in regard to his statements and their subject matter. In many cases, the inconsistent statement is more likely to be true than the testimony of the witness at the trial because it was made nearer in time to the matter to which it relates and is less likely to be influenced by the controversy that gave rise to the litigation. The trier of fact has the declarant before it and can observe his demeanor and the nature of his testimony as he denies or tries to explain away the inconsistency. Hence, it is in as good a position to determine the truth or falsity of the prior statement as it is to determine the truth or falsity of the inconsistent testimony given in court. Moreover, Section 1235 will provide a party with desirable protection against the 'turncoat' witness who changes his story on the stand and deprives the party calling him of evidence essential to his case." Comment, *California Evidence Code* § 1235. See also McCormick § 39. The Advisory Committee finds these views more convincing than those expressed in *People v. Johnson*, 68 Cal.2d 646, 68 Cal.Rptr. 599, 441 P.2d 111 (1968). The constitutionality of the Advisory Committee's view was upheld in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970). Moreover, the requirement that the statement be inconsistent with the testimony given assures a thorough exploration of both versions while the witness is on the stand and bars any general and indiscriminate use of previously prepared statements.

(B) Prior consistent statements traditionally have been admissible to rebut charges of recent fabrication or improper influence or motive but not as substantive evidence. Under the rule they are substantive evidence. The prior statement is consistent with the testimony given on the stand, and, if the opposite party wishes to open the door for its admission in evidence, no sound reason is apparent why it should not be received generally.

(C) The admission of evidence of identification finds substantial support, although it falls beyond a doubt in the category of prior out-of-court statements. *Illustrative are People v. Gould*, 54 Cal.2d 621, 7 Cal.Rptr. 273, 354 P.2d 865 (1960); *Judy v. State*, 218 Md. 168, 146 A.2d 29 (1958); *State v. Simmons*, 63 Wash.2d 17, 385 P.2d 389 (1963); *California Evidence Code* § 1238; New Jersey Evidence Rule 63(1)(c); N.Y. Code of Criminal Procedure § 393-b. Further cases are found in 4 Wigmore § 1130. The basis is the generally unsatisfactory and inconclusive nature of courtroom identifications as compared with those made at an earlier time under less suggestive conditions. The Supreme Court considered the admissibility of evidence of prior identification in *Gilbert v. California*, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967). Exclusion of lineup identification was held to be required because the accused did not then have the assistance of counsel. Significantly, the Court carefully refrained from placing its decision on the ground that testimony as to the making of a prior out-of-court identification ("That's the man") violated either the hearsay rule or the right of confrontation because not made under oath, subject to immediate cross-examination, in the presence of the trier. Instead the Court observed:

"There is a split among the States concerning the admissibility of prior extra-judicial identifications, as independent evidence of identity, both by the witness and third parties present at the prior identification. See 71 ALR2d 449. It has been held that the prior identification is hearsay, and, when admitted through the testimony of the identifier, is merely a prior consistent statement. The recent trend, however, is to admit the prior identification under the exception that admits as substantive evidence a prior communication by a witness who is available for cross-examination at the trial. See 5 ALR2d Later Case Service 1225-1228. . . ." 388 U.S. at 272, n. 3, 87 S.Ct. at 1956.

(2) Admissions. Admissions by a party-opponent are excluded from the category of hearsay on the theory that their admissibility in evidence is the result of the adversary system rather than satisfaction of the conditions of the hearsay rule. Strahorn, A Reconsideration of the Hearsay Rule and Admissions, 85 U.Pa.L.Rev. 484, 564 (1937); Morgan, Basic Problems of Evidence 265 (1962); 4 Wigmore § 1048. No guarantee of trustworthiness is required in the case of an admission. The freedom which admissions have enjoyed from technical demands of searching for an assurance of trustworthiness in some against-interest circumstance, and from the restrictive influences of the opinion rule and the rule requiring firsthand knowledge, when taken with the apparently prevalent satisfaction with the results, calls for generous treatment of this avenue to admissibility.

The rule specifies five categories of statements for which the responsibility of a party is considered sufficient to justify reception in evidence against him:

(A) A party's own statement is the classic example of an admission. If he has a representative capacity and the statement is offered against him in that capacity, no inquiry whether he was acting in the representative capacity in making the statement is required; the statement need only be relevant to represent affairs. To the same effect in *California Evidence Code* § 1220. Compare Uniform Rule 63(7), requiring a statement to be made in a representative capacity to be admissible against a party in a representative capacity.

(B) Under established principles an admission may be made by adopting or acquiescing in the statement of another. While knowledge of contents would ordinarily be essential, this is not inevitably so: "X is a reliable person and knows what he is talking about." See McCormick § 246, p. 527, n. 15. Adoption or acquiescence may be manifested in any appropriate manner. When silence is relied upon, the theory is that the person would, under the circumstances, protest the statement made in his presence, if untrue. The decision in each case calls for an evaluation in terms of probable human behavior. In civil cases, the results have generally been satisfactory. In criminal cases, however, troublesome questions have been raised by decisions holding that failure to deny is an admission: the inference is a fairly weak one, to begin with; silence may be motivated by advice of counsel or realization that "anything you say may be used against you"; unusual opportunity is afforded to manufacture evidence; and encroachment upon the privilege against self-incrimination seems inescapably to be involved. However, recent decisions of the Supreme Court relating to custodial interrogation and the right to counsel appear to resolve these difficulties. Hence the rule contains no special provisions concerning failure to deny in criminal cases.

(C) No authority is required for the general proposition that a statement authorized by a party to be made should have the status of an admission by the party. However, the question arises whether only statements to third persons should be so regarded, to the exclusion of statements by the agent to the principal. The rule is phrased broadly so as to encompass both. While it may be argued that the agent authorized to make statements to his principal does not speak for him, Morgan, *Basic Problems of Evidence* 273 (1962), communication to an outsider has not generally been thought to be an essential characteristic of an admission. Thus a party's books or records are usable against him, without regard to any intent to disclose to third persons. 5 Wigmore § 1557. See also McCormick § 78, pp. 159-161. In accord is New Jersey Evidence Rule 63(8)(a). Cf. Uniform Rule 63(8)(a) and *California Evidence Code* § 1222 which limit status as an admission in this regard to statements authorized by the party to be made "for" him, which is perhaps an ambiguous limitation to statements to third persons. Falknor, *Vicarious Admissions and the Uniform Rules*, 14 *Vand.L.Rev.* 855, 860-861 (1961).

(D) The tradition has been to test the admissibility of statements by agents, as admissions, by applying the usual test of agency. Was the admission made by the agent acting in the scope of his employment? Since few principals employ agents for the purpose of making damaging statements, the usual result was exclusion of the statement. Dissatisfaction with this loss of valuable and helpful evidence has been increasing. A substantial trend favors admitting statements related to a matter within the scope of the agency or employment. *Grayson v. Williams*, 256 *F.2d* 61 (10th Cir. 1958); *Koninklijke Luchtvaart Maatschappij N.V. KLM Royal Dutch Airlines v. Tuller*, 110 *U.S.App.D.C.* 282, 292 *F.2d* 775, 784 (1961); *Martin v. Savage Truck Lines, Inc.*, 121 *F.Supp.* 417 (D.D.C. 1054), and numerous state court decisions collected in 4 Wigmore, 1964 *Supp.*, pp. 66-73, with comments by the editor that the statements should have been excluded as not within scope of agency. For the traditional view see *Northern Oil Co. v. Socony Mobile Oil Co.*, 347 *F.2d* 81, 85 (2d Cir. 1965) and cases cited therein. Similar provisions are found in Uniform Rule 63(9)(a), Kansas Code of Civil Procedure § 60-460(i)(1), and New Jersey Evidence Rule 63(9)(a).

(E) The limitation upon the admissibility of statements of co-conspirators to those made "during the course and in furtherance of the conspiracy" is in the accepted pattern. While the broadened view of agency taken in item (iv) might suggest wider admissibility of statements of co-conspirators, the agency theory of conspiracy is at best a fiction and ought not to serve as a basis for admissibility beyond that already established. See Levie, *Hearsay and Conspiracy*, 52 *Mich.L.Rev.* 1159 (1954); Comment, 25 *U.Chi.L.Rev.* 530 (1958). The rule is consistent with the position of the Supreme Court in denying admissibility to statements made after the objectives of the conspiracy have either failed or been achieved. *Krulewitsch v. United States*, 336 *U.S.* 440, 69 *S.Ct.* 716, 93 *L.Ed.* 790 (1949); *Wong Sun v. United States*, 371 *U.S.* 471, 490, 83 *S.Ct.* 407, 9 *L.Ed.2d* 441 (1963). For similarly limited provisions see *California Evidence Code* § 1223 and New Jersey Rule 63(9)(b). Cf. Uniform Rule 63(9)(b).

Notes of Committee on the Judiciary, House Report No. 93-650. Present federal law, except in the Second Circuit, permits the use of prior inconsistent statements of a witness for impeachment only. Rule 801(d)(1) as proposed by the Court would have permitted all such statements to be admissible as substantive evidence, an approach followed by a small but growing number of State jurisdictions and recently held constitutional in *California v. Green*, 399 *U.S.* 149 (1970). Although there was some support expressed for the Court Rule, based largely on the need to counteract the effect of witness intimidation in criminal cases, the Committee decided to adopt a compromise version of the Rule similar to the position of the Second Circuit. The Rule as amended draws a distinction between types of prior

inconsistent statements (other than statements of identification of a person made after perceiving him which are currently admissible, see *United States v. Anderson*, 406 F.2d 719, 720 (4th Cir.), cert. denied, 395 U.S. 967 (1969)) and allows only those made while the declarant was subject to cross-examination at a trial or hearing or in a deposition, to be admissible for their truth. Compare *United States v. DeSisto*, 329 F.2d 929 (2nd Cir.), cert. denied, 377 U.S. 979 (1964); *United States v. Cunningham*, 446 F.2d 194 (2nd Cir. 1971) (restricting the admissibility of prior inconsistent statements as substantive evidence to those made under oath in a formal proceeding, but not requiring that there have been an opportunity for cross-examination). The rationale for the Committee's decision is that (1) unlike in most other situations involving unsworn or oral statements, there can be no dispute as to whether the prior statement was made; and (2) the context of a formal proceeding, an oath, and the opportunity for cross-examination provide firm additional assurances of the reliability of the prior statements.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. Rule 801 defines what is and what is not hearsay for the purpose of admitting a prior statement as substantive evidence. A prior statement of a witness at a trial or hearing which is inconsistent with his testimony is, of course, always admissible for the purpose of impeaching the witness' credibility.

As submitted by the Supreme Court, subdivision (d)(1)(A) made admissible as substantive evidence the prior statement of a witness inconsistent with his present testimony.

The House severely limited the admissibility of prior inconsistent statements by adding a requirement that the prior statement must have been subject to cross-examination, thus precluding even the use of grand jury statements. The requirement that the prior statement must have been subject to cross-examination appears unnecessary since this rule comes into play only when the witness testifies in the present trial. At that time, he is on the stand and can explain an earlier position and be cross-examined as to both.

The requirement that the statement be under oath also appears unnecessary. Notwithstanding the absence of an oath contemporaneous with the statement, the witness, when on the stand, qualifying or denying the prior statement, is under oath. In any event, of all the many recognized exceptions to the hearsay rule, only one (former testimony) requires that the out-of-court statement have been made under oath. With respect to the lack of evidence of the demeanor of the witness at the time of the prior statement, it would be difficult to improve upon Judge Learned Hand's observation that when the jury decides that the truth is not what the witness says now but what he said before, they are still deciding from what they see and hear in court [*Di Carlo v. U.S.*, 6 F.2d 364 (2d Cir. 1925)].

The rule as submitted by the Court has positive advantages. The prior statement was made nearer in time to the events, when memory was fresher and intervening influences had not been brought into play. A realistic method is provided for dealing with the turncoat witness who changes his story on the stand [see Comment, *California Evidence Code* § 1235; McCormick, *Evidence*, § 38 (2nd ed. 1972)].

New Jersey, California, and Utah have adopted a rule similar to this one; and Nevada, New Mexico, and Wisconsin have adopted the identical Federal rule.

For all of these reasons, we think the House amendment should be rejected and the rule as submitted by the Supreme Court reinstated. [It would appear that some of the opposition to this Rule is based on a concern that a person could be convicted solely upon evidence admissible under this Rule. The Rule, however, is not addressed to the question of the sufficiency of evidence to send a case to the jury, but merely as to its admissibility. Factual circumstances could well arise where, if this were the sole evidence, dismissal would be appropriate].

As submitted by the Supreme Court and as passed by the House, subdivision (d)(1)(c) of rule 801 made admissible the prior statement identifying a person made after perceiving him. The committee decided to delete this provision because of the concern that a person could be convicted solely upon evidence admissible under this subdivision.

The House approved the long-accepted rule that "a statement by a coconspirator of a party during the course and in furtherance of the conspiracy" is not hearsay as it was submitted by the Supreme Court. While the rule refers to a coconspirator, it is this committee's understanding that the rule is meant to carry forward the universally accepted doctrine that a joint venturer is considered as a coconspirator for the purposes of this rule even though no conspiracy has been charged. *United States v. Rinaldi*, 393 F.2d 97, 99 (2d Cir.), cert. denied 393 U.S. 913 (1968); *United States v. Spencer*, 415 F.2d 1301, 1304 (7th Cir. 1969).

Notes of Conference Committee, House Report No. 93-1597. Rule 801 supplies some basic definitions for the rules of evidence that deal with hearsay. Rule 801(d)(1) defines certain statements as not hearsay. The Senate amendments make two changes in it.

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and if the statement is inconsistent with his testimony and was given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition. The Senate amendment

drops the requirement that the prior statement be given under oath subject to cross-examination and subject to the penalty of perjury at a trial or hearing or in a deposition.

The Conference adopts the Senate amendment with an amendment, so that the rule now requires that the prior inconsistent statement be given under oath subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a deposition. The rule as adopted covers statements before a grand jury. Prior inconsistent statements may, of course, be used for impeaching the credibility of a witness. When the prior inconsistent statement is one made by a defendant in a criminal case, it is covered by Rule 801(d)(2).

The House bill provides that a statement is not hearsay if the declarant testifies and is subject to cross-examination concerning the statement and the statement is one of identification of a person made after perceiving him. The Senate amendment eliminated this provision.

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 1997 amendments. Rule 801(d)(2) has been amended in order to respond to three issues raised by *Bourjaily v. United States*, 483 U.S. 171 (1987). First, the amendment codifies the holding in *Bourjaily* by stating expressly that a court shall consider the contents of a coconspirator's statement in determining "the existence of the conspiracy and the participation therein of the declarant and the party against whom the statement is offered." According to *Bourjaily*, Rule 104(a) requires these preliminary questions to be established by a preponderance of the evidence.

Second, the amendment resolves an issue on which the Court had reserved decision. It provides that the contents of the declarant's statement do not alone suffice to establish a conspiracy in which the declarant and the defendant participated. The court must consider in addition the circumstances surrounding the statement, such as the identity of the speaker, the context in which the statement was made, or evidence corroborating the contents of the statement in making its determination as to each preliminary question. This amendment is in accordance with existing practice. Every court of appeals that has resolved this issue requires some evidence in addition to the contents of the statement. See, e.g., *United States v. Beckham*, 968 F.2d 47, 51 (D.C. Cir. 1992); *United States v. Sepulveda*, 15 F.3d 1161, 1181-82 (1st Cir. 1993), cert. denied, 114 S.Ct. 2714 (1994); *United States v. Daly*, 842 F.2d 1380, 1386 (2d Cir.), cert. denied, 488 U.S. 821 (1988); *United States v. Clark*, 18 F.3d 1337, 1341-42 (6th Cir.), cert. denied, 115 S.Ct. 152 (1994); *United States v. Zambrana*, 841 F.2d 1320, 1344-45 (7th Cir. 1988); *United States v. Silverman*, 861 F.2d 571, 577 (9th Cir. 1988); *United States v. Gordon*, 844 F.2d 1397, 1402 (9th Cir. 1988); *United States v. Hernandez*, 829 F.2d 988, 993 (10th Cir. 1987), cert. denied, 485 U.S. 1013 (1988); *United States v. Byrom*, 910 F.2d 725, 736 (11th Cir. 1990).

Third, the amendment extends the reasoning of *Bourjaily* to statements offered under subdivisions (C) and (D) of Rule 801(d)(2). In *Bourjaily*, the Court rejected treating foundational facts pursuant to the law of agency in favor of an evidentiary approach governed by Rule 104(a). The Advisory Committee believes it appropriate to treat analogously preliminary questions relating to the declarant's authority under subdivision (C), and the agency or employment relationship and scope thereof under subdivision (D).

Notes of Advisory Committee on 2011 amendments. The language of Rule 801 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.

Statements falling under the hearsay exclusion provided by Rule 801(d)(2) are no longer referred to as "admissions" in the title to the subdivision. The term "admissions" is confusing because not all statements covered by the exclusion are admissions in the colloquial sense--a statement can be within the exclusion even if it "admitted" nothing and was not against the party's interest when made. The term "admissions" also raises confusion in comparison with the Rule 804(b)(3) exception for declarations against interest. No change in application of the exclusion is intended.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 11, 2012
RE: Rule 802, N.D.R.Ev., Hearsay Rule

Form and style amendments to Rule 802 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposed amendments are attached.

RULE 802. THE RULE AGAINST HEARSAY RULE

~~Hearsay is not admissible except as provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.~~

Hearsay is not admissible unless any of the following provides otherwise:

(a) a statute;

(b) these rules; or

(c) other rules prescribed by the North Dakota Supreme Court.

EXPLANATORY NOTE

Rule 802 was amended, effective _____.

Rule 802 states the general rule excluding the admissibility of hearsay statements. Exception is made for those cases in which statutes or other rules allow the use of hearsay evidence.

Rule 802 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____; January 29, 1976, page 18; October 1, 1975, page 7. ~~Rule Fed.R.Ev. 802, Federal Rules of Evidence;~~ Rule 802, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 802. The Rule Against Hearsay

Hearsay is not admissible unless any of the following provides otherwise:

- . a federal statute;
- . these rules; or
- . other rules prescribed by the Supreme Court.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1939.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The provision excepting from the operation of the rule hearsay which is made admissible by other rules adopted by the Supreme Court or by Act of Congress continues the admissibility thereunder of hearsay which would not qualify under these Evidence Rules. The following examples illustrate the working of the exception:

Federal Rules of Civil Procedure

- Rule 4(g): proof of service by affidavit.
- Rule 32: admissibility of depositions.
- Rule 43(e): affidavits when motion based on facts not appearing of record.
- Rule 56: affidavits in summary judgment proceedings.
- Rule 65(b): showing by affidavit for temporary restraining order.

Federal Rules of Criminal Procedure

- Rule 4(a): affidavits to show grounds for issuing warrants.
- Rule 12(b)(4): affidavits to determine issues of fact in connection with motions.

Acts of Congress

10 U.S.C. § 7730: affidavits of unavailable witnesses in actions for damages caused by vessel in naval service, or towage or salvage of same, when taking of testimony or bringing of action delayed or stayed on security grounds.

29 U.S.C. § 161(4): affidavit as proof of service in NLRB proceedings.

38 U.S.C. § 5206: affidavit as proof of posting notice of sale of unclaimed property by Veterans Administration.

Notes of Advisory Committee on 2011 amendments. The language of Rule 802 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: September 11, 2012

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

Form and style amendments to Rule 803 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Paragraph (6) of the proposed amendments refers to “a certification that complies with Rule 902(11) or (12) or with a statute permitting certification.” This is new language and this type of certification is a new addition to Rule 902.

The proposed amendments are attached.

1
2 ~~RULE 803. HEARSAY EXCEPTIONS, AVAILABILITY OF DECLARANT~~

3 ~~IMMATERIAL EXCEPTIONS TO THE RULE AGAINST HEARSAY –~~
4 ~~REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS~~

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

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

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

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

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

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

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

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

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

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

32 (4) Statement Made for Medical Diagnosis or Treatment. A statement that:
33 (A) is made for, and is reasonably pertinent to, medical diagnosis or treatment; and
34 (B) describes medical history; past or present symptoms or sensations; their inception;
35 or their general cause.

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

42 (5) Recorded Recollection. A record that:

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

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

47 (C) accurately reflects the witness's knowledge.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

83 ~~(8) Public records and reports. Records, reports, statements, or data compilations, in~~
84 ~~any form, of public offices or agencies, setting forth (i) the activities of the office or agency,~~

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

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

99 (A) it sets out:

100 (i) the office's activities;

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

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

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

106 trustworthiness.

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

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

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

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

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

127 certification is admitted to prove that:

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

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

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

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

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

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

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

147 (B) attesting that the person performed a marriage or similar ceremony or

148 administered a sacrament; and

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

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

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

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

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

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

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

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

168 ~~(15) Statements in documents affecting an interest in property. A statement contained~~

169 ~~in a document purporting to establish or affect an interest in property if the matter stated was~~
170 ~~relevant to the purpose of the document, unless dealings with the property since the~~
171 ~~document was made have been inconsistent with the truth of the statement or the purport of~~
172 ~~the document.~~

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

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

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

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

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

187 ~~(18) Learned treatises. To the extent called to the attention of an expert witness upon~~
188 ~~cross-examination or relied upon by the expert witness in direct examination, statements~~
189 ~~contained in published treatises, periodicals or pamphlets on a subject of history, medicine;~~

190 ~~or other science or art, established as a reliable authority by the testimony or admission of the~~
191 ~~witness or by other expert testimony or by judicial notice. If admitted, the statements may be~~
192 ~~read into evidence but may not be received as exhibits.~~

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

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

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

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

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

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

210 ~~(20) Reputation concerning boundaries or general history. Reputation in a community,~~

211 ~~arising before the controversy, as to boundaries of or customs affecting lands in the~~
212 ~~community, and reputation as to events of general history important to the community or~~
213 ~~State or nation in which located.~~

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

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

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

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

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

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

231 (B) the conviction was for a crime punishable by death or by imprisonment for more

232 than a year;

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

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

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

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

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

244 (A) was essential to the judgment; and

245 (B) could be proved by evidence of reputation.

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

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

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

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

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

255 is the subject of the statement.

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

257 EXPLANATORY NOTE

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

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

261 The last two sentences in ~~803(8)~~ paragraph (8) ~~are were~~ derived from N.D.C.C. §§ 31-
262 09-11 and 31-09-12, which ~~are were~~ superseded by these rules.

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

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

270 Subdivision Paragraph (22) provides in certain instances, evidence of a previous final
271 judgment comes within a hearsay exception. The subdivision paragraph differs from its
272 federal counterpart. The federal exception for pleas of nolo contendere has been deleted as
273 that plea is not used in the State state courts of North Dakota. Rules 11 and 12, NDR CrimP.

274 The ~~subdivision~~ paragraph also was changed by adding post-conviction proceedings, like
275 appeals, do not affect the admissibility of previous convictions.

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

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

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

286 Rule 803 was amended, effective _____, in response to the December 1,
287 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
288 were changed to make the rule more easily understood and to make style and terminology
289 consistent throughout the rules. There is no intent to change any result in any ruling on
290 evidence admissibility.

291 Sources: Supreme Court Conference Minutes: ~~Rule 803(24)~~; of October 23 and
292 October 25, 1989 [Rule 803 (24)]. Joint Procedure Committee Minutes:
293 of _____; Rule 803(25), September 24-25, 1998, page 4; April 30-May 1, 1998,
294 page 16; Rule 803(24), April 20, 1989, pages 6-8; March 24, 1988, pages 2-6 and 15-16;

295 December 3, 1987, pages 6-7; May 21, 1987, pages 6-7; Rule 803(5), (18), (19), (21), (25),
296 December 3, 1987, pages 15-16; Rule 803, June 3, 1976, page 15; Rule 803(1), (2), January
297 29, 1976, page 19; Rule 803(3), January 29, 1976, page 19; October 1, 1975, page 7; Rule
298 803(4), (5), January 29, 1976, page 19; Rule 803(6), January 29, 1976, page 20; Rule 803(7),
299 January 29, 1976, page 20; October 1, 1975, page 7; Rule 803(8), January 29, 1976, page 21;
300 October 11, 1975, page 7; Rule 803(9), (10), (12), (13), (14), (15), (16), (17), (18), (20), (21),
301 January 29, 1976, pages 21-23; Rule 803(11), June 3, 1976, page 15; January 29, 1976, page
302 22; Rule 803(19), June 3, 1976, page 15; January 29, 1976, page 23; Rule 803(22), January
303 29, 1976, page 23, 24; October 1, 1975, page 7; Rule 803(23), January 29, 1976, page 24;
304 Rule 803(24), April 8, 1976, pages 8a, 9; January 29, 1976, page 24. ~~Rule Fed.R.Ev. 803;~~
305 ~~Federal Rules of Evidence~~; Rule 803, SBAND proposal.

306 Statutes Affected:

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

308 Considered: N.D.C.C. §§ 2-06-05, 4-09-05, 4-09-07, 4-10-03, 4-10-12, 4-11-15, 4-11-

309 19, 4-11-20, 4-22-15, 6-03-32, 6-08-10, 7-01-12, 7-08-02, 7-08-03, 10-04-19, 10-15-08, 10-

310 19-55, 10-23-13, 10-24-31, 10-28-09, 11-11-38, 11-13-08, 11-15-16, 11-18-09, 11-20-01,

311 11-20-05, 11-20-13, 12-44-18, 14-03-24, 15-29-10, 15-51-10, 16-13-11, 16-20-08, 19-01-10,

312 19-03.1-37, 19-20.1-17, 23-02-40, 23-24-04, 24-07-15, 26-08-07, 26-12-09, 26-12-13, 26-12-

313 15, 26-15-04, 26-15-26, 26-29-12, 28-20-31, 28-23-12, 31-04-05, 31-04-06, 31-08-01, 31-08-

314 02, 31-08-05, 32-19-26, 32-25-03, 32-25-04, 33-01-13, 33-04-17, 35-21-05, 35-22-11, 35-22-

315 16, 36-09-08, 36-09-20, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-11-08, 40-16-09, 40-42-

316 01, 40-58-08, 41-03-66, 42-02-07, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-10-07, 43-11-
317 10, 43-13-12, 43-17-11, 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17,
318 44-06-08, 44-06-09, 47-19-06, 47-19-12, 47-19-23, 47-19-24, 47-19-45, 48-02-15, 49-01-14,
319 49-06-14, 49-19-16, 57-24-29, 57-38-46, 61-03-06, 61-04-25, 61-05-19, 61-16-06.

320 Cross Reference: N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal
321 Conviction; N.D.R.Ev. 807 (Residual Exception); N.D.R.Crim.P. 11 (Pleas); N.D.R.Crim.P
322 12 (Pleadings and Pretrial Motions).

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

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

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

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

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

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

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

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

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

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

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

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

(C) accurately reflects the witness's knowledge.

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

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

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

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

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

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

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

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

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

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

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

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

(A) it sets out:

(i) the office's activities;

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

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

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

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

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

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

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

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

- (12) *Certificates of Marriage, Baptism, and Similar Ceremonies*. A statement of fact contained in a certificate:
- (A) made by a person who is authorized by a religious organization or by law to perform the act certified;
 - (B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and
 - (C) purporting to have been issued at the time of the act or within a reasonable time after it.
- (13) *Family Records*. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.
- (14) *Records of Documents That Affect an Interest in Property*. The record of a document that purports to establish or affect an interest in property if:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [*Other Exceptions*.] [Transferred to Rule 807.]

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1939; Dec. 12, 1975, P.L. 94-149, § 1(11), 89 Stat. 905; Oct. 1, 1987; Dec. 1, 1997; Dec. 1, 2000.)

(As amended Dec. 1, 2011.)

Amendments:

1975. Act Dec. 12, 1975, in catchline of subsec. (23), inserted comma after "family".

Notes of Advisory Committee on Rules. The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate or conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, *Basic Problems of Evidence* 340-341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless giggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication. Hutchins and Slesinger, *Some Observations on the Law of Evidence: Spontaneous Exclamations*, 28 *Colum.L.Rev.* 432 (1928), it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot., 53 *A.L.R.2d* 1245 (statements as to cause of or responsibility for motor vehicle accident); Annot., 4 *A.L.R.3d* 149 (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. *Illustrative are Tampa Elec. Co. v. Getrost*, 151 *Fla.* 558, 10 *So.2d* 83 (1942); *Houston Oxygen Co. v. Davis*, 139 *Tex.* 1, 161 *S.W.2d* 474 (1942); and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the time element, Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, *Spontaneous Statements and State of Mind*, 46 *Iowa L.Rev.* 224, 243 (1961); McCormick § 272, p. 580.

Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, *supra*; McCormick, *supra*; 6 Wigmore § 1755; Annot., 78 *A.L.R.2d* 300.

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co. v. Mosely*, 75 *U.S.* (8 *Wall.*), 397, 19 *L.Ed.* 437 (1869); *Wheeler v. United States*, 93 *U.S.A.App. D.C.* 159, 211 *F.2d* 19 (1953); cert. denied 347 *U.S.* 1019, 74 *S.Ct.* 876, 98 *L.Ed.* 1140; *Wetherbee v. Safety Casualty Co.*, 219 *F.2d* 274 (5th Cir. 1955); *Lampe v. United States*, 97 *U.S.App.D.C.* 160, 229 *F.2d* 43 (1956). Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, *supra* at 246, and as the "prevailing practice," McCormick § 272, p. 579. *Illustrative are Armour & Co. v. Industrial Commission*, 78 *Colo.* 569, 243 *P.* 546 (1926); *Young v. Stewart*, 191 *N.C.* 297, 131 *S.E.* 735 (1926). Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland*, 22 *Ill.2d* 175, 174 *N.E.2d* 804 (1961). However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden*, 73 *N.M.* 307, 387 *P.2d* 874 (1963); *Beck v. Dye*, 200 *Wash.* 1, 92 *P.2d* 1113 (1939), a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther.

In Exception [paragraph] (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See *Sanitary Grocery Co. v. Snead*, 67 App.D.C. 129, 90 F.2d 374 (1937), slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc. v. Ball*, 101 U.S.App.D.C. 416, 249 F.2d 508 (1957), upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), 6 *Wayne L.Rev.* 204, 206-209 (1960).

Similar provisions are found in Uniform Rule 63(4)(a) and (b); *California Evidence Code* § 1240 (as to Exception (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind. *Shepard v. United States*, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933); Maguire, *The Hillmon Case--Thirty-three Years After*, 38 *Harv.L.Rev.* 709, 719-731 (1925); Hinton, *States of Mind and the Hearsay Rule*, 1 *U.Chi.L.Rev.* 394, 421-423 (1934). The rule of *Mutual Life Ins. Co. v. Hillman*, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892), allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577-578; Annot., 34 *A.L.R.2d* 588, 62 *A.L.R.2d* 855. A similar recognition of the need for and practical value of this kind of evidence is found in *California Evidence Code* § 1260.

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission*, 2 *Ill.2d* 590, 119 *N.E.2d* 224 (1954); McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly*, 349 F.2d 720, 770 (2d Cir. 1965), citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., 82 *A.L.R.2d* 473, 520. The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens v. State*, 67 *Md.* 307, 316, 10 *A.* 210, 212 (1887).

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; *Jordan v. People*, 151 *Colo.* 133, 376 *P.2d* 699 (1962), cert. denied 373 U.S. 944, 83 S.Ct. 1553, 10 *L.Ed.2d* 699; *Hall v. State*, 223 *Md.* 158, 162 *A.2d* 751 (1960); *State v. Bindhammer*, 44 *N.J.* 372, 209 *A.2d* 124 (1965). Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are *California Evidence Code* § 1237 and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg &*

Meridian R.R. v. O'Brien, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); *Ahern v. Webb*, 268 F.2d 45 (10th Cir. 1959); and see *N.L.R.B. v. Hudson Pulp and Paper Corp.*, 273 F.2d 660, 665 (5th Cir. 1960); *N.L.R.B. v. Federal Dairy Co.*, 297 F.2d 487 (1st Cir. 1962). But cf. *United States v. Adams*, 385 F.2d 548 (2d Cir. 1967).

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 A. 279 (1919), is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., *The Law of Evidence: Some Proposals for its Reform* 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. 28 U.S.C. § 1732. A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States v. Mortimer*, 118 F.2d 266 (2d Cir. 1941); *La Porte v. United States*, 300 F.2d 878 (9th Cir. 1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, *Business Entries and the Like*, 46 Iowa, L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to

the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz*, 253 N.Y. 124, 170 N.E. 517 (1930), held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella v. Fyfe*, 171 F.2d 419 (1st Cir. 1948); *Gordon v. Robinson*, 210 F.2d 192 (3d Cir. 1954); *Standard Oil Co. of California v. Moore*, 251 F.2d 188, 214 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; *Yates v. Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965); Annot., 69 A.L.R.2d 1148. Cf. *Hawkins v. Gorea Motor Express, Inc.*, 360 F.2d 933 (2d Cir. 1966). Contra, 5 Wigmore § 1530a, n. 1, pp. 391-392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge . . . to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record . . ." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, 28 U.S.C. § 1732, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co. v. Taylor*, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); *Lyles v. United States*, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957), cert. denied 356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; *England v. United States*, 174 F.2d 466 (5th Cir. 1949); *Skogen v. Dow Chemical Co.*, 375 F.2d 692 (8th Cir. 1967). Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed v. Order of United Commercial Travelers*, 123 F.2d 252 (2d Cir. 1941); *Buckminster's Estate v. Commissioner of Internal Revenue*, 147 F.2d 331 (2d Cir. 1944); *Medina v. Erickson*, 226 F.2d 475 (9th Cir. 1955); *Thomas v. Hogan*, 308 F.2d 355 (4th Cir. 1962); *Glawe v. Rulon*, 284 F.2d 495 (8th Cir. 1960). In the state courts, the trend favors admissibility. *Borucki v. MacKenzie Bros. Co.*, 125 Conn. 92, 3 A.2d 224 (1938); *Allen v. St. Louis Public Service Co.*, 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); *People v. Kohlmeyer*, 284 N.Y. 366, 31 N.E.2d 490 (1940); *Weis v. Weis*, 147 Ohio St. 416, 72 N.E.2d 245 (1947). In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943), exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer*, 129 F.2d 976, 991 (2d Cir. 1942). The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, *Business Records and the Like*, 46 Iowa L.Rev. 276, 285 (1961). As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." 129 F.2d at 1002. A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc.*, 249 F.Supp. 681 (S.D.N.Y. 1965), otherwise if offered by the opposite party, *Korte v. New York, N.H. & H.R. Co.*, 191 F.2d 86 (2d Cir. 1951), cert. denied 342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog v. United States*, 217 F.2d 706 (4th Cir. 1954), error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States v. Ware*, 247 F.2d 698 (7th Cir. 1957), error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), *infra*, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States v. New York Foreign Trade Zone Operators*, 304 F.2d 792 (2d Cir. 1962); *Taylor v. Baltimore & O. R. Co.*, 344 F.2d 281 (2d Cir. 1965), since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews v.*

United States, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos v. United States*, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947), error to admit police records of convictions; *Standard Oil Co. of California v. Moore*, 251 F.2d 188 (9th Cir. 1957), cert. denied 356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148, error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in *Rule 801*, *supra*, decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); *California Evidence Code* § 1272; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, 28 U.S.C. § 1733, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. *Kay v. United States*, 255 F.2d 476 (4th Cir. 1958). The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo v. McGrath*, 196 F.2d 120 (9th Cir. 1952), and see *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919). As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), *supra*.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States*, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919), Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin*, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906), General Land Office records; *Ballew v. United States*, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895), Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook*, 284 F.2d 489 (7th Cir. 1960), remanded for resentencing 365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821, letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States*, 242 F.2d 937 (5th Cir. 1957), affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley*, 150 F.2d 356 (8th Cir. 1945); Weather Bureau records of rainfall; *United States v. Meyer*, 113 F.2d 387 (7th Cir. 1940), cert. denied 311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459, map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States v. Dumas*, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893), statement of account certified by Postmaster General in action against postmaster; *McCarty v. United States*, 185 F.2d 520 (5th Cir. 1950), reh. denied 187 F.2d 234, Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran v. Pittsburgh-Des Moines Steel Co.*, 183 F.2d 467 (3d Cir. 1950), report of Bureau of Mines as to cause of gas tank explosion; *Petition of W--*, 164 F.Supp. 659 (E.D.Pa.1958), report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944), State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co. v. United States*, 183 F.2d 331 (9th Cir. 1950), Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung v. Dulles*, 229 F.2d 244 (2d Cir. 1956), "Status Reports" offered to justify delay in

processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., 69 A.L.R.2d 1148. Various kinds of evaluative reports are admissible under federal statutes; 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 7 U.S.C. § 210(f), findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; 7 U.S.C. § 292, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; 7 U.S.C. § 1622(h), Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; 8 U.S.C. § 1440(c), separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; 18 U.S.C. § 4245, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; 46 U.S.C. § 679, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id., (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (10th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluate reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of *California Evidence Code § 1281*.

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see 8 U.S.C. § 1284(b), proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and 42 U.S.C. § 405(c)(3), (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People v. Love*, 310 Ill. 558, 142 N.E. 204 (1923), certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); *California Evidence Code § 1284*; Kansas Code of Civil Procedure § 60-460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. 8 U.S.C. § 1360(d), certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge*, 311 Ill. 184, 142 N.E. 478 (1924), holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be

furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See *California Evidence Code* § 1315 and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); *California Evidence Code* § 1316; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, 20 C.F.R. § 404.703(c), recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, *supra*. The rule is substantially identical in coverage with *California Evidence Code* § 1312.

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an Erie nature under *Cities Service Oil Co. v. Dunlap*, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939), is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); *California Evidence Code* § 1330; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. *Id.* § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 *id.* § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assurance Co.*, 286 F.2d 388 (5th Cir. 1961), upholding admissibility of 58-year-old newspaper story. Cf. Morgan, *Basic Problems of Evidence* 364 (1962), but see *id.* 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see *California Evidence Code* § 1331.

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702,

authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. *Id.* §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); *California Evidence Code § 1340*; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, *Basic Problems of Evidence* 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan v. Hardy*, 237 Ala. 603, 188 So. 264 (1939); *Lewandowski v. Preferred Risk Mut. Ins. Co.*, 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967); Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(ce), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner*, 365 F.2d 554 (6th Cir. 1966); *Sayers v. Gardner*, 380 F.2d 940 (6th Cir. 1967); *Colwell v. Gardner*, 386 F.2d 56 (6th Cir. 1967); *Glendenning v. Ribicoff*, 213 F.Supp. 301 (W.D.Mo. 1962); *Cook v. Celebrezze*, 217 F.Supp. 366 (W.D.Mo. 1963); *Sosna v. Celebrezze*, 234 F.Supp. 289 (E.D.Pa. 1964); and see *McDaniel v. Celebrezze*, 331 F.2d 426 (4th Cir. 1964). The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., 60 A.L.R.2d 77. The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus*, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949), and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson*, 193 So.2d 648 (Fla.App. 1967), cert. denied Fla., 201 So.2d 556; *Darling v. Charleston Memorial Community Hospital*, 33 Ill.2d 326, 211 N.E.2d 253 (1965); *Dabroe v. Rhodes Co.*, 64 Wash.2d 431, 392 P.2d 317 (1964).

In *Reilly v. Pinkus*, *supra*, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe v. Rhodes Co.*, *supra*. Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6130(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. *Id.* § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or

community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People v. Reeves*, 360 Ill. 55, 195 N.E. 443 (1935); *State v. Axilrod*, 248 Minn. 204, 79 N.W.2d 677 (1956); Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); *California Evidence Code* §§ 1313, 1314; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, *id.*, and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); *California Evidence Code* §§ 1320-1322; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); *California Evidence Code* § 1324; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of *res judicata*, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of *res judicata* does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, *Annot.*, 18 *A.L.R.2d* 1287, 1299, which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of *res judicata* and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note 27 *Ill.L.Rev.* 195 (1932), it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co. v. Militello*, 104 *Colo.* 28, 88 *P.2d* 567 (1939), in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see *Clark, J.*, in *New York & Cuba Mail S.S. Co. v. Continental Cas. Co.*, 117 *F.2d* 404, 411 (2d Cir. 1941); *Connecticut Fire Ins. Co. v. Farrara*, 277 *F.2d* 388 (8th Cir. 1960).

Practical considerations require exclusion of convictions of minor offenses, not because the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope v. Goble*, 39 *Cal.App.2d* 448, 103 *P.2d* 598 (1940); *Jones v. Talbot*, 87 *Idaho* 498, 394 *P.2d* 316 (1964); *Warren v. Marsh*, 215 *Minn.* 615, 11 *N.W.2d* 528 (1943); *Annot.*, 18 *A.L.R.2d* 1287, 1295-1297; 16 *Brooklyn L.Rev.* 286 (1950); 50 *Colum.L.Rev.* 529 (1950); 35 *Cornell L.Q.* 872 (1950). Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States*, 174 *U.S.* 47, 19 *S.Ct.* 574, 43 *L.Ed.* 890 (1899), error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves. The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. 15 *U.S.C.* § 902(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); *California Evidence Code* § 1300; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691)*; *Neill v. Duke of Devonshire, 8 App.Cas. 135 (1882)*. The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the *United States, Patterson v. Gaines, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847)*, follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co. v. United States, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914)*, in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933)*, records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v. Cahill, 81 F.2d 809 (9th Cir. 1936)*, board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, *In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966)*.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892)*, so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, *18 U.S.C. 3500*. Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in *28 U.S.C. 1732*. Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

Notes of Committee on the Judiciary, Senate Report No. 93-1277. The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with *rule 35 of the Federal Rules of Civil Procedure* which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify

accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act [18 U.S.C. § 3500].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis v. Bradley* [65 Conn. 99, 31 Atl. 591 (1894)]; see, also *Rathbun v. Brancatella*, 93 N.J.L. 222, 107 Atl. 279 (1919); see, also McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors--e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment. [See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20-4-803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the words "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule

804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. 7 U.S.C. § 78, findings of Secretary of Agriculture prima facie evidence of true grade of grain; 42 U.S.C. § 269(b), bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

.....

Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigation? 42 Iowa L.Rev. 363 (1957); (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co.*, 141 F.2d 568 (19th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman*, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943). Others no doubt could be added.

.....

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6) [(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trust worthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolative ness and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assoc. Co., Ltd.*, 286 F.2d 388 (5th Cir. 1961) illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also *United States v. Barbati*, 284 F. Supp. 409 (E.D.N.Y. 1968).

Because exceptional cases like the Dallas County case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, and only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

Notes of Conference Committee, House Report No. 93-1597. Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)--Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

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

Notes of Advisory Committee on 1997 amendments. The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Notes of Advisory Committee on 2000 amendments. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp.*, 968 F.2d 999 (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and 18 U.S.C. § 3505 for foreign records in criminal cases.

Notes of Advisory Committee on 2011 amendments. The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 11, 2012
RE: Rule 804, N.D.R.Ev., Hearsay Exceptions; Declarant Unavailable

Form and style amendments to Rule 804 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

One difference between the federal rule and the proposed amendments: under the federal rule dying declarations are excepted from hearsay only “[i]n a prosecution for homicide or in a civil case.” The North Dakota rule allows dying declarations in all cases. Congress amended the original federal rule to limit the use of dying declarations in a manner that was consistent with federal case law.

Another difference between the federal and state rules is in the statement against interest exception. The federal rule allows a codefendant statement against interest to be used against a criminal defendant in some cases. The state rule does not allow this and the existing language explaining this bar is retained in the proposal: “A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.”

The proposed amendments are attached.

22 ~~(5) is absent from the hearing and the proponent of a statement has been unable to~~
23 ~~procure the declarant's attendance (or in the case of a hearsay exception under subdivision~~
24 ~~(b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable~~
25 ~~means:~~

26 (5) is absent from the trial or hearing and the statement's proponent has not been able,
27 by process or other reasonable means, to procure:

28 (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1)
29 or (6); or

30 (B) the declarant's attendance or testimony, in the case of a hearsay exception under
31 Rule 804(b)(2), (3), or (4).

32 ~~A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim~~
33 ~~of lack of memory, inability, or absence is due to the procurement or wrongdoing of the~~
34 ~~proponent of a statement for the purpose of preventing the witness from attending or~~
35 ~~testifying:~~

36 But this subdivision (a) does not apply if the statement's proponent procured or
37 wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant
38 from attending or testifying.

39 ~~(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the~~
40 ~~declarant is unavailable as a witness:~~

41 (b) The Exceptions. The following are not excluded by the rule against hearsay if the
42 declarant is unavailable as a witness:

43 ~~(1) Former testimony. Testimony given as a witness at another hearing of the same or~~
44 ~~a different proceeding, or in a deposition taken in compliance with law in the course of the~~
45 ~~same or another proceeding, if the party against whom the testimony is now offered, or, in~~
46 ~~a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive~~
47 ~~to develop the testimony by direct, cross, or redirect examination.~~

48 (1) Former Testimony. Testimony that:

49 (A) was given as a witness at a trial, hearing, or lawful deposition, whether given
50 during the current proceeding or a different one; and

51 (B) is now offered against a party who had, or, in a civil case, whose predecessor in
52 interest had, an opportunity and similar motive to develop it by direct, cross-, or redirect
53 examination.

54 ~~(2) Statement under belief of impending death. A statement made by a declarant while~~
55 ~~believing that the declarant's death was imminent, concerning the cause or circumstances of~~
56 ~~the declarant's belief in impending death.~~

57 (2) Statement Under the Belief of Imminent Death. A statement that the declarant,
58 while believing the declarant's death to be imminent, made about its cause or circumstances.

59 ~~(3) Statement against interest. A statement that was at the time of its making so far~~
60 ~~contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the~~
61 ~~declarant to civil or criminal liability or to render invalid a claim by the declarant against~~
62 ~~another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable~~
63 ~~person in the declarant's position would not have made the statement without believing it to~~

64 ~~be true. A statement tending to expose the declarant to criminal liability and offered to~~
65 ~~exculpate the accused is not admissible unless corroborating circumstances clearly indicate~~
66 ~~the trustworthiness of the statement. A statement or confession offered against the accused~~
67 ~~in a criminal case, made by a codefendant or other person implicating both the declarant and~~
68 ~~the accused, is not within this exception:~~

69 (3) Statement Against Interest. A statement that:

70 (A) a reasonable person in the declarant's position would have made only if the person
71 believed it to be true because, when made, it was so contrary to the declarant's proprietary
72 or pecuniary interest or had so great a tendency to invalidate the declarant's claim against
73 someone else or to expose the declarant to civil or criminal liability; and

74 (B) if it is offered in a criminal case to exculpate the accused, is supported by
75 corroborating circumstances that clearly indicate its trustworthiness as a statement that tends
76 to expose the declarant to criminal liability.

77 A statement or confession offered against the accused in a criminal case, made by a
78 codefendant or other person implicating both the declarant and the accused, is not within this
79 exception.

80 (4) Statement of personal or family history:

81 (4) Statement of Personal or Family History. A statement about:

82 (i) A statement concerning the declarant's own birth, adoption, marriage, divorce,
83 parentage, relationship by blood, adoption, or marriage, ancestry, or other similar fact of
84 personal or family history, even though declarant had no means of acquiring personal

85 ~~knowledge of the matter stated, or~~

86 (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce,
87 relationship by blood, adoption, or marriage, or similar facts of personal or family history,
88 even though the declarant had no way of acquiring personal knowledge about that fact; or

89 ~~(ii) a statement concerning the foregoing matters, and death also, of another person,~~
90 ~~if the declarant was related to the other by blood, adoption, or marriage or was so intimately~~
91 ~~associated with the other's family as to be likely to have accurate information concerning the~~
92 ~~matter declared.~~

93 (B) another person concerning any of these facts, as well as death, if the declarant was
94 related to the person by blood, adoption, or marriage or was so intimately associated with the
95 person's family that the declarant's information is likely to be accurate.

96 (5) [Other Exceptions.] [Transferred to Rule 807]

97 ~~(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged~~
98 ~~or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the~~
99 ~~declarant as a witness.~~

100 (6) Statement Offered Against a Party That Wrongfully Caused the Declarant's
101 Unavailability. A statement offered against a party that wrongfully caused, or acquiesced in
102 wrongfully causing, the declarant's unavailability as a witness, and did so intending that
103 result.

104 EXPLANATORY NOTE

105 Rule 804 was amended, effective March 1, 1990; March 1, 2000; _____.

106 Rule 804 is ~~taken in the main from the Uniform Rules of Evidence (1974)~~ based on

107 Fed.R.Ev. 804.

108 ~~Subdivision Paragraph (b)(3) differs from the comparable federal rule Fed.R.Ev. 804~~

109 by excluding from this exception statements made by a codefendant or other person which

110 implicate both the ~~codefendant~~ other person and the accused. Such statements may not be

111 against interest, and the area is one in which constitutional rights of the defendant may

112 preclude their admission. Rather than proceed on a case-by-case basis, it was decided to

113 preclude admission of such statements entirely.

114 Rule 804 was amended, effective March 1, 2000, to follow the December 1, 1997,

115 federal amendment. The contents of Rule 804(b)(5) are transferred to new Rule 807. The

116 addition of Rule 804(b)(6) provides for forfeiture of the right to object on hearsay grounds

117 due to a party's own wrongdoing.

118 Rule 804 was amended, effective _____, in response to the December 1,

119 2011, revision of the Federal Rules of Evidence. The language and organization of the rule

120 were changed to make the rule more easily understood and to make style and terminology

121 consistent throughout the rules. There is no intent to change any result in any ruling on

122 evidence admissibility.

123 Sources: Joint Procedure Committee Minutes: of _____; September 24-

124 25, 1998, page 4; April 30-May 1, 1999, page 16; March 24-25, 1988, page 12; December

125 3, 1987, page 15; April 8, 1976, pages 9, 10, 11, 12; October 1, 1975, page 8. ~~Rule 804(a);~~

126 ~~(b)(4), Federal Rules of Evidence Fed.R.Ev. 804; Rule 804(b)(1), (b)(2), (b)(3), (b)(6),~~

127 Uniform Rules of Evidence (1974); Rule 804, SBAND proposal.

128 Cross Reference: N.D.R.Ev. 807 (Residual Exception).

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 804. Exceptions to the Rule Against Hearsay--When the Declarant Is Unavailable as a Witness

- (a) **Criteria for Being Unavailable.** A declarant is considered to be unavailable as a witness if the declarant:
- (1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;
 - (2) refuses to testify about the subject matter despite a court order to do so;
 - (3) testifies to not remembering the subject matter;
 - (4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or
 - (5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:
 - (A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or
 - (B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

But this subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

(b) **The Exceptions.** The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

- (1) *Former Testimony.* Testimony that:
 - (A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and
 - (B) is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination.
- (2) *Statement Under the Belief of Imminent Death.* In a prosecution for homicide or in a civil case, a statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.
- (3) *Statement Against Interest.* A statement that:
 - (A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and
 - (B) is supported by corroborating circumstances that clearly indicate its trustworthiness, if it is offered in a criminal case as one that tends to expose the declarant to criminal liability.
- (4) *Statement of Personal or Family History.* A statement about:
 - (A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or
 - (B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.
- (5) [*Other Exceptions.*] [Transferred to Rule 807.]
- (6) *Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability.* A statement offered against a party that wrongfully caused--or acquiesced in wrongfully causing--the declarant's unavailability as a witness, and did so intending that result.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1942; Dec. 12, 1975, P.L. 94-149, § 1(12), (13), 89 Stat. 806; Oct. 1, 1987; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7075(b), 102 Stat. 4405; Dec. 1, 1997.)
(As amended Dec. 1, 2010; Dec. 1, 2011.)

Amendments:

1975. Act Dec. 12, 1975, in section catchline, substituted semicolon for colon; and, in subsec. (b)(3), substituted "admissible" for "admissible".

1988. Act Nov. 18, 1988, in subsec. (a)(5), substituted "subdivision" for "subdivisions".

Notes of Advisory Committee on Rules.

As to firsthand knowledge on the part of hearsay declarants, see the introductory portion of the Advisory Committee's Note to Rule 803.

Subdivision (a). The definition of unavailability implements the division of hearsay exceptions into two categories by Rules 803 and 804(b).

At common law the unavailability requirement was evolved in connection with particular hearsay exceptions rather than along general lines. For example, see the separate explication of unavailability in relation to former testimony, declarations against interest, and statements of pedigree, separately developed in McCormick §§ 234, 257, and 297. However, no reason is apparent for making distinctions as to what satisfies unavailability for the different exceptions. The treatment in the rule is therefore uniform although differences in the range of process for witnesses between civil and criminal cases will lead to a less exacting requirement under item (5). See *Rule 45(e) of the Federal Rules of Civil Procedure* and *Rule 17(e) of the Federal Rules of Criminal Procedure*.

Five instances of unavailability are specified:

(1) Substantial authority supports the position that exercise of a claim of privilege by the declarant satisfies the requirement of unavailability (usually in connection with former testimony). *Wyatt v. State*, 35 Ala.App. 147, 46 So.2d 837 (1950); *State v. Stewart*, 85 Kan. 404, 116 P. 489 (1911); Annot., 45 A.L.R.2d 1354; Uniform Rule 62(7)(a); *California Evidence Code* § 240(a)(1); Kansas Code of Civil Procedure § 60-459(g)(1). A ruling by the judge is required, which clearly implies that an actual claim of privilege must be made.

(2) A witness is rendered unavailable if he simply refuses to testify concerning the subject matter of his statement despite judicial pressures to do so, a position supported by similar considerations of practicality. *Johnson v. People*, 152 Colo. 586, 384 P.2d 454 (1963); *People v. Pickett*, 339 Mich. 294, 63 N.W.2d 681, 45 A.L.R.2d 1341 (1954). Contra, *Pleau v. State*, 255 Wis. 362, 38 N.W.2d 496 (1949).

(3) The position that a claimed lack of memory by the witness of the subject matter of his statement constitutes unavailability likewise finds support in the cases, though not without dissent. McCormick § 234, p. 494. If the claim is successful, the practical effect is to put the testimony beyond reach, as in the other instances. In this instance, however, it will be noted that the lack of memory must be established by the testimony of the witness himself, which clearly contemplates his production and subjection to cross-examination.

(4) Death and infirmity find general recognition as ground. McCormick §§ 234, 257, 297; Uniform Rule 62(7)(c); *California Evidence Code* § 240(a)(3); Kansas Code of Civil Procedure § 60-459(g)(3); New Jersey Evidence Rule 62(6)(c). See also the provisions on use of depositions in *Rule 32(a)(3) of the Federal Rules of Civil Procedure* and *Rule 15(e) of the Federal Rules of Criminal Procedure*.

(5) Absence from the hearing coupled with inability to compel attendance by process or other reasonable means also satisfies the requirement. McCormick § 234; Uniform Rule 62(7)(d) and (e); *California Evidence Code* § 240(a)(4) and (5); Kansas Code of Civil Procedure § 60-459(g)(4) and (5); New Jersey Rule 62(6)(b) and (d). See the discussion of procuring attendance of witnesses who are nonresidents or in custody in *Barber v. Page*, 390 U.S. 719, 88 S.Ct. 1318, 20 L.Ed.2d 255 (1968).

If the conditions otherwise constituting unavailability result from the procurement or wrongdoing of the proponent of the statement, the requirement is not satisfied. The rule contains no requirement that an attempt be made to take the deposition of a declarant.

Subdivision (b). Rule 803 supra, is based upon the assumption that a hearsay statement falling within one of its exceptions possesses qualities which justify the conclusion that whether the declarant is available or unavailable is not a relevant factor in determining admissibility. The instant rule proceeds upon a different theory: hearsay which admittedly is not equal in quality to testimony of the declarant on the stand may nevertheless be admitted if the declarant is unavailable and if his statement meets a specified standard. The rule expresses preferences: testimony given on the stand in person is preferred over hearsay, and hearsay, if of the specified quality, is preferred over complete loss of the evidence of the declarant. The exceptions evolved at common law with respect to declarations of unavailable declarants furnish the basis for the exceptions enumerated in the proposal. The term "unavailable" is defined in subdivision (a).

Exception (1). Former testimony does not rely upon some set of circumstances to substitute for oath and cross-examination, since both oath and opportunity to cross-examine were present in fact. The only missing one of the ideal conditions for the giving of testimony is the presence of trier and opponent ("demeanor evidence"). This is lacking with

all hearsay exceptions. Hence it may be argued that former testimony is the strongest hearsay and should be included under Rule 803, supra. However, opportunity to observe demeanor is what in a large measure confers depth and meaning upon oath and cross-examination. Thus in cases under Rule 803 demeanor lacks the significance which it possesses with respect to testimony. In any event, the tradition, founded in experience, uniformly favors production of the witness if he is available. The exception indicates continuation of the policy. This preference for the presence of the witness is apparent also in rules and statutes on the use of depositions, which deal with substantially the same problem.

Under the exception, the testimony may be offered (1) against the party against whom it was previously offered or (2) against the party by whom it was previously offered. In each instance the question resolves itself into whether fairness allows imposing, upon the party against whom now offered, the handling of the witness on the earlier occasion. (1) If the party against whom now offered is the one against whom the testimony was offered previously, no unfairness is apparent in requiring him to accept his own prior conduct of cross-examination or decision not to cross-examine. Only demeanor has been lost, and that is inherent in the situation. (2) If the party against whom now offered is the one by whom the testimony was offered previously, a satisfactory answer becomes somewhat more difficult. One possibility is to proceed somewhat along the line of an adoptive admission, i.e. by offering the testimony proponent in effect adopts it. However, this theory savors of discarded concepts of witnesses' belonging to a party, of litigants' ability to pick and choose witnesses, and of vouching for one's own witnesses. Cf. McCormick § 246, pp. 526-527; 4 Wigmore § 1075. A more direct and acceptable approach is simply to recognize direct and redirect examination of one's own witness as the equivalent of cross-examining an opponent's witness. Falknor, *Former Testimony and the Uniform Rules: A Comment*, 38 *N.Y.U.L.Rev.* 651, n. 1 (1963); McCormick § 231, p. 483. See also 5 Wigmore § 1389. Allowable techniques for dealing with hostile, doublecrossing, forgetful, and mentally deficient witnesses leave no substance to a claim that one could not adequately develop his own witness at the former hearing. An even less appealing argument is presented when failure to develop fully was the result of a deliberate choice.

The common law did not limit the admissibility of former testimony to that given in an earlier trial of the same case, although it did require identity of issues as a means of insuring that the former handling of the witness was the equivalent of what would now be done if the opportunity were presented. Modern decisions reduce the requirement to "substantial" identity. McCormick § 233. Since identity of issues is significant only in that it bears on motive and interest in developing fully the testimony of the witness, expressing the matter in the latter terms is preferable. *Id.* Testimony given at a preliminary hearing was held in *California v. Green*, 399 U.S. 149, 90 S.Ct. 1930, 26 L.Ed.2d 489 (1970), to satisfy confrontation requirements in this respect.

As a further assurance of fairness in thrusting upon a party the prior handling of the witness, the common law also insisted upon identity of parties, deviating only to the extent of allowing substitution of successors in a narrowly construed privity. Mutuality as an aspect of identity is now generally discredited, and the requirement of identity of the offering party disappears except as it might affect motive to develop the testimony. Falknor, supra, at 652; McCormick § 232, pp. 487-488. The question remains whether strict identity, or privity, should continue as a requirement with respect to the party against whom offered. The rule departs to the extent of allowing substitution of one with the right and opportunity to develop the testimony with similar motive and interest. This position is supported by modern decisions. McCormick § 232, pp. 489-490; 5 Wigmore § 1388.

Provisions of the same tenor will be found in Uniform Rule 63(3)(b); *California Evidence Code* §§ 1290-1292; Kansas Code of Civil Procedure § 60-460(c)(2); New Jersey Evidence Rule 63(3). Unlike the rule, the latter three provide either that former testimony is not admissible if the right of confrontation is denied or that it is not admissible if the accused was not a party to the prior hearing. The genesis of these limitations is a caveat in Uniform Rule 63(3) Comment that use of former testimony against an accused may violate his right of confrontation. *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895), held that the right was not violated by the Government's use, on a retrial of the same case, of testimony given at the first trial by two witnesses since deceased. The decision leaves open the questions (1) whether direct and redirect are equivalent to cross-examination for purposes of confrontation, (2) whether testimony given in a different proceeding is acceptable, and (3) whether the accused must himself have been a party to the earlier proceeding or whether a similarly situated person will serve the purpose. Professor Falknor concluded that, if a dying declaration untested by cross-examination is constitutionally admissible, former testimony tested by the cross-examination of one similarly situated does not offend against confrontation. Falknor, supra, at 659-660. The constitutional acceptability of dying declarations has often been conceded. *Mattox v. United States*, 156 U.S. 237, 243, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *Kirby v. United States*, 174 U.S. 47, 61, 19 S.Ct. 574, 43 L.Ed. 890 (1899); *Pointer v. Texas*, 380 U.S. 400, 407, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965).

Exception (2). The exception is the familiar dying declaration of the common law, expanded somewhat beyond its traditionally narrow limits. While the original religious justification for the exception may have lost its conviction for some persons over the years, it can scarcely be doubted that powerful psychological pressures are present. See 5

Wigmore § 1443 and the classic statement of Chief Baron Eyre in *Rex v. Woodcock*, 1 Leach 500, 502, 168 Eng.Rep. 352, 353 (K.B. 1789).

The common law required that the statement be that of the victim, offered in a prosecution for criminal homicide. Thus declarations by victims in prosecutions for other crimes, e.g. a declaration by a rape victim who dies in childbirth, and all declarations in civil cases were outside the scope of the exception. An occasional statute has removed these restrictions, as in Colo.R.S. § 52-1-20, or has expanded the area of offenses to include abortions, 5 Wigmore § 1432, p. 224, n. 4. Kansas by decision extended the exception to civil cases. *Thurston v. Fritz*, 91 Kan. 468, 138 P. 625 (1914). While the common law exception no doubt originated as a result of the exceptional need for the evidence in homicide cases, the theory of admissibility applies equally in civil cases and in prosecutions for crimes other than homicide. The same considerations suggest abandonment of the limitation to circumstances attending the event in question, yet when the statement deals with matters other than the supposed death, its influence is believed to be sufficiently attenuated to justify the limitation. Unavailability is not limited to death. See subdivision (a) of this rule. Any problem as to declarations phrased in terms of opinion is laid at rest by Rule 701, and continuation of a requirement of first-hand knowledge is assured by Rule 602.

Comparable provisions are found in Uniform Rule 63(5); *California Evidence Code* § 1242; Kansas Code of Civil Procedure § 60-460(e); New Jersey Evidence Rule 63(5).

Exception (3). The circumstantial guaranty of reliability for declarations against interest is the assumption that persons do not make statements which are damaging to themselves unless satisfied for good reason that they are true. *Hileman v. Northwest Engineering Co.*, 346 F.2d 668 (6th Cir. 1965). If the statement is that of a party, offered by his opponent, it comes in as an admission, Rule 803(d)(2), and there is no occasion to inquire whether it is against interest, this not being a condition precedent to admissibility of admissions by opponents.

The common law required that the interest declared against be pecuniary or proprietary but within this limitation demonstrated striking ingenuity in discovering an against-interest aspect. *Higham v. Ridgeway*, 10 East 109, 103 Eng.Rep. 717 (K.B. 1808); *Reg. v. Overseers of Birmingham*, 1 B. & S. 763, 121 Eng.Rep. 897 (Q.B. 1861); McCormick, § 256, p. 551, nn. 2 and 3.

The exception discards the common law limitation and expands to the full logical limit. One result is to remove doubt as to the admissibility of declarations tending to establish a tort liability against the declarant or to extinguish one which might be asserted by him, in accordance with the trend of the decisions in this country. McCormick § 254, pp. 548-549. Another is to allow statements tending to expose declarant to hatred, ridicule, or disgrace, the motivation here being considered to be as strong as when financial interests are at stake. McCormick § 255, p. 551. And finally, exposure to criminal liability satisfies the against-interest requirement. The refusal of the common law to concede the adequacy of a penal interest was no doubt indefensible in logic, see the dissent of Mr. Justice Holmes in *Donnelly v. United States*, 228 U.S. 243, 33 S.Ct. 449, 57 L.Ed. 820 (1913), but one senses in the decisions a distrust of evidence of confessions by third persons offered to exculpate the accused arising from suspicions of fabrication either of the fact of the making of the confession or in its contents, enhanced in either instance by the required unavailability of the declarant. Nevertheless, an increasing amount of decisional law recognizes exposure to punishment for crime as a sufficient stake. *People v. Spriggs*, 60 Cal.2d 868, 36 Cal.Rptr. 841, 389 P.2d 377 (1964); *Sutter v. Easterly*, 354 Mo. 282, 189 S.W.2d 284 (1945); *Band's Refuse Removal, Inc. v. Fairlawn Borough*, 62 N.J.Super. 552, 163 A.2d 465 (1960); *Newberry v. Commonwealth*, 191 Va. 445, 61 S.E.2d 318 (1950); Annot., 162 A.L.R. 446. The requirement of corroboration is included in the rule in order to effect an accommodation between these competing considerations. When the statement is offered by the accused by way of exculpation, the resulting situation is not adapted to control by rulings as to the weight of the evidence and, hence the provision is cast in terms of a requirement preliminary to admissibility. Cf. Rule 406(a). The requirement of corroboration should be construed in such a manner as to effectuate its purpose of circumventing fabrication.

Ordinarily the third-party confession is thought of in terms of exculpating the accused, but this is by no means always or necessarily the case: it may include statements implicating him, and under the general theory of declarations against interest they would be admissible as related statements. *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965), and *Bruton v. United States*, 389 U.S. 818, 88 S.Ct. 126, 19 L.Ed.2d 70 (1968), both involved confessions by codefendants which implicated the accused. While the confession was not actually offered in evidence in *Douglas*, the procedure followed effectively put it before the jury, which the Court ruled to be error. Whether the confession might have been admissible as a declaration against penal interest was not considered or discussed. *Bruton* assumed the inadmissibility, as against the accused, of the implicating confession of his codefendant, and centered upon the question of the effectiveness of a limiting instruction. These decisions, however, by no means require that all statements implicating another person be excluded from the category of declarations against interest. Whether a statement is in fact against interest must be determined from the circumstances of each case. Thus a statement admitting guilt and

implicating another person, made while in custody, may well be motivated by a desire to curry favor with the authorities and hence fail to qualify as against interest. See the dissenting opinion of Mr. Justice White in *Bruton*. On the other hand, the same words spoken under different circumstances, e.g., to an acquaintance, would have no difficulty in qualifying. The rule does not purport to deal with questions of the right of confrontation.

The balancing of self-serving against dissenting aspects of a declaration is discussed in McCormick § 256.

For comparable provisions, see Uniform Rule 63(10); *California Evidence Code* § 1230; Kansas Code of Civil Procedure § 60-460(j); New Jersey Evidence Rule 63(10).

Exception (4). The general common law requirement that a declaration in this area must have been made ante litem motam has been dropped, as bearing more appropriately on weight than admissibility. See 5 Wigmore § 1483. Item (i) [(A)] specifically disclaims any need of firsthand knowledge respecting declarant's own personal history. In some instances it is self-evident (marriage) and in others impossible and traditionally not required (date of birth). Item (ii)(B) deals with declarations concerning the history of another person. As at common law, declarant is qualified if related by blood or marriage. 5 Wigmore § 1489. In addition, and contrary to the common law, declarant qualifies by virtue of intimate association with the family. *Id.*, § 1487. The requirement sometimes encountered that when the subject of the statement is the relationship between two other persons the declarant must qualify as to both is omitted. Relationship is reciprocal. *Id.*, § 1491.

For comparable provisions, see Uniform Rule 63 (23), (24), (25); *California Evidence Code* §§ 1310, 1311; Kansas Code of Civil Procedure § 60-460(u), (v), (w); New Jersey Evidence Rules 63(23), 63(24), 63(25).

Notes of Committee on the Judiciary, House Report No. 93-650.

Rule 804(a)(3) was approved in the form submitted by the Court. However, the Committee intends no change in existing federal law under which the court may choose to disbelieve the declarant's testimony as to his lack of memory. See *United States v. Insana*, 423 F.2d 1165, 1169-1170 (2nd Cir.), cert. denied, 400 U.S. 841 (1970).

Rule 804(a)(5) as submitted to the Congress provided, as one type of situation in which a declarant would be deemed "unavailable", that he be "absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means." The Committee amended the Rule to insert after the word "attendance" the parenthetical expression "(or, in the case of a hearsay exception under subdivision (b)(2), (3), or (4), his attendance or testimony)". The amendment is designed primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being deemed unavailable. The Committee, however, recognized the propriety of an exception to this additional requirement when it is the declarant's former testimony that is sought to be admitted under subdivision (b)(1).

Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness. The Committee considered that it is generally unfair to impose upon the party against whom the hearsay evidence is being offered responsibility for the manner in which the witness was previously handled by another party. The sole exception to this, in the Committee's view, is when a party's predecessor in interest in a civil action or proceeding had an opportunity and similar motive to examine the witness. The Committee amended the Rule to reflect these policy determinations.

Rule 804(b)(3) as submitted by the Court (now Rule 804(b)(2) in the bill) proposed to expand the traditional scope of the dying declaration exception (i.e. a statement of the victim in a homicide case as to the cause or circumstances of his believed imminent death) to allow such statements in all criminal and civil cases. The Committee did not consider dying declarations as among the most reliable forms of hearsay. Consequently, it amended the provision to limit their admissibility in criminal cases to homicide prosecutions, where exceptional need for the evidence is present. This is existing law. At the same time, the Committee approved the expansion to civil actions and proceedings where the stakes do not involve possible imprisonment, although noting that this could lead to forum shopping in some instances.

Rule 804(b)(4) as submitted by the Court (now Rule 804(b)(3) in the bill) provided as follows:

Statement against interest.—A statement which was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest or so far tended to subject him to civil or criminal liability or to render invalid a claim by him against another or to make him an object of hatred, ridicule, or disgrace, that a reasonable man in his position would not have made the statement unless he believed it to be true. A statement tending to exculpate the accused is not admissible unless corroborated.

The Committee determined to retain the traditional hearsay exception for statements against pecuniary or proprietary interest. However, it deemed the Court's additional references to statements tending to subject a declarant to civil liability or to render invalid a claim by him against another to be redundant as included within

the scope of the reference to statements against pecuniary or proprietary interest. See *Gichner v. Antonio Triano Tile and Marble Co.*, 410 F.2d 238 (D.C. Cir. 1968). Those additional references were accordingly deleted.

The Court's Rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to criminal liability and statements tending to make him an object of hatred, ridicule, or disgrace. The Committee eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. See *United States v. Dovico*, 380 F.2d 325, 327 nn. 2, 4 (2nd Cir.), cert. denied, 389 U.S. 944 (1967). As for statements against penal interest, the Committee shared the view of the Court that some such statements do possess adequate assurances of reliability and should be admissible. It believed, however, as did the Court, that statements of this type tending to exculpate the accused are more suspect and so should have their admissibility conditioned upon some further provision insuring trustworthiness. The proposal in the Court Rule to add a requirement of simple corroboration was, however, deemed ineffective to accomplish this purpose since the accused's own testimony might suffice while not necessarily increasing the reliability of the hearsay statement. The Committee settled upon the language "unless corroborating circumstances clearly indicate the trustworthiness of the statement" as affording a proper standard and degree of discretion. It was contemplated that the result in such cases as *Donnelly v. United States*, 228 U.S. 243 (1912), where the circumstances plainly indicated reliability, would be changed. The Committee also added to the Rule the final sentence from the 1971 Advisory Committee draft, designed to codify the doctrine of *Bruton v. United States*, 391 U.S. 123 (1968). The Committee does not intend to affect the existing exception to the Bruton principle where the codefendant takes the stand and is subject to cross-examination, but believed there was no need to make specific provision for this situation in the Rule, since in that even the declarant would not be "unavailable".

Notes of Committee on the Judiciary, Senate Report No. 93-1277.

Subdivision (a) of rule 804 as submitted by the Supreme Court defined the conditions under which a witness was considered to be unavailable. It was amended in the House.

The purpose of the amendment, according to the report of the House Committee on the Judiciary, is "primarily to require that an attempt be made to depose a witness (as well as to seek his attendance) as a precondition to the witness being unavailable."

Under the House amendment, before a witness is declared unavailable, a party must try to depose a witness (declarant) with respect to dying declarations, declarations against interest, and declarations of pedigree. None of these situations would seem to warrant this needless, impractical and highly restrictive complication. A good case can be made for eliminating the unavailability requirement entirely for declarations against interest cases. [Uniform rule 63(10); *Kan. Stat. Anno. 60-460(j)*; 2A N.J. Stats. Anno. 84-63(10).]

In dying declaration cases, the declarant will usually, though not necessarily, be deceased at the time of trial. Pedigree statements which are admittedly and necessarily based largely on word of mouth are not greatly fortified by a deposition requirement.

Depositions are expensive and time-consuming. In any event, deposition procedures are available to those who wish to resort to them. Moreover, the deposition procedures of the Civil Rules and Criminal Rules are only imperfectly adapted to implementing the amendment. No purpose is served unless the deposition, if taken, may be used in evidence. Under Civil Rule (a)(3) and Criminal Rule 15(e), a deposition, though taken, may not be admissible, and under Criminal Rule 15(a) substantial obstacles exist in the way of even taking a deposition.

For these reasons, the committee deleted the House amendment.

The committee understands that the rule as to unavailability, as explained by the Advisory Committee "contains no requirement that an attempt be made to take the deposition of a declarant." In reflecting the committee's judgment, the statement is accurate insofar as it goes. Where, however, the proponent of the statement, with knowledge of the existence of the statement, fails to confront the declarant with the statement at the taking of the deposition, then the proponent should not, in fairness, be permitted to treat the declarant as "unavailable" simply because the declarant was not amendable to process compelling his attendance at trial. The committee does not consider it necessary to amend the rule to this effect because such a situation abuses, not conforms to, the rule. Fairness would preclude a person from introducing a hearsay statement on a particular issue if the person taking the deposition was aware of the issue at the time of the deposition but failed to depose the unavailable witness on that issue.

Former testimony.--Rule 804(b)(1) as submitted by the Court allowed prior testimony of an unavailable witness to be admissible if the party against whom it is offered or a person "with motive and interest similar" to his had an opportunity to examine the witness.

The House amended the rule to apply only to a party's predecessor in interest. Although the committee recognizes considerable merit to the rule submitted by the Supreme Court, a position which has been advocated by many scholars

and judges, we have concluded that the difference between the two versions is not great and we accept the House amendment.

The rule defines those statements which are considered to be against interest and thus of sufficient trustworthiness to be admissible even though hearsay. With regard to the type of interest declared against, the version submitted by the Supreme Court included inter alia, statements tending to subject a declarant to civil liability or to invalidate a claim by him against another. The House struck these provisions as redundant. In view of the conflicting case law construing pecuniary or proprietary interests narrowly so as to exclude, e.g., tort cases, this deletion could be misconstrued.

Three States which have recently codified their rules of evidence have followed the Supreme Court's version of this rule, i.e., that a statement is against interest if it tends to subject a declarant to civil liability. [*Nev. Rev. Stats. § 51.345*; *N. Mex. Stats. (1973 supp.) § 20-4-804(4)*; *West's Wis. Stats. Anno. (1973 supp.) § 908.045(4)*.]

The committee believes that the reference to statements tending to subject a person to civil liability constitutes a desirable clarification of the scope of the rule. Therefore, we have reinstated the Supreme Court language on this matter.

The Court rule also proposed to expand the hearsay limitation from its present federal limitation to include statements subjecting the declarant to statements tending to make him an object of hatred, ridicule, or disgrace. The House eliminated the latter category from the subdivision as lacking sufficient guarantees of reliability. Although there is considerable support for the admissibility of such statements (all three of the State rules referred to supra, would admit such statements), we accept the deletion by the House.

The House amended this exception to add a sentence making inadmissible a statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both himself and the accused. The sentence was added to codify the constitutional principle announced in *Bruton v. United States*, 391 U.S. 123 (1968). *Bruton* held that the admission of the extrajudicial hearsay statement of one codefendant inculcating a second codefendant violated the confrontation clause of the sixth amendment.

The committee decided to delete this provision because the basic approach of the rules is to avoid codifying, or attempting to codify, constitutional evidentiary principles, such as the fifth amendment's right against self-incrimination and, here, the sixth amendment's right of confrontation. Codification of a constitutional principle is unnecessary and, where the principle is under development, often unwise. Furthermore, the House provision does not appear to recognize the exceptions to the *Bruton* rule, e.g. where the codefendant takes the stand and is subject to cross examination; where the accused confessed, see *United States v. Mancusi*, 404 F.2d 296 (2d Cir. 1968), cert. denied 397 U.S. 942 (1970); where the accused was placed at the scene of the crime, see *United States v. Zelker*, 452 F.2d 1009 (2d Cir. 1971). For these reasons, the committee decided to delete this provision.

Note to Subdivision (b)(5). See Note to Paragraph (24), Notes of Committee on the Judiciary, Senate Report No. 93-1277, set out as a note under rule 803 of these rules.

Notes of Conference Committee, House Report No. 93-1597. Rule 804 defines what hearsay statements are admissible in evidence if the declarant is unavailable as a witness. The Senate amendments make four changes in the rule.

Subsection (a) defines the term "unavailability as a witness". The House bill provides in subsection (a)(5) that the party who desires to use the statement must be unable to procure the declarant's attendance by process or other reasonable means. In the case of dying declarations, statements against interest and statements of personal or family history, the House bill requires that the proponent must also be unable to procure the declarant's testimony (such as by deposition or interrogatories) by process or other reasonable means. The Senate amendment eliminates this latter provision.

The Conference adopts the provision contained in the House bill.

The Senate amendment to subsection (b)(3) provides that a statement is against interest and not excluded by the hearsay rule when the declarant is unavailable as a witness, if the statement tends to subject a person to civil or criminal liability or renders invalid a claim by him against another. The House bill did not refer specifically to civil liability and to rendering invalid a claim against another. The Senate amendment also deletes from the House bill the provision that subsection (b)(3) does not apply to a statement or confession, made by a codefendant or another, which implicates the accused and the person who made the statement, when that statement or confession is offered against the accused in a criminal case.

The Conference adopts the Senate amendment. The Conferees intend to include within the purview of this rule, statements subjecting a person to civil liability and statements rendering claims invalid. The Conferees agree to delete the provision regarding statements by a codefendant, thereby reflecting the general approach in the Rules of Evidence to avoid attempting to codify constitutional evidentiary principles.

The Senate amendment adds a new subsection, (b)(6) [now (b)(5)], which makes admissible a hearsay statement not specifically covered by any of the five previous subsections, if the statement has equivalent circumstantial guarantees of

trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that renumbers this subsection and provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare the contest the use of the statement.

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

Notes of Advisory Committee on 1997 amendments. Subdivision (b)(5). The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended. Subdivision (b)(6). Rule 804(b)(6) has been added to provide that a party forfeits the right to object on hearsay grounds to the admission of a declarant's prior statement when the party's deliberate wrongdoing or acquiescence therein procured the unavailability of the declarant as a witness. This recognizes the need for a prophylactic rule to deal with abhorrent behavior "which strikes at the heart of the system of justice itself." *United States v. Mastrangelo*, 693 F.2d 269, 273 (2d Cir. 1982), cert. denied, 467 U.S. 1204 (1984). The wrongdoing need not consist of a criminal act. The rule applies to all parties, including the government.

Every circuit that has resolved the question has recognized the principle of forfeiture by misconduct, although the tests for determining whether there is a forfeiture have varied. See, e.g., *United States v. Aguiar*, 975 F.2d 45, 47 (2d Cir. 1992); *United States v. Potamitis*, 739 F.2d 784, 789 (2d Cir.), cert. denied, 469 U.S. 918 (1984); *Steele v. Taylor*, 684 F.2d 1193, 1199 (6th Cir. 1982), cert. denied, 460 U.S. 1053 (1983); *United States v. Balano*, 618 F.2d 624, 629 (10th Cir. 1979), cert. denied, 449 U.S. 840 (1980); *United States v. Carlson*, 547 F.2d 1346, 1358-59 (8th Cir.), cert. denied, 431 U.S. 914 (1977). The foregoing cases apply a preponderance of the evidence standard. Contra *United States v. Thevis*, 665 F.2d 616, 631 (5th Cir.) (clear and convincing standard), cert. denied, 459 U.S. 825 (1982). The usual Rule 104(a) preponderance of the evidence standard has been adopted in light of the behavior the new Rule 804(b)(6) seeks to discourage.

Notes of Advisory Committee on 2010 amendments. Subdivision (b)(3). Rule 804(b)(3) has been amended to provide that the corroborating circumstances requirement applies to all declarations against penal interest offered in criminal cases. A number of courts have applied the corroborating circumstances requirement to declarations against penal interest offered by the prosecution, even though the text of the Rule did not so provide. See, e.g., *United States v. Alvarez*, 584 F.2d 694, 701 (5th Cir. 1978) ("by transplanting the language governing exculpatory statements onto the analysis for admitting inculpatory hearsay, a unitary standard is derived which offers the most workable basis for applying Rule 804(b)(3)"); *United States v. Shukri*, 207 F.3d 412 (7th Cir. 2000) (requiring corroborating circumstances for against-penal-interest statements offered by the government). A unitary approach to declarations against penal interest assures both the prosecution and the accused that the Rule will not be abused and that only reliable hearsay statements will be admitted under the exception.

All other changes to the structure and wording of the Rule are intended to be stylistic only. There is no intent to change any other result in any ruling on evidence admissibility.

The Committee found no need to address the relationship between Rule 804(b)(3) and the Confrontation Clause, because the requirements of this exception assure that declarations admissible under it will not be testimonial.

The amendment does not address the use of the corroborating circumstances for declarations against penal interest offered in civil cases.

In assessing whether corroborating circumstances exist, some courts have focused on the credibility of the witness who relates the hearsay statement in court. But the credibility of the witness who relates the statement is not a proper factor for the court to consider in assessing corroborating circumstances. To base admission or exclusion of a hearsay statement on the witness's credibility would usurp the jury's role of determining the credibility of testifying witnesses.

Notes of Advisory Committee on 2011 amendments. The language of Rule 804 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.

No style changes were made to Rule 804(b)(3), because it was already restyled in conjunction with a substantive amendment, effective December 1, 2010.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 11, 2012
RE: Rule 805, N.D.R.Ev., Hearsay Within Hearsay

Form and style amendments to Rule 805 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposed amendments are attached.

1
2 RULE 805. HEARSAY WITHIN HEARSAY

3 ~~Hearsay included within hearsay is not excluded under the hearsay rule if each part~~
4 ~~of the combined statements conforms with an exception to the hearsay rule provided in these~~
5 Rules:

6 Hearsay within hearsay is not excluded by the rule against hearsay if each part of the
7 combined statements conforms with an exception to the rule.

8 EXPLANATORY NOTE

9 Rule 805 was amended, effective _____.

10 Rule 805 provides that double or multiple hearsay statements are not to be excluded
11 if each step is admissible under a hearsay exception. Thus, a dying declaration containing
12 another declarant's statement of his present sense impression ~~would~~ could be admissible.

13 Rule 805 was amended, effective _____, in response to the December 1,
14 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
15 were changed to make the rule more easily understood and to make style and terminology
16 consistent throughout the rules. There is no intent to change any result in any ruling on
17 evidence admissibility.

18 Sources: Joint Procedure Committee Minutes: of _____; April 8, 1976,
19 page 13. ~~Rule 805, Federal Rules of Evidence~~ Fed.R.Ev. 805; Rule 805, SBAND proposal.

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 805. Hearsay Within Hearsay

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1943.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. On principle it scarcely seems open to doubt that the hearsay rule should not call for exclusion of a hearsay statement which includes a further hearsay statement when both conform to the requirements of a hearsay exception. Thus a hospital record might contain an entry of the patient's age based on information furnished by his wife. The hospital record would qualify as a regular entry except that the person who furnished the information was not acting in the routine of the business. However, her statement independently qualifies as a statement of pedigree (if she is unavailable) or as a statement made for purposes of diagnosis or treatment, and hence each link in the chain falls under sufficient assurances. Or, further to illustrate, a dying declaration may incorporate a declaration against interest by another declarant. See McCormick § 290, p. 611.

Notes of Advisory Committee on 2011 amendments. The language of Rule 805 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: September 11, 2012

RE: Rule 806, N.D.R.Ev., Attacking and Supporting Credibility of Declarant

Form and style amendments to Rule 806 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposed amendments are attached.

1
2 RULE 806. ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT THE
3 DECLARANT'S CREDIBILITY

4 ~~If a hearsay statement, or a statement defined in Rule 801(d)(2)(iii), (iv), or (v), is~~
5 ~~admitted in evidence, the credibility of the declarant may be attacked, and if attacked may~~
6 ~~be supported, by any evidence which would be admissible for those purposes if declarant had~~
7 ~~testified as a witness. Evidence of a statement or conduct by the declarant at any time,~~
8 ~~inconsistent with the declarant's hearsay statement, is not subject to any requirement that the~~
9 ~~declarant may have been afforded an opportunity to deny or explain. If the party against~~
10 ~~whom a hearsay statement has been admitted calls the declarant as a witness, the party is~~
11 ~~entitled to examine the declarant on the statement as if under cross-examination.~~

12 When a hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E),
13 has been admitted in evidence, the declarant's credibility may be attacked, and then
14 supported, by any evidence that would be admissible for those purposes if the declarant had
15 testified as a witness. The court may admit evidence of the declarant's inconsistent statement
16 or conduct, regardless of when it occurred or whether the declarant had an opportunity to
17 explain or deny it. If the party against whom the statement was admitted calls the declarant
18 as a witness, the party may examine the declarant on the statement as if on cross-
19 examination.

20 EXPLANATORY NOTE

21 Rule 806 was amended, effective March 1, 1990: _____.

22 Rule 806 treats a declarant of hearsay evidence as any other witness by allowing the
23 declarant's credibility to be attacked in accordance with the rules of Article VI. One deviation
24 is required, however, and that is a declarant need not have been given an opportunity to deny
25 or explain a statement inconsistent with the hearsay statement. ~~Compare Rule 613(b);~~
26 ~~N.D.R.Ev.~~ This is because the inconsistent statement may well have been subsequent to the
27 hearsay statement offered in evidence, precluding bringing it to the declarant's attention.

28 Rule 806 was amended, effective March 1, 1990. The amendments are technical in
29 nature and no substantive change is intended.

30 Rule 806 was amended, effective _____, in response to the December 1,
31 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
32 were changed to make the rule more easily understood and to make style and terminology
33 consistent throughout the rules. There is no intent to change any result in any ruling on
34 evidence admissibility.

35 Sources: Joint Procedure Committee Minutes: of _____; March 24-25,
36 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 13; October 1, 1975, page
37 8. ~~Rule 806, Federal Rules of Evidence~~ Fed.R.Ev. 806; Rule 806, SBAND proposal.

38 Cross Reference: N.D.R.Ev. 607 (Who May Impeach a Witness), N.D.R.Ev. 608 (A
39 Witness's Character for Truthfulness or Untruthfulness), N.D.R.Ev. 609 (Impeachment by
40 Evidence of a Criminal Conviction), N.D.R.Ev. 613 (Witness's Prior Statement).

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 806. Attacking and Supporting the Declarant's Credibility

When a hearsay statement--or a statement described in Rule 801(d)(2)(C), (D), or (E)--has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1943; Oct. 1, 1987; Dec. 1, 1997.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The declarant of a hearsay statement which is admitted in evidence is in effect a witness. His credibility should in fairness be subject to impeachment and support as though he had in fact testified. See Rules 608 and 609. There are however, some special aspects of the impeaching of a hearsay declarant which require consideration. These special aspects center upon impeachment by inconsistent statement, arise from factual differences which exist between the use of hearsay and an actual witness and also between various kinds of hearsay, and involve the question of applying to declarants the general rule disallowing evidence of an inconsistent statement to impeach a witness unless he is afforded an opportunity to deny or explain. See Rule 613(b).

The principle difference between using hearsay and an actual witness is that the inconsistent statement will in the case of the witness almost inevitably of necessity in the nature of things be a *prior* statement, which it is entirely possible and feasible to call to his attention, while in the case of hearsay the inconsistent statement may well be a *subsequent* one, which practically precludes calling it to the attention of the declarant. The result of insisting upon observation of this impossible requirement in the hearsay situation is to deny the opponent, already barred from cross-examination, any benefit of this important technique of impeachment. The writers favor allowing the subsequent statement. McCormick § 37, p. 69; 3 Wigmore § 1033. The cases, however, are divided. Cases allowing the impeachment include *People v. Collup*, 27 Cal.2d 829, 167 P.2d 714 (1946); *People v. Rosoto*, 58 Cal.2d 304, 23 Cal.Rptr. 779, 373 P.2d 867 (1962); *Carver v. United States*, 164 U.S. 694, 17 S.Ct. 228, 41 L.Ed. 602 (1897). Contra, *Mattox v. United States*, 156 U.S. 237, 15 S.Ct. 337, 39 L.Ed. 409 (1895); *People v. Hines*, 284 N.Y. 93, 29 N.E.2d 483 (1940). The force of *Mattox*, where the hearsay was the former testimony of a deceased witness and the denial of use of a subsequent inconsistent statement was upheld, is much diminished by *Carver*, where the hearsay was a dying declaration and denial of use of a subsequent inconsistent statement resulted in reversal. The difference in the particular brand of hearsay seems unimportant when the inconsistent statement is a subsequent one. True, the opponent is not totally deprived of cross-examination when the hearsay is former testimony or a deposition but he is deprived of cross-examining on the statement or along lines suggested by it. Mr. Justice Shiras, with two justices joining him, dissented vigorously in *Mattox*.

When the impeaching statement was made *prior* to the hearsay statement, differences in the kinds of hearsay appear which arguably may justify differences in treatment. If the hearsay consisted of a simple statement by the witness, e.g. a dying declaration or a declaration against interest, the feasibility of affording him an opportunity to deny or explain encounters the same practical impossibility as where the statement is a subsequent one, just discussed, although here the impossibility arises from the total absence of anything resembling a hearing at which the matter could be put to him. The courts by a large majority have ruled in favor of allowing the statement to be used under these circumstances. McCormick § 37, p. 69; 3 Wigmore § 1033. If, however, the hearsay consists of former testimony or a deposition, the possibility of calling the prior statement to the attention of the witness or deponent is not ruled out, since the opportunity to cross-examine was available. It might thus be concluded that with former testimony or depositions the conventional foundation should be insisted upon. Most of the cases involve depositions, and Wigmore describes them as divided. 3 Wigmore § 1031. Deposition procedures at best are cumbersome and expensive, and to require the laying of the foundation may impose an undue burden. Under the federal practice, there is no way of knowing with certainty at the time of taking a deposition whether it is merely for discovery or will ultimately end up in evidence. With respect to both former testimony and depositions the possibility exists that knowledge of the statement might not be acquired until after the time of the cross-examination. Moreover, the expanded admissibility of former testimony and depositions under

Rule 804(b)(1) calls for a correspondingly expanded approach to impeachment. The rule dispenses with the requirement in all hearsay situations, which is readily administered and best calculated to lead to fair results.

Notice should be taken that *Rule 26(f) of the Federal Rules of Civil Procedure*, as originally submitted by the Advisory Committee, ended with the following:

"* * * and, without having first called them to the deponent's attention, may show statements contradictory thereto made at any time by the deponent."

This language did not appear in the rule as promulgated in December, 1937. See 4 Moore's Federal Practice P P 26.01[9], 26.35 (2d ed. 1967). In 1951, Nebraska adopted a provision strongly resembling the one stricken from the federal rule:

"Any party may impeach any adverse deponent by self-contradiction without having laid foundation for such impeachment at the time such deposition was taken." R.S.Neb. § 25-1267.07.

For similar provisions, see Uniform Rule 65; *California Evidence Code § 1202*; Kansas Code of Civil Procedure § 60-462; New Jersey Evidence Rule 65.

The provision for cross-examination of a declarant upon his hearsay statement is a corollary of general principles of cross-examination. A similar provision is found in *California Evidence Code § 1203*.

Notes of Committee on the Judiciary, Senate Report No. 93-1277. Rule 906, as passed by the House and as proposed by the Supreme Court provides that whenever a hearsay statement is admitted, the credibility of the declarant of the statement may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if the declarant had testified as a witness. Rule 801 defines what is a hearsay statement. While statements by a person authorized by a party-opponent to make a statement concerning the subject, by the party-opponent's agent or by a coconspirator of a party--see rule 801(d)(2)(c), (d) and (e)--are traditionally defined as exceptions to the hearsay rule, rule 801 defines such admission by a party-opponent as statements which are not hearsay. Consequently, rule 806 by referring exclusively to the admission of hearsay statements, does not appear to allow the credibility of the declarant to be attacked when the declarant is a coconspirator, agent or authorized spokesman. The committee is of the view that such statements should open the declarant to attacks on his credibility. Indeed, the reason such statements are excluded from the operation of rule 806 is likely attributable to the drafting technique used to codify the hearsay rule, viz some statements, instead of being referred to as exceptions to the hearsay rule, are defined as statements which are not hearsay. The phrase "or a statement defined in rule 801(d)(2)(c), (d) and (e)" is added to the rule in order to subject the declarant of such statements, like the declarant of hearsay statements, to attacks on his credibility. [The committee considered it unnecessary to include statements contained in rule 801(d)(2)(A) and (B)--the statement by the party-opponent himself or the statement of which he has manifested his adoption--because the credibility of the party-opponent is always subject to an attack on his credibility].

Notes of Conference Committee, House Report No. 93-1597. The Senate amendment permits an attack upon the credibility of the declarant of a statement if the statement is one by a person authorized by a party-opponent to make a statement concerning the subject, one by an agent of a party-opponent, or one by a coconspirator of the party-opponent, as these statements are defined in Rules 801(d)(2)(C), (D) and (E). The House bill has no such provision.

The Conference adopts the Senate amendment. The Senate amendment conforms the rule to present practice.

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

Notes of Advisory Committee on 1997 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2011 amendments. The language of Rule 806 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: September 11, 2012
RE: Rule 807, N.D.R.Ev., Residual Exception

Form and style amendments to Rule 807 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposed amendments are attached.

RULE 807. RESIDUAL EXCEPTION

~~A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines (A) the statement is offered as evidence of a material fact, (B) the statement is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts, and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.~~

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

~~However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party and to the court in writing sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 807. Residual Exception

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

- (1) the statement has equivalent circumstantial guarantees of trustworthiness;
- (2) it is offered as evidence of a material fact;
- (3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and
- (4) admitting it will best serve the purposes of these rules and the interests of justice.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

HISTORY:

(Added December 1, 1997.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on 1997 amendments. The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Notes of Advisory Committee on 2011 amendments. The language of Rule 807 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: September 12, 2012
RE: Rule 901, N.D.R.Ev., Requirement of Authentication or Identification

Form and style amendments to Rule 901 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposed amendments are attached.

1
2 RULE 901. ~~REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION~~

3 AUTHENTICATING OR IDENTIFYING EVIDENCE

4 ~~(a) General provision. The requirement of authentication or identification as a~~
5 ~~condition precedent to admissibility is satisfied by evidence sufficient to support a finding~~
6 ~~that the matter in question is what its proponent claims.~~

7 (a) In General. To satisfy the requirement of authenticating or identifying an item of
8 evidence, the proponent must produce evidence sufficient to support a finding that the item
9 is what the proponent claims it is.

10 ~~(b) Illustrations. By way of illustration only, and not by way of limitation, the~~
11 ~~following are examples of authentication or identification conforming with the requirements~~
12 ~~of this rule:~~

13 (b) Examples. The following are examples only, not a complete list, of evidence that
14 satisfies the requirement:

15 ~~(1) Testimony of witness with knowledge. Testimony of a witness with knowledge~~
16 ~~that a matter is what it is claimed to be.~~

17 (1) Testimony of a Witness with Knowledge. Testimony that an item is what it is
18 claimed to be.

19 ~~(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of~~
20 ~~handwriting, based upon familiarity not acquired for purposes of the litigation.~~

21 (2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting

22 is genuine, based on a familiarity with it that was not acquired for the current litigation.

23 ~~(3) Comparison by trier or nonexpert witness. Comparison by the trier of fact or by~~
24 ~~expert witnesses with specimens which have been authenticated.~~

25 (3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an
26 authenticated specimen by an expert witness or the trier of fact.

27 ~~(4) Distinctive characteristics and the like. Appearance, contents, substance, internal~~
28 ~~patterns, or other distinctive characteristics, taken in conjunction with circumstances.~~

29 (4) Distinctive Characteristics and the Like. The appearance, contents, substance,
30 internal patterns, or other distinctive characteristics of the item, taken together with all the
31 circumstances.

32 ~~(5) Voice identification. Identification of a voice, whether heard firsthand or through~~
33 ~~mechanical or electronic transmission or recording, by opinion based upon hearing the voice~~
34 ~~at any time under circumstances connecting it with the alleged speaker.~~

35 (5) Opinion About a Voice. An opinion identifying a person's voice, whether heard
36 firsthand or through mechanical or electronic transmission or recording, based on hearing the
37 voice at any time under circumstances that connect it with the alleged speaker.

38 ~~(6) Telephone conversations. Telephone conversations, by evidence that a call was~~
39 ~~made to the number assigned at the time by the telephone company to a particular person or~~
40 ~~business, if (i) in the case of a person, circumstances, including self-identification, show the~~
41 ~~person answering to be the one called, or (ii) in the case of a business, the call was made to~~
42 ~~a place of business and the conversation related to business reasonably transacted over the~~

43 telephone:

44 (6) Evidence About a Telephone Conversation. For a telephone conversation,
45 evidence that a call was made to the number assigned at the time to:

46 (A) a particular person, if circumstances, including self-identification, show that the
47 person answering was the one called; or

48 (B) a particular business, if the call was made to a business and the call related to
49 business reasonably transacted over the telephone.

50 ~~(7) Public records or reports. Evidence that a writing authorized by law to be recorded~~
51 ~~or filed and in fact recorded or filed in a public office, or a purported public record, report,~~
52 ~~statement, or data compilation, in any form, is from the public office where items of this~~
53 ~~nature are kept.~~

54 (7) Evidence About Public Records. Evidence that:

55 (A) a document was recorded or filed in a public office as authorized by law; or

56 (B) a purported public record or statement is from the office where items of this kind
57 are kept.

58 ~~(8) Ancient documents or data compilations. Evidence that a document or data~~
59 ~~compilation in any form, (i) is in such condition as to create no suspicion concerning its~~
60 ~~authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in~~
61 ~~existence twenty years or more at the time it is offered.~~

62 (8) Evidence About Ancient Documents or Data Compilations. For a document or data
63 compilation, evidence that it:

64 (A) is in a condition that creates no suspicion about its authenticity;

65 (B) was in a place where, if authentic, it would likely be; and

66 (C) is at least 20 years old when offered.

67 ~~(9) Process or system. Evidence describing a process or system used to produce a~~
68 ~~result and showing that the process or system produces an accurate result.~~

69 (9) Evidence About a Process or System. Evidence describing a process or system and
70 showing that it produces an accurate result.

71 ~~(10) Methods provided by statute or rule. Any method of authentication or~~
72 ~~identification complying with these rules, or other rules adopted by the North Dakota~~
73 ~~supreme court, or as provided by statute.~~

74 (10) Methods Provided by a Statute or Rule. Any method of authentication or
75 identification allowed by a statute or a rule prescribed by the North Dakota Supreme Court.

76 EXPLANATORY NOTE

77 Rule 901 was amended, effective _____.

78 ~~Article IX is taken from the Federal Rules of Evidence and has been the subject of~~
79 ~~only minor revision. Rule 901 is based on Fed.R.Ev. 901.~~

80 ~~The Article deals with the method of authenticating evidence. Authentication has been~~
81 ~~said by Wigmore to be a matter of "logical necessity":~~

82 ~~"In short, when a claim or offer involves impliedly or expressly any element of~~
83 ~~personal connection with a corporal object, that connection must be made to appear, like the~~
84 ~~other elements, else the whole fails in effect." VII Wigmore, Evidence, § 2129 at 564 (3d ed.~~

85 1940).

86 Thus, authentication Authentication is merely a preliminary question of conditional
87 relevancy and, as such, is to be determined according to the standards and requirements of
88 N.D.R.Ev. 104(b), ~~NDREv.~~ A determination that evidence is authentic does not render it
89 admissible. It may be hearsay, e.g., and excluded on that ground.

90 The ~~illustrations~~ examples listed in subdivision (b) are derived from traditional
91 methods of authentication. They should be read in light of the general requirement of
92 subdivision (a), which is satisfied by evidence sufficient to support a finding that the matter
93 is what its proponent claims.

94 Rule 901 was amended, effective _____, in response to the December 1,
95 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
96 were changed to make the rule more easily understood and to make style and terminology
97 consistent throughout the rules. There is no intent to change any result in any ruling on
98 evidence admissibility.

99 Sources: Joint Procedure Committee Minutes: of _____; June 3, 1976,
100 pages 8-10; October 1, 1975, page 8. ~~Rule 901, Federal Rules of Evidence~~ Fed.R.Ev. 901;
101 Rule 901, SBAND proposal.

102 Statutes Affected:

103 Considered: N.D.C.C. §§ 47-19-23, 47-19-24.

104 Rules:

105 Considered: ~~Rule 44(a), NDR CivP; Rule 27, NDR CrimP.~~

106 Cross Reference: N.D.R.Ev. 104 (Preliminary Questions); N.D.R.Civ.P. 44 (Proving
107 an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

FEDERAL RULES OF EVIDENCE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 901. Authenticating or Identifying Evidence

(a) **In General.** To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

(b) **Examples.** The following are examples only--not a complete list--of evidence that satisfies the requirement:

(1) *Testimony of a Witness with Knowledge.* Testimony that an item is what it is claimed to be.

(2) *Nonexpert Opinion About Handwriting.* A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

(3) *Comparison by an Expert Witness or the Trier of Fact.* A comparison with an authenticated specimen by an expert witness or the trier of fact.

(4) *Distinctive Characteristics and the Like.* The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

(5) *Opinion About a Voice.* An opinion identifying a person's voice--whether heard firsthand or through mechanical or electronic transmission or recording--based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

(6) *Evidence About a Telephone Conversation.* For a telephone conversation, evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

(7) *Evidence About Public Records.* Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

(8) *Evidence About Ancient Documents or Data Compilations.* For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

(9) *Evidence About a Process or System.* Evidence describing a process or system and showing that it produces an accurate result.

(10) *Methods Provided by a Statute or Rule.* Any method of authentication or identification allowed by a federal statute or a rule prescribed by the Supreme Court.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1943.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Subdivision (a). Authentication and identification represent a special aspect of relevancy. Michael and Adler, *Real Proof*, 5 *Vand.L.Rev.* 344, 362 (1952); McCormick §§ 179, 185; Morgan, *Basic Problems of Evidence* 378. (1962). Thus a telephone conversation may be irrelevant because on an unrelated topic or because the speaker is not identified. The latter aspect is the one here involved. Wigmore describes the need for authentication as "an inherent logical necessity." 7 Wigmore § 2129, p. 564.

This requirement of showing authenticity or identity fails in the category of relevancy dependent upon fulfillment of a condition of fact and is governed by the procedure set forth in Rule 104(b).

The common law approach to authentication of documents has been criticized as an "attitude of agnosticism," McCormick, *Cases on Evidence* 388, n. 4 (3rd ed. 1956), as one which "departs sharply from men's customs in ordinary affairs," and as presenting only a slight obstacle to the introduction of forgeries in comparison to the time and expense devoted to proving genuine writings which correctly show their origin on their face, McCormick § 185, pp. 395, 396. Today, such available procedures as requests to admit and pretrial conference afford the means of eliminating much of the need for authentication or identification. Also, significant inroads upon the traditional insistence on authentication

and identification have been made by accepting as at least prima facie genuine items of the kind treated in Rule 902, infra. However, the need for suitable methods of proof still remains, since criminal cases pose their own obstacles to the use of preliminary procedures, unforeseen contingencies may arise, and cases of genuine controversy will still occur.

Subdivision (b). The treatment of authentication and identification draws largely upon the experience embodied in the common law and in statutes to furnish illustrative applications of the general principle set forth in subdivision (a). The examples are not intended as an exclusive enumeration of allowable methods but are meant to guide and suggest, leaving room for growth and development in this area of the law.

The examples relate for the most part to documents, with some attention given to voice communications and computer print-outs. As Wigmore noted, no special rules have been developed for authenticating chattels. Wigmore, Code of Evidence § 2086 (3rd ed. 1942).

It should be observed that compliance with requirements of authentication or identification by no means assures admission of an item into evidence, as other bars, hearsay for example, may remain.

Example (1). Example (1) contemplates a broad spectrum ranging from testimony of a witness who was present at the signing of a document to testimony establishing narcotics as taken from an accused and accounting for custody through the period until trial, including laboratory analysis. See *California Evidence Code* § 1413, eyewitness to signing.

Example (2). Example (2) states conventional doctrine as to lay identification of handwriting, which recognizes that a sufficient familiarity with the handwriting of another person may be acquired by seeing him write, by exchanging correspondence, or by other means, to afford a basis for identifying it on subsequent occasions. McCormick § 189. See also *California Evidence Code* § 1416. Testimony based upon familiarity acquired for purposes of the litigation is reserved to the expert under the example which follows.

Example (3). The history of common law restrictions upon the technique of proving or disproving the genuineness of a disputed specimen of handwriting through comparison with a genuine specimen, by either the testimony of expert witnesses or direct viewing by the triers themselves, is detailed in 7 Wigmore §§ 1991-1994. In breaking away, the English Common Law Procedure Act of 1854, 17 and 18 Viet., c. 125, § 27, cautiously allowed expert or trier to use exemplars "proved to the satisfaction of the judge to be genuine" for purposes of comparison. The language found its way into numerous statutes in this country, e.g., *California Evidence Code* §§ 1417, 1418. While explainable as a measure of prudence in the process of breaking with precedent in the handwriting situation, the reservation to the judge of the question of the genuineness of exemplars and the imposition of an unusually high standard of persuasion are at variance with the general treatment of relevancy which depends upon fulfillment of a condition of fact. Rule 104(b). No similar attitude is found in other comparison situations, e.g., ballistics comparison by jury, as in *Evans v. Commonwealth*, 230 Ky. 411, 19 S.W.2d 1091 (1929), or by experts, Annot. 26 A.L.R.2d 892, and no reason appears for its continued existence in handwriting cases. Consequently Example (3) sets no higher standard for handwriting specimens and treats all comparison situations alike, to be governed by Rule 104(b). This approach is consistent with 28 U.S.C. § 1731: "The admitted or proved handwriting of any person shall be admissible, for purposes of comparison, to determine genuineness of other handwriting attributed to such person."

Precedent supports the acceptance of visual comparison as sufficiently satisfying preliminary authentication requirements for admission in evidence. *Brandon v. Collins*, 267 F.2d 731 (2d Cir. 1959); *Wausau Sulphate Fibre Co. v. Commissioner of Internal Revenue*, 61 F.2d 879 (7th Cir. 1932); *Desimone v. United States*, 227 F.2d 864 (9th Cir. 1955).

Example (4). The characteristics of the offered item itself, considered in the light of circumstances, afford authentication techniques in great variety. Thus a document or telephone conversation may be shown to have emanated from a particular person by virtue of its disclosing knowledge of facts known peculiarly to him; *Globe Automatic Sprinkler Co. v. Braniff*, 89 Okl. 105, 214 P. 127 (1923); *California Evidence Code* § 1421; similarly, a letter may be authenticated by content and circumstances indicating it was in reply to a duly authenticated one. McCormick § 192; *California Evidence Code* § 1420. Language patterns may indicate authenticity or its opposite. *Magnuson v. State*, 187 Wis. 122, 203 N.W. 749 (1925); Arens and Meadow, *Psycholinguistics and the Confession Dilemma*, 56 *Colum.L.Rev.* 19 (1956).

Example (5). Since aural voice identification is not a subject of expert testimony, the requisite familiarity may be acquired either before or after the particular speaking which is the subject of the identification, in this respect resembling visual identification of a person rather than identification of handwriting. Cf. Example (2), supra, *People v. Nichols*, 378 Ill. 487, 38 N.E.2d 766 (1942); *McGuire v. State*, 200 Md. 601, 92 A.2d 582 (1952); *State v. McGee*, 336 Mo. 1082, 83 S.W.2d 98 (1935).

Example (6). The cases are in agreement that a mere assertion of his identity by a person talking on the telephone is not sufficient evidence of the authenticity of the conversation and that additional evidence of his identity is required. The additional evidence need not fall in any set pattern. Thus the content of his statements or the reply technique, under

Example (4), supra, or voice identification under Example (5), may furnish the necessary foundation. Outgoing calls made by the witness involve additional factors bearing upon authenticity. The calling of a number assigned by the telephone company reasonably supports the assumption that the listing is correct and that the number is the one reached. If the number is that of a place of business, the mass of authority allows an ensuing conversation if it relates to business reasonably transacted over the telephone, on the theory that the maintenance of the telephone connection is an invitation to do business without further identification. *Matton v. Hoover Co.*, 350 Mo. 506, 166 S.W.2d 557 (1942); *City of Pawhuska v. Crutchfield*, 147 Okl. 4. 293 P. 1095 (1930); *Zurich General Acc. & Liability Ins. Co. v. Baum*, 159 Va. 404, 165 S.E. 518 (1932). Otherwise, some additional circumstance of identification of the speaker is required. The authorities divide on the question whether the self-identifying statement of the person answering suffices. Example (6) answers in the affirmative on the assumption that usual conduct respecting telephone calls furnish adequate assurances of regularity, bearing in mind that the entire matter is open to exploration before the trier of fact. In general, see McCormick § 193; 7 Wigmore § 2155; Annot., 71 A.L.R. 5, 105 id. 326.

Example (7). Public records are regularly authenticated by proof of custody, without more. McCormick § 191; 7 Wigmore §§ 2158, 2159. The example extends the principle to include data stored in computers and similar methods, of which increasing use in the public records area may be expected. See *California Evidence Code* §§ 1532, 1600.

Example (8). The familiar ancient document rule of the common law is extended to include data stored electronically or by other similar means. Since the importance of appearance diminishes in this situation, the importance of custody or place where found increases correspondingly. This expansion is necessary in view of the widespread use of methods of storing data in forms other than conventional written records.

Any time period selected is bound to be arbitrary. The common law period of 30 years is here reduced to 20 years, with some shift of emphasis from the probable unavailability of witnesses to the unlikelihood of a still viable fraud after the lapse of time. The shorter period is specified in the English Evidence Act of 1938, 1 & 2 Geo. 6, c. 28, and in Oregon R.S. 1963, § 41.360(34). See also the numerous statutes prescribing periods of less than 30 years in the case of recorded documents. 7 Wigmore § 2143.

The application of Example (8) is not subject to any limitation to title documents or to any requirement that possession, in the case of a title document, has been consistent with the document. See McCormick § 190.

Example (9). Example (9) is designed for situations in which the accuracy of a result is dependent upon a process or system which produces it. X-rays afford a familiar instance. Among more recent developments is the computer, as to which see *Transport Indemnity Co. v. Seib*, 178 Neb. 253, 132 N.W.2d 871 (1965); *State v. Veres*, 7 Ariz.App. 117, 436 P.2d 629 (1968); *Merrick v. United States Rubber Co.*, 7 Ariz.App. 433, 440 P.2d 314 (1968); Freed, Computer Print-Outs as Evidence, 16 Am.Jur. Proof of Facts 273; Symposium, Law and Computers in the Mid-Sixties, ALI-ABA (1966); 37 *Albany L.Rev.* 61 (1967). Example (9) does not, of course, foreclose taking judicial notice of the accuracy of the process or system.

Example (10). The example makes clear that methods of authentication provided by Act of Congress and by the Rules of Civil and Criminal Procedure or by Bankruptcy Rules are not intended to be superseded. Illustrative are the provisions for authentication of official records in Civil Procedure Rule 44 and Criminal Procedure Rule 27, for authentication of records of proceedings by court reporters in 28 U.S.C. § 753(b) and Civil Procedure Rule 80(c), and for authentication of depositions in Civil Procedure Rule 30(f).

Notes of Advisory Committee on 2011 amendments. The language of Rule 901 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: September 12, 2012
RE: Rule 902, N.D.R.Ev., Self Authentication

Form and style amendments to Rule 902 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposal contains new paragraphs (10) and (11), which allow documents to be "certified." These new paragraphs are drawn from language that was added to the federal rule in 2000. The federal rule language extended the 18 U.S.C. § 3505 foreign records certification procedure for criminal cases to foreign and domestic records in all cases. The new paragraphs seem to allow regularly kept records to be certified in the same way public records are certified under paragraph (4). The committee may wish to discuss whether to make this new language part of the state rule.

The proposed amendments are attached along with a copy of 18 U.S.C. § 3505.

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

24 (2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified.

25 A document that bears no seal if:

26 (A) it bears the signature of an officer or employee of an entity named in Rule
27 902(1)(A); and

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

95 (11) Certified Domestic Records of a Regularly Conducted Activity. The original or
96 a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by
97 a certification of the custodian or another qualified person that complies with a statute or a
98 rule prescribed by the North Dakota Supreme Court. Before the trial or hearing, the
99 proponent must give an adverse party reasonable written notice of the intent to offer the
100 record, and must make the record and certification available for inspection, so that the party
101 has a fair opportunity to challenge them.

102 (12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the
103 original or a copy of a foreign record that meets the requirements of Rule 902(11), modified
104 as follows: the certification, rather than complying with a statute or North Dakota Supreme
105 Court rule, must be signed in a manner that, if falsely made, would subject the maker to a

106 ~~criminal penalty in the country where the certification is signed. The proponent must also~~
107 ~~meet the notice requirements of Rule 902(11).~~

108 EXPLANATORY NOTE

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

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

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

118 Rule 902 was amended, effective _____, in response to the December 1,
119 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
120 were changed to make the rule more easily understood and to make style and terminology
121 consistent throughout the rules. There is no intent to change any result in any ruling on
122 evidence admissibility.

123 Sources: Joint Procedure Committee Minutes: of _____; March 24-25,
124 1988, pages 15-16; December 3, 1987, page 15; June 3, 1976, pages 10-12, 14; October 1,
125 1975, pages 8, 9. ~~Rule 902, Federal Rules of Evidence~~ Fed.R.Ev. 902; Rule 902, SBAND
126 proposal.

127 Statutes Affected:

128 Considered: 11-18-11, 16-13-11, 31-08-02, 31-08-02.1, 31-08-06, Ch. 31-09,43-13-
129 12, NDCC.

130 Rules:

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

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

FEDERAL RULES OF EVIDENCE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 902. Evidence That Is Self-Authenticating

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

- (1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:
 - (A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and
 - (B) a signature purporting to be an execution or attestation.
- (2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:
 - (A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and
 - (B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.
- (3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:
 - (A) order that it be treated as presumptively authentic without final certification; or
 - (B) allow it to be evidenced by an attested summary with or without final certification.
- (4) *Certified Copies of Public Records.* A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:
 - (A) the custodian or another person authorized to make the certification; or
 - (B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.
- (5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.
- (6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.
- (7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.
- (8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.
- (9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.
- (10) *Presumptions Under a Federal Statute.* A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.
- (11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.
- (12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1944; Oct. 1, 1987; Nov. 1, 1988; Dec. 1, 2000.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; *California Evidence Code* § 1452. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; *California Evidence Code* § 1453, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. 39 U.S.C. § 4005(b), public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co. v. Johnson*, 163 Miss. 426, 141 So. 762 (1932), Baby Ruth candy bar; *Doyle v. Continental Baking Co.*, 262 Mass. 516, 160 N.E. 325 (1928), loaf of bread; *Weiner v. Mager & Throne, Inc.*, 167 Misc 338, 3 N.Y.S.2d 918 (1938), same. And see W.Va. Code 1966, § 47-3-5, trade-mark on bottle prima facie evidence of ownership. Contra, *Keegan v. Green Giant Co.*, 150 Me. 283, 110 A.2d 599 (1954); *Murphy v. Campbell Soup Co.*, 62 F.2d 564 (1st Cir. 1933). Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46-606; *State v. Wolfley*, 75 Kan. 406, 89 P. 1046 (1907); Annot., 11 L.R.A. (N.S.) 87. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry. v. Callaghan*, 157 Ill. 406, 41 N.E. 909 (1895); 9 Wigmore § 2510a. See also the provision of 19 U.S.C. § 1615(2) that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are *California Evidence Code* § 1451 and N.Y.CPLR 4538, McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). Rule 302, supra. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co. v. United States*, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943). Cf. *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966). In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams v Walker-Thomas-Furniture Co.*, 121 U.S.App.D.C. 315, 350 F.2d 445 (1965). Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, 10 U.S.C. § 936, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; 15 U.S.C. § 77f(a), signature on SEC registration presumed genuine; 26 U.S.C. § 6064, signature to tax return prima facie genuine.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co. v. United States*, 318 U.S. 363 (1943). Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938), State law will apply irrespective of whether it is the Uniform Commercial Code.

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

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2000 amendments. The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). 18 U.S.C. § 3505 currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies 28 U.S.C. § 1746 would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

Notes of Advisory Committee on 2011 amendments. The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

18 U.S.C. § 3505

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that -

(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;

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

(C) the business activity made such a record as a regular practice; and

(D) if such record is not the original, such record is a duplicate of the original;

unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

(2) A foreign certification under this section shall authenticate such record or duplicate.

(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.

(c) As used in this section, the term -

(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;

(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and

(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 12, 2012
RE: Rule 903, N.D.R.Ev., Subscribing Witness Testimony

Form and style amendments to Rule 903 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

The proposed amendments are attached.

RULE 903. SUBSCRIBING WITNESS'S TESTIMONY UNNECESSARY

~~The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.~~

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

EXPLANATORY NOTE

Rule 903 was amended, effective _____.

~~By statute Under N.D.C.C. § 31-08-02, the common law requirement that subscribing witnesses testify to the authenticity of a document has been was abrogated. N.D.C.C. § 31-08-02. This rule continues the statutory practice, but provides that those witnesses must testify if required by the laws governing the validity of the writing.~~

Rule 903 was amended, effective _____, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of _____: June 3, 1976, page 12. ~~Rule 903, Federal Rules of Evidence~~ Fed.R.Ev. 903; Rule 903, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-02, ch. 31-09, §§ 47-19-23, 47-19-24.

FEDERAL RULES OF EVIDENCE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 903. Subscribing Witness's Testimony

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1945.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The common law required that attesting witnesses be produced or accounted for. Today the requirement has generally been abolished except with respect to documents which must be attested to be valid, e.g. wills in some states. McCormick § 188. Uniform Rule 71; *California Evidence Code § 1411*; Kansas Code of Civil Procedure § 60-468; New Jersey Evidence Rule 71; New York CPLR Rule 4537.

Notes of Advisory Committee on 2011 amendments. The language of Rule 903 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.

31-08-02. Proof of witnessed written instruments.

In proving any written instrument or contract to which there is a subscribing witness, or to which there are two or more subscribing witnesses, it shall not be necessary to call any such witness or witnesses, but the instrument or contract may be proved, except for purposes of filing or recording the same, by the evidence by which an instrument or contract to which there is no subscribing witness may be proved. It shall not be permissible, in any case, to prove such instrument or contract by proof of the handwriting of the subscribing witness or witnesses, but in all cases such instrument or contract must be proved in the same manner as one having no subscribing witness whatever.

31-08-02.1. Handwriting admissible in evidence for comparison.

The handwriting of any person shall be competent evidence for the purpose of furnishing a standard of comparison, in all cases wherein the genuineness of a writing is questioned or the identity of the writer is sought to be established.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: September 12, 2012
RE: Rule 1001, N.D.R.Ev., Definitions

Form and style amendments to Rule 1001 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the lengthy explanatory note is retained, with updates proposed by staff to reflect new electronic and digital technology.

The proposed amendments are attached.

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE

For purposes of this Article the following definitions are applicable:

In this article:

(1) ~~Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation.~~

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

(2) ~~Photographs. "Photographs" include still photographs, X-ray films, videotapes, and motion pictures.~~

(c) A "photograph" means a photographic image or its equivalent stored in any form.

(3) ~~Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an "original".~~

(d) An "original" of a writing or recording means the writing or recording itself or any

22 counterpart intended to have the same effect by the person who executed or issued it. For
23 electronically stored information, "original" means any printout, or other output readable by
24 sight, if it accurately reflects the information. An "original" of a photograph includes the
25 negative or a print from it.

26 ~~(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the~~
27 ~~original, or from the same matrix, or by means of photography, including enlargements and~~
28 ~~miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by~~
29 ~~other equivalent techniques which accurately reproduce the original.~~

30 (e) A "duplicate" means a counterpart produced by a mechanical, photographic,
31 chemical, electronic, or other equivalent process or technique that accurately reproduces the
32 original.

33 EXPLANATORY NOTE

34 Rule 1001 was amended, effective _____.

35 Rule 1001 is based on Fed.R.Ev. 1001.

36 Article X is addressed to that aspect of the law of evidence traditionally termed the
37 "best evidence" rule or, at times, more correctly, the rule requiring the production of original
38 documents. The phrase, "best evidence," does not appear in any of the rules of this Article;
39 its omission was intentional, meant to signify a departure from the interpretation often given
40 the rule, if not from the true import of the rule itself.

41 Article X applies only to writings, recordings, and photographs. These items are
42 defined, for purposes of this Article, in ~~Rule 1001~~ this rule.

43 Paragraph (1) ~~expands~~ Subdivisions (a) and (b) expand the definitions of "writings"
44 and "recordings" to include not only those documents produced by traditional methods, such
45 as handwriting, typing, and printing, but also to include data recorded ~~by means of~~ in any
46 form or manner, including by photography, magnetic impulse, and mechanical or electronic
47 recording. This definition ~~would bring~~ brings within the scope of these rules sound
48 recordings as well as data ~~contained in computer banks~~ recorded digitally and stored
49 electronically. The reason which gave birth to the "original documents" rule, i.e., the need
50 for an accurate and honest presentation of written evidence, demands the expanded
51 application of the rule to these later, modern methods of data ~~recordation~~ recording. The
52 definition is "open-ended," ~~encompassing "other form(s) of data compilation" that are~~
53 ~~generically similar to those listed. The definition~~ but it is not intended to include symbols
54 which are not representative of words or numbers.

55 Paragraph (2) Subdivision (c) defines photographs as photographic images in any
56 form, which would include still photographs, X-rays, ~~videotapes~~ videos and motion pictures.
57 This definition is included in a section apart from that defining writings and recordings, for
58 there will be occasions when Rule 1002, requiring production of an original, will apply to
59 photographs, not because they are duplicates of writings, but because the contents of the
60 photographs will be sought to be proved. ~~See Rule 1002 and explanatory note, infra:~~

61 An "original," as defined in ~~paragraph (3)~~ subdivision (d) for the purposes of this
62 Article may be, but will not necessarily be, that document or recording one would ordinarily
63 label an original, if speaking in lay terms. One would ordinarily think of an original as being

64 the document, recording, or photograph first made in point of time. But for purposes of this
65 Article, the definition and existence of an "original" is not dependent upon the chronology
66 of production. ~~As stated in 5 Weinstein's Evidence 1001-49 (1975):~~ Instead, it is "The
67 'original' is the document whose contents are to be proved. Its jural significance makes it the
68 original, whether or not it was written before or after another, was copied from another, or
69 was itself used to copy from." ~~Thus, for~~ For example, in an action for libel, a ~~Xeroxed~~
70 photocopy of a letter, if published, would be the "original" for purposes of this rule.

71 The intent of the parties to a transaction will often bear upon the legal significance of
72 a writing and, ~~thus,~~ its status as an original under this rule. ~~Thus~~ For example, if the parties
73 to a contract execute several copies, intending that each be legally effective, all copies are
74 ~~deemed to be~~ "originals." ~~5 Weinstein, supra, at 1001-50.~~

75 The prints from a photographic negative or a digital image file are treated as originals,
76 as they are ~~the first recognizable~~ the recognizable and tangible form of a photograph. The
77 negative and the digital image file, of course, would also be ~~an original in the usual case~~
78 originals.

79 The last sentence of ~~paragraph (3)~~ subdivision (d) accords the status of original to
80 computer printouts or other output "readable by sight," provided the printout is shown to
81 accurately reflect the ~~data~~ information it contains. This is a necessary provision as the
82 underlying data ~~is not~~ may not be readily comprehensible.

83 ~~Paragraph (4)~~ Subdivision (e) defines "duplicate," as that term is used in this Article.
84 The definition is broad enough to include carbon copies, printed items such as newspapers

85 or other writings produced from a single matrix, ~~Xeroxed~~ photocopies, microfilms, tape
86 records of material originally recorded on wire, or other techniques which accurately
87 reproduce the original. Accurate reproduction of the original is the sole, essential feature of
88 a duplicate under this rule. There is no requirement that the duplicates be made "in the
89 regular course of business" ~~as under prior statutes. See N.D.C.C. § 31-08-01.1.~~ The
90 duplicating process itself is ~~deemed~~ considered sufficient to assure accuracy.

91 It should be noted at this juncture that two main reasons have been advanced for the
92 requirement that original documents be produced: (1) the prevention of inaccurate
93 reproduction, and (2) the prevention of fraud. ~~McCormick on Evidence § 231 (2d ed. 1972).~~
94 ~~This paragraph~~ Subdivision (e) provides an assurance of accuracy in its definition; it does not
95 deal with the possibility of fraudulent duplications. Rule 1003, ~~infra~~, is designed to require
96 production of an original whenever the authenticity of an original is in issue.

97 Finally, it should be noted that although many nice questions may arise as to whether
98 a document is an original or a duplicate, the end result will often be its admission regardless
99 of its status. Under these rules, except when the authenticity of a writing is questioned or
100 when it would be unfair to admit a duplicate, duplicates and originals are treated
101 interchangeably. ~~See Rule 1003, infra.~~

102 Rule 1001 was amended, effective _____, in response to the December 1,
103 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
104 were changed to make the rule more easily understood and to make style and terminology
105 consistent throughout the rules. There is no intent to change any result in any ruling on

106 evidence admissibility.

107 Sources: Joint Procedure Committee Minutes: of _____: January 29,
108 1976, page 14. ~~Rule Fed.R.Ev.1001, Federal Rules of Evidence;~~ Rule 1001, SBAND
109 proposal.

110 Statutes Affected:

111 Considered: N.D.C.C. § 31-08-01.1.

112 Cross Reference: N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1003
113 (Admissibility of Duplicates).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1001. Definitions That Apply to This Article

In this article:

- (a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.
- (b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.
- (c) A "photograph" means a photographic image or its equivalent stored in any form.
- (d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For electronically stored information, "original" means any printout--or other output readable by sight--if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.
- (e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1945.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. In an earlier day, when discovery and other related procedures were strictly limited, the misleading named "best evidence rule" afforded substantial guarantees against inaccuracies and fraud by its insistence upon production of original documents. The great enlargement of the scope of discovery and related procedures in recent times has measurably reduced the need for the rule. Nevertheless important areas of usefulness persist: discovery of documents outside the jurisdiction may require substantial outlay of time and money; the unanticipated document may not practically be discoverable; criminal cases have built-in limitations on discovery. Cleary and Strong, *The Best Evidence Rule: An Evaluation in Context*, 51 *Iowa L.Rev.* 825 (1966).

Paragraph (1). Traditionally the rule requiring the original centered upon accumulations of data and expressions affecting legal relations set forth in words and figures. This meant that the rule was one essentially related to writings. Present day techniques have expanded methods of storing data, yet the essential form which the information ultimately assumes for usable purposes is words and figures. Hence the considerations underlying the rule dictate its expansion to include computers, photographic systems, and other modern developments.

Paragraph (3). In most instances, what is an original will be self-evident and further refinement will be unnecessary. However, in some instances particularized definition is required. A carbon copy of a contract executed in duplicate becomes an original, as does a sales ticket carbon copy given to a customer. While strictly speaking the original of a photograph might be thought to be only the negative, practicality and common usage require that any print from the negative be regarded as an original. Similarly, practicality and usage confer the status of original upon any computer printout. *Transport Indemnity Co. v. Seib*, 178 *Neb.* 253, 132 *N.W.2d* 871 (1965).

Paragraph (4). The definition describes "copies" produced by methods possessing an accuracy which virtually eliminates the possibility of error. Copies thus produced are given the status of originals in large measure by Rule 1003, *infra*. Copies subsequently produced manually, whether handwritten or typed, are not within the definition. It should be noted that what is an original for some purposes may be a duplicate for others. Thus a bank's microfilm record of checks cleared is the original as a record. However, a print offered as a copy of a check whose contents are in controversy is a duplicate. This result is substantially consistent with 28 *U.S.C.* § 1732(b). Compare 26 *U.S.C.* § 7513(c), giving full status as originals to photographic reproductions of tax returns and other documents, made by authority of the Secretary of the Treasury, and 44 *U.S.C.* § 399(a), giving original status to photographic copies in the National Archives.

Notes of Committee on the Judiciary, House Report No. 93-650. The Committee amended this Rule expressly to include "video tapes" in the definition of "photographs."

Notes of Advisory Committee on 2011 amendments. The language of Rule 1001 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: September 12, 2012
RE: Rule 1002, N.D.R.Ev., Requirement of Original

Form and style amendments to Rule 1002 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

RULE 1002. REQUIREMENT OF THE ORIGINAL

~~To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.~~

An original writing, recording, or photograph is required in order to prove its content unless these rules, another rule adopted by the North Dakota Supreme Court, or a statute provides otherwise.

EXPLANATORY NOTE

Rule 1002 was amended, effective _____.

Rule 1002 is based on Fed.R.Ev. 1002.

~~Rule 1002 states the rule that "to prove the content of a writing, recording, or photograph" the original is required. This rule is a familiar one as applied to writings, it is expanded under this section to include recordings and photographs. Advisory Committee's Note to Rule 1002, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

The rule is intended to be one of preference, rather than one of rigid application. The definitions contained in Rule 1001 and the ensuing Rules 1003-1007 are designed to insure that the rule operates as an aid in the search for truth and not as a rule of needless exclusion of evidence.

Perhaps the most persistent problem in applying this rule lies in determining whether the rule should be applied at all. To phrase this in terms of the present section: When are the

22 contents of a writing, recording, or photograph sought to be proved?

23 With respect to writings, there are certain instances in which it is clear that testimony
24 is given, or a writing utilized, for purposes other than to prove the contents of a writing. For
25 example, a witness may use a writing to refresh his memory without coming under this rule
26 (~~see, e.g., Kemmer v. Sunshine Mutual Ins. Co., 79 N.D. 518, 57 N.W.2d 856 (1953), and~~
27 ~~evidence of payment made may be given without producing the written receipt. McCormick~~
28 ~~on Evidence, § 233 at 564 (2d ed. 1972).~~

29 Conversely, where the writing has a legal, operative effect, as in the case of a deed,
30 it must be produced if its terms are to be proved. For example, where the contents of a notice
31 of tax sale are in issue, the newspaper document containing the notice must be produced;
32 testimony as to the contents of the notice will not be admitted. ~~De Nault v. Hoerr, 66 N.D.~~
33 ~~82, 262 N.W. 361 (1935).~~

34 Thus, ~~the~~ The test may be said to be one of legal efficacy of the document in question.
35 And, although this test has been criticized as one of difficult application, and one producing
36 questionable results (~~see, McCormick on Evidence, § 233 (2d ed. 1972)~~), it is retained, but
37 with safeguards which should remove the bases for such criticism. Rule 1003(4) provides
38 a basis for the non-application of this rule in cases where a writing is not closely related to
39 a material issue. Rules 611 and 614 allow the trial court to require written evidence, when
40 available, even though oral testimony would be acceptable under this rule. ~~See, 5 Weinstein's~~
41 ~~Evidence Para 1002(12) (1975).~~

42 This rule has application to photographs as well as writings, although it is the rare case

43 in which the contents of a photograph will be in issue. Normally, a A photograph will often
44 be introduced to "illustrate" the testimony of a witness who has personally observed that
45 which is depicted in the photograph. ~~McCormick on Evidence § 214 (2d ed. 1972)~~. In these
46 cases, this rule does not apply. There are instances, however, such as defamation cases in
47 which the contents of the photograph are involved and are subject to this rule. Also,
48 photographs taken by automatic means, such as those used in many banks, will be subject to
49 the rule requiring production of the original.

50 Exception to this rule has been made in recognition of the many statutes which direct
51 the admittance of certified copies of documents as if they were originals. See, e.g., N.D.C.C.
52 §§ ~~26-15-04~~ and 28-23-12. These statutes, and those of similar import, are left undisturbed
53 by this rule.

54 Rule 1002 was amended, effective _____, in response to the December 1,
55 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
56 were changed to make the rule more easily understood and to make style and terminology
57 consistent throughout the rules. There is no intent to change any result in any ruling on
58 evidence admissibility.

59 Sources: Joint Procedure Committee Minutes: of _____; January 29,
60 1976, page 14. ~~Rule Fed.R.Ev.1002, Federal Rules of Evidence~~; Rule 1002, SBAND
61 proposal.

62 Cross Reference: ~~Rule 1003, NDREv~~, N.D.R.Ev. 1003 (Admissibility of Duplicates),
63 statutes considered.

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1002. Requirement of the Original

An original writing, recording, or photograph is required in order to prove its content unless these rules or a federal statute provides otherwise.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The rule is the familiar one requiring production of the original of a document to prove its contents, expanded to include writings, recordings, and photographs, as defined in Rule 1001(1) and (2), *supra*.

Application of the rule requires a resolution of the question whether contents are sought to be proved. Thus an event may be proved by nondocumentary evidence, even though a written record of it was made. If, however, the event is sought to be proved by the written record, the rule applies. For example, payment may be proved without producing the written receipt which was given. Earnings may be proved without producing books of account in which they are entered. McCormick § 198; 4 Wigmore § 1245. Nor does the rule apply to testimony that books or records have been examined and found not to contain any reference to a designated matter.

The assumption should not be made that the rule will come into operation on every occasion when use is made of a photograph in evidence. On the contrary, the rule will seldom apply to ordinary photographs. In most instances a party wishes to introduce the item and the question raised is the propriety of receiving it in evidence. Cases in which an offer is made of the testimony of a witness as to what he saw in a photograph or motion picture, without producing the same, are most unusual. The usual course is for a witness on the stand to identify the photograph or motion picture as a correct representation of events which he saw or of a scene with which he is familiar. In fact he adopts the picture as his testimony, or, in common parlance, uses the picture to illustrate his testimony. Under these circumstances, no effort is made to prove the contents of the picture, and the rule is inapplicable. *Paradis, The Celluloid Witness, 37 U.Colo.L. Rev. 235, 249-251 (1965)*.

On occasion, however, situations arise in which contents are sought to be proved. Copyright, defamation, and invasion of privacy by photograph or motion picture falls in this category. Similarly as to situations in which the picture is offered as having independent probative value, e.g. automatic photograph of bank robber. See *People v. Doggett, 83 Cal.App.2d 405, 188 P.2d 792 (1948)* photograph of defendants engaged in indecent act; *Mouser and Philbin, Photographic Evidence--Is There a Recognized Basis for Admissibility? 8 Hastings L.J. 310 (1957)*. The most commonly encountered of this latter group is of course, the X-ray, with substantial authority calling for production of the original. *Daniels v. Iowa City, 191 Iowa 811, 183 N.W. 415 (1921)*; *Cellamare v. Third Acc. Transit Corp., 273 App.Div. 260, 77 N.Y.S.2d 91 (1948)*; *Patrick & Tilman v. Matkin, 154 Okl. 232, 7 P.2d 414 (1932)*; *Mendoza v. Rivera, 78 P.R.R. 569 (1955)*.

It should be noted, however, that Rule 703, *supra*, allows an expert to give an opinion based on matters not in evidence, and the present rule must be read as being limited accordingly in its application. Hospital records which may be admitted as business records under Rule 803(6) commonly contain reports interpreting X-rays by the staff radiologist, who qualifies as an expert, and these reports need not be excluded from the records by the instant rule.

The reference to Acts of Congress is made in view of such statutory provisions as 26 U.S.C. § 7513, photographic reproductions of tax returns and documents, made by authority of the Secretary of the Treasury, treated as originals, and 44 U.S.C. § 399(a), photographic copies in National Archives treated as originals.

Notes of Advisory Committee on 2011 amendments. The language of Rule 1002 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: September 12, 2012
RE: Rule 1003, N.D.R.Ev., Admissibility of Duplicates

Form and style amendments to Rule 1003 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

RULE 1003. ADMISSIBILITY OF DUPLICATES

~~A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.~~

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

EXPLANATORY NOTE

Rule 1003 was amended, effective _____.

Rule 1003 is based on Fed.R.Ev. 1003.

As was discussed in relation to Rule 1001, the primary reasons for requiring the production of original documents are to prevent inaccurate reproductions of evidence and to prevent fraud. Technological advances have rendered the inaccurate copy a rarity. Rule 1001, in its definition of a duplicate, insures that only accurate reproductions will be admitted in lieu of originals. In light of this, Rule 1003 provides that a duplicate is admissible to the same extent as an original except where there is a genuine question as to a document's authenticity or whenever it would be unfair to admit the duplicate.

The first exception is intended to cover those cases in which there is a genuine allegation of inaccuracy of reproduction or where the circumstances surrounding the case yield a substantial suggestion that the original document is not authentic. Possibilities of

22 fraud may arise, for example, where a party in possession of an original document claims that
23 the document has been lost or destroyed. Of course, this factor alone should not preclude
24 admission of a duplicate, but coupled with an allegation of fraud and an inadequate
25 explanation of the loss or destruction, exclusion of a duplicate may be warranted.—5
26 ~~Weinstein's Evidence Para 1003 (02) (1975).~~

27 The circumstances of unfairness which that would warrant exclusion of a duplicate
28 cannot be set out with any precision. This exception is intended to prevent application of the
29 general rule admitting duplicates whenever the circumstances are such that a party will be
30 prejudiced by the absence of the original in evidence. For example, where only a part of the
31 original is reproduced, and the remainder bears upon the part offered in evidence, fairness
32 would require production of the original. ~~See Advisory Committee's Notes to Rule 1003,~~
33 ~~Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

34 In the final analysis, it will be the responsibility of the courts to shape the parameters
35 of this rule and its exceptions. The exceptions will necessarily be utilized in limited instances
36 to insure fairness, but they should not be interpreted in a manner that undermines the policy
37 of the general rule which is to further the use of duplicates as evidence of writings.

38 Rule 1003 was amended, effective _____, in response to the December 1,
39 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
40 were changed to make the rule more easily understood and to make style and terminology
41 consistent throughout the rules. There is no intent to change any result in any ruling on
42 evidence admissibility.

43 Sources: Joint Procedure Committee Minutes: of _____; Sources: Joint
44 Procedure Committee Minutes: January 29, 1976, page 15. Rule Fed.R.Ev.1003, Federal
45 ~~Rules of Evidence~~; Rule 1003, SBAND proposal.

46 Statutes Affected:

47 Considered: N.D.C.C. §§ 2-06-05, ~~4-09-05~~, 4-10-03, ~~4-11-19~~, 4-22-15, 6-08-10, ~~7-01-~~
48 ~~12~~, ~~7-08-02~~, ~~10-23-13~~, ~~10-28-09~~, 11-11-38, 11-13-08, 11-18-09, ~~12-44-18~~, 14-03-24, ~~15-29-~~
49 ~~10~~, ~~15-51-10~~, 19-01-10, 19-03.1-37, 19-20.1-17, ~~23-02-40~~, 24-02-11, 24-07-15, ~~26-08-07~~,
50 ~~26-12-09~~, ~~26-12-15~~, ~~26-12-23~~, ~~26-15-04~~, ~~26-15-26~~, 28-23-12, 31-04-10, 31-08-01.1, 31-08-
51 06, 31-09-02, 31-09-03, 31-09-04, 31-09-05, 31-09-06, 31-09-10, ~~33-01-13~~, 35-21-05, 35-22-
52 11, 35-22-16, 37-01-34, 39-20-07, 40-04-06, 40-11-08, 40-16-09, 43-01-21, 43-07-13, 43-10-
53 07, 43-13-12, 43-19.1-10, 43-28-08, 43-32-16, ~~44-06-08~~, ~~44-06-09~~, 47-19-06, 47-19-45, ~~48-~~
54 ~~02-15~~, 49-01-14, 54-46.1-03, ~~57-24-29~~, 61-02-34, 61-03-06, 61-05-19, 61-16-06.

55 Cross Reference: N.D.R.Ev. 1001 (Definitions that Apply to this Article).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1003. Admissibility of Duplicates

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. When the only concern is with getting the words or other contents before the court with accuracy and precision, then a counterpart serves equally as well as the original, if the counterpart is the product of a method which insures accuracy and genuineness. By definition in Rule 1001(4), *supra*, a "duplicate" possesses this character.

Therefore, if no genuine issue exists as to authenticity and no other reason exists for requiring the original, a duplicate is admissible under the rule. This position finds support in the decisions, *Myrick v. United States*, 332 F.2d 279 (5th Cir. 1964), no error in admitting photostatic copies of checks instead of original microfilm in absence of suggestion to trial judge that photostats were incorrect; *Johns v. United States*, 323 F.2d 421 (5th Cir. 1963), not error to admit concededly accurate tape recording made from original wire recording; *Sauget v. Johnston*, 315 F.2d 816 (9th Cir. 1963), not error to admit copy of agreement when opponent had original and did not on appeal claim any discrepancy. Other reasons for requiring the original may be present when only a part of the original is reproduced and the remainder is needed for cross-examination or may disclose matters qualifying the part offered or otherwise useful to the opposing party. *United States v. Alexander*, 326 F.2d 736 (4th Cir. 1964). And see *Toho Bussan Kaisha, Ltd. v. American President Lines, Ltd.*, 265 F.2d 418, 76 A.L.R.2d 1344 (2d Cir. 1959).

Notes of Committee on the Judiciary, House Report No. 93-650. The Committee approved this Rule in the form submitted by the Court, with the expectation that the courts would be liberal in deciding that a "genuine question is raised as to the authenticity of the original."

Notes of Advisory Committee on 2011 amendments. The language of Rule 1003 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: September 12, 2012
RE: Rule 1004, N.D.R.Ev., Admissibility of Other Evidence of Contents

Form and style amendments to Rule 1004 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

~~The~~ An original is not required, and other evidence of the ~~contents~~ content of a writing, recording, or photograph is admissible if:

~~(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;~~

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

~~(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;~~

(b) an original cannot be obtained by any available judicial process;

~~(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing, or~~

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

~~(4) Collateral matters. The~~ (d) the writing, recording, or photograph is not closely related to a controlling issue.

EXPLANATORY NOTE

Rule 1004 was amended, effective _____.

22 Rule 1004 is based on Fed.R.Ev. 1004.

23 Rule 1004 excuses production of an original writing, recording, or photograph in four
24 cases:

25 (1) Subject to a good faith requirement on the part of a proponent of evidence,
26 ~~paragraph (1) subdivision (a)~~ continues the common law exception that secondary evidence
27 is admissible whenever an original has been lost or destroyed.

28 Under ~~paragraph (1) subdivision (a)~~, the intentional destruction of an original does not
29 automatically preclude admission of secondary evidence as to its contents. ~~As stated by~~
30 ~~Wigmore: "The view now generally accepted is that (1) a destruction~~ For example,
31 destruction in the ordinary course of business, and, of course, a destruction or by mistake; is
32 sufficient to allow the contents to be shown as in other cases of loss, ~~and that (2) a~~
33 ~~destruction otherwise made will equally suffice, provided the proponent first removes, to the~~
34 ~~satisfaction of the judge, any reasonable suspicion of fraud."~~ 4 Wigmore on Evidence § 1198
35 at 457-460 (Chadbourn rev. 1972).

36 The most common means of proving loss or destruction is by showing that a search
37 has been made and that it did not produce the document in question. ~~5 Weinstein's Evidence~~
38 ~~Para 1004(1)-(05) (1975).~~ It is difficult to describe with preciseness the type of search that
39 will be sufficient to prove loss or destruction; perhaps nothing meaningful can be said other
40 than that the search must be diligent. It is the function of the trial judge to determine whether
41 proof of a search satisfactorily removes the possibility of fraud. See Rule N.D.R.Ev. 104;
42 NDREv.

43 (2) Paragraph (2) Subdivision (b) applies when the writing, recording, or photograph
44 in question is in the possession or control of a person not a party to the litigation. In those
45 cases in which the original is in the possession of a party opponent, ~~paragraph (3)~~ subdivision
46 (c) governs.

47 The fact that a subpoena duces tecum has been served upon a person within the state,
48 pursuant to Rule under N.D.R.Civ.P. 45, NDR CivP, or Rule N.D.R.Crim.P. 17, NDR CrimP,
49 and has been dishonored will constitute a showing that an original is not obtainable,
50 sufficient under this rule to permit the introduction of secondary evidence.

51 Documents may also be ordered produced in conjunction with the taking of
52 depositions under Rule N.D.R.Civ.P. 28, NDR CivP, and Rule N.D.R.Crim.P. 15;
53 NDR CrimP. Again, failure to produce the documents will constitute a sufficient showing
54 under this paragraph rule.

55 (3) In contrast to the showing required under ~~Rule 1004(2)~~ subdivision (b), whenever
56 an original is in the possession of an opponent all that need be shown is that the opponent
57 was "put on notice" that the contents of the original would be a subject of proof at the
58 hearing. The notice may be held to be given by the pleadings in cases where it is clear that
59 the document in possession of the opponent will be a subject of proof. An example would
60 be a suit involving the terms of a contract or deed.

61 The safest way to insure that adequate notice is given is to provide written notice. This
62 practice should become a matter of course under this paragraph.

63 (4) Paragraph (4) Subdivision (d) is intended to relieve the requirements of Rule 1002

64 whenever a writing in question "is not closely related to a controlling issue." The rule is
65 necessary to the orderly conduct of a trial. As stated by McCormick:

66 "At nearly every turn in human affairs some writing – a letter, a bill of sale, a
67 newspaper, a deed – plays a part. Consequently any narration by a witness is likely to include
68 many references to transactions consisting partly of written communications or other
69 writings. A witness to a confession, for example, identifies the date as being the day after the
70 crime because he read of the crime in the newspaper that day, or a witness may state that he
71 was unable to procure a certain article because it was patented. It is apparent that it is
72 impracticable to forbid such references except upon condition that the writings (e.g., the
73 newspaper, and the patent) be produced in court. Recognition of an exception exempting
74 'collateral writings' from the operation of the basic rule has followed as a necessary
75 concession to expedition of trials and clearness of narration, interests which outweigh, in the
76 case of merely incidental references to documents, the need for perfect exactitude in the
77 presentation of these documents' contents." McCormick on Evidence § 234 at 565 (2d ed.
78 1972).

79 Rule 1004 was amended, effective March 1, 1990. The amendments are technical in
80 nature and no substantive change is intended.

81 Rule 1004 was amended, effective _____, in response to the December 1,
82 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
83 were changed to make the rule more easily understood and to make style and terminology
84 consistent throughout the rules. There is no intent to change any result in any ruling on

85 evidence admissibility.

86 Sources: Joint Procedure Committee Minutes: of _____; March 24-25,
87 1988, page 12; December 3, 1987, page 15; January 29, 1976, page 15; Rule Fed.R.Ev.1004;
88 Federal Rules of Evidence; Rule 1004, SBAND proposal.

89 Cross Reference: N.D.R.Ev. 104 (Preliminary Questions); N.D.R.Civ.P. 28 (Persons
90 Before Whom Depositions May Be Taken); N.D.R.Civ.P. 45 (Subpoena); N.D.R.Crim.P.
91 15 (Depositions); N.D.R.Crim.P. 17 (Subpoena).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1004. Admissibility of Other Evidence of Content

An original is not required and other evidence of the content of a writing, recording, or photograph is admissible if:

- (a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;
- (b) an original cannot be obtained by any available judicial process;
- (c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or
- (d) the writing, recording, or photograph is not closely related to a controlling issue.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Basically the rule requiring the production of the original as proof of contents has developed as a rule of preference: if failure to produce the original is satisfactory explained, secondary evidence is admissible. The instant rule specifies the circumstances under which production of the original is excused.

The rule recognizes no "degrees" of secondary evidence. While strict logic might call for extending the principle of preference beyond simply preferring the original, the formulation of a hierarchy of preferences and a procedure for making it effective is believed to involve unwarranted complexities. Most, if not all, that would be accomplished by an extended scheme of preferences will, in any event, be achieved through the normal motivation of a party to present the most convincing evidence possible and the arguments and procedures available to his opponent if he does not. Compare McCormick § 207.

Paragraph (1). Loss or destruction of the original unless due to bad faith of the proponent, is a satisfactory explanation of nonproduction. McCormick § 201.

Paragraph (2). When the original is in the possession of a third person, inability to procure it from him by resort to process or other judicial procedure is sufficient explanation of nonproduction. Judicial procedure includes subpoena duces tecum as an incident to the taking of a deposition in another jurisdiction. No further showing is required. See McCormick § 202.

Paragraph (3). A party who has an original in his control has no need for the protection of the rule if put on notice that proof of contents will be made. He can ward off secondary evidence by offering the original. The notice procedure here provided is not to be confused with orders to produce or other discovery procedures, as the purpose of the procedure under this rule is to afford the opposite party an opportunity to produce the original, not to compel him to do so. McCormick § 203.

Paragraph (4). While difficult to define with precision, situations arise in which no good purpose is served by production of the original. Examples are the newspaper in an action for the price of publishing defendant's advertisement, *Foster-Holcomb Investment Co. v. Little Rock Publishing Co.*, 151 Ark. 449, 236 S.W. 597 (1922), and the streetcar transfer of plaintiff claiming status as a passenger, *Chicago City Ry. Co. v. Carroll*, 206 Ill. 318, 68 N.E. 1087 (1903). Numerous cases are collected in McCormick § 200, p. 412, n. 1.

Notes of Committee on the Judiciary, House Report No. 93-650. The Committee approved Rule 1004(1) in the form submitted to Congress. However, the Committee intends that loss or destruction of an original by another person at the instigation of the proponent should be considered as tantamount to loss or destruction in bad faith by the proponent himself.

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 1004 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: September 12, 2012
RE: Rule 1005, N.D.R.Ev., Public Records

Form and style amendments to Rule 1005 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

22 where official records or recorded documents are in issue.

23 Unlike the balance of the rules in Article X, Rule 1005 recognizes, to a limited extent,
24 the existence of degrees of secondary evidence. Certified and compared copies are preferred
25 over other evidence of the contents of original public records. Certification of a copy is to
26 be accomplished pursuant to under Rule 902, which in turn incorporates the statutes of North
27 Dakota. See Rule 902(4). ~~Thus, the~~ The methods of proving official documents contained
28 in N.D.C.C. ch. 31-09, are permissible under Rule 1005.

29 The preference given to certified or compared copies precludes the use of duplicates
30 unless, of course, the preferred copies are not available. Rule 1003 is therefore preempted
31 by application of Rule 1005. It should be noted, however, that Rule 1005 applies to
32 documents authorized to be recorded only if they are actually recorded or filed. In a case
33 where the terms of a document are in issue, if a ~~photostat or other~~ copy is filed and the
34 original returned to the owner, the original may be proved in any method permitted by Article
35 X in general. (However, if the contents of the document filed are in issue, e.g., to prove
36 notice, the filed document is considered the "original" even if it is a ~~photostat~~ copy.)

37 The question may arise whether an attempt must be made to produce the original if
38 a certified or compared copy cannot be obtained by a reasonably diligent effort. The answer
39 is ~~affirmative~~ yes. The original is the best proof of its contents; the admissibility of copies
40 is allowed to accommodate public officials and others who may use official or recorded
41 documents. This reasoning does not support the admissibility of oral evidence, for example,
42 where the original document could be produced. See, generally, ~~5 Weinstein's Evidence Para~~

43 ~~1005(06); accord, Harmening v. Howland, 25 N.D. 38, 141 N.W. 131 (1913).~~

44 Rule 1005 was amended, effective _____, in response to the December 1,
45 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
46 were changed to make the rule more easily understood and to make style and terminology
47 consistent throughout the rules. There is no intent to change any result in any ruling on
48 evidence admissibility.

49 Sources: Joint Procedure Committee Minutes: of _____; January 29,
50 1976, page 16. Rule Fed.R.Ev.1005, Federal Rules of Evidence; Rule 1005, SBAND
51 proposal.

52 Statutes Affected:

53 Considered: N.D.C.C. ch. 31-09.

54 Cross Reference: Rule N.D.R.Ev. 902 (Evidence that is Self-Authenticating),
55 N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1103, NDREv, statutes
56 considered(Admissibility of Duplicates).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1005. Copies of Public Records to Prove Content

The proponent may use a copy to prove the content of an official record—or of a document that was recorded or filed in a public office as authorized by law—if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Public records call for somewhat different treatment. Removing them from their usual place of keeping would be attended by serious inconvenience to the public and to the custodian. As a consequence judicial decisions and statutes commonly hold that no explanation need be given for failure to produce the original of a public record. McCormick § 204; 4 Wigmore §§ 1215-1228. This blanket dispensation from producing or accounting for the original would open the door to the introduction of every kind of secondary evidence of contents of public records were it not for the preference given certified or compared copies. Recognition of degrees of secondary evidence in this situation is an appropriate *quid pro quo* for not applying the requirement of producing the original.

The provisions of 28 U.S.C. § 1733(b) apply only to departments or agencies of the United States. The rule, however, applies to public records generally and is comparable in scope in this respect to Rule 44(a) of the Rules of Civil Procedure.

Notes of Advisory Committee on 2011 amendments. The language of Rule 1005 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: September 12, 2012
RE: Rule 1006, N.D.R.Ev., Summaries

Form and style amendments to Rule 1006 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

RULE 1006. SUMMARIES TO PROVE CONTENT

~~The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.~~

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

EXPLANATORY NOTE

Rule 1006 was amended, effective _____.

Rule 1006 is based on Fed.R.Ev. 1006.

The admissibility of summaries of voluminous writings over the objection that such summaries are not the "best evidence" has long been permitted in North Dakota. See *Wishek v. United States Fidelity & Guaranty Co.*, 55 N.D. 321, 213 N.W. 488 (1927). Rule 1006 continues this rule of convenience and expands it to include summaries of recordings and photographs.

It is a condition precedent to the invocation of the rule that the component parts of the

22 summary be made available for examination or copying. This is intended to give the party
23 against whom the summary is offered a chance to analyze the underlying data and prepare
24 any challenges to the summary he may wish to make. The court may direct that the original
25 writings be produced at trial. This would be necessary, for example, should the opposing
26 party wish to introduce the originals in an attack on the accuracy of the summary.

27 Rule 1006 does not permit the admissibility of summaries where the individual
28 writings are themselves inadmissible. For example, where the original documents contain
29 hearsay, summarizing the documents will not cure the hearsay objection.

30 It should be noted that not all summaries will come within the scope of Rule 1006.
31 Computer printouts, which are summaries of stored data, are themselves originals. See Rule
32 1001(3)(d). Summaries of absent originals may be admitted under Rules 1004 or 1005
33 without reference to Rule 1006. ~~5 Weinstein's Evidence Para 1006(05) (1975).~~

34 Rule 1006 was amended, effective _____, in response to the December 1,
35 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
36 were changed to make the rule more easily understood and to make style and terminology
37 consistent throughout the rules. There is no intent to change any result in any ruling on
38 evidence admissibility.

39 Sources: Joint Procedure Committee Minutes: of _____; January 29,
40 1976, page 16. ~~Rule Fed.R.Ev.1006, Federal Rules of Evidence; Rule 1006, SBAND~~
41 proposal.

42 Cross Reference: N.D.R.Ev. 1001 (Definitions that Apply to this Article), N.D.R.Ev.

- 43 1004 (Admissibility of Other Evidence of Content), N.D.R.Ev. 1105 (Copies of Public
- 44 Records to Prove Content).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1006. Summaries to Prove Content

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1946.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. The admission of summaries of voluminous books, records, or documents offers the only practicable means of making their contents available to judge and jury. The rule recognizes this practice, with appropriate safeguards. 4 Wigmore § 1230.

Notes of Advisory Committee on 2011 amendments. The language of Rule 1006 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: September 12, 2012
RE: Rule 1007, N.D.R.Ev., Testimony or Written Admission of Party

Form and style amendments to Rule 1007 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

1
2 RULE 1007. TESTIMONY OR ~~WRITTEN ADMISSION~~ STATEMENT OF A PARTY
3 TO PROVE CONTENT

4 ~~Contents of writings, recordings, or photographs may be proved by the testimony or~~
5 ~~deposition of the party against whom offered or by that party's written admission, without~~
6 ~~accounting for the nonproduction of the original.~~

7 The proponent may prove the content of a writing, recording, or photograph by the
8 testimony, deposition, or written statement of the party against whom the evidence is offered.

9 The proponent need not account for the original.

10 EXPLANATORY NOTE

11 Rule 1007 was amended, effective March 1, 1990; _____.

12 Rule 1007 is based on Fed.R.Ev. 1007.

13 Rule 1007 operates as an exception to Rule 1002 by allowing the contents of a
14 writing, recording, or photograph to be proved by the admission of the party against whom
15 it is offered, without accounting for the nonproduction of the original. ~~To this extent, the rule~~
16 ~~is in accord with the common law. 4 Wigmore on Evidence § 1256 (Chadbourn rev. 1972).~~
17 However, in a departure from the leading case on the subject (~~Slatterie v. Pooley, 6 M. & W.~~
18 ~~664, 151 Eng. Rep. 579 (Exch. 1840)~~), not all admissions are recognized for the purpose of
19 proving the contents of a writing, but only those that are written or given as testimony or in
20 a deposition. This limitation is designed to insure that the admission will be accurately
21 related to the trier of facts and thus excludes extrajudicial, oral admissions because these are

22 vulnerable to erroneous transmission. See, generally, McCormick § 242 (2d ed. 1972).

23 Rule 1007 is not intended to prevent the use of an opponent's admission to directly
24 prove a fact that may also be evidenced by a writing. Only where the admission is used to
25 prove the contents of a writing will Rule 1007 come into play. The test is much the same as
26 that utilized under Rule 1002 to determine whether the contents of a writing are in issue. Nor
27 should Rule 1007 be held to bar the use of an adverse party's admission where secondary
28 evidence becomes admissible under the other provisions of Article X. See Rules 1004 and
29 1005.

30 Rule 1007 was amended, effective March 1, 1990. The amendment is technical in
31 nature and no substantive change is intended.

32 Rule 1007 was amended, effective _____, in response to the December 1,
33 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
34 were changed to make the rule more easily understood and to make style and terminology
35 consistent throughout the rules. There is no intent to change any result in any ruling on
36 evidence admissibility.

37 Sources: Joint Procedure Committee Minutes: of _____; March 24-25,
38 1988, page 12; December 3, 1987, page 15; January 29, 1976, pages 16, 17. ~~Rule~~
39 ~~Fed.R.Ev.1007; Federal Rules of Evidence; Rule 1007, SBAND proposal.~~

40 Cross Reference: N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1004
41 (Admissibility of Other Evidence of Content), N.D.R.Ev. 1105 (Copies of Public Records
42 to Prove Content).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1007. Testimony or Statement of a Party to Prove Content

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1947; Oct. 1, 1987.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. While the parent case, *Slatterie v. Pooley*, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840), allows proof of contents by evidence of an oral admission by the party against whom offered, without accounting for nonproduction of the original, the risk of inaccuracy is substantial and the decision is at odds with the purpose of the rule giving preference to the original. See 4 Wigmore § 1255. The instant rule follows Professor McCormick's suggestion of limiting this use of admissions to those made in the course of giving testimony or in writing. McCormick § 208, p. 424. The limitation, of course, does not call for excluding evidence of an oral admission when nonproduction of the original has been accounted for and secondary evidence generally has become admissible. Rule 1004, *supra*.

A similar provision is contained in New Jersey Evidence Rule 70(1)(h).

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 1007 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: September 12, 2012
RE: Rule 1008, N.D.R.Ev., Functions of Court and Jury

Form and style amendments to Rule 1008 consistent with the 2011 federal amendments are proposed. The amendments are not intended to change any result in any ruling on evidence admissibility.

Most of the explanatory note is retained, with some updating proposed by staff.

The proposed amendments are attached.

RULE 1008. FUNCTIONS OF THE COURT AND JURY

~~Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing, recording, or photograph ever existed, (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.~~

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines, in accordance with Rule 104(b), any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

EXPLANATORY NOTE

Rule 1008 was amended, effective _____.

Rule 1008 is based on Fed.R.Ev. 1008.

Rule 1008 divides the functions of judge and jury with respect to preliminary

22 questions of admissibility under the rules requiring or exempting the production of original
23 writings, recordings, or photographs. This rule is but a specific application of Rule 104,
24 which separates the function of judge and jury with respect to preliminary questions of
25 admissibility in general. As such, Rule 1008 has as its fundamental divider between the
26 functions of judge and jury the same distinction between preliminary questions relating to
27 the competence of evidence and those relating to conditional relevancy. See Rule 104 and
28 Explanatory Note.

29 As explained in the explanatory note to Rule 104, preliminary questions of
30 admissibility which involve the competence of proffered evidence are properly decided by
31 the judge, as these are questions whose answers are based upon broad policy considerations
32 and the fulfillment of technical legal standards. Conversely, questions which are of relevance
33 conditioned on fact are normally questions of probative value of the proffered evidence, and
34 are logically to be decided by the jury.

35 Applying this distinction to the questions which are likely to arise under the rules of
36 this article, a division of duties becomes apparent. ~~Weinstein gives us examples of the~~
37 ~~preliminary Preliminary~~ questions of fact which may arise when determining whether
38 secondary evidence should be admitted pursuant to the rules of this article, such as: "Is the
39 original lost? Was a diligent search conducted for it? Is the original unobtainable because it
40 is a public document? Is it outside the jurisdiction? Does the other party have possession or
41 control over the original? Is the authenticating witness' testimony incompetent as hearsay or
42 because of privilege?" ~~5 Weinstein's Evidence Para 1008(01) (1975).~~

43 Examination of these questions reveals that their answers depend upon consideration
of what the "best evidence" rule is intended to accomplish and also upon application of legal
45 standards. The examples quoted are of questions to be decided by the judge under Rule 1008.

46 Contrast with these the questions which, under Rule 1008, are to be decided by the
47 jury: Did the asserted writing ever exist? Is another writing the original? Does other evidence
48 of contents correctly reflect the contents? These are questions which involve only the
49 relevance of the proffered evidence and may be answered without application of legal
50 standards or policy considerations. The jury may, after answering the question, simply accord
51 the writing the appropriate probative value; it needn't ignore the evidence as if it were
52 inadmissible as hearsay. See ~~5 Weinstein's Evidence, supra, Para 1008(02) at 1008-9.~~

53 A further reason for distinguishing between questions involving competence and those
involving conditional relevance is that the former are solely preliminary but the latter have
55 a tendency to transcend the status of a preliminary question and become central issues of a
56 case. Thus, the reason for distinguishing between the two becomes one of fairness to the
57 parties. As stated by the Advisory Committee for the Federal Rules of Evidence:

58 "However, questions may arise which go beyond the mere administration of the rule
59 preferring the original and into the merits of the controversy. For example, plaintiff offers
60 secondary evidence of the contents of an alleged contract, after first introducing evidence of
61 loss of the original, and defendant counters with evidence that no such contract was ever
62 executed. If the judge decides that the contract was never executed and excludes the
63 secondary evidence, the case is at an end without ever going to the jury on a central issue."

64 Advisory Committee's Note to Rule Fed.R.Ev.1008, Federal Rules of Evidence Pamphlet
65 (West Pub. Co. 1975).

66 This rule is designed to insure consideration by a jury of critical issues that also
67 happen to be preliminary issues. It should be noted at this point that Rule 1008 is intended
68 to apply to all questions of conditional relevance, not just those listed in the rule. 5
69 ~~Weinstein's Evidence, supra, Para 1008(01) at 1008-5, 6.~~

70 Finally, as a matter of practice, notice should be taken that Rule 1008 incorporates the
71 provisions of Rule 104 as to the procedure for determining preliminary questions of
72 admissibility. Thus, even as to questions to be decided by the jury, the judge plays a part in
73 the determination. The judge, under this rule, as under Rule 104, should admit asserted
74 evidence if he believes the proponent will establish the conditional fact to the satisfaction of
75 a reasonable juror, subject to an instruction to the jury to disregard the evidence if they
76 ultimately find against the existence of the conditional fact. ~~1 Weinstein's Evidence, supra,~~
77 ~~Para 104(02) (5).~~

78 Rule 1008 was amended, effective _____, in response to the December 1,
79 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
80 were changed to make the rule more easily understood and to make style and terminology
81 consistent throughout the rules. There is no intent to change any result in any ruling on
82 evidence admissibility.

83 Sources: Joint Procedure Committee Minutes: of _____; January 29,
84 1976, page 17; October 1, 1975, page 9. ~~Rule Fed.R.Ev.1008, Federal Rules of Evidence;~~

85 Rule 1008, SBAND proposal.

Cross Reference: Rule N.D.R.Ev. 104, ~~NDREv~~ (Preliminary Questions).

FEDERAL RULES OF EVIDENCE
ARTICLE X. CONTENTS OF WRITINGS, RECORDINGS, AND PHOTOGRAPHS

Rule 1008. Functions of the Court and Jury

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. But in a jury trial, the jury determines--in accordance with Rule 104(b)--any issue about whether:

- (a) an asserted writing, recording, or photograph ever existed;
- (b) another one produced at the trial or hearing is the original; or
- (c) other evidence of content accurately reflects the content.

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1947.)
(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Most preliminary questions of fact in connection with applying the rule preferring the original as evidence of contents are for the judge, under the general principles announced in Rule 104, *supra*. Thus, the question whether the loss of the originals has been established, or of the fulfillment of other conditions specified in Rule 1004, *supra*, is for the judge. However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue. Levin, *Authentication and Content of Writings*, 10 *Rutgers L.Rev.* 632, 644 (1956). The latter portion of the instant rule is designed to insure treatment of these situations as raising jury questions. The decision is not one for uncontrolled discretion of the jury but is subject to the control exercised generally by the judge over jury determinations. See Rule 104(b), *supra*.

For similar provisions, see Uniform Rule 70(2); Kansas Code of Civil Procedure § 60-467(b); New Jersey Evidence Rule 70(2), (3).

Notes of Advisory Committee on 2011 amendments. The language of Rule 1008 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.