AGENDA

JOINT PROCEDURE COMMITTEE

January 28-29, 2016
Bismarck, N.D.

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Joint Procedure Committee
September 24-25, 2015

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CALL TO ORDER

The meeting was called to order at 1:00 p.m., on September 24, 2015, by the Chair, Justice Dale Sandstrom.

ATTENDANCE

Present:
Justice Dale Sandstrom, Chair
Honorable Todd L. Cresap
Honorable Laurie Fontaine
Honorable William A. Herauf
Honorable Jon Jensen
Honorable Steven L. Marquart
Honorable Steven McCullough (Thursday only)
Honorable Thomas E. Merrick
Honorable David E. Reich
Mr. Larry Boschee (Thursday only)
Mr. Bradley Beehler (Friday only)
Mr. Robert Hoy
Prof. Margaret Jackson
Ms. Carol Larson (Thursday only)
Mr. Lonnie Olson
Ms. Joanne Hager Ottmar
Mr. Kent Reierson
Mr. Lloyd Suhr

Absent:
Honorable John Greenwood
Mr. Daniel Dunn

Staff:
Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

Staff informed the committee that a hearing on the Annual Rules Package would be held by the Supreme Court on Oct. 8.

APPROVAL OF MINUTES

Ms. Ottmar MOVED to approve the minutes. Ms. Larson seconded. The motion to approve the minutes CARRIED.

RULE 11, N.D.R.Civ.P., SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS (PAGES 30-45 OF THE AGENDA MATERIAL)

Staff reviewed the committee's previous work on this rule at the January and April meetings. Staff explained that the initial request to consider amendments related to limited scope representation had come from the Minority Justice Implementation Committee and that MJIC Chair Judge Donovan Foughty attended the April meeting to answer questions. In April, the committee referred the proposed amendments to Rule 11 back to staff for rewriting in accordance with the discussion.

Judge Herauf MOVED to approve the proposed amendments to Rule 11. Judge Marquart seconded.

A member asked whether a limited appearance under the proposal was intended to mean a limited appearance in court. Staff said the rule was intended to create two levels of limited representation, one where the lawyer primarily provided advice and assistance with paperwork and the "limited appearance" where the lawyer provided assistance at proceedings. The member suggested that on page 35, line 70, the word "representation" should be replaced by "appearance." The member said that the discussion at the last meeting indicated that people were concerned about disclosure of the actual relationship between the attorney and the self-represented party. The member said that the proposed change would limit any disclosure about the relationship to the fact that the attorney was making a limited appearance.

A member said that the existing language in the rule seemed to refer to the agreement between attorney and party, not to a document that would be disclosed to the court and other parties. The member said it is important that there is a clear understanding between the attorney and party about the scope of representation. A member agreed but said it needs to be made clear that the other parties in the lawsuit are not entitled to this information. A member said that the information in the "notice of limited appearance," which needs to be filed if the action is filed, is all the information that needs to be given to other parties.

A member said there are two things going on: the agreement with the client which defines the scope of the representation and the notice of limited appearance that is submitted to the court. The member said the agreement with the client needs to talk about the whole representation. The Chair said that the other parties would need to know whether they were dealing with a represented person and who should be getting service of documents.

A member asked about the meaning of the term "court proceeding" on page 35, line

60. The member asked whether the use of this term was meant to preclude lawyers from making limited appearances in other proceedings, such as administrative proceedings. The member said it was also confusing that a notice of limited appearance needs to be filed if the case is filed, but proceedings and even court proceedings like depositions can take place in a case that has not been filed.

A member asked whether the Rules of Civil Procedure apply to administrative proceedings. The member said Rule 11 was a civil rule and the amended provisions seem to be meant to apply to civil proceedings. The member said the confusion could be solved by replacing "court proceeding" with "a proceeding to which these rules apply."

The Chair said that the Court has said that the Rules of Evidence apply to administrative proceedings, but that there were many things in the Rules of Civil Procedure that might not fit well in an administrative proceeding. The Chair said the Administrative Agencies Practices Act had become more detailed over the years and provided for things like discovery now so the civil rules likely do not apply in general to administrative proceedings.

Staff said that the Rules of Professional Conduct allow an attorney to engage in limited representation and this would apply to representation in administrative proceedings. A member said that agencies often had their own rules about who could represent parties in administrative proceedings. The Chair pointed out that there were cases, like DUI, where an attorney could represent a party before an administrative agency and also in district or municipal court.

Judge McCullough MOVED to amend line 69 on page 35 to delete the word "proceeding" and to add "to which these rules apply" after the word "proceeding." Judge Herauf seconded.

A member said that the proposed language is intended to eliminate ambiguity about whether limited representation was allowed in a case that never got to court. A member said that a "limited appearance" would always involve court proceedings. A member replied that an attorney might make a limited appearance in an unfiled divorce case, for example. A member said this would be "limited representation" under paragraph (1) not a limited appearance under paragraph (2), which seems to apply only to court appearances.

A member said it seemed the rule was making a distinction between "representation," which would be solely between the attorney and client, and an "appearance," which would involve the attorney, client and court. The Chair suggested that there might be instances where the attorney could make an "appearance" on behalf of the client without the involvement of the court, such as appearing at a pre-filing meeting among the parties or at

a deposition.

A member said the problem with the proposed amendment was its broadness—it could perhaps be read to extend any work in a civil action, like preparing a complaint, and could obligate the attorney to file a notice of limited appearance for this type of work. A member said that the part of the rule applicable to preparing pleadings was separate from the "limited appearance" section and specifically provided that no notice was required when attorneys did paperwork for clients. A member said the goal of the proposed amendments was to encourage lawyers to help self-represented litigants and if there was any ambiguity or anything that raised a question whether the lawyer could get out after doing the work then lawyers are unlikely to get in the case.

A member suggested that the motion language might be modified to eliminate any concerns about it being too broad. A member said the proposed language might be redundant because Rule 1 and Rule 81 already limit the scope of the civil rules.

Judge Fontaine MOVED to amend the amendment by retaining the word "court" on line 69 on page 35 and adding "or other hearing to which these rules apply" after "proceeding." Judge McCullough seconded.

A member said the previous motion language was superior because it referred to a proceeding rather than a hearing, which was broad enough to cover administrative agency proceedings. The member said that often administrative agencies have their own rules indicating they will follow the civil rules or that the rules do not apply.

A member said that the term "court proceeding" seemed to be a limiting term. A member said that "court proceeding" implies that the court has been activated and that the matter has been filed. The member said it did not seem this term would apply to proceedings that take place before filing, such as pre-filing discovery. A member said the rules would still apply to events in a civil action that go on before filing.

The motion to amend the amendment FAILED.

A member said that removing the term "court" before "proceeding" as proposed in the pending amendment would make the rule ambiguous. A member replied that if "court proceeding" is retained attorneys may not feel free to assist litigants in a limited manner prior to the filing of a case, such as in appearing at depositions which may not be "court proceedings." A member said the proposed language is intended to embrace more proceedings.

A member said that Judge Foughty explained at the last meeting that the point of the proposed amendments is to make it easier for self-represented litigants, especially the poor and minorities, to get some legal help in civil matters. The member said that depositions are probably not a big concern in typical child support or custody matters. A member replied that even poor people sometimes get summoned to be deposed. A member said it would be the rare attorney who would want to go into a deposition without having full representation of the client, given how crucial a deposition can be in a civil case. A member said retaining the more limited term "court proceeding" would make the rule more clear to the lawyers who may be making limited appearances under the rule.

A member said that perhaps a reference to the scope rule, N.D.R.Civ.P. 1, in the explanatory note would make the meaning of "proceeding" clear. A member said that the use of limiting language in the pending motion provides clarity and would allow an attorney to provide limited representation in any matter initiated under the rules, including one that has not been yet filed.

The motion CARRIED 11-5.

Mr. Hoy MOVED to amend lines 70-71 on page 35 by deleting "representation" and replacing it with "appearance" and adding "and filed with the court" at the end of the sentence. Prof. Jackson seconded.

A member said that this paragraph of the rule was talking about an appearance by the attorney for a limited purpose so the terminology of the paragraph needs to reflect this intent. The member said the disclosure of this appearance needed to be filed with the court to give notice to the opposing party and the court. The member said this filing would not disclose all the information about the scope of the limited representation agreed upon between the attorney and the self-represented party.

A member said that each of the different paragraphs deals with a different aspect of the limited representation: the paragraph that is the subject of the proposed amendment deals with the scope of representation between the attorney and the party while the next paragraph deals with the notice that needs to be given when there is a limited appearance.

A member said the problem with the existing text of the rule is that it does not clearly spell out that there needs to be a written agreement on scope of representation between the attorney and party when there is a limited appearance. The member said the proposed amendment does not address this problem. The member added that the deeper problem with the existing text is that any limited representation agreement must be subject to the Rules of Professional Conduct rather than the civil rules. The member said any requirements for a

written limited representation agreement between attorney and party should be part of the Rule of Professional Conduct. The member said the conduct rules currently allow an attorney and party to enter into a limited representation but do not require there to be a written agreement on the scope of representation. The member said this is inconsistent with the proposal before the committee.

A member suggested that these issues could be addressed in the comments with an explanation of the differences between an attorney/party agreement and the disclosure of limited appearance that must be filed with the court. A member said that notice of the existence of a limited representation relationship between an attorney and party should be public but the attorney/party agreement on scope of representation should be confidential.

A member said the problem is that the public disclosure must reveal enough information about the limited representation to give guidance to the court and other parties on how they may deal with the otherwise self-represented party. An opposing party, for example, needs to know whether they may communicate directly with the party or whether they must go through the lawyer providing limited representation.

A member said it may be dangerous for a civil rule to impose a writing requirement for the limited representation agreement while the conduct rules do not. A member said the attorney standards committee may need to weigh in on whether there should be a writing requirement for these agreements. The Chair observed that this is a somewhat new area of law where the rules are trying to adjust to a need that was not traditionally thought of as part of the attorney/client relationship.

A member said that the committee should consider deleting the sentence beginning on line 69 on page 35. The member said that the rule text already provides for a notice outlining the scope of the limited appearance. The member said it could be explained in the explanatory note that the conduct rules govern the nature of limited representation agreements. The member said that the civil rules should not mandate a written agreement when the conduct rules do not require this.

Judge McCullough MOVED to substitute deletion of the sentence beginning on page 35, line 69, for the pending motion. Ms. Ottmar seconded.

A member asked whether similar language on page 34, line 60, would need to be deleted if the substitution was approved. A member said to be consistent, such a deletion would need to be made.

Motion to substitute CARRIED.

A member said that it was reasonable for a written agreement requirement to be in the conduct rules, but that an attorney considering entering into a limited representation might not refer to the conduct rules before doing so. The member said it made more sense to have the writing requirement in Rule 11. A member replied any writing requirement should be in the rules of professional conduct. The member said if the committee decided to approve the proposed amendments, it should also contact the attorney standards committee and urge that a writing requirement be added to the professional conduct rules. The member said that it is the best practice to have a written agreement when there is a limited appearance but that the committee did not have the authority to the change the conduct rule to include this requirement.

A member said that in litigation involving limited representation a written agreement was vital so it would be clear whose responsibility it was to handle each aspect of the litigation. A member replied that this goal could be achieved by requiring the attorney to serve any notice of limited appearance on the otherwise self-represented party. The member said it was more appropriate to deal with the relationship between attorney and client, including any requirements for written agreements between attorney and client, in the conduct rules.

A member said that the proposal already required the notice of limited appearance to be served on each party involved in a matter. A member replied that this language might not be enough to make it clear that a lawyer providing limited representation needs to serve the client of these services.

Substituted motion CARRIED.

Mr. Reierson MOVED to amend page 34, line 60, to delete "under a written agreement." Judge McCullough seconded.

A member said the proposed amendment would be consistent with the amendment the committee just approved. A member said this refers to the agreement for the representation, not the appearance. The member said that if an attorney has to file a notice of appearance, the scope of representation will be included in this but if no notice is filed a written agreement should be made. A member said that line 67 on page 35, which deals with the limited appearance, still requires a written agreement. The Chair said the biggest issue is the chance for a misunderstanding if the terms of the limited representation are not written down.

The motion FAILED 6-10.

Judge McCullough MOVED to amend on page 35, lines 67-68, to delete "after

consultation, the litigant consents in writing" and replace with "in compliance with Rule 1.2 of the N.D. Rules of Prof. Conduct." Judge Marquart seconded.

A member said that the purpose of the rule is to encourage attorneys to provide services to minorities and low income parties. The member said that many attorneys would not consider providing such services without a written agreement. The member said that without a written agreement limiting the representation, an attorney would be considered to be making a general appearance. The member said changing the rule to remove the requirement for a written agreement would discourage attorneys from providing services under the rule.

A member said a written agreement should be part of any limited representation but any written agreement requirement should be made part of the professional conduct rules. The member said the conduct rules currently allow limited scope representation without a written agreement. The member said the committee could suggest that the attorney standards committee make this change to the conduct rules.

A member said the conduct rules encourage attorneys to enter into written agreements when providing limited scope representation so any attorney who wanted to have a written agreement could do so.

A member said the rule needs to be consistent— either include a writing requirement throughout or exclude it. A member said even though the conduct rules do not require a written agreement in a limited scope representation, it might be wise to include such a requirement in Rule 11 because it would be foolish for a lawyer to undertake a limited representation without a written agreement. A member said if the motion on the floor is adopted, this would prompt attorneys to look at the conduct rules before entering into a limited representation.

A member said that a written agreement is not required when an attorney takes on a general representation, no matter how complex the case, so the committee should not put a written agreement requirement in this limited representation rule. A member said when an attorney takes on a general representation, they know they have the whole case. The member said in a limited representation there is a greater need for a written agreement to define what parts of the case the attorney has and what parts belong to the party. The member said the more detailed the agreement was, the better it would be for the client and the lawyer. A member said detailed agreements also served the court because a judge would need to settle any dispute arising from a limited representation.

A member said there is a difference between the type of writings needed when there

is an agreement to prepare pleadings as opposed to an agreement to appear for a party. The member said when there is an appearance, there is a written notice that explains the scope of the representation but there is no notice when the lawyer prepares pleadings so there is more need for a written agreement. The member said lawyers were more likely to go to the civil rules before they looked up the applicable rule in the conduct rules and there was no harm requiring a written agreement when the attorney prepares pleadings.

A member said that conduct rule 1.2 allows a lawyer to limit the scope of representation after consultation and this does not need to be in writing. A member said it was unanimous to the committee those limited representation agreements should be in writing but that the conduct rules do not have this requirement. A member said that consultation should be required, but that the proposed amendment would lead attorneys to the conduct rule and they would see consultation is required.

A member asked if there was actually a conflict between conduct rule 1.2 and the proposed language given that "limited appearance" is not mentioned in the conduct rules. The member said since a "limited appearance" is apparently something new, requiring a written agreement would be legitimate and would not conflict with conduct rule 1.2.

Motion CARRIED 8-7.

Ms. Ottmar MOVED to amend the newly adopted language to read: "An attorney who complies with Rule 1.2 of the N.D. Rules of Prof. Conduct, may make a 'limited appearance' on behalf of an otherwise self-represented party involved in a proceeding to which these rules apply." Judge Jensen seconded. Motion CARRIED.

Judge McCullough MOVED to amend on pages 34-35, lines 60-62, to delete the sentence and replace with: "An attorney who complies with Rule 1.2 of the N.D. Rules of Prof. Conduct, may prepare pleadings, briefs, and other documents to be filed with the court by a self-represented party." Prof. Jackson seconded.

A member said if it approves this amendment, the committee should also contact the Joint Attorney Standards Committee and encourage that committee to amend Rule 1.2 to include a writing requirement.

Motion CARRIED.

A member asked whether it would be a good idea to table the rule until the Joint Attorney Standards Committee can be contacted and respond to the committee's suggestions related to adding a writing requirement to conduct rule 1.2. The Chair said it might be better

for the committee to act now because the standards committee had many projects currently before it and it might not be able to respond immediately to a request from this committee.

A member said one thing the rule did not address was the timing of service, i.e., who gets served at what time with the notice of limited appearance. The member said the rule also did not address whether the opposing party was suppose to serve the attorney or the otherwise self-represented part during the period of limited appearance. A member said this could be addressed in the notice document where it could be specified whether the attorney would be accepting service as part of the appearance. A member said that under N.D.R.Civ.P. 5, when there is a matter within the scope of the limited representation, service must be made on both the party and the attorney.

Ms. Ottmar MOVED to amend on page 35 line 80 to delete "distribute" and replace with "serve." Judge Herauf seconded.

A member asked whether "distribute" was used because the attorney would also be required to provide a copy to the otherwise self-represented party/client. The Chair pointed out that the companion rule, proposed N.D.R.Ct. 11.2, required that the document be "provided" to the client.

Motion CARRIED.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

RULE 11.2, N.D.R.Ct., WITHDRAWAL OF ATTORNEYS (PAGES 30-45 OF THE AGENDA MATERIALS)

Staff explained that the proposed amendments to Rule 11.2 were intended to make it clear that the new procedure under Rule 11.2 only applies when an attorney makes a limited appearance.

Judge Marquart MOVED to approve the proposed amendments to Rule 11.2. Judge Herauf seconded.

Prof. Jackson MOVED to amend at line 14 to delete "this rule" and replace with "Rule 11.2 (a), (b) and (c)." Judge Merrick seconded.

A member asked what would happen if an attorney failed to file the certificate of completion within the required time. A member said the lawyer would presumably be the

party's attorney until the certificate was filed. A member said it is in the attorney's best interest to file the certificate as soon as the limited appearance is completed. A member said there were two possibilities: allowing late filing of the certificate or requiring the attorney to make a motion to withdraw if the certificate is not filed on time.

Motion CARRIED.

A member asked it the language on line 18 could be confusing because it requires the certificate to be filed with the court even though some limited appearances could take place in actions that are not yet filed. A member replied that if the action was not filed, there would be no need to file a certificate of completion. A member said typically what happens to documents in an action that is not filed is that things are served between the parties with the originals being retained for filing if the action does eventually get filed.

Mr. Reierson MOVED to amend on page 40, line 20, to insert "served upon" after the word "and." Judge Cresap seconded.

A member said that actual service of the document is important to ensure the other parties get notice of completion of the limited appearance. The member said it would be appropriate to provide the certificate to the client without formal service.

Motion CARRIED.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

Mr. Boschee MOVED to communicate with the Attorney Standards Committee to recommend that a written agreement be required when an attorney enters into a limited representation. Motion CARRIED.

RULE 8.14, N.D.R.Ct., TERMINATION OF CHILD SUPPORT ORDER (PAGES 46-56 OF THE AGENDA MATERIAL)

Staff explained that the committee developed a proposed new Rule 8.14 at its September 2014 and January 2015 meetings and sent the proposal to the Supreme Court. The Court sent the proposed new rule out for comment and has now referred it back to the committee for review of the comments received. Staff presented the committee a new draft proposal incorporating some of the suggestions made in the comments.

Judge McCullough MOVED to adopt the proposed new draft. Judge Marquart

seconded.

A member said it would not be appropriate to automatically terminate child support if a child is placed with a third party because the child still needs to be supported. A member said it seemed like the proposal would be a change in the substantive law. A member said if a child is placed, it does not eliminate the support obligation.

A member said the intent of the particular proposal is to only terminate the obligation if a government agency places custody with the obligor. A member said the language of the paragraph needs to be broken up in order to clarify this intent. The Chair asked if the confusion was about the meaning of the term "or custody placement."

A member said custody in a juvenile court deprivation case is usually granted by order to social services and social services then makes a "custody placement," possibly with the other parent. A member said the law also allows the court by order to place the child with a parent. A member said this would be a placement under the juvenile court act, not a placement by an appropriate government agency.

A member said it would be very hard to track when child support should stop and start when there is no direct court order granting custody to the obligor but instead placement by a government agency. A member said it would be possible to have the agency certify placement to the child support division. A member said tracking temporary placements as they terminate and reinstate would be a nightmare. A member said that child support is already tracking these changes in placement and monitoring what money should go where. A member said the problem with including these kinds of placements in the rule is that the rule is written to terminate child support obligations but not to reinstate them.

Judge McCullough MOVED to delete "placement by an appropriate government agency" on page 48, lines 4-5. Judge Herauf seconded.

A member said the proposed amendment would not solve the problem because child support would still terminate if custody was placed with the obligor under the juvenile court act, which could be a temporary placement. A member said if the court directly gave custody to the obligor under the juvenile court act, there would be an order issued. A member said that this order could still be a temporary order, but all the obligor would have to do is file a motion to have the child support stayed during the period of custody. A member said that, to avoid confusion, all the language in the proposal relating to custody under the juvenile court act should be taken out. The member said there was no need for automatic termination of child support in these cases because the court could handle child support in its order.

A member said that the original purpose of the proposal was to automatically terminate a child support obligation when there were two separate cases with different orders. The member said this most often happened when the child support division started an immediate action to establish child support and then there was a later action to resolve issues such as primary residential responsibility among the parties. The member said this was different from a juvenile court act order, which could be temporary and might be difficult to track. A member said generally when there was a juvenile court act order custody was given to social services and not the obligor. A member said the language relating to custody under the uniform juvenile court act should be removed.

The Chair suggested that someone from the child support enforcement division should be contacted to speak to the committee about the intent of the rule and whether the proposed amendments are appropriate.

Ms. Ottmar MOVED to table the rule so that child support could be contacted to answer the committee's questions. Judge McCullough seconded. Motion CARRIED.

RECOGNITION CEREMONY FOR DEPARTING MEMBERS

The Chair presented Ms. Ottmar and Mr. Boschee with plaques recognizing their years of service on the committee. The Chair also passed along thanks to Judge Greenwood and Mr. Dunn, who were unable to attend the meeting. All four members were ineligible for reappointment due to term limits.

RULE 3, N.D.R.Crim.P., THE COMPLAINT (PAGES 57-91 OF THE AGENDA MATERIAL)

Staff explained that State Court Administrator Sally Holewa requested that Rule 3 be amended to include language requiring the prosecutor to file a written dismissal of charges included in the initial complaint but dropped in an amended complaint. Staff presented the committee with proposed amendments to the rule.

Mr. Hoy MOVED to approve the proposed additional amendments to Rule 3. Mr. Olson seconded.

A member said the proposed change made sense. The member said it is fairly common for officers to issue uniform citations at the scene and for the prosecutor to look at the case later and decide there is not probable cause for a charge. The member said to file a formal dismissal at that point makes sense.

A member asked if prosecutors generally failed to file written dismissals. A member said most prosecutors currently do file dismissals. A member said the problem might be that sometimes the prosecutor agrees to dismiss a charge on the record in court and does not file a written dismissal.

The motion to approve the proposed amendments to the rule CARRIED.

RULE 5, N.D.R.Crim.P., INITIAL APPEARANCE BEFORE THE MAGISTRATE (PAGES 57-91 OF THE AGENDA MATERIAL)

Staff explained that State Court Administrator Sally Holewa requested that Rule 5 be amended to include language requiring the prosecutor to file a written dismissal of a charge originally filed in a Uniform Complaint and Summons but later dropped. Staff presented the committee with proposed amendments to the rules.

Ms. Larson MOVED to approve the proposed amendments to Rule 5. Judge Cresap seconded.

A member asked about an amendment to Rule 5 the committee approved at the April meeting relating to providing information about a defendant's arrest to a foreign consulate. The member said that the Vienna Convention does not mandate who is supposed to contact the consulate. The member said the proposed amendment puts the onus on the prosecutor and law enforcement to make the contact, which in some ways put the government and law enforcement in the position of being an advocate for the defendant. Staff said that the proposed amendments were based on amendments to Fed.R.Crim.P. 5.

A member asked who made the consular notification if law enforcement did not. A member replied that in the Northeast Judicial District, the judge typically asks the clerk to make the contact.

Mr. Olson MOVED to recommend to the Court that the underlined language in Rule 5 on page 63, lines 33-35, not be adopted. Mr. Hoy seconded.

A member said the Vienna Convention only required that defendants be advised of their right to contact the consulate—it does not require a certain agency do the contacting. The member said the proposed requirement for the state's attorney and law enforcement to assume the duty of contacting the consulate for the defendant makes these agencies something of an advocate for the defendant. The member worried that it will become grounds for post-conviction relief motions if law enforcement allegedly fails to provide good contact information for the consulate.

A member said the proposed new language does not require law enforcement to act for the defendant but to assist the defendant if requested. A member said that the Attorney General's office has traditionally provided the information on the Vienna Convention and its requirements to law enforcement and prosecutors. Staff said that the comment to the federal rule said information about how to contact the consulate needs to be provided as soon as possible after arrest so the responsibility to provide the information generally falls to law enforcement. A member said there has never been a question about the need to notify but it has always been a hot potato about who was going to do it, the clerk or the state's attorney. The member said state's attorneys are given consular contact information and have it on file, while the clerks do not.

Motion FAILED 1-15.

The motion to approve the proposed amendments to the rule CARRIED.

RULE 5.1, N.D.R.Crim.P., PRELIMINARY EXAMINATION (PAGES 57-91 OF THE AGENDA MATERIAL)

Staff explained that State Court Administrator Sally Holewa requested that Rule 5.1 be amended to include language requiring a magistrate to formally dismiss the charge if the magistrate decides to discharge the defendant. Staff presented the committee with proposed amendments to the rule.

Ms. Larson MOVED to approve the proposed additional amendments to Rule 5.1. Judge Marquart seconded.

A member said that it is already common practice for judges to do dismissal orders when probable cause is not found. The member said there could be a requirement that the order be in writing to be consistent with the other amendments the committee is considering.

The motion to approve the proposed amendments to the rule CARRIED.

Judge Herauf MOVED to send the proposed amendments to N.D.R.Crim.P. 3, 5 and 5.1 immediately to the Supreme Court for consideration with the pending Annual Rules Package. Judge McCullough seconded. Motion CARRIED.

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 57-91 OF THE AGENDA MATERIAL)

Staff explained that attorney Mark Friese suggested that the committee discuss

amending Rule 41 so that a defendant could apply to have a case record made non-public when a magistrate finds no probably cause for a charge.

A member said that Mr. Friese did not think the current provisions in Rule 41 were adequate because they did not apply a specific problem he encountered, a criminal complaint being rejected on its face for lack of probable cause. Technically, this was not a dismissal because nothing was charged. Staff suggested that the general sealing procedure under Rule 41 could be followed in such a case.

A member said that there should perhaps be a screening process before the clerk files a complaint. The member said it should not be filed unless approved by the prosecutor or when probable cause is found by the magistrate. A member replied that the problem with that is that documents need to be filed before they can be moved in front of the magistrate. The member said that documents are not left at the clerk's window any more but moved electronically into the Odyssey system.

A member asked why, when no probable cause is found for a charge, that charge would not be considered dismissed and subject to removal from the internet under Rule 41 Section 6. A member replied that the charges were found deficient on their face so they couldn't have been dismissed—there was a filing seeking a charge, but no one was actually charged. A member said that a typical procedure is for a complaint to be filed and sent to the magistrate, who fills out a probable cause form, simply checking off whether there is sufficient or insufficient probable cause—there is no dismissal order. A member said what shows on a document search is that someone got charged with a crime, but there is no dismissal. A member said that sometimes a case does get left dangling out there open so the state can go and try to get more evidence to show probable cause.

A member said there was a time when more people were running around the community wanting to be their own prosecutor and lodging complaints against public officials. The member said if a complaint like this gets put in the system, goes to the magistrate and no probable cause is found, the complaint stays in the system. The member said the desire in changing the rule would be to create a mechanism to make these complaints non-public for internet search purposes.

Staff suggested that proposed amendments to the rule could be drafted before tomorrow's meeting based on the issues raised in the committee's discussion. The Chair instructed staff to prepare draft amendments for distribution at tomorrow's meeting.

By unanimous consent, discussion of Rule 41 was continued to the Friday morning session.

RULE 11, N.D.R.Civ.P., SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATIONS TO COURT; SANCTIONS; RULE 11.2, N.D.R.Ct., WITHDRAWAL OF ATTORNEYS (PAGES 30-45 OF THE AGENDA MATERIAL)

Prof. Jackson MOVED to have N.D.R.Civ.P. 11 and N.D.R.Ct. 11.2 sent immediately to the Supreme Court. Judge McCullough seconded.

A member said that the committee had already spent several meetings discussing these rules. The member said that SBAND's Volunteer Lawyers Program hopes that these rules can be used to help promote more volunteer assistance from lawyers to the poor and minorities. The member said holding the rules until the next annual rules package would be too much delay.

Motion CARRIED 15-1.

September 25, 2015 - Friday

The meeting was called to order at approximately 9:00 a.m., by Justice Dale Sandstrom, Chair.

RULE 8.14, N.D.R.Ct., TERMINATION OF CHILD SUPPORT ORDER (PAGES 46-56 OF THE AGENDA MATERIAL)

The Chair welcomed Jim Fleming and Paulette Oberst of the Child Support Division to discuss the proposed amendments to Rule 8.14. Mr. Fleming said that Court System Policy 505 guides the court internally on when child support can get shut down administratively. He said Child Support brought the proposal behind Rule 8.14 forward because it thought it would be good to have a policy to shut down child support when there is a new order on primary residential responsibility. He said this seemed to be a good way to reduce litigation when there was a clear reason for child support to end in a case.

The Chair explained that the reason for putting Child Support's proposal in the Rules of Court was so it would be clear to people outside the court system what was happening in these cases. The Chair said that outside parties can access the court rules but it is not easy for anyone to access internal court policies. The Chair said the Court had been reviewing the policies to find provisions that affect people such as court users and attorneys and attempting to move these provisions to the public rules. The Chair observed that numerous court policies relating to juvenile court procedure had recently been moved to the juvenile rules.

Mr. Fleming said it might be good in the future to consider moving other provisions

related to child support in Policy 505 to the public rules.

A member asked in what kind of cases the situation in Rule 814 arises. Ms. Oberst said it is usual for an order for child support to be issued in one county and for the obligor to seek primary residential responsibility in another county. Ms. Oberst said the problem is with the first order not being "turned off" when a second order in another county and another civil file change the child support situation. The result is that there are then two child support obligations which continue to accrue and continue to be enforced. Ms. Oberst said to have conflicting orders like this is not a weekly situation, but it is something Child Support deals with on a regular basis.

A member asked whether there were issues related to custody placements under the juvenile court act or by "an appropriate government agency." The member said such placements would be difficult to track. Ms. Oberst said Child Support's proposal was designed to deal with placement of primary residential responsibility and child support obligations in actions involving two parents, not those involving outside agencies such as social services. Ms. Oberst said that it is not very common for a child to be removed from a parent's custody under the juvenile court act and then placed with the other parent. Ms. Oberst said legal custody in such cases is usually given to Social Services. Ms. Oberst said if the situation arises where a child is placed with the obligor as part of a proceeding under the juvenile court act, Child Support does go to court and requests suspension of the child support obligation during the placement. Ms. Oberst said that the Child Support Division was not thinking about juvenile court act placements when it proposed the language that is now in Rule 8.14.

The Chair asked whether the Child Support Division would accept the elimination of the juvenile court act language from the proposal. Ms. Oberst and Mr. Fleming said it would be fine. Mr. Fleming said the heart of the original proposal was focused on changes that were more permanent.

A member asked whether the juvenile court language could be saved by an amendment specifying that it applied only when custody was placed with the obligor. Mr. Fleming said this would make the rule more clear. He said that 10 years ago, Child Support would not have intervened in these matters to try to shut off child support but now they better realize the importance of dollars that do not accrue. He said Child Support now takes action when there is a placement with the obligor to shut off child support.

The Chair said one of the problems the committee had noted with the proposed language relating to juvenile court act placements was that these placements could be temporary while the solution offered by the rule was permanently cutting off child support.

Mr. Fleming said that some courts are accepting suspension rather than termination of child support in appropriate cases, especially cases involving temporary custody.

Ms. Ottmar MOVED to delete the clause beginning with the comma on page 48, line 4 and ending with the comma on line 5. Judge Jensen seconded. Motion CARRIED.

Mr. Hoy MOVED to delete the term "or custody" at lines 7, 12, 14 and 15 on page 48. Ms. Ottmar seconded.

Mr. Fleming said that making the selected deletion would be consistent with the previous deletion and that "primary residential responsibility" was the appropriate term to retain in the rule.

Motion CARRIED.

Judge Fontaine MOVED to delete "with the prior order" on page 48, line 15 and replace with "in the prior action." Judge Jensen seconded. Motion CARRIED.

The main motion to approve the proposed amendments and to return Rule 8.14 to the Supreme Court CARRIED.

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 57-91 OF THE AGENDA MATERIAL)

Staff distributed proposed amendments to Rule 41 to the committee that would add a new ground for removal of records from the Internet, that the magistrate has not found probable cause.

The Chair suggested that since this was a new change, the committee should consider tentatively approving the proposed amendments and then bringing the rule back at the next meeting. The Chair said this would provide an opportunity to let the wider community know about the proposed amendments.

Mr. Hoy MOVED to tentatively approve the proposed amendments. Judge Herauf seconded.

A member pointed out there should be a paragraph break on line 234 at the word "If." By unanimous consent, the change was made.

The motion to tentatively approve the proposed amendments CARRIED. Rule 41 will

be put on the agenda for the next meeting.

RULE 23.1, N.D.R.Crim.P., JURY EXPENSES (PAGES 92-101 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court referred to the committee for review and recommendation a letter from Judge Douglas Mattson suggesting an amendment to Rule 23.1. Judge Mattson suggests that Rule 23.1 be amended to allow jury expenses to be assessed against a criminal defendant who, without good cause, does not appear for a jury trial. Staff presented the committee proposed amendments to Rule 23.1 based on Judge Mattson's suggestions.

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

A member asked what the process would be for assessing and collecting the jury expenses for the defendant. A member said it could just be added to the criminal judgment if the defendant is found guilty. A member said there could be civil judgment assessed if the defendant is not found guilty. A member said a criminal judgment could be treated the same as a civil judgment for collection purposes. A member said a contempt judgment is typically the way that an assessment for money could be enforced against a defendant.

A member said if the defendant is found not guilty, it might be appropriate not to assess the jury costs. A member said the proposal would not force the court to assess costs but allow the option. A member said people who could pay a judgment like this usually show up in court.

By unanimous consent, a comma was added after the word "excuse" on page 93, line 14.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

RULE 43, N.D.R.Crim.P., DEFENDANT'S PRESENCE (PAGES 102-118 OF THE AGENDA MATERIAL)

Staff explained that the committee's discussion in April revealed that there was confusion among courts and attorneys on whether Rule 43 allowed both the preliminary hearing and arraignment to be waived by a represented defendant in a felony case.

A member said that many courts have a preliminary hearing docket and if a defendant

waives the preliminary hearing the court moves directly to the arraignment. The member said that waiver of the preliminary hearing alone will not save the defendant a court appearance in a court that moves directly to the arraignment if the preliminary is waived.

The Chair said that 20 years ago, prior to the unification of county and district courts, the preliminary hearing would happen in county court and the arraignment would follow at a later time in district court. The Chair said the procedure is streamlined now that everything happens in district court. The Chair said it is especially important in felony cases that defendants are advised of their rights and of the seriousness of the matter, which typically happens at the arraignment.

A member said that being able to waive the preliminary hearing and arraignment is helpful to defendants because of the nature of North Dakota being a rural state. A Fargo attorney may have a client who is appearing in Jamestown, and if the preliminary and arraignment cannot be waived, the attorney has to make a 3 hour drive that the client needs to be charged for. The member said that if the defendant is represented, the lawyer will already have explained the defendant's rights and the offense. The member said that judges are generally willing to combine the arraignment with a change of plea hearing so that a record can be made showing the defendant was advised.

A member said that the rule in its current form is somewhat inconsistent because it allows waiver of the preliminary examination and entry of a not guilty plea in writing—in a felony case, the earliest a not guilty plea can be entered is at the arraignment. The member said that while the language of the rule does not specifically allow waiver of the arraignment, the fact that it allows entry of a not guilty plea in writing implies that waiver of the arraignment is allowed.

A member said in counties that initiate actions with the complaint, an information containing any felony charges is not served until the arraignment. The member said entering a not guilty plea to the felony charges would not be possible before this point. A member said that a defendant can work with the prosecutor in these situations and obtain a copy of the information before the arraignment so that a not guilty plea can be entered in writing.

A member agreed that inclusion in Rule 43 of language allowing entry of a not guilty plea in writing indicated that waiver of the arraignment is allowed. The member said if waiver of the arraignment is not allowed, it would not be possible to enter a not guilty plea in writing. The member said based on this analysis, there was nothing in Rule 43 that needed to be fixed.

A member said Rule 43 seemed to be okay but Rule 10 might need to be fixed because

it requires the arraignment to be held in open court. A member said that some districts do not allow waiver of the arraignment because of Rule 10's requirements.

A member said that the word "or" on page 105, line 27, should be changed to "and."

A member said it might be helpful to add language specifically allowing waiver of the arraignment to Rule 43. The Chair said that the arraignment should still be required if the defendant wanted to enter a guilty plea. A member suggested that the language of the rule at page 105, lines 23-24, could be rearranged to put the preliminary hearing first, the arraignment second, and the not guilty plea third. The member said this would make it clear that there could be a waiver of the arraignment for a not guilty plea but not for a guilty plea.

A member said that in Fargo, there had not been a reduction in the number of preliminary hearings in the time since the rule had been changed. The member said the preliminary hearing gives attorneys a chance to meet with their clients. A member said the possibility of waiver is most helpful when the lawyer is in a different town than the defendant.

Staff was instructed to redraft Rule 43 to reflect the committee's suggestions and to bring the rule back for consideration at the next meeting.

RULE 10, N.D.R.Crim.P., ARRAIGNMENT (PAGES 102-118 OF THE AGENDA MATERIAL)

Staff explained that Attorney Mark Friese suggested that the language of Rule 10 requiring arraignment be conducted in open court may be contrary to allowing arraignment to be waived by a represented defendant.

Staff suggested that an exception to the open court requirement could be inserted into Rule 10 adding language allowing waiver by a represented defendant at the beginning of the rule. A member said the language should require the waiver to be made in writing and also reference Rule 43. The Chair said the explanatory note should also be amended.

A member said the drafting of the exception to the arraignment requirement should not be so narrowly written to exclude non-represented misdemeanor defendants from waiving the arraignment.

Staff was instructed to redraft Rule 10 to reflect the committee's suggestions and to bring the rule back for consideration at the next meeting.

RULE 5, N.D.R.App.P., POST-JUDGMENT MEDIATION (PAGES 119-128 OF THE AGENDA MATERIAL)

Staff explained that the Clerk of the Supreme Court requested that Rule 5 be amended to make it clear that parties are not eligible for court funded post-judgment mediation on judgments rendered by the Supreme Court. Staff presented proposed amendments to the committee.

Ms. Ottmar MOVED to adopt the proposed amendments. Mr. Beehler seconded.

A member said the proposed amendments seemed to be consistent with the original intent of the rule.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

RULE 20, N.D.R.Juv.P., USE OF RESTRAINTS IN COURTROOM (PAGES 129-147 OF THE AGENDA MATERIAL)

Staff explained that the Juvenile Policy Board has developed a new rule on the use of restraints in the courtroom. Proposed new Rule 20 would create uniform standards for the use of restraints in juvenile courts statewide. The board requests that the committee review the proposed new rule and consider whether it should be sent to the Supreme Court for adoption. Staff presented the proposed new rule to the committee.

Judge Herauf MOVED to adopt the proposed amendments to Rule 20. Judge Marquart seconded.

A member asked whether the proposed rule would make it standard procedure for the juvenile to be brought into the courtroom without restraints in all cases. The member said it is not uncommon for problems to start arising with the child during transport from the detention center to the courtroom. The member said procedurally it might be better to bring the child into the courtroom with restraints and then if there are no problems to remove them.

A member replied that the rule was designed to allow for a hearing on restraints prior to the main proceeding. The member said the juvenile could be brought into the courtroom in restraints if a hearing on restraints had been requested. A member said that juveniles do run and this creates problems.

A member asked whether the language on page 131, line 8, was repetitive. The

member said the second use of the word "risk" seemed redundant. By unanimous consent, the word "risk" was deleted from the end of line 8.

A member said that the language at page 131, line 10, could be read to exclude the other parties from hearing the facts related to the justification for restraint use.

Mr. Hoy MOVED to amend at page 131, line 10, to insert the words "and the parties" after "court." Judge Jensen seconded.

A member said the change is needed to ensure that the child and counsel know what the facts to justify the use of restraints are. The member said the facts should not be conveyed privately to the judge, but the child should be informed so that a response can be made.

Motion CARRIED.

A member asked what the standard of review would be for the judge's decision. The Chair said that the judge is not allowed to wholly defer to law enforcement in deciding to require restraints but to exercise independent judgment. The Chair said that developing case law was that in jury trials, the defendant should generally not be visibly restrained because the presence of restraints sends a message to the jury that the defendant is dangerous.

A member said that the list of factors on pages 131-132, lines 15-22, might be incomplete. The member said one important factor was the dynamics of the family situation, where family members might be victims or hostile to the child. The member said that it may be better to keep the list of factors simple and nonspecific. A member said that it was within the discretion of the judge to decide whether the situation fell into the listed factors.

A member said that in drafting the rule to include factors, the Juvenile Policy Board was seeking to give some help to judges examining restraint situations. The member said that the list was not intended to be all inclusive.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

RULE 21, N.D.R.Juv.P., TITLE AND CITATION (PAGES 129-147 OF THE AGENDA MATERIAL)

Staff explained it was necessary to create a new Rule 21 because its content had been displaced by Rule 20.

Judge Herauf MOVED to adopt the proposed new rule. Judge Jensen seconded.

The main motion to send the proposed new rule to the Supreme Court as part of the annual rules package CARRIED.

RULE 45, N.D.R.Civ.P., SUBPOENA (PAGES 148-166 OF THE AGENDA MATERIAL)

Staff explained that the proposed amendments to Rule 45 would eliminate the requirement that the court apply a seal to subpoenas and would also make the rule more consistent with the federal rule, which has no sealing requirement.

Mr. Hoy MOVED to adopt the proposed amendments. Prof. Jackson seconded.

The Chair said the proposed language in the explanatory note was confusing because it seemed to refer another definition of "seal," sealing something away to keep it confidential.

Judge Jensen MOVED to amend at page 158, line 208, to delete "be sealed" and insert "affix a seal." Mr. Suhr seconded.

By unanimous consent, the motion was amended to delete from "that" to the end of the sentence and insert "a clerk issued subpoena have a seal affixed."

Motion CARRIED.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

FORM 10, N.D.R.Crim.P., SEARCH WARRANT (PAGES 148-166 OF THE AGENDA MATERIAL)

Staff explained that the proposed amendments to Form 10 would eliminate the requirement that the magistrate apply a seal to a search warrant.

Mr. Beehler MOVED to adopt the proposed amendments. Judge Marquart seconded.

The main motion to send the proposed amendments to the form to the Supreme Court as part of the annual rules package CARRIED.

FORM 12, N.D.R.Crim.P., BENCH WARRANT (PAGES 148-166 OF THE AGENDA MATERIAL)

Staff explained that the proposed amendments to Form 12 would eliminate the requirement that the magistrate apply a seal to a bench warrant.

Mr. Beehler MOVED to adopt the proposed amendments. Judge Marquart seconded.

A member asked whether the proposal was to put a date line on the form. The member said that when a judge signed a form like this in Odyssey, the date was automatically applied. Staff said use of the forms is not mandatory but they are in the rules primarily to provide an example of what the actual form should contain.

A member asked whether all judges were now signing forms electronically with an electronic date stamp. Judge members of the committee answered that this is being done unless the judge has to make a lot of changes on the form or to fill in a lot of blanks. A member said probate forms tend to have a lot of blanks and the court has to print out these forms and then manually fill in the blanks. Members said the best practice for lawyers who submit forms or orders to be signed by a judge is to leave the day/date line off because these will be affixed to the form when the judge electronically signs.

The main motion to send the proposed amendments to the form to the Supreme Court as part of the annual rules package CARRIED.

RULE 8.4, N.D.R.Ct., SUMMONS IN ACTION FOR DIVORCE, SEPARATION OR TO DETERMINE PARENTAL RIGHTS AND RESPONSIBILITIES (PAGES 148-166 OF THE AGENDA MATERIAL)

Staff explained that the proposed amendments to Rule 8.4 would eliminate the requirement that the court apply a seal to a summons in a domestic relations case.

Mr. Ottmar MOVED to adopt the proposed amendments. Judge Marquart seconded.

Ms. Ottmar MOVED to delete the words "under seal of the court" on page 165, line 24. Judge Jensen seconded. Motion CARRIED.

By unanimous consent, the explanatory note was amended on page 166, line 46, to read "Subdivisions (a) and (b) were."

The main motion to send the proposed amendments to the rule to the Supreme Court

as part of the annual rules package CARRIED.

RULE 4, N.D.R.Crim.P., ARREST WARRANT OR SUMMONS UPON COMPLAINT (PAGES 167-198 OF THE AGENDA MATERIAL)

Staff explained that Judge Frank Racek requested that the committee consider amending Rule 4 to eliminate the sworn statement requirement when a probable cause document is submitted by a licensed peace officer. The rationale for his proposal is to allow a seamless, all electronic process to be used when peace officers are creating and sharing probable cause documents. Staff submitted proposed amendments to Rule 4 to the committee.

The Chair said that the Criminal Justice Information Sharing system had been in place for several years and the goal was to get everything in the system moved electronically between law enforcement, prosecutors and then to the courts—all the different levels of the system. The Chair said that the ultimate innovation the court system was waiting for was to be able to have electronic criminal case initiation without manual re-entry of any the items entered at other levels of the system.

A member said that one drawback of an all-electronic system was the need for data entry at all levels. The member said that the fact that the system was being automated did not mean that people spent less time entering information.

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

A member said that in some districts police still fill out forms manually, have them notarized, and then input them: there is no re-scanning. The member also said N.D.C.C. § 29-05-01 required the complaint to be subscribed and sworn and that the proposed amendment would be inconsistent with this requirement. The Chair said the Court could supersede procedural statutes.

A member asked if the proposed changes were meant to help out law enforcement agencies using automated systems. The Chair said some agencies were using electronic forms and data entry and the proposal was to allow them to move documents without having to print them out, have them notarized, and then scan them back in.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

RULE 3, N.D.R.Crim.P., THE COMPLAINT (PAGES 167-198 OF THE AGENDA MATERIAL)

Staff explained that Judge Racek has requested that the committee consider amending Rule 3 to eliminate the sworn statement requirement when a complaint is submitted by a licensed peace officer. Staff submitted proposed amendments to Rule 3 to the committee.

Mr. Olson MOVED to adopt the proposed amendments. Judge Jensen seconded.

The Chair said the proposed Rule 3 language seemed to parallel the language in the Rule 4 proposal the committee just approved. Staff pointed out that the statutory section at the end of the rule on lines 57-58 contained language superseding the statutory requirement that a complaint be subscribed and sworn. The Chair said there was a uniform act related to electronic notarization of documents and at some point electronic subscribing and swearing may be possible.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED.

FOR THE GOOD OF THE ORDER

The Chair reported on a panel discussion at the Court Technology Conference. The Chair said California has adopted a large number of standard forms so that there could be uniform forms across the state's court system. The Chair said forms are important especially for self-represented litigants. The Chair asked the committee members to consider whether there are any areas of the law where the committee should be looking at establishing standard forms.

The Chair said California courts appreciate having standard forms because in common proceedings, the forms will contain similar information which can be always be found in the same part of the form. The Chair said our citizen access staff would like to provide more forms but they have questions about whether the forms will be accepted across the state. The Chair said that this committee may be an appropriate body to decide what a standard statewide form should include. The Chair asked the members whether they thought the committee should consider taking up this task or whether there might be some other body that would be more appropriate.

A member said another committee recently overhauled the mental health forms. The member said that many people who come into court grab forms off the Internet that are irrelevant for what they are trying to do. A member said it is possible to get a form for

anything online and sometimes the forms are not quite right. The member said from a court perspective, it would be good to know if the form a party presented was an "official" form from the self-help center or just something grabbed somewhere else on the Internet. The member said that courts were seeing a lot more self-represented litigants and a lot more forms taken off the Internet.

The Chair said there needed to be some formal process established before the Court could recognize a form as "official." The Chair said that there would need to be a determination of which types of forms were most needed and therefore most important to be standardized, such as name change forms. The Chair suggested that the committee could start looking at areas where forms were most in demand, seek comments, and potentially work to establish "official" forms.

The Chair said another issue on the horizon was retention of court records, particularly electronic court records. The Chair said that since electronic court records are categorized by code, it may be possible in the future to electronically purge files of records that should no longer be retained.

A member said another issue that might be considered in the future is the meaning of notarization. The member said there are many instances where, under the rules a document needs to be subscribed and sworn and therefore notarized, but the notarization is only a notarization of the signature, i.e., certification that person who is signing is the person identified by the document. The member said that the more modern approach generally is to require a declaration under penalty of perjury rather than notarization. The member said this is more efficient because it eliminates the need to print out a document and to find a notary. The member said it does not reduce the trustworthiness of a document because a notary generally is only certifying the identity of the signer, not trustworthiness. The member said there should be an examination of whether there is a continuing need for the notarization requirement in the rules.

A member said it would be good if the committee could obtain comment before the January meeting on the proposed changes to the discovery rules. The member said the committee should seek out comment from the defense attorneys association, the trial attorneys association and the bar association on the wisdom of incorporating the federal changes into the North Dakota rules.

The meeting adjourned at approximately 11:00 a.m. on September 25, 2015.

Michael J. Hagburg

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

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

The committee discussed an amendment to Rule 41 proposed by Mark Friese at the last meeting. Since that time, two more proposals have been made to amend Rule 41. A rule draft reflecting these three proposals is attached.

Proposal to regulate remote access

Larry Zubke, the court system's director of technology, requests that the committee consider amending Rule 41 to include language that would authorize IT to take steps to stop data miners from large scale stripping of information from the website and the district court records system. He has provided a copy of Indiana court system's website terms of use, attached, as an example of the kind of language that could be used to bar data stripping.

Rule 41 provides for broad remote access to electronic records – see the language beginning at line 77 of the rule draft. The language Mr. Zubke proposes, which begins on the second page of the Indiana document, is probably too detailed and specific to be added to Rule 41 itself. A proposed amendment to the rule, beginning at line 111 would instead allow the Court to adopt policies to regulate remote access. This is intended to give IT and the Court Technology Committee flexibility to develop specific measures to confront evolving data stripping tactics.

Proposal to protect identities of self help center patrons

Catie Palsgraf, the director the N.D. Legal Self Help Center, has requested that the committee consider amending Rule 41 to protect the identities of the self help center's patrons. In a memo, attached, Ms. Palsgraf says that the center collects certain data on patrons, including name, address, telephone number, and the topic of the query.

Ms. Palsgraf points out that the center is part of the law library and, therefore, the patron information it collects may be protected by N.D.C.C. 40-38-12, copy attached, which protects person information of library patrons. This statute, however, is in the section of the code on municipal governments and N.D.C.C. 40-38-01, the first section of the chapter in which N.D.C.C. 40-38-12 is contained, discusses establishment of libraries by cities and counties. Because it is arguable that the statute does not apply to the self help center, Ms. Palsgraf suggests that language similar to the statute's could be added to Rule 41. Proposed amendments to Rule 41 consistent with Ms. Palsgraf's suggestion begin at line 199 of the attached Rule 41 proposal.

Proposal to limit access to records when no probable cause found for complaint

At the last meeting, the committee discussed Mark Friese's proposal that Rule 41 be amended to allow sealing of the record if a complaint is filed and the magistrate later finds no probable cause. Staff prepared a proposed amendment that would allow a motion for prohibiting Internet access to this type of record under Section 6 (a)(6) – the proposed amendment begins at line 236.

Staff sent this proposal to Mr. Friese for comment and he replied in an email, attached, that it would be preferable to have the record sealed and the online entry removed completely, which is similar to what happens in a completed deferred sentence case. Deferred sentence records are somewhat unique as they are protected under statute, N.D.C.C. 12.1-32-07.2, copy attached.

In order to provide the level of protection requested by Mr. Friese by rule for the records of cases in which a complaint is filed and the magistrate later finds no probable cause, it would be necessary to add these matters to Section 5(b) of the rule. The committee may wish to discuss whether confidentiality of this record type is important enough to merit this level of protection.

RULE 41. ACCESS TO COURT RECORDS

1 Section 1. Purpose.

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

5 Section 2. Definitions.

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

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

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

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

16 (b) "Court record" does not include:

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

19 (2) information gathered, maintained or stored by a governmental agency or

20 other entity to which the court has access but which is not part of the court record
21 as defined in this rule; and
22 (3) a record that has been disposed of under court records management
23 rules.
24 (c) "Public access" means that the public may inspect and obtain a copy of
25 the information in a court record.
26 (d) "Remote access" means the ability to electronically search, inspect, or
27 copy information in a court record without the need to physically visit the court
28 facility where the court record is maintained.
29 (e) "Bulk distribution" means the distribution of all, or a significant subset,
30 of the information in court records, as is and without modification or compilation.
31 (f) "Compiled information" means information that is derived from the
32 selection, aggregation or reformulation by the court of some of the information
33 from more than one individual court record.
34 (g) "Electronic form" means information in a court record that exists as:
35 (1) electronic representations of text or graphic documents;
36 (2) an electronic image, including a video image, of a document, exhibit or
37 other thing;
38 (3) data in the fields or files of an electronic database; or
39 (4) an audio or video recording, analog or digital, of an event or notes in an
40 electronic file from which a transcript of an event can be prepared.

41 Section 3. General Access Rule.

42 (a) Public Access to Court Records.

43 (1) Court records are accessible to the public except as prohibited by this

44 rule.

45 (2) There must be a publicly accessible indication of the existence of

46 information in a court record to which access has been prohibited, which

47 indication may not disclose the nature of the information protected.

48 (3) A court may not adopt a more restrictive access policy or otherwise

49 restrict access beyond that provided for in this rule, nor provide greater access than

50 that provided for in this rule.

51 (b) When Court Records May Be Accessed.

52 (1) Court records in a court facility must be available for public access

53 during normal business hours. Court records in electronic form to which the court

54 allows remote access will be available for access subject to technical systems

55 availability.

56 (2) Upon receiving a request for access to a court record, the clerk of court

57 must respond as promptly as practical. If a request cannot be granted promptly, or

58 at all, an explanation must be given to the requestor as soon as possible. The

59 requestor has a right to at least the following information: the nature of any

60 problem preventing access and the specific statute, federal law, or court or

61 administrative rule that is the basis of the denial. The explanation must be in

62 writing if desired by the requestor.

63 (3) The clerk of court is not required to search within a court record for

64 specific information that may be sought by a requestor.

65 (c) Access to Court Records Filed Before March 1, 2009. Court records

66 filed before the adoption of N.D.R.Ct. 3.4 may contain protected information listed

67 under N.D.R.Ct. 3.4(a). This rule does not require the review and redaction of

68 protected information from a court record that was filed before the adoption of

69 N.D.R.Ct. 3.4 on March 1, 2009.

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

71 in electronic form, for remote access, for bulk distribution or for compiled

72 information. To the extent that public access to information is provided exclusively

73 through a vendor, the court will ensure that any fee imposed by the vendor for the

74 cost of providing access is reasonable.

75 Section 4. Methods of Access to Court Records.

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

77 (1) Request for Access. Any person desiring to inspect, examine, or copy a

78 court record must make an oral or written request to the clerk of court. If the

79 request is oral, the clerk may require a written request if the clerk determines that

80 the disclosure of the record is questionable or the request is so involved or lengthy

81 as to need further definition. The request must clearly identify the record requested

82 so that the clerk can locate the record without doing extensive research.

83 Continuing requests for a document not yet in existence may not be considered.

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

93 (3) Response by Court. If a clerk of court determines there is a question
94 about whether a record may be disclosed, or if a written request is made under
95 Section 6(b) for a ruling by the court after the clerk denies or grants an access
96 request, the clerk must refer the request to the court for determination. The court
97 must use the standards listed in Section 6 to determine whether to grant or deny the
98 access request.

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

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

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

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

105 (4) calendars or dockets of court proceedings, including the case number

106 and caption, date and time of hearing, and location of hearing; and

107 (5) reports specifically developed for electronic transfer approved by the

108 state court administrator and reports generated in the normal course of business, if

109 the report does not contain information that is excluded from public access under

110 Section 5 or 6.

111 The Supreme Court may implement policies to regulate remote access to

112 court records. These policies must be posted publically on the Court's website.

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

114 (1) Bulk distribution of information in the court record is permitted for

115 court records that are publicly accessible under Section 3(a).

116 (2) A request for bulk distribution of information not publicly accessible

117 can be made to the court for scholarly, journalistic, political, governmental,

118 research, evaluation or statistical purposes when the identification of specific

119 individuals is ancillary to the purpose of the inquiry. Prior to the release of

120 information under this subsection the requestor must comply with the provisions of

121 Section 6.

122 (3) A court may allow a party to a bulk distribution agreement access to

123 birth date, street address, and social security number information if the party

124 certifies that it will use the data for legitimate purposes as permitted by law.

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

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

134 (2) Requesting compiled restricted information.

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

139 (B) The request must:

140 (i) identify what information is sought,

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

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

145 (C) The court may grant the request and compile the information if it

146 determines that doing so meets criteria established by the court and is consistent
147 with the purposes of this rule, the resources are available to compile the
148 information, and that it is an appropriate use of public resources.
149 (D) If the request is granted, the court may require the requestor to sign a
150 declaration that:
151 (i) the data will not be sold or otherwise distributed, directly or indirectly, to
152 third parties, except for journalistic purposes,
153 (ii) the information will not be used directly or indirectly to sell a product or
154 service to an individual or the general public, except for journalistic purposes, and
155 (iii) there will be no copying or duplication of information or data provided
156 other than for the stated scholarly, journalistic, political, governmental, research,
157 evaluation, or statistical purpose.
158 The court may make such additional orders as may be needed to protect
159 information to which access has been restricted or prohibited.
160 Section 5. Court Records Excluded From Public Access.
161 The following information in a court record is not accessible to the public:
162 (a) information that is not accessible to the public under federal law;
163 (b) information that is not accessible to the public under state law, court
164 rule, case law or court order, including:
165 (1) affidavits or sworn testimony and records of proceedings in support of
166 the issuance of a search or arrest warrant pending the return of the warrant;

167 (2) information in a complaint and associated arrest or search warrant to the
168 extent confidentiality is ordered by the court under N.D.C.C. §§ 29-05-32 or
169 29-29-22;
170 (3) documents filed with the court for in-camera examination pending
171 disclosure;
172 (4) case information and documents in Child Relinquishment to Identified
173 Adoptive Parent cases brought under N.D.C.C. ch. 14-15.1;
174 (5) domestic violence protection order files and disorderly conduct
175 restraining order files when the restraining order is sought due to domestic
176 violence, except for orders of the court;
177 (6) documents in domestic violence protection order and disorderly conduct
178 restraining order cases in which the initial petition was dismissed summarily by the
179 court without a contested hearing;
180 (7) names of qualified or summoned jurors and contents of jury
181 qualification forms if disclosure is prohibited or restricted by order of the court;
182 (8) records of voir dire of jurors, unless disclosure is permitted by court
183 order or rule;
184 (9) records of deferred impositions of sentences resulting in dismissal;
185 (10) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected
186 information:
187 (A) except for the last four digits, social security numbers, taxpayer

188 identification numbers, and financial account numbers,

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

190 (C) except for the initials, the name of an individual known to be a minor,

191 unless the minor is a party, and there is no statute, regulation, or rule mandating

192 nondisclosure;

193 (11) judge and court personnel work material, including personal calendars,

194 communications from law clerks, bench memoranda, notes, work in progress, draft

195 documents and non-finalized documents;

196 (12) party, witness and crime victim contact information gathered and

197 recorded by the court for administrative purposes, including telephone numbers

198 and e-mail, street and postal addresses~~.~~;

199 (13) the name of a patron of the North Dakota Legal Self Help Center or

200 information sufficient to identify a patron or the subject about which a patron

201 requested information.

202 (c) This rule does not preclude access to court records by the following

203 persons in the following situations:

204 (1) federal, state, and local officials, or their agents, examining a court

205 record in the exercise of their official duties and powers~~.~~;

206 (2) parties to an action and their attorneys examining the court file of the

207 action, unless restricted by order of the court, but parties and attorneys may not

208 access judge and court personnel work material in the court file.

209 (d) A member of the public may request the court to allow access to
210 information excluded under Section 5 as provided in Section 6.
211 Section 6. Requests to Prohibit Public Access to Information in Court
212 Records or to Obtain Access to Restricted Information.
213 (a) Request to Prohibit Access.
214 (1) A request to the court to prohibit public access to information in a court
215 record may be made by any party to a case, by the individual about whom
216 information is present in the court record, or on the court's own motion on notice
217 as provided in Section 6(c).
218 (2) The court must decide whether there are sufficient grounds to overcome
219 the presumption of openness of court records and prohibit access according to
220 applicable constitutional, statutory and case law.
221 (3) In deciding whether to prohibit access the court must consider that the
222 presumption of openness may only be overcome by an overriding interest. The
223 court must articulate this interest along with specific findings sufficient to allow a
224 reviewing court to determine whether the closure order was properly entered.
225 (4) The closure of the records must be no broader than necessary to protect
226 the articulated interest. The court must consider reasonable alternatives to closure,
227 such as redaction or partial closure, and the court must make findings adequate to
228 support the closure. The court may not deny access only on the ground that the
229 record contains confidential or closed information.

230 (5) In restricting access the court must use the least restrictive means that
231 will achieve the purposes of this rule and the needs of the requestor.
232 (6) If the court concludes, after conducting the balancing analysis and
233 making findings as required by paragraphs (1) through (5), that the interest of
234 justice will be served, it may prohibit public Internet access to an individual
235 defendant's electronic court record in a criminal case:
236 (A) if the magistrate finds no probable cause for the issuance of a
237 complaint;
238 ~~(A)~~ (B) if the charges against the defendant are dismissed; or
239 ~~(B)~~ (C) if the defendant is acquitted.
240 If the court grants a request to prohibit public Internet access to an
241 electronic court record in a criminal case, the search result for the record must
242 display the words "Internet Access Prohibited under N.D.Sup.Ct. Admin.R 41."
243 (b) Request to Obtain Access.
244 (1) A request to obtain access to information in a court record to which
245 access is prohibited under Section 4(a), 5 or 6(a) may be made to the court by any
246 member of the public or on the court's own motion on notice as provided in
247 Section 6(c).
248 (2) In deciding whether to allow access, the court must consider whether
249 there are sufficient grounds to overcome the presumption of openness of court
250 records and continue to prohibit access under applicable constitutional, statutory

251 and case law. In deciding this the court must consider the standards outlined in

252 Section 6(a).

253 (c) Form of Request.

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

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

256 (3) The court may require notice to be given by the requestor or another

257 party to any individuals or entities identified in the information that is the subject

258 of the request. When the request is for access to information to which access was

259 previously prohibited under Section 6(a), the court must provide notice to the

260 individual or entity that requested that access be prohibited.

261 Section 7. Obligations Of Vendors Providing Information Technology

262 Support To A Court To Maintain Court Records.

263 (a) If the court contracts with a vendor to provide information technology

264 support to gather, store, or make accessible court records, the contract will require

265 the vendor to comply with the intent and provisions of this rule. For purposes of

266 this section, "vendor" includes a state, county or local governmental agency that

267 provides information technology services to a court.

268 (b) By contract the vendor will be required to notify the court of any

269 requests for compiled information or bulk distribution of information, including

270 the vendor's requests for such information for its own use.

271 EXPLANATORY NOTE

272 Adopted on an emergency basis effective October 1, 1996; Amended and
273 adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1,
274 2009; March 15, 2009; March 1, 2010; March 1, 2012; March 1, 2015; March 1,
275 2016;_____. Appendix amended effective August 1, 2001, to reflect the
276 name change of State Bar Board to State Board of Law Examiners.
277 Section 3(b)(3) was added, effective March 1, 2016, to clarify that the clerk
278 of court is not required to search within a court record for specific information that
279 may be sought by a requestor.
280 Section 3(c) was adopted, effective March 1, 2010, to state that protected
281 information may be contained in court records filed before the adoption of
282 N.D.R.Ct. 3.4.
283 Section 4(b) was amended, effective_____, to allow the
284 Supreme Court to implement policies to regulate remote access to court records.
285 Section 4(c) was amended, effective March 15, 2009, to allow parties who
286 enter into bulk distribution agreements with the courts to have access to birth date,
287 street address, and social security number information upon certifying compliance
288 with laws governing the security of protected information. Such laws include the
289 Federal Fair Credit Reporting Act, the Gramm Leach Bliley Act, the USA Patriot
290 Act and the Driver's Privacy Protection Act.
291 Section 5(b)(6) was amended, effective March 1, 2015, to clarify that the
292 restriction on public access to documents in domestic violence protection order

293 and disorderly conduct restraining order cases under this paragraph is limited to
294 cases that were dismissed summarily.

295 Section 5(b)(8) was amended, effective March 15, 2009, to list types of
296 protected information open to the public. The term "financial-account number" in
297 Section 5(b)(8) includes any credit, debit or electronic fund transfer card number,
298 and any other financial account number.

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

303 Section 5(b)(12) was added, effective March 1, 2016, to exclude party,
304 witness and crime victim contact information gathered and recorded by the court
305 for administrative purposes from public access.

306 Section 5(b)(13) was added, effective _____, to exclude information
307 about patrons of the North Dakota Legal Self Help Center from public access.

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

313 Section 6(a)(6) was amended, effective _____ to provide a method

314 for the court to prohibit public Internet access to an electronic case record when a
315 magistrate finds no probable cause for the issuance of a complaint.
316 Nothing in this rule or N.D.R.Ct. 3.4 precludes a clerk of court or the
317 electronic case management system from identifying non-confidential records that
318 match a name and date of birth or a name and social security number.
319 Joint Procedure Committee Minutes of _____; September 24-
320 25, 2015, pages 15-16, 20-21; April 23-24, 2015, pages 8-10; April 24-25, 2014,
321 page 27; April 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20;
322 September 24-25, 2009, pages 8-9; May 21-22, 2009, pages 28-44; January 29-20,
323 2009, pages 3-4; September 25, 2008, pages 2-6; January 24, 2008, pages 9-12;
324 October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23,
325 2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13,
326 January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25,
327 2003, pages 6-12. Court Technology Committee Minutes of June 18, 2004; March
328 19, 2004; September 12, 2003; Conference of Chief Justices/Conference of State
329 Court Administrators: Guidelines for Public Access to Court Records.
330 Cross Reference: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With
331 the Court).

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INFORMATION FOR...

- PUBLIC
- JUDGES
- CLERKS
- EDUCATORS
- PRESS
- ATTORNEYS
- COURT STAFF
- STUDENTS

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The financial data contained within a case may not include interest that has accrued or other charges that have become due since the last financial transaction. The Clerk's office can provide current financial information.

When searching the public access site by case number, it is possible that cases matching the case number entered may not appear in the search results depending on the exact format entered in the search form and the exact format entered into Odyssey. Users of the Odyssey case management system have been trained to use the exact case numbering format prescribed by Administrative Rule 8 when manually entering a case number. For help searching by case number, see our MyCase Help page.

Information obtained from this site should not be used as a substitute for competent legal advice.

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When retrieving information from MyCase, you are prohibited from (1) using or attempting to use spiders, robots, avatars, intelligent agents, or any other extraction or navigation search except for a normal browser; (2) aggregating, copying or duplicating any of the materials or information available from the site except for the small amount of materials and information temporarily required for an ordinary single use of the site; or (3) accessing data not intended for such user.

You are authorized to access, use and copy information and materials available through MyCase only as necessary for the proper use of the site's online services. The information and materials, including pages and content, may not be copied, distributed, modified, published, or transmitted in any other manner, including for use for creative work or to sell or promote other products. Violation of this policy may result in infringement of intellectual property and contractual rights of the Indiana Supreme Court, the Division of State Court Administration, Tyler Technologies, Inc., or other parties, which is prohibited by law and could result in substantial civil and criminal penalties.

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- Does my bar admission character and fitness interview have to be done in person?
- Does Indiana accept Multistate Bar Examination (MBE) scores from other jurisdictions?
- How do I become licensed by motion?
- What is the filing date for the July bar exam?
- Is the Indiana Commission for Continuing Legal Education the same as ICLEF?

TO: Mike Hagburg

FROM: Catie Palsgraaf

RE: Request for Clarification of Administrative Rule 41 Section 5 State Law Exception for Public Access of ND Legal Self Help Center Administrative Records

DATE: December 29, 2015

I would like to request clarification of Administrative Rule 41 Section 5 as applied to the ND Legal Self Help Center (Center) administrative records. Specifically, whether a state law exception currently applies to Center patron records, or if an amendment to Administrative Rule 41 Section 5 is necessary. If the state law exception does not apply, I would like to propose an amendment to Administrative Rule 41 Section 5 to allow an exception to public access to specific elements of the administrative records of the Center.

State Law Exemption – N.D.C.C. § 40-38-12

Administrative Rule 41 Section 5(b) "information that is not accessible to the public under state law . . . ." N.D.C.C. § 40-38-12 exempts certain personally identifiable records of library patrons from public access.

> "Any record maintained or received by a library receiving public funds, which provides a library patron's name or information sufficient to identify a patron together with the subject about which the patron requested information, is considered private and is excepted from the public records disclosure requirements of section 44-04-18. These records may be released when required pursuant to a court order or a subpoena."

The Center operates as a division of the ND Supreme Court Law Library, a library receiving public funds. Are Center patron records that tie the subject of a request to the identity of the patron currently exempted by N.D.C.C. § 40-38-12?

Proposed Amendment to Administrative Rule 41 Section 5

If the state law exception in N.D.C.C. § 40-38-12 does not currently apply to Center patron records, I would like to propose an amendment to Administrative Rule 41 Section 5. The amendment would allow an exception to public access to the administrative records of the ND Legal Self Help Center.

The proposed amendment to Administrative Rule 41 Section 5 is:

> "Any administrative records maintained or received by the North Dakota Legal Self Help Center, which provides a patron's name or information sufficient to identify a patron together with the subject about which the patron requested information;"

The proposed exception would not apply to every element of the Center's administrative records. It is limited in scope and would allow for public access to non-personally identifiable information about Center requests.

The data gathered from collecting records of Center requests is important to operating the Center. The data provides usage statistics and trends, identifies areas of legal need to prioritize forms creation and educational materials, allows Center staff to respond to questions or complaints related to services provided, and protects Center staff in the event of unauthorized practice of law claims.

The Center administrative records at issue are 1) the contact log of requests maintained by Center staff; and 2) the emailed and mailed Center responses to the requests. These records contain personally identifiable information that can connect the patron to the subject of their request.

The following information is collected in the Center contact log for each request:

- The date the request was received.
  - This is used to track Center usage statistics and trends.
- The time the request was received.
  - This is used to track Center usage statistics and trends.
- The patron's name, if provided.
  - This information is collected only if provided by the patron. If information will be mailed to the patron, we ask for a first and last name. If the patron does not want to provide a first and last name for mailing, we offer to use "Resident" and explain that we cannot guarantee delivery.
- The patron's phone number.
  - This is collected only if the request was made by phone.
- The subject of the request.
  - This is used to track Center usage statistics and trends, to identify areas of legal need and to prioritize forms creation and educational materials.
- Actions taken on the request, including email or mailing addresses.

- This, combined with the patron's name and phone number, is collected to answer questions or complaints related to services provided, and to protect Center staff in the event of unauthorized practice of law claims.

- Referral information, if provided by the patron.
  - This is used to track how patrons are referred to the Center.

My proposed exception will limit public access to the patron's name, phone number, and action taken columns in the Center contact log. Public access to the date, time, subject and referral columns will not be impacted. A public access version of a Center contact log could be created and made available for public inspection at the ND Supreme Court Law Library.

The Center retains a copy of each email and letter sent to patrons in response to requests. Retention allows Center staff to respond to questions or complaints related to services provided, and protects Center staff in the event of unauthorized practice of law claims.

My proposed exception will allow individual requests for Center response emails or letters sent to patrons. The individual requests for Center response emails and letters will require redaction of email addresses, mailing addresses, names and other personally identifiable information before copies of individual Center responses can be provided. Center staff will follow the requirements of Administrative Rule 41 Sections 3 and 4 when requests for Center response emails and letters are received.

Bulk distribution of Center response emails and letters, as defined by Rule 41 Section 2(e), will not be possible. The records, without redaction, cannot be distributed "as is and without modification or compilation."

Thank you for considering this exception to Administrative Rule 41.

CHAPTER 40-38
PUBLIC LIBRARIES

40-38-01. Public library and reading room - Establishment - Election.

The governing body of any city or county upon petition of not less than fifty-one percent of the qualified electors of the city or county as determined by the total number of votes cast at the last general election or upon a majority vote of the qualified electors thereof voting on the question shall establish and maintain public library service within its geographic limits by means of a public library and reading room or other public library service, either singly or in cooperation with the state library, or with one or more cities or counties, or by participation in an approved state plan for rendering public library service under the Library Services and Construction Act [20 U.S.C. 351-358], and acts amendatory thereof. Such question shall be submitted to the qualified electors upon resolution of the governing body or upon the petition of not less than twenty-five percent of that number of qualified electors of the city or county that voted at the last general election, filed with the governing body not less than ninety days before the next regular election. Library service may be discontinued within any city or county by any of the methods by which library services may be established, except that once established, such service shall not be discontinued until after it has been in operation for at least five years from the date of establishment.

40-38-02. Library fund - Financial report - Levy - Kept separate - Exemption for city levying tax - Increasing levy.

1. For the purpose of establishing and maintaining public library service, the governing body of a municipality or county authorizing the same shall establish a library fund. The library fund shall consist of annually levying and causing to be collected as other taxes are collected a municipal or county tax not exceeding the limitations in subsection 6 of section 57-15-06.7 and subsection 4 of section 57-15-10 and any other moneys received for library purposes from federal, state, county, municipal, or private sources. In the year for which the levy is sought, a library board seeking approval of a property tax levy under this chapter must file with the auditor of each participating municipality or county, at a time and in a format prescribed by the auditors, a financial report for the preceding calendar year showing the ending balances of each fund held for the library board during that year.
2. The city auditor or county treasurer shall establish and maintain the fund to account for library revenues and shall make payments from the fund for invoices that have been submitted and approved by the governing body of the library. In the case of a contract with another library for service delivery, the city auditor or county treasurer shall promptly transmit all funds received to the established library fund of the agency delivering service. On request of the city auditor or county treasurer and during an audit, the governing board of the library shall supply its records. The records must be provided on a timely basis. The fund may not revert to the governing body of the city or county at the end of any fiscal year. The fund must be used exclusively for the establishment and maintenance of public library service.
3. The governing board of the library may request annually from the governing body of a city or county a tax not exceeding the limitation in subsection 15 of section 57-15-06.7 and subsection 5 of section 57-15-10. Such tax may be levied by the governing body of a city or county.
4. If a county levies for county library service and a city levies a tax for public library service under this section the county tax levy within that city must be reduced so the total levy in that city does not exceed four mills. If the city has been totally exempted from a county library service levy under this section, the phrase "not less than fifty-one percent of the qualified electors of the city or county as determined by the total number of votes cast at the last general election" as stated in section 40-38-01 shall mean fifty-one percent of the total number of votes cast at the last general election in the county less the total number of votes cast at the last general election in the city. If an election on the question is held, the qualified electors of any city so exempted from the

county library tax shall not be entitled to vote on the establishment or discontinuance of the county library service.

5. Upon motion of the governing body or upon petition of not less than twenty-five percent of the qualified electors in the last general election of any city, school district, township, or county, filed not less than sixty days before the next election, the governing body shall submit to the qualified electors at the next election the question of whether the governing body shall increase the mill levy a specified amount for public library service above the mill levy limitation set out in this section. The governing body may call a special election at any time for the purpose of voting on the question, and the election shall be called, conducted, and certified as are other elections in that political subdivision. Upon approval by sixty percent of the qualified electors voting in the election, the governing body shall increase the levy for public library service in the amount approved by the qualified electors.

40-38-03. Board of directors - Appointment - Term of office - Compensation - Filling vacancies - Organization.

1. The governing body of a municipality that has established a public library and reading room, or the board of county commissioners for a county library, shall appoint a board of five directors who must be residents of the municipality or county, as the case may be, to govern the library and reading room. One member of the governing body of the municipality or designated representative must be a member of the board of directors of a municipal library, and must be a resident of the municipality that establishes and maintains the municipal library; and one member of the board of county commissioners or designated representative must be a member of the county board of directors.
2. The terms of office of the members of the first board of directors must be established so one member holds office for one year, two members hold office for two years, and two members hold office for three years. The members, at their first meeting, shall determine the length of their respective terms by lot. Thereafter, the number of directors required to fill expired terms must be appointed each year, and each director may hold office for a term of three years from the first day of July in the year of appointment and until a successor has been appointed. No member of the board may serve for more than two consecutive terms, after which an interval of one year must elapse before the same member may be reappointed. All vacancies on the board of directors must be reported by the board to the governing body of the municipality or the board of county commissioners, as the case may be, and must be filled thereby. An appointment to fill an unexpired term may be for the residue of the term only.
3. The appointing authority shall establish the rate of compensation for directors and actual expenses incurred by directors may be reimbursed at the official reimbursement rates of the appointing authority.
4. Immediately after the appointment of its members, the board of directors shall meet and organize by electing a president. The governing board of a municipality or county establishing public library service may, in lieu of appointing a library board, contract directly with a library board established by another governing body of a municipality or county for the purpose of extending public library service.

40-38-04. General powers and duties of board of directors.

The board of directors shall have the following powers and duties:

1. To make and adopt such bylaws, rules, and regulations relating to the duties of the officers of the board as may be expedient and not inconsistent with the provisions of this chapter.
2. To make and adopt such bylaws, rules, and regulations for the management of the library and reading room as are expedient and not inconsistent with the provisions of this chapter.
3. To control, exclusively, the expenditures of all moneys collected for or contributed to the library fund.

4. To have the supervision, care, and custody of the library property, and of the rooms or buildings constructed, leased, or set apart for use of library purposes.
5. To contract to furnish library service and to receive library service from other counties, school districts, and cities of the state of North Dakota and adjoining states, and the state library.
6. To employ qualified personnel to administer the public library and dispense library services.

40-38-05. Board of directors may purchase, build, or lease building for library - Library building fund - Public hearing required.

The board of directors, with the approval of the city or county governing body, may build, lease, lease-purchase, or purchase an appropriate building for a library and purchase a site therefor. Such lease, purchase, or contract shall not be valid without the approval of the governing body of the city or county. Prior to any actions on such proposals, the governing body shall hold a public hearing on the proposals. Notice of the hearing shall be published at least once, not less than six days prior to the hearing, in a newspaper of general circulation within the city or county. The governing body shall seek the advice and comment of the state library and the general public at the hearing. After such hearing, the governing body of a city or county may establish by resolution a library building fund for the purpose of construction, enlargement, or alteration of a building or for the purchase of an existing building to be used as a public library. The city auditor or county treasurer shall place in the library building fund all moneys for such purposes as may be appropriated by the governing body or received for such purposes from federal, state, county, city, or private sources. The library building fund shall not revert to the library general fund or the general fund of the city or county without authorization by formal resolution from both the library's board of directors and the governing body of the city or county.

40-38-06. Vouchers - How drawn.

The duly bonded secretary or treasurer of the board of directors may draw money from the library fund upon vouchers of the board of directors without any other audit.

40-38-07. Library free to inhabitants of political subdivision - Subject to rules published by board of directors.

Every library and reading room established under this chapter shall be free for the use of inhabitants of the political subdivision where it is located subject to such reasonable rules and regulations as the board of directors may deem necessary to adopt and publish to render the use of the library and reading room of the greatest benefit. The board may exclude from the use of the library and reading room any and all persons who willfully shall violate such rules.

40-38-08. Donations - How accepted - Board of directors as trustee.

All persons desirous of making donations of money, books, personal property, or real estate for the benefit of the library may vest the same in the board of directors. The board shall hold and control all property accepted for the use of the library and reading room as a special trustee.

40-38-09. Annual report of board of directors - Contents - To whom made.

The board of directors shall make a report on July first of each year to the governing body of the city or board of county commissioners, as the case may be, stating:

1. The condition of the library and property.
2. The various sums of money received from all sources.
3. How much money has been expended and for what purpose.
4. The number of books and periodicals on hand.
5. The number of books and periodicals added by purchase or gift during the year and the number thereof lost or loaned out.
6. The character and kind of books contained in the library.

7. Such other statistics, information, and suggestions as the board may deem of general interest or as may be required by the state library.

Copies of the report shall be filed with the governing body of the political subdivision and with the state library.

40-38-10. Contributions by political subdivision to establishment of library without election authorized.

To aid and facilitate the organization of library service, the governing body of any city where the population is less than two thousand five hundred may appropriate annually from its general fund, or from any other moneys received for library purposes from federal, state, and private sources, a sum not to exceed five dollars per capita for the purchase of books and periodicals to remain the property of the city and to be loaned to any local library for free public use. The governing body shall appoint a book committee of three which shall select the books and periodicals from standard and recommended lists furnished by the state library. The selection so made by such committee shall be submitted to the governing body for approval and purchase by such governing body; provided, that the amount so expended for such books and periodicals shall be within the amount appropriated therefor. Books and periodicals purchased with this fund shall be properly stamped as belonging to the city. Such appropriation shall be made and books and periodicals purchased without submitting the same to vote as provided in section 40-38-02. As an alternative, the governing body may contract with a library operated by a city, county, school district, or the state library for the provision of public library service for the city.

40-38-11. Joint public library services by cities and counties.

1. Upon compliance with section 40-38-01 for the establishment of public library services, public library services may be jointly provided through a written agreement between the governing bodies of any city or county or both to establish and maintain joint library services with one or more cities or counties or both.
2. A party shall be bound to an agreement entered into under subsection 1 for an initial five-year term and subsequent five-year terms unless it provides other parties to the agreement with notice of intent to withdraw from the agreement at least two years before the proposed date of withdrawal.
3. The parties to the agreement shall appoint a single joint library board to govern public library services covered by the agreement. The method of representation on the joint library board and the establishment of the initial board with staggered terms shall be determined in the agreement. Provided, the joint library board shall consist of an equal number of appointees from each party to the agreement and, in any case, shall consist of not less than five members nor more than eleven members. No member of the board shall serve for more than two consecutive three-year terms, after which an interval of one year must elapse before the same member may be reappointed.
4. The joint library board shall have all power and duties provided in sections 40-38-04 through 40-38-09.
5. A joint library fund shall be established for the public library services covered by the agreement. Each city or county represented in the agreement shall provide its pro rata share of funds for the services, as specified in the agreement, from the funds received under section 40-38-02. Taxes within the service area covered by the written agreement under subsection 1 which is outside city limits may be levied within the limitations and according to the procedures provided by law for a county library fund levy and taxes within the service area that is within city limits may be levied within the limitations and according to the procedures provided by law for a city library fund levy.
6. The joint library board shall appoint, and may remove, a treasurer to administer the joint library fund. The treasurer may be a treasurer of one of the parties to the agreement or a member of the board or both. The city auditor and county treasurer of each city or county represented in the agreement and the state librarian shall promptly transmit all funds authorized under subsection 5 and chapter 54-24.2, respectively, directly to the treasurer of the joint library board. The treasurer shall pay out moneys belonging to the joint library board only upon properly drawn vouchers, pursuant to

order of the joint library board. The funds received by the treasurer shall not revert to or be considered funds on hand by any governmental unit furnishing the same, at the end of any biennium or fiscal year. The treasurer shall be bonded in such amount as may be specified by resolution adopted by the joint library board.

7. The agreement shall include provisions for the dissolution of the joint library board and distribution of assets in the event the agreement is terminated.
8. Joint libraries established and operated under this section are eligible to receive financial aid under chapter 54-24.2 to the extent that each city and county represented in the agreement would be eligible for the aid.
9. Agreements for public library services between cities or counties or both may be provided under this section or other provisions of this chapter and may not be provided under chapter 54-40 or other provisions of law.
10. After July 1, 1981, the establishment of joint library services pursuant to this section shall not be permitted unless approved by the electors of each individual city or county considering the question.

40-38-12. Library records - Open records exception.

Any record maintained or received by a library receiving public funds, which provides a library patron's name or information sufficient to identify a patron together with the subject about which the patron requested information, is considered private and is excepted from the public records disclosure requirements of section 44-04-18. These records may be released when required pursuant to a court order or a subpoena.

Hagburg, Mike

From: Mark A Friese <mfriese@vogellaw.com>
Sent: Monday, December 21, 2015 8:07 AM
To: Hagburg, Mike
Cc: Narum, Daniel; Schmitz, Jay
Subject: RE: Rule 41

Good morning Mike,

I exchanged emails with Judges Narum and Schmitz on Friday. The consensus was the rules should provide a bit greater protection, even if a rule change would perhaps be necessary. For example, upon successful completion of a deferred sentence, the record is sealed, and the online entry is removed completely. Here, the proposal would simply "restrict" the online record. Sometimes the restricted access record is worse for an accused than an open record showing a dismissal.

I agree with the judges' suggestion. While I think the current proposal is helpful, it may be worthwhile to consider whether further revisions are warranted.

Thanks for all your help, Mike!
Mark

From: Hagburg, Mike [mailto:MHagburg@ndcourts.gov]
Sent: Wednesday, December 16, 2015 3:49 PM
To: Mark A Friese
Subject: Rule 41

The committee tentatively approved a change to Rule 41 that would allow a request to delete a case from internet access if the magistrate found no probable cause. I am attaching a copy of the proposal. Please let me know if this is in line with what you were looking for. The change is way down at line 231-232. Thanks for your help. Mike

Click here to report this email as spam.

This message has been scanned for malware by Websense. www.websense.com

12.1-32-07.2. Records and filing of papers.

1. Whenever the court orders that a person convicted of a felony is to be placed on probation, the clerk of the court in which the order is entered immediately shall make full copies of the judgment or order of the court with the conditions of probation and shall certify the same to the director of parole and probation of the department of corrections and rehabilitation. Upon the disposition of any criminal case, the clerk of court shall transmit to the department of corrections and rehabilitation statistical data, in accordance with rules adopted by the department, regarding all defendants whether found guilty or discharged.

2. Whenever imposition of sentence is deferred and, pursuant to section 12.1-32-07.1, the plea of guilty is withdrawn by the defendant or the verdict of guilty is set aside by the court, the clerk of court shall file all papers, including the findings and final orders in proceedings under section 12.1-32-07.1, and shall note the date of filing on the papers. The records and papers are subject to examination by the clerk, a judge of the court, the juvenile commissioner, probation officers, the defendant or defendant's counsel, and the state's attorney. Others may examine the records and papers only upon the written order of a judge of the court.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 10, N.D.R.Crim.P., Arraignment; Rule 43, N.D.R.Crim.P., Defendant's Presence

At the last meeting, the committee instructed staff to prepare amendments to Rule 10 and Rule 43 clarifying that a represented defendant in a felony case may waive the arraignment in writing.

Proposed amendments to Rule 10 are attached that would eliminate the requirement that the arraignment be conducted in "open court" if the defendant has waived presence under Rule 43. This amendment begins at line 1 of the proposal with a related explanatory note reference beginning at line 30.

Proposed amendments to Rule 43 would supplement and rearrange the felony offense presence provision to clarify that a represented defendant can waive the arraignment in writing. The amendment begins at line 23 of the proposal with a related explanatory note reference beginning at line 77.

RULE 10 ARRAIGNMENT

1 (a) In General. ~~Arraignment~~ Unless the defendant has waived presence
2 under Rule 43, arraignment must be conducted in open court and consists of:
3 (1) ensuring the defendant has a copy of the indictment, information, or
4 complaint;
5 (2) reading the indictment, information, or complaint to the defendant or
6 stating to the defendant the substance of the charge; and then
7 (3) asking the defendant to plead to the indictment, information or
8 complaint.
9 If the defendant appears at the arraignment without counsel, the defendant must be
10 informed of the right to counsel as provided in Rule 44.
11 (b) Reliable Electronic Means. Contemporaneous audio or audiovisual
12 transmission by reliable electronic means may be used to arraign a defendant as
13 permitted by N.D. Sup. Ct. Admin. R 52.
14 EXPLANATORY NOTE
15 Rule 10 was amended, effective March 1, 1990; March 1, 2004; March 1,
16 2006; March 1, 2016;_____.
17 Rule 10 follows Fed.R.Crim.P. 10 in substance and controls with respect to
18 all arraignments which arise within the state.
19 Rule 10 is designed both to safeguard important rights of the defendant as

20 well as to protect proper administration of criminal law. The arraignment is an
21 appearance before the court, intended to inform the accused of the charge against
22 the accused and to obtain an answer from the accused. It is an important step in the
23 criminal case, since it formulates the issue to be tried.

24 Failure to comply with the requirements of a proper arraignment is an
25 irregularity that does not warrant a reversal of a conviction if not raised before
26 trial. Under the rule, no specific time for the arraignment is set and no precise
27 ceremonial or verbal formality need be followed.

28 Rule 10 was amended, effective March 1, 2004. The existing text of the rule
29 was divided into subdivisions to improve clarity.

30 Subdivision (a) was amended, effective _____, to reference
31 Rule 43, which contains provisions allowing waiver of presence under specified
32 circumstances.

33 Subdivision (b) was added effective March 1, 2004, to permit the use of
34 interactive television to conduct the arraignment. Subdivision (b) was amended,
35 effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs
36 proceedings conducted by remote means. Subdivision (b) was further amended,
37 March 1, 2016, to allow the use of contemporaneous audio or audiovisual
38 transmission by reliable electronic means to conduct the arraignment.

39 Rule 10 was amended, effective March 1, 2006, in response to the
40 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The

41 language and organization of the rule were changed to make the rule more easily
42 understood and to make style and terminology consistent throughout the rules.
43 SOURCES: Joint Procedure Committee Minutes of _____;
44 September 24-25, 2015, pages 23-24; April 23-24, 2015, pages 13-14;April 29-30,
45 2004, pages 26-28;September 26-27, 2002, page 13; April 20, 1989, page 4;
46 December 3, 1987, page 15; March 23-25, 1972, pages 20-23; May 3-4, 1968,
47 pages 8-9; Fed.R.Crim.P. 10.
48 STATUTES AFFECTED:
49 SUPERSEDED: N.D.C.C. §§ 29-11-56, 29-12-01, 29-13-01, 29-13-03, 29-
50 13-04, 29-13-05, 29-13-06, 29-13-07, 29-13-08, 29-13-09, 33-12-15.
51 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the
52 Magistrate); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right
53 to and Appointment of Counsel); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous
54 Transmission by Reliable Electronic Means).

RULE 43. DEFENDANT'S PRESENCE

1 (a) When Required.

2 (1) In General. Unless this rule provides otherwise, the defendant must be

3 present at:

4 (A) the initial appearance, the arraignment, and the plea;

5 (B) every trial stage, including jury impanelment and the return of the

6 verdict; and

7 (C) sentencing.

8 (2) Reliable Electronic Means. Presence permitted by contemporaneous

9 audio or audiovisual transmission by reliable electronic means is presence for the

10 purposes of this rule.

11 (3) Jury Question.

12 (A) In General. If, after beginning deliberations, the members of the jury

13 request information on a point of law or request to have testimony read or played

14 back to them, they must be brought into the courtroom. The court's response must

15 be provided in the presence of counsel and the defendant.

16 (B) Agreed Manner of Response. In the alternative, after consultation with

17 counsel in the presence of the defendant, the court may respond to a jury's question

18 or request for testimony in a manner other than in open court if agreed to by

19 counsel and the defendant.

20 (b) When Not Required. If the court permits, a defendant need not be
21 present under any of the following circumstances:
22 (1) Felony Offense. The offense is punishable by imprisonment for more
23 than one year, and with a represented defendant's written consent, the preliminary
24 hearing, the arraignment, and entry of a not guilty plea ~~and the preliminary hearing~~
25 may occur in the defendant's absence.
26 (2) Misdemeanor Offense or Infraction. The offense is punishable by fine or
27 by imprisonment for not more than one year, or both, and with the defendant's
28 written consent, the arraignment, plea, trial, ~~or~~ and sentencing may occur in the
29 defendant's absence.
30 (3) Conference or Hearing on Legal Question. The proceeding involves
31 only a conference or hearing on a question of law.
32 (4) Sentence Correction. The proceeding involves the correction or
33 reduction of sentence under Rule 35.
34 (c) Waiving Continued Presence. The further progress of the trial, including
35 the return of the verdict and the imposition of sentence, may not be prevented and
36 the defendant waives the right to be present if the defendant, initially present at
37 trial or having pleaded guilty:
38 (1) is voluntarily absent after the trial has begun (whether or not the
39 defendant has been informed by the court of the obligation to remain during the
40 trial);

41 (2) is voluntarily absent at the imposition of sentence; or

42 (3) after being warned by the court that disruptive conduct will cause the

43 removal of the defendant from the courtroom, persists in conduct that justifies the

44 defendant's exclusion from the courtroom.

45 EXPLANATORY NOTE

46 Rule 43 was amended, effective January 1, 1980; March 1, 1990; March 1,

47 1998; March 1, 2004; March 1, 2006; March 1, 2008; March 1, 2010; March 1,

48 2015;_____.

49 Although Rule 43 does not require the defendant's presence in all instances,

50 the rule does not give a defendant the right to be absent. The court has discretion

51 whether to require the presence of the defendant.

52 In a non-felony case, if the defendant pleads guilty without appearing in

53 court, a written form must be used advising the defendant of his or her

54 constitutional rights and creating a record showing that the plea was made

55 voluntarily, knowingly, and understandingly.

56 Rule 37 provides for summary affirmance if the defendant does not appear

57 at a trial anew.

58 Rule 43 was amended, effective March 1, 2006, in response to the

59 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The

60 language and organization of the rule were changed to make the rule more easily

61 understood and to make style and terminology consistent throughout the rules.

62 Subdivision (a) was amended, effective March 1, 2004, in response to
63 amendments to Rule 5 and Rule 10 allowing interactive television to be used for
64 the initial appearance and arraignment. N.D. Sup. Ct. Admin. R. 52, which took
65 effect June 1, 2005, governs proceedings conducted by interactive television.
66 Subdivision (a) was amended, effective March 1, 2010, to explain
67 requirements for the consideration of questions submitted by the jury after
68 deliberations begin.
69 Subdivision (a) was amended, effective March 1, 2015, to allow a
70 defendant to be present by contemporaneous audio or audiovisual transmission
71 using reliable electronic means. Any appearance by a defendant by electronic
72 means must be consistent with the standards set by N.D. Sup. Ct. Admin. R. 52,
73 which governs the use of contemporaneous transmission by reliable electronic
74 means in court proceedings.
75 Subdivision (b) was amended, effective March 1, 2015, to allow a
76 represented defendant in a felony case to waive presence at the preliminary hearing
77 ~~by submitting~~ and submit a not guilty plea in writing.
78 Subdivision (b) was amended, effective _____, to clarify that a
79 represented defendant in a felony case may waive presence at the arraignment in
80 writing.
81 SOURCES: Joint Procedure Committee Minutes of _____;
82 September 24-25, 2015, pages 21-23; April 24-25, 2014, pages 12-15; May 21-22,

83 2009, pages 10-11; January 29-30, 2009, pages 13-17; September 28-29, 2006,
84 pages 8-10; January 27-28, 2005, pages 34-36; September 26-27, 2002, pages
85 13-14; January 30, 1997, pages 7-8; September 26-27, 1996, pages 8-10; January
86 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994,
87 pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; December 7-8,
88 1978, pages 27-28; October 12-13, 1978, pages 43-44; December 11-15, 1972,
89 pages 41-43; May 15-16, 1969, pages 11-13.

90 STATUTES AFFECTED:

91 SUPERSEDED: N.D.C.C. §§ 29-12-12, 29-13-02, 29-14-21, 29-16-03,
92 29-16-04, 29-16-06, 29-22-05, 29-22-11, 29-26-04, 33-12-23.

93 CONSIDERED: N.D.C.C. §§ 29-16-05, 29-26-11.

94 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the
95 Magistrate); N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 11 (Pleas);
96 N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 37
97 (Appeal as of Right to District Court; How Taken); N.D.R.Crim.P. Appendix Form
98 17 (Misdemeanor Petition to Enter Plea of Guilty); N.D. Sup. Ct. Admin. R. 52
99 (Contemporaneous Transmission by Reliable Electronic Means).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 11, N.D.R.Crim.P., Pleas

The Clerk of the Supreme Court and attorney Tom Dickson have asked the committee to consider rule amendments that would clarify the process of appealing a conditional guilty plea.

Mr. Dickson believes N.D.C.C. 28-27-02 (copy attached) needs to be updated to fix the conditional appeal process. This is the appealability statute and is substantive law, beyond the authority of the committee to amend. Any issues with modernizing it would need to be taken up with the legislature.

Petra Hulm of the clerk's office suggests that Rule 11 could be amended to include more details on what steps attorneys and the court need to take in order to ensure that an appealable order results when a conditional guilty plea is entered. She says at minimum the conditional plea agreement needs to be signed by both the state's attorney and the defense attorney, the court needs to enter an order accepting the plea, and the judgment specifically needs to state it is conditional. She says that all these factors need to be in place to establish that the defendant, the state, and that court all agreed to the conditional plea. Proposed amendments to Rule 11 that would include these steps are attached.

Ms. Hulm says that one problem is that some counties use judgment forms that do not say "conditional" and that all involved need to make sure that the conditional nature of the judgment is stated on the final document.

RULE 11. PLEAS

1 (a) Entering a Plea.

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

3 (2) Conditional Plea. ~~With the consent of the court and the prosecuting~~

4 ~~attorney, a~~ A defendant may enter a conditional plea of guilty, reserving in writing

5 the right to have an appellate court review an adverse determination of a specified

6 pretrial motion. The defendant's attorney and the prosecuting attorney must

7 consent to the conditional plea in a writing filed with the court. If the court accepts

8 the conditional plea, it must enter an order. The resulting judgment must specify it

9 is conditional. A defendant who prevails on appeal must be allowed to withdraw

10 the plea.

11 (3) Failure to Enter a Plea. If a defendant refuses to enter a plea, the court

12 must enter a plea of not guilty.

13 (b) Advice to defendant.

14 (1) The court may not accept a plea of guilty without first, by addressing the

15 defendant personally [except as provided in Rule 43(b)] in open court, informing

16 the defendant of and determining that the defendant understands the following:

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

18 that plea;

19 (B) the right to a jury trial;

20 (C) the right to be represented by counsel at trial and at every other stage of
21 the proceeding and, if necessary, the right to have the counsel provided under Rule
22 44;
23 (D) the right at trial to confront and cross-examine adverse witnesses, to be
24 protected from compelled self-incrimination, to testify and present evidence, and
25 to compel the attendance of witnesses;
26 (E) the defendant's waiver of these trial rights if the court accepts a plea of
27 guilty;
28 (F) the nature of each charge to which the defendant is pleading;
29 (G) any maximum possible penalty, including imprisonment, fine, and
30 mandatory fee;
31 (H) any mandatory minimum penalty;
32 (I) the court's authority to order restitution; and
33 (J) that, if convicted, a defendant who is not a United States citizen may be
34 removed from the United States, denied citizenship, and denied admission to the
35 United States in the future.
36 (2) Ensuring That a Plea is Voluntary. Before accepting a plea of guilty, the
37 court must address the defendant personally in open court, unless the defendant's
38 presence is not required under Rule 43(c), and determine that the plea is voluntary
39 and did not result from force, threats, or promises other than promises in a plea
40 agreement. The court must also inquire whether the defendant's willingness to

41 plead guilty results from discussion between the prosecuting attorney and the
42 defendant or the defendant's attorney.
43 (3) Determining the Factual Basis for a Plea. Before entering judgment on a
44 guilty plea, the court must determine that there is a factual basis for the plea.
45 (4) Acknowledgment by Defendant. Before entering judgment on a guilty
46 plea, the court must determine that the defendant either:
47 (A) acknowledges facts exist that support the guilty plea; or
48 (B) while maintaining innocence, acknowledges that the guilty plea is
49 knowingly, voluntarily and intelligently made by the defendant and that evidence
50 exists from which the trier of fact could reasonably conclude that the defendant
51 committed the crime.
52 (c) Plea Agreement Procedure.
53 (1) In General. The prosecuting attorney and the defendant's attorney, or the
54 defendant when acting pro se, may discuss and reach a plea agreement. The court
55 must not participate in these discussions. If the defendant pleads guilty to either a
56 charged offense or a lesser or related offense, the plea agreement may specify that
57 the prosecuting attorney will:
58 (A) not bring, or will move to dismiss, other charges;
59 (B) recommend, or agree not to oppose the defendant's request, that a
60 particular sentence is appropriate; or
61 (C) agree that a specific sentence or sentencing range is the appropriate

62 disposition of the case.

63 (2) Disclosing a Plea Agreement. The parties must disclose the plea

64 agreement in open court when the plea is offered, unless the court for good cause

65 allows the parties to disclose the plea agreement in camera.

66 (3) Judicial Consideration of a Plea Agreement.

67 (A) To the extent the plea agreement is of the type specified in Rule

68 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a

69 decision until the court has reviewed the presentence report.

70 (B) To the extent the plea agreement is of the type specified in Rule

71 11(c)(1)(B), the court must advise the defendant that the defendant has no right to

72 withdraw the plea if the court does not follow the recommendation or request.

73 (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it

74 must inform the defendant that, to the extent the plea agreement is of the type

75 specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the

76 judgment.

77 (5) Rejecting a Plea Agreement. If the court rejects a plea agreement

78 containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court

79 must do the following on the record and in open court:

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

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

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

83 and

84 (C) advise the defendant personally that if the plea is not withdrawn, the

85 court may dispose of the case less favorably toward the defendant than the plea

86 agreement contemplated.

87 (6) Time of Plea Agreement Procedure. Except for good cause shown,

88 notification to the court of the existence of a plea agreement must be given at the

89 arraignment or at such other time, prior to trial, as may be fixed by the court.

90 (d) Withdrawing a Guilty Plea.

91 (1) In general. A defendant may withdraw a plea of guilty:

92 (A) before the court accepts the plea, for any reason or no reason; or

93 (B) after the court accepts the plea, but before it imposes sentence if:

94 (i) the court rejects a plea agreement under Rule 11(c)(5); or

95 (ii) the defendant can show a fair and just reason for the withdrawal.

96 (2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is

97 necessary to correct a manifest injustice, the defendant may not withdraw a plea of

98 guilty after the court has imposed sentence.

99 (3) Prosecution Reliance on Plea. If the prosecution has been substantially

100 prejudiced by reliance on the defendant's plea, the court may deny a plea

101 withdrawal request.

102 (e) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related

103 Statements. The admissibility or inadmissibility of a plea, a plea discussion, and

104 any related statement is governed by N.D.R.Ev. 410.

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

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

113 EXPLANATORY NOTE

114 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1,
115 1996; March 1, 2006; June 1, 2006; March 1, 2010; March 1, 2016;_____.

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

123 Rule 11 was amended, effective March 1, 2006, in response to the
124 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The

125 language and organization of the rule were changed to make the rule more easily
126 understood and to make style and terminology consistent throughout the rules.
127 Subdivision (a) provides for the various alternative pleas which the
128 defendant may enter. This subdivision does not permit a defendant to enter a plea
129 of nolo contendere and differs from the federal rule in that respect.
130 Paragraph (a)(2) was adopted effective March 1, 1986. This provision
131 allows the defendant, with the approval of the court and the consent of the
132 prosecuting attorney, to enter a conditional plea of guilty and reserve in writing the
133 right, on appeal of the adverse determination of any specified pretrial motion. The
134 conditional plea procedure is intended to conserve prosecutorial and judicial
135 resources and advance speedy trial objectives by avoiding the necessity of a trial
136 simply to preserve pretrial issues for appellate review.
137 Paragraph (a)(2) was amended, effective _____, to clarify the
138 procedure for entering a conditional of guilty.
139 Subdivision (b) prescribes the advice which the court must give to the
140 defendant as a prerequisite to the acceptance of a plea of guilty. The court is
141 required to determine that a plea is made with an understanding of the nature of the
142 charge and the consequences of the plea. Subdivision (b) also establishes the
143 requirement that the court address the defendant personally.
144 Paragraph (b)(1) requires the court to determine if the defendant
145 understands the nature of the charge and requires the court to inform the defendant

146 of and determine that the defendant understands the mandatory minimum
147 punishment, if any, and the maximum possible punishment. The objective is to
148 insure that the defendant knows what minimum sentence the judge MUST impose
149 and the maximum sentence the judge MAY impose and, further, to explain the
150 consecutive sentencing possibilities when the defendant pleads to more than one
151 offense. This provision is included so that the judicial warning effectively serves to
152 overcome subsequent objections by the defendant that the defendant's counsel gave
153 the defendant erroneous information. Paragraph (b)(1) also specifies the
154 constitutional rights the defendant waives by a plea of guilty and ensures a
155 knowing and intelligent waiver of counsel is made. A similar requirement is found
156 in Rule 5(b) governing the initial appearance.

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

161 Paragraph (b)(1) was amended, effective March 1, 2016, to include a new
162 subparagraph (J) requiring the court to include a general statement that there may
163 be immigration consequences of conviction in the advice provided to the defendant
164 before the court accepts a plea of guilty or nolo contendere. The amendment,
165 which is based on an amendment to Fed.R.Crim.P. 11, mandates a generic
166 warning, not specific advice concerning the defendant's individual situation.

167 Paragraph (b)(2) requires the court to determine that a plea of guilty is
168 voluntary before accepting it. Paragraph (b)(2), together with subdivision (c),
169 affords the court an adequate basis for rejecting an improper plea agreement
170 induced by threats or inappropriate promises. The rule specifies that the court
171 personally address the defendant in determining the voluntariness of the plea.
172 Paragraph (b)(3) requires that the court not enter judgment on a plea of
173 guilty without making an inquiry to ensure that there is a factual basis for the plea.
174 Paragraph (b)(4) was added to the rule, effective March 1, 2014, and
175 requires the court to obtain an acknowledgment from the defendant on whether the
176 defendant is admitting guilt, or instead is maintaining innocence but pleading
177 guilty because evidence exists from which the trier of fact could reasonably
178 conclude the defendant committed the crime.
179 Subdivision (c) provides for a plea agreement procedure. In doing so it
180 gives recognition to the propriety of plea discussions and plea agreements,
181 provided they are disclosed in open court and subject to acceptance or rejection by
182 the trial judge. It is believed that where the defendant by the defendant's plea aids
183 in insuring prompt and certain application of correctional measures, the proper
184 ends of the criminal justice system are furthered because swift and certain
185 punishment serves the ends of both general deterrence and the rehabilitation of the
186 individual defendant. The procedure described in subdivision (c) is designed to
187 prevent abuse of plea discussions and agreements by providing appropriate and

188 adequate safeguards.

189 Paragraph (c)(1) specifies that both the attorney for the prosecution and the
190 attorney for the defense, or the defendant when acting pro se, participate in plea
191 discussions. It also makes clear that there are three possible concessions that may
192 be made in a plea agreement: first, the charge may be reduced to a lesser or related
193 offense; second, the attorney for the prosecution may agree not to recommend or
194 not oppose the imposition of a particular sentence; or third, the attorney for the
195 prosecution may promise to move for a dismissal of other charges. The court is not
196 permitted to participate in plea discussions because of the possibility that the
197 defendant would believe that the defendant would not receive a fair trial, if no
198 agreement had been reached or the court rejected the agreement, and a subsequent
199 trial ensued before the same judge.

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

207 Paragraph (c)(4) requires the court, if it accepts the plea agreement, to
208 inform the defendant that it will embody in the judgment and sentence the

209 disposition provided in the plea agreement, or one more favorable to the defendant.
210 This provision serves the dual purpose of informing the defendant immediately
211 that the agreement will be implemented.

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

219 Paragraph (c)(6) requires that the court be notified of the existence of a plea
220 agreement at the arraignment or at another time prior to trial fixed by the court
221 unless it can be shown that for good cause this was not done. Having a plea
222 entered at this stage provides a reasonable time for the defendant to consult with
223 counsel and for counsel to complete any plea discussions with the attorney for the
224 prosecution. The objective of the provision is to make clear that the court has
225 authority to require a plea agreement to be disclosed sufficiently in advance of trial
226 so as not to interfere with the efficient scheduling of criminal cases.

227 A new subdivision (d) on plea withdrawal was transferred to Rule 11 from
228 Rule 32 effective March 1, 2010.

229 Subdivision (e) makes it clear that N.D.R.Ev. 410 governs the admissibility

230 of plea discussions.

231 Subdivision (f) requires that a verbatim record be kept of the proceedings.
232 The record is important in the event of a post-conviction attack.

233 Subdivision (g) was amended, effective March 1, 1996, to reference Rule
234 43(c). In a non-felony case, if the defendant wants to plead guilty without
235 appearing in court, a written form must be used which advises the defendant of his
236 or her constitutional rights and creates a record showing that the plea was made
237 voluntarily, knowingly, and understandingly. See Appendix Form 17. A court may
238 accept a guilty plea via contemporaneous audio or audiovisual transmission by
239 reliable electronic means using the procedure set out in N.D. Sup. Ct. Admin. Rule
240 52.

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

245 SOURCES: Joint Procedure Committee Minutes of _____; April
246 23-24, 2015, page 14; January 29-30, 2015, page 23; January 31-February 1, 2013,
247 page 12; September 27, 2012, pages 18-21; January 29-30, 2009, pages 11-13,
248 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005, pages 17-18;
249 September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-27,
250 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages

251 10-12; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages
252 11-16; April 26, 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978,
253 pages 31-34; March 16-17, 1978, page 20; January 12-13, 1978, pages 5-6;
254 January 10, 1977, page 4; April 24-26, 1973, pages 8-9; December 11-15, 1972,
255 page 43; May 11-12, 1972, pages 2-6; November 18-20, 1971, pages 34-38;
256 September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

257 STATUTES AFFECTED:

258 SUPERSEDED: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14,
259 29-14-15, 29-14-16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22,
260 29-14-23, 29-14-24, 29-14-26, 29-14-27, 33-12-17, 33-12-18.

261 CONSIDERED: N.D.C.C. § 31-13-03.

262 CROSS REFERENCE: N.D.R.Crim.P. 43 (Defendant's Presence);
263 N.D.R.Crim.P. 44 (Right to and Appointment of Counsel); N.D.R.Ev. 410 (Offer
264 to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty);
265 N.D.Sup.Ct.Admin.R. 52 (Contemporaneous Transmission by Reliable Electronic
266 Means).

Hagburg, Mike

From: Tom Dickson <tdickson@dicksonlaw.com>
Sent: Friday, October 09, 2015 2:54 PM
To: Hagburg, Mike
Cc: Lloyd C. Suhr
Subject: Re: conditional guilty pleas

Mike and Lloyd:

The point of a conditional plea is appeal a legal ruling. It needs to be simpler than it currently is.

Tom

Sent from my iPhone

On Oct 9, 2015, at 2:46 PM, "Hagburg, Mike" <MHagburg@ndcourts.gov> wrote:

> Thank you for sending this along. I will put it on the committee agenda for January. Mike
>
> ---
>
> **From:** Tom Dickson [mailto:tdickson@dicksonlaw.com]
> **Sent:** Friday, October 09, 2015 2:37 PM
> **To:** Lloyd C. Suhr
> **Cc:** Hagburg, Mike
> **Subject:** Re: conditional guilty pleas
>
> My main thought is that the statute needs to be updated.
>
> Sent from my iPad
>
> On Oct 9, 2015, at 2:27 PM, "Lloyd C. Suhr" <lsuhr@suhrandlofgren.com> wrote:
>
>> Tom:
>>
>> The staff attorney for the JPC is Mike Hagburg. I'm copying him on this response. Are there specific thoughts you have about Rule 11(a)(2)?
>>
>> Lloyd
>>
>> Lloyd C. Suhr
>> Suhr & Lofgren, P.L.L.C.
>> 120 N. 3rd St. Suite 175
>> P.O. Box 2393
>> Bismarck, ND 58502
>> (701) 223-3874 (office)
>> (701) 223-3875 (fax)
>> lsuhr@suhrandlofgren.com

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From: "tdickson@dicksonlaw.com" <tdickson@dicksonlaw.com>
Date: Monday, October 5, 2015 at 5:31 PM
To: Lloyd Suhr <lsuhr@suhrandlofgren.com>
Subject: conditional guilty pleas

Lloyd:

You are on the joint procedure committee. I am not sure who your staff attorney is. I have just appealed a conditional guilty plea. The procedure is unbelievably complicated. Section 28-27-02 NDCC was written in 1887. It is beyond time to look at this issue.

It needs to be simpler, cleaner, and more efficient.

Tom

Tom Dickson
Dickson Law Office
P.O. Box 1896
Bismarck, ND 58502
(701) 222-4400
tdickson@dicksonlaw.com

CHAPTER 28-27
APPEALS TO SUPREME COURT

28-27-01. Appeals to supreme court.

A judgment or order in a civil action or in a special proceeding in any of the district courts may be removed to the supreme court by appeal as provided in this chapter.

28-27-02. What orders reviewable.

The following orders when made by the court may be carried to the supreme court:

1. An order affecting a substantial right made in any action, when such order in effect determines the action and prevents a judgment from which an appeal might be taken;
2. A final order affecting a substantial right made in special proceedings or upon a summary application in an action after judgment;
3. An order which grants, refuses, continues, or modifies a provisional remedy, or grants, refuses, modifies, or dissolves an injunction or refuses to modify or dissolve an injunction, whether such injunction was issued in an action or special proceeding or pursuant to the provisions of section 35-22-04, or which sets aside or dismisses a writ of attachment for irregularity;
4. An order which grants or refuses a new trial or which sustains a demurrer;
5. An order which involves the merits of an action or some part thereof;
6. An order for judgment on application therefor on account of the frivolousness of a demurrer, answer, or reply; or
7. An order made by the district court or judge thereof without notice is not appealable, but an order made by the district court after a hearing is had upon notice which vacates or refuses to set aside an order previously made without notice may be appealed to the supreme court when by the provisions of this chapter an appeal might have been taken from such order so made without notice, had the same been made upon notice.

28-27-02.1. Order shall describe papers on which made.

Superseded by N.D.R.App.P., Rule 49.

28-27-03. Appellant and respondent defined - Title to action on appeal unchanged.

Superseded by N.D.R.App.P., Rule 1.

28-27-04. Time for appeal.

Superseded by N.D.R.App.P., Rule 4.

28-27-05. How appeal taken.

Superseded by N.D.R.App.P., Rules 3, 25.

28-27-06. Clerk to transmit papers.

Superseded by N.D.R.App.P., Rule 11.

28-27-07. Record on appeal.

Superseded by N.D.R.App.P., Rule 10.

28-27-08. Additional time to prepare record.

Superseded by N.D.R.App.P., Rule 11.

28-27-09. Appeal ineffectual without undertaking.

Superseded by N.D.R.App.P., Rule 7.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 32, N.D.R.App.P., Form of Briefs, Appendices, and Other Documents

The Clerk of the Supreme Court has requested that the committee take a look at Rule 32(b) on the form of an appendix to an appellate brief. Specifically, the clerk has noted some problems with the application of paragraph (b)(2) of the rule that "an appendix may include a legible photocopy of any document found in the record of a printed judicial or agency decision." This language seems to allow any document from the record of any recorded decision to be included in the appendix.

Rule 32(b) is based on the federal rule, copy attached, which includes the word "or" between "record" and "of." This word was apparently dropped from Rule 32 at some point and the proposed amendment, attached, would restore it to the rule. The one word amendment is on line 64.

The clerk also raises a question about the meaning of the word "printed" in Rule 32(b)(2). This language is also included in the federal rule, but the only thing the federal comments have to say about it is: "The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record." The clerk is wondering whether a state agency decision that is posted online, but not printed, would be allowed in the appendix under Rule 32(b)(2). The committee may wish to discuss whether the word "printed" should be eliminated or replaced with a more appropriate term.

RULE 32. FORM OF BRIEFS, APPENDICES, AND OTHER DOCUMENTS

1 (a) Form of a Brief.

2 (1) Reproduction.

3 (A) A brief must be typewritten, printed, or reproduced by any process that
4 yields a clear black image on white paper. Only one side of a paper may be used.

5 (B) Photographs, illustrations, and tables may be reproduced by any method
6 that results in a good copy of the original. If filed electronically, documents must
7 be submitted in the same form as if submitted by mail, by third-party commercial
8 carrier, i.e. color. Notice to the clerk of the supreme court must be given of
9 anything other than black and white printed documents.

10 (2) Cover. The cover of the appellant's brief must be blue; the appellee's
11 red; an intervenor's or amicus curiae's green; a cross-appellee's and any reply brief
12 gray. Covers of petitions for rehearing must be the same color as the petitioning
13 party's principal brief. If the brief is filed electronically, the supreme court will
14 affix the correct color cover. The front cover of a brief must contain:

15 (A) the number of the case;

16 (B) the name of the court;

17 (C) the title of the case (see Rule 3(d)) ;

18 (D) the nature of the proceeding (e. g. , Appeal from Summary Judgment)
19 and the name of the court, agency, or board below;

20 (E) the title of the brief, identifying the party or parties for whom the brief
21 is filed;
22 (F) the name, bar identification number, office address, and telephone
23 number of counsel representing the party for whom the brief is filed.
24 (3) Binding. The brief must be bound at the left in a secure manner that
25 does not obscure the text and permits the brief to lie reasonably flat when open. If
26 the brief is filed electronically, the supreme court will bind the brief.
27 (4) Paper Size, Line Spacing, and Margins. The brief must be on 8½ by 11
28 inch paper. Margins must be at least one and one-half inch at the left and at least
29 one inch on all other sides. Pages must be numbered at the bottom, either centered
30 or at the right side.
31 (5) Typeface. Either a proportionally spaced or a monospaced face may be
32 used.
33 (A) A proportionally spaced face must be 12 point or larger with no more
34 than 16 characters per inch. The text must be double-spaced, except quotations
35 may be single-spaced and indented. Headings and footnotes may be single-spaced
36 and must be in the same typeface as the text.
37 (B) A monospaced face must be a 12-point font having ten characters per
38 inch. The text, including quotations and footnotes, must be double-spaced with no
39 more than 27 lines of type per page. Headings and footnotes must be in the same
40 typeface as the text.

41 (6) Type Styles. A brief must be set in a plain, roman style, although italics
42 or boldface may be used for emphasis. Case names must be italicized or
43 underlined.
44 (7) Paragraph Numbers. Paragraphs must be numbered in briefs. Reference
45 to material in any document that contains paragraph numbers must be to the
46 paragraph number.
47 (8) Page and Type-Volume Limitations.
48 (A) Word Limit for Proportional Typeface. If proportionately spaced
49 typeface is used,a principal brief may not exceed 8,000 words, and a reply brief
50 may not exceed 2,000 words, excluding words in the table of contents, the table of
51 citations, and any addendum. Footnotes must be included in the word count.
52 (B) Page Limit for Monospaced Typeface. If monospaced typeface is used,
53 a principal brief may not exceed 32 pages, and a reply brief may not exceed eight
54 pages, excluding the table of contents, the table of citations, and any addendum.
55 (C) Word and Page Limit for N.D.R.Civ.P. 54(b) Certification. If
56 proportionately spaced typeface is used, an argument on the appropriateness of
57 N.D.R.Civ.P. 54(b) certification may not exceed 1,250 words. If monospaced
58 typeface is used, an argument may not exceed five pages. Word and page limits for
59 Rule 54(b) certification are in addition to the limits set forth in (7)(A) and (7)(B).
60 (b) Form of an Appendix. An appendix must comply with Rule 25 and
61 paragraphs (a) (1), (2), (3), and (4), with the following exceptions:

62 (1) the cover of a separately bound appendix must be white;

63 (2) an appendix may include a legible photocopy of any document found in

64 the record <u>or</u> of a printed judicial or agency decision;

65 (3) pages in the appendix must be consecutively numbered;

66 (4) an appendix may be prepared with double sided pages.

67 The appendix must be 8 ½ by 11 inches in size. Documents of a size other

68 than 8 ½ by 11 inches may be included in the appendix but must be folded or

69 placed in a file or folder within the 8 ½ by 11 inch appendix.

70 (c) Form of Other Documents.

71 (1) All paragraphs must be numbered in documents filed with the court

72 except for exhibits, documents prepared before the action was commenced, or

73 documents not prepared by the parties or court. Reference to material in any

74 document that contains paragraph numbers must be to the paragraph number.

75 (2) Motion. Rule 27 governs motion content. The form of all motion

76 documents must comply with the requirements of paragraph (c) (4) below.

77 (3) Petition for Rehearing. Rule 40 governs petition for rehearing content.

78 (4) Other Documents. Any other document must be reproduced in the

79 manner prescribed by subdivision (a) , with the following exceptions:

80 (A) a cover is not necessary if the caption and signature page together

81 contain the information required by subdivision (a); and

82 (B) Paragraph (a) (8) does not apply.

83 (d) Non-compliance. Documents not in compliance with this rule will not
84 be filed.

85 EXPLANATORY NOTE

86 Rule 32 was amended, effective March 1, 1996; amended effective
87 September 11, 1996, subject to comment; final adoption on October 23, 1996;
88 amended effective August 1, 2001; March 1, 2003; March 1, 2007; March 1, 2008;
89 March 1, 2010; March 1, 2013; October 1, 2014;_____.

90 Rule 32 was amended, effective September 11, 1996, with respect to the
91 allowable characters per inch with proportionally spaced typeface in subparagraph
92 (a) (5) (A).

93 Rule 32 was revised, effective March 1, 2003, in response to the December
94 1, 1998, amendments to Fed.R.App.P. 32. The language and organization of the
95 rule were changed to make the rule more easily understood and to make style and
96 terminology consistent throughout the rules.

97 Paragraph (a)(2) was amended, effective March 1, 2007, to specify the
98 cover color for a petition for rehearing.

99 Paragraph (a) (3) , effective March 1, 2003, requires a brief to be bound in a
100 secure manner, however, this is not intended to allow staples or slide-lock or
101 slide-grip bindings.

102 Paragraphs (a) (6) and (a) (7) , which include type style requirements and
103 page and type-volume limitations, were adopted, effective March 1, 2003. These

104 limitations were moved to this rule from Rule 28 and generally do not follow the
105 federal format requirements. As used in paragraph (a) (6) , "plain, roman style"
106 does not include italicized, bold, or cursive type-styles.

107 Paragraph (a)(7) was amended, effective March 1, 2013, to decrease the
108 page and type volume allowed in a primary brief and a response brief.

109 Paragraph (a) (7) , effective March 1, 2003, limits the length of a brief. A
110 person may rely on the word or line count of the word-processing system used to
111 prepare the brief.

112 Subparagraph (a)(7)(C) was adopted, effective March 1, 2010, to limit the
113 length of an argument on the appropriateness of N.D.R.Civ.P. 54(b) certification.

114 Subdivision (a) was amended, effective October 1, 2014, to conform the
115 rule to electronic filing.

116 Paragraph (b) (2) was amended, _____, to clarify that an
117 appendix may include copy of any document found in the record or a copy of a
118 printed judicial or agency decision.

119 Paragraph (b) (3), effective March 1, 2003, provides an exception to the
120 size requirement for odd-sized documents in an appendix. This exception is
121 intended to allow inclusion of technical or other documents, such as maps or
122 charts, which may not be clear or legible if reduced to meet the size requirement.

123 Paragraph (c) (2), was amended, effective March 1, 2008, to transfer length
124 requirements for petitions for rehearing to Rule 40.

125 Subdivision (c) was amended, effective October 1, 2014, to clarify that
126 paragraph numbers are required in all documents submitted to the court unless a
127 specified exception applies.
128 Rule 32 was amended, effective October 1, 2014, to replace "supreme court
129 clerk" with "clerk of the supreme court" and "paper" with "document."
130 SOURCES: Joint Procedure Committee Minutes of _____;
131 September 26, 2013, pages 27-28; January 26-27, 2012, pages 8-9; September 30,
132 2011, pages 11-12; April 28-29, 2011, page 18-20; September 24-25, 2009, pages
133 15-16; April 26-27, 2007, page 18; January 25, 2007, page 19; September 22-23,
134 2005, page 27; January 24-25, 2002, pages 7-9; September 27-28, 2001, pages
135 23-25; April 26-27, 2001, page 9; April 27-28, 1995, pages 15-17; May 25-26,
136 1978, pages 17-18; January 12-13, 1978, pages 20-22. Fed.R.App.P. 32,3. 13(e)
137 and 3. 31, ABA Standards Relating to Appellate Courts (Approved Draft, 1977).
138 STATUTES AFFECTED:
139 SUPERSEDED: N.D.C.C. § 29-28-19.
140 CROSS REFERENCE: N.D.R.App.P. 27 (Motions) ; N.D.R.App.P. 28
141 (Briefs) ; N.D.R.App.P. 29 (Brief of an Amicus Curiae) ; N.D.R.App.P. 30
142 (Appendix to the Briefs) ; N.D.R.App.P. 40 (Petition for Rehearing).

Fed. R. App. P. 32. Form of Briefs, Appendices, and Other Papers

(a) Form of a Brief.

(1) Reproduction.

(A) A brief may be reproduced by any process that yields a clear black image on light paper. The paper must be opaque and unglazed. Only one side of the paper may be used.

(B) Text must be reproduced with a clarity that equals or exceeds the output of a laser printer.

(C) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original; a glossy finish is acceptable if the original is glossy.

(2) Cover. Except for filings by unrepresented parties, the cover of the appellant's brief must be blue; the appellee's, red; an intervenor's or amicus curiae's, green; any reply brief, gray; and any supplemental brief, tan. The front cover of a brief must contain:

(A) the number of the case centered at the top;

(B) the name of the court;

(C) the title of the case (see Rule 12(a));

(D) the nature of the proceeding (e.g., Appeal, Petition for Review) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed; and

(F) the name, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound in any manner that is secure, does not obscure the text, and permits the brief to lie reasonably flat when open.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 8 1/2 by 11 inch paper. The text must be double-spaced, but quotations more than two lines long may be indented and single-spaced. Headings and footnotes may be single-spaced. Margins must be at least one inch on all four sides. Page numbers may be placed in the margins, but no text may appear there.

(5) Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must include serifs, but sans-serif type may be used in headings and captions. A proportionally spaced face must be 14-point or larger.

(B) A monospaced face may not contain more than 10 1/2 characters per inch.

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Length.

(A) Page Limitation. A principal brief may not exceed 30 pages, or a reply brief 15 pages, unless it complies with Rule 32(a)(7)(B) and (C).

(B) Type-Volume Limitation.

(i) A principal brief is acceptable if:

• it contains no more than 14,000 words; or

• it uses a monospaced face and contains no more than 1,300 lines of text.

(ii) A reply brief is acceptable if it contains no more than half of the type volume specified in Rule 32(a)(7)(B)(i).

(iii) Headings, footnotes, and quotations count toward the word and line limitations. The corporate disclosure statement, table of contents, table of citations, statement with respect to oral argument, any addendum containing statutes, rules or regulations, and any certificates of counsel do not count toward the limitation.

(C) Certificate of Compliance.

(i) A brief submitted under Rules 28.1(e)(2) or 32(a)(7)(B) must include a certificate by the attorney, or an unrepresented party, that the brief complies with the type-volume limitation. The person preparing the certificate may rely on the word or line count of the word-processing system used to prepare the brief. The certificate must state either:

• the number of words in the brief; or

• the number of lines of monospaced type in the brief.

(ii) Form 6 in the Appendix of Forms is a suggested form of a certificate of compliance. Use of Form 6 must be regarded as sufficient to meet the requirements of Rules 28.1(e)(3) and 32(a)(7)(C)(i).

(b) Form of an Appendix. An appendix must comply with Rule 32(a)(1), (2), (3), and (4), with the following exceptions:

(1) The cover of a separately bound appendix must be white.

(2) An appendix may include a legible photocopy of any document found in the record or of a printed judicial or agency decision.

(3) When necessary to facilitate inclusion of odd-sized documents such as technical drawings, an appendix may be a size other than 8 1/2 by 11 inches, and need not lie reasonably flat when opened.

(c) Form of Other Papers.

(1) Motion. The form of a motion is governed by Rule 27(d).

(2) Other Papers. Any other paper, including a petition for panel rehearing and a petition for hearing or rehearing en banc, and any response to such a petition, must be reproduced in the manner prescribed by Rule 32(a), with the following exceptions:

(A) A cover is not necessary if the caption and signature page of the paper together contain the information required by Rule 32(a)(2). If a cover is used, it must be white.

(B) Rule 32(a)(7) does not apply.

(d) Signature. Every brief, motion, or other paper filed with the court must be signed by the party filing the paper or, if the party is represented, by one of the party's attorneys.

(e) Local Variation. Every court of appeals must accept documents that comply with the form requirements of this rule. By local rule or order in a particular case a court of appeals may accept documents that do not meet all of the form requirements of this rule.

Notes

(As amended Apr. 24, 1998, eff. Dec. 1, 1998; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2005, eff. Dec. 1, 2005.)

Notes of Advisory Committee on Rules—1967

Only two methods of printing are now generally recognized by the circuits—standard typographic printing and the offset duplicating process (multilith). A third, mimeographing, is permitted in the Fifth Circuit. The District of Columbia, Ninth, and Tenth Circuits permit records to be reproduced by copying processes. The Committee feels that recent and impending advances in the arts of duplicating and copying warrant experimentation with less costly forms of reproduction than those now generally authorized. The proposed rule permits, in effect, the use of any process other than the carbon copy process which produces a clean, readable page. What constitutes such is left in first instance to the parties and ultimately to the court to determine. The final sentence of the first paragraph of subdivision (a) is added to allow the use of multilith, mimeograph, or other forms of copies of the reporter's original transcript whenever such are available.

Committee Notes on Rules—1998 Amendment

In addition to amending Rule 32 to conform to uniform drafting standards, several substantive amendments are made. The Advisory Committee had been working on substantive amendments to Rule 32 for some time prior to completion of this larger project.

Subdivison (a). Form of a Brief.

Paragraph (a)(1). Reproduction.

The rule permits the use of "light" paper, not just "white" paper. Cream and buff colored paper, including recycled paper, are acceptable. The rule permits printing on only one side of the paper. Although some argue that paper could be saved by allowing double-sided printing, others argue that in order to preserve legibility a heavier weight paper would be needed, resulting in little, if any, paper saving. In addition, the blank sides of a brief are commonly used by judges and their clerks for making notes about the case.

Because photocopying is inexpensive and widely available and because use of carbon paper is now very rare, all references to the use of carbon copies have been deleted.

The rule requires that the text be reproduced with a clarity that equals or exceeds the output of a laser printer. That means that the method used must have a print resolution of 300 dots per inch (dpi) or more. This will ensure the legibility of the brief. A brief produced by a typewriter or a daisy wheel printer, as well as one produced by a laser printer, has a print resolution of 300 dpi or more. But a brief produced by a dot-matrix printer, fax machine, or portable printer that uses heat or dye transfer methods does not. Some ink jet printers are 300 dpi or more, but some are 216 dpi and would not be sufficient.

Photographs, illustrations, and tables may be reproduced by any method that results in a good copy.

Paragraph (a)(2). Cover.

The rule requires that the number of the case be centered at the top of the front cover of a brief. This will aid in identification of the brief. The idea was drawn from a local rule. The rule also requires that the title of the brief identify the party or parties on whose behalf the brief is filed. When there are multiple appellants or appellees, the information is necessary to the court. If, however, the brief is filed on behalf of all appellants or appellees, it may so indicate. Further, it may be possible to identify the class of parties on whose behalf the brief is filed. Otherwise, it may be necessary to name each party. The rule also requires that attorney's telephone numbers appear on the front cover of a brief or appendix.

Paragraph (a)(3). Binding.

The rule requires a brief to be bound in any manner that is secure, does not obscure the text, and

that permits the brief to lie reasonably flat when open. Many judges and most court employees do much of their work at computer keyboards and a brief that lies flat when open is significantly more convenient. One circuit already has such a requirement and another states a preference for it. While a spiral binding would comply with this requirement, it is not intended to be the exclusive method of binding. Stapling a brief at the upper left-hand corner also satisfies this requirement as long as it is sufficiently secure.

Paragraph (a)(4). Paper Size, Line Spacing, and Margins.

The provisions for pamphlet-size briefs are deleted because their use is so rare. If a circuit wishes to authorize their use, it has authority to do so under subdivision (d) of this rule.

Paragraph (a)(5). Typeface.

This paragraph and the next one, governing type style, are new. The existing rule simply states that a brief produced by the standard typographic process must be printed in at least 11 point type, or if produced in any other manner, the lines of text must be double spaced. Today few briefs are produced by commercial printers or by typewriters; most are produced on and printed by computer. The availability of computer fonts in a variety of sizes and styles has given rise to local rules limiting type styles. The Advisory Committee believes that some standards are needed both to ensure that all litigants have an equal opportunity to present their material and to ensure that the briefs are easily legible.

With regard to typeface there are two options: proportionally-spaced typeface or monospaced typeface.

A proportionally-spaced typeface gives a different amount of horizontal space to characters depending upon the width of the character. A capital "M" is given more horizontal space than a lower case "i." The rule requires that a proportionally-spaced typeface have serifs. Serifs are small horizontal or vertical strokes at the ends of the lines that make up the letters and numbers. Studies have shown that long passages of serif type are easier to read and comprehend than long passages of sans-serif type. The rule accordingly limits the principal sections of submissions to serif type, although sans-serif type may be used in headings and captions. This is the same approach magazines, newspapers, and commercial printers take. Look at a professionally printed brief; you will find sans-serif type confined to captions, if it is used at all. The next line shows two characters enlarged for detail. The first has serifs, the second does not.

Y Y

So that the type is easily legible, the rule requires a minimum type size of 14 points for proportionally-spaced typeface.

A monospaced typeface is one in which all characters have the same advance width. That means that each character is given the same horizontal space on the line. A wide letter such as a capital "M" and a narrow letter such as a lower case "i" are given the same space. Most typewriters

produce mono-spaced type, and most computers also can do so using fonts with names such as "Courier."

This sentence is in a proportionally spaced font; as you can see, the m and i have different widths.

This sentence is in a monospaced font; as you can see, the m and i have the same width.

The rule requires use of a monospaced typeface that produces no more than 10 1/2 characters per inch. A standard typewriter with pica type produces a monospaced typeface with 10 characters per inch (cpi). That is the ideal monospaced typeface. The rule permits up to 10 1/2 cpi because some computer software programs contain monospaced fonts that purport to produce 10 cpi but that in fact produce slightly more than 10 cpi. In order to avoid the need to reprint a brief produced in good faith reliance upon such a program, the rule permits a bit of leeway. A monospace typeface with no more than 10 cpi is preferred.

Paragraph (a)(6). Type Styles.

The rule requires use of plain roman, that is not italic or script, type. Italics and boldface may be used for emphasis. Italicizing case names is preferred but underlining may be used.

Paragraph (a)(7). Type-Volume Limitation.

Subparagraph (a)(7)(A) contains a safe-harbor provision. A principal brief that does not exceed 30 pages complies with the type-volume limitation without further question or certification. A reply brief that does not exceed 15 pages is similarly treated. The current limit is 50 pages but that limit was established when most briefs were produced on typewriters. The widespread use of personal computers has made a multitude of printing options available to practitioners. Use of a proportional typeface alone can greatly increase the amount of material per page as compared with use of a monospace typeface. Even though the rule requires use of 14-point proportional type, there is great variation in the x-height of different 14-point typefaces. Selection of a typeface with a small x-height increases the amount of text per page. Computers also make possible fine gradations in spacing between lines and tight tracking between letters and words. All of this, and more, have made the 50-page limit virtually meaningless. Establishing a safe-harbor of 50 pages would permit a person who makes use of the multitude of printing "tricks" available with most personal computers to file a brief far longer than the "old" 50-page brief. Therefore, as to those briefs not subject to any other volume control than a page limit, a 30-page limit is imposed.

The limits in subparagraph (B) approximate the current 50-page limit and compliance with them is easy even for a person without a personal computer. The aim of these provisions is to create a level playing field. The rule gives every party an equal opportunity to make arguments, without permitting those with the best in-house typesetting an opportunity to expand their submissions.

The length can be determined either by counting words or lines. That is, the length of a brief is

determined not by the number of pages but by the number of words or lines in the brief. This gives every party the same opportunity to present an argument without regard to the typeface used and eliminates any incentive to use footnotes or typographical "tricks" to squeeze more material onto a page.

The word counting method can be used with any typeface.

A monospaced brief can meet the volume limitation by using the word or a line count. If the line counting method is used, the number of lines may not exceed 1,300—26 lines per page in a 50-page brief. The number of lines is easily counted manually. Line counting is not sufficient if a proportionally spaced typeface is used, because the amount of material per line can vary widely.

A brief using the type-volume limitations in subparagraph (B) must include a certificate by the attorney, or party proceeding pro se, that the brief complies with the limitation. The rule permits the person preparing the certification to rely upon the word or line count of the word-processing system used to prepare the brief.

Currently, Rule 28(g) governs the length of a brief. Rule 28(g) begins with the words "[e]xcept by permission of the court," signaling that a party may file a motion to exceed the limits established in the rule. The absence of similar language in Rule 32 does not mean that the Advisory Committee intends to prohibit motions to deviate from the requirements of the rule. The Advisory Committee does not believe that any such language is needed to authorize such a motion.

Subdivision (b). Form of an Appendix.

The provisions governing the form of a brief generally apply to an appendix. The rule recognizes, however, that an appendix is usually produced by photocopying existing documents. The rule requires that the photocopies be legible.

The rule permits inclusion not only of documents from the record but also copies of a printed judicial or agency decision. If a decision that is part of the record in the case has been published, it is helpful to provide a copy of the published decision in place of a copy of the decision from the record.

Subdivision (c). Form of Other Papers.

The old rule required a petition for rehearing to be produced in the same manner as a brief or appendix. The new rule also requires that a petition for rehearing en banc and a response to either a petition for panel rehearing or a petition for rehearing en banc be prepared in the same manner. But the length limitations of paragraph (a)(7) do not apply to those documents and a cover is not required if all the information needed by the court to properly identify the document and the parties is included in the caption or signature page.

Existing subdivision (b) states that other papers may be produced in like manner, or "they may be

typewritten upon opaque, unglazed paper 8 1/2 by 11 inches in size." The quoted language is deleted but that method of preparing documents is not eliminated because (a)(5)(B) permits use of standard pica type. The only change is that the new rule now specifies margins for typewritten documents.

Subdivision (d). Local Variation.

A brief that complies with the national rule should be acceptable in every court. Local rules may move in one direction only; they may authorize noncompliance with certain of the national norms. For example, a court that wishes to do so may authorize printing of briefs on both sides of the paper, or the use of smaller type size or sans-serif proportional type. A local rule may not, however, impose requirements that are not in the national rule.

Committee Notes on Rules—2002 Amendment

Subdivision (a)(2). On occasion, a court may permit or order the parties to file supplemental briefs addressing an issue that was not addressed—or adequately addressed—in the principal briefs. Rule 32(a)(2) has been amended to require that tan covers be used on such supplemental briefs. The amendment is intended to promote uniformity in federal appellate practice. At present, the local rules of the circuit courts conflict. See, e.g., D.C. Cir. R. 28(g) (requiring yellow covers on supplemental briefs); 11th Cir. R. 32, I.O.P. 1 (requiring white covers on supplemental briefs).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivision (a)(7)(C). If the principal brief of a party exceeds 30 pages, or if the reply brief of a party exceeds 15 pages, Rule 32(a)(7)(C) provides that the party or the party's attorney must certify that the brief complies with the type-volume limitation of Rule 32(a)(7)(B). Rule 32(a)(7)(C) has been amended to refer to Form 6 (which has been added to the Appendix of Forms) and to provide that a party or attorney who uses Form 6 has complied with Rule 32(a)(7)(C). No court may provide to the contrary, in its local rules or otherwise.

Form 6 requests not only the information mandated by Rule 32(a)(7)(C), but also information that will assist courts in enforcing the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6). Parties and attorneys are not required to use Form 6, but they are encouraged to do so.

Subdivision (c)(2)(A). Under Rule 32(c)(2)(A), a cover is not required on a petition for panel rehearing, petition for hearing or rehearing en banc, answer to a petition for panel rehearing, response to a petition for hearing or rehearing en banc, or any other paper. Rule 32(d) makes it clear that no court can require that a cover be used on any of these papers. However, nothing prohibits a court from providing in its local rules that if a cover on one of these papers is "voluntarily" used, it must be a particular color. Several circuits have adopted such local rules. See, e.g., Fed. Cir. R. 35(c) (requiring yellow covers on petitions for hearing or rehearing en banc

and brown covers on responses to such petitions); Fed. Cir. R. 40(a) (requiring yellow covers on petitions for panel rehearing and brown covers on answers to such petitions); 7th Cir. R. 28 (requiring blue covers on petitions for rehearing filed by appellants or answers to such petitions, and requiring red covers on petitions for rehearing filed by appellees or answers to such petitions); 9th Cir. R. 40–1 (requiring blue covers on petitions for panel rehearing filed by appellants and red covers on answers to such petitions, and requiring red covers on petitions for panel rehearing filed by appellees and blue covers on answers to such petitions); 11th Cir. R. 35–6 (requiring white covers on petitions for hearing or rehearing en banc).

These conflicting local rules create a hardship for counsel who practice in more than one circuit. For that reason, Rule 32(c)(2)(A) has been amended to provide that if a party chooses to use a cover on a paper that is not required to have one, that cover must be white. The amendment is intended to preempt all local rulemaking on the subject of cover colors and thereby promote uniformity in federal appellate practice.

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment or to the Committee Note.

Subdivisions (d) and (e). Former subdivision (d) has been redesignated as subdivision (e), and a new subdivision (d) has been added. The new subdivision (d) requires that every brief, motion, or other paper filed with the court be signed by the attorney or unrepresented party who files it, much as Fed. R. Civ. P. 11 (a) imposes a signature requirement on papers filed in district court. Only the original copy of every paper must be signed. An appendix filed with the court does not have to be signed at all.

By requiring a signature, subdivision (d) ensures that a readily identifiable attorney or party takes responsibility for every paper. The courts of appeals already have authority to sanction attorneys and parties who file papers that contain misleading or frivolous assertions, see, e.g., 28 U.S.C. §1912, Fed. R. App. P. 38 & 46(b)(1)(B), and thus subdivision (d) has not been amended to incorporate provisions similar to those found in Fed. R. Civ. P. 11 (b) and 11(c).

Changes Made After Publication and Comments. No changes were made to the text of the proposed amendment. A line was added to the Committee Note to clarify that only the original copy of a paper needs to be signed.

Committee Notes on Rules—2005 Amendment

Subdivision (a)(7)(C). Rule 32(a)(7)(C) has been amended to add cross-references to new Rule 28.1, which governs briefs filed in cases involving cross-appeals. Rule 28.1(e)(2) prescribes type-volume limitations that apply to such briefs, and Rule 28.1(e)(3) requires parties to certify compliance with those type-volume limitations under Rule 32(a)(7)(C).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 3.5, N.D.R.Ct., Electronic Filing in District Courts

The State Court Administrator is working to eliminate the affixing of stamps or seals from the court document processing routine. At the last meeting, the committee approved amendments to several rules and forms to eliminate requirements for the clerk to affix a seal. These will be sent to the Supreme Court with the annual rules package.

The court administrator now requests an amendment be made to Rule 3.5 to make it clear that the presence of a document within the court system's electronic filing system is by itself enough to establish the document's authenticity and that no further stamping is required. The proposed amendment begins at line 80. The proposed explanatory note text begins at line 114 and explains the intent of the proposed amendment.

The amendment is necessary because, even though the rules will no longer require affixing stamps or seals, some statutes do. The most important of these is the statute on execution of judgments, N.D.C.C. 28-21-06. This statute provides: "An execution must be issued in the name of the state of North Dakota, attested in the name of the judge of the court that entered the judgment, sealed with the seal of the court, subscribed by the clerk of that court, and directed and delivered to a sheriff." In Williams County in particular the sheriff's office has been refusing to serve executions on judgments that do not comply with all the technical requirements of the statute.

The Supreme Court may supersede procedural statues and the "seal of the court" requirement in 28-21-06 is arguably procedural. The committee may wish to discuss whether

the language proposed by the court administrator is adequate to counter the statute and to address situations like the Williams County situation described above. If the committee approves rule language designed to supersede statutory "seal of the court" requirements, a thorough search of the code by staff will need to follow to identify other statutes subject to superseding.

RULE 3.5 ELECTRONIC FILING IN DISTRICT COURTS

1 (a) Electronic Filing.

2 (1) Documents filed electronically in the district courts must be submitted
3 through the Odyssey® electronic filing system.

4 (2) All documents filed after the initiating pleadings in criminal and
5 juvenile cases must be filed electronically. All documents in civil, non-juvenile,
6 cases must be filed electronically. A party who files a complaint in a civil case
7 must electronically serve notice of filing on the other parties or their attorneys.

8 (3) Self-represented litigants and prisoners are exempt from the electronic
9 filing requirement and may file paper documents in person, by mail, or by third
10 party commercial carrier. Self-represented litigants and prisoners who wish to file
11 documents by electronic means must use the Odyssey® system.

12 (4) On a showing of exceptional circumstances in a particular case, anyone
13 may be granted leave of court to file paper documents. Original wills, codicils and
14 other documents of independent legal significance may be filed as paper
15 documents. Colored or shaded documents may be filed as paper documents if
16 necessary to ensure legibility.

17 (5) A document filed electronically has the same legal effect as a paper
18 document.

19 (6) Any signature on a document filed electronically is considered that of

20 the officer of the court or party it purports to be for all purposes. If it is established
21 that the documents were transmitted without authority, the court must strike the
22 filing.
23 (7) A party who electronically files a proposed order must identify the filing
24 party in the Odyssey® comments field.
25 (b) Filing Formats.
26 (1) Approved formats for documents filed electronically are WordPerfect
27 (.wpd), Tagged Image File (.tif), Portable Document File (.pdf) and ASCII (.txt).
28 (2) All paragraphs must be numbered in documents filed electronically.
29 Reference to material in such documents must be to paragraph number, not page
30 number. Paragraph numbering is not required in exhibits, documents prepared
31 before the action was commenced, or in documents not prepared by the parties or
32 court.
33 (c) Time of Filing.
34 (1) A document in compliance with the rules and submitted electronically to
35 the district court clerk by 11:59 p.m. local time is considered filed on the date
36 submitted. A document electronically signed by the court is considered filed when
37 the e-signature is affixed.
38 (2) After reviewing an electronically filed document, the district court clerk
39 must inform the filer, through an e-mail generated by the Odyssey® system,
40 whether the document has been accepted or rejected.

41 (3) If a document submitted for electronic filing is rejected, the time for
42 filing is tolled from the time of submission to the time the e-mail generated by the
43 Odyssey® system notifying the filer of rejection is sent. The document will be
44 considered timely filed if resubmitted within three days after the notice of
45 rejection. A party seeking to take advantage of this tolling provision must file and
46 serve a separate document providing notice that the rejected document is being
47 resubmitted under N.D.R.Ct. 3.5(c)(3).
48 (4) Any required filing fee must be paid by credit card or debit card at the
49 time the document is filed.
50 (d) Confidentiality. In documents prepared for filing with the court,
51 information that would otherwise be included in the document but required by
52 N.D.R.Ct. 3.4 to be redacted in court documents must be separately filed in a
53 reference sheet (confidential information form, see appendix) and may be included
54 in those documents only by reference. Any document not complying with this
55 order is subject to N.D.R.Ct. 3.4(g).
56 (e) Electronic Service.
57 (1) All documents filed electronically after the initiating pleadings must be
58 served electronically through the Odyssey® system except for documents served
59 on or by self-represented litigants and prisoners. On a showing of exceptional
60 circumstances in a particular case, anyone may be granted leave of court to serve
61 paper documents or to be exempt from receiving electronic service. Attorneys who

62 are required by rule or statute to serve documents on their own clients may serve
63 paper documents.
64 (2) Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service of a
65 document is not effective if the party making service learns through any means that
66 the document did not reach the person to be served.
67 (3) All attorneys must provide at least one e-mail address to the State Board
68 of Law Examiners for accepting electronic service. Designated e-mail service
69 addresses will be posted on the North Dakota Supreme Court website.
70 (4) For purposes of computation of time, any document electronically
71 served must be treated as if it were mailed on the date of transmission. If an
72 attorney who is not exempt from electronic service fails to provide an e-mail
73 address for service or fails to accept or open electronically served e-mail, the
74 server's attempt at electronic service constitutes delivery. Service made impossible
75 due to an attorney's failure to provide an e-mail address must be shown by an
76 affidavit or certificate of attempted service.
77 (f) Technical Issues; Relief. On a showing of good cause, the court may
78 grant appropriate relief if electronic filing or electronic service was not completed
79 due to technical problems.
80 (g) Authenticity of Filed Electronic Documents. An electronic document
81 that has been filed, accepted and docketed in the Odyssey® electronic filing
82 system is considered authentic. The presence of the document in the Odyssey®

83 system's electronic index is confirmation of its authenticity. No further proof of
84 authenticity, such as a physical stamp or seal, is required to be applied to a
85 document to confirm its authenticity when the document is distributed using the
86 Odyssey® system or when it is output from the system.

87 EXPLANATORY NOTE

88 Adopted effective January 15, 2013; amended effective April 15, 2013;
89 June 1, 2013; June 1, 2015; March 1, 2016; _____.

90 Rule 3.5 was originally adopted as N.D.Sup.Ct.Admin.O. 16 on March 1,
91 2006. Order 16 was later amended, effective March 1, 2008; March 1, 2009;
92 August 1, 2010; March 1, 2011; July 1, 2012.

93 Order 16 was amended, effective July 1, 2012, to incorporate the provisions
94 of the Order 16 Addendum (Filing in the District Court where Odyssey®
95 Electronic Filing is Available) and N.D.Sup.Ct.Admin.O. 18 (Filing in Counties
96 Using the Odyssey® Case Management System). The Order 16 Addendum and
97 Order 18 were repealed, effective July 1, 2012.

98 In an appeal from an agency determination under N.D.C.C. § 28-32-42, the
99 notice of appeal must be served on all the entities listed in the statute, some of
100 whom may not be subject to electronic service through the Odyssey® system.

101 Subdivision (a) was amended, effective March 1, 2016, to clarify that
102 self-represented litigants and prisoners who wish to file documents electronically
103 must use the Odyssey® system and to require a party filing a proposed order to

104 identify the party in the Odyssey® comments field.

105 Paragraph (b)(1) was amended, effective June 1, 2015, to remove Word
106 documents from the list of approved formats for electronic filing in the Odyssey®
107 system. If a court requests that parties submit editable documents such as proposed
108 findings or orders, Word or other editable format documents still may be e-mailed
109 to the court for that purpose but only after e-filing the documents in Odyssey in an
110 approved format.

111 Subdivision (c) was amended, effective March 1, 2016, to clarify that a
112 document electronically signed by the court is considered filed when the
113 e-signature is affixed.

114 Subdivision (g) was added, effective _____, to explain that
115 once a document is accepted into the Odyssey® system, the document is
116 considered authentic and no further proof of authenticity needs to be applied to it.
117 Previously, under the system of paper records, an embossed seal or certification
118 stamp was applied to a document to establish its authenticity. The Odyssey®
119 electronic case management system provides authenticity through the electronic
120 generation of a time and date stamp as well as making a record of who filed the
121 document and which official accepted the document into the system.

122 Sources: Joint Procedure Committee Minutes of _____; April
123 23-24, 2015, pages 2-3; January 29-30, 2015, pages 13-14; April 25-26, 2013,
124 pages 3-16; January 31-February 1, 2013, pages 2-5, 15-18; September 27, 2012,

125 pages 14-21; April 29-30, 2010, page 21; April 24-25, 2008, pages 12-16; October
126 11-12, 2007, pages 3-5; April 26-27, 2007, pages 16-18; January 25, 2007, pages
127 15-16; September 23-24, 2004, pages 18-27.

128 Statutes Affected:

129 Considered: N.D.C.C. § 28-32-42.

130 Cross References: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with
131 the Court); N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction; Process; Service);
132 N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Documents); N.D.
133 Admission to Practice R. 1 (General Requirements for Admission).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 1, N.D.R.Civ.P., Scope of Rules

Proposed amendments to Rule 1 based on the December 1, 2015, amendments to Fed.R.Civ.P. 1 are attached. The rule text amendment is at line 3 and the amendment to the explanatory note at lines 16-17. The federal comments indicate that the amendment was intended to make explicit the aspiration that parties, lawyers and the courts cooperate in obtaining just, speedy an inexpensive case resolution. The comments indicate that the amendment is not intended to create an independent ground for sanctions.

RULE 1. SCOPE OF RULES

1 These rules govern the procedure in all civil actions and proceedings in
2 district court, except as stated in Rule 81. They should be construed, ~~and~~
3 administered and employed by the court and the parties to secure the just, speedy,
4 and inexpensive determination of every action and proceeding.

5 EXPLANATORY NOTE

6 Rule 1 was amended, effective March 1, 1996; March 1,
7 2011: _____.

8 Rule 1 is an adaptation of Fed.R.Civ.P. 1 with changes made only to
9 conform to the court system of North Dakota.

10 Rule 1 was amended, effective March 1, 1996, to track the 1993 federal
11 amendment.

12 Rule 1 was amended, effective March 1, 2011, in response to the December
13 1, 2007, revision of the Federal Rules of Civil Procedure. The language and
14 organization of the rule were changed to make the rule more easily understood and
15 to make style and terminology consistent throughout the rules.

16 Rule 1 was amended, effective _____, in response to the
17 December 1, 2015, revision of the Federal Rules of Civil Procedure.

18 These rules are the Federal Rules of Civil Procedure adapted to state
19 practice. These explanatory notes attempt to point out the deviations from the

20 federal rules. Where there is no significant deviation, annotations to the federal

21 rules may be useful.

22 SOURCES: Joint Procedure Committee Minutes of

23 _____; January 24, 2008, page 14; September 29-30, 1994,

24 page 23; April 26, 1984, page 29; September 20-21, 1979, pages 2-3; Fed.R.Civ.P.

25 1.

26 STATUTES AFFECTED:

27 CONSIDERED: N.D.C.C. § 30.1-02-04.

28 CROSS REFERENCE: N.D.R.Civ.P. 81 (Applicability In General);

29 N.D.R.Ev. 102 (Purpose and Construction).

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE*

1 **Rule 1. Scope and Purpose**

2 These rules govern the procedure in all civil actions
3 and proceedings in the United States district courts, except
4 as stated in Rule 81. They should be construed, ~~and~~
5 administered, and employed by the court and the parties to
6 secure the just, speedy, and inexpensive determination of
7 every action and proceeding.

Committee Note

Rule 1 is amended to emphasize that just as the court should construe and administer these rules to secure the just, speedy, and inexpensive determination of every action, so the parties share the responsibility to employ the rules in the same way. Most lawyers and parties cooperate to achieve these ends. But discussions of ways to improve the administration of civil justice regularly include pleas to discourage over-use, misuse, and abuse of procedural tools that increase cost and result in delay. Effective advocacy is

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

consistent with — and indeed depends upon — cooperative and proportional use of procedure.

This amendment does not create a new or independent source of sanctions. Neither does it abridge the scope of any other of these rules.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 16, N.D.R.Civ.P., Pretrial Conferences; Scheduling; Management

Proposed amendments to Rule 16 based on the December 1, 2015, amendments to Fed.R.Civ.P. 16 are attached. There are major differences between N.D. Rule 16 and the federal rule so the amendments have been integrated into the proposal in what seem like the most appropriate spots.

The first amendment is on line 16 and adds preservation of electronically stored information to the list of topics at a pretrial conference. The next amendment is on lines 71-72 and requires a party moving for a discovery order to request a conference with the court before filing the motion. The committee may wish to discuss whether this would be practicable in state court cases. The federal comments say that a conference can be a more efficient way to resolve discovery issues, but it also says actually having a conference is not mandatory under the amendment language – granting the request is within the court's discretion.

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

1 (a) Purposes of a Pretrial Conference. In any action, the court may, and
2 when any of the triggering events specified in Rule 16(b) occur must, order the
3 attorneys and any self-represented parties to appear in person, telephonically, or by
4 other electronic means, for one or more pretrial conferences for such purposes as:
5 (1) expediting disposition of the action;
6 (2) establishing early and continuing control so that the case will not be
7 protracted because of lack of management;
8 (3) discouraging wasteful pretrial activities;
9 (4) improving the quality of the trial through more thorough preparation;
10 (5) facilitating settlement; and
11 (6) discussing the desirability of using alternative dispute resolution.
12 (b) Scheduling; Triggering Events.
13 (1) Triggering Events. The court must conduct a pretrial conference for the
14 purpose of entering a scheduling order if:
15 (A) more than six months have passed since filing of the summons and
16 complaint or answer without final disposition of the case or filing of a dispositive
17 motion;
18 (B) the summons and complaint or answer was served more than six months
19 before filing and ninety days have passed since filing without final disposition of

20 the case or filing or a dispositive motion;

21 (C) a Rule 40 (e) notice has been issued and any response to the notice

22 contained a request that the case be left open; or

23 (D) any party makes a written request for a pretrial conference to enter a

24 scheduling order.

25 (2) When Conference Held. The pretrial conference must be held within 60

26 days of the triggering event.

27 (c) Attendance and Matters for Consideration at a Pretrial Conference.

28 (1) Attendance. A represented party must authorize at least one of its

29 attorneys to make stipulations and admissions about all matters that can reasonably

30 be anticipated for discussion at a pretrial conference. If appropriate, the court may

31 require that a party or its representative be present or reasonably available by

32 telephone or other means to consider possible settlement.

33 (2) Matters for Consideration. At any pretrial conference, the court may

34 consider and take appropriate action on the following matters:

35 (A) formulating and simplifying the issues, and eliminating claims or

36 defenses;

37 (B) joining other parties and amending the pleadings, if necessary or

38 desirable;

39 (C) obtaining admissions and stipulations about facts and documents to

40 avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

41 (D) avoiding unnecessary proof and cumulative evidence, and determining
42 limitations or restrictions on the use of testimony under N.D.R.Ev. 702;
43 (E) determining the appropriateness and timing of summary adjudication
44 under Rule 56 and other motions;
45 (F) controlling and scheduling discovery;
46 (G) resolving issues relating to disclosure, ~~or~~ discovery, or preservation of
47 electronically stored information, including the form or forms in which it should be
48 produced;
49 (H) scheduling the identification of witnesses and documents, scheduling
50 the filing and exchange of any pretrial briefs, and setting dates for further
51 conferences and for trial;
52 (I) referring issues to a master;
53 (J) settling the case and using special procedures to assist in resolving the
54 dispute;
55 (K) determining the form and content of the pretrial order;
56 (L) disposing of pending motions;
57 (M) adopting special procedures for managing potentially difficult or
58 protracted actions that may involve complex issues, multiple parties, difficult legal
59 questions, or unusual proof problems;
60 (N) ordering a separate trial under Rule 42(b) of a claim, counterclaim,
61 crossclaim, third-party claim, or particular issue;

62 (O) ordering the presentation of evidence early in the trial on a manageable
63 issue that could, on the evidence, be the basis for a judgment as a matter of law
64 under Rule 50(a) or a judgment on partial findings under Rule 52(c);
65 (P) establishing a reasonable limit on the time allowed to present evidence;
66 (Q) allocating peremptory challenges; and
67 (R) facilitating in other ways the just, speedy, and inexpensive disposition
68 of the action.
69 (d) Pretrial Orders. After any conference under this rule, the court must
70 issue an order reciting the action taken. This order controls the course of the action
71 unless the court modifies it. The order must direct that before moving for an order
72 relating to discovery, the movant must request a conference with the court.
73 (e) Final Pretrial Conference. The court may hold a final pretrial conference
74 to formulate a trial plan, including a plan to facilitate the admission of evidence.
75 The conference must be held as close to the time of trial as is reasonable, and must
76 be attended by at least one attorney who will conduct the trial for each party and by
77 any self-represented party. The court may modify the order issued after a final
78 pretrial conference only to prevent manifest injustice.
79 (f) Sanctions.
80 (1) In General. On motion or on its own, the court may issue any just orders,
81 including those authorized by Rule 37, if a party or its attorney:
82 (A) fails to appear at a pretrial conference;

83 (B) is substantially unprepared to participate, or does not participate in good
84 faith, in the conference; or
85 (C) fails to obey a scheduling or other pretrial order.
86 (2) Imposing Fees and Costs. Instead of or in addition to any other sanction,
87 the judge must order the party, its attorney, or both to pay the reasonable expenses,
88 including attorney fees, incurred because of any noncompliance with this rule,
89 unless the noncompliance was substantially justified or that other circumstances
90 make an award of expenses unjust.
91 EXPLANATORY NOTE
92 Rule 16 was amended, effective July 1, 1981; March 1, 1986; March 1,
93 1990; March 1, 1996; March 1, 2000; August 1, 2004; March 1, 2008; March 1,
94 2011; December 1, 2011; _____.
95 Rule 16 was amended, effective March 1, 2000, to add a new subdivision
96 (a)(6) relating to alternative dispute resolution. Under N.D.R.Ct. 8.8, all parties in
97 civil cases are required to discuss early alternative dispute resolution and must file
98 a statement with the district court regarding participation in ADR.
99 Rule 16 was amended, effective March 1, 2011, in response to the
100 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
101 and organization of the rule were changed to make the rule more easily understood
102 and to make style and terminology consistent throughout the rules.
103 Subdivision (a) was amended and new subdivisions (b), (c) and (e) were

104 added, effective August 1, 2004, to incorporate a mechanism to trigger a pretrial
105 conference when certain events occur in an action.
106 Subdivision ~~(d)~~ (c) was amended, effective March 1, 2008, to add issues
107 related to electronically stored information to the list of possible subjects for
108 discussion at a pretrial conference.
109 Subdivision (c) was amended, effective _____, to add
110 preservation of electronically stored information to the list of possible subjects for
111 discussion at a pretrial conference.
112 Subdivision (d) was amended, effective March 1, 1996, to follow the 1993
113 amendment to Fed.R.Civ.P. 16(c).
114 Subdivision (d) was amended, effective _____, to require a pretrial
115 order to direct that before moving for an order relating to discovery, the movant
116 must request a conference with the court.
117 Subdivision (h) was amended, effective March 1, 1990. The amendment is
118 technical in nature and no substantive change is intended.
119 SOURCES: Joint Procedure Committee Minutes of
120 _____; September 30, 2011, page 17; September 25, 2008,
121 page 7; April 24-25, 2008, pages 25-26; October 11-12, 2007, page 3; September
122 18-19, 2003, pages 11-18; April 24-25, 2003, pages 26-30; May 6-7, 1999, pages
123 7-8; January 28-29, 1999, pages 7-12; January 26-27, 1995, page 10; September
124 29-30, 1994, pages 22-23; April 20, 1989, page 2; December 3, 1987, page 11;

125 April 26-27, 1984, pages 26-28; January 19-20, 1984, pages 18-23; September
126 18-19, 1980, pages 12-13; September 20-21, 1979, page 11; Fed.R.Civ.P. 16.
127 CROSS REFERENCE: N.D.R.Civ.P. 15 (Amended and Supplemental
128 Pleadings), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure),
129 N.D.R.Civ.P. 36 (Requests for Admission), N.D.R.Civ.P. 40 (Assignment of Cases
130 for Trial), N.D.R.Civ.P. 41 (Dismissal of Actions), N.D.R.Ct. 8.4 (Summons in
131 Action for Divorce or Separation), N.D.R.Ct. 8.8 (Alternative Dispute
132 Resolution).

1 **Rule 16. Pretrial Conferences; Scheduling; Management**

2 * * * * *

3 **(b) Scheduling.**

4 **(1)** ***Scheduling Order.*** Except in categories of
5 actions exempted by local rule, the district judge
6 — or a magistrate judge when authorized by
7 local rule — must issue a scheduling order:

8 **(A)** after receiving the parties' report under
9 Rule 26(f); or

10 **(B)** after consulting with the parties' attorneys
11 and any unrepresented parties at a
12 scheduling conference~~ by telephone, mail,~~
13 ~~or other means~~.

14 **(2)** ***Time to Issue.*** The judge must issue the
15 scheduling order as soon as practicable, but ~~in~~
16 ~~any event~~unless the judge finds good cause for

17 delay, the judge must issue it within the earlier
18 of ~~120~~90 days after any defendant has been
19 served with the complaint or ~~90~~60 days after any
20 defendant has appeared.
21 **(3)** ***Contents of the Order.***
22 * * * * *
23 **(B)** *Permitted Contents.* The scheduling order
24 may:
25 * * * * *
26 **(iii)** provide for disclosure, ~~or~~discovery,
27 or preservation of electronically
28 stored information;
29 **(iv)** include any agreements the parties
30 reach for asserting claims of
31 privilege or of protection as trial-
32 preparation material after

33 information is produced, including
34 agreements reached under Federal
35 Rule of Evidence 502;
36 **(v)** direct that before moving for an
37 order relating to discovery, the
38 movant must request a conference
39 with the court;
40 **(~~v~~vi)** set dates for pretrial conferences and
41 for trial; and
42 **(~~vi~~vii)** include other appropriate matters.
43 * * * * *

Committee Note

The provision for consulting at a scheduling conference by "telephone, mail, or other means" is deleted. A scheduling conference is more effective if the court and parties engage in direct simultaneous communication. The conference may be held in person, by telephone, or by more sophisticated electronic means.

The time to issue the scheduling order is reduced to the earlier of 90 days (not 120 days) after any defendant has been served, or 60 days (not 90 days) after any defendant has appeared. This change, together with the shortened time for making service under Rule 4(m), will reduce delay at the beginning of litigation. At the same time, a new provision recognizes that the court may find good cause to extend the time to issue the scheduling order. In some cases it may be that the parties cannot prepare adequately for a meaningful Rule 26(f) conference and then a scheduling conference in the time allowed. Litigation involving complex issues, multiple parties, and large organizations, public or private, may be more likely to need extra time to establish meaningful collaboration between counsel and the people who can supply the information needed to participate in a useful way. Because the time for the Rule 26(f) conference is geared to the time for the scheduling conference or order, an order extending the time for the scheduling conference will also extend the time for the Rule 26(f) conference. But in most cases it will be desirable to hold at least a first scheduling conference in the time set by the rule.

Three items are added to the list of permitted contents in Rule 16(b)(3)(B).

The order may provide for preservation of electronically stored information, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(C). Parallel amendments of Rule 37(e) recognize that a duty to preserve discoverable information may arise before an action is filed.

The order also may include agreements incorporated in a court order under Evidence Rule 502 controlling the effects of disclosure of information covered by attorney-client privilege or work-product protection, a topic also added to the provisions of a discovery plan under Rule 26(f)(3)(D).

Finally, the order may direct that before filing a motion for an order relating to discovery the movant must request a conference with the court. Many judges who hold such conferences find them an efficient way to resolve most discovery disputes without the delay and burdens attending a formal motion, but the decision whether to require such conferences is left to the discretion of the judge in each case.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 26, N.D.R.Civ.P., General Provisions Governing Discovery

Proposed amendments to Rule 26 consistent with the December 1, 2015, amendments to Fed.R.Civ.P. 26 are attached.

The proposed amendments begin at line 13 with the addition of detailed proportionality considerations to the scope of discovery part of Rule 26 and the deletion of many of the previous scope factors. Under the proposal, the unique N.D. language defining "electronically stored information" would be removed from this paragraph and transferred to the electronic discovery paragraph that begins at line 47. Related to the proportionality amendments, there is language added at lines 147-148 allowing a protective order to include language on allocation of expenses.

As explained in the attached federal comments, the addition of new proportionality language is intended to restore an emphasis on proportionality when determining what is within the scope of discovery. The comments indicate that a proportionality component was added to the rule in 1983 but diluted by amendments in 1993 and 2000. The comments state: "The parties and the court have a collective responsibility to consider proportionality of all discovery and consider it in resolving discovery disputes."

A process to apply to have a shorter response time for Rule 34 requests is part of the federal Rule 26 amendments. This language is not included with the proposed changes to Rule 26 because applying for a shorter time would be done as part of the mandatory discovery conference, which is not part of the N.D. rule. Under N.D.R.Civ.P. 34, there is a

30 day deadline for responding to a request, but the defendant is allowed 45 days after service of the summons and complaint to respond. The committee may wish to discuss whether to include some version of the federal response time amendments in our rules.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

1 (a) Discovery Methods. Parties may obtain discovery by one or more of the
2 following methods:
3 (1) depositions on oral examination or written questions;
4 (2) written interrogatories;
5 (3) production of documents or things or permission to enter on land or
6 other property, for inspection and other purposes;
7 (4) physical and mental examinations; and
8 (5) requests for admission.
9 (b) Discovery Scope and Limits.
10 (1) In General.
11 (A) Scope. Unless otherwise limited by court order, the scope of discovery
12 is as follows: Parties may obtain discovery regarding any nonprivileged matter that
13 is relevant to any party's claim or defense and proportional to the needs of the case,
14 considering the importance of the issues at stake in the action, the amount in
15 controversy, the parties' relative access to relevant information, the parties'
16 resources, the importance of the discovery in resolving the issues, and whether the
17 burden or expense of the proposed discovery outweighs its likely benefit.
18 Information within this scope of discovery need not be admissible in evidence to
19 be discoverable. ~~, including the existence, description, nature, custody, condition,~~

20 ~~and location of any documents, electronically stored information, or other tangible~~
21 ~~things and the identity and location of persons who know of any discoverable~~
22 ~~matter. For good cause, the court may order the discovery of any matter relevant to~~
23 ~~the subject matter involved in the action. Relevant information need not be~~
24 ~~admissible at the trial if the discovery appears reasonably calculated to lead to the~~
25 ~~discovery of admissible evidence. For the purposes of the discovery rules, the~~
26 ~~phrase "electronically stored information" includes reasonably accessible metadata~~
27 ~~that will enable the discovering party to have the ability to access such information~~
28 ~~as the date sent, date received, author, and recipients. The phrase does not include~~
29 ~~other metadata unless the parties agree otherwise or the court orders otherwise~~
30 ~~upon motion of a party and a showing of good cause for the production of certain~~
31 ~~metadata. All discovery is subject to the limitations imposed by Rule~~
32 ~~26(b)(1)(B)(i).~~
33 (B) Limitations on Frequency and Extent.
34 (i) When Required. On motion or on its own, the court must limit the
35 frequency or extent of discovery otherwise allowed by these rules if it determines
36 that:
37 – discovery sought is unreasonably cumulative or duplicative, or it can be
38 obtained from some other source that is more convenient, less burdensome, or less
39 expensive;
40 –the party seeking discovery has had ample opportunity to obtain the

41 information by discovery in the action; or

42 –the ~~burden or expense of the~~ proposed discovery is outside the scope

43 permitted by Rule 26(b)(1)(A) ~~outweighs its likely benefit, considering the needs~~

44 ~~of the case, the amount in controversy, the parties' resources, the importance of the~~

45 ~~issues at stake in the action, and the importance of the discovery in resolving the~~

46 ~~issues~~.

47 (ii) Specific Limitations on Electronically Stored Information. For the

48 purposes of the discovery rules, the phrase "electronically stored information"

49 includes reasonably accessible metadata that will enable the discovering party to

50 have the ability to access such information as the date sent, date received, author,

51 and recipients. The phrase does not include other metadata unless the parties agree

52 otherwise or the court orders otherwise upon motion of a party and a showing of

53 good cause for the production of certain metadata. A party need not provide

54 discovery of electronically stored information from sources that the party identifies

55 as not reasonably accessible because of undue burden or cost. On motion to

56 compel discovery or for a protective order, the party from whom discovery is

57 sought must show that the information is not reasonably accessible because of

58 undue burden or cost. If that showing is made, the court may nonetheless order

59 discovery from such sources if the requesting party shows good cause, considering

60 the limitations of Rule 26(b)(1)(~~B~~ A). The court may specify conditions for the

61 discovery.

62 (2) Insurance Agreements. If a person carrying on an insurance business
63 might be liable to satisfy part or all of a judgment in an action or to indemnify or
64 reimburse for payments made to satisfy the judgment, a party may obtain discovery
65 of the existence and contents of the insurance agreement. Disclosure of the
66 insurance agreement is not reason for its admission in evidence at trial. An
67 application for insurance may not be treated as part of an insurance agreement.
68 (3) Trial Preparation Materials.
69 (A) Documents and Tangible Objects. Ordinarily, a party may not discover
70 documents and tangible things that are prepared in anticipation of litigation or for
71 trial by or for another party or its representative (including the other party's
72 attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule
73 26(b)(5), these materials may be discovered if:
74 (i) they are otherwise discoverable under Rule 26(b)(1); and
75 (ii) the party shows that it has substantial need of the materials to prepare its
76 case and cannot, without undue hardship, obtain their substantial equivalent by
77 other means.
78 (B) Protection Against Disclosure. If the court orders discovery of those
79 materials, it must protect against disclosure of the mental impressions, conclusions,
80 opinions, or legal theories of a party's attorney or other representative concerning
81 the litigation.
82 (C) Previous Statement. Any party or other person may, on request and

83 without the required showing, obtain the person's own previous statement about
84 the action or its subject matter. If the request is refused, the person may move for a
85 court order and Rule 37(a)(5) applies to the award of expenses. A previous
86 statement is:
87 (i) a written statement that the person has signed or otherwise adopted or
88 approved; or
89 (ii) a contemporaneous stenographic, mechanical, electrical, or other
90 recording, or a transcription of it, that recites substantially verbatim the person's
91 oral statement.
92 (4) Trial Preparation Experts.
93 (A) Expert Who May Testify. Discovery of facts known and opinions held
94 by experts, otherwise discoverable under Rule 26(b)(1) and acquired or developed
95 in anticipation of litigation or for trial, may be obtained only as follows:
96 (i) a party may through interrogatories require any other party to identify
97 each person whom the other party expects to call as an expert witness at trial; to
98 state the subject matter on which the expert is expected to testify; and to state the
99 substance of the facts and opinions to which the expert is expected to testify and a
100 summary of the grounds for each opinion;
101 (ii) a party may depose any person who has been identified as an expert
102 witness whose opinions may be presented at trial unless the court finds, on motion,
103 that the deposition is unnecessary, overly burdensome, or unfairly oppressive.

104 (B) Expert Employed Only for Trial Preparation. Ordinarily, a party may
105 not, by interrogatories or deposition, discover facts known or opinions held by an
106 expert who has been retained or specially employed by another party in
107 anticipation of litigation or to prepare for trial and who is not expected to be called
108 as a witness at trial. But a party may do so only:
109 (i) as provided in Rule 35(b); or
110 (ii) on showing exceptional circumstances under which it is impracticable
111 for the party to obtain facts or opinions on the same subject by other means.
112 (C) Payment. Unless manifest injustice would result, the court must require
113 that the party seeking discovery:
114 (i) pay the expert a reasonable fee for time spent in responding to discovery
115 under Rule 26(b)(4)(A) or (B); and
116 (ii) for discovery under Rule 26(b)(4)(A) the court may require, and for
117 discovery under Rule 26(b)(4)(B) the court must require the party seeking
118 discovery to pay the other party a fair portion of the fees and expenses it
119 reasonably incurred in obtaining the expert's facts and opinions.
120 (5) Claiming Privilege or Protecting Trial Preparation Materials.
121 (A) Information Withheld. When a party withholds information otherwise
122 discoverable by claiming that the information is privileged or subject to protection
123 as trial-preparation material, the party must:
124 (i) expressly make the claim; and

125 (ii) describe the nature of the documents, communications, or tangible
126 things not produced or disclosed, and do so in a matter that, without revealing
127 information itself privileged or protected, will enable other parties to assess the
128 claim.

129 (B) Information Produced. If information is produced in discovery that is
130 subject to a claim of privilege or of protection as trial-preparation material, the
131 party making the claim may notify any party that received the information of the
132 claim and the basis for it. After being notified, a receiving party must promptly
133 return, sequester, or destroy the specified information and any copies it has and
134 may not use or disclose the information until the claim is resolved. A receiving
135 party may promptly present the information to the court under seal for
136 determination of the claim. If the receiving party disclosed the information before
137 being notified, it must take reasonable steps to retrieve it. The producing party
138 must preserve the information until the claim is resolved.

139 (c) Protective Orders.

140 (1) In General. A party or any person from whom discovery is sought may
141 move for a protective order in the court where the action is pending, or as an
142 alternative on matters relating to a deposition, in the court in the district where the
143 deposition will be taken. The court may, for good cause shown, issue an order to
144 protect a party or person from annoyance, embarrassment, oppression, or undue
145 burden or expense, including one or more of the following:

146 (A) forbidding the discovery;

147 (B) specifying terms and conditions, including time or place <u>or the</u>

148 <u>allocation of expenses</u> for the discovery;

149 (C) prescribing a discovery other than the one selected by the party seeking

150 discovery;

151 (D) forbidding inquiry into certain matters, or limiting the scope of

152 discovery to certain matters;

153 (E) designating the persons who may be present while the discovery is

154 conducted;

155 (F) requiring that a deposition be sealed and opened only on court order;

156 (G) requiring that a trade secret or other confidential research, development,

157 or commercial information not be revealed or be revealed only in a specified way;

158 and

159 (H) requiring that the parties simultaneously file specified sealed documents

160 or information to be opened as the court directs.

161 (2) Ordering Discovery. If a motion for a protective order is wholly or

162 partially denied, the court may, on just terms, order that any party or person

163 provide or permit discovery.

164 (3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

165 (d) Sequence and Timing of Discovery. Unless, on motion, the court orders

166 otherwise for the parties' and witnesses' convenience and in the interests of justice,

167 methods of discovery may be used in any sequence and discovery by one party
168 does not require any other party to delay its discovery.
169 (e) Supplementing Responses.
170 (1) In General. A party who has responded to an interrogatory, request for
171 production, or request for admission, must supplement or correct its response:
172 (A) in a timely manner if the party learns that in some material respect the
173 response is incomplete or incorrect, and if the additional or corrective information
174 has not otherwise been made known to the parties during the discovery process or
175 in writing; or
176 (B) as ordered by the court.
177 (2) Witnesses. A party has a duty to timely supplement a response about:
178 (A) the identity and location of persons having knowledge of discoverable
179 matters, and
180 (B) the identity of each person expected to be called as an expert witness at
181 trial, the subject matter on which the person is expected to testify, and the
182 substance of the person's testimony.
183 (f) Discovery Meeting, Discovery Conference, Discovery Plan.
184 (1) Discovery Meeting. No earlier than 40 days after the complaint is filed
185 in an action, any party's attorney or a self-represented party may request in writing
186 a meeting on the subject of discovery, including the discovery of electronically
187 stored information. If such a request is made, the parties must meet within 21 days,

188 unless agreed otherwise by the parties or their attorneys or another time for the
189 meeting is ordered by the court. Even if the parties or their attorneys do not seek to
190 have a discovery meeting, at any time after the complaint is filed the court may
191 direct the parties or their attorneys to appear before it for a discovery conference.
192 (2) Matters for Consideration. During a discovery meeting held under Rule
193 26(f)(1), the attorneys and any self-represented parties must:
194 (A) consider the nature and basis of the parties' claims and defenses and the
195 possibilities for promptly settling or resolving the case, and
196 (B) discuss the preparation of a discovery plan as set forth in Rule 26 (f)(3).
197 (3) Conduct of Meeting. Attorneys for the parties, and any self-represented
198 parties, that have appeared in the case are jointly responsible for arranging the
199 meeting, for being prepared to discuss a discovery plan, and for attempting in good
200 faith to agree on a discovery plan. The meeting may be held by telephone, by
201 videoconference, or in person, or by a combination of methods, unless the court,
202 on motion, orders the attorneys and the self-represented parties to attend in person.
203 (4) Discovery Plan or Report.
204 (A) In General. If a discovery plan is agreed on, it must be submitted to the
205 court within 14 days after the meeting, and the parties may request a conference
206 with the court regarding the plan. If the parties do not agree on a discovery plan,
207 they must submit to the court within 14 days after the meeting a joint report
208 containing those parts of a discovery plan on which they agree and the position of

209 each of the parties on the parts upon which they disagree. Unless the parties agree
210 otherwise, the attorney for the first plaintiff listed on the complaint is responsible
211 for submitting the discovery plan or joint report.
212 (B) Discovery Plan Contents. A discovery plan must contain the following:
213 (i) a statement of the issues as they then appear;
214 (ii) a proposed plan and schedule of discovery, including the
215 discovery of electronically stored information;
216 (iii) with respect to electronically stored information, and if appropriate
217 under the circumstances of the case, a reference to the preservation of such
218 information, the media form, format, or procedures by which such information will
219 be produced, the allocation of the costs of preservation, production, and, if
220 necessary, restoration, of such information, the method for asserting or preserving
221 claims of privilege or of protection of the information as trial-preparation materials
222 if different from that provided in Rule 26 (b)(5), the method for asserting or
223 preserving confidentiality and proprietary status, and any other matters addressed
224 by the parties;
225 (iv) any limitations proposed to be placed on discovery, including, if
226 appropriate under the circumstances of the case, that discovery be conducted in
227 phases or be limited to or focused on particular issues;
228 (v) when discovery should be completed; and
229 (vi) if appropriate under the circumstances of the case, any limitations or

230 conditions under Rule 26 (c) regarding protective orders.

231 (5) Discovery Conference. If the parties are unable to agree to a discovery
232 plan at a meeting held under Rule 26 (f)(1), they must, on motion of any party,
233 appear before the court for a discovery conference at which the court must order
234 the entry of a discovery plan after consideration of the report required to be
235 submitted under Rule 26 (f)(4)(A) and the position of the parties. The order may
236 address other matters, including the allocation of discovery costs, as are necessary
237 for the proper management of discovery in the action. An order may be altered or
238 amended as justice may require. The court may combine the discovery conference
239 with a pretrial conference authorized by Rule 16.

240 (g) Signing Discovery Request, Responses, and Objections.

241 (1) Signature Required; Effect of Signature. Every discovery request,
242 response, or objection must be signed by at least one attorney of record in the
243 attorney's individual name, or by the party personally, if self-represented, state the
244 signer's address, electronic mail address for electronic service, telephone number,
245 and State Board of Law Examiners identification number, if applicable. By
246 signing, the attorney or party certifies that the signer has read the request,
247 response, or objection, and that to the best of the signer's knowledge, information,
248 and belief formed after a reasonable inquiry it is:

249 (A) consistent with these rules and warranted by existing law or by a good
250 faith argument for extending, modifying or reversing existing law;

251 (B) not interposed for any improper purpose, such as to harass, cause
252 unnecessary delay or needlessly increase the cost of litigation; and
253 (C) neither unreasonable nor unduly burdensome or expensive, considering
254 the needs of the case, prior discovery in the case, the amount in controversy, and
255 the importance of the issues at stake in the litigation.
256 (2) Failure to Sign. Other parties have no duty to act on an unsigned
257 request, response, or objection until it is signed, and the court, on motion or on its
258 own, must strike it unless a signature is promptly supplied after the omission is
259 called to the attorney's or party's attention.
260 (3) Sanction for Improper Certification. If a certification violates this rule,
261 without substantial justification, the court, on motion or its own, must impose an
262 appropriate sanction on the signer, the party on whose behalf the signer was acting,
263 or both. The sanction may include an order to pay the reasonable expenses,
264 including attorney's fees, caused by the violation.
265 EXPLANATORY NOTE
266 Rule 26 was amended, effective July 1, 1981; March 1, 1986; March 1,
267 1990; March 1, 1996; March 1, 2008; March 1, 2011; March 1, 2013; March 1,
268 2015;_____.
269 Rule 26 is derived from Fed.R.Civ.P. 26
270 As amended, effective March 1, 1996, a party deposing another party's
271 expert witness under subdivision (b)(4)(A)(ii) must pay the expert a reasonable fee

272 under subdivision (b)(4)(C), even though a court order has not been obtained

273 authorizing the deposition or commanding payment of expert witness fees.

274 Rule 26 was amended, effective March 1, 2008, to implement changes

275 related to discovery of electronically stored information. The changes reflect the

276 2006 amendments to Fed.R.Civ.P. 26. Subdivision (b) was amended to incorporate

277 a new subparagraph ~~(b)(2)(B)~~ (b)(1)(B)(ii) on limitations to discovery of electronic

278 information. A new paragraph (b)(6) was also added to address claims of privilege

279 or protection of trial preparation materials.

280 Rule 26 was amended, effective March 1, 2011, in response to the

281 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language

282 and organization of the rule were changed to make the rule more easily understood

283 and to make style and terminology consistent throughout the rules.

284 Paragraph (b)(1) was amended, effective _____, to incorporate

285 considerations related to proportionality into subparagraph (b)(1)(A) as a limitation

286 on the scope of discovery. This change was patterned on the Dec. 1, 2015

287 amendments to Fed.R.Civ.P. 26. Language defining "electronically stored

288 information" and designating what types of metadata may be discovered was

289 moved to subparagraph (b)(1)(B)(ii).

290 ~~Subparagraph (b)(1)(A) was amended, effective March 1, 2013, to include a~~

291 ~~definition of "electronically stored information" and to designate what types of~~

292 ~~metadata may be discovered.~~

293 Subparagraph (c)(1)(H) was amended, effective March 1, 2015, to remove a
294 reference to filing documents in a sealed paper envelope. Items are filed with the
295 court electronically, and may be designated as sealed when submitted.
296 Subdivision (f) was amended, effective March 1, 2013, to provide a
297 procedure for discovery meetings and conferences and for the formulation of
298 discovery plans and reports, with an emphasis on discussing and planning for the
299 discovery of electronic information.
300 Paragraph (g)(1) was amended, effective March 1, 2015, to specify that the
301 attorney's electronic mail address for electronic service must be included with the
302 signature.
303 SOURCES: Joint Procedure Committee Minutes of
304 _____; April 24-25, 2014, page 25; January 26-27, 2012, page
305 17-19; January 29-30, 2009, page 6; September 25, 2008, pages 21-22; January 25,
306 2007, pages 9-10; September 28-29, 2006, pages 18-20; January 26-27, 1995,
307 pages 10-12; September 29-30, 1994, pages 21-22; April 20, 1989, page 2;
308 December 3, 1987, page 11; April 26, 1984, page 28; January 20, 1984, pages
309 23-31; December 11-12, 1980, page 2; October 30-31, 1980, pages 9-10;
310 September 20-21, 1979, page 19; Fed.R.Civ.P. 26.
311 CROSS REFERENCE: N.D.R.Civ.P. 16 (Pretrial Procedure-Formulating
312 Issues), N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken),
313 N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 30

314 (Depositions Upon Oral Examination), N.D.R.Civ.P. 30.1 (Uniform Audio-Visual
315 Deposition Rule), N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written
316 Questions), N.D.R.Civ.P. 33 (Interrogatories to Parties), N.D.R.Civ.P. 34
317 (Production of Documents and Things and Entry Upon Land for Inspection and
318 Other Purposes), N.D.R.Civ.P. 35 (Physical and Mental Examination of Persons),
319 N.D.R.Civ.P. 36 (Requests for Admission), and N.D.R.Civ.P. 37 (Failure to Make
320 Discovery-Sanctions); N.D.R.Ev. 507 (Trade Secrets), N.D.R.Ev. 510 (Waiver of
321 Privilege by Voluntary Disclosure), and N.D.R.Ev. 706 (Court-Appointed
322 Experts).

1 **Rule 26. Duty to Disclose; General Provisions**
2 **Governing Discovery**

3 * * * * *

4 **(b) Discovery Scope and Limits.**

5 **(1)** ***Scope in General.*** Unless otherwise limited by
6 court order, the scope of discovery is as follows:
7 Parties may obtain discovery regarding any
8 nonprivileged matter that is relevant to any
9 party's claim or defense and proportional to the
10 needs of the case, considering the importance of
11 the issues at stake in the action, the amount in
12 controversy, the parties' relative access to
13 relevant information, the parties' resources, the
14 importance of the discovery in resolving the
15 issues, and whether the burden or expense of the
16 proposed discovery outweighs its likely benefit.
17 Information within this scope of discovery need

18 not be admissible in evidence to be
19 discoverable. ~~including the existence,~~
20 ~~description, nature, custody, condition, and~~
21 ~~location of any documents or other tangible~~
22 ~~things and the identity and location of persons~~
23 ~~who know of any discoverable matter. For good~~
24 ~~cause, the court may order discovery of any~~
25 ~~matter relevant to the subject matter involved in~~
26 ~~the action. Relevant information need not be~~
27 ~~admissible at the trial if the discovery appears~~
28 ~~reasonably calculated to lead to the discovery of~~
29 ~~admissible evidence. All discovery is subject to~~
30 ~~the limitations imposed by Rule 26(b)(2)(C).~~
31 (2) ***Limitations on Frequency and Extent.***
32 * * * * *

33 **(C)** *When Required.* On motion or on its own,
34 the court must limit the frequency or extent
35 of discovery otherwise allowed by these
36 rules or by local rule if it determines that:
37 * * * * *
38 **(iii)** the ~~burden or expense of the~~ proposed
39 discovery is outside the scope
40 permitted by Rule 26(b)(1)~~outweighs~~
41 ~~its likely benefit, considering the~~
42 ~~needs of the case, the amount in~~
43 ~~controversy, the parties' resources, the~~
44 ~~importance of the issues at stake in the~~
45 ~~action, and the importance of the~~
46 ~~discovery in resolving the issues~~.
47 * * * * *

48 **(c) Protective Orders.**

49 **(1)** ***In General.*** A party or any person from whom
50 discovery is sought may move for a protective
51 order in the court where the action is pending —
52 or as an alternative on matters relating to a
53 deposition, in the court for the district where the
54 deposition will be taken. The motion must
55 include a certification that the movant has in
56 good faith conferred or attempted to confer with
57 other affected parties in an effort to resolve the
58 dispute without court action. The court may, for
59 good cause, issue an order to protect a party or
60 person from annoyance, embarrassment,
61 oppression, or undue burden or expense,
62 including one or more of the following:

63 * * * * *

64 **(B)** specifying terms, including time and
65 place or the allocation of expenses, for the
66 disclosure or discovery;
67 * * * * *
68 **(d) Timing and Sequence of Discovery.**
69 * * * * *
70 **(2) *Early Rule 34 Requests.***
71 **(A)** *Time to Deliver.* More than 21 days after
72 the summons and complaint are served on a
73 party, a request under Rule 34 may be
74 delivered:
75 **(i)** to that party by any other party, and
76 **(ii)** by that party to any plaintiff or to any
77 other party that has been served.

78 (B) *When Considered Served.* The request is
79 considered to have been served at the first
80 Rule 26(f) conference.
81 (~~2~~3) ***Sequence.*** Unless~~, on motion,~~ the parties
82 stipulate or the court orders otherwise for the
83 parties' and witnesses' convenience and in the
84 interests of justice:
85 (A) methods of discovery may be used in any
86 sequence; and
87 (B) discovery by one party does not require any
88 other party to delay its discovery.
89 * * * * *
90 **(f) Conference of the Parties; Planning for Discovery.**
91 * * * * *
92 (3) ***Discovery Plan.*** A discovery plan must state the
93 parties' views and proposals on:

94 * * * * *

95 **(C)** any issues about disclosure, ~~or~~discovery, or
96 preservation of electronically stored
97 information, including the form or forms in
98 which it should be produced;

99 **(D)** any issues about claims of privilege or of
100 protection as trial-preparation materials,
101 including — if the parties agree on a
102 procedure to assert these claims after
103 production — whether to ask the court to
104 include their agreement in an order under
105 Federal Rule of Evidence 502;

106 * * * * *

Committee Note

Rule 26(b)(1) is changed in several ways.

Information is discoverable under revised Rule 26(b)(1) if it is relevant to any party's claim or defense and is proportional to the needs of the case. The considerations that bear on proportionality are moved from present Rule 26(b)(2)(C)(iii), slightly rearranged and with one addition.

Most of what now appears in Rule 26(b)(2)(C)(iii) was first adopted in 1983. The 1983 provision was explicitly adopted as part of the scope of discovery defined by Rule 26(b)(1). Rule 26(b)(1) directed the court to limit the frequency or extent of use of discovery if it determined that "the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation." At the same time, Rule 26(g) was added. Rule 26(g) provided that signing a discovery request, response, or objection certified that the request, response, or objection was "not unreasonable or unduly burdensome or expensive, given the needs of the case, the discovery already had in the case, the amount in controversy, and the importance of the issues at stake in the litigation." The parties thus shared the responsibility to honor these limits on the scope of discovery.

The 1983 Committee Note stated that the new provisions were added "to deal with the problem of over-discovery. The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry. The

new sentence is intended to encourage judges to be more aggressive in identifying and discouraging discovery overuse. The grounds mentioned in the amended rule for limiting discovery reflect the existing practice of many courts in issuing protective orders under Rule 26(c). . . . On the whole, however, district judges have been reluctant to limit the use of the discovery devices."

The clear focus of the 1983 provisions may have been softened, although inadvertently, by the amendments made in 1993. The 1993 Committee Note explained: "[F]ormer paragraph (b)(1) [was] subdivided into two paragraphs for ease of reference and to avoid renumbering of paragraphs (3) and (4)." Subdividing the paragraphs, however, was done in a way that could be read to separate the proportionality provisions as "limitations," no longer an integral part of the (b)(1) scope provisions. That appearance was immediately offset by the next statement in the Note: "Textual changes are then made in new paragraph (2) to enable the court to keep tighter rein on the extent of discovery."

The 1993 amendments added two factors to the considerations that bear on limiting discovery: whether "the burden or expense of the proposed discovery outweighs its likely benefit," and "the importance of the proposed discovery in resolving the issues." Addressing these and other limitations added by the 1993 discovery amendments, the Committee Note stated that "[t]he revisions in Rule 26(b)(2) are intended to provide the court with broader discretion to impose additional restrictions on the scope and extent of discovery . . . ."

The relationship between Rule 26(b)(1) and (2) was further addressed by an amendment made in 2000 that added a new sentence at the end of (b)(1): "All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii)[now Rule 26(b)(2)(C)]." The Committee Note recognized that "[t]hese limitations apply to discovery that is otherwise within the scope of subdivision (b)(1)." It explained that the Committee had been told repeatedly that courts were not using these limitations as originally intended. "This otherwise redundant cross-reference has been added to emphasize the need for active judicial use of subdivision (b)(2) to control excessive discovery."

The present amendment restores the proportionality factors to their original place in defining the scope of discovery. This change reinforces the Rule 26(g) obligation of the parties to consider these factors in making discovery requests, responses, or objections.

Restoring the proportionality calculation to Rule 26(b)(1) does not change the existing responsibilities of the court and the parties to consider proportionality, and the change does not place on the party seeking discovery the burden of addressing all proportionality considerations.

Nor is the change intended to permit the opposing party to refuse discovery simply by making a boilerplate objection that it is not proportional. The parties and the court have a collective responsibility to consider the proportionality of all discovery and consider it in resolving discovery disputes.

The parties may begin discovery without a full appreciation of the factors that bear on proportionality. A party requesting discovery, for example, may have little information about the burden or expense of responding. A party requested to provide discovery may have little information about the importance of the discovery in resolving the issues as understood by the requesting party. Many of these uncertainties should be addressed and reduced in the parties' Rule 26(f) conference and in scheduling and pretrial conferences with the court. But if the parties continue to disagree, the discovery dispute could be brought before the court and the parties' responsibilities would remain as they have been since 1983. A party claiming undue burden or expense ordinarily has far better information — perhaps the only information — with respect to that part of the determination. A party claiming that a request is important to resolve the issues should be able to explain the ways in which the underlying information bears on the issues as that party understands them. The court's responsibility, using all the information provided by the parties, is to consider these and all the other factors in reaching a case-specific determination of the appropriate scope of discovery.

The direction to consider the parties' relative access to relevant information adds new text to provide explicit focus on considerations already implicit in present Rule 26(b)(2)(C)(iii). Some cases involve what often is called "information asymmetry." One party — often an individual plaintiff — may have very little discoverable information. The other party may have vast amounts of information, including information that can be readily

retrieved and information that is more difficult to retrieve. In practice these circumstances often mean that the burden of responding to discovery lies heavier on the party who has more information, and properly so.

Restoring proportionality as an express component of the scope of discovery warrants repetition of parts of the 1983 and 1993 Committee Notes that must not be lost from sight. The 1983 Committee Note explained that "[t]he rule contemplates greater judicial involvement in the discovery process and thus acknowledges the reality that it cannot always operate on a self-regulating basis." The 1993 Committee Note further observed that "[t]he information explosion of recent decades has greatly increased both the potential cost of wide-ranging discovery and the potential for discovery to be used as an instrument for delay or oppression." What seemed an explosion in 1993 has been exacerbated by the advent of e-discovery. The present amendment again reflects the need for continuing and close judicial involvement in the cases that do not yield readily to the ideal of effective party management. It is expected that discovery will be effectively managed by the parties in many cases. But there will be important occasions for judicial management, both when the parties are legitimately unable to resolve important differences and when the parties fall short of effective, cooperative management on their own.

It also is important to repeat the caution that the monetary stakes are only one factor, to be balanced against other factors. The 1983 Committee Note recognized "the significance of the substantive issues, as measured in

philosophic, social, or institutional terms. Thus the rule recognizes that many cases in public policy spheres, such as employment practices, free speech, and other matters, may have importance far beyond the monetary amount involved." Many other substantive areas also may involve litigation that seeks relatively small amounts of money, or no money at all, but that seeks to vindicate vitally important personal or public values.

So too, consideration of the parties' resources does not foreclose discovery requests addressed to an impecunious party, nor justify unlimited discovery requests addressed to a wealthy party. The 1983 Committee Note cautioned that "[t]he court must apply the standards in an even-handed manner that will prevent use of discovery to wage a war of attrition or as a device to coerce a party, whether financially weak or affluent."

The burden or expense of proposed discovery should be determined in a realistic way. This includes the burden or expense of producing electronically stored information. Computer-based methods of searching such information continue to develop, particularly for cases involving large volumes of electronically stored information. Courts and parties should be willing to consider the opportunities for reducing the burden or expense of discovery as reliable means of searching electronically stored information become available.

A portion of present Rule 26(b)(1) is omitted from the proposed revision. After allowing discovery of any matter relevant to any party's claim or defense, the present rule

adds: "including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter." Discovery of such matters is so deeply entrenched in practice that it is no longer necessary to clutter the long text of Rule 26 with these examples. The discovery identified in these examples should still be permitted under the revised rule when relevant and proportional to the needs of the case. Framing intelligent requests for electronically stored information, for example, may require detailed information about another party's information systems and other information resources.

The amendment deletes the former provision authorizing the court, for good cause, to order discovery of any matter relevant to the subject matter involved in the action. The Committee has been informed that this language is rarely invoked. Proportional discovery relevant to any party's claim or defense suffices, given a proper understanding of what is relevant to a claim or defense. The distinction between matter relevant to a claim or defense and matter relevant to the subject matter was introduced in 2000. The 2000 Note offered three examples of information that, suitably focused, would be relevant to the parties' claims or defenses. The examples were "other incidents of the same type, or involving the same product"; "information about organizational arrangements or filing systems"; and "information that could be used to impeach a likely witness." Such discovery is not foreclosed by the amendments. Discovery that is relevant to the parties' claims or defenses may also support amendment of the

pleadings to add a new claim or defense that affects the scope of discovery.

The former provision for discovery of relevant but inadmissible information that appears "reasonably calculated to lead to the discovery of admissible evidence" is also deleted. The phrase has been used by some, incorrectly, to define the scope of discovery. As the Committee Note to the 2000 amendments observed, use of the "reasonably calculated" phrase to define the scope of discovery "might swallow any other limitation on the scope of discovery." The 2000 amendments sought to prevent such misuse by adding the word "Relevant" at the beginning of the sentence, making clear that "'relevant' means within the scope of discovery as defined in this subdivision . . . ." The "reasonably calculated" phrase has continued to create problems, however, and is removed by these amendments. It is replaced by the direct statement that "Information within this scope of discovery need not be admissible in evidence to be discoverable." Discovery of nonprivileged information not admissible in evidence remains available so long as it is otherwise within the scope of discovery.

Rule 26(b)(2)(C)(iii) is amended to reflect the transfer of the considerations that bear on proportionality to Rule 26(b)(1). The court still must limit the frequency or extent of proposed discovery, on motion or on its own, if it is outside the scope permitted by Rule 26(b)(1).

Rule 26(c)(1)(B) is amended to include an express recognition of protective orders that allocate expenses for

disclosure or discovery. Authority to enter such orders is included in the present rule, and courts already exercise this authority. Explicit recognition will forestall the temptation some parties may feel to contest this authority. Recognizing the authority does not imply that cost-shifting should become a common practice. Courts and parties should continue to assume that a responding party ordinarily bears the costs of responding.

Rule 26(d)(2) is added to allow a party to deliver Rule 34 requests to another party more than 21 days after that party has been served even though the parties have not yet had a required Rule 26(f) conference. Delivery may be made by any party to the party that has been served, and by that party to any plaintiff and any other party that has been served. Delivery does not count as service; the requests are considered to be served at the first Rule 26(f) conference. Under Rule 34(b)(2)(A) the time to respond runs from service. This relaxation of the discovery moratorium is designed to facilitate focused discussion during the Rule 26(f) conference. Discussion at the conference may produce changes in the requests. The opportunity for advance scrutiny of requests delivered before the Rule 26(f) conference should not affect a decision whether to allow additional time to respond.

Rule 26(d)(3) is renumbered and amended to recognize that the parties may stipulate to case-specific sequences of discovery.

Rule 26(f)(3) is amended in parallel with Rule 16(b)(3) to add two items to the discovery plan —

issues about preserving electronically stored information and court orders under Evidence Rule 502.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 33, N.D.R.Civ.P., Interrogatories to Parties

Proposed amendments to Rule 33 consistent with the December 1, 2015, amendments to Fed.R.Civ.P. 33 are attached. The proposed amendment is on line 15 and is minor change cross referencing the new Rule 26 scope of discovery provision.

RULE 33. INTERROGATORIES TO PARTIES

1 (a) In General.

2 (1) Timing. A party may serve written interrogatories on the plaintiff after
3 commencement of the action and on any other party after service of the summons
4 and complaint on that party.

5 (2) Scope. An interrogatory may relate to any matter that may be inquired
6 into under Rule 26(b). An interrogatory is not objectionable merely because it asks
7 for an opinion or contention that relates to fact or the application of law to fact, but
8 the court may order that the interrogatory need not be answered until designated
9 discovery is complete, or until a pretrial conference or some other time.

10 (3) Number. Unless otherwise stipulated or ordered by the court, a party
11 may serve on any other party no more than 50 written interrogatories. Interrogatory
12 subparts are not counted as separate interrogatories if they are logically or factually
13 subsumed within and necessarily related to the primary question. Leave to serve
14 additional interrogatories may be granted to the extent consistent with Rule
15 26(b)(1)~~(B)~~.

16 (b) Answers and Objections.

17 (1) Responding Party. The interrogatories must be answered:

18 (A) by the party to whom they are directed;

19 (B) if that party is a public or private corporation, a partnership, an

20 association, a governmental agency, or any other organization, by any officer or
21 agent, who must furnish the information available to the party.
22 (2) Time to Respond. The responding party must serve its answer and any
23 objections within 30 days after being served with the interrogatories, but a
24 defendant is not required to serve its answer and any objections until 45 days after
25 service of the summons and complaint on it. A shorter or longer time may be
26 stipulated to under Rule 29 or be ordered by the court. Any stipulated extension of
27 time applies to interrogatory answers and objections.
28 (3) Answering Each Interrogatory. Each interrogatory must, to the extent it
29 is not objected to, be answered separately and fully in writing under oath. A party
30 must restate the interrogatory being answered immediately preceding its answer to
31 the interrogatory.
32 (4) Objections. The grounds for objecting to an interrogatory must be stated
33 with specificity. Any ground not stated in a timely objection is waived unless the
34 court, for good cause, excuses the failure.
35 (5) Signature. The person who makes the answers must sign them, and the
36 attorney who objects must sign any objections.
37 (6) Repetitive Question. A party is not required to answer an interrogatory
38 that is repetitive of any interrogatory it has already answered. An interrogatory
39 served by one party is considered to be served by all parties.
40 (c) Use. An answer to an interrogatory may be used to the extent allowed by

41 the Rules of Evidence.

42 (d) Option to Produce Business Records. If the answer to an interrogatory
43 may be determined by examining, auditing, compiling abstracting, or summarizing
44 a party's business records (including electronically stored information), and if the
45 burden of deriving or ascertaining the answer will be substantially the same for
46 either party, the responding party may answer by:

47 (1) specifying the records that must be reviewed, in sufficient detail to
48 enable the interrogating party to locate and identify them as readily as the
49 responding party could; and

50 (2) giving the interrogating party a reasonable opportunity to examine and
51 audit the records and to make copies, compilations, abstracts, or summaries.

52 EXPLANATORY NOTE

53 Rule 33 was amended, effective January 1, 1981; September 1, 1983;
54 March 1, 1992 on an emergency basis; July 14, 1993; March 1, 1997; March 1,
55 2004; March 1, 2008; March 1, 2011; March 1, 2013; March 1,
56 2016;_____.

57 Rule 33 was amended, effective March 1, 2011, in response to the
58 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
59 and organization of the rule were changed to make the rule more easily understood
60 and to make style and terminology consistent throughout the rules.

61 Paragraph (a)(3) was added, effective March 1, 2013, to limit the number of

62 interrogatories a party may serve. Each party is allowed to serve 50 interrogatories
63 on any other party, but must obtain leave of court (or a stipulation from the
64 opposing party) to serve a larger number. Parties cannot evade this limitation by
65 joining as "subparts" questions that seek information about discrete separate
66 subjects. However, a question asking about communications of a particular type
67 should be treated as a single interrogatory even though it requests that the time,
68 place, persons present, and contents be stated separately for each such
69 communication.

70 Paragraph (a)(3) was amended, effective March 1, 2016, to define the
71 instances in which a subpart of an interrogatory does not constitute a separate
72 interrogatory.

73 Paragraph (a)(3) was amended, effective _____, to cross reference
74 the proportionality requirements in Rule 26(b)(1).

75 Paragraph (b)(2) was amended, effective March 1, 2004, to clarify that any
76 stipulated extension applies to answers and objections.

77 Subdivision (d) was amended, effective March 1, 2008, in response to the
78 2006 federal revision. The amendments clarify that electronically stored
79 information is a type of business record.

80 SOURCES: Joint Procedure Committee Minutes of _____;
81 January 29-30, 2015, pages 15-16; January 26-27, 2012, pages 20-22; January
82 29-30, 2009, page 28; September 28-29, 2006, pages 20-22; January 30-31, 2003,

83 pages 13-15; September 28-29, 1995, page 14; November 7-8, 1991, page 5;

84 October 25-26, 1990, pages 17-18; February 17-18, 1983, pages 12-14; October

85 30-31, 1980, pages 19-20; November 29-30, 1979, page 7; Fed.R.Civ.P. 33.

86 CROSS REFERENCE: N.D.R.Civ.P. 26 (General Provisions Governing

87 Discovery), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure),

88 N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for

89 Inspection and Other Purposes), and N.D.R.Civ.P. 37 (Failure to Make Discovery

90 Sanctions); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure).

1 **Rule 33. Interrogatories to Parties**

2 **(a) In General.**

3 **(1)** ***Number.*** Unless otherwise stipulated or ordered
4 by the court, a party may serve on any other
5 party no more than 25 written interrogatories,
6 including all discrete subparts. Leave to serve
7 additional interrogatories may be granted to the
8 extent consistent with Rule 26(b)(1) and (2).

9 * * * * *

Committee Note

Rule 33 is amended in parallel with Rules 30 and 31 to reflect the recognition of proportionality in Rule 26(b)(1).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 34, N.D.R.Civ.P., Producing Documents, Electronically Stored Information and Tangible Things, or Entering onto Land for Inspection and Other Purposes

Proposed amendments to Rule 34 consistent with the December 1, 2015, amendments to Fed.R.Civ.P. 34 are attached.

The proposed amendments begin at line 32 with new language requiring grounds for an objection to production to be stated with specificity, allowing copies to be produced instead of allowing inspection, and requiring an objection to state if any requested materials are being withheld based on the objection. The attached federal comments indicate that the new language is intended to clarify requirements for objections and to reflect the common practice of providing copies.

As discussed under Rule 26, a shorter response time for Rule 34 requests was included under the federal rule amendments. This amendment is not included with the proposed changes to Rule 34, which currently has a 30 day deadline for responding but allows a defendant 45 after service of the summons and complaint to respond.

RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION AND TANGIBLE THINGS, OR ENTERING ONTO LAND FOR INSPECTION AND OTHER PURPOSES

1 (a) In General. A party may serve on any other party a request within the
2 scope of Rule 26(b):
3 (1) to produce and permit the requesting party or its representative to
4 inspect, copy, test, or sample the following items in the responding party's
5 possession, custody, or control:
6 (A) any designated documents or electronically stored information -
7 including writings, drawings, graphs, charts, photographs, sound recordings,
8 images, and other data or data compilations - stored in any medium from which
9 information can be obtained either directly or, if necessary, after translation by the
10 responding party into a reasonably usable form; or
11 (B) any designated tangible things; or
12 (2) to permit entry onto designated land or other property possessed or
13 controlled by the responding party, so that the requesting party may inspect,
14 measure, survey, photograph, test, or sample the property or any designated object
15 or operation on it.
16 (b) Procedure.
17 (1) Contents of the Request. The request:

18 (A) must describe with reasonable particularity each item or category of

19 items to be inspected;

20 (B) must specify a reasonable time, place and manner for the inspection and

21 for performing the related acts; and

22 (C) may specify the form or forms in which electronically stored

23 information is to be produced.

24 (2) Responses and Objections.

25 (A) Time to Respond. The party to whom the request is directed must

26 respond in writing within 30 days after being served, but a defendant is not

27 required to serve its response until 45 days after being served with the summons

28 and complaint. A shorter or longer time may be stipulated to under Rule 29 or be

29 ordered by the court.

30 (B) Responding to Each Item. For each item or category, the response must

31 either state that inspection and related activities will be permitted as requested or

32 state ~~an objection~~ with specificity the grounds for objecting to the request,

33 including the reasons. The responding party may state that it will produce copies of

34 documents or of electronically stored information instead of permitting inspection.

35 The production must then be completed no later than the time for inspection

36 specified in the request or another reasonable time specified in the response.

37 (C) Objections. An objection must state whether any responsive materials

38 are being withheld on the basis of that objection. An objection to part of a request

39 must specify the part and permit inspection of the rest.

40 (D) Responding to a Request for Production of Electronically Stored
41 Information. The response may state an objection to a requested form for
42 producing electronically stored information. If the responding party objects to a
43 requested form - or if no form was specified in the request - the party must state
44 the form or forms it intends to use.

45 (E) Producing the Documents or Electronically Stored Information. Unless
46 otherwise stipulated or ordered by the court, these procedures apply to producing
47 documents or electronically stored information:

48 (i) A party must produce documents as they are kept in the usual course of
49 business or must organize and label them to correspond to the categories in the
50 request;

51 (ii) If the request does not specify a form for producing electronically stored
52 information, a party must produce it in a form or forms in which it ordinarily
53 maintained or in a reasonably usable form or forms; and

54 (iii) a party need not produce the same electronically stored information in
55 more than one form.

56 (c) ~~Persons not parties~~ Nonparties. As provided in Rule 45, a nonparty may
57 be compelled to produce documents and tangible things or to permit an inspection.

58 EXPLANATORY NOTE

59 Rule 34 was amended, effective July 1, 1981; March 1, 1990; January 1,

60 1995; March 1, 1997; March 1, 2008; March 1,

61 2011;_____.

62 An objection must be served within the time for serving a response or the

63 objection is waived. Any extension must be in writing and should specify whether

64 the extension includes responses, objections, or both.

65 Paragraph (b)(2) was amended, effective_____, in response to

66 the December 1, 2015, revision of Fed.R.Civ.P. 34. The amendments allow copies

67 of documents or electronically stored information to be produced rather than

68 permitting inspection and to require an objection to specify whether anything is

69 being withheld on the basis of the objection.

70 Rule 34 was amended, effective March 1, 2011, in response to the

71 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language

72 and organization of the rule were changed to make the rule more easily understood

73 and to make style and terminology consistent throughout the rules.

74 Rule 34 was amended, effective March 1, 2008, in response to the 2006

75 federal revision. The amendments provide guidance regarding requests for

76 electronically stored information.

77 SOURCES: Joint Procedure Committee Minutes of _____;

78 January 29-30, 2009, pages 28-29; September 28-29, 2006, pages 20-22;January

79 25-26, 1996, page 6; September 28-29, 1995, page 14; April 20, 1989, page 2;

80 December 3, 1987, page 11; October 30-31, 1980, pages 20-22; November 29-30,

81 1979, page 7; Fed.R.Civ.P. 34.

82 CROSS REFERENCE: N.D.R.Civ.P. 16 (Pre-Trial Procedure Formulating

83 Issues), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P.

84 29 (Stipulations Regarding Discovery Procedures), N.D.R.Civ.P. 37 (Failure to

85 Make Discovery Sanctions), N.D.R.Ev. 510 (Waiver of Privilege by Voluntary

86 Disclosure).

1 **Rule 34. Producing Documents, Electronically Stored**
2 **Information, and Tangible Things, or**
3 **Entering onto Land, for Inspection and**
4 **Other Purposes**

5 * * * * *

6 **(b) Procedure.**

7 * * * * *

8 **(2)** ***Responses and Objections.***

9 **(A)** *Time to Respond.* The party to whom the
10 request is directed must respond in writing
11 within 30 days after being served or — if
12 the request was delivered under
13 Rule 26(d)(2) — within 30 days after the
14 parties' first Rule 26(f) conference. A
15 shorter or longer time may be stipulated to
16 under Rule 29 or be ordered by the court.

17 **(B)** *Responding to Each Item.* For each item or
18 category, the response must either state that

19 inspection and related activities will be
20 permitted as requested or state ~~an~~
21 ~~objection~~ with specificity the grounds for
22 objecting to the request, including the
23 reasons. The responding party may state
24 that it will produce copies of documents or
25 of electronically stored information instead
26 of permitting inspection. The production
27 must then be completed no later than the
28 time for inspection specified in the request
29 or another reasonable time specified in the
30 response.
31 **(C)** *Objections.* An objection must state
32 whether any responsive materials are being
33 withheld on the basis of that objection. An

34 objection to part of a request must specify

35 the part and permit inspection of the rest.

36 * * * * *

Committee Note

Several amendments are made in Rule 34, aimed at reducing the potential to impose unreasonable burdens by objections to requests to produce.

Rule 34(b)(2)(A) is amended to fit with new Rule 26(d)(2). The time to respond to a Rule 34 request delivered before the parties' Rule 26(f) conference is 30 days after the first Rule 26(f) conference.

Rule 34(b)(2)(B) is amended to require that objections to Rule 34 requests be stated with specificity. This provision adopts the language of Rule 33(b)(4), eliminating any doubt that less specific objections might be suitable under Rule 34. The specificity of the objection ties to the new provision in Rule 34(b)(2)(C) directing that an objection must state whether any responsive materials are being withheld on the basis of that objection. An objection may state that a request is overbroad, but if the objection recognizes that some part of the request is appropriate the objection should state the scope that is not overbroad. Examples would be a statement that the responding party will limit the search to documents or electronically stored information created within a given period of time prior to

the events in suit, or to specified sources. When there is such an objection, the statement of what has been withheld can properly identify as matters "withheld" anything beyond the scope of the search specified in the objection.

Rule 34(b)(2)(B) is further amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. The response to the request must state that copies will be produced. The production must be completed either by the time for inspection specified in the request or by another reasonable time specifically identified in the response. When it is necessary to make the production in stages the response should specify the beginning and end dates of the production.

Rule 34(b)(2)(C) is amended to provide that an objection to a Rule 34 request must state whether anything is being withheld on the basis of the objection. This amendment should end the confusion that frequently arises when a producing party states several objections and still produces information, leaving the requesting party uncertain whether any relevant and responsive information has been withheld on the basis of the objections. The producing party does not need to provide a detailed description or log of all documents withheld, but does need to alert other parties to the fact that documents have been withheld and thereby facilitate an informed discussion of the objection. An objection that states the limits that have controlled the search for responsive and relevant materials qualifies as a statement that the materials have been "withheld."

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 37, N.D.R.Civ.P., Failure to Make or Cooperate in Discovery; Sanctions

Proposed amendments to Rule 37 consistent with the December 1, 2015, amendments to Fed.R.Civ.P. 37 are attached.

A minor amendment is proposed at line 19 to reflect that copies of documents can be produced in response to a Rule 34 request.

Significant amendments are proposed to subdivision (f) beginning at line 118. The previous somewhat vague standard for imposing sanctions for failure to preserve electronic information would be replaced by more detailed standards on determining when to impose sanctions along with a list of sanctions that may be imposed. As explained in the attached federal comments, the amendment was necessary because of the growth of discovery of electronic information and the different standards that had been developed and applied in different parts of the country for discovery sanctions related to electronic information.

A proposed amendment to the explanatory note beginning at line 145 would explain that a change in standards had been made but it does not explain how to apply the standards. The federal comments are considerably more extensive and do contain a discussion of how to apply the new standards. The committee may wish to discuss whether the proposed amendments to the Rule 37 explanatory note should be expanded.

RULE 37. FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS

1 (a) Motion for an Order Compelling Discovery.

2 (1) In General. On notice to other parties and all affected persons, a party
3 may move for an order compelling discovery. The motion must include a
4 certification that the movant has in good faith conferred or attempted to confer
5 with the person or party failing to make discovery in an effort to obtain it without
6 court action.

7 (2) Appropriate Court. A motion for an order to a party must be made in the
8 court where the action is pending. A motion for an order to a nonparty may be
9 made in the court where the discovery is or will be taken or in the court where the
10 action is pending.

11 (3) Specific Motions.

12 (A) To Compel a Discovery Response. A party seeking discovery may
13 move for an order compelling an answer, designation, production, or inspection.
14 This motion may be made if:

15 (i) a deponent fails to answer a question asked under Rule 30 or 31;

16 (ii) a corporation or other entity fails to make a designation under Rule
17 30(b)(6) or 31(a);

18 (iii) a party fails to answer an interrogatory submitted under Rule 33; or

19 (iv) a party fails to <u>produce documents or fails to</u> respond that inspection

20 will be permitted - or fails to permit inspection - as requested under Rule 34.

21 (B) Related to a Deposition. When taking an oral deposition, the party

22 asking a question may complete or adjourn the examination before moving for an

23 order.

24 (4) Evasive or Incomplete Answer or Response. For purposes of this

25 subdivision (a), an evasive or incomplete answer or response must be treated as a

26 failure to answer or respond.

27 (5) Payment of Expenses; Protective Order.

28 (A) If the Motion Is Granted (or Discovery Is Provided After Filing). If the

29 motion is granted—or if the requested discovery is provided after the motion was

30 filed—the court must, after giving an opportunity to be heard, require the party or

31 deponent whose conduct necessitated the motion, the party or attorney advising

32 that conduct, or both to pay the movant's reasonable expenses incurred in making

33 the motion, including attorney's fees. But the court must not order this payment if:

34 (i) the movant filed the motion before attempting in good faith to obtain

35 discovery without court action;

36 (ii) the opposing party's nondisclosure, response, or objection was

37 substantially justified; or

38 (iii) other circumstances make an award of expenses unjust.

39 (B) If the Motion Is Denied. If the motion is denied, the court may issue any

40 protective order authorized under Rule 26(c) and must, after giving an opportunity

41 to be heard, require the movant, the attorney filing the motion, or both to pay the
42 party or deponent who opposed the motion its reasonable expenses incurred in
43 opposing the motion, including attorney's fees. But the court must not order this
44 payment if the motion was substantially justified or other circumstances make an
45 award of expenses unjust.

46 (C) If the Motion Is Granted in Part and Denied in Part. If the motion is
47 granted in part and denied in part, the court may issue any protective order
48 authorized under Rule 26(c) and may, after giving an opportunity to be heard,
49 apportion the reasonable expenses for the motion.

50 (b) Failure to Comply With a Court Order.

51 (1) Sanctions in the District Where the Deposition Is Taken. If the court
52 where the discovery is taken orders a deponent to be sworn or to answer a question
53 and the deponent fails to obey, the failure may be treated as contempt of court.

54 (2) Sanctions by the Court in Which the Action Is Pending.

55 (A) For Not Obeying a Discovery Order. If a party or a party's officer,
56 director, or managing agent - or a witness designated under Rule 30(b)(6) or 31(a)
57 - fails to obey an order to provide or permit discovery, including an order under
58 Rule 26(f), 35, or 37(a), the court where the action is pending may issue further
59 just orders. They may include the following:

60 (i) directing that the matters embraced in the order or other designated facts
61 be taken as established for purposes of the action, as the prevailing party claims;

62 (ii) prohibiting the disobedient party from supporting or opposing
63 designated claims or defenses, or from introducing designated matters in evidence;
64 (iii) striking pleadings in whole or in part;
65 (iv) staying further proceedings until the order is obeyed;
66 (v) dismissing the action or proceeding in whole or in part;
67 (vi) rendering a default judgment against the disobedient party; or
68 (vii) treating as contempt of court the failure to obey any order except an
69 order to submit to a physical or mental examination.
70 (B) For Not Producing a Person for Examination. If a party fails to comply
71 with an order under Rule 35(a) requiring it to produce another person for
72 examination, the court may issue any of the orders listed in Rule
73 37(b)(2)(A)(i)-(vi), unless the disobedient party shows that it cannot produce the
74 other person.
75 (C) Payment of Expenses. Instead of or in addition to the orders above, the
76 court must order the disobedient party, the attorney advising that party, or both to
77 pay the reasonable expenses, including attorney's fees, caused by the failure, unless
78 the failure was substantially justified or other circumstances make an award of
79 expenses unjust.
80 (c) Failure to Admit. If a party fails to admit what is requested under Rule
81 36 and if the requesting party later proves a document to be genuine or the matter
82 true, the requesting party may move that the party who failed to admit pay the

83 reasonable expenses, including attorney's fees, incurred in making that proof. The
84 court must so order unless:
85 (1) the request was held objectionable under Rule 36(a);
86 (2) the admission sought was of no substantial importance;
87 (3) the party failing to admit had reasonable ground to believe that it might
88 prevail on the matter; or
89 (4) there was other good reason for the failure to admit.
90 (d) Party's Failure to Attend Its Own Deposition, Serve Answers to
91 Interrogatories, or Respond to a Request for Inspection.
92 (1) In General.
93 (A) Motion; Grounds for Sanctions. The court where the action is pending
94 may, on motion, order sanctions if:
95 (i) a party or a party's officer, director, or managing agent - or a person
96 designated under Rule 30(b)(6) or 31(a) - fails, after being served with proper
97 notice, to appear for that person's deposition; or
98 (ii) a party, after being properly served with interrogatories under Rule 33
99 or a request for inspection under Rule 34, fails to serve its answers, objections, or
100 written response.
101 (B) Certification. A motion for sanctions for failing to answer or respond
102 must include a certification that the movant has in good faith conferred or
103 attempted to confer with the party failing to act in an effort to obtain the answer or

104 response without court action.

105 (2) Unacceptable Excuse for Failing to Act. A failure described in Rule
106 37(d)(1)(A) is not excused on the ground that the discovery sought was
107 objectionable, unless the party failing to act has a pending motion for a protective
108 order under Rule 26(c).

109 (3) Types of Sanctions. Sanctions may include any of the orders listed in
110 Rule 37(b)(2)(A)(i)-(vi). Instead of or in addition to these sanctions, the court must
111 require the party failing to act, the attorney advising that party, or both to pay the
112 reasonable expenses, including attorney's fees, caused by the failure, unless the
113 failure was substantially justified or other circumstances make an award of
114 expenses unjust.

115 (e) Expenses Against the State. Except to the extent permitted by statute,
116 expenses and fees may not be awarded against the State of North Dakota under this
117 rule.

118 (f) Failure to Preserve Electronically Stored Information. ~~Absent~~
119 ~~exceptional circumstances, a court may not impose sanctions under these rules on a~~
120 ~~party for failing to provide electronically stored information lost as a result of the~~
121 ~~routine, good-faith operation of an electronic information system.~~ If electronically
122 stored information that should have been preserved in the anticipation or conduct
123 of litigation is lost because a party failed to take reasonable steps to preserve it,
124 and it cannot be restored or replaced through additional discovery, the court:

125 (1) upon finding prejudice to another party from loss of the information,

126 may order measures no greater than necessary to cure the prejudice; or

127 (2) only upon finding that the party acted with the intent to deprive another

128 party of the information's use in the litigation may:

129 (A) presume that the lost information was unfavorable to the party;

130 (B) instruct the jury that it may or must presume the information was

131 unfavorable to the party; or

132 (C) dismiss the action or enter a default judgment.

133 (g) Failure to Participate in the Framing of a Discovery Plan. If a party or its

134 attorney fails to participate in good faith in developing and submitting a proposed

135 discovery plan as required by Rule 26(f), the court may, after giving an opportunity

136 to be heard, require that party or attorney to pay to any other party the reasonable

137 expenses, including attorney's fees, caused by the failure.

138 EXPLANATORY NOTE

139 Rule 37 was amended, effective July 1, 1981; March 1, 1990; January 1,

140 1995; March 1, 1997; March 1, 2004; March 1, 2008; March 1,

141 2011;_____.

142 Paragraph (a)(2) was amended, effective March 1, 2004, to require a party

143 moving for a discovery order to certify that a good faith effort was made to resolve

144 the discovery dispute prior to seeking court intervention.

145 Subdivision (f) was amended, effective_____, to specify

146 measures a court may employ when electronically stored information is lost and to
147 specify the findings a court must make to justify imposition of these measures.
148 Rule 37 was amended, effective March 1, 2008, in response to the 2006
149 federal revision. A new subdivision (f) on electronically stored information was
150 added and material dealing with expenses against the state was moved to
151 subdivision (e).
152 Rule 37 was amended, effective March 1, 2011, in response to the
153 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
154 and organization of the rule were changed to make the rule more easily understood
155 and to make style and terminology consistent throughout the rules.
156 SOURCES: Joint Procedure Committee Minutes of _____;
157 January 29-30, 2009, pages 31-32; January 25, 2007, page 10; September 28-29,
158 2006, pages 22-25; January 30-31, 2003, pages 15-16; September 28-29, 1995,
159 pages 15-16; January 27-28, 1994, pages 16-17; April 20, 1989, page 2; December
160 3, 1987, page 11; December 11-12, 1980, page 3; October 30-31, 1980, pages
161 22-26; November 29-30, 1979, page 80; Fed.R.Civ.P. 37.
162 CROSS REFERENCE: N.D.R.Civ.P. 26 (General Provisions Governing
163 Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), N.D.R.Civ.P.
164 31 (Depositions of Witnesses Upon Written Questions), N.D.R.Civ.P. 33
165 (Interrogatories to Parties), N.D.R.Civ.P. 34 (Production of Documents and Things
166 and Entry Upon Land for Inspection and Other Purposes), N.D.R.Civ.P. 35

167 (Physical and Mental Examination of Persons), N.D.R.Civ.P. 36 (Requests for

168 Admission) and N.D.R.Civ.P. 45 (Subpoena).

170

1 **Rule 37. Failure to Make Disclosures or to Cooperate**
2 **in Discovery; Sanctions**

3 **(a) Motion for an Order Compelling Disclosure or**
4 **Discovery.**

5 * * * * *

6 **(3)** ***Specific Motions.***

7 * * * * *

8 **(B)** *To Compel a Discovery Response.* A party
9 seeking discovery may move for an order
10 compelling an answer, designation,
11 production, or inspection. This motion may
12 be made if:

13 * * * * *

14 **(iv)** a party fails to produce documents or
15 fails to respond that inspection will be
16 permitted — or fails to permit

17 inspection — as requested under
18 Rule 34.
19 * * * * *
20 **(e) Failure to ~~Provide~~Preserve Electronically Stored**
21 **Information.** ~~Absent exceptional circumstances, a~~
22 ~~court may not impose sanctions under these rules on a~~
23 ~~party for failing to provide electronically stored~~
24 ~~information lost as a result of the routine, good faith~~
25 ~~operation of an electronic information system.~~If
26 electronically stored information that should have
27 been preserved in the anticipation or conduct of
28 litigation is lost because a party failed to take
29 reasonable steps to preserve it, and it cannot be
30 restored or replaced through additional discovery, the
31 court:

32 **(1)** upon finding prejudice to another party from loss
33 of the information, may order measures no
34 greater than necessary to cure the prejudice; or
35 **(2)** only upon finding that the party acted with the
36 intent to deprive another party of the
37 information's use in the litigation may:
38 **(A)** presume that the lost information was
39 unfavorable to the party;
40 **(B)** instruct the jury that it may or must
41 presume the information was unfavorable to
42 the party; or
43 **(C)** dismiss the action or enter a default
44 judgment.
45 * * * * *

Committee Note

Subdivision (a). Rule 37(a)(3)(B)(iv) is amended to reflect the common practice of producing copies of documents or electronically stored information rather than simply permitting inspection. This change brings item (iv) into line with paragraph (B), which provides a motion for an order compelling "production, or inspection."

Subdivision (e). Present Rule 37(e), adopted in 2006, provides: "Absent exceptional circumstances, a court may not impose sanctions under these rules on a party for failing to provide electronically stored information lost as a result of the routine, good-faith operation of an electronic information system." This limited rule has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information. Federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve electronically stored information. These developments have caused litigants to expend excessive effort and money on preservation in order to avoid the risk of severe sanctions if a court finds they did not do enough.

New Rule 37(e) replaces the 2006 rule. It authorizes and specifies measures a court may employ if information that should have been preserved is lost, and specifies the findings necessary to justify these measures. It therefore forecloses reliance on inherent authority or state law to determine when certain measures should be used. The rule does not affect the validity of an independent tort claim for

spoliation if state law applies in a case and authorizes the claim.

The new rule applies only to electronically stored information, also the focus of the 2006 rule. It applies only when such information is lost. Because electronically stored information often exists in multiple locations, loss from one source may often be harmless when substitute information can be found elsewhere.

The new rule applies only if the lost information should have been preserved in the anticipation or conduct of litigation and the party failed to take reasonable steps to preserve it. Many court decisions hold that potential litigants have a duty to preserve relevant information when litigation is reasonably foreseeable. Rule 37(e) is based on this common-law duty; it does not attempt to create a new duty to preserve. The rule does not apply when information is lost before a duty to preserve arises.

In applying the rule, a court may need to decide whether and when a duty to preserve arose. Courts should consider the extent to which a party was on notice that litigation was likely and that the information would be relevant. A variety of events may alert a party to the prospect of litigation. Often these events provide only limited information about that prospective litigation, however, so that the scope of information that should be preserved may remain uncertain. It is important not to be blinded to this reality by hindsight arising from familiarity with an action as it is actually filed.

Although the rule focuses on the common-law obligation to preserve in the anticipation or conduct of litigation, courts may sometimes consider whether there was an independent requirement that the lost information be preserved. Such requirements arise from many sources — statutes, administrative regulations, an order in another case, or a party's own information-retention protocols. The court should be sensitive, however, to the fact that such independent preservation requirements may be addressed to a wide variety of concerns unrelated to the current litigation. The fact that a party had an independent obligation to preserve information does not necessarily mean that it had such a duty with respect to the litigation, and the fact that the party failed to observe some other preservation obligation does not itself prove that its efforts to preserve were not reasonable with respect to a particular case.

The duty to preserve may in some instances be triggered or clarified by a court order in the case. Preservation orders may become more common, in part because Rules 16(b)(3)(B)(iii) and 26(f)(3)(C) are amended to encourage discovery plans and orders that address preservation. Once litigation has commenced, if the parties cannot reach agreement about preservation issues, promptly seeking judicial guidance about the extent of reasonable preservation may be important.

The rule applies only if the information was lost because the party failed to take reasonable steps to preserve the information. Due to the ever-increasing volume of electronically stored information and the multitude of

devices that generate such information, perfection in preserving all relevant electronically stored information is often impossible. As under the current rule, the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information, although the prospect of litigation may call for reasonable steps to preserve information by intervening in that routine operation. This rule recognizes that "reasonable steps" to preserve suffice; it does not call for perfection. The court should be sensitive to the party's sophistication with regard to litigation in evaluating preservation efforts; some litigants, particularly individual litigants, may be less familiar with preservation obligations than others who have considerable experience in litigation.

Because the rule calls only for reasonable steps to preserve, it is inapplicable when the loss of information occurs despite the party's reasonable steps to preserve. For example, the information may not be in the party's control. Or information the party has preserved may be destroyed by events outside the party's control — the computer room may be flooded, a "cloud" service may fail, a malign software attack may disrupt a storage system, and so on. Courts may, however, need to assess the extent to which a party knew of and protected against such risks.

Another factor in evaluating the reasonableness of preservation efforts is proportionality. The court should be sensitive to party resources; aggressive preservation efforts can be extremely costly, and parties (including

governmental parties) may have limited staff and resources to devote to those efforts. A party may act reasonably by choosing a less costly form of information preservation, if it is substantially as effective as more costly forms. It is important that counsel become familiar with their clients' information systems and digital data — including social media — to address these issues. A party urging that preservation requests are disproportionate may need to provide specifics about these matters in order to enable meaningful discussion of the appropriate preservation regime.

When a party fails to take reasonable steps to preserve electronically stored information that should have been preserved in the anticipation or conduct of litigation, and the information is lost as a result, Rule 37(e) directs that the initial focus should be on whether the lost information can be restored or replaced through additional discovery. Nothing in the rule limits the court's powers under Rules 16 and 26 to authorize additional discovery. Orders under Rule 26(b)(2)(B) regarding discovery from sources that would ordinarily be considered inaccessible or under Rule 26(c)(1)(B) on allocation of expenses may be pertinent to solving such problems. If the information is restored or replaced, no further measures should be taken. At the same time, it is important to emphasize that efforts to restore or replace lost information through discovery should be proportional to the apparent importance of the lost information to claims or defenses in the litigation. For example, substantial measures should not be employed to restore or replace information that is marginally relevant or duplicative.

Subdivision (e)(1). This subdivision applies only if information should have been preserved in the anticipation or conduct of litigation, a party failed to take reasonable steps to preserve the information, information was lost as a result, and the information could not be restored or replaced by additional discovery. In addition, a court may resort to (e)(1) measures only "upon finding prejudice to another party from loss of the information." An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation.

The rule does not place a burden of proving or disproving prejudice on one party or the other. Determining the content of lost information may be a difficult task in some cases, and placing the burden of proving prejudice on the party that did not lose the information may be unfair. In other situations, however, the content of the lost information may be fairly evident, the information may appear to be unimportant, or the abundance of preserved information may appear sufficient to meet the needs of all parties. Requiring the party seeking curative measures to prove prejudice may be reasonable in such situations. The rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Once a finding of prejudice is made, the court is authorized to employ measures "no greater than necessary to cure the prejudice." The range of such measures is quite broad if they are necessary for this purpose. There is no all-purpose hierarchy of the severity of various measures;

the severity of given measures must be calibrated in terms of their effect on the particular case. But authority to order measures no greater than necessary to cure prejudice does not require the court to adopt measures to cure every possible prejudicial effect. Much is entrusted to the court's discretion.

In an appropriate case, it may be that serious measures are necessary to cure prejudice found by the court, such as forbidding the party that failed to preserve information from putting on certain evidence, permitting the parties to present evidence and argument to the jury regarding the loss of information, or giving the jury instructions to assist in its evaluation of such evidence or argument, other than instructions to which subdivision (e)(2) applies. Care must be taken, however, to ensure that curative measures under subdivision (e)(1) do not have the effect of measures that are permitted under subdivision (e)(2) only on a finding of intent to deprive another party of the lost information's use in the litigation. An example of an inappropriate (e)(1) measure might be an order striking pleadings related to, or precluding a party from offering any evidence in support of, the central or only claim or defense in the case. On the other hand, it may be appropriate to exclude a specific item of evidence to offset prejudice caused by failure to preserve other evidence that might contradict the excluded item of evidence.

Subdivision (e)(2). This subdivision authorizes courts to use specified and very severe measures to address or deter failures to preserve electronically stored information, but only on finding that the party that lost the

information acted with the intent to deprive another party of the information's use in the litigation. It is designed to provide a uniform standard in federal court for use of these serious measures when addressing failure to preserve electronically stored information. It rejects cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize the giving of adverse-inference instructions on a finding of negligence or gross negligence.

Adverse-inference instructions were developed on the premise that a party's intentional loss or destruction of evidence to prevent its use in litigation gives rise to a reasonable inference that the evidence was unfavorable to the party responsible for loss or destruction of the evidence. Negligent or even grossly negligent behavior does not logically support that inference. Information lost through negligence may have been favorable to either party, including the party that lost it, and inferring that it was unfavorable to that party may tip the balance at trial in ways the lost information never would have. The better rule for the negligent or grossly negligent loss of electronically stored information is to preserve a broad range of measures to cure prejudice caused by its loss, but to limit the most severe measures to instances of intentional loss or destruction.

Similar reasons apply to limiting the court's authority to presume or infer that the lost information was unfavorable to the party who lost it when ruling on a pretrial motion or presiding at a bench trial. Subdivision (e)(2) limits the ability of courts to draw

adverse inferences based on the loss of information in these circumstances, permitting them only when a court finds that the information was lost with the intent to prevent its use in litigation.

Subdivision (e)(2) applies to jury instructions that permit or require the jury to presume or infer that lost information was unfavorable to the party that lost it. Thus, it covers any instruction that directs or permits the jury to infer from the loss of information that it was in fact unfavorable to the party that lost it. The subdivision does not apply to jury instructions that do not involve such an inference. For example, subdivision (e)(2) would not prohibit a court from allowing the parties to present evidence to the jury concerning the loss and likely relevance of information and instructing the jury that it may consider that evidence, along with all the other evidence in the case, in making its decision. These measures, which would not involve instructing a jury it may draw an adverse inference from loss of information, would be available under subdivision (e)(1) if no greater than necessary to cure prejudice. In addition, subdivision (e)(2) does not limit the discretion of courts to give traditional missing evidence instructions based on a party's failure to present evidence it has in its possession at the time of trial.

Subdivision (e)(2) requires a finding that the party acted with the intent to deprive another party of the information's use in the litigation. This finding may be made by the court when ruling on a pretrial motion, when presiding at a bench trial, or when deciding whether to give an adverse inference instruction at trial. If a court were to

conclude that the intent finding should be made by a jury, the court's instruction should make clear that the jury may infer from the loss of the information that it was unfavorable to the party that lost it only if the jury first finds that the party acted with the intent to deprive another party of the information's use in the litigation. If the jury does not make this finding, it may not infer from the loss that the information was unfavorable to the party that lost it.

Subdivision (e)(2) does not include a requirement that the court find prejudice to the party deprived of the information. This is because the finding of intent required by the subdivision can support not only an inference that the lost information was unfavorable to the party that intentionally destroyed it, but also an inference that the opposing party was prejudiced by the loss of information that would have favored its position. Subdivision (e)(2) does not require any further finding of prejudice.

Courts should exercise caution, however, in using the measures specified in (e)(2). Finding an intent to deprive another party of the lost information's use in the litigation does not require a court to adopt any of the measures listed in subdivision (e)(2). The remedy should fit the wrong, and the severe measures authorized by this subdivision should not be used when the information lost was relatively unimportant or lesser measures such as those specified in subdivision (e)(1) would be sufficient to redress the loss.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 5, 2016

RE: Rule 55, N.D.R.Civ.P., Default; Default Judgment; Rule 64, N.D.R.Civ.P., Seizing Property

Fed.R.Civ.P. 55(c) was amended December 1, 2015. We have not adopted this subdivision in our Rule 55 so no change to the Rule 55 text is proposed.

The Rule 55 explanatory note at lines 55-60 contains a discussion of the federal Soldiers' and Sailors' Civil Relief Act. This act has been renamed the Servicemembers' Civil Relief Act and has moved to a different part of the U.S. Code. Proposed amendments updating the Rule 55 explanatory note to reflect these changes are attached.

The Rule 64 explanatory note at lines 25-30 also contains a discussion of this act and similar proposed amendments to update the note are attached.

RULE 55. DEFAULT; DEFAULT JUDGMENT

1 (a) Entry. If a party against whom a judgment for affirmative relief is
2 sought has failed to plead or otherwise appear and the failure is shown by affidavit
3 or otherwise, the court may direct the clerk to enter an appropriate default
4 judgment in favor of the plaintiff and against the defendant as follows:
5 (1) If the plaintiff's claim against a defendant is for a sum certain or a sum
6 that can be made certain by computation, the court, on affidavit of the amount due
7 and on production of the written instrument, if any, on which the claim is based,
8 may direct the entry of judgment.
9 (2) In all other cases, the court, before directing the entry of judgment, must
10 require the necessary proof to enable it to determine and grant any relief to the
11 plaintiff. To this end, the court may:
12 (A) Hear evidence and assess damages;
13 (B) Direct a reference for an accounting or for taking testimony or for a
14 determination of the facts; or
15 (C) Submit any issue of fact to a jury.
16 (3) A default judgment may be entered against a minor or incompetent
17 person only if represented by a general guardian or other representative who has
18 appeared. If the party against whom a default judgment is sought has appeared
19 personally or by a representative, that party or its representative must be served

20 with a motion for judgment. Notice must be served with the motion and must
21 comply with N.D.R.Ct. 3.2(a).
22 (4) When service of the summons has been made by published notice, or by
23 delivery of a copy outside the state, default judgment must not be entered until the
24 plaintiff, if required by the court, has filed a court-approved bond that conforms to
25 a court order regarding the restitution of property obtained from the judgment if a
26 defense is later permitted and sustained. A bond is not required in actions
27 involving the title to real estate or to foreclose mortgages or other liens.
28 (b) Judgment Against the State. A default judgment may be entered against
29 the state, its officers, or its agencies only if the claimant establishes a claim or right
30 to relief by evidence that satisfies the court.
31 EXPLANATORY NOTE
32 Rule 55 was amended, effective March 1, 1990; March 1, 2003; March 1,
33 2011. The explanatory note was amended, effective _____.
34 Rule 55 is derived from Fed.R.Civ.P. 55, with several changes.
35 The federal rule contains a two-step process:entry of default and then entry
36 of judgment. The first step is not specifically required in this rule. Subdivision (a)
37 is a combination of the first two subdivisions of the federal rule, but specifies that
38 the clerk cannot enter a default judgment without being directed to do so by the
39 court, unlike the federal rule where the clerk can enter judgment in certain cases
40 without court direction. Paragraph (2) authorizes the court to require proof before

directing the default judgment. Paragraph (4), derived partly from N.D.R.C. § 28-0906 (1943), authorizes the court to require a bond before judgment is entered when service of the summons has been made by publication or delivery out of the state, with certain exceptions.

Former subdivision (b) was deleted from the rule effective March 1, 2011. The subdivision included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary; Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Subdivision (b) is identical to subdivision (d) of the federal rule, with the substitution of the state for United States.

The federal provision [subdivision (c)] for setting aside default was not adopted. See Rule 60(b) regarding relief from a judgment or order.

The operation of this rule is also directly affected by the ~~Soldiers' and Sailors' Civil Relief Act of 1940~~ Servicemember's Civil Relief Act, 50 U.S.C. ~~Appendix~~ §§ ~~501~~ 3901, et seq. Section ~~520~~ 3931 imposes specific requirements that must be fulfilled before a default judgment can be ordered or entered. If a default judgment is entered against a person in military service without compliance with the requirements of § ~~520~~ 3931, the judgment may be vacated.

Rule 55 was amended, effective March 1, 1990. The amendments were

62 technical in nature and no substantive change was intended.

63 Rule 55 was amended, effective March 1, 2003.Paragraph (a)(3) was
64 changed to substitute the term "motion" for the term "application" and to require
65 that a motion for a default judgment must comply with N.D.R.Ct. 3.2(a).

66 Rule 55 was amended, effective March 1, 2011, in response to the
67 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
68 and organization of the rule were changed to make the rule more easily understood
69 and to make style and terminology consistent throughout the rules.

70 SOURCES: Joint Procedure Committee Minutes of _____;
71 September 24-25, 2009, page 23; September 27-28, 2001, pages 15-17; April 20,
72 1989, page 2; December 3, 1987, page 11; November 29-30, 1979, page 15;
73 Fed.R.Civ.P. 55.

74 CROSS REFERENCE: N.D.R.Civ.P. 5(a) (Service—When Required),
75 N.D.R.Civ.P. 6(d) (For Motions—Affidavits), N.D.R.Civ.P. 7(b) (Motions and
76 Other Papers), N.D.R.Civ.P. 37 (Failure to Make Discovery Sanctions),
77 N.D.R.Civ.P. 54 (Judgment Costs), and N.D.R.Civ.P. 60 (Relief from Judgment or
78 Order).

RULE 64. SEIZING PROPERTY

1 At the commencement of and throughout an action, every remedy is
2 available that, under the law of this state, provides for seizing property to secure
3 satisfaction of the potential judgment.

4 EXPLANATORY NOTE

5 Rule 64 was amended, effective March 1, 2011. The explanatory note was
6 amended, effective _____.

7 Rule 64 is derived from Fed.R.Civ.P. 64.

8 The principal departure from the federal rule is the authorization for the use
9 of the remedies only for the seizure of property, not persons as in Fed.R.Civ.P. 64.
10 Qualifications to the federal rule do not apply to the North Dakota court system
11 and were not included. Also, the listing of remedies available has been omitted.
12 These are found in the North Dakota Century Code.

13 The remedies available in this state include attachment (N.D.C.C. Chapter
14 32-08.1), replevin (N.D.C.C. Chapter 32-07), garnishment (N.D.C.C. Chapter
15 32-09), and others. Some state laws authorizing prejudgment remedies but not
16 providing for prior notice and hearing have been struck down. See, Sniadach v.
17 Family Finance Corporation of Bay View, 89 S.Ct. 1820, 395 U.S. 337, 23
18 L.Ed.2d 349 (1969); Fuentes v. Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed.2d
19 556 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d

406 (1974); Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); and Guzeman v. Western State Bank, 516 F.2d 125 (8th Cir. 1974). The latter case ruled that the North Dakota attachment statute (N.D.C.C. Chapter 32-08) violated due process. That statute was subsequently repealed and replaced by N.D.C.C. Chapter 32-08.1.

It is also possible some federal laws may take precedence in this area. For example, Sections ~~203 and 204~~ 3933 and 3934 of the ~~Soldiers' and Sailors' Civil Relief Act of 1940~~ Servicemember's Civil Relief Act, 50 U.S.C. ~~Appendix, 523 and 524~~ §§ 3901, et seq., provide under certain circumstances for the vacation or stay of any attachment or garnishment directed against the serviceman's property, money, or debts in the hands of another.

Rule 64 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of _____; January 28-29, 2010, pages 13-14; November 29-30, 1979, pages 20-21;Fed.R.Civ.P. 64.

CROSS REFERENCE: ~~Rule~~ N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction Process Service)~~; N.D.R.Civ.P~~.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 13, 2016

RE: Rule 7.1, N.D.R.Ct., Judgments, Orders and Decrees

Bismarck attorney Thomas Jackson contacted staff about some issues he had with Rule 7.1. He was involved in a matter where the court prepared its own findings of fact and conclusions of law and ordered the opposing party to prepare a proposed judgment. The opposing party did so, filed it with the court, and the clerk signed off on it.

Mr. Jackson said he had problems with the proposed judgment and thought he had 14 days to file objections under the rule. He said he examined the rule closely, however, and discovered that proposed judgments were not covered by the rule's provision allowing a response to another's party's proposal. He said he will now need to follow a more formal procedure to attempt to get the judgment corrected.

Mr. Jackson suggested that the rule be amended to include proposed judgments with proposed findings of fact and conclusions of law as an item the non-preparing party may object to under the rule. Proposed amendments to Rule 7.1 consistent with Mr. Jackson's suggestion are attached. They begin at line 7 of the proposal.

RULE 7.1 JUDGMENTS, ORDERS AND DECREES

1 (a) Preparation of Orders and Decrees-Presentation of Drafts. Whenever the
2 court makes a ruling other than in the course of trial, the attorney for the prevailing
3 party must prepare and present to the court the order, order for judgment, or decree
4 to be entered, unless the court directs otherwise. All proposed orders and
5 judgments must be filed with the clerk.

6 (b) Preparation of Findings of Fact, ~~and~~ Conclusions of Law and
7 Judgments.

8 (1) Preparation by One or More Parties. Preparation of proposed findings of
9 fact and conclusions of law under N.D.R.Civ.P. 52(a) or a proposed judgment may
10 be assigned by the court to one or more parties. Any findings of fact, ~~and~~
11 conclusions of law or proposed judgment prepared by one or more parties must be
12 served upon all other parties for review and comment. The other parties may serve
13 a response in writing, within 14 days of service, or such other time as the court, in
14 its discretion, may allow. All proposed findings of fact and conclusions of law or
15 proposed judgments must be filed with the clerk. The court must thereafter enter
16 findings of fact, ~~and~~ conclusions of law or judgment as it may ~~deem~~ consider
17 appropriate.

18 (2) Preparation by Court. If the court chooses to prepare its own findings of
19 fact and conclusions of law, the parties may, in the discretion of the court, be

20 allowed to submit and file proposed findings of fact and conclusions of law within
21 the time specified by the court for that purpose. The court may consider such
22 proposed findings of fact and conclusions of law submitted and filed by the
23 parties, and may adopt, modify, or reject any proposed findings of fact or
24 conclusion of law regardless of who submitted and filed it with the court.
25 (3) Amendment of Findings. Nothing contained in this Rule of Court affects
26 the right of any party to move the court for an order amending the findings of fact
27 finally entered by the court or to make additional findings, under N.D.R.Civ.P.
28 52(b).
29 (c) If a party prepares documents under this rule, copies must be served
30 upon all other parties.
31 (d) Satisfaction of Judgment for Money When Judgment Creditor Cannot
32 Be Found.
33 (1) Satisfaction by Motion. A judgment for money may be satisfied by the
34 court, if no execution is outstanding and the time for appeal has expired, as
35 follows:
36 (A) The judgment debtor may file a motion for satisfaction with the court,
37 supported by an affidavit executed by the judgment debtor or the judgment debtor's
38 attorney stating the following:
39 (i) the amount of the original judgment and the judgment balance, and
40 accrued interest and costs due the judgment creditor;

41 (ii) that after the exercise of due diligence the judgment creditor and the
42 judgment creditor's attorney cannot be found or that the judgment creditor or the
43 judgment creditor's attorney has failed or refused to deliver a satisfaction of
44 judgment upon being tendered or paid the amount due; and
45 (iii) that notice of the motion has been sent by mail or third-party
46 commercial carrier to the judgment creditor and the judgment creditor's attorney at
47 their respective last-known addresses.
48 (B) Upon granting the motion, the court ~~shall~~ must enter an order directing
49 the clerk to receive the amount due on the judgment with accrued interest and costs
50 for the judgment creditor. After payment, the court must enter an order satisfying
51 the judgment and showing the amount deposited with the clerk.
52 (C) For purposes of this rule, the word "judgment" includes a decree for
53 payment of money upon which execution could issue.
54 (2) Satisfaction by Affidavit. A judgment for money may be satisfied by the
55 clerk of the court in which the judgment was rendered, if no execution is
56 outstanding and the time for appeal has expired, as follows:
57 (A) The judgment debtor or the judgment debtor's attorney may execute and
58 file an affidavit for satisfaction with the clerk stating the following:
59 (i) the amount of the original judgment and the judgment balance, and
60 accrued interest and costs due the judgment creditor;
61 (ii) that the judgment debtor desires to pay the amount due on the judgment;

62 and

63 (iii) that after the exercise of due diligence the judgment creditor and the

64 judgment creditor's attorney cannot be found or that the judgment creditor or the

65 judgment creditor's attorney has failed or refused to deliver a satisfaction of

66 judgment upon being tendered the amount due.

67 (B) Upon receipt of the affidavit and payment of the amount due on the

68 judgment with accrued interest and costs for the judgment creditor, the clerk must:

69 (i) note satisfaction of the judgment on the judgment docket and on the

70 register of the action in which the judgment was entered;

71 (ii) execute under the seal of the court and deliver to the judgment debtor a

72 certificate reciting that the amount paid in satisfaction of the judgment, with

73 accrued interest and costs, has been received and that the judgment has been fully

74 paid and satisfied; and

75 (iii) notify all persons of record in the action appearing to have any interest

76 in, or lien upon, the judgment, including the attorney of record for the original

77 judgment creditor, that the clerk has received the amount due on the judgment and

78 that the judgment has been satisfied of record.The notice must be in writing and

79 must be given by certified or registered mail to the last-known post office address

80 of each of the persons entitled to receive the notice.The clerk must file the receipts

81 for mailing the notice with the other papers in the action.

82 (C) Upon demand, the clerk must pay the amount received in satisfaction of

83 the money judgment, with accrued interest and costs, to the person entitled to
84 receive payment of the judgment amount.The clerk must take duplicate receipts for
85 payment, one to be held by the clerk and one to be filed with the other papers in
86 the action.

87 (D) A satisfaction of judgment entered by a clerk before the time for appeal
88 has expired is void and without prejudice to a judgment creditor or the judgment
89 creditor's assigns.

90 EXPLANATORY NOTE

91 Rule 7.1 was amended, effective March 1, 1994; March 1, 1999; March 1,
92 2003; March 1, 2011;_____.

93 Rule 7.1 was amended, effective March 1, 1994, in response to GeoStar
94 Corp. v. Parkway Petroleum, Inc., 495 N.W.2d 61, 65-66 (N.D. 1993) and
95 Disciplinary Action Against Wilson, 461 N.W.2d 105 (N.D. 1990). The
96 amendment to subdivision (a) requires the prevailing party to prepare a draft of the
97 order or decree whenever the court makes a ruling other than in the course of trial.
98 Former subdivision (a) also required the prevailing party to prepare drafts of the
99 order, order for judgment, or decree to be entered, whenever the court made a final
100 determination in an action.

101 Rule 7.1 was amended, effective March 1, 2011, to require a party who
102 submits proposed orders, judgments, findings of fact or conclusions of law to the
103 court to file these proposals with the clerk.

104 New subdivisions (b) and (c) were added. Former subdivision (b) was
105 changed to subdivision (d). New subdivision (b) concerns the preparation of
106 findings of fact and conclusions of law under Rule 52(a), N.D.R.Civ.P. New
107 subdivision (c) was added to provide notice to all parties and to prevent ex parte
108 contact with the court.

109 Paragraph (b)(1) was amended, effective March 1, 2011, to increase the
110 time to serve a response to proposed findings of fact and conclusions of law from
111 10 to 14 days.

112 Paragraph (b)(1) was amended, effective _____, to include
113 proposed judgments among the items covered by the rule.

114 Subdivision (d) was amended, effective March 1, 1999, to allow a notice of
115 the motion to satisfy to be sent via commercial carrier as an alternative to mail.

116 Subdivision (d) was amended, effective March 1, 2003, to incorporate the
117 provisions of N.D.C.C. § 28-20-28, which permit a money judgment to be satisfied
118 upon payment of the amount due to the clerk of the court in which the judgment
119 was rendered without filing a motion for satisfaction with the court.The
120 amendments permit a judgment debtor to satisfy a judgment for money by either
121 filing a written motion for satisfaction with the court and paying the amount due
122 upon entry of an order of satisfaction, or by paying the amount due to the clerk and
123 receiving from the clerk a certificate of satisfaction.

124 SOURCES: Joint Procedure Committee Minutes of _____;

125 September 23-24, 2010, page 26; April 29-30, 2010, page 21; January 24-25, 2002,

126 pages 5-7; September 27-28, 2001, page 18; January 29-30, 1998, page 22; April

127 29-30, 1993, page 11; January 28-29, 1993, pages 9-10.

128 STATUTES AFFECTED:

129 SUPERSEDED: N.D.C.C. § 28-20-28.

130 CROSS REFERENCE: N.D.R.Civ.P. 52 (Findings by the Court) and

131 N.D.R.Civ.P. 60 (Relief From Judgment of Order).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 22, 2016

RE: Rule 11.2, N.D.R.Ct., Withdrawal of Attorneys

The Board of Governors of the State Bar Association of North Dakota has requested that the committee consider a change to Rule 11.2. A letter from the board is attached.

The board proposes that a new subdivision be added to Rule 11.2 to make clear that withdrawal under the rule is not required in a civil case that has not been filed. In its letter, the board indicates that such a change is needed so that attorneys are not required to file cases for the sole purpose of requesting withdrawal for representation. The board states that an attorney seeking to withdraw in a case that had not been filed would still have an ethical obligation to inform the client in writing of the attorney's action.

Proposed amendments to Rule 11.2 consistent with the board's suggestions are attached.

RULE 11.2 WITHDRAWAL OF ATTORNEYS

1 (a) Notice of Withdrawal. An attorney's appearance for a party may only be
2 withdrawn upon leave of court. Reasonable notice of the motion for leave to
3 withdraw must be given by personal service, by registered or certified mail, or via
4 a third-party commercial carrier providing a traceable delivery, directed to the
5 party at the party's last known business or residence address. If the notice is
6 undeliverable, the attorney must submit an affidavit to the court reciting the efforts
7 made to give notice.

8 (b) Motion to Withdraw. The motion for leave to withdraw must be in
9 writing and, unless another attorney is substituted, must state the last known
10 address, e-mail addresses and telephone numbers of the party represented.

11 (c) Withdrawal on Appeal. If a notice of appeal is filed in a matter, any
12 attorney seeking leave to withdraw must file the motion with the supreme court
13 clerk.

14 (d) Limited Appearance. This rule does not apply to attorneys representing a
15 party under a notice of limited representation served under N.D.R.Civ.P. 11(e)
16 unless the attorney seeks to withdraw from the limited representation itself.

17 (e) Filing Required. This rule does not apply to attorneys representing
18 parties in civil actions that have not been filed with the court.

19 EXPLANATORY NOTE

20 Rule 11.2 was amended, effective March 1, 1999; March 1, 2000; March 1,
21 2006; March 1, 2009; March 1, 2015;_____.
22 The March 1, 1999, amendments allow notice via a commercial carrier
23 providing a traceable delivery service.
24 The March 1, 2000, amendments are stylistic.
25 Subdivision (a) was amended, effective March 1, 2015, to require the
26 attorney, when notice of withdrawal cannot be delivered, to submit an affidavit
27 regarding the efforts made to provide notice.
28 Subdivision (b) was amended, effective March 1, 2015, to require the
29 attorney to provide the court with any known party e-mail addresses or telephone
30 numbers.
31 Subdivision (c) was added, effective March 1, 2006, to make it clear that an
32 attorney seeking to withdraw from representation in a matter that is on appeal must
33 file a motion for leave to withdraw with the supreme court clerk. The supreme
34 court clerk will refer withdrawal motions involving court appointed attorneys to
35 the trial court for decision and appointment of new counsel.
36 Subdivision (d) was added, effective March 1, 2009, to make it clear that an
37 attorney who serves a notice of limited representation to represent a party for one
38 or more matters in a case is not required to formally withdraw upon completion of
39 activity covered by the notice. Under N.D.R.Civ.P. 11(e), however, the attorney
40 must serve a notice of termination of limited representation when the attorney's

41 involvement ends. Rule 11.2 and N.D.R.Civ.P. 5 and 11 were amended to permit
42 attorneys to assist otherwise unrepresented parties on a limited basis without
43 undertaking full representation of the party.

44 Subdivision (e) was added, effective _____, to clarify that an
45 attorney is not required to seek leave to withdraw under this rule if the action has
46 not been filed.

47 SOURCES: Joint Procedure Committee Minutes of
48 _____; September 25-26, 2014, pages 3-4; April 24-25,
49 2014, pages 26-27; January 24, 2008, pages 2-7; October 11-12, 2007, pages
50 20-26; September 23-24, 2004, page 29; May 6-7, 1999, pages 15-16; January
51 29-30, 1998, page 22.

52 Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and
53 Other Papers), N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other Papers;
54 Representation to Court; Sanctions); N.D.R. Prof. Conduct 1.2 (Scope of
55 Representation).

October 14, 2015

Hon. Dale V. Sandstrom
Supreme Court
Judicial Wing, First Floor
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

Justice Sandstrom:

The Board of Governors of the Association would like the Joint Committee on Attorney Procedures to look at a possible change to a Rule.

The Board believes the following exception to Rule of Court 11.2 would make it easier for an attorney to withdraw from a case, when a case has yet to be filed. A recent Ethics Opinion on this question was issued, and the opinion states a lawyer cannot ethically withdraw from a civil case, without court approval under N.D.R.Ct. 11.2, when the case has never been filed with a court. There are situations, however, where filing the case makes little sense, and only costs the attorney or their clients money. In discussing the issue, the Board believes it would be appropriate to change the rule to avoid situations where lawyers are forced to file actions, which would not otherwise need to be filed, for the sole purpose of withdrawing as counsel. Therefore, the following Rule change is requested:

(e) Filing Required. This rule does not apply to attorneys representing parties in civil actions that have not been filed with the court.

In these cases, an attorney is free to withdraw so long as the client is made aware, in writing, of the attorney's action. If you have any questions, please let me know.

Sincerely,

Joseph Wetch
SBAND President