

AGENDA

JOINT PROCEDURE COMMITTEE

May 12-13, 2016
Fargo, N.D.

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JUSTICES OF THE NORTH DAKOTA
SUPREME COURT

Chief Justice
Gerald W. VandeWalle

Justices
Dale V. Sandstrom
Carol Ronning Kapsner
Daniel J. Crothers
Lisa Fair McEvers

JOINT PROCEDURE COMMITTEE
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Laurie Fontaine, District Judge
William A. Herauf, District Judge
Jon J. Jensen, District Judge
Steven L. Marquart, District Judge
Steven McCullough, District Judge
Thomas E. Merrick, District Judge
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Kent A. Reiersen
Robert Schultz
Lloyd Suhr

Staff Attorney
Michael Hagburg

MINUTES OF MEETING

Joint Procedure Committee
January 28-29, 2016

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CALL TO ORDER

The meeting was called to order at 1:00 p.m., on January 28, 2016, by the Chair,
Justice Dale Sandstrom.

ATTENDANCE

Present:

- Justice Dale Sandstrom, Chair
- Honorable Laurie Fontaine
- Honorable Jon Jensen
- Honorable Steven L. Marquart
- Honorable Thomas E. Merrick (Thursday only)

Honorable David E. Reich
Honorable Robin Schmidt
Mr. Bradley Beehler
Mr. Sean Foss
Mr. Robert Hoy
Mr. Lonnie Olson
Mr. Zachary Pelham
Mr. Kent Reiersen
Mr. Lloyd Suhr

Absent:

Honorable Todd L. Cresap
Honorable William A. Herauf
Honorable Steven McCullough
Prof. Margaret Jackson
Ms. Carol Larson
Mr. Robert Schultz

Staff:

Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

The Chair introduced the new members of the committee.

APPROVAL OF MINUTES

Judge Jensen MOVED to approve the minutes. Judge Reich seconded. The motion to approve the minutes CARRIED.

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 31-60 OF THE AGENDA MATERIAL)

Staff reviewed the committee's previous work on this rule at the September meeting regarding limiting access to records in a case when no probable cause is found for a complaint. Staff explained that additional requests to amend the rule had been made to insert a provision that would allow the Supreme Court to regulate remote access to court records and a provision that would protect the identities of Legal Self Help Center patrons.

Judge Marquart MOVED to approve the proposed amendments to Rule 41. Mr. Beehler seconded.

The committee discussed the proposed amendment related to regulating remote access to court records. The Chair asked whether “implement” on page 38, line 111 should be changed to “adopt.” A member said the Court had not adopted any policies yet so the rule should say “adopt.”

Judge Marquart MOVED to add “adopt and” before the word “implement” on page 38, line 111. Mr. Beehler seconded. Motion CARRIED.

The committee moved onto the proposed amendment on page 42 at lines 199-201 that would restrict access to the information about N.D. Legal Self Help Center patrons. A member suggested that a complete restriction on patron information may not be advisable.

Staff explained that the Self Help Center is seeking the rule change because they want people to be able to use the Self Help Center’s resources without feeling like their activities will be monitored. Staff said that the Self Help Center does not provide legal assistance or help in drafting documents to patrons but instead points to the right forms and resources so patrons could do their legal work themselves.

A member said that under the rule proposal, if later a lawsuit took place, the Self Help Center patron’s information would not be discoverable. A member asked whether including language in the rule related to a topic that may already be covered by statute may create problems.

A member said that it is legitimate for the Self Help Center to want to protect patron identities. The member said the statute that the Self Help Center had brought to the committee’s attention was a public library statute and probably would not apply to protect Self Help Center patron identities. The member said it is understandable that a person calling in to request divorce forms might not want this information to be public.

A member said that patron information should be confidential. The member said the whole point of the Self Help Center was to allow people that have no money or attorneys to get some guidance on what forms to use to get into court. A member said the proposal was broader than the library statute, which would allow records to be released in response to a subpoena. The member said Self Help Center patron records would simply not be public records under the proposed amendment.

The committee moved on to page 44, lines 236-239, and the proposed amendment

relating to restrictions on records access in a criminal case when a magistrate finds no probable cause for the issuance of a complaint.

A member asked what the effect of the proposed change would be. Staff said that under the proposal, a party could make a motion to have electronic access to the case restricted, but the case name would still appear. Staff said that provisions in the rule require that, if something is withdrawn from the record, there must be an indication of this in the record.

The Chair said criminal complaints generally come from state's attorneys or law enforcement but sometimes a member of the public will swear out a complaint. The Chair said sometimes a citizen complaint may contain information that is unfounded or scurrilous. A member said that often the person wants to bring charges against the judge or the state's attorney and that even if the complaint is unfounded and goes nowhere, it is still available to be looked up.

Staff said if the committee wanted records completely restricted in cases where the magistrate found no probable cause for the complaint, the language would need to be put into Section 5 of the rule.

Staff reminded the committee that Chris Iverson of the Odyssey user group had submitted a query on whether access to records in pretrial diversion cases could be treated the same as records in deferred imposition cases.

A member said that pretrial diversions were not used widely because they did not give the prosecution many tools to ensure that the defendant complied with the conditions. The member said using deferred imposition was generally a better approach. A member said the prosecution was suspended during the period of the pretrial diversion under the terms of an agreement, which the court needs to approve. A member said the court does not hear about it again if the conditions of the agreement are fulfilled, the case would just be dismissed.

A member said the whole reason the committee had drafted the rule language allowing people with dismissals and acquittals to seek restricted access to their cases was to help out people who could not obtain work or housing because of having these cases in their records. Staff said that the way cases were displayed on the Internet in response to a record search had been changed so that it says a case was dismissed on the first page of the record. Staff said that if a person followed the procedure under the rule, only the case name would be shown after an Internet search—a searcher would need to go to the courthouse to find out more.

The Chair said because pretrial diversion cases are dismissed if the agreement is

fulfilled, the defendant could use the existing language of the rule to seek restricted Internet access to the case.

A member asked whether the pretrial diversion rule could be amended to match up with the deferred imposition rule and allow access to the case to be restricted automatically. The Chair said that deferred imposition cases are covered by a statute which requires the records to be sealed after a certain time and the rule language follows this. A member said this leads to inconsistent results because the person who gets a deferred sentence has pled guilty but their record becomes completely clear while the person who has a charge dismissed still has that charge on their record. A member said this inconsistency will continue to be a problem until the legislature or the courts allow complete expungement when charges are dismissed.

The Chair said the other side of the equation was that people have a right to know if criminal charges have been brought against a person. A member said that electronic access to records causes a real impact on people's lives because charges that may have been dismissed years ago remain accessible.

Mr. Hoy MOVED to remove the language on page 44, lines 236-238, and to insert it on page 41 after line 184. Mr. Beehler seconded.

A member said the intent of the proposed amendment was to make the record inaccessible to the public in cases where the magistrate had found no probable cause and in cases where charges were dismissed. A member said if this was done, people would not even be able to go to a courthouse to see these records. A member said a problem with this approach is that there is a difference between a person who pleads guilty to one charge based on an agreement that the rest will be dismissed and a person who has charges dismissed because they are without basis.

Judge Fontaine MOVED to amend the motion to remove the language related to dismissed charges from the new paragraph proposed for page 41 after line 184. Judge Jensen seconded.

A member said that the proposed amendment creates different levels of "not guilty." The member said in a deferred imposition, the defendant pleads guilty but then the record is sealed. Further, under the proposal, when no probable cause was found by the magistrate, the record would be sealed. Defendants who were acquitted or had charges dismissed, however, would still have their record accessible to the public on the Internet and at the courthouse. The member said that the rationale for the differential treatment was hard to figure out.

A member said that there is a justification to seal successfully completed deferred imposition cases but not to seal dismissals when they resulted from a plea bargain and the defendant pleaded guilty to related charges. A member said there is also a justification to seal when the magistrate finds no probable cause because there is a decision by the court that it will take no action at all on a criminal complaint. The member said there is no reason at all why a charge for which there was no probable cause should show up on anyone's record.

A member said that there is also justification to seal when someone gets charged by the police or through a citation and the charge is dismissed summarily by the prosecutor after investigating. The member said no formal lack of probable cause determination is made in these cases, the prosecution simply moves to dismiss and unfortunately this leads to the record of the charge following the person forever. The member said it is also justifiable to seal charges that are dismissed as part of a plea agreement because this only happens when the prosecution cannot prove these charges.

A member said that the real problem that has led to dismissed charges affecting people's lives is computer access. The member said people seeking information do not read or understand the information available on the Internet and as a consequence others are being denied jobs and housing due to dismissed charges on the Internet record. The member said restricting computer access to records of dismissed criminal charges would be a good idea as long as people can still gain access to the record at the courthouse.

A member said that the proposal amendment would lead to records of dismissed criminal charges being sealed and not accessible at the courthouse. The member said that under the current rule, people can move to restrict computer access to records of dismissed criminal charges. The member said that generally criminal records should be public unless there is a very good justification to restrict access.

The motion to amend the motion CARRIED 10-3.

The motion as amended CARRIED 12-1.

A member said the rule as amended is a step in the right direction but it does not go far enough to protect the records of people who are not guilty of criminal charges.

The main motion to send the proposed amendments to the rule to the Supreme Court as part of the annual rules package CARRIED 12-1.

Staff was instructed to revise the explanatory note to reflect the amendments.

RULE 10, N.D.R.Crim.P., ARRAIGNMENT; RULE 43, N.D.R.Crim.P., DEFENDANT'S PRESENCE (PAGES 61-69 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 10 and Rule 43 had been prepared to clarify that a represented defendant in a felony case may waive the arraignment in writing.

The Chair reminded the committee that before unification of the county and district courts, the preliminary hearing would have taken place in county court and the arraignment in district court. The Chair said the preliminary hearing and arraignment are no longer distinct processes but are done consecutively by the same court.

Judge Jensen MOVED to approve the proposed amendments to Rule 10. Mr. Hoy seconded. Motion CARRIED.

Mr. Hoy MOVED to approve the proposed amendments to Rule 43. Judge Jensen seconded. Motion CARRIED.

Judge Reich MOVED to immediately send the proposed amendments Rules 10 and 43 to the Supreme Court. Mr. Suhr seconded. Motion CARRIED.

RULE 11, N.D.R.Crim.P., PLEAS (PAGES 70-86 OF THE AGENDA MATERIAL)

Staff explained that amendments to Rule 11 had been proposed to clarify the process of appealing a conditional guilty plea.

Judge Marquart MOVED to adopt the proposed amendments to Rule 11. Mr. Hoy seconded.

The Chair said that one important proposed change is that a writing would be required. The Chair said the Supreme Court sometimes has cases where the conditions were never specified in writing but only discussed orally before the judge.

A member said the proposed change was a good idea. The member said conditional pleas are very rare, but when they do come up the documents drafted and filed are not consistent. The member said the proposal would give guidance on what is required for a conditional plea.

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

RULE 32, N.D.R.App.P., FORM OF BRIEFS, APPENDICES, AND OTHER DOCUMENTS (PAGES 87-103 OF THE AGENDA MATERIAL)

Staff explained that the Clerk of the Supreme Court requested the committee to examine Rule 32(b) to determine if amendments are needed to clarify whether agency or judicial decisions may be included in the appendix.

Judge Fontaine MOVED to approve the proposed amendments to Rule 32. Mr. Olson seconded.

The Chair said that the appendix has traditionally been where copies of items from the record are placed, not copies of opinions. The Chair said that things that are not in the record should be placed in the addendum. The Chair said the Court wants to know what a party has actually brought before the district court and it finds these things in the appendix.

Judge Marquart MOVED to amend on page 91 at line 64 by deleting the language after the word "record." Judge Jensen seconded.

A member said it is sometimes important to give the Court printed copies of agency decisions that may be only available online. A member said that N.D.R.App.P. 28(g) covers the addendum.

The Chair said that the Court may be able to dispense with the appendix in the future as technology advances and tools are developed to copy the electronic record in a form that allows efficient searching.

The motion CARRIED.

Judge Jensen MOVED to amend the explanatory note on page 93, lines 116-118, to conform to the text amendment. Judge Reich seconded. 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 3.5, N.D.R.Ct., ELECTRONIC FILING IN DISTRICT COURTS (PAGES 104-112 OF THE AGENDA MATERIAL)

Staff explained that the State Court Administrator had proposed an amendment 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.

Judge Marquart MOVED to approve the proposed amendments to Rule 3.5. Mr. Beehler seconded.

A member asked whether the proposed amendment would eliminate all applications of seals to documents. The member said that another state may require some sort of physical certification of authenticity when a document is presented. Staff said the court administrator seemed to favor eliminating all stamping of documents.

A member asked how many North Dakota's statutes required application of the seal of the court to documents. The member said many probate statutes require a seal to be applied to probate documents. The member said that even clerks of court want documents being transferred from other counties to be physically certified. The member said it would be hard to support the proposed change without knowing what statutes require a court seal to be affixed. A member said that in probate cases, institutions outside the court system such as banks, want to see a court seal on probate documents.

A member asked whether changes were being developed to the Odyssey system to allow a seal to be electronically affixed to court documents. Staff said that several innovations had been developed in conjunction with the judge electronic signature feature, such as ways for the judge to make minor alterations to a submitted document. Staff said that part of the next phase of development would be something that could be used like an electronic clerk's stamp.

A member said the committee needed more information on statutory requirements. The Chair said that under the proposal, no certification would be required on a document headed for another state, such as a child support order. The Chair suggested that an uncertified document may not be accepted by another state. A member said that the proposal did not include enough safeguards for authenticity of documents output from the system.

Staff said that, in Williams County for example, the sheriff's department had been willing to act on arrest warrants transmitted electronically but had balked at serving executions on judgments that had been printed out by the clerk without a seal affixed. A member said executions traditionally have a stamp or seal affixed.

A member said there would be no problem eliminating requirements to certify records moving electronically through the system, whether from county to county or from the courts to an agency or lawyer—if a user obtains an electronic record directly from the Odyssey system, that is an indicator that the record is authentic. The member, however, said it would

likely create problems if the proposed rule change somehow barred court officials from certifying records that are output from the system. A member said telling the clerks to throw away their seals would only cause problems for people who need to have a tangible way to show that the records they obtain from the courts are authentic.

Staff said the Odyssey system itself does not currently apply any sort of a seal or certificate when a document is output.

A member said an example of documents that need to be certified are letters that establish a person as a personal representative of an estate. The member said without a stamp or seal, a person could use a letter that had expired—it is the act of affixing the seal that begins the period of time in which the letter is valid. The member said there are many provisions of the probate code that require seals to be affixed to a document because this is an indicator that the document is effective beginning on a set date.

The Chair suggested that certification of the record could be made by whoever takes it out of Odyssey, i.e., the sheriff could certify an arrest warrant that the sheriff downloaded from Odyssey. A member said that the language in the proposal suggested that there did not need to be any certification if the record was output from Odyssey—the mere fact it was once in Odyssey and then printed out would be good enough to prove authenticity. The member suggested that the language on “output” was inadequate and should be removed from the proposal.

A member said that the state hospital and other medical facilities get orders for continuing treatment and evaluation transmitted directly through Odyssey. A member said these orders generally are originally in paper form and then are signed and scanned into the system. A member, however, said a seal is never involved with these documents.

A member said the main concern with adopting the proposal is that many statutes required certain documents to be sealed. The Chair said when probate statutes require a seal to be affixed to certain documents it is because these documents often need to be presented to institutions outside the court system, such as banks. The Chair said these institutions want to see something on the document that is a guarantee of authenticity.

A member asked whether probate documents need to be signed by the court. A member said judges do sign letters testamentary and have been signing them electronically through Odyssey.

The Chair said North Dakota is quite a bit ahead of the rest of the country in having electronic court records and requiring electronic filing and service. A member said the

proposed amendment is fine for records moving through the system and being accessed through the system. The member said the problem is when records are output—then they need some additional indicator or authenticity.

A member said that what to do when a statute requires a seal to be affixed on a document needs to be addressed. The member said that someone may send an electronic document such as an execution on a judgment to a sheriff through the Odyssey system and that document would be considered authentic under the proposed rule amendment, but lacking a seal it would not meet the statutory requirements for authenticity.

Judge Fontaine MOVED to postpone the proposed amendments pending additional research by staff on statutes that require a seal to be affixed on documents. Judge Jensen seconded. Motion CARRIED.

RULE 1, N.D.R.Civ.P., SCOPE OF RULES (PAGES 113-117 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 1 based on the December 2015 amendments to the federal rule had been prepared. Staff said that the amendments were intended to reflect the aspiration that parties, lawyers and the courts cooperate in obtaining just, speedy and inexpensive case resolution.

Mr. Hoy MOVED to approve the proposed amendments to Rule 1. Judge Marquart seconded.

Staff said the change is intended to make Rule 1 consistent with the federal rule. The Chair explained that historically North Dakota had followed the federal rules and incorporated the federal changes. The Chair said by doing this, lawyers and the courts have the advantage of being able to be guided by federal cases interpreting rule language that is the same as our rules. The Chair said our state is not bound to incorporate a federal change that it disagrees with and that our rules differ in several ways from the federal rules.

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

RULE 16, N.D.R.Civ.P., PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT (PAGES 118-130 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 16 based on the December 2015

amendments to the federal rule had been prepared. Staff said that the amendments related to preservation of electronically stored information and motions for discovery orders.

Mr. Beehler MOVED to approve the proposed amendments to Rule 16. Mr. Pelham seconded.

A member said that the proposed requirement that a party request a conference before moving for a discovery order would create problems and expand the amount of time attorneys and the court spend on discovery issues. A member said in the federal system, most discovery disputes are handled by magistrates and they handle discovery conferences efficiently. The member said the conference requirement has cut down on the filing of motions substantially because it gives the court and the parties a chance to try to resolve discovery issues informally. A member said the conference requirement essentially gives the parties the chance to make an oral discovery motion that the court can resolve quickly. A member replied that any opinion that the court would express at a discovery conference would be an advisory opinion and it would be inappropriate for the rules to require the court to give such opinions.

A member said one difference between state and federal court that would make the conference requirement impractical is the large number of self-represented litigants in state court. The member said discovery conferences with self represented litigants would be problematic especially if there was no requirement to submit any sort of written brief beforehand. A member said that the conference requirement could cut down on motions to compel in certain circumstances if the parties receive guidance on what might be discoverable. The member said the conference requirement is very effective in the federal courts.

A member said that when conferences are held in the federal system they do not generally concern the details of a motion but instead include a general discussion of the issue and some guidance from the magistrate on what is discoverable. The member said if the parties disagree with the magistrate, they can file a motion. A member said that, in the federal system, having conferences is an effective way to cut down on discovery disputes and motions to compel.

A member replied that it is not that simple in state court where there is a crowded docket and judges do not regularly deal with the types of discovery issues that civil litigation attorneys live with. The member said state judges would need time to look at the issue and could not make a judgment at a short conference. The member said that Rule 37 already requires parties to make a good faith effort to confer and resolve discovery disputes on their own. The member said the onus should be on the parties not the court to resolve these issues.

A member replied that having a discovery conference with the court gives the parties some direction on the court's thinking and puts the parties in a better position to resolve a dispute.

A member said it was not wise to encourage attorneys to bring more discovery disputes to the court. The member said discovery disputes already take up a great deal of court time. The member said the existing system encourages the parties to work together to resolve disputes and the court should only be involved as a last resort. A member said that there are always going to be discovery disputes and experienced counsel can generally resolve them. The member said involving the court in the dispute by way of a short telephone conference is not the way to resolve problems.

Judge Marquart MOVED to delete the proposed new language on page 122, lines 71-72. Judge Schmidt seconded.

A member said the proposed new language did not require a conference to take place, just for the parties to request one. The member said actually having a conference would be at the discretion of the judge.

Motion CARRIED 11-2.

By unanimous consent, the explanatory note language on page 124, lines 114-116, was deleted.

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

RULE 26, N.D.R.Civ.P., GENERAL PROVISIONS GOVERNING DISCOVERY (PAGES 131-165 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 26 based on the December 2015 amendments to the federal rule had been prepared. Staff said that the amendments primarily consisted of adding detailed proportionality considerations to the scope of discovery part of the rule. Staff distributed comments on the proposed changes from the N.D. Association for Justice and attorney Derrick Braaten.

Judge Marquart MOVED to approve the proposed amendments to Rule 26. Judge Schmidt seconded.

A member pointed out that under the proposal the sentence "[r]elevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to

the discovery of admissible evidence” would be deleted. The member said this was a major change in the rule. A member said that parties to a case should have the opportunity to discover evidence that may be relevant. The member said parties often object to the disclosure of evidence based on relevance, but the party seeking discovery needs to see the evidence before it can determine whether it is relevant or not.

Judge Marquart MOVED to indefinitely postpone consideration of the proposed amendments. Mr. Beehler seconded.

A member said the rule as it stands already encompasses the proposed changes. The member said that there is no good reason to change the rule just because the federal rule has been changed. Staff said that the rule already diverges from the federal rule in several ways, including changes adopted several years ago based on North Carolina’s amendments.

A member said that putting all the rule material on electronically stored information in one place, as is contemplated under the proposal, might be a good idea.

Motion CARRIED 8-6.

A member said that the committee should consider Mr. Braaten’s suggestions to incorporate aspects of the federal rule’s expert disclosure requirements into Rule 26. The member said it would be beneficial if Rule 26 included more clarity about what expert information was subject to disclosure. Staff was instructed to draft proposed amendments related to expert disclosure for consideration by the committee at the next meeting.

RULE 33, N.D.R.Civ.P., INTERROGATORIES TO PARTIES (PAGES 166-172 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 33 based on the December 2015 amendments to the federal rule had been prepared. Staff said that the amendments were linked to changes to Rule 26.

By unanimous consent, the committee decided the proposed amendments to Rule 33 were mooted by the committee’s action on the proposed amendments to Rule 26.

RULE 34, N.D.R.Civ.P., PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION AND TANGIBLE THINGS, OR ENTERING ONTO LAND FOR INSPECTION AND OTHER PURPOSES (PAGES 173-182 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 34 based on the December 2015 amendments to the federal rule had been prepared. Staff said that the amendments were designed to clarify requirements for making objections to production.

Mr. Foss MOVED to approve the proposed amendments to Rule 34. Judge Marquart seconded.

A member asked why parties are required to sign interrogatory answers but not required to sign responses to requests for production. Staff said that Rule 33 requires the person answering the interrogatories to sign, which indicates that they are more testimonial in nature. A member said that the attorney is required to sign off on responses to requests for production. A member said that the attorney responding to requests for production does not know if the response was complete and responsive.

A member said the proposed new language on page 175, lines 35-36, is problematic because it allows the party making the request to set a deadline for production. The member said this is contrary to the language elsewhere in the rule, which allows 30-45 days for a response. A member said the proposed new language did not seem to be necessary because the rule itself set the allowed time for a response.

Mr. Beehler MOVED to delete the proposed new language on page 175, lines 35-36. Mr. Foss seconded.

A member said that proposed new language requiring a party to state "with specificity" the grounds for an objection did not seem to add anything to the rule. The member said that the rule already requires a party to state the reasons for their objections. The member said the proposed new language seemed redundant.

A member said the proposed new language allowing the person responding to the request to specify a reasonable time for production could be helpful when it was difficult to provide records within the 30-day time frame under the rule. A member said the existing language of the rule allows the parties to stipulate a shorter or longer time or the court to order a different time. A member said it was a problem that the proposed new language could allow the person responding to a request to control the time of the response as long as the response time was "reasonable."

The motion CARRIED.

Judge Marquart MOVED to indefinitely postpone consideration of the proposed amendments. Judge Jensen seconded.

A member said that the proposed new language on page 175, lines 37-38, is important because it would allow the party who made the request to know whether the opposing party was holding anything back based on an objection. A member said the language specifically allowing the responding party to provide copies was useful because it allows the parties to avoid any dispute about whether the party seeking production needs to come to the responding party's business to search for documents. A member said current practice is to provide copies and the proposed language is consistent with this practice.

The motion FAILED.

Mr. Reiersen MOVED to insert a new subdivision (d) on page 176 after line 57: "Signature. The person who responds to the request must sign the response, and the attorney who objects must sign any objections." Mr. Hoy seconded.

A member said that it would be useful to have a signature requirement for responses to requests for production. The member said with the signature, it would be clear who prepared the responses. A member said this signer would be the person who provided the documents to the attorney.

The Chair asked what document the person would be signing. A member explained that there is a document that the lawyer currently signs called a response to request for production of documents. The member said by signing this document, the lawyer is saying that everything the client produced was being turned over, but the lawyer has no way of knowing whether the client actually produced everything responsive to the request.

A member asked whether the proposed amendment would require a lawyer to sign each individual objection. The member said some attorneys sign each objection while some do a blanket signature at the end of the objections. A member said both Rule 36 and Rule 11 require the attorney's signature so the proposed language requiring attorneys to sign objections may be superfluous. A member said the proposed language was consistent with the language of Rule 33.

A member asked whether it would be difficult to find a single individual who would be able to sign the response considering that numerous people would likely be involved in gathering the documents. A member said signatures are required for interrogatories. A

member said this can be handled by using a signature block indicating that the signer represents the company and that the responses were prepared at the signer's request.

A member asked what impact the signature would have. The member said a signature on an interrogatory answer indicates it was given under oath but a signature on a response would not have that effect. The member said adding the signature requirement would not make it easier to get sanctions for non-production. A member responded that with a signature, the attorney will at least know the identity of a person whom they can question about the completeness of the responses and what steps they took to find responsive documents. The member said it is also useful for the attorney on the side that is producing the documents because it is a way of making the client responsible for what they produce.

Motion CARRIED.

Judge Reich MOVED to strike the words "including the reasons" on page 175, line 33. Judge Jensen seconded.

A member said the proposed new language requires parties to state the grounds for an objection with specificity while the existing language requires parties to state the reasons for an objection. The member said that the reasons for the objection would be included in a specific statement of the grounds for an objection so the language requiring a statement of the reasons is unnecessary.

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.

A member proposed that staff prepare draft rule amendments for consideration by the committee at a future meeting that would require a party signature on requests for admissions under Rule 36. The member said Rule 36 would then be consistent with Rules 33 and 34 and would require some party responsibility for responses to requests for admissions.

January 29, 2016 - Friday

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

RULE 41, N.D. Sup. Ct. Admin. R., ACCESS TO COURT RECORDS (PAGES 31-60 OF THE AGENDA MATERIAL)

Staff presented additional amendments to the Rule 41 proposal that had been requested by the committee.

Judge Marquart MOVED to approve the additional proposed amendments to Rule 41. Judge Jensen seconded. Motion CARRIED.

RULE 34, N.D.R.Civ.P., PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION AND TANGIBLE THINGS, OR ENTERING ONTO LAND FOR INSPECTION AND OTHER PURPOSES (PAGES 173-182 OF THE AGENDA MATERIAL)

Staff presented additional amendments to the Rule 34 proposal that had been requested by the committee.

Mr. Reiersen MOVED to approve the additional proposed amendments to Rule 34. Mr. Beehler seconded. Motion CARRIED.

RULE 37, N.D.R.Civ.P., FAILURE TO MAKE OR COOPERATE IN DISCOVERY; SANCTIONS (PAGES 183-205 OF THE AGENDA MATERIAL)

Staff explained that proposed amendments to Rule 37 based on the December 2015 amendments to the federal rule had been prepared. Staff said that the amendments would modify the part of the rule relating to sanctions for failure to preserve electronic information by providing more detailed standards on determining when to impose sanctions along with a list of sanctions that may be imposed.

Judge Marquart MOVED to approve the proposed amendments to Rule 37. Mr. Pelham seconded.

A member said that on page 189, lines 120-121, the proposed amendments would delete language that prohibited sanctions when electronically stored information was deleted due to routine, good-faith operation of the system. The member said this language set a useful standard and deleting it could cause problems.

A member said the federal commentary did a lot to address how the new standard should be applied and why the “routine, good-faith” language was no longer necessary. The member said, however, that the federal comments would not be part of the rule and people

may not know to look at them for guidance. The member said it may be useful to include a reference stating that there are extensive comments in the federal rule.

Judge Marquart MOVED to retain the existing rule language on page 189, lines 118-121. Mr. Reiersen seconded.

A member said that it would be a major change to the rule if the “routine, good-faith” language was deleted. The member said if there is electronic information that is routinely deleted there should not be any sanction for deleting it. A member said that even if the federal comments do explain how to proceed without the “routine, good-faith” language, our rule is for North Dakota lawyers and many do not look at the comments. A member said even if the “routine, good-faith” language is retained, a reference to the federal comments would be helpful in providing direction and guidance about when the court should consider extreme sanctions.

A member said the proposal to retain the existing language of the rule along with the proposed new language sets up a conflict. The member said the new language requires parties to take reasonable steps to retain electronically stored information that might be relevant in a lawsuit while the existing language excuses parties from the failure to retain information under certain circumstances.

A member said the “routine, good-faith” language is useful because there are cases when no one could have reasonably known that any steps should have been taken to preserve evidence, such as when surveillance tape is overwritten on a 24-hour cycle but no lawsuit is brought until two years after an event. A member said there is no contradiction in retaining the existing and proposed new language because this would essentially create a two-step process: an analysis of whether the information was lost in a “routine, good faith” way and if it was not, a further analysis as to whether reasonable steps were taken to preserve the information.

A member said that in a case of routinely overwritten surveillance tape, if no one had given notice of a claim, it would have been reasonable to allow the surveillance tape to be overwritten and there would be no reason to apply the “routine, good-faith” defense. A member replied that without the “routine, good-faith” defense, such a case would raise factual questions about reasonable expectations, especially if someone had been injured. A member said that if the “routine, good-faith” defense could not be used, results in these disputes would be inconsistent.

The Chair said that it seems to be common practice in electronic surveillance video to record over the video after a certain period of time so this is a recurrent issue. The Chair

said the proposed new rule language would also apply to information stored on devices like computers, information that also may be overwritten.

A member suggested that the motion could be amended to make the existing language and the proposed new language work better together, with a reasonableness test applied before the “routine, good-faith” defense could be used. A member said this would put parties on notice that they could not continue routine destruction of stored information if there is some reason they need to stop.

By unanimous consent, the motion was amended to replace the word “if” on page 189, line 121, with “unless.”

Mr. Hoy MOVED to amend the motion to replace the word “that” on page 189, line 22, with “which.” Mr. Reiersen seconded.

A member said that the proposed amendment would restructure the rule so that it would only apply to information lost during the “routine, good faith” operation of a system and information loss that may not be in good faith, such as intentional or negligent destruction. The member said the proposed new “unless” language would make the rule apply only to good faith operation.

Members said there was other language in the rule that would apply to intentional destruction of information. The Chair said the way the proposed amendment was constructed, it would prohibit the court from imposing sanctions for failure to preserve electronic information unless an exception applied.

Motion CARRIED.

By unanimous consent, the motion was amended to move the language on page 189, lines 118-121, to page 190, line 132.

A member asked if the language that had been moved to the end of the subdivision should be numbered. The member said the language looked out of place without numbering.

Judge Reich MOVED to amend the motion to renumber the proposed amended language. Judge Jensen seconded. Motion CARRIED.

Staff said that titles could be added to the newly numbered paragraphs in order to make the subdivision easier to understand.

A member said that there is still a conflict between the proposed new language and the existing language of the rule. The member said that the language before the committee would allow a party who had failed to take reasonable steps to preserve electronic information to use good faith operation of the system as a defense. The member said someone who did not take reasonable steps should not be protected by the good faith defense.

A member said that the good faith defense did not apply under “exceptional circumstances” and that failing to take reasonable steps, such as allowing destruction of evidence after a notice of claim, would negate the good faith defense. A member said that if someone sustained an obvious injury that was captured by surveillance video, this should also be an “exceptional circumstance” that would prevent use of the good faith defense.

A member said that there was still a problem because the fact that someone does something that is not reasonable does not necessarily create an exceptional circumstance. The member said the federal language would apply a reasonableness standard to failure to preserve information while the existing state language, by allowing a good faith defense to apply “absent exceptional circumstances,” gives extra protection to a party who failed to preserve information. The member said the federal language seemed to be an attempt to move the rule away from protecting parties who maintain electronic information to having party actions evaluated according to a reasonableness standard.

A member said one thing that was clear was that if the language currently before the committee was approved, it would invite some interesting legal arguments in cases involving disputes over the preservation of evidence and the meaning of “exceptional circumstances.” A member said that the proposed new language as used in the federal rule establishes a fair balancing test between storing information and making sure it is preserved for litigation. The member said that under the proposed new language, if a party fails to act reasonably to preserve information, the court is not required to impose a sanction. The member said if information is lost because of routine system operation, the court has discretion to balance all the factors, including the level of fault and the importance of the information, and to decide whether a sanction is needed.

A member agreed that the proposed new language would shift the emphasis of the rule to put a burden on parties to preserve information. The member said this was a problem because there is often a large lapse in time from the point where an alleged injury occurred and the point where a lawsuit is brought. The member said the proposed change will lead to factual disputes on whether there was adequate notice to trigger a duty to preserve information in a given case. A member said the proposed language would create a major shift in the law related to evidence preservation.

A member said that the language of the rule could be adapted to include both the reasonableness requirement and a defense based on good faith. The Chair said that a company owner may know litigation is coming but information might be destroyed by a technician who does not have this knowledge and allows the system to keep operating routinely. The Chair asked whether the defense would apply when the technician destroyed the information routinely in good faith even though management had knowledge that there may be a need to preserve information. A member said this might be an exceptional circumstance that would negate the defense.

Mr. Hoy MOVED to postpone consideration of the proposed amendments until the next meeting. Mr. Beehler seconded.

Members said postponing would be appropriate because the proposed amendments would create a major shift in practice. A member said it would be good to look at what other jurisdictions have been doing on this issue. A member said it might be a good idea to work with SBAND to get comments from lawyers on the proposal.

Motion CARRIED.

RULE 55, N.D.R.Civ.P., DEFAULT; DEFAULT JUDGMENT (PAGES 206-212 OF THE AGENDA MATERIAL)

Staff explained that the explanatory note to Rule 55 contained references to a federal statute that had been renamed and renumbered. Staff said the proposed amendments would update the explanatory note.

Mr. Beehler MOVED to approve the proposed amendments to Rule 55. Judge Jensen seconded.

The main motion to send the proposed amendments to Rule 55 to the Supreme Court as part of the annual rules package CARRIED.

RULE 64, N.D.R.Civ.P., SEIZING PROPERTY (PAGES 206-212 OF THE AGENDA MATERIAL)

Staff explained that the explanatory note to Rule 64 contained references to a federal statute that had been renamed and renumbered. Staff said the proposed amendments would update the explanatory note.

Judge Schmidt MOVED to approve the proposed amendments to Rule 64. Judge

Fontaine seconded.

The main motion to send the proposed amendments to Rule 64 to the Supreme Court as part of the annual rules package CARRIED.

RULE 7.1, N.D.R.Ct., JUDGMENTS, ORDERS AND DECREES (PAGES 213-220 OF THE AGENDA MATERIAL)

Staff explained that an attorney suggested Rule 7.1 be amended to allow a party 14 days to file objections to a proposed judgment.

Mr. Beehler MOVED to approve the proposed amendments to Rule 7.1. Judge Marquart seconded.

A member said it is very common for a judge to order a party to prepare a proposed judgment. A member said the judge generally gives the proposed judgment to the clerk to make sure it is consistent with the findings of fact and conclusions of law before entry. The member said judges often order the party preparing a proposed judgment to send a copy to the opposing party and judges often wait to allow the opposing party to comment. The member said there is nothing formal in the rules requiring this procedure to be followed.

A member said allowing time to object to a proposed judgment seemed acceptable. A member replied that there was a problem with possible delay. The member said that parties already get 14 days to object to proposed findings of fact and conclusions of law. The member said the proposed amendments would then give parties another 14 days to object to a proposed judgment, which mean that a month would pass after the decision before the judgment was entered. The member said the idea of allowing a period for objections to proposed judgments was good but in practice it would create delay.

A member said a proposed judgment is usually not queued up to be looked at by the judge. A member said one approach would be to change the rule so that proposed findings of fact, conclusions of law, and judgments are done at the same time and there is only one 14-day review period. A member said the judgment usually follows the order for judgment closely and the clerk is not supposed to accept a judgment that does not track the order. A member said it would be unusual for a judgment not to reflect the order. A member said if there was a difference, a party could ask for the judgment to be amended.

A member said this is not a problem that occurs regularly and when it does the lawyers typically resolve it themselves. A member said if the problem is not resolved, the aggrieved party can make a motion to amend the judgment. A member said if there is some

discrepancy from the order for judgment, the problem is usually easy to resolve.

Motion FAILED.

RULE 11.2, N.D.R.Ct., WITHDRAWAL OF ATTORNEYS (PAGES 221-225 OF THE AGENDA MATERIAL)

Staff explained The Board of Governors of the State Bar Association of North Dakota requested that the committee consider a change to Rule 11.2 related to withdrawal of counsel in a civil case that has not yet been filed.

Mr. Beehler MOVED to approve the proposed amendments to Rule 11.2. Mr. Olson seconded.

The Chair said the proposal would address a case where the action had been commenced but not filed and actions such as discovery may have been carried out. The Chair said a case could go along for years without being filed.

Mr. Hoy MOVED to change the title of the proposed new subdivision on page 222, line 17, to "Unfiled Cases." Judge Marquart seconded.

A member said that the proposed title, "Filing Required," might suggest that something would need to be filed when nothing needs to be filed if the case itself is not filed.

Motion CARRIED.

Mr. Hoy MOVED to add to the explanatory note a reference to the attorney's ethical obligation to inform a client of the intent to withdraw under N.D. Rule Prof. Conduct 1.16. Judge Jensen seconded.

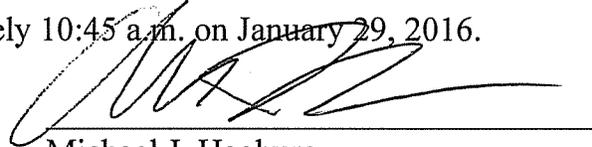
The main motion to send the proposed amendments to Rule 11.2 to the Supreme Court as part of the annual rules package CARRIED.

FOR THE GOOD OF THE ORDER

A member requested that staff perform additional research on access to records in criminal cases. The member requested that staff look into Minnesota's approach to restricting remote access to pre-conviction records in criminal cases. The member said public access to records at the courthouse is not causing problems for people looking for jobs and housing, it is remote access to these records over the Internet. The member asked that staff look into other approaches to handling these records. The Chair said North Dakota was

quite advanced in allowing public access to court records but that often the Internet sources that were causing problems for people were not the state's records website but criminal records search databases assembled from the state's bulk records. The Chair said the Court Technology Committee also needs to play a role on remote access to records issues.

The meeting adjourned at approximately 10:45 a.m. on January 29, 2016.

A handwritten signature in black ink, appearing to read 'M. Hagburg', written over a horizontal line.

Michael J. Hagburg

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: April 26, 2016
RE: Rule 43, N.D.R.Crim.P., Defendant's Presence

At the last meeting, the committee approved proposed amendments to Rule 10 and Rule 43 clarifying that a represented defendant in a felony case may waive the arraignment in writing. The committee decided to send these proposed amendments directly to the Supreme Court.

The Court considered the proposed amendments and decided that defendants seeking waiver of the preliminary hearing and arraignment should be required to acknowledge in writing that they have been informed of their rights. The Court also suggested that the committee develop a form for the use of defendants seeking waiver. A referral letter from Penny Miller is attached, outlining the Court's actions and suggestions.

The Court's proposed amendments to Rule 43 are attached for the committee's review. Staff has drafted a proposed form, attached, for defendants seeking waiver. This proposed form was based on the form currently used by misdemeanor defendants and contains language based on the recital of rights in N.D.R.Crim.P. 5 and 11.

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 and written
24 acknowledgment that the defendant was advised of the rights listed in Rules
25 5(b)(1) and (2), 5(c) and 11(b), the preliminary hearing, the arraignment, and entry
26 of a not guilty plea and the preliminary hearing may occur in the defendant's
27 absence.

28 (2) Misdemeanor Offense or Infraction. The offense is punishable by fine or
29 by imprisonment for not more than one year, or both, and with the defendant's
30 written consent and written acknowledgment that the defendant was advised of the
31 rights listed in Rules 5(b)(1) and (3) and 11(b), the arraignment, plea, trial, or
32 sentencing may occur in the defendant's absence.

33 (3) Conference or Hearing on Legal Question. The proceeding involves
34 only a conference or hearing on a question of law.

35 (4) Sentence Correction. The proceeding involves the correction or
36 reduction of sentence under Rule 35.

37 (c) Waiving Continued Presence. The further progress of the trial, including
38 the return of the verdict and the imposition of sentence, may not be prevented and
39 the defendant waives the right to be present if the defendant, initially present at
40 trial or having pleaded guilty:

41 (1) is voluntarily absent after the trial has begun (whether or not the
42 defendant has been informed by the court of the obligation to remain during the
43 trial);

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

45 (3) after being warned by the court that disruptive conduct will cause the
46 removal of the defendant from the courtroom, persists in conduct that justifies the
47 defendant's exclusion from the courtroom.

48 EXPLANATORY NOTE

49 Rule 43 was amended, effective January 1, 1980; March 1, 1990; March 1,
50 1998; March 1, 2004; March 1, 2006; March 1, 2008; March 1, 2010; March 1,
51 2015;_____.

52 Although Rule 43 does not require the defendant's presence in all instances,
53 the rule does not give a defendant the right to be absent. The court has discretion
54 whether to require the presence of the defendant.

55 In a non-felony case, if the defendant pleads guilty without appearing in
56 court, a written form must be used advising the defendant of his or her
57 constitutional rights and creating a record showing that the plea was made
58 voluntarily, knowingly, and understandingly.

59 Rule 37 provides for summary affirmance if the defendant does not appear
60 at a trial anew.

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

62 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
63 language and organization of the rule were changed to make the rule more easily
64 understood and to make style and terminology consistent throughout the rules.

65 Subdivision (a) was amended, effective March 1, 2004, in response to
66 amendments to Rule 5 and Rule 10 allowing interactive television to be used for
67 the initial appearance and arraignment. N.D. Sup. Ct. Admin. R. 52, which took
68 effect June 1, 2005, governs proceedings conducted by interactive television.

69 Subdivision (a) was amended, effective March 1, 2010, to explain
70 requirements for the consideration of questions submitted by the jury after
71 deliberations begin.

72 Subdivision (a) was amended, effective March 1, 2015, to allow a
73 defendant to be present by contemporaneous audio or audiovisual transmission
74 using reliable electronic means. Any appearance by a defendant by electronic
75 means must be consistent with the standards set by N.D. Sup. Ct. Admin. R. 52,
76 which governs the use of contemporaneous transmission by reliable electronic
77 means in court proceedings.

78 Subdivision (b) was amended, effective March 1, 2015, to allow a
79 represented defendant in a felony case to waive presence at the preliminary hearing
80 ~~by submitting~~ and submit a not guilty plea in writing.

81 Subdivision (b) was amended, effective _____, to clarify that a
82 represented defendant in a felony case may waive presence at the arraignment in

83 writing and to require all defendants seeking waiver of presence to acknowledge in
84 writing that they were advised of their rights.

85 SOURCES: Joint Procedure Committee Minutes of _____;
86 January 28-29, 2016, page 7; September 24-25, pages 21-23; April 24-25, 2014,
87 pages 12-15; May 21-22, 2009, pages 10-11; January 29-30, 2009, pages 13-17;
88 September 28-29, 2006, pages 8-10; January 27-28, 2005, pages 34-36; September
89 26-27, 2002, pages 13-14; January 30, 1997, pages 7-8; September 26-27, 1996,
90 pages 8-10; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4;
91 April 28-29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page
92 15; December 7-8, 1978, pages 27-28; October 12-13, 1978, pages 43-44;
93 December 11-15, 1972, pages 41-43; May 15-16, 1969, pages 11-13.

94 STATUTES AFFECTED:

95 SUPERSEDED: N.D.C.C. §§ 29-12-12, 29-13-02, 29-14-21, 29-16-03,
96 29-16-04, 29-16-06, 29-22-05, 29-22-11, 29-26-04, 33-12-23.

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

98 CROSS REFERENCE: N.D.R.Crim.P. 5 (Initial Appearance Before the
99 Magistrate); N.D.R.Crim.P. 10 (Arrestment); N.D.R.Crim.P. 11 (Pleas);
100 N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 37
101 (Appeal as of Right to District Court; How Taken); N.D.R.Crim.P. Appendix Form
102 17 (Misdemeanor Petition to Enter Plea of Guilty); N.D. Sup. Ct. Admin. R. 52
103 (Contemporaneous Transmission by Reliable Electronic Means).

Hagburg, Mike

From: Miller, Penny
Sent: Thursday, February 25, 2016 2:32 PM
To: Sandstrom, Justice Dale V.
Cc: Hagburg, Mike
Subject: N.D.R.Crim.P. 43

*SUPREME COURT OF NORTH DAKOTA
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VIA E-MAIL ONLY

February 25, 2016

Honorable Dale V. Sandstrom
Chair, Joint Procedure Committee
First Floor, Judicial Wing
State Capitol Building
600 East Boulevard Avenue
Bismarck, ND 58505-0530

RE: Proposed Amendments to N.D.R.Crim.P. 43 (Defendant's Presence)

Dear Justice Sandstrom:

Your letter of February 8, 2016, forwarding proposed amendments to N.D.R.Crim.P. 10 and N.D.R.Crim.P. 43 was received and discussed by the Court.

In reviewing the proposed amendments to N.D.R.Crim.P. 43, the Court discussed whether the requirements of N.D.R.Crim.P. 5(b)(1), (2) and (3), and 5(c) should be referenced in the rule, and whether a form should be developed and included in the appendix to the rules. In light of this discussion, the Court is requesting the Joint Procedure Committee to review proposals developed by Mike Hagburg regarding the Court's discussion, and provide recommendations. It is my understanding Mike, will provide the amended rule and proposed form for the Committee.

Sincerely,

Penny Miller

Clerk
North Dakota Supreme Court

pc: Mike Hagburg, Staff Attorney

STATE OF NORTH DAKOTA
COUNTY OF _____

IN DISTRICT COURT
CRIMINAL NO. _____

THE STATE OF NORTH DAKOTA,
PLAINTIFF
vs.
_____,
DEFENDANT

**PETITION TO WAIVE
PRELIMINARY HEARING
AND ARRAIGNMENT
IN A FELONY CASE**

1 TO THE ABOVE-NAMED COURT:
2

3 I wish to waive the preliminary hearing and arraignment in this case and I state to
4 the
5 Court the following:

6 1. I am the Defendant in this case, my full name is _____ and my
7 date
8 of birth is _____.

9 2. I am charged with _____(name of offense)_____ in violation of
10 _____(statute
11 or ordinance)_____.

12 3. I understand that the maximum possible sentence for the offense with which I
13 am
14 charged is _____ days imprisonment or a fine of ____ (amount)____ or both, and that
15 the

14 Court may impose a sentence of imprisonment of not less than _____ days
15 imprisonment or a fine of _____ or both (if a minimum sentence is required
by
16 statute).

17 4. I am represented by _____.

18

19

20 5. I have been advised by my attorney that:

21

22 I have a right to remain silent and that any statement I make may later be
23 used against me;

24

25 I have a right to the assistance of counsel before making any statement or
26 answering any questions;

27

28 I have a right to be represented by counsel at each and every stage of the
29 proceedings;

30

31 I have a right to have legal services provided at public expense to the extent
32 that I am unable to pay for my defense without undue hardship; and

33

34 I have the right to be admitted to reasonable bail under Rule 46.

35

36 6. I understand that a defendant who is not a United States citizen may request that
37 an attorney for the state or a law enforcement officer notify a consular officer from
38 the defendant's country of nationality that the defendant has been arrested.

39

40 7. I have been advised by my attorney that:

41

42 I have the right to plead not guilty and to persist in that plea;

43

44 I have the right to a jury trial;

45

46 I have the right at trial to confront and cross-examine adverse witnesses,
47 to be protected from compelled self-incrimination, to testify and present evidence,
48 and to compel the attendance of witnesses.

49

50 8. I understand that I am presumed to be not guilty. At trial, the burden of proof
51 would be on the State to prove beyond a reasonable doubt that I committed the
52 offense. I understand that I will waive my right to a trial if I later choose to plead
53 guilty

54

55 9. I understand I have the right to a preliminary hearing under Rule 5.1. The
56 purpose of the preliminary hearing would not be to determine guilt or innocence,
57 but for the Court to determine whether there is probable cause to believe that an
58 offense has been committed and I committed the offense.

59

60 10. I understand that under Rule 10 I have a right to an arraignment in open court
61 and to have the indictment, information, or complaint read before entering a plea.

62

63 11. I have fully discussed the charge(s), all my rights, and this petition with my
64 attorney, ____ (name of attorney) _____. I knowingly and voluntarily give up my
65 right to be present at the preliminary examination and arraignment and request that
66 the Court enter a plea of NOT GUILTY to the charge(s) in the indictment,
67 information or complaint on my behalf.

68

69 Dated this ____ day of _____, 20__.

70

71

72

73 Signature of Defendant

74

75

76

77 Printed Name of Defendant

78

79 Subscribed and sworn to before me this

80

81 ____ day of _____, 20__.

82

83

84

85 NOTARY PUBLIC

86

87 I, ___(name of attorney)___ state that I am the attorney for the defendant in this
88 criminal action; that I personally explained the contents of the above petition to
89 the defendant; and that I personally observed the defendant date and sign the
90 above petition.

91

92 Dated this ____ day of _____, 20__.

93

94

95

96 Attorney for Defendant

97

98 PETITION TO WAIVE PRELIMINARY HEARING AND ARRAIGNMENT

99 ACCEPTED BY

100

101

102

103 Judge of (District Court)Date

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 26, 2016

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

At the last meeting, the committee discussed proposed amendments to Rule 26 based on the December 2015 amendments to Fed.R.Civ.P. 26. The committee decided to indefinitely postpone consideration of those amendments.

At the meeting, the committee also discussed a letter from attorney Derrick Braaten that suggested changes to Rule 26 that would make it more consistent with the federal rule's provisions on discovery of material related to expert witnesses.

Proposed amendments to Rule 26 are attached.

In the version of Rule 26 discussed at the last meeting, language related to electronically stored information was moved from subparagraph (b)(1)(A) to subparagraph (b)(1)(B)(ii). In the discussion, some members expressed approval of this proposed change because it brought language related to electronically stored information together in one place. This proposed amendment is retained in the attached draft amendments to the rule.

Fed.R.Civ.P. 26(a)(2) requires automatic disclosure of specific information from experts expected to testify. North Dakota has not adopted the federal disclosure requirements and does not have an equivalent section. In order to provide more clarity about what information an expert must disclose, the draft amendments would insert a new subparagraph (b)(4)(A)(ii) that would allow attorneys to seek through discovery the same information that the federal rule requires experts to disclose automatically. New language in subparagraph

(b)(4)(A)(ii) would allow a deposition to be conducted only after this information was requested and provided, consistent with the federal rule. Language in (b)(4)(A)(ii) that allows a party to object to an expert depositions, which is inconsistent with the federal rule, would be deleted under the proposal.

Fed.R.Civ.P. 26(b)(4) contains provisions protecting draft reports and trial preparation communications. These provisions were added to the federal rule in 2010 to provide more work product protection. Mr. Braaten specifically mentioned these provisions in his letter suggesting that Rule 26 be amended to conform more closely to the federal rule. Proposed amendments to Rule 26 would insert new subparagraphs (b)(4)(B) and (b)(4)(C) providing the same protections as the federal provisions. The committee discussed the then new federal provisions extensively at the April and September 2011 meetings and rejected them. Excerpts from these discussions are attached.

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, including the existence, description,
14 nature, custody, condition, and location of any documents, electronically stored
15 information, or other tangible things and the identity and location of persons who
16 know of any discoverable matter. For good cause, the court may order the
17 discovery of any matter relevant to the subject matter involved in the action.
18 Relevant information need not be admissible at the trial if the discovery appears
19 reasonably calculated to lead to the discovery of admissible evidence. For the

20 purposes of the discovery rules, the phrase "electronically stored information"
21 includes reasonably accessible metadata that will enable the discovering party to
22 have the ability to access such information as the date sent, date received, author,
23 and recipients. The phrase does not include other metadata unless the parties agree
24 otherwise or the court orders otherwise upon motion of a party and a showing of
25 good cause for the production of certain metadata. All discovery is subject to the
26 limitations imposed by Rule 26(b)(1)(B)(i).

27 (B) Limitations on Frequency and Extent.

28 (i) When Required. On motion or on its own, the court must limit the
29 frequency or extent of discovery otherwise allowed by these rules if it determines
30 that:

31 – discovery sought is unreasonably cumulative or duplicative, or it can be
32 obtained from some other source that is more convenient, less burdensome, or less
33 expensive;

34 –the party seeking discovery has had ample opportunity to obtain the
35 information by discovery in the action; or

36 –the burden or expense of the proposed discovery outweighs its likely
37 benefit, considering the needs of the case, the amount in controversy, the parties'
38 resources, the importance of the issues at stake in the action, and the importance of
39 the discovery in resolving the issues.

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

41 purposes of the discovery rules, the phrase "electronically stored information"
42 includes reasonably accessible metadata that will enable the discovering party to
43 have the ability to access such information as the date sent, date received, author,
44 and recipients. The phrase does not include other metadata unless the parties agree
45 otherwise or the court orders otherwise upon motion of a party and a showing of
46 good cause for the production of certain metadata. A party need not provide
47 discovery of electronically stored information from sources that the party identifies
48 as not reasonably accessible because of undue burden or cost. On motion to
49 compel discovery or for a protective order, the party from whom discovery is
50 sought must show that the information is not reasonably accessible because of
51 undue burden or cost. If that showing is made, the court may nonetheless order
52 discovery from such sources if the requesting party shows good cause, considering
53 the limitations of Rule 26(b)(1)(B). The court may specify conditions for the
54 discovery.

55 (2) Insurance Agreements. If a person carrying on an insurance business
56 might be liable to satisfy part or all of a judgment in an action or to indemnify or
57 reimburse for payments made to satisfy the judgment, a party may obtain discovery
58 of the existence and contents of the insurance agreement. Disclosure of the
59 insurance agreement is not reason for its admission in evidence at trial. An
60 application for insurance may not be treated as part of an insurance agreement.

61 (3) Trial Preparation Materials.

62 (A) Documents and Tangible Objects. Ordinarily, a party may not discover
63 documents and tangible things that are prepared in anticipation of litigation or for
64 trial by or for another party or its representative (including the other party's
65 attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule
66 26(b)(5), these materials may be discovered if:

67 (i) they are otherwise discoverable under Rule 26(b)(1); and

68 (ii) the party shows that it has substantial need of the materials to prepare its
69 case and cannot, without undue hardship, obtain their substantial equivalent by
70 other means.

71 (B) Protection Against Disclosure. If the court orders discovery of those
72 materials, it must protect against disclosure of the mental impressions, conclusions,
73 opinions, or legal theories of a party's attorney or other representative concerning
74 the litigation.

75 (C) Previous Statement. Any party or other person may, on request and
76 without the required showing, obtain the person's own previous statement about
77 the action or its subject matter. If the request is refused, the person may move for a
78 court order and Rule 37(a)(5) applies to the award of expenses. A previous
79 statement is:

80 (i) a written statement that the person has signed or otherwise adopted or
81 approved; or

82 (ii) a contemporaneous stenographic, mechanical, electrical, or other

83 recording, or a transcription of it, that recites substantially verbatim the person's
84 oral statement.

85 (4) Trial Preparation Experts.

86 (A) Expert Who May Testify. Discovery of facts known and opinions held
87 by experts, otherwise discoverable under Rule 26(b)(1) and acquired or developed
88 in anticipation of litigation or for trial, may be obtained only as follows:

89 (i) a party may through interrogatories require any other party to identify
90 each person whom the other party expects to call as an expert witness at trial; to
91 state the subject matter on which the expert is expected to testify; and to state the
92 substance of the facts and opinions to which the expert is expected to testify and a
93 summary of the grounds for each opinion;

94 (ii) if a person identified as an expert witness is one retained or specially
95 employed to provide expert testimony in the case or one whose duties as the other
96 party's employee regularly involve giving expert testimony, a party may require the
97 witness to provide a report containing:

98 – a complete statement of all opinions the witness will express and the basis
99 and reasons for them;

100 – the facts or data considered by the witness in forming them;

101 – any exhibits that will be used to summarize or support them;

102 – the witness's qualifications, including a list of all publications authored in
103 the previous 10 years;

104 – a list of all other cases in which, during the previous 4 years, the witness
105 testified as an expert at trial or by deposition; and

106 – a statement of the compensation to be paid for the study and testimony in
107 the case.

108 (ii iii) a party may depose any person who has been identified as an expert
109 witness whose opinions may be presented at trial ~~unless the court finds, on motion,~~
110 ~~that the deposition is unnecessary, overly burdensome, or unfairly oppressive. If~~
111 Rule 26(b)(4)(A)(ii) allows a party to obtain a report from the expert, the
112 deposition may be conducted only after the report is provided.

113 (B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules
114 26(b)(3)(A) and (B) protect drafts of any report required under Rule
115 26(b)(4)(A)(ii), regardless of the form in which the draft is recorded.

116 (C) Trial-Preparation Protection for Communications Between a Party's
117 Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications
118 between the party's attorney and any witness required to provide a report under
119 26(b)(4)(A)(ii), regardless of the form of the communications, except to the extent
120 that the communications:

121 (i) relate to compensation for the expert's study or testimony;

122 (ii) identify facts or data that the party's attorney provided and that the
123 expert considered in forming the opinions to be expressed; or

124 (iii) identify assumptions that the party's attorney provided and that the

125 expert relied on in forming the opinions to be expressed.

126 (B D) Expert Employed Only for Trial Preparation. Ordinarily, a party may
127 not, by interrogatories or deposition, discover facts known or opinions held by an
128 expert who has been retained or specially employed by another party in
129 anticipation of litigation or to prepare for trial and who is not expected to be called
130 as a witness at trial. But a party may do so only:

131 (i) as provided in Rule 35(b); or

132 (ii) on showing exceptional circumstances under which it is impracticable
133 for the party to obtain facts or opinions on the same subject by other means.

134 (C E) Payment. Unless manifest injustice would result, the court must
135 require that the party seeking discovery:

136 (i) pay the expert a reasonable fee for time spent in responding to discovery
137 under Rule 26(b)(4)(A) or (B D); and

138 (ii) for discovery under Rule 26(b)(4)(A) the court may require, and for
139 discovery under Rule 26(b)(4)(B D) the court must require the party seeking
140 discovery to pay the other party a fair portion of the fees and expenses it
141 reasonably incurred in obtaining the expert's facts and opinions.

142 (5) Claiming Privilege or Protecting Trial Preparation Materials.

143 (A) Information Withheld. When a party withholds information otherwise
144 discoverable by claiming that the information is privileged or subject to protection
145 as trial-preparation material, the party must:

146 (i) expressly make the claim; and
147 (ii) describe the nature of the documents, communications, or tangible
148 things not produced or disclosed, and do so in a matter that, without revealing
149 information itself privileged or protected, will enable other parties to assess the
150 claim.

151 (B) Information Produced. If information is produced in discovery that is
152 subject to a claim of privilege or of protection as trial-preparation material, the
153 party making the claim may notify any party that received the information of the
154 claim and the basis for it. After being notified, a receiving party must promptly
155 return, sequester, or destroy the specified information and any copies it has and
156 may not use or disclose the information until the claim is resolved. A receiving
157 party may promptly present the information to the court under seal for
158 determination of the claim. If the receiving party disclosed the information before
159 being notified, it must take reasonable steps to retrieve it. The producing party
160 must preserve the information until the claim is resolved.

161 (c) Protective Orders.

162 (1) In General. A party or any person from whom discovery is sought may
163 move for a protective order in the court where the action is pending, or as an
164 alternative on matters relating to a deposition, in the court in the district where the
165 deposition will be taken. The court may, for good cause shown, issue an order to
166 protect a party or person from annoyance, embarrassment, oppression, or undue

167 burden or expense, including one or more of the following:

168 (A) forbidding the discovery;

169 (B) specifying terms and conditions, including time or place for the
170 discovery;

171 (C) prescribing a discovery other than the one selected by the party seeking
172 discovery;

173 (D) forbidding inquiry into certain matters, or limiting the scope of
174 discovery to certain matters;

175 (E) designating the persons who may be present while the discovery is
176 conducted;

177 (F) requiring that a deposition be sealed and opened only on court order;

178 (G) requiring that a trade secret or other confidential research, development,
179 or commercial information not be revealed or be revealed only in a specified way;
180 and

181 (H) requiring that the parties simultaneously file specified sealed documents
182 or information to be opened as the court directs.

183 (2) Ordering Discovery. If a motion for a protective order is wholly or
184 partially denied, the court may, on just terms, order that any party or person
185 provide or permit discovery.

186 (3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

187 (d) Sequence and Timing of Discovery. Unless, on motion, the court orders

188 otherwise for the parties' and witnesses' convenience and in the interests of justice,
189 methods of discovery may be used in any sequence and discovery by one party
190 does not require any other party to delay its discovery.

191 (e) Supplementing Responses.

192 (1) In General. A party who has responded to an interrogatory, request for
193 production, or request for admission, must supplement or correct its response:

194 (A) in a timely manner if the party learns that in some material respect the
195 response is incomplete or incorrect, and if the additional or corrective information
196 has not otherwise been made known to the parties during the discovery process or
197 in writing; or

198 (B) as ordered by the court.

199 (2) Witnesses. A party has a duty to timely supplement a response about:

200 (A) the identity and location of persons having knowledge of discoverable
201 matters, and

202 (B) the identity of each person expected to be called as an expert witness at
203 trial, the subject matter on which the person is expected to testify, and the
204 substance of the person's testimony.

205 (f) Discovery Meeting, Discovery Conference, Discovery Plan.

206 (1) Discovery Meeting. No earlier than 40 days after the complaint is filed
207 in an action, any party's attorney or a self-represented party may request in writing
208 a meeting on the subject of discovery, including the discovery of electronically

209 stored information. If such a request is made, the parties must meet within 21 days,
210 unless agreed otherwise by the parties or their attorneys or another time for the
211 meeting is ordered by the court. Even if the parties or their attorneys do not seek to
212 have a discovery meeting, at any time after the complaint is filed the court may
213 direct the parties or their attorneys to appear before it for a discovery conference.

214 (2) Matters for Consideration. During a discovery meeting held under Rule
215 26(f)(1), the attorneys and any self-represented parties must:

216 (A) consider the nature and basis of the parties' claims and defenses and the
217 possibilities for promptly settling or resolving the case, and

218 (B) discuss the preparation of a discovery plan as set forth in Rule 26 (f)(3).

219 (3) Conduct of Meeting. Attorneys for the parties, and any self-represented
220 parties, that have appeared in the case are jointly responsible for arranging the
221 meeting, for being prepared to discuss a discovery plan, and for attempting in good
222 faith to agree on a discovery plan. The meeting may be held by telephone, by
223 videoconference, or in person, or by a combination of methods, unless the court,
224 on motion, orders the attorneys and the self-represented parties to attend in person.

225 (4) Discovery Plan or Report.

226 (A) In General. If a discovery plan is agreed on, it must be submitted to the
227 court within 14 days after the meeting, and the parties may request a conference
228 with the court regarding the plan. If the parties do not agree on a discovery plan,
229 they must submit to the court within 14 days after the meeting a joint report

230 containing those parts of a discovery plan on which they agree and the position of
231 each of the parties on the parts upon which they disagree. Unless the parties agree
232 otherwise, the attorney for the first plaintiff listed on the complaint is responsible
233 for submitting the discovery plan or joint report.

234 (B) Discovery Plan Contents. A discovery plan must contain the following:

235 (i) a statement of the issues as they then appear;

236 (ii) a proposed plan and schedule of discovery, including the discovery of
237 electronically stored information;

238 (iii) with respect to electronically stored information, and if appropriate
239 under the circumstances of the case, a reference to the preservation of such
240 information, the media form, format, or procedures by which such information will
241 be produced, the allocation of the costs of preservation, production, and, if
242 necessary, restoration, of such information, the method for asserting or preserving
243 claims of privilege or of protection of the information as trial-preparation materials
244 if different from that provided in Rule 26 (b)(5), the method for asserting or
245 preserving confidentiality and proprietary status, and any other matters addressed
246 by the parties;

247 (iv) any limitations proposed to be placed on discovery, including, if
248 appropriate under the circumstances of the case, that discovery be conducted in
249 phases or be limited to or focused on particular issues;

250 (v) when discovery should be completed; and

251 (vi) if appropriate under the circumstances of the case, any limitations or
252 conditions under Rule 26 (c) regarding protective orders.

253 (5) Discovery Conference. If the parties are unable to agree to a discovery
254 plan at a meeting held under Rule 26 (f)(1), they must, on motion of any party,
255 appear before the court for a discovery conference at which the court must order
256 the entry of a discovery plan after consideration of the report required to be
257 submitted under Rule 26 (f)(4)(A) and the position of the parties. The order may
258 address other matters, including the allocation of discovery costs, as are necessary
259 for the proper management of discovery in the action. An order may be altered or
260 amended as justice may require. The court may combine the discovery conference
261 with a pretrial conference authorized by Rule 16.

262 (g) Signing Discovery Request, Responses, and Objections.

263 (1) Signature Required; Effect of Signature. Every discovery request,
264 response, or objection must be signed by at least one attorney of record in the
265 attorney's individual name, or by the party personally, if self-represented, state the
266 signer's address, electronic mail address for electronic service, telephone number,
267 and State Board of Law Examiners identification number, if applicable. By
268 signing, the attorney or party certifies that the signer has read the request,
269 response, or objection, and that to the best of the signer's knowledge, information,
270 and belief formed after a reasonable inquiry it is:

271 (A) consistent with these rules and warranted by existing law or by a good

272 faith argument for extending, modifying or reversing existing law;

273 (B) not interposed for any improper purpose, such as to harass, cause
274 unnecessary delay or needlessly increase the cost of litigation; and

275 (C) neither unreasonable nor unduly burdensome or expensive, considering
276 the needs of the case, prior discovery in the case, the amount in controversy, and
277 the importance of the issues at stake in the litigation.

278 (2) Failure to Sign. Other parties have no duty to act on an unsigned
279 request, response, or objection until it is signed, and the court, on motion or on its
280 own, must strike it unless a signature is promptly supplied after the omission is
281 called to the attorney's or party's attention.

282 (3) Sanction for Improper Certification. If a certification violates this rule,
283 without substantial justification, the court, on motion or its own, must impose an
284 appropriate sanction on the signer, the party on whose behalf the signer was acting,
285 or both. The sanction may include an order to pay the reasonable expenses,
286 including attorney's fees, caused by the violation.

287 EXPLANATORY NOTE

288 Rule 26 was amended, effective July 1, 1981; March 1, 1986; March 1,
289 1990; March 1, 1996; March 1, 2008; March 1, 2011; March 1, 2013; March 1,
290 2015;_____.

291 Rule 26 is derived from Fed.R.Civ.P. 26

292 As amended, effective March 1, 1996, a party deposing another party's

293 expert witness under subdivision (b)(4)(A)(ii) must pay the expert a reasonable fee
294 under subdivision (b)(4)(C), even though a court order has not been obtained
295 authorizing the deposition or commanding payment of expert witness fees.

296 Rule 26 was amended, effective March 1, 2008, to implement changes
297 related to discovery of electronically stored information. The changes reflect the
298 2006 amendments to Fed.R.Civ.P. 26. Subdivision (b) was amended to incorporate
299 a new subparagraph (b)(2)(B) on limitations to discovery of electronic information.
300 A new paragraph (b)(6) was also added to address claims of privilege or protection
301 of trial preparation materials.

302 Rule 26 was amended, effective March 1, 2011, in response to the
303 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
304 and organization of the rule were changed to make the rule more easily understood
305 and to make style and terminology consistent throughout the rules.

306 Subparagraph (b)(1)(A) was amended, effective March 1, 2013, to include a
307 definition of "electronically stored information" and to designate what types of
308 metadata may be discovered. Effective _____, this language was transferred
309 to subparagraph (b)(1)(B)(ii).

310 Subparagraph (b)(4)(A)(ii) was added, effective _____, to allow a
311 party to request an expert witness report in certain situations. Subparagraph
312 (b)(4)(A)(iii) was amended to allow a deposition of an expert witness from whom
313 a reporte was requested to be conducted only after the report is provided.

314 Subparagraphs (b)(4)(B) and (b)(4)(C) were added,
315 effective _____, to protect draft reports and trial preparation
316 communications.

317 Subparagraph (c)(1)(H) was amended, effective March 1, 2015, to remove a
318 reference to filing documents in a sealed paper envelope. Items are filed with the
319 court electronically, and may be designated as sealed when submitted.

320 Subdivision (f) was amended, effective March 1, 2013, to provide a
321 procedure for discovery meetings and conferences and for the formulation of
322 discovery plans and reports, with an emphasis on discussing and planning for the
323 discovery of electronic information.

324 Paragraph (g)(1) was amended, effective March 1, 2015, to specify that the
325 attorney's electronic mail address for electronic service must be included with the
326 signature.

327 SOURCES: Joint Procedure Committee Minutes of
328 _____ ; January 28-29, 2016, pages 13-14; April 24-25, 2014,
329 page 25; January 26-27, 2012, page 17-19; January 29-30, 2009, page 6;
330 September 25, 2008, pages 21-22; January 25, 2007, pages 9-10; September 28-29,
331 2006, pages 18-20; January 26-27, 1995, pages 10-12; September 29-30, 1994,
332 pages 21-22; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984,
333 page 28; January 20, 1984, pages 23-31; December 11-12, 1980, page 2; October
334 30-31, 1980, pages 9-10; September 20-21, 1979, page 19; Fed.R.Civ.P. 26.

335 CROSS REFERENCE: N.D.R.Civ.P. 16 (Pretrial Procedure-Formulating
336 Issues), N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken),
337 N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 30
338 (Depositions Upon Oral Examination), N.D.R.Civ.P. 30.1 (Uniform Audio-Visual
339 Deposition Rule), N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written
340 Questions), N.D.R.Civ.P. 33 (Interrogatories to Parties), N.D.R.Civ.P. 34
341 (Production of Documents and Things and Entry Upon Land for Inspection and
342 Other Purposes), N.D.R.Civ.P. 35 (Physical and Mental Examination of Persons),
343 N.D.R.Civ.P. 36 (Requests for Admission), and N.D.R.Civ.P. 37 (Failure to Make
344 Discovery-Sanctions); N.D.R.Ev. 507 (Trade Secrets), N.D.R.Ev. 510 (Waiver of
345 Privilege by Voluntary Disclosure), and N.D.R.Ev. 706 (Court-Appointed
346 Experts).

January 20, 2016

Mike Hagburg
Via email: MHagburg@ndcourts.gov
Staff Attorney
Joint Procedure Committee

Re: Amendments to ND Discovery Rules

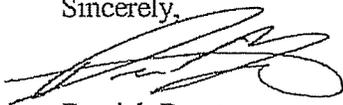
Dear Mr. Hagburg:

I am writing to request that the committee consider changes to N.D.R.Civ.P. 26 to conform more closely to the federal rule. Specifically, the federal rules have been amended in recent years in response to issues attorneys ran into regarding the discoverability of attorney work product and draft reports. I have had disputes in the past few years with other attorneys regarding what is discoverable, and whether documents can be obtained from trial experts through the use of subpoenas. While this is a common practice, I have also encountered other attorneys who direct their experts not to respond to such subpoenas, which raises additional issues related to standing.

I recently had a disagreement with one attorney that we were able to work out amicably, but I had begun a rough draft of a motion to compel, which highlights some of the issues that lead me to write to you.

I realize that this issue may be beyond the scope of what is being considered currently by the committee, but I hope that by raising this issue it will be considered in the future if not with the current amendments.

Sincerely,



Derrick Braaten

Attachment

xxx,)	
)	
Plaintiff,)	Case No. xxx
)	
vs.)	
)	BRIEF IN SUPPORT OF
x,)	MOTION TO COMPEL
)	
Defendant.)	
)	
)	
)	

[¶1]. Plaintiff submitted the objection attached as Exhibit B in response to the Subpoena Duces Tecum attached as Exhibit A hereto. Defendant is requesting that this court compel xxxxxx to produce documents in accord with the subpoena for the deposition to be held on November 17, 2015, at 10:00 a.m.

[¶2]. First, xxxxxxxx is not represented by the attorneys making the objection; he is a third party retained expert, and as such, Plaintiff's counsel does not have standing to make the objection.

[¶3]. More importantly, Plaintiff misunderstands the nature of the limitations imposed by N.D.R.Civ.P. 26(b)(4). North Dakota's present Rule 26(b)(4) is substantially the same as the federal equivalent as it existed prior to the 2010 Amendments. The text of N.D.R.Civ.P. 26(b)(4)(A) is as follows:

- (4) Trial Preparation Experts.
- (A) Expert Who May Testify. Discovery of facts known and opinions held by experts, otherwise discoverable under Rule 26(b)(1) and acquired or

developed in anticipation of litigation or for trial, may be obtained only as follows:

(i) a party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial; to state the subject matter on which the expert is expected to testify; and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion;

(ii) a party may depose any person who has been identified as an expert witness whose opinions may be presented at trial unless the court finds, on motion, that the deposition is unnecessary, overly burdensome, or unfairly oppressive.

[¶4]. The text of F.R.Civ.P. 26(b)(4) as it existed in 2006 is as follows:

(4) Trial Preparation: Experts. (A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided. Rule 26 FEDERAL RULES OF CIVIL PROCEDURE 36 (B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

Federal Rule of Civil Procedure 26 (2006).

[¶5]. “Although not binding, federal court interpretations of a corresponding federal rule of civil procedure are highly persuasive in construing [North Dakota’s] rule.”

Thompson v. Peterson, 546 N.W.2d 856, 860 (N.D. 1996).

[¶6]. A treatise on the issue pertinent here discussed the federal rules and explained that some courts might take issue with a litigant issuing a subpoena duces tecum to an expert without an accompanying deposition notice, but it is not questioned that the practice of issuing a subpoena to the expert to produce documents *at a deposition* is proper.

[O]ne can certainly require the production of the documents at the deposition through the use of the Rule 45 subpoena process. But production of the documents at the deposition at a minimum slows down the deposition process as deposing counsel usually has to work his or her way through the documents while questioning is ongoing in real time....

One possible approach [to get documents in advance] might be to issue a separate, earlier subpoena for the custodian of records of the expert's office, thinking that one could get the documents through the custodian's deposition, review them, then depose the expert individually on his or her substantive work later. Such an approach may be worth a try, although as of the present writing the case law governing this issue is less than clear

Expert Witnesses in Civil Trials § 8:9.

[¶7]. This treatise then cites to authority that discussed this issue with the following quote in a footnote:

Compare Thomas v. Marina Associates, 202 F.R.D. 433, 51 Fed. R. Serv. 3d 745 (E.D. Pa. 2001) (suggesting in dicta that a subpoena to a custodian of records might be treated differently than a subpoena to the expert, and holding that absent a claim of privilege a defendant has no standing to challenge a subpoena served directly on the expert) *and* Thomas v. Marina Associates, 202 F.R.D. 433, 51 Fed. R. Serv. 3d 745 (E.D. Pa. 2001) (“With regard to nonparties such as plaintiffs' expert witness, a request for documents may be made by a subpoena duces tecum pursuant to Rule 45”) *with* Marsh v. Jackson, 141 F.R.D. 431, 432 (W.D. Va. 1992) (Rule 45 subpoena may not be used to circumvent limitations on expert discovery prescribed by Rule 26); *see also* Newcomb v. Principal Mut. Life Ins. Co., 2008 WL 3539520 (W.D. N.C. 2008) (acknowledging the confusion in the caselaw and suggesting that an adjournment of the expert's deposition to allow deposing counsel an opportunity to review the documents might be appropriate).

Expert Witnesses in Civil Trials § 8:9, fn.10.

[¶8]. A seminal case on this issue is *Marsh v. Jackson*, 141 F.R.D. 431, 432-33 (W.D. Va. 1992). That court stated:

The comments state that “[C]lause (c)(3)(B)(ii) provides appropriate protection for the intellectual property of the non-party witness; it does not apply to the expert retained by a party, whose information is subject to the provisions of Rule 26(b)(4).” Rule 45, 1991 Amendment, Subsection (c) advisory committee notes. As indicated, Rule 26(b)(4) and, concurrently,

Rule 30, traditionally have been seen as limitations on the methods by which information may be discovered from experts retained by a party. None of the methods of discovery allowed under Rules 26(b)(4) and 30 permit the use of bare Rule 45 subpoenas *duces tecum*. Instead, they operate as a control, or brake if you will, on the potential runaway use of the subpoena *duces tecum* to compel the production of the evidence of experts retained by a party to testify at trial. These methods are tried and true. They both are simple and provide protection for the parties and witnesses. They contemplate gathering information first from the party *viz* Rule 26(b). In the event a party wishes to deal directly with the opponent's expert, Rule 30 permits the use of a deposition. In conjunction with that deposition, the expert might be served also with a Rule 45 subpoena *duces tecum* requiring him to produce a designated list of materials or things.

Marsh v. Jackson, 141 F.R.D. 431, 432-33 (W.D. Va. 1992).

[¶9]. While it is true that the language of the F.R.Civ.P. 26(b)(4) has been changed and does not correspond directly to North Dakota's Rule 2626(b)(4), the changes to the federal rule were made after the authority cited above interpreted them, and furthermore, the rule changes were made to require additional disclosure and detail in expert reports, and to protect attorney work product. To the extent these changes to the federal rule bear upon the applicability of their interpretation to the interpretation of the North Dakota rule, the additional disclosures militate in favor of Defendant's position, and Defendant is not asking for any attorney work-product or attorney-client privileged documents, and will forego any request for communications between Defendant's legal counsel and Mr. Ibach. Most importantly, when the *Marsh* case was decided, the federal rule substantively the same as North Dakota's Rule 26. *See* F.R.Civ.P. 26(b)(4)

[¶10]. The primary documents being sought are xxxxx xxx

[¶11]. In light of the foregoing arguments, xxx respectfully requests that this court issue a motion to compel xxx to produce these documents at the deposition currently scheduled for xxx.

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Rule 26. Duty to Disclose; General Provisions Governing Discovery

(a) Required Disclosures.

(1) Initial Disclosure.

(A) In General. Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties:

(i) the name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment;

(ii) a copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody, or control and may use to support its claims or defenses, unless the use would be solely for impeachment;

(iii) a computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered; and

(iv) for inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(B) Proceedings Exempt from Initial Disclosure. The following proceedings are exempt from initial disclosure:

(i) an action for review on an administrative record;

(ii) a forfeiture action in rem arising from a federal statute;

(iii) a petition for habeas corpus or any other proceeding to challenge a criminal conviction or sentence;

(iv) an action brought without an attorney by a person in the custody of the United States, a state, or a state subdivision;

(v) an action to enforce or quash an administrative summons or subpoena;

(vi) an action by the United States to recover benefit payments;

(vii) an action by the United States to collect on a student loan guaranteed by the United States;

(viii) a proceeding ancillary to a proceeding in another court; and

(ix) an action to enforce an arbitration award.

(C) Time for Initial Disclosures—In General. A party must make the initial disclosures at or within 14 days after the parties' Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in this action and states the objection in the proposed discovery plan. In ruling on the objection, the court must determine what disclosures, if any, are to be made and must set the time for disclosure.

(D) Time for Initial Disclosures—For Parties Served or Joined Later. A party that is first served or otherwise joined after the Rule 26(f) conference must make the initial disclosures within 30 days after being served or joined, unless a different time is set by stipulation or court order.

(E) Basis for Initial Disclosure; Unacceptable Excuses. A party must make its initial disclosures based on the information then reasonably available to it. A party is not excused from making its disclosures because it has not fully investigated the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In General. In addition to the disclosures required by Rule 26(a)(1), a party must disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705.

(B) Witnesses Who Must Provide a Written Report. Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report—prepared and signed by the witness—if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony. The report must contain:

- (i) a complete statement of all opinions the witness will express and the basis and reasons for them;
- (ii) the facts or data considered by the witness in forming them;
- (iii) any exhibits that will be used to summarize or support them;
- (iv) the witness's qualifications, including a list of all publications authored in the previous 10 years;
- (v) a list of all other cases in which, during the previous 4 years, the witness testified as an expert at trial or by deposition; and
- (vi) a statement of the compensation to be paid for the study and testimony in the case.

(C) Witnesses Who Do Not Provide a Written Report. Unless otherwise stipulated or ordered by the court, if the witness is not required to provide a written report, this disclosure must state:

- (i) the subject matter on which the witness is expected to present evidence under Federal Rule of Evidence 702, 703, or 705; and
- (ii) a summary of the facts and opinions to which the witness is expected to testify.

(D) Time to Disclose Expert Testimony. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:

- (i) at least 90 days before the date set for trial or for the case to be ready for trial; or
- (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B) or (C), within 30 days after the other party's disclosure.

(E) Supplementing the Disclosure. The parties must supplement these disclosures when required under Rule 26(e).

(3) Pretrial Disclosures.

(A) In General. In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to the other parties and promptly file the following information about the evidence that it may present at trial other than solely for impeachment:

(i) the name and, if not previously provided, the address and telephone number of each witness—separately identifying those the party expects to present and those it may call if the need arises;

(ii) the designation of those witnesses whose testimony the party expects to present by deposition and, if not taken stenographically, a transcript of the pertinent parts of the deposition; and

(iii) an identification of each document or other exhibit, including summaries of other evidence—separately identifying those items the party expects to offer and those it may offer if the need arises.

(B) Time for Pretrial Disclosures; Objections. Unless the court orders otherwise, these disclosures must be made at least 30 days before trial. Within 14 days after they are made, unless the court sets a different time, a party may serve and promptly file a list of the following objections: any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(A)(ii); and any objection, together with the grounds for it, that may be made to the admissibility of materials identified under Rule 26(a)(3)(A)(iii). An objection not so made—except for one under Federal Rule of Evidence 402 or 403—is waived unless excused by the court for good cause.

(4) Form of Disclosures. Unless the court orders otherwise, all disclosures under Rule 26(a) must be in writing, signed, and served.

(b) Discovery Scope and Limits.

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable..

(2) Limitations on Frequency and Extent.

(A) When Permitted. By order, the court may alter the limits in these rules on the number of depositions and interrogatories or on the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36.

(B) Specific Limitations on Electronically Stored Information. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(C) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule if it determines that:

(i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;

(ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

(3) Trial Preparation: Materials.

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order, and Rule 37(a)(5) applies to the award of expenses. A previous statement is either:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other recording—or a transcription of it—that recites substantially verbatim the person's oral statement.

(4) Trial Preparation: Experts.

(A) Deposition of an Expert Who May Testify. A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If Rule 26(a)(2)(B) requires a report from the expert, the deposition may be conducted only after the report is provided.

(B) Trial-Preparation Protection for Draft Reports or Disclosures. Rules 26(b)(3)(A) and (B) protect drafts of any report or disclosure required under Rule 26(a)(2), regardless of the form in which the draft is recorded.

(C) Trial-Preparation Protection for Communications Between a Party's Attorney and Expert Witnesses. Rules 26(b)(3)(A) and (B) protect communications between the party's attorney and any witness required to provide a report under Rule 26(a)(2)(B), regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the opinions to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

(D) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(E) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (D); and

(ii) for discovery under (D), also pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial-Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

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

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending—or as an alternative on matters relating to a deposition, in the court for the district where the deposition will be taken. The motion must include a certification that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action. The court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the disclosure or discovery;

(B) specifying terms, including time and place or the allocation of expenses, for the disclosure or discovery;

(C) prescribing a discovery method other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of disclosure or discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified documents or information in sealed envelopes, to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partly denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Timing and Sequence of Discovery.

(1) Timing. A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f), except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B), or when authorized by these rules, by stipulation, or by court order.

(2) Early Rule 34 Requests.

Time to Deliver. More than 21 days after the summons and complaint are served on a party, a request under Rule 34 may be delivered:

(i) to that party by any other party, and

(ii) by that party to any plaintiff or to any other party that has been served.

(B) When Considered Served. The request is considered to have been served at the first Rule 26(f) conference.

(3) Sequence. Unless the parties stipulate or the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice:

(A) methods of discovery may be used in any sequence; and

(B) discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Disclosures and Responses.

(1) In General. A party who has made a disclosure under Rule 26(a)—or who has responded to an interrogatory, request for production, or request for admission—must supplement or correct its disclosure or response:

(A) in a timely manner if the party learns that in some material respect the disclosure or response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the other parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Expert Witness. For an expert whose report must be disclosed under Rule 26(a)(2)(B), the party's duty to supplement extends both to information included in the report and to information given during the expert's deposition. Any additions or changes to this information must be disclosed by the time the party's pretrial disclosures under Rule 26(a)(3) are due.

(f) Conference of the Parties; Planning for Discovery.

(1) Conference Timing. Except in a proceeding exempted from initial disclosure under Rule 26(a)(1)(B) or when the court orders otherwise, the parties must confer as soon as practicable—and in any event at least 21 days before a scheduling conference is to be held or a scheduling order is due under Rule 16(b).

(2) Conference Content; Parties' Responsibilities. In conferring, the parties must consider the nature and basis of their claims and defenses and the possibilities for promptly settling or resolving the case; make or arrange for the disclosures required by Rule 26(a)(1); discuss any issues about preserving discoverable information; and develop a proposed discovery plan. The attorneys of record and all unrepresented parties that have appeared in the case are jointly responsible for arranging the conference, for attempting in good faith to agree on the proposed discovery plan, and for submitting to the court within 14 days after the conference a written report outlining the plan. The court may order the parties or attorneys to attend the conference in person.

(3) Discovery Plan. A discovery plan must state the parties' views and proposals on:

(A) what changes should be made in the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made;

(B) the subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues;

(C) any issues about disclosure, discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(D) any issues about claims of privilege or of protection as trial-preparation materials, including—if the parties agree on a procedure to assert these claims after production—whether to ask the court to include their agreement in an order under Federal Rule of Evidence 502;

(E) what changes should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed; and

(F) any other orders that the court should issue under Rule 26(c) or under Rule 16(b) and (c).

(4) Expedited Schedule. If necessary to comply with its expedited schedule for Rule 16(b) conferences, a court may by local rule:

(A) require the parties' conference to occur less than 21 days before the scheduling conference is held or a scheduling order is due under Rule 16(b); and

(B) require the written report outlining the discovery plan to be filed less than 14 days after the parties' conference, or excuse the parties from submitting a written report and permit them to report orally on their discovery plan at the Rule 16(b) conference.

(g) Signing Disclosures and Discovery Requests, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every disclosure under Rule 26(a)(1) or (a)(3) and every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's own name—or by the party personally, if unrepresented—and must state the signer's address, e-mail address, and telephone number. By signing, an attorney or party certifies that to the best of the person's knowledge, information, and belief formed after a reasonable inquiry:

(A) with respect to a disclosure, it is complete and correct as of the time it is made; and

(B) with respect to a discovery request, response, or objection, it is:

- (i) consistent with these rules and warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law, or for establishing new law;
- (ii) not interposed for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation; and
- (iii) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the action.

(2) Failure to Sign. Other parties have no duty to act on an unsigned disclosure, request, response, or objection until it is signed, and the court must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule without substantial justification, the court, on motion or on its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

Notes

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 30, 1970, eff. July 1, 1970; Apr. 29, 1980, eff. Aug. 1, 1980; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 12, 2006, eff. Dec. 1, 2006; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010; Apr. 29, 2015, eff. Dec. 1, 2015.)

Committee Notes on Rules—2010 Amendment

Rule 26. Rules 26(a)(2) and (b)(4) are amended to address concerns about expert discovery. The amendments to Rule 26(a)(2) require disclosure regarding expected expert testimony of those expert witnesses not required to provide expert reports and limit the expert report to facts or data (rather than “data or other information,” as in the current rule) considered by the witness. Rule 26(b)(4) is amended to provide work-product protection against discovery regarding draft expert disclosures or reports and — with three specific exceptions — communications between expert witnesses and counsel.

In 1993, Rule 26(b)(4)(A) was revised to authorize expert depositions and Rule 26(a)(2) was added to provide disclosure, including — for many experts — an extensive report. Many courts read the disclosure provision to authorize discovery of all communications between counsel and expert witnesses and all draft reports. The Committee has been told repeatedly that routine discovery into attorney-expert communications and draft reports has had undesirable effects. Costs have risen. Attorneys may employ two sets of experts — one for purposes of consultation and another to testify at trial — because disclosure of their collaborative interactions with expert consultants would reveal their most sensitive and confidential case analyses. At the same time, attorneys often feel compelled to adopt a guarded attitude toward their interaction with testifying experts that impedes effective communication, and experts adopt strategies that protect against discovery but also interfere with their work.

Subdivision (a)(2)(B). Rule 26(a)(2)(B)(ii) is amended to provide that disclosure include all “facts or data considered by the witness in forming” the opinions to be offered, rather than the “data or other information” disclosure prescribed in 1993. This amendment is intended to alter the outcome in cases that have relied on the 1993 formulation in requiring disclosure of all attorney-expert communications and draft reports. The amendments to Rule 26(b)(4) make this change explicit by providing work-product protection against discovery regarding draft reports and disclosures or attorney-expert communications.

The refocus of disclosure on “facts or data” is meant to limit disclosure to material of a factual nature by excluding theories or mental impressions of counsel. At the same time, the intention is that “facts or data” be interpreted broadly to require disclosure of any material considered by the expert, from whatever source, that contains factual ingredients. The disclosure obligation extends to any facts or data “considered” by the expert in forming the opinions to be expressed, not only those relied upon by the expert.

Subdivision (a)(2)(C). Rule 26(a)(2)(C) is added to mandate summary disclosures of the opinions to be offered by expert witnesses who are not required to provide reports under Rule 26(a)(2)(B) and of the facts supporting those opinions. This disclosure is considerably less extensive than the report required by Rule 26(a)(2)(B). Courts must take care against requiring undue detail, keeping in mind that these witnesses have not been specially retained and may not be as responsive to counsel as those who have.

This amendment resolves a tension that has sometimes prompted courts to require reports under Rule 26(a)(2)(B) even from witnesses exempted from the report requirement. An (a)(2)(B) report is required only from an expert described in (a)(2)(B).

A witness who is not required to provide a report under Rule 26(a)(2)(B) may both testify as a fact witness and also provide expert testimony under Evidence Rule 702, 703, or 705. Frequent examples include physicians or other health care professionals and employees of a party who do not regularly provide expert testimony. Parties must identify such witnesses under Rule 26(a)(2)(A) and provide the disclosure required under Rule 26(a)(2)(C). The (a)(2)(C) disclosure obligation does not include facts unrelated to the expert opinions the witness will present.

Subdivision (a)(2)(D). This provision (formerly Rule 26(a)(2)(C)) is amended slightly to specify that the time limits for disclosure of contradictory or rebuttal evidence apply with regard to disclosures under new Rule 26(a)(2)(C), just as they do with regard to reports under Rule 26(a)(2)(B).

Subdivision (b)(4). Rule 26(b)(4)(B) is added to provide work-product protection under Rule 26(b)(3)(A) and (B) for drafts of expert reports or disclosures. This protection applies to all witnesses identified under Rule 26(a)(2)(A), whether they are required to provide reports under Rule 26(a)(2)(B) or are the subject of disclosure under Rule 26(a)(2)(C). It applies regardless of the form in which the draft is recorded, whether written, electronic, or otherwise. It also applies to drafts of any supplementation under Rule 26(e); see Rule 26(a)(2)(E).

Rule 26(b)(4)(C) is added to provide work-product protection for attorney-expert communications regardless of the form of the communications, whether oral, written, electronic, or otherwise. The addition of Rule 26(b)(4)(C) is designed to protect counsel’s work product and ensure that lawyers may interact with retained experts without fear of exposing those communications to searching discovery. The protection is limited to communications between an expert witness required to provide a report under Rule 26(a)(2)(B) and the attorney for the party on whose behalf the witness will be testifying, including any “preliminary” expert opinions. Protected “communications” include those between the party’s attorney and assistants of the expert witness. The rule does not itself protect communications between counsel and other expert witnesses, such as those for whom disclosure is required under Rule 26(a)(2)(C). The rule does not exclude protection under other doctrines, such as privilege or independent development of the work-product doctrine.

The most frequent method for discovering the work of expert witnesses is by deposition, but Rules 26(b)(4)(B) and (C) apply to all forms of discovery.

Rules 26(b)(4)(B) and (C) do not impede discovery about the opinions to be offered by the expert or the development, foundation, or basis of those opinions. For example, the expert’s testing of material involved in litigation, and notes of any such testing, would not be exempted from discovery by this rule. Similarly, inquiry about communications the expert had with anyone other than the party’s counsel about the opinions expressed is unaffected by the rule. Counsel are also free to question expert witnesses about alternative analyses, testing methods, or approaches to the issues on which they are testifying, whether or not the expert considered them in

forming the opinions expressed. These discovery changes therefore do not affect the gatekeeping functions called for by *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), and related cases.

The protection for communications between the retained expert and “the party’s attorney” should be applied in a realistic manner, and often would not be limited to communications with a single lawyer or a single law firm. For example, a party may be involved in a number of suits about a given product or service, and may retain a particular expert witness to testify on that party’s behalf in several of the cases. In such a situation, the protection applies to communications between the expert witness and the attorneys representing the party in any of those cases. Similarly, communications with in-house counsel for the party would often be regarded as protected even if the in-house attorney is not counsel of record in the action. Other situations may also justify a pragmatic application of the “party’s attorney” concept.

Although attorney-expert communications are generally protected by Rule 26(b)(4)(C), the protection does not apply to the extent the lawyer and the expert communicate about matters that fall within three exceptions. But the discovery authorized by the exceptions does not extend beyond those specific topics. Lawyer-expert communications may cover many topics and, even when the excepted topics are included among those involved in a given communication, the protection applies to all other aspects of the communication beyond the excepted topics.

First, under Rule 26(b)(4)(C)(i) attorney-expert communications regarding compensation for the expert’s study or testimony may be the subject of discovery. In some cases, this discovery may go beyond the disclosure requirement in Rule 26(a)(2)(B)(vi). It is not limited to compensation for work forming the opinions to be expressed, but extends to all compensation for the study and testimony provided in relation to the action. Any communications about additional benefits to the expert, such as further work in the event of a successful result in the present case, would be included. This exception includes compensation for work done by a person or organization associated with the expert. The objective is to permit full inquiry into such potential sources of bias.

Second, under Rule 26(b)(4)(C)(ii) discovery is permitted to identify facts or data the party’s attorney provided to the expert and that the expert considered in forming the opinions to be expressed. The exception applies only to communications “identifying” the facts or data provided by counsel; further communications about the potential relevance of the facts or data are protected.

Third, under Rule 26(b)(4)(C)(iii) discovery regarding attorney-expert communications is permitted to identify any assumptions that counsel provided to the expert and that the expert relied upon in forming the opinions to be expressed. For example, the party’s attorney may tell the expert to assume the truth of certain testimony or evidence, or the correctness of another expert’s conclusions. This exception is limited to those assumptions that the expert actually did rely on in forming the opinions to be expressed. More general attorney-expert discussions about hypotheticals, or exploring possibilities based on hypothetical facts, are outside this exception.

Under the amended rule, discovery regarding attorney-expert communications on subjects outside the three exceptions in Rule 26(b)(4)(C), or regarding draft expert reports or disclosures, is permitted only in limited circumstances and by court order. A party seeking such discovery must make the showing specified in Rule 26(b)(3)(A)(ii) — that the party has a substantial need for the discovery and cannot obtain the substantial equivalent without undue hardship. It will be rare for a party to be able to make such a showing given the broad disclosure and discovery otherwise allowed regarding the expert’s testimony. A party’s failure to provide required disclosure or discovery does not show the need and hardship required by Rule 26(b)(3)(A); remedies are provided by Rule 37.

In the rare case in which a party does make this showing, the court must protect against disclosure of the attorney’s mental impressions, conclusions, opinions, or legal theories under Rule 26(b)(3)(B). But this protection does not extend to the expert’s own development of the opinions to be presented; those are subject to probing in deposition or at trial.

Former Rules 26(b)(4)(B) and (C) have been renumbered (D) and (E), and a slight revision has been made in (E) to take account of the renumbering of former (B).

Changes Made After Publication and Comment.

Small changes to rule language were made to conform to style conventions. In addition, the protection for draft expert disclosures or reports in proposed Rule 26(b)(4)(B) was changed to read "regardless of the form in which the draft is recorded." Small changes were also made to the Committee Note to recognize this change to rule language and to address specific issues raised during the public comment period.

¹ In response to concerns about the proposal raised at the June 15–16, 2005, Standing Committee meeting, the Committee Note was revised to emphasize that the courts will continue to examine whether a privilege claim was made at a reasonable time, as part of substantive law.

EXCERPT FROM MINUTES OF MEETING

Joint Procedure Committee

April 28-29, 2011

RULE 26, N.D.R.Civ.P., GENERAL PROVISIONS GOVERNING DISCOVERY (PAGES 156-178 OF THE AGENDA MATERIAL)

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Staff explained that Rule 26 came before the Committee at the September 2010 meeting, during which the Committee considered whether amendment of the rule to clarify protections for communications between attorneys and expert witnesses would be appropriate. In the interim between meetings, staff prepared amendments to Rule 26 based on suggestions from a Committee member and also based on the December 2010 amendments to Fed.R.Civ.P. 26.

Judge Kleven MOVED to recommend adoption of the proposed amendments to Rule 26. Judge McCullough seconded.

A member said that there were two parts to the proposed amendments. One part deals with allowing interrogatories to be used to obtain the same information in a state case as would be provided in an expert witness disclosure in a federal case. The other part excludes discovery of materials the attorney provides to the expert witness unless these materials fall within certain exceptions. The member suggested that the Committee discuss the separate proposals one at a time.

Judge Marquart MOVED to delete proposed amendments at page 162, lines 86-93. Mr. Dunn seconded.

A member said the proposed language would invade the attorney work product privilege. The member said that the idea of an attorney having a conversation with a retained expert and then the expert being required to repeat the conversation is unnerving.

A member said the proposed language would protect attorney/expert communications. A member disagreed because the proposal would require the expert to reveal facts or data the attorney provided.

A member said that the problem with the proposed language is that it would make it more difficult to test the information the expert received. If queried, an expert might reply that the attorney did not provide any significant information. The member said there is no way

to test such a response for veracity unless the questioner can see what the expert has looked at. The member said the expert should not be allowed to be the gatekeeper for this information.

The member said that, under the current system, attorneys know everything is discoverable and consequently do not put much down on paper. The member said everything should continue to be discoverable. A member said that the proposed rule seems to allow access to most information that attorneys would want to have access to: expert compensation and facts, data, and assumptions the expert was instructed to consider.

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A member said that under the current language of the rule, and the trend of judicial decisions, there is no protection for attorney/expert communications. A member said if the new federal approach is not adopted, as is proposed under the motion, the Committee should consider putting some protections in place for attorney/expert communications.

A member said the current approach is a sound one because it allows attorneys to operate with their eyes wide open, knowing that all communications with an expert witness are discoverable.

A member said that the federal rule takes a different approach than North Dakota because it requires affirmative disclosure of certain information about experts. The member said that the federal courts had generally interpreted the federal rule to require disclosure of all attorney/expert communications. The member said that the amendment to Fed.R.Civ.P. 26 was designed to place some limitations on disclosure.

A member said the Committee needs to determine its philosophical approach to what is discoverable. The member said that the Committee's discussion of the amendments reveals two positions - that all attorney/expert communications should be protected or that they all should be discoverable.

A member said the purpose of discovery is to show everything and to eliminate surprise trials. The member said that the more light that can be shed on attorney/expert communications, the better.

A member said if the Committee chose to adopt the federal approach, it should also adopt the federal protections for draft reports. The member said that even though North Dakota does not require reports, they are sometimes prepared. A member said that a sophisticated expert will destroy all drafts as a matter of course and they will never be seen.

A member said that when an attorney gives information to an expert, both facts and the attorney's reasoning are provided. The member said it is a problem that an attorney's thoughts can be revealed during expert discovery, and if this becomes formal policy, it will discourage attorneys from telling experts anything.

A member said that experts are hired to provide opinions, not to parrot back the attorney's reasoning or theory of the case. A member replied that the attorney reveals case theory and thinking by pointing out facts that the expert should be considering. A member said that an attorney can provide facts to the expert without sharing reasoning by simply providing the expert with deposition transcripts and other factual material. The member said this is the safest approach because at some point the expert will be asked "what did the lawyer

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tell you about this case."

A member said the main concern about experts is that when they are brought in they know nothing about the case but are being paid big money. Consequently, the simple conclusion is that experts will say anything necessary to help their employers. The member said the only way to persuade the fact finder to think otherwise is to make sure that all the information provided to the expert is disclosed. Because all the expert knows about the case is based on what the attorney provides, disclosure of all this information should be provided.

A member said that the expert could be cross-examined to find out the information used to form the conclusion. A member replied that if disclosures are limited, then attorneys will not know what to cross-examine the expert about.

A member said that part of the reasoning behind the federal amendments was that a lot of time was spent at depositions going through attorney/expert communications. The member said the federal language was designed to provide some standards for what attorney/expert communications are discoverable. A member said the language seems to take a middle ground between the "no discovery" and "everything is discoverable" positions. The member said that the language allows attorneys to probe bias (expert compensation) and the facts and assumptions underlying the expert's opinions. A member said if an expert is using something provided by the attorney to form an opinion, the other side should be able to ask about it.

A member said true work product should not be discoverable - the attorney's mental impressions, thoughts and conclusions. The member said it is preferable that the attorney does not share those things with the expert because this makes it less likely the expert will provide an independent conclusion. A member said an attorney might tell an expert an

opinion that a certain witness is a liar; the expert will then be more likely to discount that witness's evidence before even examining it. The member said that the other side should be able to cross-examine the expert on whether the attorney told the expert the witness was a liar.

A member said that adopting either the "no discovery" or the "everything is discoverable" approach would at least provide clarity. The member said the new language in the federal rule does create some uncertainty about what is discoverable. A member noted that the proposed language covers oral communications with experts as well as written communications.

The motion CARRIED with one vote in opposition.

A member said that with the federal language now deleted from the proposal, something would have to be done to clarify the North Dakota position on disclosure of

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attorney/expert communication. A member said that the current state of the law seems to be that everything is discoverable, even though the Supreme Court has not specifically ruled on the issue.

A member said there was other draft language in the proposal that would require widespread disclosure of information. A member said the proposal's remaining language would require even non-retained experts, such as treating physicians, to disclose a large amount of information that they are not prepared to disclose. A member said that the proposed language does not take into account the distinction made in the federal rule between retained and non-retained experts. The member said the main purpose of the proposed language was to make sure that attorneys in North Dakota could obtain through interrogatories all the information that an attorney in a federal case would get through the required expert report.

A member said that the rule proposal required additional work to integrate the distinction between retained and non-retained experts. A member said that requiring extensive disclosures from non-retained experts like highway patrol officers and treating physicians was not appropriate.

Mr. Boschee MOVED to table the rule until the September meeting so that additional work could be done on the proposed amendments. Judge Herauf seconded. Motion CARRIED.

A member said it would be appropriate to add additional language to the rule to make it clear what attorney/expert communications were discoverable. Members suggested that alternative versions of the rule proposal be made available for the Committee to review,

along with Judge Donovan Foughty's recent memorandum opinion on the subject as well as the federal committee's reasoning supporting the federal amendments.

EXCERPT FROM MINUTES OF MEETING

Joint Procedure Committee

September 30, 2011

RULE 26, N.D.R.Civ.P., GENERAL PROVISIONS GOVERNING DISCOVERY (PAGES 51-75 OF THE AGENDA MATERIAL)

Staff explained that the Committee had considered and rejected proposed amendments to Rule 26 relating to communications between attorneys and expert witnesses at the September 2010 and April 2011 meetings. Staff said that Committee member Larry Boschee had prepared new proposed amendments to Rule 26 in response to the Committee's previous objections.

Mr. Boschee MOVED to recommend adoption of the proposed amendments. Mr. Quick seconded.

Mr. Boschee explained his proposed amendments. He said that the Committee had dealt with two issues regarding Rule 26 at the last meeting: whether North Dakota should adopt the new federal language on materials provided to experts by attorneys and whether North Dakota should allow parties to obtain additional information on experts through interrogatories.

Mr. Boschee said that the proposed amendments distinguish between retained and non-retained experts, limiting the types of information that can be obtained from the latter. He said the purpose for the amendments was to be a bridge between the current system and the future, when North Dakota may adopt the federal pre-trial discovery disclosure rules and expert report requirements.

A member asked whether the proposed amendments allowed for the discovery of draft reports. A member said that the language did not refer specifically to draft reports and it was neutral on draft reports just like the current rule. The member said the federal rule specifically makes draft reports non-discoverable.

A member asked whether information in the form of thoughts, impressions and opinions provided by the lawyer to the expert was discoverable under the proposed

amendments. A member said that the proposal is neutral as to this information, just like the current rule. The member said discovery of such material would be left up to the courts and case law.

A member observed that the proposed amendments would not give a lawyer any guidance as to what types of communication between an expert and a lawyer would be discoverable. A member replied that, because the Committee chose not to adopt the new federal language, the rule continued to be neutral on this subject.

A member said that the use of the language "facts and data considered by the witness" in the proposal seemed to allow discovery of all material provided to an expert. A member replied that the language was from the federal expert disclosure rule and would be an enhancement of the current language of the rule. A member said this language would give parties ammunition in seeking disclosure of additional information.

A member said that, under the proposed language, lawyers may now need to write two letters to experts—one as a cover letter for materials being sent for review and another that gives the lawyer's theories about what happened. The member said the second letter might be necessary because it would be protected by work product privilege.

A member said the whole purpose of the expert disclosure requirement was to avoid surprise at trial, requiring experts to report their opinions and the basis of their opinions prior to trial. The member said that expert discovery now too often is focused on attempting to uncover work product—dead end theories experts had considered and abandoned, for example. The member said trying to force disclosure of this material, often found in draft reports, was a waste of time and caused unnecessary expense without fulfilling the purpose of expert opinion disclosure, avoiding surprise at trial. The member said attorneys should be able to communicate privately with an expert witness without the other side being able to discover all that was said. The member said that expert disclosure has gone too far and that work product should not be discoverable.

A member said the language of the proposal was imprecise, but it did not seem to open up work product for disclosure. The member said the language seemed to allow disclosure only of factual information provided to the expert, not all attorney communications. The member said opposing counsel should have the right to know all the facts an expert considered, even if the expert ultimately decided a given fact was not important.

A member said that disclosing the materials that were given to an expert to review is fine, but requiring disclosure of all "facts or data" considered opens up disclosure of all

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letters, emails and other communications.

A member said the proposed language was from the federal rule. The member said that the language was not intended to open up discovery of letters, emails or other work product. The member said the language was intended simply to allow interrogatories to be used to obtain the same information that, in federal court, experts are required to provide in a report.

The member said, regardless of the intent, the proposed language could be interpreted overly broad. A member replied that disclosing everything relating to the expert's opinion is the best approach. The member said that if the expert's opinion is affected by something the attorney says, this should be disclosed.

A member asked whether practicing attorneys were having a problem with Rule 26 as it exists and whether there was a demonstrable need to amend the rule. A member replied that a few problems have arisen because the working rule, generally understood among civil practitioners, was that everything given to the expert was discoverable. A member said the problem was not with the rule but in gray areas where the work product rule could arguably apply. The member said the only purpose in changing the rule would be to clarify these gray areas.

A member said that once something is disclosed to an expert, it is no longer work product. A member replied that this may be true for raw data, but it is not the case for communication about strategy and theories between attorney and expert. A member said it seemed like any problems with the rule were in areas that were not addressed by the proposed amendments. A member replied the purpose of the proposed language was to more closely track the federal rule to make practice more consistent.

A member said the proposed language could be a first step in building a bridge to a possible future where expert reports are required in North Dakota. The member said that the advantage to requiring reports is that, when there is a report, a deposition may not be necessary.

A member replied that the interrogatory originally was all the discovery provided-a party could not depose an expert. The member said the rule was written with the hypothetical question in mind, because this was the way expert testimony was formerly presented. The member said that obtaining the facts and basis for testimony was key, because this would reveal the hypothetical question. The member said with the elimination of the hypothetical question, and with depositions of experts now allowed, obtaining the facts and basis for testimony through interrogatories may not be as important.

A member said that disclosures are made as part of the discovery process, and parties generally disclose the expert report just to protect themselves, even though this is beyond what is required. A member said that when the federal rule was first enacted requiring disclosure of reports, the reaction from practicing attorneys was negative. The member said that parties have gotten used to providing reports and it is no longer a big deal. The member said adopting a report requirement in North Dakota is a path that should be considered someday.

A member said the use of the open-ended term "may" in the proposal could possibly broaden the scope of discovery to consultants who have not yet been retained to testify at trial. The member said that the proposed language also might allow discovery of any party employee who could possibly give "expert" testimony. A member replied that the proposed language reflects the language used in the federal rule.

The motion to amend Rule 26 FAILED.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 28, 2016

RE: Rule 37, N.D.R.Civ.P., Failure to Make or Cooperate in Discovery; Sanctions

At the last meeting, the committee considered proposed amendments to Rule 37 based on the December 2015 amendments to Fed.R.Civ.P. 37. The committee decided to postpone consideration of the amendments because they represented a substantial change in practice. The committee requested that staff conduct additional research and work with SBAND to get comments from attorneys in the state.

Perhaps because these amendments are so new, staff was unable to locate any useful information on how other states are reacting to them. Staff did locate an ABA article, attached, that attempts to explain the purpose and operation of the amendments. The article states that the amendments were “an attempt to insert reasonableness and proportionality into the duty to preserve electronic evidence.” The article explains that the previous language, which protects parties who engage in “routine good-faith operation” of their electronic information systems was not adequate to address all the issues arising out the vastly expanded use of electronically stored information.

Consistent with what the committee discovered during its discussions at the last meeting, the article also points out that reading the commentary to the amendments is essential in understanding them. The article states: “It is instructive to note that while Rule 37(e) consists of 130 words, it took the rules committee over 2,500 words to explain and interpret it.”

A motion to amend the Rule 37 proposal was before the committee when it voted to postpone discussion at the last meeting. The attached Rule 37 draft contains the pending proposal, which would retain both the new language and the old "good faith" provision. The draft also contains an alternative paragraph developed by staff after listening to a recording of the committee discussion: the alternative would allow parties to present evidence of good faith as evidence of reasonableness rather than having good faith be an absolute defense to sanctions.

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 produce documents or fails to 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.~~

122 (1) Court Action. If electronically stored information that should have been
123 preserved in the anticipation or conduct of litigation is lost because a party failed
124 to take reasonable steps to preserve it, and it cannot be restored or replaced

125 through additional discovery, the court:

126 (A) upon finding prejudice to another party from loss of the information,
127 may order measures no greater than necessary to cure the prejudice; or

128 (B) only upon finding that the party acted with the intent to deprive another
129 party of the information's use in the litigation may:

130 (i) presume that the lost information was unfavorable to the party;

131 (ii) instruct the jury that it may or must presume the information was
132 unfavorable to the party; or

133 (iii) dismiss the action or enter a default judgment.

134 (2) Good Faith Operation. Absent exceptional circumstances, a court may
135 not impose sanctions under these rules on a party for failing to provide
136 electronically stored information lost as a result of the routine, good-faith
137 operation of an electronic information system.

138 [Alternative Paragraph][(2) Good Faith Operation. A party may show that it
139 operated its electronic information system in a routine and good-faith manner as
140 evidence of reasonableness.]

141 (g) Failure to Participate in the Framing of a Discovery Plan. If a party or its
142 attorney fails to participate in good faith in developing and submitting a proposed
143 discovery plan as required by Rule 26(f), the court may, after giving an opportunity
144 to be heard, require that party or attorney to pay to any other party the reasonable
145 expenses, including attorney's fees, caused by the failure.

146 EXPLANATORY NOTE

147 Rule 37 was amended, effective July 1, 1981; March 1, 1990; January 1,
148 1995; March 1, 1997; March 1, 2004; March 1, 2008; March 1,
149 2011; _____.

150 Paragraph (a)(2) was amended, effective March 1, 2004, to require a party
151 moving for a discovery order to certify that a good faith effort was made to resolve
152 the discovery dispute prior to seeking court intervention.

153 Subdivision (f) was amended, effective _____, to specify
154 measures a court may employ when electronically stored information is lost and to
155 specify the findings a court must make to justify imposition of these measures.

156 Rule 37 was amended, effective March 1, 2008, in response to the 2006
157 federal revision. A new subdivision (f) on electronically stored information was
158 added and material dealing with expenses against the state was moved to
159 subdivision (e).

160 Rule 37 was amended, effective March 1, 2011, in response to the
161 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
162 and organization of the rule were changed to make the rule more easily understood
163 and to make style and terminology consistent throughout the rules.

164 SOURCES: Joint Procedure Committee Minutes of _____;
165 January 28-29, 2016, pages 18-22; January 29-30, 2009, pages 31-32; January 25,
166 2007, page 10; September 28-29, 2006, pages 22-25; January 30-31, 2003, pages

167 15-16; September 28-29, 1995, pages 15-16; January 27-28, 1994, pages 16-17;
168 April 20, 1989, page 2; December 3, 1987, page 11; December 11-12, 1980, page
169 3; October 30-31, 1980, pages 22-26; November 29-30, 1979, page 80;
170 Fed.R.Civ.P. 37.

171 CROSS REFERENCE: N.D.R.Civ.P. 26 (General Provisions Governing
172 Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), N.D.R.Civ.P.
173 31 (Depositions of Witnesses Upon Written Questions), N.D.R.Civ.P. 33
174 (Interrogatories to Parties), N.D.R.Civ.P. 34 (Production of Documents and Things
175 and Entry Upon Land for Inspection and Other Purposes), N.D.R.Civ.P. 35
176 (Physical and Mental Examination of Persons), N.D.R.Civ.P. 36 (Requests for
177 Admission) and N.D.R.Civ.P. 45 (Subpoena).

179

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.

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The 2015 Amendment to Federal Rule of Civil Procedure 37(e)

By Neil E. Aresty – November 3, 2015

After much debate, public commentary, and discussion, proposed new Federal Rule of Civil Procedure 37(e), "Failure to Preserve Electronically Stored Information," is expected to go into effect on December 1, 2015. New Rule 37(e) replaces the entire text of current Rule 37(e). See *Report of the Judicial Conference Committee on Rules of Practice and Procedure*, app. B-55 to -67 (2014) [hereinafter *Judicial Conference Report*]. Businesses, especially those that have become overwhelmed by the costs of electronic discovery, just might find comfort in this new rule, which is an attempt to insert reasonableness and proportionality into the duty to preserve electronic evidence. It is also motivated by the desire to see cases decided on their merits and not on which side can afford higher discovery costs.

Rule 37(e) as it exists today was adopted in 2006. It applies to electronically stored information (ESI) lost through "routine good-faith operation" of an electronic information system rather than through intentional acts intended to make evidence unavailable in litigation. Currently the rule states:

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.

Current Rule 37(e) is sometimes referred to as a "safe harbor" rule: its drafters recognized the need to protect the good faith operations of businesses dealing with an ever-growing volume of ESI through the use of backup policies and procedures that routinely and systematically delete ESI.

The Advisory Committee on Civil Rules, in its "Committee Notes on Rules—2015 Amendment," observed that the current rule "has not adequately addressed the serious problems resulting from the continued exponential growth in the volume of such information." Proposed Rule 37(e) was intended to address the complications arising from the growing volume of ESI and the velocity with which it is increasing. The new rule provides:

(e) Failure to Preserve Electronically Stored Information. If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:

- (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
- (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:

- (A) presume that the lost information was unfavorable to the party;
- (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
- (C) dismiss the action or enter a default judgment.

It is instructive to note that while new Rule 37(e) consists of approximately 130 words, it took the rules committee over 2,500 words to explain and interpret it. The committee felt the need to parse the rule, explain its application, give examples of when to use curative remedies and/or sanctions, and explicitly state that the source of these remedies stem from this new rule—not the court's inherent authority to punish spoliation. "[The rule] therefore forecloses reliance on inherent authority or state law to determine when certain measures [curative remedies or sanctions] should be used." Committee Notes—2015

Amendment.

Since the 2006 amendments to the federal rules, the federal circuits have established significantly different standards for imposing sanctions or curative measures on parties who fail to preserve ESI. See *Rimkus Consulting Grp., Inc. v. Cammarata*, 688 F. Supp. 2d 598, 614–15 (S.D. Tex. 2010) (discussing cases). The committee notes stress a desire to provide a uniform standard in the federal courts for use of the most serious sanctions when addressing the failure to preserve ESI. They specifically reject the approach adopted in cases such as *Residential Funding Corp. v. DeGeorge Financial Corp.*, 306 F.3d 99 (2d Cir. 2002), that authorize giving adverse-inference instructions on a finding of negligence or even gross negligence. “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.” Committee Notes—2015 Amendment.

In *Rimkus*, Judge Rosenthal of the Southern District of Texas, confronted with several dispositive motions including “doomsday” motions for sanctions due to spoliation of ESI, offered a prescient analysis of the spoliation and sanction issues that arise in electronic discovery disputes. She distinguished the often cited decision in *Pension Committee of the University of Montreal Pension Plan v. Banc of America Securities, LLC*, 685 F. Supp. 2d 456 (S.D.N.Y. 2010), on the grounds that it involved allegations of intentional destruction of potentially relevant ESI and not negligence (or even gross negligence).

Analyzing the case law and authorities discussing when deletion becomes spoliation, Judge Rosenthal recognized that

[c]ulpability can range along a continuum from destruction intended to make evidence unavailable in litigation to inadvertent loss of information for reasons unrelated to the litigation. Prejudice can range along a continuum from an inability to prove claims or defenses to little or no impact on the presentation of proof. *A court’s response to the loss of evidence depends on both the degree of culpability and the extent of prejudice. Even if there is intentional destruction of potentially relevant evidence, if there is no prejudice to the opposing party, that influences the sanctions consequence.*

Rimkus, 688 F. Supp. 2d at 613 (emphasis added). She also pointed out that in the Fifth Circuit and elsewhere, “negligent as opposed to intentional, “bad faith” destruction of evidence is not sufficient to give [rise to] an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial.” *Rimkus*, 688 F. Supp. 2d at 615.

Although it was not cited in the committee notes, Judge Rosenthal’s decision in *Rimkus* set the stage for the new Rule 37(e). It not only distinguished negligence and gross negligence from bad faith and intent to deprive but also discussed the need for sanctions to be proportionate to the culpability involved and the prejudice that results. *Rimkus*, 688 F. Supp. 2d at 618. The new rule is intended to resolve the split among the circuits on the use of the most serious ESI spoliation sanctions, and it is designed to provide a straightforward framework for the issuance of any remedies or sanctions evolving from the failure to preserve relevant ESI. *Judicial Conference Report, supra*, at app. B-56 to -57.

By its terms, proposed Rule 37(e) only deals with ESI—not paper documents or physical things. The rule sets forth three conditions that must be satisfied before its remedies can be applied:

1. ESI that should have been preserved in the anticipation or conduct of litigation is lost;
2. A party failed to take reasonable steps to preserve the information; and
3. The information cannot be restored or replaced through additional discovery.

If the court finds that these three conditions are satisfied, then:

Upon a finding of prejudice to another party from the loss of the information, it may order measures no greater than necessary to cure the prejudice, under the terms of Rule 37(e)(1); or

Only upon a finding that the party acted with intent to deprive another party of the information’s use in the litigation, it may, under the terms of Rule 37(e)(2):

- (A) Presume that the lost information was unfavorable to the party;
- (B) Instruct the jury that it may or must presume the information was unfavorable to the party; or
- (C) Dismiss the action or enter a default judgment.

Practitioners should pay particular attention to the following elements of the new rule.

Application of the Duty to Preserve

Proposed Rule 37(e) does not apply when information is lost before the duty to preserve attaches. The duty to preserve arises when litigation is reasonably foreseeable and is based upon a longstanding common law duty. See, e.g., *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1320 (Fed. Cir. 2011).

Focus on “Reasonable Steps” to Preserve ESI

The requirement that a party “failed to take reasonable steps to preserve” ESI evidence provides the defending party the opportunity to explain why and how it was unable to do so. One can only imagine the difficulties involved in accounting for all the potentially relevant ESI that might exist. This is especially true in a world that uses new forms of communication technology almost daily. In addition to email, people are increasingly using

new services and formats for communication, including new forms of chat/texting, real-time video communication, and new social media platforms. Whether a party had possession, custody, or control of all forms of the material ESI could be relevant to what preservation is considered reasonable. Whether or not the defending party even knows that potentially relevant ESI exists and is in its custody or control may be reason enough to absolve it of the obligation to produce.

Also, there are a growing number of mechanisms using Internet technologies to communicate information among "the Internet of Things," e.g., electronic systems in cars that park themselves, "smart homes" linking HVAC, kitchen appliances, and security systems, not to mention the explosion of new medical devices, all of which use Internet protocols to communicate stored electronic information via the Internet. See Daniel Burrus, "The Internet of Things Is Far Bigger Than Anyone Realizes," *Wired* (last visited Oct. 21, 2015).

The Sophistication and Relative Resources of the Parties

The committee notes also suggest that the court look at the parties' sophistication, their relative resources, and the importance of the ESI to the claim or defense when considering the appropriate and proportionate remedy. Could this become a new area of discovery? That is, how sophisticated is the party withholding ESI? What kind of IT and/or financial resources does the requesting or producing party have? Is this David vs. Goliath? How will these inquiries relate to the issue of proportionality and/or the failure to produce ESI?

Whether Lost ESI Can Be Restored or Replaced with Additional Discovery

In the preliminary analysis of the request for relief under the proposed rule, the court must also determine whether the lost ESI can be restored or replaced through additional discovery. If the information can be restored or replaced, then no further measures should be taken.

If the information is considered lost and cannot be replaced or restored, then the court must determine what prejudice flows from the loss of the information in order to determine whether or not it "may order measures no greater than necessary to cure the prejudice." The committee notes indicate that once a finding of prejudice is made, the rule leaves judges with discretion to determine how best to assess prejudice in particular cases.

Intent to Deprive a Party of the Use of ESI in the Litigation

If the court determines that a party acted with the intent to deprive another party of the information's use in the litigation, it may allow the factfinder to draw the adverse inference that the lost information was unfavorable to the party; dismiss a claim, defense, or the entire action; or enter a default judgment.

Conclusion

In 2006, a new category was added to the definition of "documents" under Federal Rule of Civil Procedure 34(a): "electronically stored information." The rules committee indicated that the term was meant to be broadly interpreted. See Fed. R. Civ. P. 34 & 2006 advisory committee notes. It is safe to say that, today, a document is not your father's document. Tomorrow's document will most likely not even look like the documents your children are creating. Today, documents are highly dynamic electronic bits that travel at the speed of light in multiple directions and in multiple iterations before they "end up" (if they end up) at a given location.

The world in which paper discovery began has turned into an ESI world that is often difficult to capture and can be very costly to harness. The 2015 amendments to the Federal Rules of Civil Procedure, and in particular proposed Rule 37(e), are a laudable attempt to provide litigants a roadmap for conducting electronic discovery in a more cost-effective, reasonable fashion and in a manner that requires the application of proportionality as set forth in Federal Rule of Civil Procedure 26(b)(1).

Keywords: litigation, commercial, business, e-discovery, spoliation, sanctions, Rule 37, ESI

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MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 27, 2016

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

At the last meeting, the committee discussed the court administrator's proposed amendments to Rule 3.5, which were intended to eliminate any requirement to affix a seal or stamp to documents maintained within and output from the Odyssey system. The committee voted to postpone discussion of the proposed amendments pending additional research on statutory requirements for court documents to have a seal affixed.

Staff found numerous statutes and rules that have requirements that the court affix seals to documents. A more detailed discussion of these provisions appears below. Generally, when a statute or rule requires a seal, it is to certify the authenticity of a document generated by the court such as an execution, writ, subpoena or transcript.

The court administrator's office recognizes that there is a web of requirements relating the court seals in North Dakota law. They have indicated that a main priority now is to have a rule that allows documents to be transmitted electronically between different courts without a need for the documents to be certified before transfer. Currently, in order to certify a document it must be printed out, stamped and then re-scanned. Staff has modified the proposed amendments to Rule 3.5 to reflect this request. The proposed amendments are attached.

According to IT, the Odyssey system has the capability to allow court clerks to attach an image to a filed document, so a method for clerks to electronically stamp/seal a document before outputting it from the system can be developed in the future.

Attached is a list of 18 statutes (with text excerpts) that discuss court seals or requirements that courts affix a seal to documents. The most important of these statutes is probably N.D.C.C. 31-04-10 on the form and contents of a certificate for certifying copies to be used as evidence. This statute provides: "Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying officer, if there is any, or if such officer is a clerk of a court having a seal, under the seal of such court."

This statute is at issue in Jangula v. N.D. Dept. Of Transportation, which is pending before the Supreme Court. This case involves electronic documents – state lab analytical reports – that did not have a seal affixed. The appellant argues that a seal was required under N.D.C.C. 31-04-10 before the reports could be used as evidence. The state argues that N.D.C.C. 39-20-07 requires electronic copies of analytical reports to be accepted as prima facie evidence in court.

Under N.D.R.Ev. 902, documents with a seal affixed are at the top of the hierarchy of self-authenticating documents. N.D.R.Ev. 902(10), however, says documents declared authentic by statute are also self-authenticating. Other rules also deal with seals: N.D.R.Civ.P. 44 on proof of an official record requires certification of a record to be made with a seal affixed; N.D.R.Ct. 7.1 on judgments orders and decrees requires a certificate of satisfaction of judgment to be made under the seal of the court.

The committee discussed requirements for seals in probate matters at the last meeting. The only Uniform Probate Code statute to require an official seal is N.D.C.C. 30.1-08-04 on self-proved wills. Most of the informal probate forms on the Court's self-help site, however, require some of seal, generally by a notary. The letters testamentary form requires a seal to be affixed by the clerk of court.

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 filing is
42 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.

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 _____; January
123 28-29, 2016, pages 8-11; April 23-24, 2015, pages 2-3; January 29-30, 2015, pages
124 13-14; April 25-26, 2013, pages 3-16; January 31-February 1, 2013, pages 2-5,

125 15-18; September 27, 2012, pages 14-21; April 29-30, 2010, page 21; April 24-25,
126 2008, pages 12-16; October 11-12, 2007, pages 3-5; April 26-27, 2007, pages
127 16-18; January 25, 2007, pages 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).

1-01-38 Seal - Definition.

When the seal of a court, public officer, or person is required by law to be affixed to any process, commission, paper, or instrument, the word "seal" includes an impression of such seal upon the paper alone as well as upon wax or a wafer affixed thereto.

28-21-06 Issuance and contents of execution.

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.

28-31-08 Writs.

All writs issued from or out of the supreme court must be signed by the clerk, sealed with the seal of the court, and attested upon the day issued.

31-03-25 Summoning witness in this state to testify in another state.

If a judge of a court of record in any state which by its laws has made provision for commanding persons within that state to attend and testify in a criminal prosecution in this state, certifies under the seal of such court that:

1. There is a criminal prosecution pending in such court;
2. A person who is within this state is a material witness in such prosecution; and
3. The person's presence will be required for a specified number of days, any judge of a court of record in the county in which such person may be, upon presentation of such certificate, shall fix a time and place for a hearing and shall notify the witness of such time and place.

31-03-28 Witness from another state summoned to testify in this state.

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions in this state, is a material witness in a prosecution pending in a court of record in this state, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

31-04-10 Form and contents of certificate for certifying copies to be used as evidence.

Whenever a copy of a writing is certified for the purpose of evidence, the certificate must state in substance that the copy is a correct copy of the original, or of a specified part thereof, as the case may be. The certificate must be under the official seal of the certifying

officer, if there is any, or if such officer is a clerk of a court having a seal, under the seal of such court.

31-09-02 When copies of records and proceedings of federal, state, and territorial courts admissible in evidence.

Copies of the records and judicial proceedings of any court of the United States, or of any state or territory of the United States, shall be admissible as evidence in this state when attested by the clerk with the seal of the court annexed, if there is a seal, together with a certificate of the judge, chief justice, or presiding magistrate that the attestation is in due form, and the said records and judicial proceedings so authenticated shall have such faith and credit given to them in every court within this state as they have by law or usage in the courts of the United States or of the state or territory from which they are taken.

31-09-04 How judicial record of foreign country proved.

A judicial record of a foreign country may be proved by the attestation of the clerk with the seal of the court annexed, if there is a clerk and seal, or of the legal keeper of the record, with the seal of office annexed, if there is a seal, together with the certificate of the chief judge or presiding magistrate that the person making the attestation is the clerk of the court, or the legal keeper of the record, and in either case, that the signature of such person is genuine and that the attestation is in due form. The signature of the chief judge or presiding magistrate must be authenticated by the certificate of the minister, ambassador, or a consul, vice consul, or consular agent of the United States in such foreign country.

31-09-06 Certified transcript of county judge's record admissible in courts of other counties.

A transcript of the docket record of a county judge in an action or proceeding, when certified by the judge or the judge's successor in office, may be read in evidence in another county if there is attached thereto a certificate of the clerk of the district court of the county in which such record was made, under the seal of the court, to the effect that the person certifying such transcript was at the date thereof a county judge of the county, and in addition, if such docket record was made by another, that such other at the time of the making of the same was a county judge of the county.

32-08.1-02 Issuance of writ - Hearing and notice requirement - Form and contents.

A writ of attachment may be issued on the request of the plaintiff before final judgment and after a summons and a complaint is filed. Except as provided in section 32-08.1-02.1, the writ may only be issued following a hearing at which the plaintiff shall present the affidavit described in section 32-08.1-03. The court may issue the writ of attachment only if the

plaintiff has provided the required affidavit, has executed a sufficient bond as required under sections 32-08.1-03 and 32-08.1-05, and has made a prima facie showing of the right to attachment. The plaintiff shall provide the defendant with a copy of the request for the writ and the accompanying affidavit and notice of the time of the hearing. The writ, if issued, must be directed to the sheriff of some county in which the property of the defendant is supposed to be and must require the sheriff to attach all the property of the defendant within the sheriff's county, or so much thereof as may be sufficient to satisfy the plaintiff's demand, together with costs and expenses. The writ must be in the name of the court and be sealed with its seal and signed by its judge.

32-22-04 By what court application granted.

The writ of habeas corpus must be granted, issued, and made returnable as hereinafter stated:

1. The writ must be granted by the supreme court, or any judge thereof, upon petition by or on behalf of any person restrained of the person's liberty within this state. When granted by the court, it, in all cases, shall be issued out of and under the seal of the supreme court, and may be made returnable, either before the supreme court, or before the district court or any judge of the district court; or
2. The writ may be granted, issued, and determined by the district courts and the judges thereof upon petition by or on behalf of any person restrained of the person's liberty in their respective districts.

When application is made to the supreme court, or to a judge thereof, proof by the oath of the person applying or other sufficient evidence shall be required that the judge of the district court having jurisdiction by the provisions of subsection 2 is absent from the judge's district or has refused to grant such writ, or for some cause to be specially set forth, is incapable of acting, and if such proof is not produced the application shall be denied.

32-22-08 Writ of habeas corpus - Form.

Every writ of habeas corpus issued under the provisions of this chapter shall be in substantially the following form:

...

Such writ must be endorsed "By the Habeas Corpus Act", and if issued by the court, it shall be under the seal of the court, and if by the judge, it shall be under the judge's hand.

32-27-03 Notice to be given by clerk of the district court.

Upon the filing of a petition of the kind described in this chapter, the clerk of the district court with whom such petition is filed shall issue a notice under the seal of the said district court fixing the time and place for the hearing upon such petition. Such notice shall be published in the official newspaper of the county for three successive weeks, the last publication to be at least ten days before the time set for the hearing. A copy of such notice

and of such petition shall be served upon the attorney general and upon the state's attorney of the county of which the petitioner is a resident at least thirty days before the time set for the hearing. Proof of the publication and service required by this section shall be filed in the office of the clerk of the district court on or before the date set for the hearing on such petition.

32-37-03 Notice given by clerk of district court.

Upon the filing of a petition of the kind described in this chapter, the clerk of the district court with whom such petition is filed shall issue a notice under the seal of the said district court fixing the time and place for the hearing upon such petition. Such notice shall be published in the official newspaper of the county for two successive weeks, the last publication to be at least ten days before the time set for hearing. Proof of the publication required by this section shall be filed in the office of the clerk of the district court on or before the date set for the hearing on such petition.

43-05-16 Grounds for disciplinary action [Podiatrist].

3. In disciplinary actions alleging a violation of subdivision c or d of subsection 1, a copy of the judgment or proceeding under the seal of the clerk of court or of the administrative agency that entered the judgment or proceeding is admissible into evidence without further authentication and constitutes prima facie evidence of the contents of that judgment or proceeding.

44-08-06.1 Validation - Certificates of acknowledgment.

All certificates of acknowledgment by notaries public on all documents filed for record with a recorder in the state, notwithstanding any defects or irregularities with the notary seal, are hereby validated, ratified, approved, and confirmed. Notwithstanding section 44-08-06, all seals of a court or officer of this state are binding, legal, and enforceable. The provisions of this section relating to validation of acknowledgments are applicable to all documents filed with any county recorder in the state after July 1, 1987.

44-08-07 When temporary seal may be authorized.

When any court of record is unprovided with a seal, the judge thereof may authorize the use of any temporary seal, or of any device by way of seal, until a permanent seal is provided.

47-19-32 Certification of acknowledgments or proof of instruments - Officer's certificate - How authenticated.

An officer taking and certifying an acknowledgment or proof of an instrument for record must authenticate the officer's certificate by affixing thereto:

1. The officer's signature followed by the name of the officer's office; and
2. The officer's seal of office, if by the laws of the territory, state, or country where the acknowledgment or proof is taken, or by authority of which the officer is acting, the officer is required to have an official seal.

A judge or clerk of a court of record must authenticate that officer's certificate by affixing thereto the seal of the judge's or clerk's court. A mayor of a city must authenticate that officer's certificate by affixing thereto the seal of the mayor's city.

NDRCivP 44

NDRCt. 7.1

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 29, 2016

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

The committee approved several amendments to Rule 41 at the last meeting. After the discussion, Mr. Hoy suggested that the committee take up the rule again at this meeting to consider amendments to protect the information of persons who have had criminal charges dismissed or who have been acquitted. He suggested the committee take a look at the Minnesota approach to protecting pre-conviction records that are posted online.

Like North Dakota, Minnesota posts basic criminal record information online. Minnesota had public hearings on its online record policy in 2004. According to the report of the hearings, excerpt attached, the area of records that received the most attention were records of unproven criminal allegations. Similar to the discussions in this committee, people argued that pre-conviction records should not be accessible over the Internet because easy access to these records stigmatizes people and creates barriers to innocent people getting jobs or housing. People arguing for access, in particular the press, said the public had a right to know what goes on in the justice system.

The Minnesota public access committee reached an interesting compromise. They agreed that access to pre-conviction records should be unrestricted at the courthouse, and that records should be fully searchable over courthouse terminals. They also agreed to keep the basic records available over the Internet. To protect people who had not been convicted of a crime, they decided to disable name searches of records in cases where a conviction did not result. Searchers are still allowed to find these records using a docket number search. A copy of the Minnesota rule is attached.

Proposed amendments to Rule 41 following the Minnesota approach are attached. The amendments would limit remote access to pre-conviction records by name search, except for those using secure public access. The Rule 41 draft contains the amendments the committee previously approved – the proposed new amendment is highlighted.

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.

100 (1) In General. The following information in court records must be made
101 remotely accessible to the public if it exists in electronic form, unless public access
102 is restricted under this rule:

103 († A) litigant/party indexes to cases filed with the court;

104 (2 B) listings of new case filings, including the names of the parties;
105 (3 C) register of actions showing what documents have been filed in a case;
106 (4 D) calendars or dockets of court proceedings, including the case number
107 and caption, date and time of hearing, and location of hearing; and

108 (5 E) reports specifically developed for electronic transfer approved by the
109 state court administrator and reports generated in the normal course of business, if
110 the report does not contain information that is excluded from public access under
111 Section 5 or 6.

112 (2) Access Regulation.

113 (A) The Supreme Court may adopt and implement policies to regulate
114 remote access to court records. These policies must be posted publically on the
115 Court's website.

116 (B) A record of a criminal case for which there is no conviction may not be
117 remotely accessed through a name search except through the secure public access
118 system.

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

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

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

125 individuals is ancillary to the purpose of the inquiry. Prior to the release of
126 information under this subsection the requestor must comply with the provisions of
127 Section 6.

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

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

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

140 (2) Requesting compiled restricted information.

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

145 (B) The request must:

146 (i) identify what information is sought,
147 (ii) describe the purpose for requesting the information and explain how the
148 information will benefit the public interest or public education, and
149 (iii) explain provisions for the secure protection of any information
150 requested to which public access is restricted or prohibited.

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

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

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

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

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

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

166 Section 5. Court Records Excluded From Public Access.

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

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

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

170 rule, case law or court order, including:

171 (1) affidavits or sworn testimony and records of proceedings in support of

172 the issuance of a search or arrest warrant pending the return of the warrant;

173 (2) information in a complaint and associated arrest or search warrant to the

174 extent confidentiality is ordered by the court under N.D.C.C. §§ 29-05-32 or

175 29-29-22;

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

177 disclosure;

178 (4) case information and documents in Child Relinquishment to Identified

179 Adoptive Parent cases brought under N.D.C.C. ch. 14-15.1;

180 (5) domestic violence protection order files and disorderly conduct

181 restraining order files when the restraining order is sought due to domestic

182 violence, except for orders of the court;

183 (6) documents in domestic violence protection order and disorderly conduct

184 restraining order cases in which the initial petition was dismissed summarily by the

185 court without a contested hearing;

186 (7) names of qualified or summoned jurors and contents of jury

187 qualification forms if disclosure is prohibited or restricted by order of the court;

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

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

191

192 (10) records of a case in which the magistrate finds no probable cause for
193 the issuance of a complaint;

194 ~~(10)~~ (11) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected
195 information:

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

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

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

202 ~~(11)~~ (12) judge and court personnel work material, including personal
203 calendars, communications from law clerks, bench memoranda, notes, work in
204 progress, draft documents and non-finalized documents;

205 ~~(12)~~ (13) party, witness and crime victim contact information gathered and
206 recorded by the court for administrative purposes, including telephone numbers
207 and e-mail, street and postal addresses;

208 (14) the name of a patron of the North Dakota Legal Self Help Center or

209 information sufficient to identify a patron or the subject about which a patron
210 requested information.

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

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

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

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

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

222 (a) Request to Prohibit Access.

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

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

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

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

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

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

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

246 (B) if the defendant is acquitted.

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

250 (b) Request to Obtain Access.

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

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

260 (c) Form of Request.

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

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

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

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

270 (a) If the court contracts with a vendor to provide information technology
271 support to gather, store, or make accessible court records, the contract will require

272 the vendor to comply with the intent and provisions of this rule. For purposes of
273 this section, "vendor" includes a state, county or local governmental agency that
274 provides information technology services to a court.

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

278 EXPLANATORY NOTE

279 Adopted on an emergency basis effective October 1, 1996; Amended and
280 adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1,
281 2009; March 15, 2009; March 1, 2010; March 1, 2012; March 1, 2015; March 1,
282 2016; _____ . Appendix amended effective August 1, 2001, to reflect the
283 name change of State Bar Board to State Board of Law Examiners.

284 Section 3(b)(3) was added, effective March 1, 2016, to clarify that the clerk
285 of court is not required to search within a court record for specific information that
286 may be sought by a requestor.

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

290 Section 4(b) was amended, effective _____, to allow the
291 Supreme Court to enact and implement policies to regulate remote access to court
292 records and to limit remote access by name search to pre-conviction records in

293 criminal cases.

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

300 Section 5(b)(6) was amended, effective March 1, 2015, to clarify that the
301 restriction on public access to documents in domestic violence protection order
302 and disorderly conduct restraining order cases under this paragraph is limited to
303 cases that were dismissed summarily.

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

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

312 Section 5(b)(10) was added, effective _____, to exclude cases in which
313 a magistrate finds no probable cause for the issuance of a complaint from public

314 access.

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

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

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

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

328 Joint Procedure Committee Minutes of _____; January 28-29,
329 2016, pages 2-7; September 24-25, 2015, pages 15-16, 20-21; April 23-24, 2015,
330 pages 8-10; April 24-25, 2014, page 27; April 28-29, 2011, pages 9-12; September
331 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009,
332 pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6;
333 January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27,
334 2007, page 31; September 22-23, 2005, pages 6-16; April 28-29, 2005, pages

335 22-25; April 29-30, 2004, pages 6-13, January 29-30, 2004, pages 3-8; September
336 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12. Court Technology
337 Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003;
338 Conference of Chief Justices/Conference of State Court Administrators:
339 Guidelines for Public Access to Court Records.
340 Cross Reference: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With
341 the Court).

110.05 (differences as to whether the transcript or other parts of the record on appeal truly disclose what occurred in the trial court are to be submitted to and determined by the trial court; material omissions or misstatements may be resolved by the trial court, stipulation of the parties, or by the appellate court on motion by a party or on its own initiative).

Alleged inaccuracies in the records submitted by the parties and other participants in the litigation must also be brought to the attention of the court through existing procedures for introducing and challenging evidence. These procedures typically have deadlines associated with the progress of the case and failure to act in a timely fashion may preclude relief.

RULE 8. INSPECTION, COPYING, BULK DISTRIBUTION AND REMOTE ACCESS.

Subd. 1. Access to Original Records. Upon request to a custodian, a person shall be allowed to inspect or to obtain copies of original versions of records that are accessible to the public in the place where such records are normally kept, during regular working hours. However, copies, edited copies, reasonable facsimiles or other appropriate formats may be produced for inspection if access to the original records would: result in disclosure of information to which access is not permitted; provide remote or bulk access that is not permitted under this rule; jeopardize the security of the records; or prove otherwise impractical. Unless expressly allowed by the custodian, records shall not be removed from the area where they are normally kept.

Subd. 2. Remote Access to Electronic Records.

(a) *Definitions.*

- (1) "Register of actions" means a register or list of the title, origination, activities, proceedings and filings in each case [MINN. STAT. § 485.07(1)];
- (2) "Calendars" means lists or searchable compilations of the cases to be heard or tried at a particular court house or court division [MINN. STAT. § 485.11];
- (3) "Indexes" means alphabetical lists or searchable compilations for plaintiffs and for defendants for all cases including the names of the parties, date commenced, case file number, and such other data as the court directs [MINN. STAT. § 485.08];
- (4) "Judgment docket" means an alphabetical list or searchable compilation including name of each judgment debtor, amount of the judgment, and precise time of its entry [MINN. STAT. § 485.07(3)];
- (5) "Remote access" and "remotely accessible" mean that information in a court record can be electronically searched, inspected, or copied without the need to physically visit a court facility. The state court administrator may designate publicly accessible facilities other than court facilities as

official locations for public access to court records where records can be electronically searched, inspected, or copied without the need to physically visit a court facility. This access shall not be considered remote access for purposes of these rules.

- (6) "Appellate court record" means the case records of the Minnesota Court of Appeals and the Minnesota Supreme Court, including without limitation opinions, orders, judgments, notices, motions, and briefs.
- (b) *Certain Data Not To Be Remotely Disclosed.* Notwithstanding Rule 8, subd. 2 (c), (e), (f), and (g) for case records other than appellate court records, the public shall not have remote access to the following data fields in the register of actions, calendars, index, and judgment docket, with regard to parties or their family members, jurors, witnesses (other than expert witnesses), or victims of a criminal or delinquent act:
- (1) social security numbers and employer identification numbers;
 - (2) street addresses except that street addresses of parties may be made available by access agreement in a form prepared by the state court administrator and approved by the Judicial Council;
 - (3) telephone numbers;
 - (4) financial account numbers; and
 - (5) in the case of a juror, witness, or victim of a criminal or delinquent act, information that either specifically identifies the individual or from which the identity of the individual could be ascertained.

Without limiting any other applicable laws or court rules, and in order to address privacy concerns created by remote access, it is recommended that court personnel preparing judgments, orders, appellate opinions and notices limit the disclosure of items (2), (3) and (5) above to what is necessary and relevant for the purposes of the document. Under MINN. GEN. R. PRAC. 11, inclusion of items (1) and (4) in judgments, orders, appellate opinions and notices is to be made using the confidential information form 11.1. Disclosure of juror information is also subject to MINN. GEN. R. PRAC. 814, MINN. R. CRIM. P. 26.02, subd. 2, and MINN. R. CIV. P. 47.01.

- (c) *Pending Criminal Records.* The Information Technology Division of State Court Administration shall make reasonable efforts and expend reasonable and proportionate resources to prevent records of pending criminal matters from being electronically searched by defendant name by the majority of known, mainstream electronic search tools, including but not limited to the court's own electronic search tools. "Records of pending criminal matters" are records, other than appellate court records, for which there is no conviction as defined in MINN. STAT. § 609.02, subd. 5 (2014), on any of the charges.

- (d) *District Court Case Types With No Remote Access.* There shall be no remote access to publicly accessible district court case records in the following case types:
- (1) Domestic abuse (proceedings for orders for protection under MINN. STAT. § 518B.01);
 - (2) Harassment (proceedings for harassment restraining orders under MINN. STAT. § 609.748);
 - (3) Delinquency felony (felony-level juvenile delinquency proceedings involving a juvenile at least 16 years old under MINN. R. JUV. DEL. P.);
 - (4) CHIPS, CHIPS-Permanency; CHIPS-Runaway; CHIPS-Truancy; CHIPS-Voluntary Placement; and Child in Voluntary Foster Care for Treatment (encompasses publicly accessible records of all child protection proceedings under the MINN. R. JUV. PROT. P.).
- (e) *District Court Case Types With No Remote Access to Documents.* To the extent that the custodian has the resources and technical capacity to do so, the custodian shall provide remote access to the publicly accessible portions of the district court register of actions, calendars, indexes, and judgments dockets, but excluding any other documents in the following case types:
- (1) All Commitment case types (encompasses all proceedings under MINN. SPEC. R. COMMITMENT & TREATMENT ACT).
- (f) *District Court Case Types With No Remote Access to Party/Participant-Submitted Documents.* To the extent that the custodian has the resources and technical capacity to do so, the custodian shall provide remote access to the publicly accessible portions of the district court register of actions, calendars, indexes, judgment dockets, judgments, orders, appellate opinions, and notices prepared by the court, but excluding any other documents, in the following case types:
- (1) Custody, Dissolution With Child, Dissolution Without Children, Other Family, and Support (encompasses all family case types);
 - (2) Post-Adjudication Paternity Proceedings.
- (g) *District Court Case Types with Remote Access to Documents.* To the extent that the custodian has the resources and technical capacity to do so, the custodian shall provide remote access to the publicly accessible portions of the district court register of actions, calendars, indexes, judgments dockets, judgments, orders, appellate opinions, notices prepared by the court, and any other documents, in the following case types:
- (1) All Major and Minor Civil Case Types (Torrens, Tort, Consumer Credit, Contract, Employment, Forfeiture, Condemnation, Civil Other/Miscellaneous, Other Major Civil, Personal Injury, Conciliation, Implied Consent, Minor Civil Judgments, and Unlawful Detainer);
 - (2) Formal Probate, Other Probate, Guardianship and Conservatorship, and Trust;
 - (3) All Major and Minor Criminal Case Types; and

- (4) All electronic case records that are accessible to the public under Rule 4 and that have been in existence for more than 90 years.
- (h) *Remote Access to Appellate Court Records.* The Clerk of the Appellate Courts will provide remote access to publicly accessible appellate court records filed on or after July 1, 2015, except:
 - (1) The record on appeal as defined in MINN. R. CIV. APP. P. 110.01;
 - (2) Data elements listed in clause (b)(1)–(5) of this rule contained in the appellate court records case management system (currently known as “PMACS”);
 - (3) Appellate briefs, provided that the State Law Library may, to the extent that it has the resources and technical capacity to do so, provide remote access to appellate court briefs provided that the following are redacted: appendices or addenda to briefs, data listed in clause (b)(1)–(5) of this rule, and other records that are not accessible to the public.

To the extent that the Clerk of the Appellate Courts has the resources and technical capacity to do so, the Clerk of Appellate Courts may provide remote access to appellate records filed between January 1, 2013 and June 30, 2015. Public appellate records for which remote access is not available may be accessible at public terminals in the state law library.

- (i) *Exceptions.*
 - (1) *Particular Case.* After notice to the parties and an opportunity to be heard, the presiding judge may by order direct the court administrator to provide remote electronic access to records of a particular case that would not otherwise be remotely accessible under parts (b) through (h) of this rule.
 - (2) *E-mail and Other Means of Transmission.* Any record custodian may, in the custodian’s discretion and subject to applicable fees, provide public access by e-mail or other means of transmission to publicly accessible records that would not otherwise be remotely accessible under parts (b) through (h) of this rule.
 - (3) *E-filed Records.* Documents electronically filed or served using the E-Filing System designated by the state court administrator shall be remotely accessible to the person filing or serving them and the recipient of them, on the E-Filing System for the period designated by the court, and on the court’s case management system to the extent technically feasible.

Subd. 3. Bulk Distribution of Court Records. A custodian shall, to the extent that the custodian has the resources and technical capacity to do so, provide bulk distribution of its publicly accessible electronic case records as follows:

- (a) Records subject to remote access limitations in Rule 8, subd. 2, shall not be provided in bulk to any individual or entity except as authorized by order or directive of the Supreme Court or its designee.
- (b) All other electronic case records that are remotely accessible to the public under Rule 8, subd. 2 shall be provided to any individual or entity.

Subd. 4. Criminal Justice and Other Government Agencies. Notwithstanding other rules, access to non-publicly accessible records and remote and bulk access to publicly accessible records by criminal justice and other government agencies shall be governed by order or directive of the Supreme Court or its designees.

Subd. 5. Access to Certain Evidence.

- (a) General. Except for medical records under part (b) of this rule, where access is restricted by court order or the evidence is no longer retained by the court under a court rule, order or retention schedule, documents and physical objects admitted into evidence in a proceeding that is open to the public shall be available for public inspection under such conditions as the court administrator may deem appropriate to protect the security of the evidence.
- (b) Medical Record Exhibits. Medical records under Rule 4, subd. 1(f), of these rules that are admitted into evidence in a commitment proceeding that is open to the public shall be available for public inspection only as ordered by the presiding judge.
- (c) No Remote Access to Trial or Hearing Exhibits. Evidentiary exhibits from a hearing or trial shall not be remotely accessible, but this shall not preclude remote access to full or partial versions of such records that are or were otherwise submitted to the court as a publicly accessible record.

Subd. 6. Fees. When copies are requested, the custodian may charge the copy fee established by statute but, unless permitted by statute, the custodian shall not require a person to pay a fee to inspect a record. When a request involves any person's receipt of copies of publicly accessible information that has commercial value and is an entire formula, pattern, compilation, program, device, method, technique, process, data base, or system developed with a significant expenditure of public funds by the judicial branch, the custodian may charge a reasonable fee for the information in addition to costs of making, certifying, and compiling the copies. The custodian may grant a person's request to permit the person to make copies, and may specify the condition under which this copying will be permitted.

Advisory Committee Comment-2005

The 2005 addition of a new Rule 8, subd. 2, on remote access establishes a distinction between public access at a court facility and remote access over the Internet. Subdivision 2 attempts to take a measured step into Internet access that provides the best chance of successful implementation given current technology and competing interests at stake. The rule limits Internet access to records that are created by the courts as this is the

only practical method of ensuring that necessary redaction will occur. Redaction is necessary to prevent Internet access to clear identity theft risks such as social security numbers and financial account numbers. The rule recognizes a privacy concern with respect to remote access to telephone and street addresses, or the identities of witnesses or jurors or crime victims. The identity of victims of a criminal or delinquent act are already accorded confidentiality in certain contexts [MINN. STAT. § 609.3471 (2004) (victims of criminal sexual conduct)], and the difficulty of distinguishing such contexts from all others even in a data warehouse environment may establish practical barriers to Internet access.

Internet access to preconviction criminal records may have significant social and racial implications, and the requirements of Rule 8, subd. 2(c) are intended to minimize the potential impact on persons of color who may be disproportionately represented in criminal cases, including dismissals. The rule contemplates the use of log-ins and other technology that require human interaction to prevent automated information harvesting by software programs. One such technology is referred to as a "Turing test" named after British mathematician Alan Turing. The "test" consists of a small distorted picture of a word and if the viewer can correctly type in the word, access or log in to the system is granted. Presently, software programs do not read clearly enough to identify such pictures. The rule contemplates that the courts will commit resources to staying ahead of technology developments and implementing necessary new barriers to data harvesting off the courts' web site, where feasible.

Some district courts currently allow public access to records of other courts within their district through any public access terminal located at a court facility in that district. The definition of "remote access" has been drafted to accommodate this practice. The scope of the definition allows statewide access to the records in Rule 8, subd. 2, from any single courthouse terminal in the state, which is the current design of the new district court computer system referred to as MNCIS.

The exception in Rule 8, subd. 2(e), for allowing remote access to additional documents, is intended for individual cases when Internet access to documents will significantly reduce the administrative burdens associated with responding to multiple or voluminous access requests. Examples include high-volume or high-profile cases. The exception is intended to apply to a specific case and does not authorize a standing order that would otherwise swallow the rule.

The 2005 addition of a new Rule 8, subd. 3, on bulk distribution, complements the remote access established under the preceding subdivision. Courts have been providing this type of bulk data to the public for the past ten years, although distribution has mainly been limited to noncommercial entities and the media. The bulk data would not include the data set forth in Rule 8, subd. 2(b), or any case records that are not accessible to the public. The bulk data accessible to the public would, however, include preconviction criminal records as long as the individual or entity requesting the data enters into an agreement in the form approved by the state court administrator that provides that the individual or entity will not disclose or disseminate the data in a manner that identifies specific individuals who are the subject of such data.

The 2005 addition of new Rule 8, subd. 4(a), regarding criminal justice and other governmental agencies, recognizes that the courts are required to report certain information to other agencies and that the courts are participating in integration efforts (e.g., CriMNet) with other agencies. The access is provided remotely or via regular (e.g.,

nightly or even annually) bulk data exchanges. The provisions on remote and bulk record access are not intended to affect these interagency disclosures. Additional discretionary disclosures are authorized under subd. 4(b).

The 2005 changes to Rule 8, subd. 5, regarding access to certain evidence, are intended to address the situation in which the provisions appear to completely cut off public access to a particular document or parts of it even when the item is formally admitted into evidence (i.e., marked as an exhibit and the record indicates that its admission was approved by the court) in a publicly accessible court proceeding. See, e.g., MINN. STAT. § 518.146 (2004) (prohibiting public access to, among other things, tax returns submitted in dissolution cases). The process for formally admitting evidence provides an opportunity to address privacy interests affected by an evidentiary item. Formal admission into evidence has been the standard for determining when most court services records become accessible to the public under Rule 4, subd. 1(b), and this should apply across the board to documents that are admitted into evidence.

The changes also recognize that evidentiary items may be subject to protective orders or retention schedules or other orders. As indicated in Rule 4, subd. 2, and its accompanying advisory committee comment, the procedures for obtaining a protective order are addressed in other rules. Similarly, as indicated in Rule 1, the disposition, retention and return of records and objects is addressed elsewhere.

Advisory Committee Comment-2007

The 2007 modifications to Rule 8, subd. 2(b), recognize the feasibility of controlling remote access to identifiers in data fields and the impracticability of controlling them in text fields such as documents. Data fields in court computer systems are designed to isolate specific data elements such as social security numbers, addresses, and names of victims. Access to these isolated elements can be systematically controlled by proper computer programming. Identifiers that appear in text fields in documents are more difficult to isolate. In addition, certain documents completed by court personnel occasionally require the insertion of names, addresses and/or telephone numbers of parties, victims, witnesses or jurors. Examples include but are not limited to appellate opinions where victim or witness names may be necessary for purposes of clarity or comprehensibility, "no-contact" orders that require identification of victims or locations for purposes of enforceability, orders directing seizure of property, and various notices issued by the court.

The use of the term "recommends" intentionally makes the last sentence of the rule hortatory in nature, and is designed to avoid creating a basis for appeals. The reference to other applicable laws and rules recognizes that there are particular provisions that may control the disclosure of certain information in certain documents. For example, the disclosure of restricted identifiers (which includes social security numbers, employer identification numbers, and financial account numbers) on judgments, orders, decisions and notices is governed by MINN. GEN. R. PRAC. 11. Rules governing juror-related records include MINN. GEN. R. PRAC. 814, MINN. R. CRIM. P. 26.02, subd. 2, and MINN. R. CIV. P. 47.01.

The 2007 modifications to Rule 8, subd. 2(c), recognize that criminal cases often involve a conviction on less than all counts charged, and that appellate records that have long been remotely accessible have included pretrial and preconviction appeals. The clarification regarding automated tools recognizes that the participant index on the court's

case management system is included in the scope of the limits on remote searching of preconviction records.

The 2007 modification to Rule 8, subd. 2(d), authorizes the state court administrator to designate additional locations as court facilities for purposes of remote access. For example, a government service center, registrar of titles office or similar location that is not in the same building as the court's offices could be designated as a location where the public could have access to court records without the limitations on remote access. In some counties, these types of offices are located in the courthouse and in other counties they are in a separate building. This change allows such offices to provide the same level of access to court records regardless of where they are located.

The 2007 addition of Rule 8, subd. 2(e)(3), is intended to reinstate the routine disclosure, by facsimile transmission or e-mail, of criminal complaints, pleadings, orders, disposition bulletins, and other documents to the general public. These disclosures were unintentionally cut off by the definition of remote access under Rule 8, subd. 2(d), which technically includes facsimile and e-mail transmissions. Limiting disclosures to the discretion of the court administrator relies on the common sense of court staff to ensure that this exception does not swallow the limits on remote and bulk data access. The rule also recognizes that copy fees may apply. Some but not all courts are able to process electronic (i.e., credit card) fee payments.

ACCESS RULE 8, subd. 4(b), authorizes disclosure of certain records to executive branch entities pursuant to a nondisclosure agreement. Minnesota Statutes § 13.03, subd. 4(a) (2006), provides a basis for an executive branch entity to comply with the nondisclosure requirements. It is recommended that this basis be expressly recognized in the nondisclosure agreement and that the agreement limit the executive branch agency's use of the nonpublicly-accessible court records to that necessary to carry out its duties as required by law in connection with any civil, criminal, administrative, or arbitral proceeding in any federal or state court, or local court or agency or before any self-regulated body.

Advisory Committee Comment-2008

The 2008 modifications to Rule 8, subd. 2(a), recognize that privacy concerns in regard to remote access, such as identity theft, subside over time while the historical value of certain records may increase. The rule permits remote access to otherwise publicly accessible records as long as the records have been in existence for 90 years or more. This provision is based in part on the executive branch data practices policy of allowing broader access to records that are approximately a lifetime in age. See MINN. STAT. § 13.10, subd. 2 (2006) (private and confidential data on decedents becomes public when ten years have elapsed from the actual or presumed death of the individual and 30 years have elapsed from the creation of the data; "an individual is presumed to be dead if either 90 years elapsed since the creation of the data or 90 years have elapsed since the individual's birth, whichever is earlier, except that an individual is not presumed to be dead if readily available data indicate that the individual is still living").

The 2008 modifications to Rule 8, subs. 2(c) and 3, recognize that certain juvenile court records are accessible to the public and that the remote access policy for preconviction criminal records needs to be consistently applied in the juvenile context. There are both adjudications and convictions in the juvenile process. Delinquency

adjudications are governed by MINN. R. JUV. DEL. P. 15.05, subd. 1(A), and MINN. STAT. § 260B.198, subd. 1 (Supp. 2007); traffic offender adjudications are governed by MINN. R. JUV. DEL. P. 17.09, subd. 2(B) and MINN. STAT. § 260B.225, subd. 9 (2006); and extended jurisdiction juvenile convictions are governed by MINN. R. JUV. DEL. P. 19.10, subd. 1(A) and MINN. STAT. § 260B.130, subd. 4 (2006). Juvenile records that are otherwise publicly accessible but have not reached the appropriate adjudication or conviction are not remotely accessible under Rule 8, subds. 2(c) and 3.

Advisory Committee Comment-2012 Amendment

The 2012 addition of Rule 8, subd. 2(e)(4), is intended to recognize that documents electronically filed with the courts or electronically served using the court's internet-accessible electronic filing and electronic service system can be made remotely accessible to the parties filing or serving the same and to the recipients of such service. This continues remote access that was established through the Judicial District E-Filing Pilot Project Provisions, adopted by the court on October 21, 2010, and amended on March 10, 2011. Those provisions are being replaced by permanent rules.

Advisory Committee Comment-2015

Rule 8, subd. 2, is amended in 2015 to allow for expanded remote public access to certain court records. Subdivision 2(a) has become a definition section. Subdivision 2(b) continues existing limits on remote access to certain data elements contained in the district court case management system.

Rule 8, subd. 2(c) is amended to replace "preconviction" with "pending" as the latter is more consistent with the presumption of innocence. No substantive change is being made in this rule in regard to pending criminal matters. References in the rule to juvenile delinquency proceedings have been removed as they are no longer necessary in light of the Court's May 14, 2014, order amending MINN. R. JUV. DEL. P. 30.02 to preclude all remote public access to delinquency cases involving felony level conduct by a juvenile at least 16 years old.

Rule 8, subd. 2(d) - (g), establishes a tiered approach to remote public access to district court records. Case types with no remote access are listed in clause (d), which merely continues existing practice for these case types. Proceedings for orders for protection and harassment restraining orders are already maintained with no remote access as required by the federal Violence Against Women Act, 18 U.S.C.A. § 2265(d)(3). Felony-level juvenile delinquency proceedings involving a juvenile at least 16 years old are also already maintained with no remote access under MINN. R. JUV. DEL. P. 30.02. All proceedings governed by MINN. R. JUV. PROT. P. are also currently maintained with no remote or courthouse electronic access, although publicly accessible records will not be accessible at a courthouse terminal.

Rule 8, subd. 2(e), continues the existing level of remote access, which currently includes no documents, for all proceedings under MINN. SPEC. R. COMMITMENT & TREATMENT ACT. This approach is consistent with the recommendation of the Court's advisory committee on those commitment rules, and attempts to maintain current level of remote public access (register of actions, name index, and calendars) but not create additional undue hardship for litigants in such cases by making the detailed documents

remotely accessible. Medical records in commitment matters also receive additional protections in Rule 8, subd. 5.

Rule 8, subd. 2(f), provides for remote public access to court-generated documents, along with the register of actions, index, calendars, and judgment docket, for all family law case types and post-adjudication paternity matters. There is no remote access to documents submitted by parties or participants. This means, for example, that there is no remote access in dissolution and child support matters to affidavits, which may contain highly sensitive information or, in some cases, unfounded allegations. Affidavits can be accessed at the courthouse to the extent that they are publicly accessible.

Rule 8, subd. 2(g), provides remote access to all publicly accessible documents in all major and minor civil and criminal cases, and all probate matters. It also continues the existing provision in these rules regarding remote access in all case types to publicly accessible case records that have been in existence for at least 90 years.

Rule 8, subd. 2(h), attempts to clarify remote access to appellate court records. The appellate courts are able to implement remote access to party-submitted documents on a day forward basis as the appellate court case management system and case types are different than those of the district court. The exceptions to remote access are consistent with those for district court records and recognize that district court records make their way into the appellate record.

Rule 8, subd. 3, as amended in 2015, retains consistent treatment for bulk and remote access. Inconsistent treatment would allow one to defeat the purpose of the other.

Rule 8, subd. 4, is amended in 2015 to recognize that the judicial branch has developed access policies to address systemic, computerized access by various government agencies. Such policy development properly belongs outside the public access rules.

Rule 8, subd. 5, is amended in 2015 to establish an exception to public access for medical records admitted into evidence in commitment proceedings. These records tend to be voluminous and redaction on an individual basis is impractical. The Supreme Court Advisory Committee on Special Rules of Procedure Governing Proceedings Under the Minnesota Commitment and Treatment Act felt strongly about this approach and that committee has also codified this approach in its recommended changes to the commitment rules. A number of district courts also have standing orders accomplishing the same result. This rule change would obviate the need for such standing orders.

Rule 8, subd. 5, is also amended to clarify that trial exhibits are not remotely accessible. Many exhibits because of their physical nature cannot be digitized, and therefore would not be remotely accessible. This clarification attempts to provide consistency for remote public access treatment of exhibits.

STATE OF MINNESOTA

IN SUPREME COURT

No. C4-85-1848

In re: Supreme Court Advisory Committee on Rules of
Public Access to Records of the Judicial Branch

Recommendations of the Minnesota Supreme Court Advisory Committee on
Rules of Public Access to Records of the Judicial Branch

FINAL REPORT

June 28, 2004

Hon. Paul H. Anderson, chair

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and certain companies to travel to the courthouse and use courthouse space and equipment to obtain information.

Judgments, orders, and notices prepared by the court have integrity in that they are the product of an adjudicatory process. The same may not be true of other documents. For example, while an affidavit filed by a party may truthfully reflect that a particular allegation has been made, the affidavit does not have the same integrity.¹⁹ In addition, the courts control the issuance of judgments, orders and notices. The burden of not including certain items for Internet publication should not unduly interfere with the preparation of these items. If a social security number or victim's name needs to be included in a particular judgment or order, the court has the opportunity to prepare a publicly accessible paper version and an Internet accessible version without too much additional effort. The advisory committee realizes that its proposal to allow Internet access to all case records that the courts themselves generate will require education of judges, attorneys and court staff in order to avoid exposing the judicial branch to significant liability or the type of criticism that undermines the public trust and confidence in the courts.

Several advisory committee members reminded the committee that it needs to consider all perspectives, including that of the poor, minorities,²⁰ victims, jurors and witnesses. The committee learned that most victims of crime prefer that all victim identifiers (name, address, telephone numbers, etc.) not be published on the Internet because such access will lead to more victimization and re-victimization. Some committee members believe that if the courts have to sacrifice protection of victims, jurors and witnesses in order to implement Internet access, then the courts simply should not implement Internet access. A majority of the committee agreed that victim, juror and witness identifiers should not be accessible through the limited, court-generated records that the committee believes should be accessible on the Internet.

Unproven Criminal Allegations

The issue that received the most attention during the public hearing was whether the courts should publish unproven criminal allegations on the Internet. There are racial and social implications that pull at both sides of the issue.

¹⁹ Author and Yale Law Professor Stephen L. Carter draws a distinction between truth and integrity in his article, *The Insufficiency of Honesty* (Atlantic Monthly, Feb. 1996, p.74-76) (reproduced at <http://www.csun.edu/~hfmgt001/honesty.doc>).

²⁰ Some court records now are not accessible to all citizens due to language barriers, but they are available with the help of an interpreter.

Impact on Communities of Color

Over a decade ago the Minnesota Supreme Court Racial Bias Task Force found that people of color were arrested more often, charged more often, required to post higher bails, and given longer sentences, than whites.²¹ Unfortunately, these trends appear to continue.

According to the results of a study conducted in 2001 by the Minneapolis-based Council on Crime and Justice, African American drivers are stopped by police at a rate much greater than their presence in the population.²² Once stopped, African Americans generally are more likely to be arrested than white people.²³ And once they have made it through the court system, the ratio of African Americans to whites in state prison is about 25 to 1. This is the highest ratio of all states.²⁴ In 2000, 37.2% of the state's prisoners were African American. By comparison only 3.5% of the population of Minnesota was African American.²⁵

Charges against African Americans also result in a disproportionate number of dismissals. In 2001 the Council on Crime and Justice studied 2600 arrests in the city of Minneapolis for six low level offenses: driving after revocation, driving after suspension, driving without a license, loitering with intent to commit prostitution or to sell narcotics, and lurking with intent to commit a crime.²⁶ The study found that 78% of defendants arrested and booked were also charged (i.e., ended up in court records), but only 20% were convicted. Of those charged, 33% had no criminal history, and 10% had been arrested at least once before without

²¹ *Minnesota Supreme Court Task Force on Racial Bias on the Court System Final Report*, May 1993, at S-5, S-9, and S-19. Some judges and attorneys surveyed by the task force felt that the race of the defendant and victim play a role in sentencing in Minnesota. *Id.*, at S-12. The task force also found that persons of color often chose not to go to trial because of the perception that they would not receive a fair trial. *Id.* At S-15.

²² In a study of Minneapolis police stops, African American drivers accounted for 37% of vehicle stops despite comprising only 18% of the population. Thomas L. Johnson, Cheryl Widder Heilman, *An Embarrassment to All Minnesotans: Racial Disparity in the Criminal Justice System*, Bench & Bar of Minnesota (May/June 2001).

²³ *Id.* In Minneapolis, African Americans were found to be about two and one half times more likely to be arrested and booked than whites following a traffic stop; Native Americans about three times more likely.

²⁴ See: <http://www.crimeandjustice.org/Pages/Projects/RDI/RDI%20Reports.htm>

²⁵ *Id.*

²⁶ Public hearing comments of Tom Johnson, Council on Crime and Justice.

any conviction ever having been obtained. A disproportionate percentage of those arrested (74%) and those charged (79%) were African American, but only 18% were convicted. Many more African Americans had multiple previous arrests without convictions than whites; 86% of those having more than five arrests without convictions were African American.

Other sources corroborate the high number of dismissals. For example, the state public defender's office handles approximately 175,000 cases annually, and 15,000 of these result in outright dismissals (i.e., they are not the result of plea bargains or not guilty verdicts).²⁷ Minneapolis accounted for 11,000 of the dismissals, with 10,000 dismissed by the prosecutor. In the vast majority of these dismissals (95%), the charges were not screened by a prosecutor before they were filed with the court (either as tickets or tab charges). Once filed with the court, however, the defendant's name and charge appear on the courts' records including court calendars.

Based on these statistics and anecdotal information the advisory committee received comments from many community leaders and groups who propose that no preconviction court records be published via the Internet. These proponents are deeply concerned that making preconviction court records available to anyone at any time and in virtual perpetuity over the Internet will have a permanent, disproportionate impact on the housing and employment of persons of color, especially young men of color.²⁸ Proponents of keeping preconviction records off the Internet point out that while judges and lawyers can distinguish between a charge and a conviction, such important distinctions are not made by the general public or in the world of housing and employment.²⁹

²⁷ Public hearing comments of John Stuart, State Public Defender.

²⁸ Public hearing comments of Archbishop Harry J. Flynn, Archdiocese of St. Paul and Minneapolis; public hearing comments of Tom Johnson, Council on Crime and Justice; Pastor Albert Gallmon, Jr. Fellowship Missionary Baptist Church, Minneapolis; public hearing comments of Hon. George Stephenson, District Court, Second Judicial District; public hearing comments of Roger Banks, State Council on Black Minnesotans; public hearing comments of Kizzy Johnson, Communities Against Police Brutality; public hearing comments of Don Samuels, Minneapolis City Council Member; public hearing testimony of Bishop Craig E. Johnson, Evangelical Lutheran Church in America, Minneapolis Area Synod.

²⁹ Public hearing comments of Archbishop Harry J. Flynn, Archdiocese of St. Paul and Minneapolis; public hearing comments of Gordon Stewart, Legal Rights Center.

Proponents of keeping preconviction records off the Internet also argue that publishing preconviction court records on the Internet: (1) will undermine the efforts of the Court's Implementation Committee on Multicultural Diversity and Fairness in the Courts;³⁰ (2) will degrade the presumption of innocence which the courts have a constitutional duty to protect; (3) will shame and marginalize the innocent instead of protecting them; (4) will increase our racial and class divide rather than narrow it; (5) will make the court a part of the wider web of injustices that it seeks to eliminate; (6) is both immoral and un-American; and (7) is unnecessary for public interest research purposes as many data sources currently exist to support public interest research.³¹

When it was pointed out by advisory committee members that cities currently sell arrest information in bulk to commercial data brokers who in turn sell the information through subscription services, and that some jails post their current list of detainees on the Internet, these proponents countered that: (1) two wrongs do not make a right; (2) law enforcement data lacks the imprimatur of the court; (3) law enforcement data is only available from local offices while statewide compilations of such records are accorded privacy by statute; (4) aside from jail detainees and special projects, cities are not posting arrest information on the Internet.³²

While recognizing that relatively few overall criminal cases involve the falsely or mistakenly accused, proponents of keeping preconviction records off the Internet stress the impact that Internet publication can have, particularly for people of

³⁰ The Implementation Committee unanimously supports the proposal that no preconviction court records be published via the Internet. See March 17, 2004, Minutes, Implementation Committee on Multicultural Diversity and Fairness in the Courts, at p. 1.

³¹ Public hearing comments of Archbishop Harry J. Flynn, Archdiocese of St. Paul and Minneapolis; public hearing comments of Pastor Albert Gallmon, Jr. Fellowship Missionary Baptist Church, Minneapolis; public hearing comments of Hon. George Stephenson, District Court, Second Judicial District; public hearing comments of Gordon Stewart, Legal Rights Center; public hearing comments of Roger Banks, State Council on Black Minnesotans; public hearing comments of Kizzy Johnson, Communities Against Police Brutality; public hearing comments of Don Samuels, Minneapolis City Council Member; public hearing comments of Scott Benson, Minneapolis City Council Member; public hearing testimony of Bishop Craig E. Johnson, Evangelical Lutheran Church in America, Minneapolis Area Synod.

³² Public hearing comments of John Stuart, State Public Defender; public hearing comments of Don Samuels, Minneapolis City Council Member.

color. One commentator remarked "it is easy for some in our society to say 'If you really wanted to work, you could find a job,' or 'that's what happens when you commit a crime.' Those who have said so are less likely to have found themselves unemployed and/or homeless lately."³³

Response to Impact on Communities of Color

The advisory committee also heard from various groups, mostly media representatives, opposed to any limits on Internet publication of preconviction court records. These opponents point out that: (1) even where there are demonstrable cases of Internet access to court records causing injury to reputation, this is not sufficient to overcome the presumption of public access;³⁴ (2) the high number of dismissals is a problem that should be reported;³⁵ (3) trying to solve social problems by keeping information off of the Internet is poor public policy, our system of government operates best when it is open to public scrutiny;³⁶ (4) if misuse of records is a genuine threat, then it is the legislature's job, not the court's, to define and take steps to prevent illegal acts;³⁷ (5) the less access there is to court records, the less accurate, fair and timely news reporting will be because news is a 24 hour business and courthouses have limited hours;³⁸ (6) dire predictions about the awful consequences of public access were made to the Minnesota Supreme Court prior to its recent decision to allow more public access to child protection cases, but a lengthy experimental period produced no evidence showing that those predictions were warranted;³⁹ and (7) by keeping court records off the Internet, the public will know less about the courts and public perception of the courts will suffer.⁴⁰

A few advisory committee members noted that Internet access to unproven criminal charges through the court's registers of actions will also serve the goal of holding law enforcement accountable for the use of its arrest and detention

³³ Public hearing comments of the Hon. George Stephenson, District Court, Second Judicial District.

³⁴ Public hearing comments of Lucy Dalglish, Reporters Committee for Freedom of the Press, et al.

³⁵ *Id.*

³⁶ Public hearing comments of Prof. Jane Kirtley, Silha Center for Study of Media Ethics and Law, School of Journalism & Mass Communication, University of Minnesota.

³⁷ *Id.*

³⁸ Public hearing comments of Chris Ison, Editor, Star Tribune.

³⁹ Public hearing comments of Gary Hill, KSTP-TV et al.

⁴⁰ *Id.*

authority, and also the goals of holding the prosecutor and the courts accountable for their role in such matters. Such access can benefit defendants by providing the information necessary to expose shortcomings in the criminal justice system. Public safety is also served by knowledge of who has been charged with a crime. The relatively few overall criminal cases involving the falsely or mistakenly charged simply do not outweigh the significant benefits of Internet access.⁴¹

Using Technology to Minimize Automated Harvesting

Some advisory committee members see a distinction between an individualized need for public access to court records over the Internet and a commercial need for such access. Thus, the committee considered technology that would attempt to make preconviction court records accessible in some way via the Internet, but less susceptible to automated harvesting by commercial data brokers. This approach attempts to preserve some level of practical obscurity for preconviction records and yet provide a means for some convenient public access.

Many of Minnesota's judicial districts post calendars on the Internet, and these calendars contain both preconviction and postconviction records. These calendars permit the public to see what is transpiring in their courts. A combination of random, non-predictable file names for the calendars plus nontext, image only format, plus a "prove-you-are-human log-in procedure" between each calendar file request theoretically can prevent automated searching devices from simply harvesting preconviction records by name from these calendars displayed on the Internet while permitting individual public access.

An example of the prove-you-are-human log-in procedure is referred to as a "Turing test" named after British mathematician Alan Turing. The "test" consists of a small distorted picture of a word and if the viewer can correctly type in the word, access or log in to the system is granted. Right now, software programs do not read clearly enough to identify such pictures. Theoretically, this will separate the human reader from the automated software program that is designed to simply harvest data on a particular individual.

The format of court calendars is also important. Most calendars are produced in a PDF format readable through common and freely available software (Adobe Acrobat Reader). The PDF format can be either a text searchable format or an

⁴¹ See attached Exhibits K and L (minority reports discussing benefits of full Internet access).

image only graphic format. The effort required to search an image-only format by name is certainly greater than that for text-based format.

Use of random and nonpredictable file names is necessary to reduce the possibility of avoiding the log-in process and jumping directly to the calendar file. Otherwise, if the Monday calendar file is always titled "Mondaycalendar," then software programs will know what file to look for.

Names indexes present a particular problem in the preconviction context. Most court case management systems include both name and case number indexes to locate the cases. Removing the name index completely is one option, but that also removes the name index from postconviction matters as well. Another option is to remove the preconviction cases from the reach of the name index search.

The advisory committee was concerned about the potential ramifications of these measures, both in terms of effectiveness and overall costs and in terms of impact on the courts' current technology efforts, including the roll out of its new case management system known as MNCIS. Also of concern was the impact on current customers of electronic records in the Fourth Judicial District, which publishes conciliation court, housing court, and high-profile case records over the Internet, and has in excess of 200 paid subscribers to its electronic access service that includes all of its civil and criminal case records. The committee appointed a special fact-finding subcommittee to investigate the potential ramifications, and the results of that subcommittee's work is attached as Exhibit N to this report.

The fact-finding subcommittee found that these measures would not significantly affect the budget or time frame for the MNCIS project. The advisory committee will have to define "preconviction" with enough detail to allow IT staff to correctly implement any policy.

The impact on the Fourth Judicial District is less clear, although its separate SIP system will eventually be replaced by MNCIS within the next year, which may obviate most of the problem. Taking away preconviction records from subscription customers may add staff and terminal equipment and operation costs as it is anticipated that current subscribers will continue to obtain preconviction records by coming to the courthouse.

Regarding continued effectiveness, court technology staff has advised the advisory committee that there is no real yardstick. Technological advances may eventually obviate any of these measures, but advances and vigilance may also provide new measures and continued effectiveness. It is anticipated that keeping ahead of technical advances will be a constant struggle.

Recommendation on Unproven Criminal Accusations

By a close vote of 9 to 7, a majority of the advisory committee agreed that Internet publication of preconviction court records should, to the extent feasible, be posted on the Internet in a format that is not searchable by defendant name by automated tools. This means that preconviction cases can appear on court calendars posted on the Internet if measures are taken to prevent automated searching, such as using prove-you-are-human log-ins, random file names, and image-only file format. This also means that a criminal case in preconviction status will not show up on a name index search conducted via the Internet but will show up on a name index search conducted at the courthouse public access terminal. This recommendation is codified in proposed Rule 8, subd. 3(c).

The recommendation defines “preconviction” criminal case records as records for which there is no conviction as defined in MINN. STAT. § 609.02, subd. 5 (2003), which states:

“Conviction” means any of the following accepted and recorded by the court:

- (1) a plea of guilty; or
- (2) a verdict of guilty by a jury or a finding of guilty by the court.

The Minnesota Supreme Court has ruled that the general practice to be followed is to have a conviction “recorded” in a judgment entered in the file in accordance with MINN. R. CRIM. P. 27.03, subd. 7.⁴² That rule states:

“Subd. 7. Judgment. The clerk's record of a judgment of conviction shall contain the plea, the verdict of findings, and the adjudication and sentence. If the defendant is found not guilty or for any other reason is entitled to be discharged, judgment shall be entered accordingly. The sentence or stay of imposition of sentence is an adjudication of guilt

Thus, a continuance for dismissal under MINN. STAT. § 609.132 that occurs before any guilty plea is accepted and “recorded” by the court as provided above would not be a conviction. Similarly, any diversion that occurs before a guilty plea is accepted and “recorded” by the court as set forth above would not be a conviction. A stay of imposition or execution of sentence, on the other hand, constitutes an

⁴² *State v. Hoelzel*, 639 N.W.2d 605 (Minn. 2002).

adjudication under MINN. R. CRIM. P. 27.03, subd. 7, quoted above, and a conviction would be considered "recorded" once the record of a judgment has been entered in the file.⁴³ Other situations that would not result in a "recorded" conviction include the retention of unadjudicated offenses under MINN. STAT § 609.04 (2003) or issuing a stay of adjudication under *State v. Krotzer*, 548 N.W.2d 252 (Minn. 1996).⁴⁴

Attorney Records

Information on licensed and registered attorneys is maintained by the Clerk of the Appellate Courts in the attorney registration database. Rule 9 of the Rules of the Supreme Court for Registration of Attorneys limits public access to attorney information both over the Internet and in bulk record disclosures:

Rule 9. ACCESS TO ATTORNEY REGISTRATION RECORDS
Attorney registration records shall be accessible only as provided in this rule.

- A. Public Inquiry Concerning Specific Attorney. Upon inquiry, the Clerk of the Appellate Courts may disclose to the public the name, address, admission date, continuing legal education category, current status, and license number of a registered attorney, provided that each inquiry and disclosure is limited to a single registered attorney.
- B. Publicly Available List. The Clerk may also disclose to the public a complete list of the name, city, and zip code of all registered attorneys.
- C. Lists Available to Continuing Legal Education Providers and the Courts. Upon written request and payment of the required fee, the Clerk may disclose to a bona fide continuing legal education business a complete list of the name, address, admission date, continuing legal education category, current status, and license number of all registered attorneys. The Clerk may also disclose the same information to a court or judicial district solely for use in updating mailing addresses of attorneys to be included in a judicial evaluation program.

⁴³ The fact that a person may eventually complete probation without the sentence being imposed or executed merely affects the level of conviction rendered. *See* MINN. STAT. §§ 609.13, .135 (2003).

⁴⁴ *State v. Hoelzel, supra.*

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: April 29, 2016

RE: Rule 58, N.D. Sup. Ct. Admin. R., Vexatious Litigation

The Supreme Court has requested that the committee consider a new rule to address vexatious litigants. Clerk Penny Miller explains in the attached letter that the rule is necessary to deal with litigants who consume the state's judicial resources by filing non-meritorious litigation, burdening both the court system and opposing parties.

The Court has provided the committee with a copy of Idaho's vexatious litigation rule and their roster of vexatious litigants. The Court also provided copies of vexatious litigant rules from California, Florida, Nevada, Ohio, Texas, Utah and Washington State for the committee's reference.

Staff has drafted a proposed new administrative rule, attached, which is based on the Idaho rule.

Under the rule, a presiding judge may issue a pre-filing order against a person found to be a vexatious litigant. A pre-filing order would typically require the person to obtain permission from a judge before filing anything with the court. In the Odyssey environment, this presents an problem because in order to get anything before a judge, it generally needs to be filed in Odyssey. The Ohio rule deals with this problem by specifically allowing a person subject to a pre-filing order to file an application to seek leave to file. Staff has included this exception in the rule. The committee may wish to discuss whether this is the best means to use to allow vexatious litigants to apply for leave to file.

RULE 58. VEXATIOUS LITIGATION

1 Section 1. Purpose.

2 This rule is intended to allow courts to address vexatious litigation, which is
3 an impediment to the proper functioning of the courts, while protecting the
4 constitutional rights of all individuals to access to the courts.

5 Section 2. Definition.

6 (a) Litigation means any civil action or proceeding, including any appeal
7 from an administrative agency, any appeal of a referee order to the district court,
8 and any appeal to the Supreme Court.

9 (b) Vexatious litigant means a person who habitually, persistently, and
10 without reasonable grounds engages in conduct that:

11 (1) serves merely to harass or maliciously injure another party in a civil
12 action;

13 (2) is not warranted under existing law and cannot be supported by a good
14 faith argument for an extension, modification, or reversal of existing law;

15 (3) is imposed solely for delay;

16 (4) hinders the effective administration of justice;

17 (5) imposes an unacceptable burden on judicial personnel and resources; or

18 (6) impedes the normal and essential functioning of the judicial process.

19 Section 3. Pre-filing Order.

20 (a) A presiding judge may enter a pre-filing order prohibiting a vexatious
21 litigant from filing any new litigation in the courts of this state as a self-
22 represented party without first obtaining leave of a judge of the court in the district
23 where the litigation is proposed to be filed. A pre-filing order must contain an
24 exception allowing the person subject to the order to file an application seeking
25 leave to file.

26 (b) A district judge or referee may, on the judge's own motion or the motion
27 of any party, refer the consideration of whether to enter a pre-filing order to the
28 presiding judge. The presiding judge may also consider whether to enter such a
29 pre-filing order on the judge's own motion or the motion of a party if the litigant
30 with respect to whom the pre-filing order is to be considered is a party to an action
31 before the presiding judge.

32 Section 4. Finding.

33 A presiding judge may find a person to be a vexatious litigant based on a
34 finding that:

35 (a) in the immediately preceding seven-year period the person has
36 commenced, prosecuted or maintained as a self-represented party at least three
37 litigations, other than in small claims court, that have been finally determined
38 adversely to that person; or

39 (b) after a litigation has been finally determined against the person, the
40 person has repeatedly relitigated or attempted to relitigate, as a self-represented

41 party, either

42 (1) the validity of the determination against the same defendant or
43 defendants as to whom the litigation was finally determined; or

44 (2) the cause of action, claim, controversy, or any of the issues of fact or
45 law, determined or concluded by the final determination against the same
46 defendant or defendants as to whom the litigation was finally determined; or

47 (c) in any litigation while acting as a self-represented party, the person
48 repeatedly files unmeritorious motions, pleadings, or other papers, conducts
49 unnecessary discovery, or engages in other tactics that are frivolous or solely
50 intended to cause unnecessary delay; or

51 (d) the person has previously been declared to be a vexatious litigant by any
52 state or federal court of record in any action or proceeding.

53 Section 5. Notice.

54 If the presiding judge finds that there is a basis to conclude that a person is
55 a vexatious litigant and that a pre-filing order should be issued, the presiding judge
56 must issue a proposed pre-filing order along with the proposed findings supporting
57 the issuance of the pre-filing order. The person who would be designated as a
58 vexatious litigant in the proposed order will have 14 days to file a written response
59 to the proposed order and findings. If a response is filed, the presiding judge may,
60 in the judge's discretion, grant a hearing on the proposed order. If no response is
61 filed within 14 days, or if the presiding judge concludes following a response and

62 any subsequent hearing that there is a basis for issuing the order, the presiding
63 judge may issue the pre-filing order.

64 Section 6. Appeal. A pre-filing order entered by a presiding judge
65 designating a person as a vexatious litigant may be appealed to the Supreme Court
66 by such person as a matter of right.

67 Section 7. Supreme Court Order.

68 The Supreme Court may, on the Court's own motion or the motion of any
69 party to an appeal, enter a pre-filing order prohibiting a vexatious litigant from
70 filing any new litigation in the courts of this state as a self-represented party
71 without first obtaining leave of a judge of the court where the litigation is proposed
72 to be filed. If the Supreme Court finds that there is a basis to conclude that a
73 person is a vexatious litigant and that a pre-filing order should be issued, the Court
74 must issue a proposed pre-filing order along with the proposed findings supporting
75 the issuance of the pre-filing order. The person who would be designated as a
76 vexatious litigant in the proposed order will have 14 days to file a written response
77 to the proposed order and findings. If no response is filed within 14 days, or if the
78 Supreme Court concludes following a response and any subsequent hearing that
79 there is a basis for issuing the order, the pre-filing order may be issued.

80 Section 8. Sanctions; New Litigation.

81 (a) Disobedience of a pre-filing order entered pursuant to this rule may be
82 punished as a contempt of court.

83 (b) A judge may permit the filing of new litigation by a vexatious litigant
84 subject to a pre-filing order only if it appears that the litigation has merit and has
85 not been filed for the purpose of harassment or delay.

86 (c) If a vexatious litigant subject to a pre-filing order files any litigation
87 without first obtaining the required leave of a judge to file the litigation, the court
88 may dismiss the action. In addition, any party named in the litigation may file a
89 notice stating that the plaintiff is a vexatious litigant subject to a pre-filing order.
90 The filing of such notice stays the litigation. The litigation must be dismissed by
91 the court unless the plaintiff, within 14 days of the filing of the notice, obtains an
92 order from the judge permitting the litigation to proceed. If the judge issues an
93 order permitting the litigation to proceed, the time for the defendants to answer or
94 respond to the litigation will begin to run when the defendants are served with the
95 order of the judge.

96 Section 10. Roster.

97 The clerk of court must provide a copy of any pre-filing order issued under
98 to this rule to the State Court Administrator, who will maintain a list of vexatious
99 litigants subject to pre-filing orders.

100 EXPLANATORY NOTE

101 Rule 58 was adopted, effective _____.

102 SOURCES: Joint Procedure Committee Minutes of

103 _____ Idaho Ct. Admin. R. 59.

Hagburg, Mike

From: Miller, Penny
Sent: Wednesday, March 02, 2016 6:35 PM
To: Sandstrom, Justice Dale V.
Cc: Hagburg, Mike
Subject: Referral - Vexatious Litigants
Attachments: Vexatious Litigant Rosters Admin Rules 2.pdf

*SUPREME COURT OF NORTH DAKOTA
OFFICE OF THE CLERK
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Bismarck, ND 58505-0530
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VIA E-MAIL ONLY

March 2, 2016

Honorable Dale V. Sandstrom
Chair, Joint Procedure Committee
First Floor, Judicial Wing
State Capitol Building
600 East Boulevard Avenue
Bismarck, ND 58505-0530

RE: Vexatious Litigants

Dear Justice Sandstrom:

On behalf of the Supreme Court, I request the Joint Procedure Committee to consider a possible rule for a process for the Supreme Court and District Courts to address vexatious or abusive litigants.

There are litigants who consume an inordinate amount of judicial resources filing non-meritorious litigation in this state, and while the impact on the court system is of great concern, providing relief to opposing parties should also be considered.

To assist the Committee with your consideration of this issue, attached are an administrative rule and webpage roster of vexatious litigants from Idaho, and rules from California, Florida, Nevada, Ohio, Texas, Utah and Washington state are attached.

If I can be of further assistance in this matter, please contact me.

Sincerely,

Penny Miller

Clerk
North Dakota Supreme Court

Attach.
pc & attach.: Mike Hagburg, Staff Attorney

I.C.A.R. 59. Vexatious Litigation

Idaho Court Administrative Rule 59. Vexatious Litigation.

(a) The Court finds that the actions of persons who habitually, persistently, and without reasonable grounds engage in conduct that:

(1) serves merely to harass or maliciously injure another party in a civil action;

(2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law; or

(3) is imposed solely for delay, hinder the effective administration of justice, impose an unacceptable burden on judicial personnel and resources, and impede the normal and essential functioning of the judicial process. Therefore, to allow courts to address this impediment to the proper functioning of the courts while protecting the constitutional right of all individuals to access to the courts, the Court adopts the procedures set forth in this rule.

(b) Litigation, as used in this rule, means any civil action or proceeding, and includes any appeal from an administrative agency, any appeal from the small claims department of the magistrate division, any appeal from the magistrate division to the district court, and any appeal to the Supreme Court.

(c) An administrative judge may enter a prefiling order prohibiting a vexatious litigant from filing any new litigation in the courts of this state pro se without first obtaining leave of a judge of the court where the litigation is proposed to be filed. A district judge or magistrate judge may, on the judge's own motion or the motion of any party, refer the consideration of whether to enter such an order to the administrative judge. The administrative judge may also consider whether to enter such a prefiling order on his or her own motion or the motion of a party if the litigant with respect to whom the prefiling order is to be considered is a party to an action before the administrative judge.

(d) An administrative judge may find a person to be a vexatious litigant based on a finding that a person has done any of the following:

(1) In the immediately preceding seven-year period the person has commenced, prosecuted or maintained pro se at least three litigations, other than in the small claims department of the magistrate division, that have been finally determined adversely to that person.

(2) After a litigation has been finally determined against the person, the person has repeatedly relitigated or attempted to relitigate, pro se, either

(A) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined or

(B) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined.

(3) In any litigation while acting pro se, repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary delay.

(4) Has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding.

(e) If the administrative district judge finds that there is a basis to conclude that a person is a vexatious litigant and that a prefilling order should be issued, the administrative district judge shall issue a proposed prefilling order along with the proposed findings supporting the issuance of the prefilling order. The person who would be designated as a vexatious litigant in the proposed order shall then have fourteen (14) days to file a written response to the proposed order and findings. If a response is filed, the administrative district judge may, in his or her discretion, grant a hearing on the proposed order. If no response is filed within fourteen (14) days, or if the administrative district judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the administrative district judge may issue the prefilling order.

(f) A prefilling order entered by an administrative district judge designating a person as a vexatious litigant may be appealed to the Supreme Court by such person as a matter of right.

(g) The Supreme Court may, on the Court's own motion or the motion of any party to an appeal, enter a prefilling order prohibiting a vexatious litigant from filing any new litigation in the courts of this state pro se without first obtaining leave of a judge of the court where the litigation is proposed to be filed. If the Supreme Court finds that there is a basis to conclude that a person is a vexatious litigant and that a prefilling order should be issued, the Court shall issue a proposed prefilling order along with the proposed findings supporting the issuance of the prefilling order. The person who would be designated as a vexatious litigant in the proposed order shall then have fourteen (14) days to file a written response to the proposed order and findings. If no response is filed within fourteen (14) days, or if the Supreme Court concludes following a response and any subsequent hearing that there is a basis for issuing the order, the prefilling order may be issued.

(h) Disobedience of a prefilling order entered pursuant to this rule may be punished as a contempt of court.

I.C.A.R. 59. Vexatious Litigation

Published on Supreme Court (<http://www.isc.idaho.gov>)

(i) A presiding judge shall permit the filing of new litigation by a vexatious litigant subject to a prefiling order only if it appears that the litigation has merit and has not been filed for the purpose of harassment or delay.

(j) If a vexatious litigant subject to a prefiling order files any litigation without first obtaining the required leave of a judge to file the litigation, the court may dismiss the action. In addition, any party named in the litigation may file a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order. The filing of such notice shall stay the litigation. The litigation shall be dismissed by the court unless the plaintiff, within fourteen (14) days of the filing of the notice, obtains an order from the presiding judge permitting the litigation to proceed. If the presiding judge issues an order permitting the litigation to proceed, the time for the defendants to answer or respond to the litigation will begin to run when the defendants are served with the order of the presiding judge.

(k) The clerk of the court shall provide a copy of any prefiling order issued pursuant to this rule to the Administrative Director of the Courts, who shall maintain a list of vexatious litigants subject to prefiling orders.

(Adopted April 14, 2011, effective July 1, 2011.)

Source URL: <http://www.isc.idaho.gov/icar59>



Published on *Supreme Court* (<http://isc.idaho.gov>)

[Home](#) > [Judicial Rosters](#) > Vexatious Litigants

Vexatious Litigants

Roster of Idaho's Vexatious Litigants

Each of the individuals listed on this roster has been found to be a vexatious litigant and is subject to a prefiling order. This means that either the Idaho Supreme Court or the Administrative District Judge in one of Idaho's seven judicial districts has issued an order under Idaho Court Administrative Rule (I.C.A.R) 59 ⁽¹⁾ stating:

- (1) that the person has been found to be a vexatious litigant as defined in I.C.A.R 59; and
- (2) that the person is prohibited from filing any new litigation pro se (that is, without being represented by a lawyer), unless that person has first obtained leave of a judge of the court where the litigation would be filed.

Any litigation filed in violation of such an order may be dismissed by the court, and the violation of the order may be punished as a contempt of court. If you are named as a party in any litigation filed in violation of a prefiling order, you may file a notice with the court drawing attention to that violation. Duplication of names is common, and care should be taken to be sure that the person who has filed the litigation is in fact the person who has been declared to be a vexatious litigant. Please review I.C.A.R 59 for more information.

Last Name	Suffix	First Name	Middle	Other Known Names Used	Order Date	Notes:

Anderton		Bardell	Joseph		August 24, 2013	Bannock County, Case No. CV-2012-638 Bannock County, Case No. CV-2012-2376 Bannock County, Case No. CV-2013-348 > Order ^[2]
Andoe		Johnny	Ray		June 24, 2015	Jerome County, Case No. CV-2015-501 > Order ^[3]
Osterhoudt		Franklin	Ward		February 26, 2015	Twin Falls County, Case No. CV-2014-4907 > Prefiling Order ^[4]
Padden		Fredric	S.		October 13, 2013	Minidoka County, Case No. CV-2013-0817 > Order ^[5]
Rose		Dana			May 14, 2015	Cassia County, Case No. CV-2015-0411 > Order ^[6]
Sivak		Lacey	Mark		March 19, 2013	Ada County Case No. CV-OT-2013-00572

						> <u>Findings of Fact & Conclusions of Law</u> ^[7] > <u>Prefiling Order</u> ^[8]
Smith		Dana	Lydell		August 20, 2014	Minidoka County, CV-2014-0556 > <u>Prefiling Order</u> ^[9]
Telford		Holli	Lundahl		October 27, 2011	Oneida County, Supreme Court No. 39497-2011-3 > <u>Administrative Order & Declaration</u> ^[10]
Thomann		Mark	R.		May 8, 2015	Ada County Case No. CVOT 2014-12555 > <u>Prefiling Order</u> ^[11]
Ullrich		Stephen	F.		March 28, 2013	Supreme Court Docket No. 40785-2013 > <u>Order</u> ^[12]

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Source URL: <http://isc.idaho.gov/main/vexatious-litigants>

Links:

- [1] <http://www.isc.idaho.gov/icar59>
- [2] http://isc.idaho.gov/..vexatious/Anderton_Declaration.pdf
- [3] http://isc.idaho.gov/..vexatious/Andoe_Vexatious_Litigant.pdf
- [4] http://isc.idaho.gov/..vexatious/Osterhoudt_PreFilingOrder_02.15.pdf
- [5] http://isc.idaho.gov/..vexatious/Padden_VexLit_Order_Minidoka10-13.pdf
- [6] http://isc.idaho.gov/..vexatious/Rose_PrefilingOrder_5.15.pdf.pdf

- [7] http://isc.idaho.gov/./vexatious/Sivak_FindingsFactAndConclusion3-19-2013.pdf
- [8] http://isc.idaho.gov/./vexatious/Sivak_PrefilingOrder3-19-13.pdf
- [9] http://isc.idaho.gov/./vexatious/DanaLydellSmith_Order_08.20.14.pdf
- [10] http://isc.idaho.gov/./vexatious/Telford_OrderDeclaringVexatiousLitigant.pdf
- [11] http://isc.idaho.gov/./vexatious/Thomann_Vexatious_Prefiling_Order_05.08.15.pdf
- [12] http://www.isc.idaho.gov/vexatious/Ullrich_Vexatious_Litigant_Order_2013.pdf

State of California
CODE OF CIVIL PROCEDURE
PART 2. OF CIVIL ACTIONS
TITLE 3A. VEXATIOUS LITIGANTS
§ 391

391.7. (a) In addition to any other relief provided in this title, the court may, on its own motion or the motion of any party, enter a prefiling order which prohibits a vexatious litigant from filing any new litigation in the courts of this state in propria persona without first obtaining leave of the presiding justice or presiding judge of the court where the litigation is proposed to be filed. Disobedience of the order by a vexatious litigant may be punished as a contempt of court.

(b) The presiding justice or presiding judge shall permit the filing of that litigation only if it appears that the litigation has merit and has not been filed for the purposes of harassment or delay. The presiding justice or presiding judge may condition the filing of the litigation upon the furnishing of security for the benefit of the defendants as provided in Section 391.3.

(c) The clerk may not file any litigation presented by a vexatious litigant subject to a prefiling order unless the vexatious litigant first obtains an order from the presiding justice or presiding judge permitting the filing. If the clerk mistakenly files the litigation without the order, any party may file with the clerk and serve, or the presiding justice or presiding judge may direct the clerk to file and serve, on the plaintiff and other parties a notice stating that the plaintiff is a vexatious litigant subject to a prefiling order as set forth in subdivision (a). The filing of the notice shall automatically stay the litigation. The litigation shall be automatically dismissed unless the plaintiff within 10 days of the filing of that notice obtains an order from the presiding justice or presiding judge permitting the filing of the litigation as set forth in subdivision (b). If the presiding justice or presiding judge issues an order permitting the filing, the stay of the litigation shall remain in effect, and the defendants need not plead, until 10 days after the defendants are served with a copy of the order.

(d) For purposes of this section, "litigation" includes any petition, application, or motion other than a discovery motion, in a proceeding under the Family Code or Probate Code, for any order.

(e) The presiding justice or presiding judge of a court may designate a justice or judge of the same court to act on his or her behalf in exercising the authority and responsibilities provided under subdivisions (a) to (c), inclusive.

(f) The clerk of the court shall provide the Judicial Council a copy of any prefiling orders issued pursuant to subdivision (a). The Judicial Council shall maintain a record of vexatious litigants subject to those prefiling orders and shall annually disseminate a list of those persons to the clerks of the courts of this state.

(Amended by Stats. 2011, Ch. 49, Sec. 1. (SB 731) Effective January 1, 2012.)



68.093 **Florida** Vexatious Litigant Law.—

(1) This section may be cited as the "Florida Vexatious Litigant Law."

(2) As used in section, the term:

(a) "Action" means a civil action governed by the Florida Rules of Civil Procedure and proceedings governed by the Florida Probate Rules, but does not include actions concerning family law matters governed by the Florida Family Law Rules of Procedure or any action in which the Florida Small Claims Rules apply.

(b) "Defendant" means any person or entity, including a corporation, association, partnership, firm, or governmental entity, against whom an action is or was commenced or is sought to be commenced.

(c) "Security" means an undertaking by a vexatious litigant to ensure payment to a defendant in an amount reasonably sufficient to cover the defendant's anticipated, reasonable expenses of litigation, including attorney's fees and taxable costs.

(d) "Vexatious litigant" means:

1. A person as defined in s. 1.01(3) who, in the immediately preceding 5-year period, has commenced, prosecuted, or maintained, pro se, five or more civil actions in any court in this state, except an action governed by the Florida Small Claims Rules, which actions have been finally and adversely determined against such person or entity; or
2. Any person or entity previously found to be a vexatious litigant pursuant to this section.

An action is not deemed to be "finally and adversely determined" if an appeal in that action is pending. If an action has been commenced on behalf of a party by an attorney licensed to practice law in this state, that action is not deemed to be pro se even if the attorney later withdraws from the representation and the party does not retain new counsel.

(3)(a) In any action pending in any court of this state, including actions governed by the Florida Small Claims Rules, any defendant may move the court, upon notice and hearing, for an order requiring the plaintiff to furnish security. The motion shall be based on the grounds, and supported by a showing, that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against the moving defendant.

(b) At the hearing upon any defendant's motion for an order to post security, the court shall consider any evidence, written or oral, by witness or affidavit, which may be relevant to the consideration of the motion. No determination made by the court in such a hearing shall be admissible on the merits of the action or deemed to be a determination of any issue in the action. If, after hearing the evidence, the court determines that the plaintiff is a vexatious litigant and is not reasonably likely to prevail on the merits of the action against the moving defendant, the court shall order the plaintiff to furnish security to the moving defendant in an amount and within such time as the court deems appropriate.

(c) If the plaintiff fails to post security required by an order of the court under this section, the court shall immediately issue an order dismissing the action with prejudice as to the defendant for whose benefit the security was ordered.

(d) If a motion for an order to post security is filed prior to the trial in an action, the action shall be automatically stayed and the moving defendant need not plead or otherwise respond to the complaint until 10 days after the motion is denied. If the motion is granted, the

moving defendant shall respond or plead no later than 10 days after the required security has been furnished.

(4) In addition to any other relief provided in this section, the court in any judicial circuit may, on its own motion or on the motion of any party, enter a prefiling order prohibiting a vexatious litigant from commencing, pro se, any new action in the courts of that circuit without first obtaining leave of the administrative judge of that circuit. Disobedience of such an order may be punished as contempt of court by the administrative judge of that circuit. Leave of court shall be granted by the administrative judge only upon a showing that the proposed action is meritorious and is not being filed for the purpose of delay or harassment. The administrative judge may condition the filing of the proposed action upon the furnishing of security as provided in this section.

(5) The clerk of the court shall not file any new action by a vexatious litigant pro se unless the vexatious litigant has obtained an order from the administrative judge permitting such filing. If the clerk of the court mistakenly permits a vexatious litigant to file an action pro se in contravention of a prefiling order, any party to that action may file with the clerk and serve on the plaintiff and all other defendants a notice stating that the plaintiff is a pro se vexatious litigant subject to a prefiling order. The filing of such a notice shall automatically stay the litigation against all defendants to the action. The administrative judge shall automatically dismiss the action with prejudice within 10 days after the filing of such notice unless the plaintiff files a motion for leave to file the action. If the administrative judge issues an order permitting the action to be filed, the defendants need not plead or otherwise respond to the complaint until 10 days after the date of service by the plaintiff, by United States mail, of a copy of the order granting leave to file the action.

(6) The clerk of a court shall provide copies of all prefiling orders to the Clerk of the Florida Supreme Court, who shall maintain a registry of all vexatious litigants.

(7) The relief provided under this section shall be cumulative to any other relief or remedy available to a defendant under the laws of this state and the Florida Rules of Civil Procedure, including, but not limited to, the relief provided under s. 57.105.

History.—s. 1, ch. 2000-314.

68.094 Short title.—This act may be cited as the "Florida Access to Civil Legal Assistance Act."

History.—s. 1, ch. 2002-288.

NV

NRS 155.165 Finding of vexatious litigant; sanctions; standing of interested party and vexatious litigant under certain circumstances.

1. The court may find that a person is a vexatious litigant if the person files a petition, objection, motion or other pleading which is without merit or intended to harass or annoy the personal representative or a trustee. In determining whether the person is a vexatious litigant, the court may take into consideration whether the person has previously filed pleadings in a proceeding that were without merit or intended to harass or annoy a fiduciary.

2. If a court finds that a person is a vexatious litigant pursuant to subsection 1, the court may impose sanctions on the person in an amount sufficient to reimburse the estate or trust for all or part of the expenses incurred by the estate or trust to respond to the petition, objection, motion or other pleading and for any other pecuniary losses which are associated with the actions of the vexatious litigant. The court may make an order directing entry of judgment for the amount of such sanctions.

3. The court may deny standing to an interested party to bring a petition or motion if the court finds that:

- (a) The subject matter of the petition or motion is unrelated to the interests of the interested party;
- (b) The interests of the interested party are minimal as it relates to the subject matter of the petition or motion; or
- (c) The interested party is a vexatious litigant pursuant to subsection 1.

4. If a court finds that a person is a vexatious litigant pursuant to subsection 1, that person does not have standing to:

- (a) Object to the issuance of letters; or
- (b) Request the removal of a personal representative or a trustee.

(Added to NRS by 2011, 1461)

Nevada
State Leg.

(Listing of names
on website)

Ohio Revised
Codes

2323.52 Civil action to declare person vexatious litigator.

(A) As used in this section:

(1) "Conduct" has the same meaning as in section 2323.51 of the Revised Code.

(2) "Vexatious conduct" means conduct of a party in a civil action that satisfies any of the following:

(a) The conduct obviously serves merely to harass or maliciously injure another party to the civil action.

(b) The conduct is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law.

(c) The conduct is imposed solely for delay.

(3) "Vexatious litigator" means any person who has habitually, persistently, and without reasonable grounds engaged in vexatious conduct in a civil action or actions, whether in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court, whether the person or another person instituted the civil action or actions, and whether the vexatious conduct was against the same party or against different parties in the civil action or actions. "Vexatious litigator" does not include a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio unless that person is representing or has represented self pro se in the civil action or actions.

(B) A person, the office of the attorney general, or a prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation who has defended against habitual and persistent vexatious conduct in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court may commence a civil action in a court of common pleas with jurisdiction over the person who allegedly engaged in the habitual and persistent vexatious conduct to have that person declared a vexatious litigator. The person, office of the attorney general, prosecuting attorney, city director of law, village solicitor, or similar chief legal officer of a municipal corporation may commence this civil action while the civil action or actions in which the habitual and persistent vexatious conduct occurred are still pending or within one year after the termination of the civil action or actions in which the habitual and persistent vexatious conduct occurred.

(C) A civil action to have a person declared a vexatious litigator shall proceed as any other civil action, and the Ohio Rules of Civil Procedure apply to the action.

(D)

(1) If the person alleged to be a vexatious litigator is found to be a vexatious litigator, subject to division (D)(2) of this section, the court of common pleas may enter an order prohibiting the vexatious litigator from doing one or more of the following without first obtaining the leave of that court to proceed:

(a) Instituting legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court;

(b) Continuing any legal proceedings that the vexatious litigator had instituted in any of the courts specified in division (D)(1)(a) of this section prior to the entry of the order;

(c) Making any application, other than an application for leave to proceed under division (F)(1) of this section, in any legal proceedings instituted by the vexatious litigator or another person in any of the courts specified in division (D)(1)(a) of this section.

(2) If the court of common pleas finds a person who is authorized to practice law in the courts of this state under the Ohio Supreme Court Rules for the Government of the Bar of Ohio to be a vexatious litigator and enters an order described in division (D)(1) of this section in connection with that finding, the order shall apply to the person only insofar as the person would seek to institute proceedings described in division (D)(1)(a) of this section on a pro se basis, continue proceedings described in division (D)(1)(b) of this section on a pro se basis, or make an application described in division (D)(1)(c) of this section on a pro se basis. The order shall not apply to the person insofar as the person represents one or more other persons in the person's capacity as a licensed and registered attorney in a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims. Division (D)(2) of this section does not affect any remedy that is available to a court or an adversely affected party under section 2323.51 or another section of the Revised Code, under Civil Rule 11 or another provision of the Ohio Rules of Civil Procedure, or under the common law of this state as a result of frivolous conduct or other inappropriate conduct by an attorney who represents one or more clients in connection with a civil or criminal action or proceeding or other matter in a court of common pleas, municipal court, or county court or in the court of claims.

(3) A person who is subject to an order entered pursuant to division (D)(1) of this section may not institute legal proceedings in a court of appeals, continue any legal proceedings that the vexatious litigator had instituted in a court of appeals prior to entry of the order, or make any application, other than the application for leave to proceed allowed by division (F)(2) of this section, in any legal proceedings instituted by the vexatious litigator or another person in a court of appeals without first obtaining leave of the court of appeals to proceed pursuant to division (F)(2) of this section.

(E) An order that is entered under division (D)(1) of this section shall remain in force indefinitely unless the order provides for its expiration after a specified period of time.

(F)

(1) A court of common pleas that entered an order under division (D)(1) of this section shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of common pleas, municipal court, or county court unless the court of common pleas that entered that order is satisfied that the proceedings or application are not an abuse of process of the court in question and that there are reasonable grounds for the proceedings or application. If a person who has been found to be a vexatious litigator under this section requests the court of common pleas that entered an order under division (D)(1) of this section to grant the person leave to proceed as described in division (F)(1) of this section, the period of time commencing with the filing with that court of an application for the issuance of an order granting leave to proceed and ending with the issuance of an order of that nature shall not be computed as a part of an applicable period of limitations within which the legal proceedings or application involved generally must be instituted or made.

(2) A person who is subject to an order entered pursuant to division (D)(1) of this section and who seeks to institute or continue any legal proceedings in a court of appeals or to make an application, other than an application for leave to proceed under division (F)(2) of this section, in any legal proceedings in a court of appeals shall file an application for leave to proceed in the court of appeals in

which the legal proceedings would be instituted or are pending. The court of appeals shall not grant a person found to be a vexatious litigator leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of appeals unless the court of appeals is satisfied that the proceedings or application are not an abuse of process of the court and that there are reasonable grounds for the proceedings or application. If a person who has been found to be a vexatious litigator under this section requests the court of appeals to grant the person leave to proceed as described in division (F)(2) of this section, the period of time commencing with the filing with the court of an application for the issuance of an order granting leave to proceed and ending with the issuance of an order of that nature shall not be computed as a part of an applicable period of limitations within which the legal proceedings or application involved generally must be instituted or made.

(G) During the period of time that the order entered under division (D)(1) of this section is in force, no appeal by the person who is the subject of that order shall lie from a decision of the court of common pleas or court of appeals under division (F) of this section that denies that person leave for the institution or continuance of, or the making of an application in, legal proceedings in the court of claims or in a court of appeals, court of common pleas, municipal court, or county court.

(H) The clerk of the court of common pleas that enters an order under division (D)(1) of this section shall send a certified copy of the order to the supreme court for publication in a manner that the supreme court determines is appropriate and that will facilitate the clerk of the court of claims and a clerk of a court of appeals, court of common pleas, municipal court, or county court in refusing to accept pleadings or other papers submitted for filing by persons who have been found to be a vexatious litigator under this section and who have failed to obtain leave to proceed under this section.

(I) Whenever it appears by suggestion of the parties or otherwise that a person found to be a vexatious litigator under this section has instituted, continued, or made an application in legal proceedings without obtaining leave to proceed from the appropriate court of common pleas or court of appeals to do so under division (F) of this section, the court in which the legal proceedings are pending shall dismiss the proceedings or application of the vexatious litigator.

Effective Date: 06-28-2002



CIVIL PRACTICE AND REMEDIES CODE

TITLE 2. TRIAL, JUDGMENT, AND APPEAL

SUBTITLE A. GENERAL PROVISIONS

CHAPTER 11. VEXATIOUS LITIGANTS

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 11.001. DEFINITIONS. In this chapter:

(1) "Defendant" means a person or governmental entity against whom a plaintiff commences or maintains or seeks to commence or maintain a litigation.

(2) "Litigation" means a civil action commenced, maintained, or pending in any state or federal court.

(3) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1224, Sec. 10, eff. September 1, 2013.

(4) "Moving defendant" means a defendant who moves for an order under Section 11.051 determining that a plaintiff is a vexatious litigant and requesting security.

(5) "Plaintiff" means an individual who commences or maintains a litigation pro se.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.01, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 1, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 10, eff. September 1, 2013.

Sec. 11.002. APPLICABILITY. (a) This chapter does not apply to an attorney licensed to practice law in this state unless the attorney proceeds pro se.

(b) This chapter does not apply to a municipal court.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 2, eff. September 1, 2013.

SUBCHAPTER B. VEXATIOUS LITIGANTS

Sec. 11.051. MOTION FOR ORDER DETERMINING PLAINTIFF A VEXATIOUS LITIGANT AND REQUESTING SECURITY. In a litigation in this state, the defendant may, on or before the 90th day after the date the defendant files the original answer or makes a special appearance, move the court for an order:

- (1) determining that the plaintiff is a vexatious litigant; and
- (2) requiring the plaintiff to furnish security.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.052. STAY OF PROCEEDINGS ON FILING OF MOTION. (a) On the filing of a motion under Section 11.051, the litigation is stayed and the moving defendant is not required to plead:

- (1) if the motion is denied, before the 10th day after the date it is denied; or
- (2) if the motion is granted, before the 10th day after the date the moving defendant receives written notice that the plaintiff has furnished the required security.

(b) On the filing of a motion under Section 11.051 on or after the date the trial starts, the litigation is stayed for a period the court determines.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.053. HEARING. (a) On receipt of a motion under Section 11.051, the court shall, after notice to all parties, conduct a hearing to determine whether to grant the motion.

(b) The court may consider any evidence material to the ground of the motion, including:

- (1) written or oral evidence; and
- (2) evidence presented by witnesses or by affidavit.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.054. CRITERIA FOR FINDING PLAINTIFF A VEXATIOUS LITIGANT. A court may find a plaintiff a vexatious litigant if the defendant shows that there is not a reasonable probability that the plaintiff will prevail in the litigation against the defendant and that:

(1) the plaintiff, in the seven-year period immediately preceding the date the defendant makes the motion under Section 11.051, has commenced, prosecuted, or maintained at least five litigations as a pro se litigant other than in a small claims court that have been:

(A) finally determined adversely to the plaintiff;
(B) permitted to remain pending at least two years without having been brought to trial or hearing; or

(C) determined by a trial or appellate court to be frivolous or groundless under state or federal laws or rules of procedure;

(2) after a litigation has been finally determined against the plaintiff, the plaintiff repeatedly relitigates or attempts to relitigate, pro se, either:

(A) the validity of the determination against the same defendant as to whom the litigation was finally determined; or

(B) the cause of action, claim, controversy, or any of the issues of fact or law determined or concluded by the final determination against the same defendant as to whom the litigation was finally determined; or

(3) the plaintiff has previously been declared to be a vexatious litigant by a state or federal court in an action or proceeding based on the same or substantially similar facts, transition, or occurrence.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 3, eff. September 1, 2013.

Sec. 11.055. SECURITY. (a) A court shall order the plaintiff to furnish security for the benefit of the moving defendant if the

court, after hearing the evidence on the motion, determines that the plaintiff is a vexatious litigant.

(b) The court in its discretion shall determine the date by which the security must be furnished.

(c) The court shall provide that the security is an undertaking by the plaintiff to assure payment to the moving defendant of the moving defendant's reasonable expenses incurred in or in connection with a litigation commenced, caused to be commenced, maintained, or caused to be maintained by the plaintiff, including costs and attorney's fees.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.056. DISMISSAL FOR FAILURE TO FURNISH SECURITY. The court shall dismiss a litigation as to a moving defendant if a plaintiff ordered to furnish security does not furnish the security within the time set by the order.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Sec. 11.057. DISMISSAL ON THE MERITS. If the litigation is dismissed on its merits, the moving defendant has recourse to the security furnished by the plaintiff in an amount determined by the court.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

SUBCHAPTER C. PROHIBITING FILING OF NEW LITIGATION

Sec. 11.101. PREFILING ORDER; CONTEMPT. (a) A court may, on its own motion or the motion of any party, enter an order prohibiting a person from filing, pro se, a new litigation in a court to which the order applies under this section without permission of the appropriate local administrative judge described by Section 11.102(a) to file the litigation if the court finds, after notice and hearing as provided by Subchapter B, that the person is a vexatious litigant.

(b) A person who disobeys an order under Subsection (a) is subject to contempt of court.

(c) A litigant may appeal from a prefiling order entered under Subsection (a) designating the person a vexatious litigant.

(d) A prefiling order entered under Subsection (a) by a justice or constitutional county court applies only to the court that entered the order.

(e) A prefiling order entered under Subsection (a) by a district or statutory county court applies to each court in this state.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.02, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 4, eff. September 1, 2013.

Sec. 11.102. PERMISSION BY LOCAL ADMINISTRATIVE JUDGE. (a) A vexatious litigant subject to a prefiling order under Section 11.101 is prohibited from filing, pro se, new litigation in a court to which the order applies without seeking the permission of:

(1) the local administrative judge of the type of court in which the vexatious litigant intends to file, except as provided by Subdivision (2); or

(2) the local administrative district judge of the county in which the vexatious litigant intends to file if the litigant intends to file in a justice or constitutional county court.

(b) A vexatious litigant subject to a prefiling order under Section 11.101 who files a request seeking permission to file a litigation shall provide a copy of the request to all defendants named in the proposed litigation.

(c) The appropriate local administrative judge described by Subsection (a) may make a determination on the request with or without a hearing. If the judge determines that a hearing is necessary, the judge may require that the vexatious litigant filing a request under Subsection (b) provide notice of the hearing to all defendants named in the proposed litigation.

(d) The appropriate local administrative judge described by Subsection (a) may grant permission to a vexatious litigant subject

to a prefiling order under Section 11.101 to file a litigation only if it appears to the judge that the litigation:

- (1) has merit; and
- (2) has not been filed for the purposes of harassment or

delay.

(e) The appropriate local administrative judge described by Subsection (a) may condition permission on the furnishing of security for the benefit of the defendant as provided in Subchapter B.

(f) A decision of the appropriate local administrative judge described by Subsection (a) denying a litigant permission to file a litigation under Subsection (d), or conditioning permission to file a litigation on the furnishing of security under Subsection (e), is not grounds for appeal, except that the litigant may apply for a writ of mandamus with the court of appeals not later than the 30th day after the date of the decision. The denial of a writ of mandamus by the court of appeals is not grounds for appeal to the supreme court or court of criminal appeals.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.03, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 5, eff. September 1, 2013.

Sec. 11.103. DUTIES OF CLERK. (a) Except as provided by Subsection (d), a clerk of a court may not file a litigation, original proceeding, appeal, or other claim presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 unless the litigant obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing.

(b) Repealed by Acts 2013, 83rd Leg., R.S., Ch. 1224, Sec. 10, eff. September 1, 2013.

(c) If the appropriate local administrative judge described by Section 11.102(a) issues an order permitting the filing of the litigation, the litigation remains stayed and the defendant need not

plead until the 10th day after the date the defendant is served with a copy of the order.

(d) A clerk of a court of appeals may file an appeal from a prefiling order entered under Section 11.101 designating a person a vexatious litigant or a timely filed writ of mandamus under Section 11.102.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.

Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.04, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 6, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 7, eff. September 1, 2013.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 10, eff. September 1, 2013.

Sec. 11.1035. MISTAKEN FILING. (a) If the clerk mistakenly files litigation presented, pro se, by a vexatious litigant subject to a prefiling order under Section 11.101 without an order from the appropriate local administrative judge described by Section 11.102 (a), any party may file with the clerk and serve on the plaintiff and the other parties to the litigation a notice stating that the plaintiff is a vexatious litigant required to obtain permission under Section 11.102 to file litigation.

(b) Not later than the next business day after the date the clerk receives notice that a vexatious litigant subject to a prefiling order under Section 11.101 has filed, pro se, litigation without obtaining an order from the appropriate local administrative judge described by Section 11.102(a), the clerk shall notify the court that the litigation was mistakenly filed. On receiving notice from the clerk, the court shall immediately stay the litigation and shall dismiss the litigation unless the plaintiff, not later than the 10th day after the date the notice is filed, obtains an order from the appropriate local administrative judge described by Section 11.102(a) permitting the filing of the litigation.

(c) An order dismissing litigation that was mistakenly filed by a clerk may not be appealed.

Added by Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 8, eff. September 1, 2013.

Sec. 11.104. NOTICE TO OFFICE OF COURT ADMINISTRATION; DISSEMINATION OF LIST. (a) A clerk of a court shall provide the Office of Court Administration of the Texas Judicial System a copy of any prefiling order issued under Section 11.101 not later than the 30th day after the date the prefiling order is signed.

(b) The Office of Court Administration of the Texas Judicial System shall post on the agency's Internet website a list of vexatious litigants subject to prefiling orders under Section 11.101. On request of a person designated a vexatious litigant, the list shall indicate whether the person designated a vexatious litigant has filed an appeal of that designation.

(c) The Office of Court Administration of the Texas Judicial System may not remove the name of a vexatious litigant subject to a prefiling order under Section 11.101 from the agency's Internet website unless the office receives a written order from the court that entered the prefiling order or from an appellate court. An order of removal affects only a prefiling order entered under Section 11.101 by the same court. A court of appeals decision reversing a prefiling order entered under Section 11.101 affects only the validity of an order entered by the reversed court.

Added by Acts 1997, 75th Leg., ch. 806, Sec. 1, eff. Sept. 1, 1997.
Amended by:

Acts 2011, 82nd Leg., 1st C.S., Ch. 3 (H.B. 79), Sec. 9.05, eff. January 1, 2012.

Acts 2013, 83rd Leg., R.S., Ch. 1224 (S.B. 1630), Sec. 9, eff. September 1, 2013.



Rule 83. Vexatious litigants.

(a) Definitions.

(a)(1) The court may find a person to be a "vexatious litigant" if the person, including an attorney acting pro se, without legal representation, does any of the following:

(a)(1)(A) In the immediately preceding seven years, the person has filed at least five claims for relief, other than small claims actions, that have been finally determined against the person, and the person does not have within that time at least two claims, other than small claims actions, that have been finally determined in that person's favor.

(a)(1)(B) After a claim for relief or an issue of fact or law in the claim has been finally determined, the person two or more additional times re-litigates or attempts to re-litigate the claim, the issue of fact or law, or the validity of the determination against the same party in whose favor the claim or issue was determined.

(a)(1)(C) In any action, the person three or more times does any one or any combination of the following:

(a)(1)(C)(i) files unmeritorious pleadings or other papers,

(a)(1)(C)(ii) files pleadings or other papers that contain redundant, immaterial, impertinent or scandalous matter,

(a)(1)(C)(iii) conducts unnecessary discovery or discovery that is not proportional to what is at stake in the litigation, or

(a)(1)(C)(iv) engages in tactics that are frivolous or solely for the purpose of harassment or delay.

(a)(1)(D) The person purports to represent or to use the procedures of a court other than a court of the United States, a court created by the Constitution of the United States or by Congress under the authority of the Constitution of the United States, a tribal court recognized by the United States, a court created by a state or territory of the United States, or a court created by a foreign nation recognized by the United States.

(a)(2) "Claim" and "claim for relief" mean a petition, complaint, counterclaim, cross claim or third-party complaint.

(b) Vexatious litigant orders. The court may, on its own motion or on the motion of any party, enter an order requiring a vexatious litigant to:

(b)(1) furnish security to assure payment of the moving party's reasonable expenses, costs and, if authorized, attorney fees incurred in a pending action;

(b)(2) obtain legal counsel before proceeding in a pending action;

(b)(3) obtain legal counsel before filing any future claim for relief;

(b)(4) abide by a pre-filing order requiring the vexatious litigant to obtain leave of the court before filing any paper, pleading, or motion in a pending action;

(b)(5) abide by a prefiling order requiring the vexatious litigant to obtain leave of the court before filing any future claim for relief; or

(b)(6) take any other action reasonably necessary to curb the vexatious litigant's abusive conduct.

(c) Necessary findings and security.

(c)(1) Before entering an order under subparagraph (b), the court must find by clear and convincing evidence that:

(c)(1)(A) the party subject to the order is a vexatious litigant; and

(c)(1)(B) there is no reasonable probability that the vexatious litigant will prevail on the claim.

(c)(2) A preliminary finding that there is no reasonable probability that the vexatious litigant will prevail is not a decision on the ultimate merits of the vexatious litigant's claim.

(c)(3) The court shall identify the amount of the security and the time within which it is to be furnished. If the security is not furnished as ordered, the court shall dismiss the vexatious litigant's claim with prejudice.

(d) Prefiling orders in a pending action.

(d)(1) If a vexatious litigant is subject to a prefiling order in a pending action requiring leave of the court to file any paper, pleading, or motion, the vexatious litigant shall submit any proposed paper, pleading, or motion to the judge assigned to the case and must:

(d)(1)(A) demonstrate that the paper, pleading, or motion is based on a good faith dispute of the facts;

(d)(1)(B) demonstrate that the paper, pleading, or motion is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(d)(1)(C) include an oath, affirmation or declaration under criminal penalty that the proposed paper, pleading or motion is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(d)(2) A prefiling order in a pending action shall be effective until a final determination of the action on appeal, unless otherwise ordered by the court.

(d)(3) After a prefiling order has been effective in a pending action for one year, the person subject to the prefiling order may move to have the order vacated. The motion shall be decided by the judge to whom the pending action is assigned. In granting the motion, the judge may impose any other vexatious litigant orders permitted in paragraph (b).

(d)(4) All papers, pleadings, and motions filed by a vexatious litigant subject to a prefiling order under this paragraph (d) shall include a judicial order authorizing the filing and any required security. If the order or security is not included, the clerk or court shall reject the paper, pleading, or motion.

(e) Prefiling orders as to future claims.

(e)(1) A vexatious litigant subject to a pre-filing order restricting the filing of future claims shall, before filing, obtain an order authorizing the vexatious litigant to file the claim. The presiding judge of the judicial district in which the claim is to be filed shall decide the application. In granting an application, the presiding judge may impose in the pending action any of the vexatious litigant orders permitted under paragraph (b).

(e)(2) To obtain an order under paragraph (e)(1), the vexatious litigant's application must:

(e)(2)(A) demonstrate that the claim is based on a good faith dispute of the facts;

(e)(2)(B) demonstrate that the claim is warranted under existing law or a good faith argument for the extension, modification, or reversal of existing law;

(e)(2)(C) include an oath, affirmation, or declaration under criminal penalty that the proposed claim is not filed for the purpose of harassment or delay and contains no redundant, immaterial, impertinent or scandalous matter;

(e)(2)(D) include a copy of the proposed petition, complaint, counterclaim, cross-claim, or third party complaint; and

(e)(2)(E) include the court name and case number of all claims that the applicant has filed against each party within the preceding seven years and the disposition of each claim.

(e)(3) A pre-filing order limiting the filing of future claims is effective indefinitely unless the court orders a shorter period.

(e)(4) After five years a person subject to a pre-filing order limiting the filing of future claims may file a motion to vacate the order. The motion shall be filed in the same judicial district from which the order entered and be decided by the presiding judge of that district.

(e)(5) A claim filed by a vexatious litigant subject to a pre-filing order under this paragraph (e) shall include an order authorizing the filing and any required security. If the order or security is not included, the clerk of court shall reject the filing.

(f) Notice of vexatious litigant orders.

(f)(1) The clerks of court shall notify the Administrative Office of the Courts that a pre-filing order has been entered or vacated.

(f)(2) The Administrative Office of the Courts shall disseminate to the clerks of court a list of vexatious litigants subject to a pre-filing order.

(g) Statute of limitations or time for filing tolled. Any applicable statute of limitations or time in which the person is required to take any action is tolled until 7 days after notice of the decision on the motion or application for authorization to file.

(h) Contempt sanctions. Disobedience by a vexatious litigant of a pre-filing order may be punished as contempt of court.

(i) Other authority. This rule does not affect the authority of the court under other statutes and rules or the inherent authority of the court.

ELC 5.1
GRIEVANTS

(a) Filing of Grievance. Any person or entity may file a grievance against a lawyer who is subject to the disciplinary authority of this jurisdiction.

(b) Consent to Disclosure.

(1) Subject to paragraph (2), by filing a grievance, the grievant consents to disclosure of all information submitted. This includes disclosure to the respondent lawyer or to any person under rules 3.1 - 3.4.

(2) Disclosure may be specifically restricted, such as:

(A) when a protective order is issued under rule 3.2(e); or

(B) when the grievance was filed under rule 5.2; or

(C) when necessary to protect a compelling privacy or safety interest of a grievant or other individual.

(3) By filing a grievance, the grievant also agrees that the respondent or any other lawyer contacted by the grievant may disclose to disciplinary counsel any information relevant to the investigation, unless a protective order is issued under rule 3.2(e).

(4) Consent to disclosure under this rule by submitting information to disciplinary counsel does not constitute a waiver of any privilege or restriction against disclosure in any other form.

(c) Grievant Rights. A grievant has the following rights:

(1) to be advised promptly of the receipt of the grievance, and of the name, address, and office phone number of the person assigned to its investigation if such an assignment is made;

(2) to have a reasonable opportunity to communicate with the person assigned to the grievance, by telephone, in person, or in writing, about the substance of the grievance or its status;

(3) to receive a copy of any response submitted by the respondent, subject to the following:

(A) Withholding Response. Disciplinary counsel may withhold all or a portion of the response from the grievant when:

(i) the response refers to information protected by RPC 1.6 or RPC 1.9 to which the grievant is not privy; or

(ii) the response contains information of a personal and private nature about the respondent or others; or

(iii) the interests of justice would be better served by not releasing the response;

(B) Challenge to Disclosure Decision. Either the grievant or the respondent may file a challenge to disciplinary counsel's decision to withhold or not withhold all or a portion of a grievance or response within 20 days of the date of mailing of the decision. The challenge shall be resolved by a review committee, unless the matter has previously been dismissed under rule 5.7(b) or the time period for submitting a request for review of a dismissal has expired under rule 5.7(b)

(4) to attend any hearing conducted into the grievance, subject to these rules and any protective order issued under rule 3.2(e), except that if the grievant is also a witness, the hearing officer may order the grievant excluded during the testimony of any other witness whose testimony might affect the grievant's testimony;

(5) to provide relevant testimony at any hearing conducted into the grievance, subject to these rules and any protective order issued under rule 3.2(e);

(6) to be notified of any proposed decision to refer the respondent to diversion and to be given a reasonable opportunity to submit to disciplinary counsel a written comment thereon;

(7) to be advised of the disposition of the grievance; and

(8) to request reconsideration of a dismissal of the grievance as provided in rule 5.7(b).

(d) Duties. A grievant should do the following:

(1) give the person assigned to the grievance documents or other evidence in his or her possession, and witnesses' names and addresses;

(2) assist in securing relevant evidence; and

(3) appear and testify at any hearing resulting from the grievance.

(e) Vexatious grievants.

(1) The Chair of the Disciplinary Board may enter an order declaring an individual or entity a vexatious grievant and restraining that individual from filing grievances or pursuing other rights under this rule, pursuant to the procedures set out in this subsection. A "vexatious grievant" is a person or entity who has engaged in a frivolous or harassing course of conduct that so departs from a reasonable standard of conduct as to render the grievant's conduct abusive to the disciplinary system or participants in the disciplinary system.

(2) Either disciplinary counsel or a lawyer who has been the subject of a grievance may file a motion to declare the grievant vexatious.

(3) The motion must set forth with particularity (A) the facts establishing that the grievant's conduct

is vexatious and (B) the restrictions on the grievant's conduct that are sought.

(4) The moving party must serve a copy of the motion on the grievant. If the motion is filed by a respondent lawyer, the motion must also be served on disciplinary counsel. Service may be made by first class mail.

(5) The grievant, disciplinary counsel, and the respondent lawyer shall have 20 days to file a written response.

(6) If the Chair finds that the person is a vexatious grievant, the Chair shall enter an order setting out with particularity (A) the factual basis for such finding, (B) the restrictions imposed on the grievant's conduct, and (C) the basis for imposing such restrictions. The restrictions must be no broader than necessary to prevent the harassment and abuse found.

(7) The moving party, the grievant, and the disciplinary counsel may seek review of the Chair's order by a petition for discretionary review under rule 12.4. No other appeal of the order shall be allowed.

(8) The fact that a person or entity has been determined to be a vexatious grievant and the scope of any restrictions imposed shall be public information. All other proceedings and documents related to a motion under this subsection are confidential.

[Adopted effective October 1, 2002; amended effective January 1, 2014; January 1, 2015.]

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: April 29, 2016
RE: Stipulated Divorce Forms

Catie Palsgraf, the director of the N.D. Legal Self Help Center, is working on revising the center's stipulated divorce forms. She has requested that the committee look at a proposed new signature block for these forms that was suggested by two ECJD judges.

The proposed new signature block, attached, would allow the judge reviewing the stipulated divorce to adopt the parties' "Agreement as to Facts" as the Court's Findings of Facts and the parties' "Stipulated Terms for Judgment" as the Court's Conclusions of Law. The judge would then "let judgment be entered accordingly."

Ms. Palsgraf is concerned that adopting this signature block, which would allow judges to order judgment in a divorce without creating their own Findings of Fact and Conclusions of Law (or ordering the parties to do so) would be problematic. First, the Supreme Court has said that the Court prefers judges to do their own Findings of Fact and Conclusions of Law. See Schmidkunz v. Schmidkunz, 529 N.W.2d 857 (N.D. 1995) (attached). Rule 52(a) also states "the court must find the facts specially and state its conclusions of law separately."

Second, other judges reviewing the proposal have suggested that adopting the parties' forms as the court's Findings of Fact and Conclusions of Law would make it difficult to correct mistakes or to make modifications. The forms, current draft attached, are fill in the blank forms that can be submitted in paper by self-represent parties, perhaps even in handwriting. In addition, attorneys can and do use forms on the Self Help site in their own

practice and they could find these forms useful in shortcutting the usual process of preparing detailed Findings of Fact and Conclusions of Law.

Ms. Palsgraf asks that the committee examine the proposed signature block to see whether it would be consistent with accepted practice to use it in a stipulated divorce.

2. Plaintiff, _____, is the mother **OR** father (choose one) of the minor child(ren).

Address: _____
(street address)

(city, state, zip code)

Birth Year: _____

Last 4 Digits of Social Security Number: XXX-XX-_____

Employer's Name and Address: _____

3. Defendant, _____, is the mother **OR** father (choose one) of the minor child(ren).

Address: _____
(street address)

(city, state, zip code)

Birth Year: _____

Last 4 Digits of Social Security Number: XXX-XX-_____

Employer's Name and Address: _____

4. Plaintiff and Defendant were married on _____ in the City of _____, County of _____, State of _____.

5. Plaintiff is now, and for the entire 6 months immediately before serving the Summons and Complaint, a resident of the State of North Dakota.

6. That no decree, judgment or order of divorce, separation or annulment has been granted to either party against the other in any Court of competent jurisdiction of North Dakota or any other state, territory or country, and that there is no other action pending for divorce by either party against the other in any Court.

7. (Choose one)

Neither Plaintiff nor Defendant is currently in the Armed Services of the United States of America or its allies.

OR

Plaintiff/ Defendant (choose one) is currently in the Armed Services of the United States of America or its allies but is not currently deployed or notified of deployment.

8. Irreconcilable differences have arisen between the Plaintiff and Defendant making the continuation of the marriage impossible.

9. Plaintiff and Defendant have children together, namely:

1. Minor Child's Initials: _____ Year of Birth: _____

Last 4 Digits of Social Security Number: XXX-XX-_____

2. Minor Child's Initials: _____ Year of Birth: _____

Last 4 Digits of Social Security Number: XXX-XX-_____

3. Minor Child's Initials: _____ Year of Birth: _____

Last 4 Digits of Social Security Number: XXX-XX-_____

Additional sheets are attached as Appendix _____. (Choose if applicable)

10. (Choose one)

Plaintiff/ Defendant (choose one) is not pregnant.

OR

Plaintiff/ Defendant (choose one) is pregnant.

However, the Plaintiff/ Defendant (choose one) is not the father, and the child is not at issue in this proceeding.

11. Child support: (choose one)

There is a child support order already in existence. The case number is:

_____.

OR

There is no child support order already in existence.

12. Plaintiff has the following sources of monthly income:

Source	Amount
Employment	\$
Public Assistance	\$
Social Security Benefits	\$
Unemployment/Workers Compensation	\$
Interest/Dividend Income	\$
Other (describe)	\$

13. Defendant has the following sources of monthly income:

Source	Amount
Employment	\$
Public Assistance	\$
Social Security Benefits	\$
Unemployment/Workers Compensation	\$
Interest/Dividend Income	\$
Other (describe)	\$

14. Spousal support: (choose one)

Neither Plaintiff nor Defendant needs spousal support.

OR

Plaintiff/ Defendant (choose one) needs spousal support from Plaintiff/ Defendant (choose one).

This is because Plaintiff/ Defendant (choose one) is _____ years of age, has been married to Plaintiff/ Defendant (choose one) for _____ years, has a monthly income totaling \$ _____, and because:

15. Real Property: (choose one)

We do not own any real property.

OR

The owner(s) of record of the real property is Plaintiff/ Defendant/ Both parties (choose one). The real property is located at _____

The legal description of the property is _____

This real property was purchased on _____, for \$ _____.

Mortgages or loans against this real property total \$ _____.

The market value of this real property is \$ _____.

Additional sheets are attached as Appendix _____. (Choose if applicable)

16. Vehicles: (choose one)

We do not own any vehicles

OR

We own the following vehicle(s):

Vehicle (include Year/Make/Model)	Name(s) on Title	Balance Owed	Monthly Payment
		\$	\$
		\$	\$
		\$	\$
		\$	\$
		\$	\$

Additional sheets are attached as Appendix _____. (Choose if applicable)

17. We jointly own personal property, including household goods, furniture, and furnishings, all of which property has been divided to the parties' satisfaction.

18. Retirement Plan(s): (choose one)

We have not paid money into a pension, profit-sharing plan, IRA or other retirement plan for Plaintiff or Defendant. Our past or present employers, union or other group have not paid money into a pension, profit-sharing plan, IRA or other retirement plan for Plaintiff or Defendant.

OR (choose all that apply)

Plaintiff or Plaintiff's past or present employer, union or other group pays or has paid money into a pension, profit-sharing plan, IRA or other retirement plan for Plaintiff.

Describe the plan(s): _____

Defendant or Defendant's past or present employer, union or other group pays or has paid money into a pension, profit-sharing plan, IRA or other retirement plan for Defendant.
Describe the plan(s): _____

Additional sheets are attached as Appendix _____. (Choose if applicable)

19. Other Assets: (choose one)

There are no financial or other assets of this marriage that are not otherwise included in this Settlement Agreement.

OR

Plaintiff and Defendant have the following financial or other assets of this marriage that are not otherwise included in this Settlement Agreement:

Asset	Location	Account or Policy Number (last 4 digits)	Value
			\$
			\$
			\$
			\$
			\$

Additional sheets are attached as Appendix _____. (Choose if applicable)

20. Debts: (choose one)

There are no debts of this marriage.

OR

Plaintiff and Defendant have the following outstanding debts:

Debt Owed To	Purpose of Debt	Debt Incurred By	Balance Owed	Monthly Payment
			\$	\$
			\$	\$
			\$	\$
			\$	\$
			\$	\$
			\$	\$
			\$	\$

Additional sheets are attached as Appendix _____. (Choose if applicable)

21. Plaintiff wants to restore his or her name. Yes No
If YES, the new name is _____.
Plaintiff has no intent to defraud or mislead anyone by changing his/her name.

22. Defendant wants to restore his or her name. Yes No
If YES, the new name is _____.
Defendant has no intent to defraud or mislead anyone by changing his/her name.

STIPULATED TERMS FOR JUDGMENT

THE PARTIES STIPULATE AND AGREE that the following terms and provisions may, if approved by the court, be entered as the Judgment and Decree in the above-entitled case.

1. **JURISDICTION.** The parties stipulate that the District Court, _____ County, North Dakota, has jurisdiction over the parties and subject matter of the present action and that the proper venue of this action is in the District Court, _____ County, North Dakota.
2. **DIVORCE AND COURT APPROVAL.** The Plaintiff is awarded an absolute Decree of Divorce, all in accordance with the provisions of the North Dakota Century Code. As part of the proceedings in this matter, Plaintiff will submit this Settlement Agreement to the above-entitled Court. If the divorce is not granted, the terms of this Settlement Agreement will not be of effect. If the Court does not approve this Settlement Agreement, the parties shall be advised and shall be given opportunity to appear and present argument, witnesses and testimony. If the Court approves this Settlement Agreement, and if the Court grants a dissolution to Plaintiff herein, the terms of this Settlement Agreement shall be made a part of any Judgment issued by reference, whether or not each and every portion of this Settlement Agreement is literally set forth in the Judgment and Decree.
3. **PARENTAL RIGHTS AND RESPONSIBILITIES:** The parties shall have the parental rights and responsibilities as set forth in North Dakota Century Code Section 14-09-32, which are as follows:
 - a. The right to access and obtain copies of the child's educational, medical, dental, religious, insurance, and other records or information.
 - b. The right to attend educational conferences concerning the child. This right does not require any school to hold a separate conference with each parent.
 - c. The right to reasonable access to the child by written, telephonic, and electronic means.
 - d. The duty to inform the other parent as soon as reasonably possible of a serious accident or serious illness for which the child receives health care treatment. The parent shall

provide to the other parent a description of the serious accident or serious illness, the time of the serious accident or serious illness, and the name and location of the treating health care provider.

- e. The duty to immediately inform the other parent of residential telephone numbers and address, and any changes to the same.
- f. The duty to keep the other parent informed of the name and address of the school the child attends.

4. **PARENTING PLAN:** Pursuant to N.D.C.C. § 14-09-30, Paragraphs 4 through 17 of the Stipulated Terms for Judgment of this Settlement Agreement constitute the Parenting Plan.

5. **RESIDENTIAL RESPONSIBILITY AND PARENTING TIME:**

a. It is in the best interests of the minor child(ren) that residential responsibility shall be: (choose one)

- Shared equally between the Plaintiff and the Defendant.
- Primary residential responsibility shall be with the Plaintiff. The Defendant shall have parenting time as agreed in the Parenting Time Schedule below.
- Primary residential responsibility shall be with the Defendant. The Plaintiff shall have parenting time as agreed in the Parenting Time Schedule below.

b. The legal residence of the minor child(ren) for school attendance shall be: (choose one)

- The Plaintiff's place of residence.
- The Defendant's place of residence.
- _____

c. **Parenting Time Schedule:** We intend the following schedule to be the ongoing consistent parenting time schedule for the child(ren). We also recognize that there will be times when the schedule requires adaptation for the best interest of the child(ren). We intend the following schedule to be an attempt at consistency and stability for the children:

(P = Plaintiff, D = Defendant)

Sunday	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday
P:	P:	P:	P:	P:	P:	P:
D:	D:	D:	D:	D:	D:	D:

Additional detail for Parenting Time Schedule:

d. **Alternate Schedules:** The above Parenting Time schedule will be the default "normal" schedule except as outlined below, or as modified by mutual agreement. The alternate schedules will be as follows: (choose all that apply)

Summer Time: Summer Time is defined as:

The Summer Time alternate schedule will be:

School Release Days: School Release Days are defined as:

The School Release Days alternate schedule will be:

Summer Time/Schools Release Days with the other parent takes precedence over summer activities (such as sports), when the Parenting Time cannot be reasonably scheduled around such events.

Vacation with Parents: Each parent shall have vacation with the child(ren) as follows:

Additional changes to normal Parenting Time schedule will be:

e. **Schedule for Holidays and Other Special Days:** The parenting schedule for the child(ren) for holidays and other special days is:

	With Plaintiff (Odd, Even, Every Year, or Regular Parenting Time)	With Defendant (Odd, Even, Every Year, or Regular Parenting Time)
New Year's Day		
Martin Luther King Day		
President's Day		
Spring Break		
Easter		
Mother's Day		
Memorial Day		
Father's Day		
July 4th		
Labor Day		
Teacher's Conferences		
Halloween		
Veteran's Day		
Thanksgiving Day		
Winter Break		
Christmas Eve Day		
Christmas Day		
Plaintiff's Birthday		
Defendant's Birthday		
Child's Birthday		

For purposes of the Holidays and Other Special Days parenting schedule, a holiday includes:

f. **Priorities Under the Parenting Schedule:** The following days have priority in the following order:

g. **Children's Activities During Parenting Time:** In order to promote the development of well-rounded healthy children, we both support the extracurricular activities of the children. We both agree that we will work together to ensure that the children's activities are not planned as to interfere with the relationship with either parent. We will inform each other of the children's extracurricular activities by:

h. **Timeliness:** If a parent is more than _____ minutes late to pick the children up for a visit, that visit will be canceled, or:

i. We agree that if either parent misses their parenting time for any reason, we will deal with the missed time as follows:

j. We agree that it would be upsetting for our children if a parent misses their parenting time and does not notify the other parent in advance. Except in extreme emergencies, we agree to notify the other parent that we will not be able to exercise our scheduled parenting time as follows:

-
-
-
- k. **Restrictions on Contact with the Children:** Until further order of the Court, the child's time with mother/father will be subject to the following conditions:
-
-

6. **DECISION MAKING RESPONSIBILITY:**

- a. **Emergency Medical Decisions:** Each parent is authorized to make emergency health care decisions while the children are in that parent's care.
- b. **Day-to-day Decisions:** Each parent is authorized to make decisions regarding the day-to-day care and control of the children while the children reside with that parent, except as provided below.
- c. **Daycare/Afterschool provider:** (choose all that apply)
- When we reside in the same community, we agree to use the same daycare/afterschool provider.
 - To the extent feasible, we agree to rely on each other to care for the children when the other parent is unavailable.
 - Each parent may decide to utilize the daycare/afterschool provider of their own choosing.
 - Daycare/afterschool provider will be designated by mother.
 - Daycare/afterschool provider will be designated by father.
 - The children's daycare/afterschool provider is: _____
- d. **Education Decisions** will be made by: (choose one)
- Plaintiff
 - Defendant
 - Plaintiff and Defendant jointly
- e. **Non-Emergency Health Care Decisions** will be made by: (choose one)
- Plaintiff
 - Defendant
 - Plaintiff and Defendant jointly
- f. **Insurance Matters:** (choose all that apply)
- A parent who, except in an emergency, takes the children to a doctor, dentist, or other provider not so approved or qualified under the existing health care insurance should pay the additional cost thus incurred.

- When there is a contemplated change in insurance which requires a change in medical care providers and a child has a chronic illness, thoughtful consideration should be given by the parents to what is more important, i.e., allowing the child to remain with the original provider or taking advantage of economic or medical benefits offered by the new carrier.
 - When there is an obligation to pay medical expenses, the responsible parent shall be promptly furnished with the bill by the other parent. The parents shall cooperate in submitting bills to the appropriate insurance carrier. Thereafter, the parent responsible for paying the balance of the bill shall make arrangements directly with the health care provider and shall inform the other parent of such arrangements. Insurance refunds should be promptly turned over to the parent who paid the bill for which the refund was received.
- g. **Spiritual Development** decisions will be made by: (choose one)
- Plaintiff
 - Defendant
 - Plaintiff and Defendant jointly
- h. **Both parents must consent** before any minor child will be permitted to: (choose all that apply)
- Marry
 - Obtain a driver's license
 - Enlist in armed services
 - Get a tattoo
 - Have any body part pierced
 - _____
- i. **Sole decision making** belongs to: (choose all that apply)
- The Plaintiff for the following decisions and the following reasons:

 - The Defendant for the following decisions and the following reasons:

- j. **In the event of a dispute about a major decision**, we will use the following tie breaker method: (choose one)
- Plaintiff will decide
 - Defendant will decide
 - The parties will work with a qualified third party appropriate to the decision (educator, counselor, physician, coach, clergy, mediator) to try to reach resolution. If that is not successful: (choose one)

- Plaintiff will decide
- Defendant will decide

7. RECORDS:

Both parents may have access to the children's medical, dental, and school records. Each parent must communicate with the other parent with regard to grade reports, extra-curricular activities, and any other notices from the daycare, the school and related entities concerning the children. The children's daycare and school(s) must be notified of the split households and advised to send copies of the children's school documents, notices and related information to each parent. Both parents retain the right and shall notify and authorize the daycare, the school, and the children's doctors and other professionals to communicate directly with and outside the presence of the other parent. Each parent shall be listed as the children's parent and as an emergency contact with the daycare, the school, and all health professionals unless directed by court order to the contrary. Each parent shall immediately notify the other of any medical emergencies or serious illnesses of the children. If the child is taking medications, the parents shall communicate regarding instructions, dosage, and related information.

The parent who has medical insurance coverage on the children shall supply to the other parent an insurance card and, as applicable, insurance forms and a list of insurer-approved or HMO-qualified health care providers in the area where the other parent is residing.

- 8. COMMUNICATION BETWEEN PARENTS:** The parents shall communicate only in positive ways. The parents shall not make and shall not allow others to make derogatory remarks about the other parent in the child's presence.

We believe the most positive way to communicate is by:

a. _____

or

b. _____

or

c. _____

Parents should always keep each other advised of their address, telephone numbers, and emergency contact information.

9. **CHILDREN'S CLOTHING/PERSONAL ITEMS:** (choose any or all that apply)

- Each parent shall supply the appropriate children's clothing with them for their scheduled time with the other parent, OR
- Each parent shall supply appropriate clothing for the children to remain at that parent's home during parenting time, OR
- _____.
- These clothes are to be considered the children's clothes and shall be returned clean (when reasonably possible) with the minor children by the other parent.
- The child shall leave personal items at each parent's home and shall not remove those items from that home.
- The child shall take personal items between each parent's home, and it is the responsibility of each parent to ensure that the personal items remain with the child.
- _____.
- Both parents shall advise, as far in advance as possible, of any special activities so that the appropriate clothing belonging to the children may be sent.
- In the winter, or cold months of the year, the children are required to have adequate boots, gloves, hats, and jackets to be provided by both parents.
- In the winter, or cold months of the year, each parent shall ensure that the children have appropriate winter clothing to wear, regardless of parenting time.

10. **NEITHER PARENT WILL PERMIT THE CHILD TO BE SUBJECTED TO:** (complete blanks and/or choose all that apply)

- _____
- _____
- _____
- _____
- Temporary Removal of the child from the state, except as agreed by the parties or authorized by the Court.
- Violations of these provisions may subject the offender to court sanctions, or, if continuous and serious, may result in modification of the parenting plan.
- We agree that violations of these terms will result in

_____.

11. **TRANSPORTATION AND EXCHANGE ARRANGEMENTS:** (choose any and all that apply)

- When we live in the same community, the responsibility of picking up and returning the children should be shared with pickup at _____ and drop off at _____.
- Pick up at _____
- Drop off at _____
- Alternative Pick up/Drop off at _____
- A parent may not enter the residence of the other parent, except by express invitation by that parent, regardless of whether a visiting parent retains a property interest in the residence.
- The children shall be picked up and returned to the front entrance of the appropriate residence.
- The parent dropping off the children should not leave the premises until the children are safely inside.
- Parents should refrain from surprise visits to the other parent's home.
- A parent's time with the children is his or her own, and the children's time with that parent is equally private.
- Any change in pick up or drop off location will be determined by:

_____.
- The person picking up or returning the children during times of parenting time has an obligation to be punctual, arriving at the agreed time and place, not substantially earlier or later.
- Other: _____

_____.

12. **COMMUNICATION:** Communication between parents and children shall be liberally permitted at reasonable hours and at the expense of parent initiating contact. The children may, of course, communicate with either parent though at reasonable hours and frequencies and at the cost of the parent contacted, if there is a cost. During long vacations the parent with whom the child is on vacation should make the child available for contact _____ . At all other times, the parent with whom the child is staying shall not refuse to allow contact or take any action in order to deny the other parent contact. Each parent should facilitate the communication between the child and the other parent. (Choose any and all that apply.)

- Parents may agree on a specified time for communication to the children so that the children will be made available.

- A parent may wish to provide a child with a telephone calling card or cell phone or computer to facilitate communication with that parent.
- Each parent has an unrestricted right to send cards, letters, packages, and audio and video cassettes or CDs.
- Children also have the same right to send items to their parents.
- Neither parent should interfere with any of the above mentioned rights.
- A parent may wish to provide a child with self-addressed stamped envelopes for the child's use in corresponding with that parent.
- If the child and the parent have internet capability, communication through e-mail should be fostered and encouraged but with consideration for the number of e-mails and the amount of time spent on the computer.
- Other: _____

13. **EXCHANGING INFORMATION:** Both parents shall notify the other parent in writing of any change in residence, telephone numbers, names and addresses of employers, changes in health insurance coverage for the children, and changes in health insurance available through employer which could cover the children.

14. **CHANGES TO PARENTING PLAN:** As parents we recognize that the parenting plan imposes specific requirements and responsibilities; however, when family necessities, illnesses, or commitments reasonably so require, we will modify the parenting plan fairly. The parent requesting modification shall act in good faith and give as much notice as circumstances permit. If we cannot agree, we will look to the dispute resolution provisions in this document, or bring the matter to a parenting coordinator. We also anticipate that at some point circumstances may fundamentally change, and agree that we will review the parenting plan upon the following events: (Choose any and all that apply.)

- The oldest child reaches age _____.
- If either parent intends to move more than ___ miles from his or her current residence.
- In two years.
- After recommendation of the parenting coordinator.
- After recommendation of a professional (i.e. doctor, therapist, pastor).
- After arrest or criminal activity by one or both parties.
- Upon verified chemical abuse /relapse.
- Upon an agency or Court finding of child abuse or neglect by one or both parties.
- Upon a court finding of domestic violence by one or both parties.

- Prolonged lack of contact with the child.
- Other: _____
- The parents may change this plan by agreement, but all changes must be in writing, signed, and dated by both parents.

15. **OUT OF STATE RELOCATION OF RESIDENCE OF THE CHILD:** Pursuant to the provisions of N.D.C.C. § 14-09-07, a parent entitled to the residential placement of a child may not change the residence of the child to another state except upon order of the Court or with the consent of the other parent.

16. **DISPUTE RESOLUTION:**

- a. Disputes between the parties shall be submitted to:
 - Counseling
 - Mediation
 - Other _____
- b. The cost of this process will be allocated between the parties as follows based on: (choose one)
 - Each parent shall pay one-half.
 - Each parent's proportional share of income from the child support worksheets.
 - As determined in the dispute resolution process.
 - _____
- c. A parent will begin the dispute resolution process by notifying the other parent by:
 - Written request
 - Certified mail
- d. In the dispute resolution process:
 1. Preference will be given to carrying out this Parenting Plan.
 2. Unless an emergency exists, the parents shall use the designated process to resolve disputes relating to implementation of the plan, except those related to financial support.
 3. A written record will be prepared of any agreement reached in counseling or mediation and of each arbitration award and will be provided to each party.
 4. If the court finds that a parent has used or frustrated the dispute resolution process without good reason, the court may award attorneys' fees and financial sanctions to the other parent.

17. **COMPLIANCE:** After this parenting plan has been made a part of a court order or judgment, repeated, unjustified violations of these provisions may subject the offender to court

sanctions, or, if continuous and serious, may result in modification of the parenting plan. One parent's failure to comply with a provision of the parenting plan does not affect the other parent's obligation to comply with the parenting plan. Violation of provisions of this plan with actual knowledge of its terms is punishable by contempt of court and may be a criminal offense. Violation of this plan may subject a violator to arrest, fines, imprisonment or sanctions or other remedies available under the law.

18. CHILD SUPPORT:

a. Pursuant to the North Dakota Child Support Guidelines and N.D.C.C. § 14-09-09.7,

(check one)

Plaintiff shall pay Defendant \$ _____ per month as and for child support based on net monthly income of _____. Plaintiff's income was determined by (explain) _____

A copy of the completed child support calculation forms that were used to calculate the child support obligation are attached as Appendix _____.

Defendant shall pay Plaintiff \$ _____ per month as and for child support based on net monthly income of _____. Defendant's income was determined by (explain) _____

A copy of the completed child support calculation forms that were used to calculate the child support obligation are attached as Appendix _____.

Plaintiff and Defendant have equal residential responsibility. Based on Plaintiff's net monthly income of \$ _____ and child support obligation of \$ _____, and Defendant's net monthly income of \$ _____ and child support obligation of \$ _____, child support amounts will be offset for payment purposes.

Plaintiff/ Defendant (check one) will pay the difference of \$ _____ per month. A copy of the completed child support calculation forms that were used to calculate the child support obligation are attached as Appendix _____.

A child support order already exists for the child(ren). The child support case number is _____. The existing child support payment amounts shall be incorporated into the judgment in this case. A copy of the child support order is attached as Appendix _____.

b. Deviation from child support calculator: (check one)

- The child support amount listed in Paragraph 18(a) does not deviate from the child support calculator.
- The child support amount listed in Paragraph 18(a) deviates from the child support calculator. \$_____ is the presumptively correct child support amount. Pursuant to N.D.C.C. § 14-09-09.7, the presumption is rebutted because (explain)

and is in the best interests of the child(ren) because (explain)

- Additional sheets are attached as Appendix _____. (Choose if applicable)

c. Child support shall commence (check one)

- On the first day of the month after judgment is entered and due on that same day each successive month.

- On _____, _____ and due on the _____ of each successive month.

- As required by the existing child support order. The child support case number is _____.

d. The support obligation of Plaintiff/ Defendant (check one) for the minor children shall continue until the recipient child attains majority and continues as to the child until the end of the month during which the child is graduated from high school or attains the age of nineteen (19) years, whichever occurs first, if: (a) the child is enrolled and attending high school and is eighteen (18) years of age prior to the date the child is expected to be graduated; and (b) the child resides with the person to whom the duty of support is owed.

e. Step-down child support obligation: (check one)

- Does not apply. This Settlement Agreement applies to one minor child of Plaintiff and Defendant.

- Plaintiff and Defendant reserve this issue.

- Plaintiff and Defendant have _____ minor children together, to which this Settlement Agreement applies. The step-down child support obligation is:

After child support terminates for one child, Plaintiff/ Defendant (check one) shall pay \$_____ child support per month. The first payment is due on the day indicated in Section 18(c) on the first month after child support terminates

for one child. Subsequent payments are due on each successive month on the day indicated in Section 18(c) **until** child support terminates for a second child.

After child support terminates for two children, Plaintiff/ Defendant (check one) shall pay \$_____ child support per month. The first payment is due on the day indicated in Section 18(c) on the first month after child support terminates for one child. Subsequent payments are due on each successive month on the day indicated in Section 18(c) **until** child support terminates for a third child.

Additional sheets are attached as Appendix _____. (Choose if applicable)

- f. Child support orders are subject to income withholding in accordance with N.D.C.C. § 14-09-09.24. The obligation will accrue interest if not paid timely in accordance with N.D.C.C. § 14-09-08.19. Payment shall be made through the North Dakota State Disbursement Unit (SDU), and mailed to: SDU, P.O. Box 7280, Bismarck, ND 58507-7280.
- g. Child support orders are subject to periodic review under N.D.C.C. § 14-09-08.4. Either party may request a review of an order by applying to the child support agency as provided in N.D.C.C. § 14-09-08.9.
- h. Each party subject to this order shall provide SDU with the following information within ten days of the order or within ten days of any change of information as provided in N.D.C.C. § 14-09-08.1:
- Social Security number;
 - Residential and mailing addresses and any change of address;
 - Telephone number;
 - Motor vehicle operator's license number;
 - Employer's name, address and telephone number; and
 - Change of any other condition which may affect the proper administration of the order.

19. MEDICAL SUPPORT:

- a. **Health Insurance:** In accordance with the provisions of N.D.C.C. § 14-09-08.10, the parent with physical custody of the minor child(ren) shall provide satisfactory health insurance for the minor child(ren) whenever that coverage is available at no or nominal cost, now or in the future.

In the event the parent with physical custody of the minor child does not have satisfactory health insurance at no or nominal cost, the parent without physical custody of the minor child(ren) shall provide satisfactory health insurance for the minor child(ren) whenever that coverage is available at reasonable cost or becomes available

at reasonable cost, now or in the future. Reasonable cost is defined pursuant to N.D.C.C. § 14-09-08.15.

- Existing coverage (choose if applicable)
 - Plaintiff/ Defendant (choose one) currently provides medical coverage of the minor child(ren) and shall continue to provide coverage as long as it is available at a reasonable cost.

b. **Uninsured and Unreimbursed Medical Expenses:** Plaintiff and Defendant shall divide uninsured and unreimbursed medical expenses associated with the child(ren), including, but not limited to medical, dental, orthodontia, vision, counseling, co-pays, deductible and prescription drugs, in the following way:
 Plaintiff shall pay _____% and the Defendant shall pay _____%.

Plaintiff and Defendant shall exchange written verification of their respective out-of-pocket medical costs for the child(ren) on a (choose one) monthly quarterly annual basis. Reimbursement shall be made to the other party within _____ days.

If one party has made payment for the child(ren)'s uninsured or unreimbursed medical expenses and the other party is reimbursed by the insurance company, the party receiving the reimbursement shall immediately pay the reimbursed amount to the party who paid the health care provider.

20. **CHILDCARE COSTS:** Plaintiff and Defendant shall divide childcare costs in the following way:

21. **CHILD TAX EXEMPTION:** Only one party may claim a deduction for each child on their income tax return. Plaintiff and Defendant agree to prepare appropriate IRS forms. (choose one)

- For each minor child, the child tax exemption shall be claimed according to the following schedule:

(P = Plaintiff, D = Defendant)

Child's Initials	Deduction claimed every year by:		Deduction claimed odd years by:		Deduction claimed even years by:	
	<input type="checkbox"/> P	<input type="checkbox"/> D	<input type="checkbox"/> P	<input type="checkbox"/> D	<input type="checkbox"/> P	<input type="checkbox"/> D

	<input type="checkbox"/> P	<input type="checkbox"/> D	<input type="checkbox"/> P	<input type="checkbox"/> D	<input type="checkbox"/> P	<input type="checkbox"/> D
	<input type="checkbox"/> P	<input type="checkbox"/> D	<input type="checkbox"/> P	<input type="checkbox"/> D	<input type="checkbox"/> P	<input type="checkbox"/> D

Additional sheets are attached as Appendix _____. (Choose if applicable)

The parent who provided health insurance coverage for the minor child for _____% or more of the tax year shall claim the child tax exemption for that child.

Other: _____

22. SPOUSAL SUPPORT: (choose one)

- Defendant shall pay to Plaintiff the amount of \$ _____ per month as and for spousal support for a period of _____.
- Plaintiff shall pay to Defendant the amount of \$ _____ per month as and for spousal support for a period of _____.
- Neither Plaintiff nor Defendant will be awarded permanent or rehabilitative spousal support and the court shall be divested from any jurisdiction to make any awards of spousal support in the future.

23. REAL PROPERTY: (choose one)

We do not own any real property.

OR

The real property located at _____,
 _____,
 and the legal description of the property is _____

should be distributed as follows: (choose one)

Plaintiff/ Defendant (choose one) shall be awarded sole title and interest and subject to a mortgage or loan against the property in the amount of \$ _____.

OR

(Describe the distribution of the real property) _____

Additional sheets are attached as Appendix _____. (Choose if applicable)

24. **VEHICLES:** (choose one)

We do not own any vehicles.

OR

The vehicles shall be awarded to Plaintiff and Defendant as follows, and the party receiving each vehicle shall pay for all loans and insurance associated with the vehicle:

Vehicle (include Year/Make/Model)	Awarded to:

Additional sheets are attached as Appendix _____. (Choose if applicable)

25. **PERSONAL PROPERTY:** Plaintiff's and Defendant's personal property, including household goods, furniture, and all furnishings have already been divided to the parties' satisfaction.

- a. Plaintiff shall have all right, title, interest, and equity, free and clear of any claim on the part of Defendant, in and to the personal property in Plaintiff's possession.
- b. Defendant shall have all right, title, interest, and equity, free and clear of any claim on the part of Plaintiff, in and to the personal property in Defendant's possession.

26. **RETIREMENT PLAN(S):** (choose one)

We have not paid money into a pension, profit-sharing plan, IRA or other retirement plan for Plaintiff or Defendant. Our past or present employers, union or other group have not paid money into a pension, profit-sharing plan, IRA or other retirement plan for Plaintiff or Defendant.

OR (choose all that apply)

Plaintiff's pension, profit sharing plan, IRA or other retirement plan shall be awarded as follows: _____

Defendant's pension, profit sharing plan, IRA or other retirement plan shall be awarded as follows: _____

Additional sheets are attached as Appendix _____. (Choose if applicable)

27. OTHER ASSETS: (choose one)

- There are no financial or other assets of this marriage that are not otherwise included in this Settlement Agreement.

OR

- The parties shall be awarded all rights, title, interest and equity in and to the following assets, financial or other asset, as follows:

Asset	Location	Account or Policy Number (last 4 digits)	Value	Awarded To:
			\$	
			\$	
			\$	
			\$	
			\$	

Additional sheets are attached as Appendix _____. (Choose if applicable)

28. DEBTS:

a. (choose one)

- There are no debts of this marriage.

OR

- Plaintiff's and Defendant's marital debts shall be divided as follows, and each party shall hold the other harmless from any responsibility for the debts each is ordered to pay:

Debt Owed To:	To Be Paid By:

Additional sheets are attached as Appendix _____. (Choose if applicable)

- b. Except as otherwise expressly provided, any and all unpaid debts not otherwise included in this Settlement Agreement, incurred by the Plaintiff and Defendant during the course of their marriage shall be the responsibility of the person who incurred the debt.

- c. Plaintiff and Defendant shall not to contract any debt, charge or liability whatsoever for which the other or their property or estate shall or may become liable or answerable in the future.

29. **FORMER NAME:** (choose one)

- Neither Plaintiff nor Defendant wants to restore his or her name.

OR

- Plaintiff/ Defendant (choose one), presently known as _____
_____ and year of birth _____, will be restored to his or
her former name of " _____ "
in any Judgment issued herein and will be known thereafter as _____
_____.

30. **EXECUTION OF REQUIRED DOCUMENTS:** The parties shall, within ten (10) days from the date of Entry of Judgment, or upon presentation, whichever occurs first, execute any document, transfer papers, titles or other documents required to effect the terms and provisions of the Judgment and Decree. In the event that a party fails to sign transfer papers, as required, the Judgment shall operate to transfer title to property, as awarded.

31. **FINALITY OF SETTLEMENT:** This Settlement Agreement is intended as a full, complete, final and conclusive settlement of all marital rights and all property rights between the parties.

32. **VALIDITY OF AGREEMENT:** This Settlement Agreement shall be binding upon the parties hereto with respect to the above- entitled action, or any other action between the parties and it is agreed that the material provisions of this Settlement Agreement shall be incorporated in and made a part of any judgment or decree entered into this action. If any provisions of this agreement are held to be invalid, unconscionable, or unenforceable, all the remaining provisions of this Settlement Agreement shall nevertheless continue in full force and effect.

33. **FULL DISCLOSURE AND RELIANCE:** Each party warrants to the other that there has been accurate, complete and current disclosure of all income, assets, and liabilities.

34. **ACKNOWLEDGMENT OF AGREEMENT:** The parties have read this Settlement Agreement, have given it serious thought and consideration, and understand its contents. The parties agree that this Settlement Agreement is fair, just, equitable, and in the best interests of the child(ren) under the circumstances, and it has been made in aid of an orderly and just determination of the marital rights, property settlement, and parental rights and

On the _____ day of _____, 20_____, before
me personally appeared _____
known to me to be the same person described in and who executed the within and foregoing
instrument and acknowledged to me that (he) (she) executed the same.

Notary Public

(Leave this following section blank. It will be completed by the Court if this Settlement Agreement is adopted as the Findings of Fact, Conclusions of Law and Order for Judgment, and Judgment.)

Pursuant to the stipulation of the parties, this matter was reviewed by the undersigned judge of the District Court. The Court, upon review of the stipulation and pleadings herein, makes the following:

FINDINGS OF FACT, CONCLUSIONS OF LAW and ORDER FOR JUDGMENT

The parties' "Agreement as to Facts" is adopted as the Court's Findings of Fact. The parties' "Stipulated Terms for Judgment" are adopted as the Court's Conclusions of Law.

ORDER FOR JUDGMENT

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated this _____ day of _____, 20_____.

By the Court

Judge of District Court

JUDGMENT

The court, having reviewed the Settlement Agreement and has made its Findings of Fact, Conclusions of Law and Order for Judgment:

IT IS HEREBY ORDERED ADJUDGED AND DECREED

The parties' "Stipulated Terms for Judgment" adopted as the Court's "Conclusions of Law" shall be the Judgment.

WITNESS the hand and seal of the Court this _____ day of _____,
20_____.

By the Clerk of Court

Clerk of Court

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: May 1, 2016
RE: Rule 36, N.D.R.Civ.P., Requests for Admission

At the last meeting, the committee approved amendments to Rule 34 on production of documents and things. Among these amendments was a new subdivision requiring the person responding to the request to sign the response. Mr. Beehler requested that the committee consider a similar amendment to Rule 36 on requests for admission.

Attached are proposed amendments to Rule 36, adding a new subdivision (c) that would require the person responding the request to sign the response and an attorney making objections to sign these.

RULE 36. REQUESTS FOR ADMISSION

1 (a) Scope and Procedure.

2 (1) Scope. A party may serve on any other party a written request to admit,
3 for purposes of the pending action only, the truth of any matters within the scope
4 of Rule 26(b) relating to:

5 (A) facts, the application of law to fact, or opinions about either; and

6 (B) the genuineness of any described documents.

7 (2) Form; Copy of a Document; Timing. Each matter must be separately
8 stated. A request to admit the genuineness of a document must be accompanied by
9 a copy of the document unless it is, or has been, otherwise made available for
10 inspection and copying. A party may serve the request on the plaintiff after
11 commencement of the action and on any other party after service of the summons
12 and complaint on it.

13 (3) Time to Respond; Effect of Not Responding. A matter is admitted
14 unless, within 30 days after being served, the party to whom the request is directed
15 serves on the requesting party a written answer or objection addressed to the matter
16 and signed by the party or its attorney. A defendant is not required to serve its
17 answer or any objections until 45 days after service of the summons and complaint
18 on it. A shorter or longer time for responding may be stipulated to under Rule 29
19 or be ordered by the court.

20 (4) Answer. If a matter is not admitted, the answer must specifically deny it
21 or state in detail why the answering party cannot truthfully admit or deny it. A
22 denial must fairly respond to the substance of the matter; and when good faith
23 requires that a party qualify an answer or deny only a part of a matter, the answer
24 must specify the part admitted and qualify or deny the rest. The answering party
25 may assert lack of information or knowledge as a reason for failing to admit or
26 deny only if a party states that it has made reasonable inquiry and that the
27 information it knows or can readily obtain is insufficient to enable it to admit or
28 deny.

29 (5) Objections. The grounds for objecting to a request must be stated.

30 (6) Matter Presenting a Trial Issue. A party must not object to a request
31 solely on the ground that it presents a genuine issue for trial. The party may deny
32 the matter or state why it cannot admit or deny.

33 (7) Motion Regarding the Sufficiency of an Answer or Objection. The
34 requesting party may move to determine the sufficiency of an answer or objection.
35 Unless the court finds an objection justified, it must order that an answer be
36 served, On finding that an answer does not comply with this rule, the court may
37 order either that the matter is admitted or that an amended answer be served. The
38 court may defer its final decision until a pretrial conference or a specified time
39 before trial. Rule 37(a)(4) applies to an award of expenses.

40 (b) Effect of an Admission; Withdrawing or Amending It. A matter

41 admitted under this rule is conclusively established unless the court, on motion,
42 permits the admission to be withdrawn or amended. Subject to Rule 16, the court
43 may permit withdrawal or amendment if it would promote the presentation of the
44 merits of the action and if the court is not persuaded that it would prejudice the
45 requesting party in maintaining or defending the action on the merits. An
46 admission under this rule is not an admission for any other purpose and cannot be
47 used against the party in any other proceeding.

48 (c) Signature. The person who responds to the request must sign the
49 response, and the attorney who objects must sign any objections.

50 EXPLANATORY NOTE

51 Rule 36 was amended, effective March 1, 1990; March 1, 1997; March 1,
52 2011; _____.

53 Rule 36 was amended, effective March 1, 2011, in response to the
54 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
55 and organization of the rule were changed to make the rule more easily understood
56 and to make style and terminology consistent throughout the rules.

57 Subdivision (c) was added, effective _____, to require the person
58 who responds to a request for admission to sign the response document and for an
59 attorney who make objections to sign the objections.

60 SOURCES: Joint Procedure Committee Minutes of

61 _____; January 29-30, 2009, page 31; September 28-29, 1995,

62 page 15; April 20, 1989, page 2; December 3, 1987, page 11; November 29-30,

63 1979, page 7; Fed.R.Civ.P. 36.

64 CROSS REFERENCE: N.D.R.Civ.P. 16 (Pre-Trial Procedure Formulating
65 Issues), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P.
66 29 (Stipulations Regarding Discovery Procedure), and N.D.R.Civ.P. 37 (Failure to
67 Make Discovery Sanctions).

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: May 1, 2016
RE: Rule 3, N.D.R.Crim.P., The Complaint

Attorney Tom Dickson has requested that the committee consider amendments to Rule 3 that stop the filing of criminal complaints by private citizens. He said private citizens should not be able to file criminal charges on their own and that they can file civil claims if they have a grievance against someone. His email is attached.

Attached are proposed amendments to Rule 3 that would limit the filing of complaints to licensed peace officers and prosecutors. The new proposed amendments are highlighted. The other amendments shown in the draft were approved at the September 2015 meeting and relate to swearing requirements for complaints by licensed peace officers.

Most of the criminal statutes related to complaints were superseded when Rule 3 took effect. The remaining statutes are silent on whether citizens may file complaints. Prior to Rule 3, N.D.C.C. 29-05-02, copy attached, required anyone "who has reason to believe that a crime or public offense has been committed" to make a complaint against the offender. This does not seem to have been a controversial statute: staff has been unable to find any North Dakota case law on it or its predecessor statutes, which date back to the Revised Code of 1895.

RULE 3. THE COMPLAINT

1 (a) General. The complaint is a written statement of the essential facts
2 constituting the elements of the offense charged. The complaint must be sworn to
3 and subscribed before an officer authorized by law to administer oaths within this
4 state, or if made by a licensed peace officer, must contain a written declaration that
5 it is made and subscribed under penalty of perjury, and be presented to a
6 magistrate. Only licensed peace officers and prosecuting attorneys may present
7 complaints. The complaint may be presented as provided
8 in Rule 4.1.

9 (b) Magistrate Review. The magistrate may examine on oath the
10 complainant and other witnesses and receive any affidavit filed with the complaint.
11 If the magistrate examines the complainant or other witnesses on oath, the
12 magistrate shall cause their statements to be reduced to writing and subscribed by
13 the persons making them or to be recorded.

14 (c) Amendment. The magistrate may permit a complaint to be amended at
15 any time before a finding or verdict if no additional or different offense is charged
16 and if substantial rights of the defendant are not prejudiced. If the prosecuting
17 attorney chooses not to pursue a charge contained in the initial complaint, a
18 dismissal of that charge must be stated on the amended complaint.

19 EXPLANATORY NOTE

20 Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1,
21 2006; March 1, 2007; August 1, 2011; March 1, 2013; March 1,
22 2016;_____.

23 Subdivision (a) was amended, effective January 1, 1995, to allow a
24 complaint to be subscribed and sworn to outside the presence of a magistrate. An
25 effect of this amendment is to allow facsimile transmission of the complaint. For a
26 listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The
27 amendment does not preclude a magistrate from examining a complainant or other
28 witnesses under oath when making the probable cause determination.

29 Subdivision (a) was amended, effective March 1, 1996, to clarify that the
30 complaint is the initial document for charging a person with a misdemeanor or
31 felony.

32 Subdivision (a) was amended, effective March 1, 2007, to specify that the
33 complaint must contain a statement of the facts that establish the elements of the
34 offense charged.

35 Subdivision (a) was amended, effective August 1, 2011, to eliminate
36 language about the complaint being the initial charging document for all criminal
37 offenses. N.D.C.C. § 29-04-05 was amended in 2011 to specify that “A
38 prosecution is commenced when a uniform complaint and summons, a complaint,
39 or an information is filed or when a grand jury indictment is returned.”

40 Subdivision (a) was amended, effective March 1, 2013, to allow the

41 complaint to be presented to the magistrate by telephone or other reliable
42 electronic means under Rule 4.1.

43 Subdivision (a) was amended, _____, to allow a
44 licensed peace officer to make a complaint under a written declaration that it is
45 made and subscribed under penalty of perjury.

46 Subdivision (a) was amended, _____, to clarify that
47 only licensed peace officers and prosecuting attorneys may present
48 complaints.

49 Subdivision (c) is similar to Rule 7(e).

50 Subdivision (c) was amended, effective March 1, 2016, to require a written
51 dismissal to be filed with the amended complaint if the prosecuting attorney
52 chooses not to pursue charges raised in the initial complaint.

53 Rule 3 was amended, effective March 1, 2006, in response to the December
54 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and
55 organization of the rule were changed to make the rule more easily understood and
56 to make style and terminology consistent throughout the rules.

57 SOURCES: Joint Procedure Committee Minutes of _____;
58 September 24-25, 2015, pages 14-15; January 26-27, 2012, page 25; April 28-29,
59 2011, pages 17-18; April 24-25, 2003, pages 25-26; January 26-27, 1995, pages 3-
60 5; April 28-29, 1994, pages 20-22; January 27-29, 1972, pages 4-7 September 27-
61 8, 1968, pages 1-2; November 17-18, 1967, page 2.

62 STATUTES AFFECTED:

63 SUPERSEDED: N.D.C.C. §§ 29-01-13(1), 29-05-01 to the extent that it

64 requires a complaint to be sworn, 29-05-02 to the extent that it requires a

65 complaint to be subscribed and sworn to before a magistrate, 29-05-03, 33-12-03,

66 33-12-04, 33-12-05, 33-12-16, 33-12-25.

67 CONSIDERED: N.D.C.C. §§ 29-04-05, 12-01-04(12), 29-01-14, 29-02-06,

68 29-02-07, 29-04-05, 29-05-01, 29-05-05.

69 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or

70 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 7

71 (The Indictment and the Information).

Hagburg, Mike

To: Hagburg, Mike
Subject: ND Crimp 3

From: Tom Dickson [<mailto:tdickson@dicksonlaw.com>]
Sent: Tuesday, March 15, 2016 4:51 PM
To: Hagburg, Mike
Subject: RE: NDCrimP 41

Mike:

I think the Committee should also look at NDCrimP 3. I don't think private citizens should be able to sign criminal complaints and initiate criminal charges. They can file a civil claim if they want. This also might require some old statutes to be re-examined.

The criminal justice system is the province of the State.

Tom

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

29-05-02. Who must make complaint.—Every person who has reason to believe that a crime or public offense has been committed by another person must make complaint against such person before some magistrate having authority to make inquiry of the same.

Source: R. C. 1895, § 7887; R. C. 1899, § 7887; R. C. 1905, § 9695; C. L. 1913, § 10531; R. C. 1943, § 29-0502.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: May 1, 2016
RE: Rule 17, N.D.R.Crim.P., Subpoena

Committee member Bob Hoy has located language in Rule 17 that seems to require a court order before a subpoena can be issued to compel attendance at a deposition in a criminal case. He requests that the committee consider amendments allowing an attorney to issue deposition subpoenas. His email is attached

Proposed amendments to Rule 17 that would allow an attorney for a party to the proceeding to issue a deposition subpoena are attached.

Paragraph (a)(2) of Rule 17 already allows attorneys to issue subpoenas under the rule. This is different from the federal rule, copy attached, which does not contain this language. Paragraph (a)(2) has been part of the rule since 1983.

The proposed amendment would make the part of the rule on deposition subpoenas consistent with the rest of the rule and would also eliminate any reference to a court order for a deposition. N.D.R.Crim.P. 15, copy attached, is not wholly based on the federal rule and does not require court orders for all depositions.

The committee may wish to discuss whether it is necessary to retain paragraph (f)(2) given that Rule 15(a)(4) allows objections to subpoenas and Rule 15(b) has a procedure for witnesses who do not respond to subpoenas.

RULE 17. SUBPOENA

1 (a) Content.

2 (1) A subpoena must state the court's name and the title of the action, and
3 command the witness to attend and testify at the time and place the subpoena
4 specifies. The clerk or magistrate shall issue a signed blank subpoena, or a signed
5 blank subpoena for the production of documentary evidence or objects, to the party
6 requesting it, and that party must fill in the blanks before the subpoena is served.

7 (2) The attorney for a party to any proceeding may issue a subpoena, or a
8 subpoena for the production of documentary evidence or objects, in the court's
9 name. A subpoena issued by an attorney has the same effect as a subpoena issued
10 under Rule 17(a)(1). The subpoena must state the attorney's name, office address,
11 and the party for whom the attorney appears.

12 (b) [Deleted].

13 (c) Producing Documents and Objects.

14 (1) In General. A subpoena may order the witness to produce any books,
15 papers, documents, data, or other objects the subpoena designates. The court may
16 direct the witness to produce the designated items in court before trial or before
17 they are to be offered in evidence. When the items arrive, the court may permit the
18 parties and their attorneys to inspect all or part of them.

19 (2) Quashing or Modifying the Subpoena. On motion made promptly, the

20 court may quash or modify the subpoena if compliance would be unreasonable or
21 oppressive.

22 (d) Service. A peace officer or any nonparty who is at least 18 years old
23 may serve a subpoena. The server must deliver a copy of the subpoena to the
24 witness and must tender to the witness one day's witness attendance fee and the
25 legal mileage allowance. The server need not tender the attendance fee or mileage
26 allowance when the prosecution or an indigent defendant has requested the
27 subpoena.

28 (e) Place of service.

29 (1) In North Dakota. A subpoena requiring a witness to attend a hearing or
30 trial may be served anywhere within North Dakota.

31 (2) Witness Outside State. Service on a witness outside this state may be
32 made only as provided by law.

33 (3) Subpoena in Out-of-State Action. N.D.R.Ct. 5.1 defines the procedure
34 for discovery or depositions in an out-of-state action.

35 (f) Issuing a Deposition Subpoena.

36 (1) Issuance. ~~An order to take a deposition authorizes the~~ The clerk of court
37 ~~or, a magistrate or an attorney for a party to the proceeding to~~ may issue a
38 subpoena for a deposition under Rule 15 to any witness named or described in the
39 order notice.

40 (2) Place. After considering the convenience of the witness and the parties,

41 the court may order—and the subpoena may require—the witness to appear
42 anywhere the court designates.

43 (g) Contempt. Failure by any witness without adequate excuse to obey a
44 subpoena served upon that witness may be a contempt of the court from which the
45 subpoena issued.

46 (h) Information Not Subject to Subpoena. No party may subpoena a
47 statement of a witness or of a prospective witness under this rule. Rule 16 governs
48 the production of a statement.

49 EXPLANATORY NOTE

50 Rule 17 was amended September 1, 1983; March 1, 1990; March 1, 2006;
51 June 1, 2006; March 1, 2008; March 1, 2013; _____.

52 Rule 17 follows Fed.R.Crim.P. 17 in substance and controls with respect to
53 all subpoenas in criminal cases issued by the courts of this state.

54 Rule 17 is not limited to subpoena for the trial. A subpoena may be issued
55 for a preliminary hearing, in aid of a grand jury investigation, for a deposition, or
56 for a determination of an issue of fact raised by a pretrial motion. Rule 17 is also
57 intended to obtain witnesses and documents for use as evidence, although it is not
58 a discovery device.

59 Rule 17 was amended, effective March 1, 2006, in response to the
60 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
61 language and organization of the rule were changed to make the rule more easily

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

63 Paragraph (a)(1) follows Fed.R.Crim.P. 17(a) except that subpoenas may be
64 issued by the magistrate as well as the clerk of court. The fact that some of the
65 lesser state courts are without the benefit of a clerk necessitates this requirement.

66 Paragraph (a)(2) was amended, effective September 1, 1983, to provide that
67 an attorney for a party may issue subpoenas with the same effect as the clerk or
68 magistrate.

69 Subdivision (b), which provided assistance for indigent defendants seeking
70 to subpoena persons, was deleted, effective June 1, 2006. As of January 1, 2006,
71 the North Dakota Commission on Legal Counsel for Indigents became responsible
72 for providing defense services, including subpoenas, to indigent defendants.

73 Subdivision (c) follows Fed.R.Crim.P. 17(c) and authorizes issuance of a
74 subpoena duces tecum. Rule 17 generally is available to any "party" and this is no
75 less true of subdivision (c). Thus the prosecution as well as the defendant may use
76 subdivision (c), subject to the limitations imposed by the Fourth and Fifth
77 Amendments.

78 Subdivision (d) was amended, effective March 1, 2006, to simplify service
79 instructions for a subpoena and to eliminate outmoded methods of service.

80 Subdivision (d) was amended, effective March 1, 2008, to eliminate an obsolete
81 cross-reference.

82 A subpoena will ordinarily be served by a peace officer although

83 subdivision (d) permits service by any person who is not a party and who is 18 or
84 more years old. Service of a subpoena under Fed.R.Crim.P. 17 has been held
85 effective only if the fee for one day's attendance and the mileage allowed by law
86 are tendered to the witness when the subpoena is delivered. Fees and mileage need
87 not be tendered if the subpoena is issued in behalf of the state or on behalf of a
88 defendant unable to pay.

89 Subdivision (e) is an adaptation of the Colorado Rules of Criminal
90 Procedure. Under N.D.C.C. ch. 31-03 (Means of Compelling Attendance of
91 Witnesses), North Dakota has adopted a Uniform Act to secure the attendance of
92 witnesses from another state in criminal proceedings. Under paragraph (e)(2)
93 service of subpoenas on witnesses out-of-state is governed by N.D.C.C. ch. 31-03.

94 Subdivision (e) was amended, effective March 1, 2013, to direct persons to
95 N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in
96 an action pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for
97 interstate depositions and discovery.

98 Subdivision (f) follows Fed.R.Crim.P. 17(f), with appropriate changes to
99 satisfy the requirements of North Dakota. Paragraph (f)(1) provides that a court
100 ~~order for the taking of depositions gives authority to the clerk of court or,~~
101 magistrate or an attorney for a party to the proceeding to may issue subpoenas for
102 the persons named ~~or described therein~~ in a deposition notice.

103 Paragraph (f)(2) provides the court with discretion in determining where the

104 deposition is to be taken.

105 Subdivision (g) follows N.D.R.Civ.P. 45(e). This provision merely restates
106 existing law.

107 Subdivision (h) was adopted, effective September 1, 1983, to provide that
108 statements made by witnesses or prospective witnesses are not subject to subpoena
109 under Rule 17 but are subject to production in accordance with Rule 16. This
110 correlates to Rule 16's provisions relating to production of statements.

111 SOURCES: Joint Procedure Committee Minutes of
112 _____; January 26-27, 2012, pages 3-7; September 30, 2011,
113 pages 12-15; April 28-29, 2011, page 25; April 26-27, 2007, pages 22-23; April
114 27-28, 2006, pages 2-5, 15-17; January 27-28, 2005, pages 13-14; April 20, 1989,
115 page 4; December 3, 1987, page 15; November 18-19, 1982, pages 10-13; October
116 15-16, 1981, pages 6-10; October 12-13, 1978, page 8; June 26-27, 1972, pages
117 14-20; July 25-26, 1968, pages 6-10; Fed.R.Crim.P. 17.

118 STATUTES AFFECTED:

119 SUPERSEDED: N.D.C.C. § § 31-03-04, 31-03-07, 31-03-08, 31-03-09,
120 31-03-13, 31-06-07, 40-18-09.

121 CONSIDERED: N.D.C.C. § § 29-10.1-19, 31-03-01, 31-03-15, 31-03-16,
122 31-03-17, 31-03-18, 31-03-25, 31-03-26, 31-03-27, 31-03-28, 31-03-29, 31-03-30,
123 31-03-31.

124 CROSS REFERENCE: N.D.R.Civ.P. 45 (Subpoena); N.D.R.Ct. 5.1

125

(Interstate Depositions and Discovery).

Hagburg, Mike

From: Robert G. Hoy <RHoy@OhnstadLaw.com>
Sent: Friday, March 11, 2016 9:44 AM
To: Hagburg, Mike
Subject: Joint Procedure Committee

Mike;
Some years ago Rule 15, NDRCrImP was changed to allow depositions to be taken without prior court approval. Recently, however, I was looking at Rule 17(f), NDRCrImP regarding subpoenas for depositions. It is stated in terms reminiscent of the former Rule 15 where a Court Order was required to take the deposition. I think Rule 17 should be updated to reflect counsel is authorized to issue the subpoena for attendance at a deposition. Perhaps this could be addressed by the Joint Procedure Committee at some point. Thanks. Bob

Robert G. Hoy
Ohnstad Twichell, P.C.
901 - 13th Avenue East
P.O. Box 458
West Fargo, ND 58078-0458
TEL (701) 282-3249



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Effective March 1, 2016

RULE 15. DEPOSITIONS

(a) When Taken. At any time after the defendant has appeared, any party may take testimony of any person by deposition including audio-visual depositions taken as provided in N.D.R.Civ.P. 30.1, except:

(1) the defendant may not be deposed unless the defendant consents and the defendant's lawyer, if the defendant has one, is present or the defendant waives the lawyer's presence;

(2) a discovery deposition may be taken after the time set by the court only with leave of court;

(3) a deposition to perpetuate testimony may be taken only with leave of court, which must be granted upon motion of any party if it appears that the deponent may be able to give material testimony but may be unable to attend a trial or hearing; and

(4) upon motion of a party or of the deponent and upon a showing that the taking of the deposition does or will unreasonably annoy, embarrass, or oppress, or cause undue burden or expense to, the deponent or a party, the court in which the prosecution is pending or a court of the jurisdiction where the deposition is being taken may order that the deposition not be taken or continued or may limit the scope and manner of its taking. Upon demand of the objecting party or deponent, the taking of the deposition may be suspended for the time necessary to make the motion.

Attendance of witnesses and production of documentary evidence and objects may be compelled by subpoena under Rule 17.

(b) Witness Who Would Not Respond To Subpoena. If a party is granted leave to take a deposition to perpetuate testimony, the court, upon motion of the party and a showing of probable cause to believe that the deponent would not respond to a subpoena, by order must direct a law enforcement officer to take the deponent into custody and hold the deponent until the taking of the deposition commences but not to exceed six hours and to keep the deponent in custody during the taking of the deposition. If the motion is by the prosecuting attorney, the court, upon further motion by the prosecuting attorney and a showing of probable cause to believe the defendant would not otherwise attend the taking of the deposition, may make the same order for the defendant.

(c) Notice Of Taking. The party at whose instance the deposition is to be taken shall give all parties reasonable written notice of the name and address of each person to be examined, the time and place for the deposition, and the manner of recording. Upon motion of a party or of the deponent, the court may change the time, place, or manner of record.

(d) How Taken. The deposition must be taken in the manner provided in civil actions, except:

(1) if the deposition is taken at a place over which this state lacks jurisdiction, it may be taken instead in the manner provided by the law of that place;

(2) it must be recorded by the means specified in the notice; and

(3) upon motion of a party and a showing that a party or the deponent is engaging in serious misconduct at the taking of a deposition, the court by order may direct that the deposition's taking be continued in the presence of a designated officer, in which case the designated officer may preside over the remainder of the deposition's taking.

(e) Place Of Taking. The deposition must be taken in a building where the trial may be held, at a place agreed upon by the parties, or at a place designated by special or general order of the court. If the defendant is in custody or subject to terms of release that prohibit leaving the state and does not appear before the court and understandingly and voluntarily waives the right to be present, a deposition to perpetuate testimony must not be taken at a place which requires transporting the defendant within a jurisdiction that does not confer upon law enforcement officers of this state the right to transport prisoners within it.

(f) Presence Of Defendant.

(1) At Discovery Deposition. The defendant may be present at the taking of a discovery deposition, but if the defendant is in custody, the defendant may be present only with leave of court.

(2) At Deposition To Perpetuate Testimony. The defendant must be present at the taking of a deposition to perpetuate testimony, but if the defendant's counsel is present at the taking:

(A) the court may excuse the defendant from being present if the defendant appears before the court and understandingly and voluntarily waives the right to be present;

(B) the taking of the deposition may continue if the defendant, present when it commenced, leaves voluntarily; or

(C) if the deposition's taking is presided over by a judicial officer, the judicial officer may direct that the deposition's taking or part of the deposition's taking be conducted in the defendant's absence if the judicial officer has justifiably excluded the defendant because of the defendant's disruptive conduct.

(3) Unexcused Absence. If the defendant is not present at the commencement of the taking of a deposition to perpetuate testimony and the defendant's absence has not been excused:

(A) its taking may proceed, in which case the deposition may be used only as a discovery deposition; or

(B) if the deposition is taken at the instance of the prosecution, the prosecuting attorney may direct that the commencement of its taking be postponed until the defendant's attendance can be obtained, and the court, upon application of the prosecuting attorney, by order may direct a law enforcement officer to take the defendant into custody during the taking of the deposition.

(4) Taking Depositions Outside the United States Without the Defendant's Presence. The deposition of a witness who is outside the United States may be taken without the defendant's presence if the court makes case-specific findings of all the following:

(A) the witness's testimony could provide substantial proof of a material fact in a felony prosecution;

(B) there is a substantial likelihood that the witness's attendance at trial cannot be obtained;

(C) the witness's presence for a deposition in the United States cannot be obtained;

(D) the defendant cannot be present because:

(i) the country where the witness is located will not permit the defendant to attend the deposition;

(ii) for an in-custody defendant, secure transportation and continuing custody cannot be assured at the witness's location; or

(iii) for an out-of-custody defendant, no reasonable conditions will assure an appearance at the deposition or at trial or sentencing; and

(E) the defendant can meaningfully participate in the deposition through reasonable means.

(g) Payment Of Expenses. If the deposition is taken at the instance of the prosecution, the court may, and in all cases where the defendant is unable to bear the expense the court must, direct the state to pay the expense of taking the deposition, including the reasonable expenses of travel and subsistence of defense counsel and, if the deposition is to perpetuate testimony or if the court permits for a discovery deposition, of the defendant in attending the deposition.

(h) Substantive Use On Grounds Of Unavailability. So far as otherwise admissible under the rules of evidence, a deposition to perpetuate testimony may be used as substantive evidence at the trial or upon any hearing if the deponent is unavailable as defined in N.D.R.Ev. 804(a). A discovery deposition may then be so used if the court determines that the use is fair in light of the nature and extent of the total examination at the taking thereof, but it may be offered by the prosecution only if the defendant was present at its taking. If only a part of a deposition is offered in evidence by a party, an adverse party may require the offering of all of it that is relevant to the part offered.

(i) Objections To Admissibility. Objections to receiving in evidence a deposition or part of a deposition may be made as provided in civil actions.

(j) Deposition By Agreement Not Precluded. Nothing in this rule precludes the taking of a deposition, orally or upon written questions, or the use of a deposition, by agreement of the parties.

EXPLANATORY NOTE

Rule 15 was amended, effective January 1, 1980; March 1, 1990; March 1, 2006; March 1, 2016.

Rule 15 is substantially the same as Rule 431, Uniform Rules of Criminal Procedure (1974). Former Rule 15, effective until January 1, 1980, was an adaptation of Fed.R.Crim.P. 15. The present rule provides for a greatly expanded use of depositions in criminal cases. Subdivisions (a), (b), (f) and (h) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 15 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) permits depositions to be taken to perpetuate testimony, as in the former rule, but also for discovery purposes, which was not previously provided for. Rather than requiring court approval of discovery depositions, this subdivision changes the emphasis by allowing them without court approval, subject to the right of a party or deponent to move under paragraph (4) to have a court order that the deposition be continued, not taken, or limited in scope or manner of taking. The court will set a time after which discovery depositions may not be taken without court permission. Leave of court is required for the taking of a deposition to perpetuate testimony.

Subdivision (a) was amended, effective March 1, 1990. The amendment was made to clarify the fact that audio-visual depositions may be taken under the rule. The amendment also provides that the method of taking audio-visual depositions is governed by N.D.R.Civ.P. 30.1.

Subdivision (b) provides a method for securing the attendance of a deponent who would not respond to a subpoena. In addition, to ensure confrontation and the presence of the defendant required by subdivision (f)(2) to use the deposition at trial, the prosecuting attorney may move the court for an order to secure defendant's presence at the taking of a deposition.

Requirements for notice of the taking of a deposition are set forth in subdivision (c). The court may change the noticed time, place, or manner of recording upon motion of the deponent, as well as any party.

Subdivision (d) specifies that a deposition be taken in the same manner as in civil actions, with certain exceptions. Paragraph (1) covers depositions on enclaves over which the State of North Dakota lacks jurisdiction, such as Indian reservations, as well as depositions outside the physical boundaries of the state. Paragraph (2) allows depositions to be recorded by other than stenographic means, without a court order. Provision is made in paragraph (3) for a court to designate an official to preside over a deposition upon a showing of misconduct by a party or the deponent.

The place of taking a deposition is governed by subdivision (e). Restriction is placed on taking depositions outside of this state in situations where the defendant may not travel or be transported to the proposed location, unless the defendant waives the right to be present.

Subdivision (f) concerns the presence of the defendant at a deposition. Distinction is made between a discovery deposition and one to perpetuate testimony. The defendant is not required to be present at a discovery deposition, but the defendant's presence may enable the prosecution to use the deposition as substantive evidence at trial, as provided in subdivision (h). The taking of a deposition to perpetuate testimony necessitates the defendant's presence, with four exceptions: defendant is excused by the court upon an appearance and voluntary waiver of the right to be present; defendant is voluntarily absent after start of deposition; a judicial officer presiding over the deposition justifiably excludes the defendant because of the defendant's disruptive conduct; or the court allows a deposition to be taken outside the United States without the defendant's presence after making case-specific findings. No warning is expressly required before exclusion, as in Rule 43(b)(2). If the defendant is not present at a deposition to perpetuate testimony under one of the above exceptions, the defendant's counsel must be.

Paragraph (3) of subdivision (f) covers the situation when the defendant is not present at the start of a deposition to perpetuate testimony and has not been excused under paragraph (2). The taking may proceed as a discovery deposition or the prosecuting attorney, if the prosecuting attorney is taking the deposition, may postpone the taking and secure a court order to take the defendant into custody to assure the defendant's presence, so that the deposition will have the greater admissibility of a perpetuation deposition.

Paragraph (f)(4) was adopted, effective March 1, 2016, to allow a deposition to be taken outside the United States without the defendant's presence in certain specified circumstances. The provision was based on Fed.R.Crim.P. 15(c)(3).

SOURCES: Joint Procedure Committee Minutes of April 23-24, 2015, pages 26-27; January 27-28, 2005, page 12; April 20, 1989, pages 4-5; March 24-25, 1988, pages 6-7; December 3, 1987, pages 9-10 and 15; January 25-26, 1979, pages 5-7; December 7-8, 1978, pages 33-37; October 12-13, 1978, page 3; April 2-26, 1973, pages 9-10; June 26-27, 1972, page 3; December 11-12, 1968, pages 2-24; September 26-27, 1968, pages 2-6; Rule 431, Uniform Rules of Criminal Procedure (1974).

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. ch. 31-06.

CONSIDERED: N.D.C.C. ch. 31-04.

CROSS REFERENCE: N.D.R.Crim.P. 17 (Subpoena); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Civ.P. 30.1 (Uniform Audio-Visual Deposition Rule); N.D.R.Ev. 804 (Hearsay Exceptions; Declarant Unavailable).

Rule 17. Subpoena

(a) Content. A subpoena must state the court's name and the title of the proceeding, include the seal of the court, and command the witness to attend and testify at the time and place the subpoena specifies. The clerk must issue a blank subpoena—signed and sealed—to the party requesting it, and that party must fill in the blanks before the subpoena is served.

(b) Defendant Unable to Pay. Upon a defendant's ex parte application, the court must order that a subpoena be issued for a named witness if the defendant shows an inability to pay the witness's fees and the necessity of the witness's presence for an adequate defense. If the court orders a subpoena to be issued, the process costs and witness fees will be paid in the same manner as those paid for witnesses the government subpoenas.

(c) Producing Documents and Objects.

(1) In General. A subpoena may order the witness to produce any books, papers, documents, data, or other objects the subpoena designates. The court may direct the witness to produce the designated items in court before trial or before they are to be offered in evidence. When the items arrive, the court may permit the parties and their attorneys to inspect all or part of them.

(2) Quashing or Modifying the Subpoena. On motion made promptly, the court may quash or modify the subpoena if compliance would be unreasonable or oppressive.

(3) Subpoena for Personal or Confidential Information About a Victim. After a complaint, indictment, or information is filed, a subpoena requiring the production of personal or confidential information about a victim may be served on a third party only by court order. Before entering the order and unless there are exceptional circumstances, the court must require giving notice to the victim so that the victim can move to quash or modify the subpoena or otherwise object.

(d) Service. A marshal, a deputy marshal, or any nonparty who is at least 18 years old may serve a subpoena. The server must deliver a copy of the subpoena to the witness and must tender to the witness one day's witness-attendance fee and the legal mileage allowance. The server need not tender the attendance fee or mileage allowance when the United States, a federal officer, or a federal agency has requested the subpoena.

(e) Place of Service.

(1) In the United States. A subpoena requiring a witness to attend a hearing or trial may be served at any place within the United States.

(2) In a Foreign Country. If the witness is in a foreign country, 28 U.S.C. §1783 governs the subpoena's service.

(f) Issuing a Deposition Subpoena.

(1) Issuance. A court order to take a deposition authorizes the clerk in the district where the deposition is to be taken to issue a subpoena for any witness named or described in the order.

(2) Place. After considering the convenience of the witness and the parties, the court may order—and the subpoena may require—the witness to appear anywhere the court designates.

(g) Contempt. The court (other than a magistrate judge) may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by a federal court in that district. A magistrate judge may hold in contempt a witness who, without adequate excuse, disobeys a subpoena issued by that magistrate judge as provided in 28 U.S.C. §636(e).

(h) Information Not Subject to a Subpoena. No party may subpoena a statement of a witness or of a prospective witness under this rule. Rule 26.2 governs the production of the statement.

Notes

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94-64, §3(29), July 31, 1975, 89 Stat. 375; Apr. 30, 1979, eff. Dec. 1, 1980; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 23, 2008, eff. Dec. 1, 2008.)

Notes of Advisory Committee on Rules—1944

Note to Subdivision (a). This rule is substantially the same as Rule 45(a) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (b). This rule preserves the existing right of an indigent defendant to secure attendance of witnesses at the expense of the Government, 28 U.S.C. [former] 656 (Witnesses for indigent defendants). Under existing law, however, the right is limited to witnesses who are within the district in which the court is held or within one hundred miles of the place of trial. No procedure now exists whereby an indigent defendant can procure at Government expense the attendance of witnesses found in another district and more than 100 miles of the place of trial. This limitation is abrogated by the rule so that an indigent defendant will be able to secure the attendance of witnesses at the expense of the Government no matter where they are located. The showing required by the rule to justify such relief is the same as that now exacted by 28 U.S.C. [former] 656.

Note to Subdivision (c). This rule is substantially the same as Rule 45(b) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (d). This rule is substantially the same as Rule 45(c) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix]. The provision permitting persons other than the marshal to serve the subpoena, and requiring the payment of witness fees in Government cases is new matter.

Note to Subdivision (e)(1). This rule continues existing law, 28 U.S.C. [former] 654 (Witnesses; subpoenas; may run into another district). The rule is different in civil cases in that in such cases, unless a statute otherwise provides, a subpoena may be served only within the district or within 100 miles of the place of trial, 28 U.S.C. [former] 654; Rule 45(e)(1) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (e)(2). This rule is substantially the same as Rule 45(e)(2) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix]. See *Blackmer v. United States*, 284 U.S. 421, upholding the validity of the statute referred to in the rule.

Note to Subdivision (f). This rule is substantially the same as Rule 45(d) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (g). This rule is substantially the same as Rule 45(f) of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Notes of Advisory Committee on Rules—1948 Amendment

The amendment is to substitute proper reference to Title 28 in place of the repealed act.

Notes of Advisory Committee on Rules—1966 Amendment

Subdivision (b).—Criticism has been directed at the requirement that an indigent defendant disclose in advance the theory of his defense in order to obtain the issuance of a subpoena at government expense while the

government and defendants able to pay may have subpoenas issued in blank without any disclosure. See Report of the Attorney General's Committee on Poverty and the Administration of Criminal Justice (1963) p. 27. The Attorney General's Committee also urged that the standard of financial inability to pay be substituted for that of indigency. *Id.* at 40–41. In one case it was held that the affidavit filed by an indigent defendant under this subdivision could be used by the government at his trial for purposes of impeachment. *Smith v. United States*, 312 F.2d 867 (D.C.Cir. 1962). There has also been doubt as to whether the defendant need make a showing beyond the face of his affidavit in order to secure issuance of a subpoena. *Greenwell v. United States*, 317 F.2d 108 (D.C.Cir. 1963).

The amendment makes several changes. The references to a judge are deleted since applications should be made to the court. An *ex parte* application followed by a satisfactory showing is substituted for the requirement of a request or motion supported by affidavit. The court is required to order the issuance of a subpoena upon finding that the defendant is unable to pay the witness fees and that the presence of the witness is necessary to an adequate defense.

Subdivision (d).—The subdivision is revised to bring it into conformity with 28 U.S.C. §1825.

Notes of Advisory Committee on Rules—1972 Amendment

Subdivisions (a) and (g) are amended to reflect the existence of the “United States magistrate,” a phrase defined in rule 54.

Notes of Advisory Committee on Rules—1974 Amendment

Subdivision (f)(2) is amended to provide that the court has discretion over the place at which the deposition is to be taken. Similar authority is conferred by Civil Rule 45(d)(2). See C. Wright, *Federal Practice and Procedure: Criminal* §278 (1969).

Ordinarily the deposition should be taken at the place most convenient for the witness but, under certain circumstances, the parties may prefer to arrange for the presence of the witness at a place more convenient to counsel.

Notes of Committee on the Judiciary, House Report No. 94–247; 1975 Amendment

A. Amendments Proposed by the Supreme Court. Rule 17 of the Federal Rules of Criminal Procedure deals with subpoenas. Subdivision (f)(2) as proposed by the Supreme Court provides:

The witness whose deposition is to be taken may be required by subpoena to attend at any place designated by the trial court.

B. Committee Action. The Committee added language to the proposed amendment that directs the court to consider the convenience of the witness and the parties when compelling a witness to attend where a deposition will be taken.

Notes of Advisory Committee on Rules—1979 Amendment

Note to Subdivision (h). This addition to rule 17 is necessary in light of proposed rule 26.2, which deals with the obtaining of statements of government and defense witnesses.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on Rules—1993 Amendment

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101–650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

Committee Notes on Rules—2002 Amendment

The language of Rule 17 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

A potential substantive change has been made in Rule 17(c)(1); the word “data” has been added to the list of matters that may be subpoenaed. The Committee believed that inserting that term will reflect the fact that in an increasingly technological culture, the information may exist in a format not already covered by the more conventional list, such as a book or document.

Rule 17(g) has been amended to recognize the contempt powers of a court (other than a magistrate judge) and a magistrate judge.

Committee Notes on Rules—2008 Amendment

Subdivision (c)(3). This amendment implements the Crime Victims’ Rights Act, codified at 18 U.S.C. §3771(a)(8), which states that victims have a right to respect for their “dignity and privacy.” The rule provides a protective mechanism when the defense subpoenas a third party to provide personal or confidential information about a victim. Third party subpoenas raise special concerns because a third party may not assert the victim’s interests, and the victim may be unaware of the subpoena. Accordingly, the amendment requires judicial approval before service of a subpoena seeking personal or confidential information about a victim from a third party. The phrase “personal or confidential information,” which may include such things as medical or school records, is left to case development.

The amendment provides a mechanism for notifying the victim, and makes it clear that a victim may move to quash or modify the subpoena under Rule 17(c)(2)—or object by other means such as a letter—on the grounds that it is unreasonable or oppressive. The rule recognizes, however, that there may be exceptional circumstances in which this procedure may not be appropriate. Such exceptional circumstances would include, evidence that might be lost or destroyed if the subpoena were delayed or a situation where the defense would be unfairly prejudiced by premature disclosure of a sensitive defense strategy. The Committee leaves to the judgment of the court a determination as to whether the judge will permit the question whether such exceptional circumstances exist to be decided ex parte and authorize service of the third-party subpoena without notice to anyone.

The amendment applies only to subpoenas served after a complaint, indictment, or information has been filed. It has no application to grand jury subpoenas. When the grand jury seeks the production of personal or confidential information, grand jury secrecy affords substantial protection for the victim’s privacy and dignity interests.

Changes Made to Proposed Amendment Released for Public Comment. The proposed amendment omits the language providing for ex parte issuance of a court order authorizing a subpoena to a third party for private or confidential information about a victim. The last sentence of the amendment was revised to provide that unless there are exceptional circumstances the court must give the victim notice before a subpoena seeking the victim’s personal or confidential information can be served upon a third party. It was also revised to add the language “or otherwise object” to make it clear that the victim’s objection might be lodged by means other than a motion, such as a letter to the court.

Amendment by Public Law

1975 —Subd. (f)(2). Pub. L. 94-64 amended par. (2) generally.

Effective Date of 1979 Amendment

Amendment of this rule by addition of subd. (h) by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96-42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

Effective Date of Amendments Proposed April 22, 1974; Effective Date of 1975 Amendments

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94-64, effective Dec. 1, 1975, see section 2 of Pub. L. 94-64, set out as a note under rule 4 of these rules.

Supersedure

Provision of subd. (d) of this rule that witness shall be tendered the fee for 1 day's attendance and mileage allowed by law as superseded by section 1825 of Title 28, Judiciary and Judicial Procedure, see such section and Reviser's Note thereunder.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: May 1, 2016
RE: Rule 41, N.D.R.Crim.P., Search and Seizure

Attorney Tom Dickson has requested that the committee consider amendments to Rule 41 that would supersede the part of N.D.C.C. 29-29-01 that requires evidence seized under a search warrant to be brought before the magistrate. He says the statute is outdated and has led to unfortunate consequences. His email is attached.

Attached are proposed amendments to Rule 41 that would supersede the requested part of N.D.C.C. 29-29-01.

N.D.C.C. 29-29-01, copy attached, was considered but not superseded by the committee and the Supreme Court when the rule was first adopted. This means that they knew the statute existed and it was part of what they considered when drafting Rule 41.

Rule 41 was somewhat unique in that it was discussed at several meetings before it was finally approved by the committee. There is nothing in the minutes, however, on whether property seized under a search warrant would have to be delivered directly to the magistrate. Rule 41 has always required return only of an inventory.

It is possible that the committee did not supersede N.D.C.C. 29-29-01 because it defines what can be done under a warrant (bring the property before the magistrate) while Rule 41 sets out the specific procedure for accomplishing the return (inventory the property and bring the magistrate the inventory).

RULE 41. SEARCH AND SEIZURE

1 (a) Authority to Issue a Warrant. A state or federal magistrate acting within
2 or for the territorial jurisdiction where the property or person sought is located, or
3 from which it has been removed, may issue a search warrant authorized by this
4 rule.

5 (b) Persons or Property Subject to Search and Seizure. A warrant may be
6 issued for any of the following:

7 (1) property that constitutes evidence of a crime;

8 (2) contraband, the fruits of crime, or things criminally possessed;

9 (3) property designed or intended for use, or which is or has been used as
10 the means of, committing a crime;

11 (4) a person for whose arrest there is probable cause, or who is unlawfully
12 restrained.

13 (c) Issuing the Warrant.

14 (1) Warrant on Affidavit or Sworn Recorded Testimony.

15 (A) In General. A warrant other than a warrant on oral testimony under
16 Rule 41 (c)(2) may issue only on an affidavit or affidavits sworn to or sworn
17 recorded testimony taken before a state or federal magistrate and establishing the
18 grounds for issuing the warrant.

19 (B) Examination. Before ruling on a request for a warrant, the magistrate

20 may require the affiant or other witnesses to appear personally and may examine
21 under oath the affiant and any witnesses the affiant may produce. This examination
22 must be recorded and made part of the proceedings.

23 (C) Probable Cause. If the state or federal magistrate is satisfied that
24 grounds for the application exist or that there is probable cause to believe they
25 exist, the magistrate must issue a warrant identifying the property or person to be
26 seized and naming or describing with particularity the person or place to be
27 searched. The finding of probable cause may be based upon hearsay evidence in
28 whole or in part.

29 (D) Command to Search. The warrant must be directed to a peace officer
30 authorized to enforce or assist in enforcing any law of this state. It must command
31 the officer to search, within a specified period of time not to exceed ten days, the
32 person or place named for the property or person specified.

33 (E) Service and Return. The warrant must be served in the daytime, unless
34 the issuing authority, by appropriate provision in the warrant, and for reasonable
35 cause shown, authorizes its execution at times other than daytime. It may designate
36 a state or federal magistrate to whom it must be returned.

37 (2) Warrant by Telephonic or Other Reliable Electronic Means. In
38 accordance with Rule 4.1, the magistrate may issue a warrant based on information
39 communicated by telephone or other reliable electronic means.

40 (3) Warrant Seeking Electronically Stored Information. A warrant under

41 Rule 41(c) may authorize the seizure of electronic storage media or the seizure or
42 copying of electronically stored information. Unless otherwise specified, the
43 warrant authorizes a later review of the media or information consistent with the
44 warrant. The time for executing the warrant refers to the seizure or on-site copying
45 of the media or information, and not to any later off-site copying or review.

46 (d) Execution and Return With Inventory.

47 (1) Execution. The person who executes the warrant must enter the date and
48 time of the execution on the face of the warrant.

49 (2) Inventory. An officer present during the execution of the warrant must
50 prepare and verify an inventory of any property seized. The officer must do so in
51 the presence of the applicant for the warrant and the person from whom, or from
52 whose premises, the property was taken. If either one is not present, the officer
53 must prepare and verify the inventory in the presence of at least one other credible
54 person. In a case involving the seizure of electronic storage media or the seizure or
55 copying of electronically stored information, the inventory may be limited to
56 describing the physical storage media that were seized or copied. The officer may
57 retain a copy of the electronically stored information that was seized or copied.

58 (3) Receipt. The officer taking property under the warrant must:

59 (A) give a copy of the warrant and a receipt for the property taken to the
60 person from whom or from whose premises the property was taken; or

61 (B) leave a copy of the warrant and receipt at the place from which the

62 officer took the property.

63 (4) Return. The officer executing the warrant must promptly return
64 it—together with a copy of the inventory—to the magistrate designated on the
65 warrant. The officer may do so by reliable electronic means. The magistrate on
66 request must give a copy of the inventory to the person from whom, or from whose
67 premises, the property was taken and to the applicant for the warrant.

68 (e) Motion for Return of Property. A person aggrieved by an unlawful
69 search and seizure of property or by the deprivation of property may move the trial
70 court for the property's return. The court must receive evidence on any factual
71 issue necessary to decide the motion. If it grants the motion, the court must return
72 the property to the moving party, although the court may impose reasonable
73 conditions to protect access and use of the property in later proceedings. If a
74 motion for return of property is made or heard after an indictment, information, or
75 complaint is filed, it must be treated also as a motion to suppress under Rule 12.

76 (f) Motion to Suppress. A motion to suppress evidence may be made in the
77 trial court as provided in Rule 12.

78 (g) Return of Papers to Clerk. The magistrate to whom the warrant is
79 returned must attach to the warrant a copy of the return, inventory and all other
80 related papers and must file them with the clerk of the trial court.

81 (h) Scope and Definitions.

82 (1) Scope. This rule does not modify any statute regulating search or

83 seizure, or the issuance and execution of a search warrant in special circumstances.

84

85 (2) Definitions. The following definitions apply under this rule:

86 (A) "Property" includes documents, books, papers and any other tangible
87 objects.

88 (B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to
89 local time.

90 EXPLANATORY NOTE

91 Rule 41 was amended, effective September 1, 1983; March 1, 1990; March
92 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1,
93 2013. The explanatory note was amended, effective _____.

94 Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement
95 the provisions of Article I, Section 8, of the North Dakota Constitution and the
96 Fourth Amendment to the United States Constitution, which guarantee, "The right
97 of the people to be secure in their persons, houses, papers and effects against
98 unreasonable searches and seizures shall not be violated; and no warrant shall issue
99 but upon probable cause, supported by oath or affirmation, particularly describing
100 the place to be searched and the persons and things to be seized." To implement
101 this constitutional protection, an illegal search and seizure will bar the use of such
102 evidence in a criminal prosecution. The suppression sanction is imposed in order
103 to discourage abuses of power by law enforcement officials in conducting searches

104 and seizures.

105 Subdivision (a) provides that a search warrant be issued by a magistrate,
106 either state or federal, acting within or for the territorial jurisdiction. The provision
107 which permits a federal magistrate to issue a search warrant is the reciprocal of the
108 federal rule, which permits a state magistrate to issue a search warrant pursuant to
109 a federal matter. It is contemplated that a search warrant will be issued by a federal
110 magistrate only on the nonavailability of a state magistrate.

111 Subdivision (a) does not require that the individual requesting the search
112 warrant be a law enforcement officer. There appears to be common-law support
113 for the use of the search warrant as a means of getting an owner's property back.
114 The primary purpose of the rule, however, is the authorization of a search in the
115 interest of law enforcement and as a practical matter the request for issuance of a
116 search warrant by someone other than a law enforcement officer is virtually
117 nonexistent.

118 Subdivision (b) describes the property or persons which may be seized with
119 a lawfully issued search warrant. Issuance of a search warrant to search for items
120 of solely evidential value is authorized. There is no intention to limit the protection
121 of the Fifth Amendment against compulsory self-incrimination, so items that are
122 solely "testimonial" or "communicative" in nature might well be inadmissible on
123 those grounds.

124 Paragraph (c)(1) follows the federal rule except that North Dakota's rule

125 permits the issuance of a warrant on sworn recorded testimony without an
126 affidavit. Probable cause for the issuance of a search warrant should be assessed
127 under the totality-of-circumstances test.

128 The provision for examination of the affiant before the magistrate is
129 intended to assure the magistrate an opportunity to make a careful decision as to
130 whether there is probable cause based on legally obtained evidence. The
131 requirement that the testimony be recorded is to insure an adequate basis for
132 determining the sufficiency of the evidentiary grounds for the issuance of the
133 search warrant if a motion to suppress is later filed.

134 The language of subparagraph (c)(1)(E), "for reasonable cause shown," is
135 intended to explain the necessity for executing the warrant at a time other than the
136 daytime. This provision is intended to be a substantive prerequisite to the issuance
137 of a warrant that is to be executed at a time other than daytime, although it is not
138 necessary that the quoted language ("for reasonable cause shown") be defined in
139 subdivision (h).

140 Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph
141 (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a
142 warrant based on information communicated by telephone or other reliable
143 electronic means under the procedure set out in Rule 4.1.

144 Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective
145 March 1, 2012, to provide guidelines for warrants authorizing the seizure of

146 electronic storage media and electronically stored information and for the
147 inventory of seized electronic material. The amendments were based on the
148 December 1, 2009, amendments to Fed.R.Crim.P. 41.

149 Subdivision (d) is intended to make clear that a copy of the warrant and an
150 inventory receipt for property taken shall be left at the premises at the time of the
151 lawful search or with the person from whose premises the property is taken if he is
152 present.

153 Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer
154 to make a return by reliable electronic means.

155

156 Subdivision (e) requires that the motion for return of property be made in the trial
157 court rather than in a preliminary hearing before the magistrate who issued the
158 warrant. It further provides for a return of the property if: (1) the person is entitled
159 to lawful possession, and (2) the seizure is illegal. However, property which is
160 considered contraband does not have to be returned even if seized illegally. The
161 last sentence of subdivision (e) provides that a motion for return of property, made
162 in the trial court, shall be treated as a motion to suppress under N.D.R.Crim.P. 12.
163 The purpose of this provision is to have a series of pretrial motions disposed of in
164 a single appearance, such as at a Rule 17.1 (Omnibus Hearing), rather than in a
165 series of pretrial motions made on different dates causing undue delay in
166 administration.

167 Subdivisions (a), (b), and (c) were amended in 1983, effective September 1,
168 1983, to add persons as permissible objects of search warrants. These amendments
169 follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible
170 for a search warrant to issue to search for a person if there is probable cause to
171 arrest that person; or that person is being unlawfully restrained.

172 Subdivisions (c) and (d) were amended, effective March 1, 1990. The
173 amendments are technical in nature and no substantive change is intended.

174 Subdivision (e) was amended, effective March 1, 1992, to track the federal
175 rule.

176 Rule 41 was amended, effective March 1, 2006, in response to the
177 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
178 language and organization of the rule were changed to make the rule more easily
179 understood and to make style and terminology consistent throughout the rules.

180 SOURCES: Joint Procedure Committee Minutes of
181 _____; January 26-27, 2012, pages 26-27; April 28-29, 2011,
182 page 17; September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26;
183 April 28-29, 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29,
184 1994, pages 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages
185 15-16; April 20, 1989, page 4; December 3, 1987, page 15; October 15-16, 1981,
186 pages 12-15; December 7-8, 1978, pages 23-26; October 12-13, 1978, pages
187 15-19; April 24-26, 1973, page 14; December 11-15, 1972, pages 31-37;

188 November 18-20, 1971, pages 3-9; September 16-18, 1971, pages 11-32; March
189 12-13, 1970, page 3; November 20-21, 1969, pages 19-24; May 15-16, 1969,
190 pages 21-23; Fed.R.Crim.P. 41.

191 STATUTES AFFECTED:

192 SUPERSEDED: N.D.C.C. §§ 29-29-01 to the extent that it requires
193 personal property to be brought before the magistrate. 29-29-02, 29-29-03,
194 29-29-04, 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13,
195 29-29-14, 29-29-15, 29-29-16, 29-29-17.

196 CONSIDERED: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3),
197 ~~29-29-01~~, 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.
198 N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

199 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or
200 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12
201 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and
202 Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct.
203 Admin. R. 52 (Interactive Television).

Hagburg, Mike

From: Hagburg, Mike
Sent: Monday, May 02, 2016 11:20 AM
To: Hagburg, Mike
Subject: FW: ND Crimp 41

From: Tom Dickson [<mailto:tdickson@dicksonlaw.com>]
Sent: Monday, March 14, 2016 3:27 PM
To: Hagburg, Mike
Subject: RE: NDCrimP 41

Mike:

Thank you for your assistance.

However, the statute is outdated. It was written in 1877. No one brings evidence to the courthouse anymore. It is also cause for great confusion as was recently witnessed in the payload case. A law enforcement got criminally charged because the AG's office uses out of date forms.

Some of these statutes need to be addressed by your committee. Another one is the appealable order statute which was also enacted in the 19th Century.

Appealing an order deferring imposition of sentence should not be so complicated.

Tom

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From: Hagburg, Mike [<mailto:MHagburg@ndcourts.gov>]
Sent: Monday, March 14, 2016 2:43 PM
To: Tom Dickson
Subject: RE: NDCrimP 41

I see by the rule history that 29-29-01 was considered, but not superseded, by the committee and the court when the rule was first adopted. This means that they knew the statute existed and it was presumably part of their materials when they were drafting the rule.

Looking at the early minutes, Rule 41 was somewhat unique in that it was discussed at several meetings before it was finally approved by the committee. However, the issue of whether property seized under a search warrant would ever have to be delivered directly to the magistrate was not discussed. This is probably because the original version of the rule, just like the current version, only required return of the warrant and the inventory to the magistrate. So I think the continuing intent as the rule has been developed was that the magistrate gets the inventory, not the actual property.

I think it also could be argued that 29-29-01 defines what can be done under a warrant (bring the property before the magistrate) while Rule 41 sets out the specific procedure for accomplishing the return (inventory the property and bring the magistrate the inventory). Under the state constitution, a court promulgated rule of procedure prevails when it is in

conflicts with a legislatively enacted rule of procedure. N.D. Const. Art. VI, Section 3, City of Fargo v. Dawson, 466 N.W.2d 584 (N.D. 1991).

Mike

From: Tom Dickson [<mailto:tdickson@dicksonlaw.com>]
Sent: Sunday, March 13, 2016 3:05 PM
To: Hagburg, Mike
Subject: NDCrimP 41

Mike:

I am calling upon your expertise once again. An issue has come up and I need some historical perspective. Section 29-29-01 NDCC was initially passed in 1877. It provided that "the peace officer to search for personal property and to bring it before the magistrate."

NDRCrimP 41 like all modern rules requires only that that the inventory be filed with the Magistrate. There is no requirement that the property literally be brought before the Magistrate. This is in compliance with common sense and with modern police procedure that the contraband is not literally be given to the Magistrate.

My question is when or if Rule 41 was amended to eliminate the actual delivery of the evidence to the magistrate.

Thank you.

Tom

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29-29-01. Search warrant defined. A search warrant is an order in writing, made in the name of the state, signed by a magistrate, directed to a peace officer, commanding the peace officer to search for personal property and to bring it before the magistrate.

Source: C.Crim.P. 1877, § 561; R.C. 1895, § 8461; R.C. 1899, § 8461; R.C. 1905, § 10271; C.L. 1913, § 11129; R.C. 1943, § 29-2901.

Cross-References.

Declaration of rights, see N.D. Const., Art. I.
Search and seizure, see N.D.R.Crim.P., Rule 41.

Federal Prosecution.

In bank robbery prosecution under federal

statute, search warrant issued by police magistrate rather than federal court was held proper. *Gallagher v. United States*, 406 F.2d 102 (8th Cir. 1969), cert. denied, 395 U.S. 968, 89 S. Ct. 2117, 23 L. Ed. 2d 756 (1969).

Collateral References.

Validity of, and admissibility of evidence discovered in, search authorized by judge over telephone, 38 A.L.R.4th 1145.

Validity of anticipatory search warrants — state cases, 67 A.L.R.5th 361.

MEMO

TO: Joint Procedure Committee
FROM: Mike Hagburg
DATE: May 1, 2016
RE: Rule 3.1, N.D.R.Ct., Pleadings

The Odyssey User Group recently reviewed Rule 3.1 as part of an effort to update how documents are handled within the Odyssey system. They developed a procedure for dealing with non-conforming documents that are stricken under Rule 3.1(j). Basically, they decided that the documents would be hidden from system users, but not destroyed or deleted.

In the process of this review, they asked staff what the legal effect of having a document “stricken” would be. This is explained in the rule text: its service is to be of no effect. They suggested that the committee consider whether this is appropriate and whether some safe harbor relief should be allowed.

Under Rule 3.1(j), ordering a document to be stricken is something that can be done at the discretion of the court and can only happen if a party refused to obey an order to reform a non-conforming document. Therefore, it is possible that the committee considered having “service to be of no effect” an appropriate remedy for a party’s refusal to fix a document. On the other hand, Rule 3.5 provides a safe harbor for documents that are rejected on initial filing and the committee may consider it appropriate to provide the same relief to parties who have documents stricken under Rule 3.1(j).

Proposed amendments to Rule 3.1 that would offer a safe harbor provision based on the provision in Rule 3.5 are attached.

RULE 3.1 PLEADINGS

1 (a) Legibility and Numbering. All pleadings and other documents must be
2 typewritten, printed, or reproduced and easily readable. Each sheet must be
3 separately numbered. Pleadings and other documents filed with the court, except as
4 otherwise permitted by the court, must be prepared on 8 1/2 x 11 inch white paper.

5 (b) Signature. All pleadings and other documents of a party represented by
6 an attorney must be signed by at least one attorney of record in the attorney's
7 individual name and contain the attorney's address, telephone number, e-mail
8 address for electronic service, and State Board of Law Examiners identification
9 number. All pleadings and other documents of a party who is not represented by an
10 attorney must be signed by the party and contain the party's address and telephone
11 number.

12 (c) Spacing and Names. Writing must appear on one side of the sheet only
13 and must be double-spaced, except for quoted material. Names must be typed or
14 printed beneath all signatures.

15 (d) Binding. All pleadings and other documents in an action or proceeding
16 must be filed by the clerk flat and unfolded and each set of papers firmly fastened
17 together.

18 (e) Filing of Documents. A party seeking to file a pleading or other
19 document must submit it to the clerk. The first submitted version of a pleading or

20 document will be treated as the original unless otherwise ordered by the court. A
21 party need only file a single copy of any pleading or document.

22 (f) Lost Papers. If any original document is lost or withheld by any person,
23 the court may authorize a copy to be filed.

24 (g) File Numbers. The clerk, at the time of the filing of a case and at the
25 time of the filing of any responsive pleading, must assign a file number to the case
26 and immediately notify the attorney of record of the assigned file number.
27 Thereafter, all documents and pleadings to be filed must bear the assigned file
28 number on the front or title page in the upper righthand portion of the document to
29 be filed.

30 (h) Filing After Service. After the complaint is filed, all documents required
31 to be served on a party, together with certificate of service, must be filed with the
32 court within a reasonable time after service. Discovery documents may only be
33 filed as allowed by N.D.R.Civ.P. 5(d)(3).

34 (i) Privacy Protection. Parties must follow privacy protection instructions in
35 N.D.R.Ct. 3.4 when making filings with the court. Court personnel have no duty to
36 review documents for compliance with N.D.R.Ct. 3.4.

37 (j) Non-Conforming Documents.

38 (1) Documents and pleadings that do not conform to this rule may not be
39 filed.

40 (2) If a non-conforming document is filed by mistake, the court on motion

41 or on its own may order the pleading or other document reformed. If the order is
42 not obeyed, the court may order the document stricken and its service to be of no
43 effect.

44 (3) If a document is stricken, the time for filing is tolled from the time of
45 submission to the time the order striking the document is filed. The document will
46 be considered timely filed if resubmitted in corrected form within three days after
47 the order striking the document is filed.

48 EXPLANATORY NOTE

49 Rule 3.1 was amended, effective January 1, 1988; March 1, 1996; March 1,
50 1999; August 1, 2001; March 1, 2005; March 1, 2007; March 1, 2009; May 1,
51 2012; March 1, 2013; April 15, 2013; March 1,
52 2014;_____.

53 Rule 3.1 was reorganized, effective May 1, 2012, to make it clear that all
54 documents presented for filing must conform to all applicable requirements of the
55 rule.

56 A new subdivision (b) was added, effective March 1, 1996, which contains
57 signature requirements. The letter designation of each existing subdivision was
58 amended accordingly.

59 Subdivision (b) was amended, effective April 15, 2013, to require the
60 e-mail address for electronic service under Rule 3.5 to be provided in filed
61 documents.

62 A new subdivision (e) was added, effective March 1, 2005, to clarify that
63 documents must be filed with the clerk. Submitting a document to a judge or to
64 court personnel other than the clerk does not constitute filing. The first version of a
65 given document submitted to the clerk, regardless of what form it is in, will be
66 filed and treated as the original. A party seeking to correct the original or have
67 another document treated as the original must obtain an order from the court.

68 Subdivision (e) was amended, effective March 1, 2014, to clarify that only a
69 single copy of any pleading or document need be filed with the court. This
70 provision supersedes the requirement in N.D.C.C. § 29-15-21 that a demand for
71 change of judge be filed in triplicate and the requirements in N.D.C.C. §§
72 14-12.2-36 and 14-14.1-25 for the filing of two copies of an order. This provision
73 should be interpreted as superseding any statutory requirement that multiple copies
74 of a document be filed with the court.

75 Subdivision (h) was amended, effective March 1, 2014, to require, once the
76 complaint has been filed, filing of all documents that must be served, along with a
77 certificate of service, within a reasonable time after service. This provision is
78 modeled after Minn. R. Civ. P. 5.04.

79 Subdivision (i) was amended, effective March 1, 2007, to specify that court
80 personnel have no duty to review documents for compliance with privacy
81 protection rules.

82 Subdivision (i) was amended, effective March 1, 2009, to reflect the

83 addition of document privacy protection requirements to N.D.R.Ct. 3.4.

84 Subdivision (j) was amended, effective _____ to time of
85 filing to be tolled pending resubmission of a stricken document.

86 SOURCES: Joint Procedure Committee Minutes of
87 _____; September 26, 2013, pages 7-11; April 25-26, 2013,
88 pages 13-15; September 27, 2012, page 14; January 26-27, 2012, pages 16-17;
89 January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27,
90 2007, page 31; September 22-23, 2005, pages 16-17; September 23-24, 2004,
91 pages 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30, 2004, pages 3-8;
92 September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12; January 29-30,
93 1998, page 22; September 29-30, 1994, pages 6-7.

94 STATUTES AFFECTED:

95 Superseded: N.D.C.C. §§ 14-12.2-36 (in part), 14-14.1-25 (in part), and
96 29-15-21 (in part).

97 CROSS REFERENCE: N.D.R.Civ.P. 5 (Service and Filing of Pleadings
98 and Other Papers); N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other
99 Papers; Representations to Court; Sanctions); N.D.R.Ct. 3.4 (Privacy Protection
100 for Filings Made with the Court); N.D.R.Ct. 3.5 (Electronic Filing in the District
101 Courts); N.D.Sup.Ct.Admin.R. 41 (Access to Judicial Records).