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**MEMORANDUM**

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**TO:** North Dakota Joint Procedure Rule-65 Subcommittee Members

**FROM:** Subcommittee Member Larry Boschee

**SUBJECT:** Draft Rule 65 of the North Dakota Rules of Civil Procedure

**DATE:** April 5, 2011

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At the last joint procedure committee, the committee reviewed the draft rule 65 that the rule-65 subcommittee presented. The committee made several changes to that draft before adopting the present version of the rule. The rule-65 subcommittee has reviewed the current version of the rule for unintended glitches, ambiguities, and areas where the language could be improved.

The subcommittee also drafted a proposed explanatory note for the rule. It contains concepts from the current version of the rule that may be better suited for the explanatory note.

**Proposed Changes to the Current Version of Rule 65**

The rule-65 subcommittee recommends consideration of the following changes to the current version of the rule:

**65(a)(1):**

1. Change the heading to “Motion, Proposed Complaint, and Filing” so that the heading more fully describes the content of the section.

2. Recast the first sentence to, “The provisional-injunctive moving party must submit a proposed complaint seeking injunctive relief with the motion.” This proposed revision puts the sentence in the active voice.

3. Change the second sentence to, “The moving party must file the motion, proposed complaint, and other supporting documents no later than the next day after the granting or denial of the motion that the courthouse is open normal working hours.” This proposed revision puts the sentence in the active voice and requires the filing of “other supporting documents” along with the motion and the proposed complaint. It also changes the deadline for filing the documents from “the next day that is not a Saturday, Sunday, or legal holiday” to “the next day the courthouse is open normal working hours.” The reason for this change is to account for the fact that the courthouse could be closed for reasons other than a weekend or a legal holiday. For example, the courthouse could be closed because of a blizzard.

4. Add as the final sentence, “Unless the moving party timely files these documents, an issued provisional injunction expires.” The purpose of this proposed sentence is to provide an enforcement mechanism for the requirement that the provisional-injunction moving party file the case.

**65(a)(5):**

1. Change the word “entry” in the first sentence to “issuance.” “Issuance” rather than “entry” should trigger the 28-day provisional-injunction period. Since a party

may move for a provisional injunction without filing the case, a delay may occur between issuance and entry of the injunction.

2. Add the words “or after” after the word “At” in the third sentence. If the need arises, the court could extend a provisional injunction for purposes of deciding the preliminary-injunction motion after the preliminary-injunction hearing.

**65(a)(7)(A):**

1. Change the first sentence to, “If the adverse party received less than four days actual notice of the provisional-injunction motion before the provisional injunction issued, the adverse party may move to dissolve or modify the injunction on four days actual notice, or on shorter notice the court for good cause sets, to the party that obtained the injunction.” This sentence clarifies that the moving party must give the adverse party four-days “actual notice” of the motion to preclude the adverse party from moving to dissolve or modify.

2. Delete the sentence, “The court must hear and decide the motion as promptly as justice requires.” This concept seems better suited for the explanatory note.

**65(a)(7)(C):**

1. Delete this section because parties do not need a rule to stipulate. This concept seems better suited for the explanatory note.

**65(b)(3):**

Change the section to read as follows:

Passing Injunction. A passing injunction is an interim injunction that the court may issue to allow it time to decide a preliminary-injunction motion

when no provisional injunction is in place. If at the preliminary-injunction hearing the moving party shows appropriate injunction grounds and the clear need for immediate relief, the court may issue a passing injunction effective for 14 days. The court may extend the passing injunction for good cause, but must enter the reasons for any extension in the record.

This proposed revision provides a definition of a passing injunction that is parallel to the definitions for the provisional and preliminary injunctions.

**65(d)(3):**

Delete this section. Parties do not need a rule to stipulate. Also, evidence received at the preliminary-injunction hearing will be part of the record without a rule saying that it is. These concepts seem better suited for the explanatory note.

At a minimum, the introductory word “If” should be changed to “When.” Oral testimony is allowed under the current version of rule 65(c)(3), unless the court directs otherwise.

**65(f)(2)(B):**

Recast the sentence to, “ Unless the court specifically finds that the adverse party received four day’s actual notice of the provisional-injunction motion before the provisional injunction issued, the provisional injunction must state that the adverse party may, under Rule 65(a)(7), move to dissolve or modify the injunction on four day’s actual notice, or on shorter notice the court for good cause sets, to the party that obtained the injunction.” This proposed sentence changes the style of the sentence and clarifies that the four-day period is measured backwards from the date the provisional injunction issued.

**65(g)(1):**

Adopt one of the following two alternatives:

*Alternative 1:* Add the word “issued” before the word “interim” and the words “for enforcement” before the word “until,” so that the complete sentence reads as follows:

Generally. Except for good cause shown and recited in the record, an issued interim injunction does not become effective for enforcement until the moving party posts security in a form and amount that the court considers sufficient to pay the enjoined party’s costs and damages if found wrongfully enjoined.

*Alternative 2:* Replace the existing sentence with the following two sentences:

Generally. Except for good cause shown and recited in the record, the moving party must post security for an interim injunction in a form and amount that the court considers sufficient to pay the enjoined party’s costs and damages if found wrongfully enjoined. The court must vacate the injunction unless the party that obtained the injunction provides the security within a reasonable time that the court sets.

The current version of the rule says that an “interim injunction does not become effective” until the moving party posts the required security. This language creates an ambiguity regarding when the limited periods for the provisional and passing injunctions start. These periods should start immediately; not when the moving party posts the security. Otherwise the moving party would have the power to delay the start of these periods.

Under either alternative the provisional and passing injunction periods start immediately. Under alternative 1, the injunction does not become effective for enforcement until the moving party posts the security. Under alternative 2, the injunction

is effective for enforcement immediately, but the court must vacate it if the party does not post the required security by the deadline set.

A matter to consider is the length of time it could take the moving party to obtain and post security. If the court issues an injunction on a Saturday afternoon, the moving party may not be able to obtain and post the security until Monday. Under alternative one, the adverse party could violate the injunction's terms on Sunday with impunity.

**65(g)(4):**

1. Replace the words "An enjoined party" in the first sentence with the words "A party enjoined under an interim injunction." This proposed change would clarify that only a party enjoined under an interim injunction may move for security, additional security, or different security. A party enjoined under a permanent injunction may not make this motion because that party has already had a trial on the merits.

2. Delete the sentence, "The adverse party may combine this motion with a Rule 65(a)(7) motion to dissolve or modify a provisional injunction." A rule is not needed for practical advice. This concept seems better suited for the explanatory note.

**Proposed Explanatory Note**

The rule-65 subcommittee recommends consideration of the following explanatory note:

The court should promptly hear and decide a motion to dissolve or modify a provisional injunction. If the parties stipulate, the court may convert the motion-to-dissolve or -modify hearing into the preliminary-injunction hearing.

If the parties stipulate, the court may advance the trial on the merits and consolidate it with the preliminary-injunction hearing. The parties and the court should take care, however, to preserve any party's right to a jury trial.

An adverse party may combine a rule 65(g)(4) motion for security, or additional or different security, with a Rule 65(a)(7) motion to dissolve or modify a provisional injunction.