AGENDA

JOINT PROCEDURE COMMITTEE

January 31-February 1, 2013
Bismarck, N.D.

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JUSTICES OF THE NORTH DAKOTA SUPREME COURT

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Justices
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Mary Muehlen Maring
Carol Ronning Kapsner
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Bruce D. Quick
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Staff Attorney
Michael Hagburg

MINUTES OF MEETING

Joint Procedure Committee
September 27, 2012

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CALL TO ORDER

The meeting was called to order at 9:00 a.m., on September 27, 2012, by the Chair, Justice Mary Muehlen Maring.

ATTENDANCE

Present:
Justice Mary Muehlen Maring, Chair
Honorable Laurie Fontaine
Honorable John Greenwood
Honorable William A. Herauf
Honorable Debbie Kleven (afternoon only)
Honorable Steven L. Marquart
Honorable Steven McCullough
Honorable Thomas E. Merrick
Honorable David E. Reich
Mr. Bradley Beehler
Mr. Larry L. Boschee
Mr. Daniel Dunn
Mr. Robert Hoy
Prof. Margaret Moore Jackson
Mr. Richard H. McGee
Mr. Lonnie Olson
Ms. Joanne Hager Ottmar
Mr. Bruce D. Quick
Mr. Kent Reierson

Absent:
Honorable William McLees

Staff:
Mike Hagburg
Kim Hoge

PRELIMINARY MATTERS

The Chair discussed the schedule for the meeting and plans for the January meeting.

APPROVAL OF MINUTES

Judge Herauf 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 34-57 OF THE AGENDA MATERIAL)

Staff explained that, based on the Committee's comments at the April meeting, staff prepared additional proposed forms to be used by people seeking to limit Internet access to certain criminal records. Staff presented the forms to the Committee.

Judge Herauf MOVED to adopt the proposed Affidavit of Personal Service form. Judge McCullough seconded. Motion CARRIED.

Ms. Ottmar MOVED to adopt the proposed Affidavit of Mailing form. Judge Herauf seconded.

A member asked whether it was necessary that service be by certified mail. A member said, because the motion would be made by a party in an existing action, service by certified mail may be unnecessary. The member said requiring certified mail could be a burden on a self-represented litigant. A member said this motion was no different from any other motion in a criminal action and certified mail was not required for other motions.

A member said one concern was that this motion could be submitted long after the charge was made and the state's attorney could be a different person than the one involved in the matter originally. The member said to have a certified mail requirement could provide proof that the motion was submitted. A member said that an alternative to the certified mail requirement would be to add language to the mailing affidavit form requiring that the motion documents be mailed to the state's attorney by name at the specific address of the state's attorney's office.

A member asked if it would be useful to add another form to the motion package to be sent to the state's attorney. The member said that this additional form would require the state's attorney to acknowledge receipt of the motion documents and indicate whether the state's attorney intended to contest the motion. The member said the state's attorney would be required to file the form and this would show the court that the state's attorney had received the motion and show the state's attorney's position.

A member said that the proposed forms were designed to be used when there had been an acquittal or dismissal. The member said that the suggested additional new form would likely be disposed of by the state's attorney because the case was closed. A member said, on the other hand, some state's attorneys were likely to oppose every motion just like some oppose every parole request. The member said that having an admission of service in the file would be useful.

A member said that if the affidavit of mailing form simply included blanks requiring the state's attorney's name and complete address, the moving party would know these had to be filled in and would know that the package needed to be sent with the full address on the envelope.

Judge Fontaine MOVED to amend the Affidavit of Service by Mail form to eliminate the certified mail requirement and to add language requiring the complete name and address of the state's attorney to be included in the form. Judge Herauf seconded. Motion CARRIED.

The motion to adopt the Affidavit of Mailing form CARRIED.

Judge Fontaine MOVED to adopt the proposed Notice of Motion form. Judge Marquart seconded.

The Chair said that at the last meeting a member had requested that the moving party's email address be included on the form. By unanimous consent, the Committee decided that the email address should be added to the signature block.

Judge Fontaine MOVED to amend the form to add language specifying N.D.R.Ct. 3.2's 14-day time deadline for response to the motion. Ms. Ottmar seconded. Motion CARRIED.

Motion to adopt the Notice of Motion form CARRIED.

Mr. Quick MOVED to adopt the proposed Motion and Brief form. Judge Herauf seconded.

Mr. Hoy MOVED to amend language on the last sentence of page 39 to read "has sustained or is likely to sustain." Judge Herauf seconded. Motion CARRIED.

Motion to adopt proposed Motion and Brief form CARRIED.

Mr. Hoy MOVED to adopt the proposed Affidavit in Support of Motion form. Judge Herauf seconded.

Judge Merrick MOVED to amend language to include (date) and (crime) in the blanks in paragraph (1) on page 41. Judge Herauf seconded. Motion CARRIED.

Mr. Hoy MOVED to add (date) to paragraph (2) on page 41 and to add language

similar to that added to the brief form "have sustained or am likely to sustain" to paragraph (4) on page 41. Prof. Moore Jackson seconded. Motion CARRIED.

Motion to adopt proposed form CARRIED.

Judge Herauf MOVED to adopt the proposed Findings of Fact and Conclusions of Law form. Ms. Ottmar seconded.

Mr. Hoy MOVED to add "or is likely to sustain" to paragraph III on page 44. Judge McCullough seconded. Motion CARRIED.

A member asked whether the paragraph instructing the court administrator to limit should be separated out into an order form. Members agreed that there should be a separate order document. By unanimous consent, staff was directed to draft a separate order form.

Judge Merrick MOVED to amend language to replace "court administrator" with "clerk of court" on page 44. Judge Herauf seconded. Motion CARRIED.

Motion to adopt proposed form CARRIED.

Judge McCullough MOVED to send the forms to the Supreme Court. Judge Herauf seconded.

RULE 604, N.D.R.Ev., INTERPRETER (PAGES 58-66 OF THE AGENDA MATERIAL)

The Committee approved form and style changes to Rule 604 at the April meeting. Staff presented proposed additional cross-references to the rule and provided the Committee with research on other court rules and statutes that deal with interpreters.

Judge McCullough MOVED to adopt the proposed amendments to Rule 604. Prof. Moore Jackson seconded.

A member said that the interpreter statute was obsolete and should be superseded by rule. The member said the statutory oath, for example, was different from the oath for interpreters from N.D.R.Ct. 6.10, which courts used. A member said that the Rule 6.10 oath did not offer an opportunity to affirm for interpreters. The consensus of the Committee was that it should address Rule 6.10 and the other administrative and procedural rules on interpreters at the next meeting.

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

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

RULE 704, N.D.R.Ev., OPINION ON AN ULTIMATE ISSUE (PAGES 67-79 OF THE AGENDA MATERIAL)

At the April meeting, the Committee discussed proposed amendments to Rule 704 intended to bar experts from testifying on whether a defendant's mental state satisfied an element of a crime. In response to the Committee's requests, staff provided additional research on the proposal and an alternate proposal intended to be consistent with the current rule and state statutes and case law.

Mr. Quick MOVED to adopt the proposed alternate draft. Judge Herauf seconded.

Staff explained why the federal drafters removed "inference" from the rule. The Chair directed the Committee to the federal explanatory note on the issue. A member said that it would be preferable to add similar language to the rule proposal so that if the issue came up in a case, the explanation about the removal of "inference" from the rule would be close at hand.

Mr. Hoy MOVED to add language from the federal explanatory to the rule at page 70, line 18. Judge Herauf seconded. Motion CARRIED.

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

RULE 707, N.D.R.Ev., ANALYTICAL REPORT ADMISSION; CONFRONTATION (PAGES 80-98 OF THE AGENDA MATERIAL)

The Committee briefly discussed Rule 707 at the April meeting, but decided to defer any action on the rule until the United States and North Dakota Supreme Courts had the opportunity to rule on pending cases involving analytical reports. Staff presented the Committee with a summary of the decisions in the United States and North Dakota cases.

The Chair explained that the Court had attempted to clarify that the rule was intended to apply to "confrontational" purposes, not foundational. The Chair said there is confusion between defense and prosecution lawyers on whether failure to specify all witnesses involved in preparing a report amounts to a waiver of objections regarding unnamed witnesses and their contributions to the report. The Chair said it might be useful for staff to draft and the Committee to consider an amendment indicating that the rule addresses those individuals that are presenting testimonial material and not mere foundation.

A member said that the problem is determining who is a testimonial witness and who is a foundational witness. The member said that there are many instances where arguments can be made on both sides for a given witness, where their testimony may be a blend of foundational and testimonial material.

A member said the rule creates traps for the unwary on the defense and prosecution sides. The member said, with the way the case law has developed, the notice and demand requirement in the rule may be unnecessary. he Chair said one reason for the rule is that state statutes on admission of reports have not been changed even though automatic admission of reports is no longer allowed under the Constitution.

Judge Fontaine MOVED to table the rule until the January meeting. Mr. Olson seconded.

A member said the Committee needs more time to look at the case law and think about whether the rule needs to be modified. A member said it might be helpful if staff researched how other states have approached the issue.

Motion CARRIED.

RULE 4, N.D.R.Civ.P., PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE (PAGES 99-125 OF THE AGENDA MATERIAL)

Staff informed the Committee that Judge Nelson has requested that the Committee consider whether to include the substance of N.D.C.C. § 39-01-11 in Rule 4.

A member said there are several statutes that discuss means of substituted service. For example, statutes let parties serve the insurance commissioner when bringing suit against certain insurance companies. The member said a recent statute allows parties to serve the secretary of state when bringing suit against a company that no longer has authority to do business in the state. The member wondered where the Committee would draw the line on bringing substituted service statutes into the rules.

A member said a better approach to bringing the statutes into the rules would be to cross-reference the substituted service statutes in the rules so that parties and courts could more easily locate them. The member said having a rule for every specific situation would make no sense given the work the legislature has already done on substituted service statutes.

The Chair said that adding cross-references was problematic because there is no assurance that the Committee could locate every statute that should be cross-referenced. A

member indicated that Leonard Bucklin wrote a manual on civil practice years ago in which he discussed the various special service statutes and this could be a good resource for assembling cross references.

By unanimous consent, the proposal was tabled until the January meeting to allow staff to research special service statutes to cross-reference.

RULE 45, N.D.R.Civ.P., SUBPOENA (PAGES 126-152 OF THE AGENDA MATERIAL)

Staff explained that Mr. Reierson had raised an issue regarding Rule 45 and its inconsistent treatment of the objection notice requirement. Staff presented two alternate proposals for rule amendments that would correct the inconsistency.

Mr. Reierson MOVED to adopt the proposed "Alternative A" amendments to Rule 45. Prof. Moore Jackson seconded.

A member said that, as it stands, it is not clear what notice needs to be provided in a deposition subpoena of a third party. It may also be easier under the rule to object to a subpoena to produce documents than it is to object to a subpoena for a deposition or a hearing. The member said that making it easy to object to a deposition subpoena can allow a third party to upset complicated planning by the parties in a case.

Mr. Reierson MOVED to amend line 13 on page 129 to add the word "only." Prof. Moore Jackson seconded.

A member said to limit the notice requirement to subpoenas duces tecum that request "only" documents, as proposed under the motion, would make it less likely that a third party could disrupt deposition plans in cases when the deponent is requested to bring documents to the deposition. The member said that if a person who was subpoenaed to attend a deposition and bring documents had objections, the person could still bring a motion to quash. The member said if the subpoena was for documents alone, the subpoenaed third party could make a "notice objection" and the burden would be on the party serving the subpoena to seek a court order compelling production. The member said this was reasonable because an objection to a subpoena to produce only documents would not interfere with deposition planning and scheduling and delay the progress of the action.

A member said that allowing an easier objection process when only documents are subpoenaed is reasonable because often a "documents only" subpoena is served on an institution like a bank or hospital, which may have confidentiality concerns about releasing documents.

Motion CARRIED.

Mr. Reierson MOVED to amend line 162 on page 136 to add the word "only." Prof. Moore Jackson seconded. Motion CARRIED.

A member asked what was the advantage of having different notice requirements for document production subpoenas and deposition subpoenas. The member said it seemed more sensible to have the same notice requirements for all subpoenas. A member replied that allowing third parties to easily object to deposition subpoenas (rather than seeking a motion to quash) complicates the deposition scheduling process and delays progress of the action. The member said when seeking only documents, scheduling is not generally a concern and an objection would not unduly delay the action.

A member replied that if the notice was included as part of a deposition subpoena, at least the third party would be required to state any objections to a deposition within ten days rather than not showing up to the deposition. A member said that third parties with experience in the court system know that they can object to subpoenas, so providing the notice to them is not so important. The member said, however, that providing the notice is very important when the subject of the subpoena is not experienced with the court system because the notice explains their rights and evens the playing field somewhat for them.

A member said that the notice provision goes beyond just providing a third party with information about the right to object to a subpoena. The member said that by making an objection under the terms of the notice, the third party shifts the burden on the party seeking discovery to make a motion to compel. The member said if a party is doing a deposition and under tight scheduling restrictions and deadlines, the burden should be on the witness to seek protection. The member said the situation is different when seeking document production because there could be privileged information requested and the basis for an objection would be clearer. The member said it makes sense to apply a different standard for objections to document requests as opposed to requests for live testimony.

A member said that one approach to level the playing field would be to have a different notice for third parties subject to deposition subpoenas informing them of their right to make a motion to quash. This would inform them of their rights without shifting the burden to the party seeking testimony and delaying the action. A member said that the current rule seemed to allow a party to refuse to provide live testimony simply by providing an objection so the rule needed to be modified in some way to prevent possible delay of trials and depositions. The member said extending the notice requirement to all subpoenas would likely create this sort of delay.

A member said that applying the notice requirement only to documents reflects the reality that obtaining live testimony is complicated and expensive and that when an attorney wants to obtain testimony from a person, the attorney generally has reason to believe the person can provide important information. The member said that attorneys can cast the net a little wider when they seek documents just to see what it is out there. The member said that, in such a case, it makes sense to require the attorney to explain why a document production request is justified. A member said a third party facing a document production request–such as a telephone company or medical provider–is unlikely to have any interest in the action and may be justified in requiring the party seeking information to prove that a subpoena is justified.

The main motion CARRIED.

Mr. Beehler MOVED to send the rule to the Supreme Court immediately for consideration with the pending Annual Rules Package. Judge Herauf seconded. Motion CARRIED.

RULE 11, N.D.R.Crim.P., PLEAS (PAGES 153-224 OF THE AGENDA MATERIAL)

Staff explained that the Supreme Court had requested that the Committee address the issue of whether allowing Alford pleas is consistent with Rule 11. Staff presented the Committee with research on the question and with proposed amendments to Rule 11.

Judge Fontaine MOVED to adopt the proposed amendments to Rule 11. Mr. Olson seconded.

A member said that Alford pleas are not a big problem in cases when the defendant is represented, but that they are suspect when the defendant does not have a lawyer. A member said that many times a self-represented defendant will agree that they could be convicted based on the state's factual basis statement and so they plead guilty.

A member said the defendant does not even have to agree with the factual basis–under Alford a court can accept a guilty plea as long as the defendant understands what is happening. The member said the court can read a defendant's rights and the defendant confirm understanding, but that does not mean the defendant understands–it likely means the defendant is pleading guilty because the defendant wants to get out of court and go to work. The member said that a court should not be able to accept an Alford plea from a self-represented defendant.

A member said that the courts take many Alford pleas and that close to 50 percent of

all guilty pleas are Alford pleas. The member said courts have limited means to stop self-represented defendants from accepting Alford pleas: if the court refuses to accept a plea one day and gives its reasons, the defendant can come back the next day to plead again and will tailor responses to questions to address the court's previous concerns.

A member said the proposed amendments would essentially create a nolo contendere plea in North Dakota, even though it would still be called a guilty plea. The member said that under the Rules of Evidence, nolo pleas are treated differently than guilty pleas and that a nolo plea by whatever name should be treated like any other nolo plea under the evidence rules. A member said that the main difference between a nolo plea and a guilty plea in the federal system is that a nolo plea does not have the same collateral consequences (in civil cases) as a guilty plea.

Judge Herauf MOVED to amend line 38 on page 156 to add the word "guilty" before the word "plea." Ms. Ottmar seconded. Motion CARRIED.

A member asked whether a defendant who acknowledges a factual basis should also be required to acknowledge "guilt" rather than just admitting that there is a factual basis for a guilty plea. The member said this would differentiate a guilty plea entered based on "guilt" from an Alford plea.

Judge Greenwood MOVED to amend line 37 on page 156 to read: "acknowledges facts that support the guilty plea." Mr. Quick seconded. Motion CARRIED.

Mr. McGee MOVED to amend line 38 on page 156 to move the phrase "while maintaining innocence" to the beginning of the sentence. Ms. Ottmar seconded. Motion CARRIED.

A member said that, when a self-represented criminal defendant maintains innocence but still wants to plead guilty for the sake of convenience, the state must be required to present a factual basis for the guilty plea before the court can accept the plea. A member said that some courts will not accept a guilty plea if the defendant does not agree that the state's facts, if proven, could be the basis of a conviction. A member said that, under the Alford standard, the defendant does not need to agree that the state provided a factual basis before the court can accept the plea.

A member said that, under the language of the proposal, a court would be able to accept a guilty plea without the defendant agreeing that an adequate factual basis had been presented. A member said that a court could still refuse to accept a guilty plea if a defendant both denied guilt and did not accept the state's factual basis because allowing a guilty plea

under those circumstances would not be in the defendant's best interest. The member said that the defendant has to be able to intelligently and knowingly analyze why pleading guilty would be in their best interest. The member said that defendants should be required to acknowledge that there is evidence against them that could lead to their conviction at trial before a guilty plea should be accepted.

A member said that the proposal and Alford allow a defendant to maintain innocence and plead guilty based on the defendant's own evaluation of what's in the defendant's best interests. A member said that maybe there should be a requirement that there be a best interest discussion on the record if the defendant chooses to plead guilty while maintaining innocence.

The Chair pointed to language in the syllabus of State v. McKay, 234 N.W.2d 853 (N.D. 1975), stating: "An individual accused of a crime may voluntarily, knowingly, and understandingly plead guilty to a crime even if he is unable to admit his participation in the acts constituting the crime, provided that evidence is introduced from which it can be concluded that defendant committed the crime." The Chair suggested that this standard could be integrated into the language of the rule.

A member said that, in determining whether there is a factual basis for a plea as required by Rule 11, courts already work with the state and the defendant to examine evidence "from which it can be concluded that defendant committed the crime." The member said the Committee should make sure that the language of the proposal reflects the requirements of case law.

A member said that many of the problems cited regarding Alford pleas could be avoided if all defendants were represented when a guilty plea is entered. The member said that public defenders are generally not assigned until after the initial appearance and that many guilty pleas are entered at the initial appearance.

A member asked the difference between an Alford plea and a nolo contendere plea. A member responded that there is no such thing as an Alford plea: there is a guilty plea with a factual basis that satisfies the standards set out in the Alford case. The member said that after McKay came out, it was standard practice for prosecutors to call witnesses every time a defendant pled guilty to establish the factual basis required by Alford. The member said that pleas under Alford used to be rare, but they are becoming more and more common. The member said that self-represented defendants do not know what Alford is: they want to plead guilty, but they do not acknowledge the factual basis.

A member said a nolo plea is a plea without the collateral civil consequences of a

guilty plea, such as automatic big civil tax penalties in a tax evasion case. The member said that North Dakota has never recognized the nolo plea. A member suggested that the state study nolo pleas. The member said there are cases when a nolo plea is beneficial to both sides–it is a way for the state and the defendant to resolve a criminal case without the defendant having to admit the elements of the offense, an admission that could be used against the defendant in a later civil or administrative case.

A member asked what would be the downside of North Dakota recognizing nolo contendere pleas under the rules. A member said that in sexual offense cases, the defendant would not have to admit that they committed a sexual offense. Such an admission is a prerequisite for getting sex offender treatment. Staff said this was an objection raised in previous discussions of nolo pleas by the Committee. A member said that nolo pleas might not be a good idea in sex offense cases, but there are other types of cases where being able to take a nolo plea would be beneficial to both sides.

A member said that, from a defense standpoint, nolo pleas can be useful. The member said that a defendant accused of a sex crime might not be willing to admit guilt in a public courtroom, but would be willing to make a nolo plea and to later admit the offense in the privacy of treatment. A member said that the court must make it clear that an admission is necessary before treatment is possible when accepting a nolo plea in a sex crime case.

Judge Fontaine MOVED to amend line 39 on page 156 to add "and evidence exists from which it can be concluded that the defendant committed the crime" to the end of the sentence. Judge Herauf seconded.

A member asked whether the acknowledgment required in the proposal needs to be knowing, intelligent, and voluntary. The member said that this could be questioned in many of the cases where self-represented litigants enter Alford pleas.

A member said, if the whole rule is considered, it is already required that a plea must be voluntary. A member said that adding the proposed new language may mean that the court needs to have a separate colloquy on best interests and query whether the plea is knowing, intelligent, and voluntary. A member said the Alford case requires the defendant to "intelligently" conclude that a guilty plea is the defendant's best interest. A member said the Committee could consider adding language to reflect this requirement.

Motion CARRIED.

Mr. Quick MOVED to table. Judge Herauf seconded.

A member said that, in addition to continuing to consider the proposed new language, the Committee should also look at nolo pleas and investigate the collateral consequences of guilty and nolo pleas.

Motion CARRIED.

RULE 3.1, N.D.R.Ct., PLEADINGS (PAGES 225-238 OF THE AGENDA MATERIAL)

Staff explained that several clerks of court had expressed concerns about the Rule 3.1 requirement that pleadings be accompanied by proof of service. Staff presented proposed amendments to the rule that would insert language allowing pleadings to be filed without proof of service accompanying when this is allowed by statute or rule.

Mr. Hoy MOVED to adopt the proposed amendments to Rule 3.1. Judge Herauf seconded. Motion CARRIED.

Ms. Ottmar MOVED to send the rule to the Supreme Court immediately for consideration with the pending Annual Rules Package. Mr. Hoy seconded. Motion CARRIED.

ORDER 16, N.D.Sup.Ct.Admin.O., ELECTRONIC FILING IN THE DISTRICT COURTS (PAGES 239-246 OF THE AGENDA MATERIAL)

Staff reported that the Supreme Court had amended Administrative Order 16 effective July 1 and that the Chair requested that the Committee review the amendments. Staff presented proposed amendments to the Order for the Committee's consideration.

Judge McCullough MOVED to adopt the proposed amendments to Order 16. Judge Marquart seconded.

A member asked whether the proposal by the Grand Fork's Sheriff's Office to electronically serve documents to health professionals involved in mental health cases through the Odyssey system was technically feasible. Staff said that a document filed through Odyssey could be emailed to anyone using the system's "carbon copy" feature, but a document could only be "served" through the system to a registered user.

A member asked if the attorneys on the Committee were using the Odyssey system. A member said that attorneys typically rely on their staff to file documents with the system.

A member said some people involved in court cases would prefer to have service through Odyssey, but they have not preregistered with the system. The member said an option should be available to make legitimate email service to these people who are willing to acknowledge service of the document. A member replied it would be very complicated to create an option for Odyssey service to people who are not registered Odyssey users. A member said that if there is someone who is being served often, such as a doctor who is regularly involved in mental health cases, the people serving documents should encourage that person to register with the system so they can accept electronic service.

A member said that the new language in Order 16 seemed fine in general, but that it was going to be hard for lawyers to access the new material because they generally do not look at the administrative orders when they are looking for procedural instructions. The member said that Order 16 should be a rule, probably in the Rules of Court.

A member said that, in the federal system, lawyers are required to save a hard copy of the documents they submit so that they can establish the legitimacy of the signature. Staff said the philosophy behind the Odyssey electronic signature system was that anything an attorney wanted to have as an electronic signature was acceptable. A member said that judges are able to electronically sign Odyssey generated documents, but they cannot sign documents submitted by parties or attorneys.

A member said that the federal system accepts the /s/ type electronic signature as long as the attorney consents.

A member said service of discovery material should not go through the Odyssey system because it often is very voluminous paper. The member said that the order seems to require all service to be electronic in any matter filed after April 1, 2013, even if the served material is not filed.

A member said the problem with the provision allowing parties to seek relief when the rejection of a document leads to deadline problems is that, every time a document is rejected, the court might potentially have to get involved. The member said a better approach would be to enact a tolling provision to govern rejected documents.

Mr. Reierson MOVED to insert new language after line 24 on page 242 as follows: "The filing deadline is tolled until the submitted document is accepted or rejected, and if rejected for a technical defect, the document will be considered timely filed if resubmitted within three days after the notice of rejection." Ms. Ottmar seconded.

A member said the court should not have to get involved if the document is rejected

on technical grounds only and the proposed language would allow the party to resubmit the document within a reasonable time of the rejection. A member said that the time should just be tolled–if the document is in on time and is rejected, the deadline should stop during the period the document was considered and then rejected. A member said the drawback to this approach is that, if a document is filed on the day it is due, the attorney may not be at their desk when the notice of rejection is received. A member said there should be some time frame after the notice is received to resubmit the document.

A member said that another glitch parties may face in attempting to file documents in Odyssey is that the policy between districts on how documents may be filed differs; some districts will allow documents in a given form to be filed while others will reject the same document. The member said that one case where this was an issue was a paternity case, which is a confidential file. The member said that one district prevented the attorney from filing into a confidential file via Odyssey. The member said filing policy needs to be made consistent across the state before electronic filing requirements are imposed.

Judge McCullough MOVED to amend the motion as follows: "If a document is rejected for a technical defect, the time for filing is tolled from the time of submission to the time the e-mail generated by the Odyssey system notifying the filer of rejection is sent. The document will be considered timely filed if resubmitted within three days after the notice of rejection." Mr. Quick seconded.

A member said that the federal system operates differently: When something is filed electronically, all the filed material is distributed to the other parties involved in the matter immediately. There is no delay caused by the need to accept or reject documents. The member said that the North Dakota system does not work efficiently and this creates a need to draft rules to account for the inefficiencies that are part of the system.

Motion CARRIED.

A member asked whether the term "electronic filing" at line 46 on 243 was redundant in light of the Committee's proposed amendments. A member said it would be good to retain the term because the tolling solution may not catch every problem and retaining the language would allow the court to craft a solution in the less usual case.

A member directed the Committee's attention to the clause at lines 39-40 on page 242 that states: "Electronic service is not effective if the party making service learns that the attempted service did not reach the person to be served." The member asked if this provision only applied if the server received some system message indicating that the service attempt failed or whether it applied no matter how the server learned of the failed service. The

member said that in one case a party served an expert disclosure electronically, which did not reach the person being served, and that neither party learned of the non-service until just before trial when the party that had attempted to serve the expert disclosure listed the expert on its witness list. The member said that it is not clear whether a claim of ineffective service made after such a late discovery of non-service is allowed under the rule, especially in the absence of a system-generated non-delivery message to the sender.

Mr. Boschee MOVED to add language "through any means" after the word "learns" on line 39 on page 242. Judge Herauf seconded.

A member said the proposed change would allow a party to bring non-service of an item to the court's attention at whatever point the non-service was discovered. A member replied that, in the example cited, the party who attempted to serve the document would not have known that it was not delivered because they did not receive a non-delivery message.

A member said that all electronic service under the order will be done through the Odyssey system, not email. The member said that items served through Odyssey are tracked electronically and whether or not they reached their destination can be determined by checking the system record.

A member said the example cited referred to a discovery disclosure. A member said that it is not clear from the language of the order whether discovery documents should be served through Odyssey.

A member said that the provision at lines 39-40 on page 242 indicates that "service is not effective" if a party learns it did not reach the intended person. The member said that it is not clear from the order whether a service that is "not effective" could be fixed so that deadlines would be met. A member said there are rules with deadlines that are based on service and if service is "not effective" the deadline would not be met, even if the item had been filed.

A member asked whether the provision was necessary. The member said that a party that does not receive something is not served and such service could never be "effective." Staff said that when something is served through Odyssey, the receiver must take some sort of action to pick it up and this action establishes that the item was received.

A member said that provision seems to apply to items that are served by email outside the Odyssey system, in which case the receiver would have to agree to receive service in that manner. The member said the proposed amendment is necessary to protect people who have agreed to receive service by email outside of Odyssey.

A member said that the language of the order's service provision at lines 33-38 on page 242 can be read as requiring all documents in matters filed after April 1, 2013, to be served electronically through the Odyssey system. The member said that the intent of the provision probably was to require items filed in Odyssey to also be served through Odyssey. The member said that there are many items that are served that are never filed. A member said that the system could be overwhelmed if all discovery documents, for example, were served through the system. A member said that parties should not be forced to serve documents through Odyssey that are not filed with the court.

Mr. Boschee MOVED to table his motion. Judge McCullough seconded. Motion CARRIED.

Mr. Boschee MOVED to amend lines 34-36 on page 242 as follows: "~~In any matter filed~~ After April 1, 2013, all documents filed electronically after the initiating pleadings must be served electronically through the Odyssey® system . . . ." Judge Herauf seconded.

A member asked whether the term "initiating pleadings" was clear. A member responded that the term was not defined, but that it was used earlier in the order in the electronic filing provision at lines 6-9 on page 241. Staff said that the order allowed initiating pleadings in a civil case to be filed electronically while the initiating pleadings in a criminal case may not be. A member explained that Odyssey does not allow initiating pleadings to be e-filed in criminal cases because they require complex offense coding that is done by court staff and not state's attorney's offices.

A member asked whether the complaint in a civil case needs to be filed electronically. Staff said that the order at present allows, but does not require, the complaint to be e-filed. A member said that the words "after the initiating pleadings" then may not be necessary in the provision at lines 34-36 on page 242. Members responded that the order would then conflict with N.D.R.Civ.P. 4 because it would require a complaint filed electronically to be served electronically.

A member questioned deleting the words "in any matter filed after" as proposed under the motion. The member said that removing the language would extend the order to a wider set of cases, because it would apply to all matters pending as of April 1, 2013.

A member said that in a recent case that was commenced by service, the defendant did not find out the case had been filed until the defendant got a notice of assignment of a judge. The member said that there is no provision in the order to let the other parties know that the complaint or answer has been filed. The Chair said the Odyssey system has the capability to notify attorneys whenever documents are filed in a case, as long as the attorneys are signed

up for Odyssey. A member said that before Odyssey, a party would have no way of knowing a complaint had been filed before the judge was assigned unless the opposing party gave them a courtesy notification. A member asked whether the order should require that a party filing a complaint should enter into the Odyssey system the names and addresses of the other parties in the case.

A member asked who enters the opposing party information initially into Odyssey. The member observed that notices of documents entered into the system are regularly sent through Odyssey in ongoing cases. The members of the Committee were uncertain about who had the duty to associate all the parties and their attorneys with a new case. A member said that attorneys are not required to register for the Odyssey system now and if people who are not registered are taking part in a case, they do not receive notifications through Odyssey. A member looking at the Odyssey portal said that a party filing a document can associate the names of attorneys registered with the system with the case.

A member said that one reason the Court Technology Committee proposed the changes to Order 16 was in order to compel parties to e-file materials so that the clerks no longer need to spend so much of their time scanning and filing documents. The member said the second reason was to get all court users into the Odyssey system so that e-service is possible in most cases.

Motion CARRIED.

Mr. Reierson MOVED to add the word "filed" after the word "documents" at line 6 on page 241. Ms. Ottmar seconded.

Ms. Moore Jackson MOVED to amend the motion by deleting "in any matter filed" from the beginning of line 6 on page 241. Mr. Boschee seconded.

A member said that the proposed amendment would make the e-filing requirement apply to all active cases as of April 1. A member said this may not be in line with what the Supreme Court wants. A member said that the Committee will probably be considering this order for years. A member said that all the cases currently in the system are being converted to electronic files by scanning in documents, so it makes sense to require documents to be filed in electronic form. A member said that some older lawyers are still doing all their business on paper. A member pointed out there was an exception in the order that would allow attorneys to get court approval to continue filing in paper.

Motion to the motion CARRIED. Motion CARRIED.

Mr. Boschee's motion to amend lines 39-40 on page 242 was taken off the table. Motion CARRIED.

A member said that exempting self-represented litigants from e-filing was a concern because some of them are experts with computers and capable of e-filing. The member said the language of the order seemed to suggest self-represented litigants are incapable of e-filing. A member replied that the courts may not want the self-represented litigants registering for Odyssey access. A member said that the order allowed self-represented litigants to file on paper but did not require it.

A member said that an alternate approach would be to allow self-represented litigants to request an exemption from e-filing rather than giving them a blanket exemption. A member responded that the courts would prefer not to have to handle requests from every self-represented litigant to allow paper filing.

Mr. Beehler MOVED to have Order 16 made part of the Rules of Court. Judge Kleven seconded. Motion CARRIED.

A member asked why the order requires filing fees to be paid by credit or debit card and does not allow cash payments. The Chair explained that electronic payment is part of e-filing, but that it is required only if the initiating pleadings are e-filed. Staff said a party can still pay the filing fee in cash because the order does not require initiating pleadings to be e-filed. A member said the rule, and the card payment requirement, only applied to electronic filing.

A member returned to the issue of whether a party should give notice of filing the complaint. A member said if a party serves the complaint and files it right away, the party would not know who to notify because the answer would not have been returned.

A member said that it was acceptable to require paragraph numbers for original documents prepared by the party, but that the language at lines 17-18 on page 241 seemed to require paragraph numbers even on supporting documents, such as a copy of a contract that might be submitted with a complaint. A member said exhibits would be submitted in some sort of graphic format, such as a .pdf, and their formatting would not be changed through the process of electronic submission, so paragraphs numbers would not be needed.

A member asked whether this meant that every document prepared by an attorney, including briefs and affidavits, would need to have paragraph numbers. A member replied that this is what the language on lines 17-18 said. A member suggested that language limiting the paragraph number requirement could be added to the provision.

Mr. Boschee MOVED to add the words "party generated" before the word "documents" to lines 17-18 on page 241.

A member said that the suggested language might cause more confusion, such as when an exhibit document, such as a contract, was originally created by a party. The suggested language could be interpreted to mandate that paragraph numbers be added to the document. A member said it was unlikely that the existing language on lines 17-18 would be interpreted to require paragraph numbers to be added to an old document submitted as an exhibit. A member said that the word "documents" could be changed to "pleadings" and this might put a limit on the number of documents for which paragraph numbers are required.

Motion WITHDRAWN.

The main motion CARRIED.

Judge McCullough MOVED to send the proposed amendments to the Supreme Court immediately. Judge Herauf seconded. Motion CARRIED.

RULE 801, N.D.R.Ev., DEFINITIONS (PAGES 247-259 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 801 based on the amendments to the federal rule. Staff explained that the proposal retained North Dakota's existing rule that prior inconsistent statements may be used as substantive evidence in civil cases and, if the prior statement was made under oath, in criminal cases. Staff said that the proposal contained some new language about evidence in conspiracy cases.

Mr. Quick MOVED to adopt the proposed amendments to Rule 801. Prof. Moore Jackson seconded.

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

RULE 802, N.D.R.Ev., HEARSAY RULE (PAGES 260-262 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 802 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 802. Judge Kleven seconded.

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

RULE 803, N.D.R.Ev., HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL (PAGES 263-295 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 803 based on the amendments to the federal rule. Staff explained that there was new language in the proposal relating to certifications made under Rule 902.

Judge Kleven MOVED adopt the proposed amendments to Rule 803. Judge Marquart seconded.

A member said that Rule 902 should be discussed first before considering Rule 803 to examine the issue of certifications.

Mr. Boschee MOVED to table the rule and to discuss Rule 902 first. Mr. Quick seconded. Motion CARRIED.

RULE 902, N.D.R.Ev., SELF AUTHENTICATION (PAGES 335-346 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 902 based on the amendments to the federal rule. Staff explained that the proposal contained new paragraphs (10) and (11), which would allow documents to be "certified."

Mr. Quick MOVED to adopt the proposed amendments to Rule 902. Judge Herauf seconded.

A member said if the amendments are adopted the explanatory note should reflect that they represent a substantive change. A member asked whether there was a statute or rule that provides for certification in North Dakota. A member responded that the use of affidavits is currently standard practice in the state, while the federal system has a statute that allows "declarations" to be made under penalty of perjury without the need for notarization. The member said the term "certification" includes such declarations and also affidavits.

A member suggested that language be added to the explanatory note to clarify that the term "certification" includes affidavits. A member asked where to find the authority for "certification" in a statute or a rule, given that the proposed language refers to these. A

member responded that N.D.C.C. ch. 31-04 has provisions defining affidavits and detailing their uses.

A member said the Committee could consider a rule defining certification so that it was clear what Rule 803 and 902 addressed. A member said that the term "certification" could be replaced by "affidavit" in these rules and that would also bring clarity.

Mr. Boschee MOVED to delete "a certification of the custodian or another qualified person that complies with a statute or a rule prescribed by the North Dakota Supreme Court" at lines 97-98 on page 340 and to substitute "an affidavit." Mr. Reierson seconded.

A member said there is a difference between a certification and an affidavit. A member said that medical records usually are certified as a true and correct copy. A member said that the intent of allowing "certification" was to allow records to be admitted with all of the elements of the business records exception satisfied and with no need to call a foundational witness to testify.

A member pointed to N.D.C.C. § 31-04-10, "Form and contents of certificate for certifying copies to be used as evidence." The member said that this sort of certificate, which is not an affidavit, is the one used by custodians of medical records. A member said that this type of certification would establish that records were true and correct copies, but it would not meet the time or knowledge elements of the business records exception. The member said the type of certification referenced in the federal rule is intended to fully satisfy all elements of the business records exception and to make it unnecessary to call a foundational witness.

A member said that certification under N.D.C.C. § 31-04-10 would be consistent with the authentication standard of Rule 902 but it would be inadequate to fulfill the foundational standard for business records in Rule 803. A member said that the federal definition of certification, as the term is used in the federal evidence rules, includes statutory declarations and affidavits, which are made under penalty of perjury.

A member suggested that the rule could refer to an affidavit or a certification. A member said a certification seems to mean something more than an affidavit. A member asked whether both the affidavit and certification need to comply with a state statute or rule. A member said perhaps a better approach than adding affidavit to the rule would be to define certification in the explanatory note as including affidavits. The member said this would give flexibility if there were additional forms of certification adopted later by the legislature or court. A member said that both "affidavit" and "certification" were already defined in N.D.C.C. ch. 31-04.

Mr. Boschee MOVED to amend his motion to substitute "an affidavit or a certification of the custodian or another qualified person" for the language on lines 97-98 on page 340. Motion failed for lack of a second.

A member asked for an example of a "declaration." A member replied that, in federal court, when medical records are produced after an authorization, the custodian fills out a declaration under penalty of perjury that states that the records were kept in the ordinary course of business along with the other elements of the business records exception.

A member pointed out the notes of the federal advisory committee indicate that a "declaration that satisfies 28 U.S.C. 1746" would satisfy the certification requirement of the federal rule. A member said this indicated that the federal certification requirement demanded something more than certification of a true and correct copy. A member said that the 28 U.S.C. 1746 declaration was an unsworn declaration made under penalty of perjury.

A member said that if a minor amendment of the proposed language was made to allow certifications under N.D.C.C. § 31-04-10 for authentication and affidavits, this could address the concerns expressed by the Committee. A member said that the federal rule's definition of certification seemed to require a declaration made under the penalty of perjury that included all the requirements of the business records exception, which is more than is required by N.D.C.C. § 31-04-10. A member said that, unless the Committee adopted the federal definition, it would be necessary to follow the state statutory definition in interpreting the rule. A member said that the new language would not make sense unless it required certification of all the elements of the business records exception.

The Chair suggested that staff research the definition of certification under state and federal statutes and develop a definition for incorporation into the rule. Staff said that if a definition satisfactory to the Committee was developed it could be substituted for the "statute or rule" language that is currently part of the proposal. The Chair indicated that the definition would need to incorporate affidavits, certification and declarations as discussed by the Committee. A member said that reference to federal rule commentary might be helpful in developing a definition.

Judge Fontaine MOVED to table the proposed amendments to Rule 902. Mr. Quick seconded. Motion CARRIED.

RULE 804, N.D.R.Ev. HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE (PAGES 296-312 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 804 based on the amendments to the

federal rule. Staff explained that the existing North Dakota rule allows dying declarations in all cases and does not allow a hearsay statement or confession made by a codefendant to be offered against the accused in a criminal case. Staff said the proposal retained these existing state standards.

Judge Herauf MOVED to adopt the proposed amendments to Rule 804. Judge Marquart seconded.

Judge Merrick MOVED to delete the word "but" from the beginning of the sentence at line 36 on page 298. Judge McCullough seconded. Motion CARRIED.

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

RULE 805, N.D.R.Ev., HEARSAY WITHIN HEARSAY (PAGES 313-315 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 805 based on the amendments to the federal rule.

Mr. Olson MOVED to adopt the proposed amendments to Rule 805. Ms. Ottmar seconded.

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

RULE 806, N.D.R.Ev., ATTACKING AND SUPPORTING CREDIBILITY OF DECLARANT (PAGES 316-320 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 806 based on the amendments to the federal rule.

Mr. Quick MOVED to adopt the proposed amendments to Rule 806. Judge Herauf seconded.

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

RULE 807, N.D.R.Ev., RESIDUAL EXCEPTION (PAGES 321-324 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 807 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 807. Mr. Hoy seconded.

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

RULE 901, N.D.R.Ev., REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION (PAGES 325-334 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 901 based on the amendments to the federal rule.

Ms. Ottmar MOVED to adopt the proposed amendments to Rule 901. Judge Reich seconded.

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

RULE 903, N.D.R.Ev., SUBSCRIBING WITNESS TESTIMONY (PAGES 347-350 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 903 based on the amendments to the federal rule.

Judge Marquart MOVED to adopt the proposed amendments to Rule 903. Judge Kleven seconded.

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

RULE 1001, N.D.R.Ev., DEFINITIONS (PAGES 351-359 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1001 based on the amendments to the

federal rule. Staff explained that some updates to the explanatory note were proposed to reflect new electronic and digital technology.

Judge Kleven MOVED to adopt the proposed amendments to Rule 1001. Judge Herauf seconded.

A member asked about the use of the word "article" in the proposed text of the rule. Staff replied that "article" in the evidence rules was used to describe a set of rules, such as the 800 series or 1000 series rules. A member said that "article" was an odd choice for a word to describe a set of rules. A member said that it was used in the text of the federal rules from which the proposed amendments were derived.

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

RULE 1002, N.D.R.Ev., REQUIREMENT OF ORIGINAL (PAGES 360-364 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1002 based on the amendments to the federal rule.

Mr. Beehler MOVED to adopt the proposed amendments to Rule 1002. Judge McCullough seconded.

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

RULE 1003, N.D.R.Ev., ADMISSIBILITY OF DUPLICATES (PAGES 365-369 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1003 based on the amendments to the federal rule.

Judge Herauf MOVED to adopt the proposed amendments to the Rule 1003. Mr. Beehler seconded.

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

RULE 1004, N.D.R.Ev., ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS (PAGES 370-376 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1004 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 1004. Mr. Beehler seconded.

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

RULE 1005, N.D.R.Ev., PUBLIC RECORDS (PAGES 377-381 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1005 based on the amendments to the federal rule.

Judge Fontaine MOVED to adopt the proposed amendments to Rule 1005. Judge McCullough seconded.

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

RULE 1006, N.D.R.Ev., SUMMARIES (PAGES 382-386 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1006 based on the amendments to the federal rule.

Ms. Ottmar MOVED to adopt the proposed amendments to Rule 1006. Judge Greenwood seconded.

Judge McCullough MOVED to delete the word "and" from the beginning of the last sentence at line 11 on page 383. Mr. Dunn seconded. Motion CARRIED.

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

RULE 1007, N.D.R.Ev., TESTIMONY OR WRITTEN ADMISSION OF PARTY (PAGES 387-390 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1007 based on the amendments to the federal rule.

Judge McCullough MOVED to adopt the proposed amendments to Rule 1007. Judge Herauf seconded.

By unanimous consent, the word "however" was deleted from line 17.

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

RULE 1008, N.D.R.Ev., FUNCTIONS OF COURT AND JURY (PAGES 391-397 OF THE AGENDA MATERIAL)

Staff presented proposed amendments to Rule 1008 based on the amendments to the federal rule.

Mr. Beehler MOVED to adopt the proposed amendments to Rule 1008. Judge Herauf seconded.

By unanimous consent, the word "but" was deleted from line 13.

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

The meeting adjourned at approximately 3:00 p.m., on September 27, 2012.

Michael J. Hagburg

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 2, 2013

RE: Rule 4, N.D.R.Civ.P., Persons Subject to Jurisdiction; Process; Service

At the September meeting, the committee discussed Judge Nelson's proposal to consider including N.D.C.C. § 39-01-11 in Rule 4.

N.D.C.C. § 39-01-11 is a substituted service statute under which nonresidents who use roads in the state appoint the director of the DOT as their agent for service of process in any action growing out of a motor vehicle accident in the state. It has several associated statutes that support it.

The committee indicated that there are many substituted service statutes in the code and a better idea than including them in Rule 4 would be to cross-reference them so that they would be easier for people to locate and apply.

Staff has prepared proposed amendments to Rule 4's explanatory note referencing a non-inclusive list of substituted service statutes. The proposed amendments, along with the text from the included statutes, is attached. Of these, N.D.C.C. § 10-01.1-13 may be the most important as it is a catch-all statute that covers service on dissolved and foreign business entities.

RULE 4. PERSONS SUBJECT TO JURISDICTION; PROCESS; SERVICE

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

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

(2) any other fiduciary;

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

(4) a partnership;

(5) an association;

(6) a corporation; and

(7) any other legal or commercial entity.

(b) Personal jurisdiction.

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

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

22 (A) transacting any business in this state;

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

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

25 property within this state;

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

27 within or outside this state;

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

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

30 (G) acting as a director, manager, trustee, or officer of a corporation organized under

31 the laws of, or having its principal place of business within, this state;

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

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

34 this state.

35 (3) Limitation on jurisdiction based on contacts. If jurisdiction over a person is based

36 solely on paragraph (2) of this subdivision, only a claim for relief arising from bases

37 enumerated in paragraph (2) may be asserted against that person.

38 (4) Acquisition of jurisdiction. A court of this state may acquire personal jurisdiction

39 over any person through service of process as provided in this rule or by statute, or by

40 voluntary general appearance in an action by any person either personally or through an

41 attorney or any other authorized person.

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

43 action should be heard in another forum, the court may stay or dismiss the action in whole
44 or in part on any condition that may be just.
45 (c) Process.
46 (1) Contents of summons. The summons must:
47 (A) specify the venue of the court in which the action is brought;
48 (B) contain the title of the action specifying the names of the parties;
49 (C) be directed to the defendant;
50 (D) state the time within which these rules require the defendant to appear and defend;
51 (E) notify the defendant that, if the defendant fails to appear and defend, default
52 judgment will be rendered against the defendant for the relief demanded in the complaint;
53 and
54 (F) be dated and subscribed by the plaintiff or the plaintiff's attorney and include the
55 post office address of the plaintiff or plaintiff's attorney.
56 (G) If the action involves real estate and service is by publication, include the
57 additional information required by Rule 4(e)(8).
58 (2) Copy of Complaint. A copy of the complaint must be served with the summons,
59 except when service is by publication under Rule 4(e).
60 (d) Personal service.
61 (1) By whom service of all process may be made:
62 (A) within the state by any person of legal age and not a party to nor interested in the
63 action; and

64 (B) outside the state by any person who may make service under the law of this state
65 or under the law of the place where service is made, or by a person who is designated by a
66 court of this state.
67 (2) How service of process is made within the state.
68 (A) Serving an individual fourteen years of age and older. Service must be made on
69 an individual 14 or more years of age by:
70 (i) delivering a copy of the summons to the individual personally;
71 (ii) leaving a copy of the summons at the individual's dwelling or usual place of
72 residence in the presence of a person of suitable age and discretion who resides there;
73 (iii) delivering, at the office of the process server, a copy of the summons to the
74 individual's spouse if the spouses reside together;
75 (iv) delivering a copy of the summons to the individual's agent authorized by
76 appointment or by law to receive service of process; or
77 (v) any form of mail or third-party commercial delivery addressed to the individual
78 to be served and requiring a signed receipt and resulting in delivery to that individual.
79 (B) Serving an individual under the age of fourteen. Service must be made on an
80 individual under the age of 14 by delivering a copy of the summons to:
81 (i) the individual's guardian, if the individual has one within the state;
82 (ii) the individual's parent or any person or agency having the individual's care or
83 control, or with whom the individual resides, if the individual does not have a guardian
84 within the state; or

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

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

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

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

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

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

104 (E) Serving a municipal or public corporation. Service must be made on a city,
105 township, school district, park district, county, or any other municipal or public corporation,

106 by delivering a copy of the summons to any member of its governing board.

107 (F) Serving the state and its agencies.

108 (i) State. Service must be made on the state, by delivering a copy of the summons to

109 the governor or attorney general or an assistant attorney general.

110 (ii) State agency. Service must be made on an agency of the state, such as the Bank

111 of North Dakota or the North Dakota Mill and Elevator Association, by delivering a copy of

112 the summons to the managing head of the agency or to the attorney general or an assistant

113 attorney general.

114 (G) Serving an agent not authorized to receive process. If service is made on an agent

115 who is not expressly authorized by appointment or by law to receive service of process on

116 behalf of the defendant, a copy of the summons and complaint must be mailed or delivered

117 via a third-party commercial carrier to the defendant with return receipt requested not later

118 than ten days after service by depositing a copy of the summons and complaint, with postage

119 or shipping prepaid, in a post office or with a commercial carrier in this state and directed to

120 the defendant to be served at the defendant's last reasonably ascertainable address.

121 (3) How service of process is made outside the state. Service on any person subject

122 to the personal jurisdiction of the courts of this state may be made outside the state:

123 (A) in the manner as service within this state, with the force and effect as though

124 service had been made within this state;

125 (B) under the law of the place where service is made for service in that place in an

126 action in any of its courts of general jurisdiction; or

127 (C) as directed by court order.

128 (e) Service by publication.

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

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

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

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

137 (ii) the relief demanded against the defendant consists wholly or partly in excluding
138 the defendant from that lien or interest or in defining, regulating, or limiting that lien or
139 interest, or

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

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

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

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

148 (F) the action is to determine parenting rights and responsibilities of an individual
149 subject to the court's jurisdiction; or
150 (G) the action is to award, partition, condemn, or escheat real or personal property in
151 this state.
152 (2) Filing of complaint and affidavit for service by publication. Before service of the
153 summons by publication is authorized, a complaint and affidavit must be filed with the clerk
154 of court where the action is venued. The complaint must set forth a claim in favor of the
155 plaintiff and against the defendant and be based on one or more of the situations specified
156 in paragraph (e)(1). The affidavit must be executed by the plaintiff or the plaintiff's attorney
157 and must state one or more of the following:
158 (A) that after diligent inquiry personal service of the summons cannot be made on the
159 defendant in this state to the best knowledge, information, and belief of the affiant;
160 (B) that the defendant is a domestic corporation that has forfeited its charter or right
161 to do business in this state or has failed to file its annual report as required by law;
162 (C) that the defendant is a domestic or foreign corporation and has no officer, director,
163 superintendent, managing agent, business agent, or other agent authorized by appointment
164 or by law on whom service of process can be made on its behalf in this state; or
165 (D) that all persons having or claiming an estate or interest in, or lien or encumbrance
166 on, the real property described in the complaint, whether as heirs, devisees, legatees, or
167 personal representative of a deceased person, or under any other title or interest, and not in
168 possession, nor appearing of record in the office of the register of deeds, the clerk of the

169 district court, or the county auditor of the county in which the real property is situated, to
170 have a claim, title or interest in the property, are proceeded against as unknown persons
171 defendant under N.D.C.C. Chs. 32-17 or 32-19 and stating facts necessary to satisfy the
172 requirements of those chapters.

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

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

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

187 (6) Time when first publication or service outside state must be made. The first
188 publication of the summons, or personal service of the summons and complaint on the
189 defendant outside the state, must be made within 60 days after the filing of the affidavit for

190 publication. If not made, the action is considered discontinued as to any defendant not served
191 within that time.
192 (7) When defendant served by publication is permitted to defend.
193 (A) The defendant who is served by publication, or the defendant's representative, on
194 application and sufficient cause shown at any time before judgment, must be allowed to
195 defend the action.
196 (B) Except in an action for divorce, the defendant who is served by publication, or the
197 defendant's representative, on just terms, may be allowed to defend at any time within three
198 years after entry of judgment if the defendant files an affidavit with the court that states:
199 (i) the defendant has a good and meritorious defense to the action; and
200 (ii) the defendant had no actual notice or knowledge of the action to enable the
201 defendant to make application to defend before the entry of judgment.
202 (C) If the defense is successful and the judgment, or any part of the judgment, has
203 been collected or otherwise enforced, restitution may be ordered by the court, but the title to
204 property sold under the judgment to a purchaser in good faith may not be affected.
205 (D) A defendant is considered to have had notice of the action and of the judgment
206 if the defendant:
207 (i) receives a copy of the summons in the action by mail or delivery under paragraph
208 (e)(4); or
209 (ii) is personally served the summons outside the state under paragraph (e)(5).
210 (8) Additional information to be published for real property. In all cases in which

211 publication of summons is made in an action that the title to, or an interest in or lien on, real
212 property is involved, the publication must also contain a description of the real property and
213 a statement of the object of the action.

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

217 (1) by any internationally agreed means of service that is reasonably calculated to give
218 notice, such as those authorized by the Hague Convention on the Service Abroad of Judicial
219 and Extrajudicial Documents;

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

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

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

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

227 (i) delivering a copy of the summons and the complaint to the individual personally;
228 or

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

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

232 (4) Serving a minor or incompetent person. Unless otherwise provided by law, service
233 must be made on a minor or an incompetent person in a place not within any judicial district
234 of the United States in the manner prescribed by paragraphs (2)(A), (2)(B), and (3).
235 (5) Serving a foreign corporation, partnership, or association. Unless otherwise
236 provided by law, service must be made on a foreign corporation, partnership or other
237 unincorporated association, that is subject to suit under a common name, in a place not within
238 any judicial district of the United States in the manner prescribed for individuals in this
239 subdivision except personal delivery under paragraph (2)(C)(i).
240 (g) When service by publication or outside state is complete. Service by publication
241 is complete fifteen days after the first publication of the summons. Personal service of the
242 summons and complaint upon the defendant outside the state is complete fifteen days after
243 the date of service.
244 (h) Amendment of process or proof of service. The court may allow any process or
245 proof of service to be amended at any time on notice and just terms, unless it clearly appears
246 that the substantial rights of the party against whom the process was issued would be
247 materially prejudiced.
248 (i) Proof of service. Proof of service of the summons and the complaint or notice, if
249 any, accompanying the summons or of other process, must be made as follows:
250 (1) if served by the sheriff or other officer, by the officer's certificate of service;
251 (2) if served by any other person, by the server's affidavit of service;
252 (3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06

253 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of
254 a copy of the summons and complaint under paragraph (e)(4), if the summons and complaint
255 has been deposited;
256 (4) in any other case of service by mail or delivery via a third-party commercial carrier
257 resulting in delivery under paragraph (d)(2) or (d)(3), by an affidavit of mailing or an
258 affidavit of delivery of a copy of the summons and complaint or other process, with return
259 receipt attached; or
260 (5) by the written admission of the defendant.
261 (j) Contents of proof of service.
262 (1) The certificate, affidavit, or admission of service mentioned in subdivision (i) must
263 state the date, time, place, and manner of service.
264 (2) If the process, pleading, order of court, or other paper is served personally by a
265 person other than the sheriff or person designated by law, the affidavit of service must also
266 state that:
267 (A) the server is of legal age and not a party to the action nor interested in the action,
268 and
269 (B) the server knew the person served to be the person named in the papers served and
270 the person intended to be served.
271 (k) Contents of affidavit of mailing or delivery via a third-party commercial carrier.
272 An affidavit of mailing or delivery required by this rule must:
273 (1) state a copy of the process, pleading, order of court, or other paper to be served

274 was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-
275 party commercial carrier and directed to the party shown in the affidavit to be served at the
276 party's last reasonably ascertainable address;

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

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

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

280 (l) Effect of mail or delivery refusal. If a summons and complaint or other process is
281 mailed or sent with delivery restricted and requiring a receipt signed by the addressee, the
282 addressee's refusal to accept the mail or delivery constitutes delivery. Return of the mail or
283 delivery bearing an official indication on the cover that delivery was refused by the addressee
284 is prima facie evidence of the refusal. Service is complete on the date of refusal.

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

287 EXPLANATORY NOTE

288 Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977; January 1,
289 1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1998;
290 March 1, 1999; March 1, 2004; March 1, 2007; August 1, 2009; March 1, 2011; March 1,
291 2013;_____.

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

294 Rule 4 was amended, effective March 1, 1999, to allow delivery via a third-party

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

302 Originally, Rule 4 concerned process, with no mention of jurisdiction. In 1971, what
303 are now subdivisions (a) [Definition of Person] and (b) [Jurisdiction over Person] were
304 added. They were taken from the Uniform Interstate and International Procedure Act. Many
305 changes were also made to subdivision (d) [previously (c)] concerning personal service,
306 several of which were taken from that Act.

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

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

311 Paragraph (c)(3) on making a demand to file the complaint was transferred to Rule 5,
312 effective March 1, 2013.

313 Subdivision (d) was amended, effective March 1, 1998, to allow personal service by
314 delivering a copy of the summons to an individual's spouse. The time of service for an item
315 served by mail or third-party commercial carrier under subdivision (d) is the time the item

316 is delivered to or refused by the recipient. Refusal of delivery is tantamount to receipt of the
317 mail or delivery for purposes of service. On the other hand, if the mail or delivery is
318 unclaimed, no service is made. Subdivision (l) was added in 1983, effective September 1,
319 1983, to make it clear that refusal of delivery by the addressee constitutes delivery.

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

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

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

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

336 Service of process under statutory methods is allowed in some circumstances. Service

337 statutes include: N.D.C.C. § 10-01.1-13 (Service of process on foreign and dissolved
338 business entities); N.D.C.C. § 26.1-11-10 (service on a foreign insurance company);
339 N.D.C.C. § 28-04.1-02 (service on a person agreeing by contract to be sued in North
340 Dakota); N.D.C.C. ch. 28-06.2 (service on the United States); N.D.C.C. § 39-01-11 (service
341 on non-resident motorist); N.D.C.C. § 43-07-19 (service on non-resident contractors doing
342 public work); N.D.C.C. § 52-04-12 (service on non-resident employers in unemployment
343 compensation actions); N.D.C.C. § 53-05-04 (Service of process in actions related to
344 amusements).

345 Sources: Joint Procedure Committee Minutes of _____; January
346 26-27, 2012, pages 12-13; April 29-30, 2010, pages 5-6; May 21-22, 2009, pages 44-45;
347 April 27-28, 2006, pages 11-14; January 30-31, 2003, pages 6-10; September 26-27, 2002,
348 pages 15-18; April 30-May 1, 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18;
349 September 25-26, 1997, page 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996,
350 pages 14-16; January 26-27, 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987,
351 pages 1-4 and 11; May 21-22, 1987, page 5; November 29, 1984, pages 3-5; September 30-
352 October 1, 1982, pages 15-18; April 15-16, 1982, pages 2-5; December 11-12, 1980, page
353 2; October 30-31, 1980, page 31; January 17-18, 1980, pages 1-3; November 29-30, 1979,
354 page 2; October 27-28, 1977, page 10; April 8-9, 1976, pages 5-9; Fed.R.Civ.P. 4.

355 Statutes Affected:

356 Considered: N.D.C.C. ch. 28-06.2; N.D.C.C. §§ 10-01.1-13; 26.1-11-10; 28-04.1-02;
357 39-01-11; 43-07-19; 52-04-12; 53-05-04.

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

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

10-01.1-13. Service of process on entities, nonresident governors, and the secretary of state.

1. Until the legal existence of an entity ceases, or until the authority of a foreign entity is withdrawn or revoked, service of any process, notice, or demand on the entity or nonresident governor may be served on:

a. A registered agent;

b. A governor of the entity, whether resident in this state or not;

c. Any responsible person found at the registered office or at the principal executive office if located in this state; or

d. On the secretary of state as provided in this section.

2. Service is perfected under this section pursuant to North Dakota Rules of Civil Procedure or applicable law.

3. The secretary of state is the agent for service of process:

a. When a foreign entity transacts business without a certificate of authority;

b. When a domestic entity has been dissolved;

c. If an entity that previously filed a registered agent filing with the secretary of state no longer has a registered agent; or

d. If the registered agent, governor, or responsible person cannot with reasonable diligence be served.

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4. Service of process, notice, or demand on a registered agent must be in the form of a written document.

5. Service on the secretary of state:

a. Shall be made by registered mail or personal delivery to the secretary of state and not by electronic communication.

b. Shall include the return of the sheriff, or the affidavit of an individual who is not a party, verifying that neither the registered agent nor a responsible person can be found at the registered office or at the principal executive office.

c. Is deemed personal service upon the entity and must be made by filing with the secretary of state:

(1) Three copies of the process, notice, or demand; and

(2) The fees provided in section 10-01.1-03.

d. Is returnable in not less than thirty days notwithstanding a shorter period specified in the process, notice, or demand.

6. The secretary of state shall immediately forward, by registered mail, a copy of the process, notice, or demand addressed to:

a. The entity at the principal executive office address of record;

b. Any address provided by any serving party; or

c. To any forwarding address provided by the United States postal service.

7. The secretary of state shall maintain a record of every process, notice, and demand served on the secretary of state under this section, including the date of service and the action taken with reference to the process, notice, or demand.

8. Service of process, notice, or demand may be perfected by any other means provided by law other than this chapter.

9. The court shall determine if service is proper.

26.1-11-10. Consent to service of process.

Service of process upon the commissioner as attorney for a foreign insurance company doing business in this state is sufficient service upon the company.

28-04.1-02. Action in this state by agreement.
1. If the parties have agreed in writing that an action on a controversy may be brought in this state and the agreement provides the only basis for the exercise of jurisdiction, a court of this state will entertain the action if:
a. The court has power under the law of this state to entertain the action;
b. This state is a reasonably convenient place for the trial of the action;
c. The agreement as to the place of the action was not obtained by misrepresentation, duress, the abuse of economic power, or other unconscionable means; and
d. The defendant, if within the state, was served as required by law of this state in the case of persons within the state or, if without the state, was served either personally or by registered or certified mail directed to the defendant's last-known address.
2. This section does not apply to cognovit clauses, to arbitration clauses, or to the appointment of an agent for the service of process pursuant to statute, rule, or court order.

28-06.2-01. Process served upon the United States - Persons designated to receive summons and complaint.
Service must be made upon the United States by any person authorized to make service under state law or the rules of civil procedure by delivering a copy of the summons and of the complaint to the United States attorney for the federal judicial district in which the action is brought, or to an assistant United States attorney in that district, or to a clerical employee designated by the United States attorney, and by sending a copy of the summons and of the complaint by certified mail to the attorney general of the United States, at Washington, District of Columbia, and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by certified mail to such officer or agency.

39-01-11. Nonresident motor vehicle user - Service upon.
The use and operation by a resident of this state or that person's agent, or by a nonresident or that person's agent, of a motor vehicle upon or over the highways of this state must be deemed an appointment by such resident when that person has been absent from this state continuously for six months or more following an accident or by such nonresident at any time, of the director of the department of transportation of this state to be the person's true and lawful attorney upon whom may be served all legal process in any action or proceeding against the person growing out of the use or operation of the motor vehicle resulting in damages or loss to person or property, whether the damage or loss occurs upon a public highway or upon public or private property, and such use or operation constitutes an agreement that any such process in any action against the person which is so served has the same legal force and effect as if served upon the person personally, or, in case of the person's death, that such process has the same legal force and effect as if served upon the administrator of the person's estate. Service of the summons in such case may be made by delivering a copy thereof to the director with a fee of ten dollars.

43-07-19. Nonresident contractors - Agent for service of process.
Every applicant for a contractor's license who is not a resident of the state of North Dakota, by signing and filing the application, appoints the secretary of state as the applicant's true and lawful agent upon whom may be served all lawful process in any action or proceeding against such nonresident contractor. Such appointment in writing is evidence of the contractor's consent that any such process against the contractor which is so served upon the secretary of state shall be of the same legal force and effect as if served upon the contractor personally within this state. Registered foreign corporations entitled to do business in this state according to chapter 10-19.1, registered foreign limited liability companies entitled to do business in the state according to chapter 10-32, foreign limited liability partnerships entitled to do business in the state according to chapter 45-22, and foreign limited partnerships entitled to do business in the state according to chapter 45-10.2 and having a current registered agent and registered address on file in the secretary of state's office need not appoint the secretary of state as agent for service of process under this section. Within ten days after service of the summons upon the secretary of state, notice of such service with the summons and complaint in the action shall be sent to the defendant contractor at the defendant contractor's last-known address by registered or certified mail with return receipt requested and proof of such mailing shall be attached to the summons. The secretary of state shall keep a record of all process served upon the secretary of state under this section, showing the day and hour of service. Whenever service of process was made under this section, the court, before entering a default judgment, or at any stage of the proceeding, may order such continuance as may be necessary to afford the defendant contractor reasonable opportunity to defend any action pending against the defendant contractor.

52-04-12. Civil action to collect contributions, interest, penalties, delinquency fees - Service on nonresident employers - Contribution liens - Certificates.
1. Collection process of the bureau shall also be by civil action for collection of any money owing to the bureau from any source and for whatever reason, inclusive of interest thereon, penalties and delinquency fees when there is provision for such additional assessments. Costs of the action allowed by statute must be added when judgment is awarded against the debtor, unless waived. When the debtor is a nonresident of this state and the claim for relief accrued subsequent to July 1, 1963, and prior to July 1, 1969, jurisdiction thereof by service of process must be governed by the provisions of this section as it appeared in chapter 334 of the 1963 North Dakota Session Laws and the Supplement to the North Dakota Century Code from July 1, 1963, to July 1, 1969, and when the claim for relief accrued subsequent to July 1, 1969, and prior to August 1, 1971, jurisdiction thereof by service of process must be governed by the provisions of chapter 293 of the 1969 North Dakota Session Laws and chapter 28-06.1 of the Supplement to the North Dakota Century Code, and when the claim for relief accrued subsequent to August 1, 1971, jurisdiction thereof by service of process must be governed by the amended provisions of rule 4 of the North Dakota Rules of Civil Procedure adopted and promulgated by the supreme court under date of June 28, 1971.
2. Whenever any employer, liable to pay contributions, interest, or penalty, fails to pay, the amount of contributions, interest, penalty, and costs that accrue is a lien in favor of the state upon all property and all rights to property belonging to the employer. The lien attaches at the time the contributions, interest, or penalty becomes due, and continues until the liability is satisfied. To preserve the lien against subsequent mortgages, purchasers for value and without notice of the lien, judgment creditors, and

lienholders, job service North Dakota shall file with the recorder, in the county in which the property is located, a notice of the lien. The lien is effective from the time of filing of the notice. The recorder shall preserve the notice and endorse on it the day, hour, and minute when it was received. The recorder shall index the notice of lien in an appropriate index record and record the notice of lien in the manner provided for recording real estate mortgages. The recorder shall accept the notice of lien for filing without payment of a fee by job service North Dakota. Upon payment of the contributions, interest, penalty, and costs, job service North Dakota shall file with the recorder a satisfaction of the lien. The recorder shall enter the satisfaction on the notice of lien, index the satisfaction in an appropriate index record, and record the satisfaction in the manner provided for recording satisfactions of real estate mortgages. The recorder shall accept the satisfaction for filing without payment of a fee by job service North Dakota. The attorney general, upon request of job service North Dakota, may bring suit without bond, to foreclose the lien.

3. Whenever any employer, liable to pay contributions, interest, or penalty, fails to pay the same, job service North Dakota may file a certificate, specifying the amount of contributions, interest, and penalty due and the name of the liable employer, with the clerk of district court in any county. The clerk shall enter and docket the certificate in the same manner as a judgment that directs the payment of money. The certificate has the force and effect of a judgment of the district court. The certificate is a lien on all the real property, except the homestead, of every person named, which the person may have in any county in which the certificate is docketed at the time of docketing or which the person thereafter acquires in the county, for ten years from the time of docketing. The certificate may be renewed in the same manner and with the same effect as a judgment that directs the payment of money. Execution of the certificate is issuable in the same manner as provided for execution of judgments. Job service North Dakota may proceed by garnishment to enforce the certificate in the same manner as a creditor is entitled to proceed by garnishment to enforce a judgment. Upon payment of the contributions, interest, penalty, and costs, job service North Dakota shall file with the clerk of court a satisfaction of the certificate. The clerk shall discharge the record in the same manner as judgments.

4. The foregoing remedies are cumulative and no action taken by job service North Dakota may be construed to be an election to pursue any remedy to the exclusion of any other remedy provided by law.

53-05-04. Service of process upon secretary of state.

In any action or proceeding upon a claim arising out of conduct regulated by this chapter, service of process may be made upon the secretary of state. When served with process, such official, if possible, immediately shall ascertain the post-office address of such person and shall forward a copy of the process served by registered or certified mail to such person. Such service of process upon the secretary of state for all purposes of such suit, and any verdict rendered or judgment entered therein, must be deemed legal and valid personal service of process the same as though made personally upon such person.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 16, 2013

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

At the September meeting, the committee discussed whether language should be added to Rule 11 that would require an acknowledgment from a defendant making a so-called Alford plea. This discussion was prompted by the Supreme Court's concerns that defendants in general do not understand that a guilty plea can be valid even if they do not admit guilt. The committee made multiple amendments to the original acknowledgment proposal, which was based on language from a Florida rule. The committee decided that the rule should be tabled so that it could evaluate its amendments to the provision before making further amendments. The proposal on the table, as amended by the committee, is attached and labeled Alt. A.

Prior to deciding to table the proposal, the committee was discussing whether the court needed to query a defendant making an Alford plea on whether the plea was knowing, intelligent and voluntary. The committee did not make any amendments along this line. Most of the amendments the committee made at the September meeting were drawn from the language of North Carolina v. Alford, 400 U.S. 25 (1970) and State v. McKay, 243 N.W.2d 853 (N.D. 1975). Copies of these cases are attached.

One of the topics that came up during the discussion was whether the state should adopt the nolo contendere plea. Staff was requested to research the nolo plea and its collateral consequences compared to a guilty plea. Fortunately, there is an ALR annotation that covers this topic at 89 ALR 540. This annotation indicates that at least 27 jurisdictions, led by the Federal courts, accept the plea. The collateral consequences of the plea, however,

vary considerably.

Even though North Dakota does not accept the nolo plea, its statutes impose certain collateral consequences for those who make the plea that are essentially indistinguishable from the consequences of a guilty plea. For example: under N.D.C.C. §§ 10-19.1-91(3), 10-32-99(3), 10-33-84(3), a nolo plea may be a factor in determining whether a person is eligible for indemnification by a business organization; under § 12.1-32-15, a nolo plea to sex crime means sex offender registration is required; and peace officers (§ 12-63-12), mortgage purveyors (§ 13-10-05), teachers (§ 15.1-13-25); outdoor outfitters (§ 20.1-03-25), architects (§ 43-03-20) and chiropractors (§ 43-06-15) among many other categories of licensed professionals can be denied licenses based on nolo pleas to offenses.

The ALR annotation lists some categories where a nolo plea may be treated differently than a guilty plea. In particular, there is a general rule that a nolo plea does not establish guilt in any matter other than the particular case in which it was made. So, a nolo plea generally cannot be used to establish a defendant's "guilt" in a civil suit or in another criminal case. On the other hand, the federal courts and many states (including North Dakota as shown above) allow a conviction obtained by nolo plea to be treated the same as a conviction obtained by trial or guilty plea.

If the committee wishes to consider amending Rule 11 to allow a nolo plea in North Dakota, staff has prepared an alternative proposal, labeled Alt. B, that incorporates the federal rules language related to the nolo plea. This alternative proposal is attached.

RULE 11. PLEAS

(a) Entering a plea.

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

(2) Conditional plea. With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea.

(3) Failure to Enter a Plea. If a defendant refuses to enter a plea, the court must enter a plea of not guilty.

(b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

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

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, the right to have the counsel provided under Rule 44;

(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the

22 attendance of witnesses;

23 (E) the defendant's waiver of these trial rights if the court accepts a plea of guilty;

24 (F) the nature of each charge to which the defendant is pleading;

25 (G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;

26 (H) any mandatory minimum penalty; and

27 (I) the court's authority to order restitution.

28 (2) Ensuring that a plea is voluntary. Before accepting a plea of guilty, the court must

29 address the defendant personally in open court, unless the defendant's presence is not

30 required under Rule 43(c), and determine that the plea is voluntary and did not result from

31 force, threats, or promises other than promises in a plea agreement. The court must also

32 inquire whether the defendant's willingness to plead guilty results from discussion between

33 the prosecuting attorney and the defendant or the defendant's attorney.

34 (3) Determining the factual basis for a plea. Before entering judgment on a guilty

35 plea, the court must determine that there is a factual basis for the plea.

36 <u>(4) Acknowledgment by Defendant. Before entering judgment on a guilty plea, the</u>

37 <u>court must determine that the defendant either:</u>

38 <u>(A) acknowledges facts that support the guilty plea; or</u>

39 <u>(B) while maintaining innocence, acknowledges that the guilty plea is in the</u>

40 <u>defendant's best interest and evidence exists from which it can be concluded that the</u>

41 <u>defendant committed the crime.</u>

42 (c) Plea agreement procedure.

43 (1) In general. The prosecuting attorney and the defendant's attorney, or the defendant
44 when acting pro se, may discuss and reach a plea agreement. The court must not participate
45 in these discussions. If the defendant pleads guilty to either a charged offense or a lesser or
46 related offense, the plea agreement may specify that the prosecuting attorney will:
47 (A) not bring, or will move to dismiss, other charges;
48 (B) recommend, or agree not to oppose the defendant's request, that a particular
49 sentence is appropriate; or
50 (C) agree that a specific sentence or sentencing range is the appropriate disposition
51 of the case.
52 (2) Disclosing a plea agreement. The parties must disclose the plea agreement in open
53 court when the plea is offered, unless the court for good cause allows the parties to disclose
54 the plea agreement in camera.
55 (3) Judicial consideration of a plea agreement.
56 (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or
57 (C), the court may accept the agreement, reject it, or defer a decision until the court has
58 reviewed the presentence report.
59 (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the
60 court must advise the defendant that the defendant has no right to withdraw the plea if the
61 court does not follow the recommendation or request.
62 (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must
63 inform the defendant that, to the extent the plea agreement is of the type specified in Rule

64 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

65 (5) Rejecting a plea agreement. If the court rejects a plea agreement containing
66 provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following
67 on the record and in open court:

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

69 (B) advise the defendant personally that the court is not required to follow the plea
70 agreement and give the defendant an opportunity to withdraw the plea; and

71 (C) advise the defendant personally that if the plea is not withdrawn, the court may
72 dispose of the case less favorably toward the defendant than the plea agreement
73 contemplated.

74 (6) Time of plea agreement procedure. Except for good cause shown, notification to
75 the court of the existence of a plea agreement must be given at the arraignment or at such
76 other time, prior to trial, as may be fixed by the court.

77 (d) Withdrawing a guilty plea.

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

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

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

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

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

83 (2) Finality of a Guilty Plea. Unless the defendant proves that withdrawal is necessary
84 to correct a manifest injustice, the defendant may not withdraw a plea of guilty after the court

85 has imposed sentence.

86 (3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced
87 by reliance on the defendant's plea, the court may deny a plea withdrawal request.

88 (e) Admissibility or inadmissibility of a plea, plea discussions, and related statements.
89 The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is
90 governed by N.D.R.Ev. 410.

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

94 (g) Defendant's presence at plea proceeding. A plea of guilty may be made only by the
95 defendant, in open court, unless the defendant is a corporation, in which case it may be made
96 by counsel; or in a non-felony case, the defendant may petition to enter a plea of guilty as
97 provided in Rule 43(b).

98 EXPLANATORY NOTE

99 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996;
100 March 1, 2006; June 1, 2006; March 1, 2010;_____.

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

106 acceptance or rejection of the plea agreement.

107 Rule 11 was amended, effective March 1, 2006, in response to the December 1, 2002,
108 revision of the Federal Rules of Criminal Procedure. The language and organization of the
109 rule were changed to make the rule more easily understood and to make style and
110 terminology consistent throughout the rules.

111 Subdivision (a) provides for the various alternative pleas which the defendant may
112 enter. This subdivision does not permit a defendant to enter a plea of nolo contendere and
113 differs from the federal rule in that respect.

114 Paragraph (a)(2) was adopted effective March 1, 1986. This provision allows the
115 defendant, with the approval of the court and the consent of the prosecuting attorney, to enter
116 a conditional plea of guilty and reserve in writing the right, on appeal of the adverse
117 determination of any specified pretrial motion. The conditional plea procedure is intended
118 to conserve prosecutorial and judicial resources and advance speedy trial objectives by
119 avoiding the necessity of a trial simply to preserve pretrial issues for appellate review.

120 Subdivision (b) prescribes the advice which the court must give to the defendant as
121 a prerequisite to the acceptance of a plea of guilty. The court is required to determine that a
122 plea is made with an understanding of the nature of the charge and the consequences of the
123 plea. Subdivision (b) also establishes the requirement that the court address the defendant
124 personally.

125 Paragraph (b)(1) requires the court to determine if the defendant understands the
126 nature of the charge and requires the court to inform the defendant of and determine that the

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

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

140 Paragraph (b)(2) requires the court to determine that a plea of guilty is voluntary
141 before accepting it. Paragraph (b)(2), together with subdivision (c), affords the court an
142 adequate basis for rejecting an improper plea agreement induced by threats or inappropriate
143 promises. The rule specifies that the court personally address the defendant in determining
144 the voluntariness of the plea.

145 Paragraph (b)(3) requires that the court not enter judgment on a plea of guilty without
146 making an inquiry to ensure that there is a factual basis for the plea.

147 Paragraph (b)(4) was added to the rule, effective _____, and requires the

148 court to obtain an acknowledgment from the defendant about whether the defendant is
149 admitting guilt or pleading guilty based on the defendant's best interest.

150 Subdivision (c) provides for a plea agreement procedure. In doing so it gives
151 recognition to the propriety of plea discussions and plea agreements, provided they are
152 disclosed in open court and subject to acceptance or rejection by the trial judge. It is believed
153 that where the defendant by the defendant's plea aids in insuring prompt and certain
154 application of correctional measures, the proper ends of the criminal justice system are
155 furthered because swift and certain punishment serves the ends of both general deterrence
156 and the rehabilitation of the individual defendant. The procedure described in subdivision (c)
157 is designed to prevent abuse of plea discussions and agreements by providing appropriate and
158 adequate safeguards.

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

169 Paragraph (c)(2) provides that the parties must disclose any plea agreement in open
170 court or, for good cause, in camera.
171 Paragraph (c)(3) gives the court, upon notice of the plea agreement, the option of
172 accepting or rejecting the agreement or deferring its decision until receipt of the presentence
173 report. The court must inform the defendant that it may choose not to accept a sentence
174 recommendation made as part of a plea agreement. Decisions on plea agreements are left to
175 the discretion of the individual trial judge.
176 Paragraph (c)(4) requires the court, if it accepts the plea agreement, to inform the
177 defendant that it will embody in the judgment and sentence the disposition provided in the
178 plea agreement, or one more favorable to the defendant. This provision serves the dual
179 purpose of informing the defendant immediately that the agreement will be implemented.
180 Paragraph (c)(5) requires the court, on the record, upon its rejection of the plea
181 agreement, to inform the defendant of this fact and to advise the defendant personally, in
182 open court, or for good cause, in camera, that the court is not bound by the plea agreement.
183 The defendant must be afforded an opportunity to withdraw the defendant's plea and must
184 be advised that if the defendant persists in the defendant's guilty plea, the disposition of the
185 case may be less favorable to the defendant than contemplated by the plea agreement.
186 Paragraph (c)(6) requires that the court be notified of the existence of a plea
187 agreement at the arraignment or at another time prior to trial fixed by the court unless it can
188 be shown that for good cause this was not done. Having a plea entered at this stage provides
189 a reasonable time for the defendant to consult with counsel and for counsel to complete any

190 plea discussions with the attorney for the prosecution. The objective of the provision is to
191 make clear that the court has authority to require a plea agreement to be disclosed sufficiently
192 in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

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

195 Subdivision (e) makes it clear that N.D.R.Ev. 410 governs the admissibility of plea
196 discussions.

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

199 Subdivision (g) was amended, effective March 1, 1996, to reference Rule 43(c). In a
200 non-felony case, if the defendant wants to plead guilty without appearing in court, a written
201 form must be used which advises the defendant of his or her constitutional rights and creates
202 a record showing that the plea was made voluntarily, knowingly, and understandingly. See
203 Appendix Form 17. A court may accept a guilty plea via interactive television using the
204 procedure set out in N.D. Sup. Ct. Admin. R. 52.

205 Rule 11 does not include a subdivision entitled harmless error and differs from the
206 1983 amendment to Fed.R.Crim.P. 11(h) in that respect. Rule 52(a), Harmless Error, is
207 intended to have general application to all the criminal rules of procedure.

208 Sources: Joint Procedure Committee Minutes of _____; January 29-
209 30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005,
210 pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-

211 27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12;
212 April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26,
213 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17,
214 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973,
215 pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20,
216 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

217 Statutes Affected:

218 Superseded: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-
219 16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23, 29-14-24, 29-14-
220 26, 29-14-27, 33-12-17, 33-12-18.

221 Considered: N.D.C.C. § 31-13-03.

222 Cross Reference: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right
223 to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo Contendere;
224 Withdrawn Plea of Guilty); N.D.Sup.Ct.Admin.R. 52 (Interactive Television).

RULE 11. PLEAS

(a) Entering a plea.

(1) In general. A defendant may plead not guilty, ~~or~~ guilty or (with the court's consent) nolo contendere.

(2) Conditional plea. With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal must be allowed to withdraw the plea.

(3) Nolo Contendere Plea. Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

~~(3)~~ (4) Failure to Enter a Plea. If a defendant refuses to enter a plea, the court must enter a plea of not guilty.

(b) Advice to defendant.

(1) The court may not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

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

(B) the right to a jury trial;

© the right to be represented by counsel at trial and at every other stage of the

22 proceeding and, if necessary, the right to have the counsel provided under Rule 44;

23 (D) the right at trial to confront and cross-examine adverse witnesses, to be protected

24 from compelled self-incrimination, to testify and present evidence, and to compel the

25 attendance of witnesses;

26 (E) the defendant's waiver of these trial rights if the court accepts a plea of guilty or

27 nolo contendere;

28 (F) the nature of each charge to which the defendant is pleading;

29 (G) any maximum possible penalty, including imprisonment, fine, and mandatory fee;

30 (H) any mandatory minimum penalty; and

31 (I) the court's authority to order restitution.

32 (2) Ensuring that a plea is voluntary. Before accepting a plea of guilty or nolo

33 contendere, the court must address the defendant personally in open court, unless the

34 defendant's presence is not required under Rule 43©, and determine that the plea is voluntary

35 and did not result from force, threats, or promises other than promises in a plea agreement.

36 The court must also inquire whether the defendant's willingness to plead guilty or nolo

37 contendere results from discussion between the prosecuting attorney and the defendant or

38 the defendant's attorney.

39 (3) Determining the factual basis for a plea. Before entering judgment on a guilty

40 plea, the court must determine that there is a factual basis for the plea.

41 (c) Plea agreement procedure.

42 (1) In general. The prosecuting attorney and the defendant's attorney, or the defendant

43 when acting pro se, may discuss and reach a plea agreement. The court must not participate
44 in these discussions. If the defendant pleads guilty or nolo contendere to either a charged
45 offense or a lesser or related offense, the plea agreement may specify that the prosecuting
46 attorney will:
47 (A) not bring, or will move to dismiss, other charges;
48 (B) recommend, or agree not to oppose the defendant's request, that a particular
49 sentence is appropriate; or
50 (C) agree that a specific sentence or sentencing range is the appropriate disposition
51 of the case.
52 (2) Disclosing a plea agreement. The parties must disclose the plea agreement in open
53 court when the plea is offered, unless the court for good cause allows the parties to disclose
54 the plea agreement in camera.
55 (3) Judicial consideration of a plea agreement.
56 (A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or
57 (C), the court may accept the agreement, reject it, or defer a decision until the court has
58 reviewed the presentence report.
59 (B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the
60 court must advise the defendant that the defendant has no right to withdraw the plea if the
61 court does not follow the recommendation or request.
62 (4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must
63 inform the defendant that, to the extent the plea agreement is of the type specified in Rule

64 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

65 (5) Rejecting a plea agreement. If the court rejects a plea agreement containing
66 provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following
67 on the record and in open court:

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

69 (B) advise the defendant personally that the court is not required to follow the plea
70 agreement and give the defendant an opportunity to withdraw the plea; and

71 (C) advise the defendant personally that if the plea is not withdrawn, the court may
72 dispose of the case less favorably toward the defendant than the plea agreement
73 contemplated.

74 (6) Time of plea agreement procedure. Except for good cause shown, notification to
75 the court of the existence of a plea agreement must be given at the arraignment or at such
76 other time, prior to trial, as may be fixed by the court.

77 (d) Withdrawing a guilty <u>or nolo contendere</u> plea.

78 (1) In general. A defendant may withdraw a plea of guilty <u>or nolo contendere</u>:

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

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

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

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

83 (2) Finality of a Guilty <u>or Nolo Contendere</u> Plea. Unless the defendant proves that
84 withdrawal is necessary to correct a manifest injustice, the defendant may not withdraw a

85 plea of guilty or nolo contendere after the court has imposed sentence.

86 (3) Prosecution Reliance on Plea. If the prosecution has been substantially prejudiced
87 by reliance on the defendant's plea, the court may deny a plea withdrawal request.

88 (e) Admissibility or inadmissibility of a plea, plea discussions, and related statements.
89 The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is
90 governed by N.D.R.Ev. 410.

91 (f) Recording the proceedings. A verbatim record of the proceedings at which the
92 defendant enters a plea must be made. If there is a plea of guilty or nolo contendere, the
93 record must include the court's inquiries and advice to the defendant required under Rule
94 11(b) and (C).

95 (g) Defendant's presence at plea proceeding. A plea of guilty or nolo contendere may
96 be made only by the defendant, in open court, unless the defendant is a corporation, in which
97 case it may be made by counsel; or in a non-felony case, the defendant may petition to enter
98 a plea of guilty or nolo contendere as provided in Rule 43(b).

99 EXPLANATORY NOTE

100 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996;
101 March 1, 2006; June 1, 2006; March 1, 2010;_____.

102 Rule 11 is similar to Fed.R.Crim.P. 11. The rule is designed to accomplish a number
103 of objectives: (1) it prescribes the advice that the court must give to ensure the defendant who
104 pleads guilty or nolo contendere has made an informed plea; and (2) it provides for a plea
105 agreement procedure designed to give recognition to the propriety of plea discussions

106 between counsel, to bring the existence of a plea agreement out in open court, and to provide
107 methods for court acceptance or rejection of the plea agreement.

108 Rule 11 was amended, effective March 1, 2006, in response to the December 1, 2002,
109 revision of the Federal Rules of Criminal Procedure. The language and organization of the
110 rule were changed to make the rule more easily understood and to make style and
111 terminology consistent throughout the rules.

112 Rule 11 was amended, effective _____, to allow a defendant to make
113 a plea of nolo contendere.

114 Subdivision (a) provides for the various alternative pleas which the defendant may
115 enter. This subdivision does not permit a defendant to enter a plea of nolo contendere and
116 differs from the federal rule in that respect.

117 Paragraph (a)(2) was adopted effective March 1, 1986. This provision allows the
118 defendant, with the approval of the court and the consent of the prosecuting attorney, to enter
119 a conditional plea of guilty or nolo contendere and reserve in writing the right, on appeal of
120 the adverse determination of any specified pretrial motion. The conditional plea procedure
121 is intended to conserve prosecutorial and judicial resources and advance speedy trial
122 objectives by avoiding the necessity of a trial simply to preserve pretrial issues for appellate
123 review.

124 Subdivision (b) prescribes the advice which the court must give to the defendant as
125 a prerequisite to the acceptance of a plea of guilty or nolo contendere . The court is required
126 to determine that a plea is made with an understanding of the nature of the charge and the

127 consequences of the plea. Subdivision (b) also establishes the requirement that the court
128 address the defendant personally.

129 Paragraph (b)(1) requires the court to determine if the defendant understands the
130 nature of the charge and requires the court to inform the defendant of and determine that the
131 defendant understands the mandatory minimum punishment, if any, and the maximum
132 possible punishment. The objective is to insure that the defendant knows what minimum
133 sentence the judge MUST impose and the maximum sentence the judge MAY impose and,
134 further, to explain the consecutive sentencing possibilities when the defendant pleads to more
135 than one offense. This provision is included so that the judicial warning effectively serves
136 to overcome subsequent objections by the defendant that the defendant's counsel gave the
137 defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the
138 defendant waives by a plea of guilty <u>or nolo contendere</u> and ensures a knowing and
139 intelligent waiver of counsel is made. A similar requirement is found in Rule 5(b) governing
140 the initial appearance.

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

145 Paragraph (b)(2) requires the court to determine that a plea of guilty <u>or nolo</u>
146 <u>contendere</u> is voluntary before accepting it. Paragraph (b)(2), together with subdivision (C),
147 affords the court an adequate basis for rejecting an improper plea agreement induced by

148 threats or inappropriate promises. The rule specifies that the court personally address the
149 defendant in determining the voluntariness of the plea.

150 Paragraph (b)(3) requires that the court not enter judgment on a plea of guilty without
151 making an inquiry to ensure that there is a factual basis for the plea.

152 Subdivision (C) provides for a plea agreement procedure. In doing so it gives
153 recognition to the propriety of plea discussions and plea agreements, provided they are
154 disclosed in open court and subject to acceptance or rejection by the trial judge. It is believed
155 that where the defendant by the defendant's plea aids in insuring prompt and certain
156 application of correctional measures, the proper ends of the criminal justice system are
157 furthered because swift and certain punishment serves the ends of both general deterrence
158 and the rehabilitation of the individual defendant. The procedure described in subdivision (C)
159 is designed to prevent abuse of plea discussions and agreements by providing appropriate and
160 adequate safeguards.

161 Paragraph (c)(1) specifies that both the attorney for the prosecution and the attorney
162 for the defense, or the defendant when acting pro se, participate in plea discussions. It also
163 makes clear that there are three possible concessions that may be made in a plea agreement:
164 first, the charge may be reduced to a lesser or related offense; second, the attorney for the
165 prosecution may agree not to recommend or not oppose the imposition of a particular
166 sentence; or third, the attorney for the prosecution may promise to move for a dismissal of
167 other charges. The court is not permitted to participate in plea discussions because of the
168 possibility that the defendant would believe that the defendant would not receive a fair trial,

169 if no agreement had been reached or the court rejected the agreement, and a subsequent trial
170 ensued before the same judge.

171 Paragraph (c)(2) provides that the parties must disclose any plea agreement in open
172 court or, for good cause, in camera.

173 Paragraph (c)(3) gives the court, upon notice of the plea agreement, the option of
174 accepting or rejecting the agreement or deferring its decision until receipt of the presentence
175 report. The court must inform the defendant that it may choose not to accept a sentence
176 recommendation made as part of a plea agreement. Decisions on plea agreements are left to
177 the discretion of the individual trial judge.

178 Paragraph (c)(4) requires the court, if it accepts the plea agreement, to inform the
179 defendant that it will embody in the judgment and sentence the disposition provided in the
180 plea agreement, or one more favorable to the defendant. This provision serves the dual
181 purpose of informing the defendant immediately that the agreement will be implemented.

182 Paragraph (c)(5) requires the court, on the record, upon its rejection of the plea
183 agreement, to inform the defendant of this fact and to advise the defendant personally, in
184 open court, or for good cause, in camera, that the court is not bound by the plea agreement.
185 The defendant must be afforded an opportunity to withdraw the defendant's plea and must
186 be advised that if the defendant persists in the defendant's guilty <u>or nolo contendere</u> plea, the
187 disposition of the case may be less favorable to the defendant than contemplated by the plea
188 agreement.

189 Paragraph (c)(6) requires that the court be notified of the existence of a plea

190 agreement at the arraignment or at another time prior to trial fixed by the court unless it can
191 be shown that for good cause this was not done. Having a plea entered at this stage provides
192 a reasonable time for the defendant to consult with counsel and for counsel to complete any
193 plea discussions with the attorney for the prosecution. The objective of the provision is to
194 make clear that the court has authority to require a plea agreement to be disclosed sufficiently
195 in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

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

198 Subdivision (e) makes it clear that N.D.R.Ev. 410 governs the admissibility of plea
199 discussions.

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

202 Subdivision (g) was amended, effective March 1, 1996, to reference Rule 43(C). In
203 a non-felony case, if the defendant wants to plead guilty <u>or nolo contendere</u> without
204 appearing in court, a written form must be used which advises the defendant of his or her
205 constitutional rights and creates a record showing that the plea was made voluntarily,
206 knowingly, and understandingly. See Appendix Form 17. A court may accept a guilty <u>or nolo</u>
207 <u>contendere</u> plea via interactive television using the procedure set out in N.D. Sup. Ct. Admin.
208 R. 52.

209 Rule 11 does not include a subdivision entitled harmless error and differs from the
210 1983 amendment to Fed.R.Crim.P. 11(h) in that respect. Rule 52(a), Harmless Error, is

211 intended to have general application to all the criminal rules of procedure.

212 Sources: Joint Procedure Committee Minutes of _____; January 29-

213 30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005,

214 pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-

215 27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12;

216 April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26,

217 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17,

218 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973,

219 pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20,

220 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

221 Statutes Affected:

222 Superseded: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-

223 16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23, 29-14-24, 29-14-

224 26, 29-14-27, 33-12-17, 33-12-18.

225 Considered: N.D.C.C. § 31-13-03.

226 Cross Reference: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right

227 to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo Contendere;

228 Withdrawn Plea of Guilty); N.D.Sup.Ct.Admin.R. 52 (Interactive Television).

FEDERAL RULES OF CRIMINAL PROCEDURE
TITLE IV. ARRAIGNMENT AND PREPARATION FOR TRIAL

Rule 11. Pleas

(a) Entering a Plea.

(1) *In general.* A defendant may plead not guilty, guilty, or (with the court's consent) nolo contendere.

(2) *Conditional Plea.* With the consent of the court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. A defendant who prevails on appeal may then withdraw the plea.

(3) *Nolo Contendere Plea.* Before accepting a plea of nolo contendere, the court must consider the parties' views and the public interest in the effective administration of justice.

(4) *Failure to Enter a Plea.* If a defendant refuses to enter a plea or if a defendant organization fails to appear, the court must enter a plea of not guilty.

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) *Advising and Questioning the Defendant.* Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

(A) the government's right, in a prosecution for perjury or false statement, to use against the defendant any statement that the defendant gives under oath;

(B) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(C) the right to a jury trial;

(D) the right to be represented by counsel--and if necessary have the court appoint counsel--at trial and at every other stage of the proceeding;

(E) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

(F) the defendant's waiver of these trial rights if the court accepts a plea of guilty or nolo contendere;

(G) the nature of each charge to which the defendant is pleading;

(H) any maximum possible penalty, including imprisonment, fine, and term of supervised release;

(I) any mandatory minimum penalty;

(J) any applicable forfeiture;

(K) the court's authority to order restitution;

(L) the court's obligation to impose a special assessment;

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under *18 U.S.C. § 3553(a)*; and

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence.

(2) *Ensuring That a Plea Is Voluntary.* Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and determine that the plea is voluntary and did not result from force, threats, or promises (other than promises in a plea agreement).

(3) *Determining the Factual Basis for a Plea.* Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

(c) Plea Agreement Procedure.

(1) *In General.* An attorney for the government and the defendant's attorney, or the defendant when proceeding pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty or nolo contendere to either a charged offense or a lesser or related offense, the plea agreement may specify that an attorney for the government will:

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence or sentencing range is appropriate or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request does not bind the court); or

(C) agree that a specific sentence or sentencing range is the appropriate disposition of the case, or that a particular provision of the Sentencing Guidelines, or policy statement, or sentencing factor does or does not apply (such a recommendation or request binds the court once the court accepts the plea agreement).

(2) *Disclosing a Plea Agreement.* The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) *Judicial Consideration of a Plea Agreement.*

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) *Accepting a Plea Agreement.* If the court accepts the plea agreement, it must inform the defendant that to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) *Rejecting a Plea Agreement.* If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court (or, for good cause, in camera):

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

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea; and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

(d) Withdrawing a Guilty or Nolo Contendere Plea. A defendant may withdraw a plea of guilty or nolo contendere:

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

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

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

(B) the defendant can show a fair and just reason for requesting the withdrawal.

(e) Finality of a Guilty or Nolo Contendere Plea. After the court imposes sentence, the defendant may not withdraw a plea of guilty or nolo contendere, and the plea may be set aside only on direct appeal or collateral attack.

(f) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and any related statement is governed by *Federal Rule of Evidence 410.*

(g) Recording the Proceedings. The proceedings during which the defendant enters a plea must be recorded by a court reporter or by a suitable recording device. If there is a guilty plea or a nolo contendere plea, the record must include the inquiries and advice to the defendant required under Rule 11(b) and (c).

(h) Harmless Error. A variance from the requirements of this rule is harmless error if it does not affect substantial rights.

HISTORY:

(Amended July 1, 1966; July 31, 1975, P.L. 94-64, §§ 2, 3(5)-(10), 89 Stat. 371, 372; Dec. 1, 1975; Aug. 1, 1979; Dec. 1, 1980; Aug. 1, 1982; Aug. 1, 1983; Aug. 1, 1985; Aug. 1, 1987; Nov. 18, 1988, P.L. 100-690, Title VII, Subtitle B, § 7076, 102 Stat. 4406; Dec. 1, 1989.)

(As amended Dec. 1, 1999; Dec. 1, 2002; Dec. 1, 2007.)

Amendments:

1975. Act July 31, 1975, § 3(5)-(9) (effective 12/1/75, as provided by § 2 of such Act, which appears as a note to Rule 4), substituted subsecs. (c) and (e)(1)-(4) for ones which read:

"(c) Advice to defendant. The court shall not accept a plea of guilty or nolo contendere without first, by addressing the defendant personally in open court, informing him of and determining that he understands the following:

"(1) the nature of the charge to which the plea is offered; and

"(2) the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered; and

"(3) that the defendant has the right to plead not guilty, or to persist in that plea if it has already been made; and

"(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial.

"(e) Plea agreement procedure.

(1) In general. The attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching an agreement that, upon the entering of a plea of guilty or nolo contendere to a charged offense or to a lesser or related offense, the attorney for the government will move for dismissal of other charges, or will recommend or not oppose the imposition of a particular sentence, or will do both. The court shall not participate in any such discussions.

"(2) Notice of such agreement. If a plea agreement has been reached by the parties which contemplates entry of a plea of guilty or nolo contendere in the expectation that a specific sentence will be imposed or that other charges before the court will be dismissed, the court shall require the disclosure of the agreement in open court at the time the plea is offered. Thereupon the court may accept or reject the agreement, or may defer its decision as to acceptance or rejection until there has been an opportunity to consider the presentence report.

"(3) Acceptance of plea. If the court accepts the plea agreement, the court shall inform the defendant that it will embody in the judgment and sentence the disposition provided for in the plea agreement or another disposition more favorable to the defendant than that provided for in the plea agreement.

"(4) Rejection of plea. If the court rejects the plea agreement, the court shall inform the parties of this fact, advise the defendant personally in open court that the court is not bound by the plea agreement, afford the defendant the opportunity to then withdraw his plea, and advise the defendant that if he persists in his guilty plea or plea of nolo contendere the disposition of the case may be less favorable to the defendant than that contemplated by the plea agreement.".

Such Act further (effective 8/1/75, as provided by § 2 of such Act, which appears as a note to Rule 4), substituted subsec. (e)(6) for one which read: "(6) Inadmissibility of plea discussions. Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.".

1988. Act Nov. 18, 1988, in subsec. (c)(1), inserted "or term of supervised release".

Notes of Advisory Committee. 1. This rule is substantially a restatement of existing law and practice, *18 U.S.C. [former] § 564* (Standing mute); *Fogus v United States, 34 F.2d 97,* (C.C.A. 4th) (Duty of court to ascertain that plea of guilty is intelligently and voluntarily made).

2. The plea of nolo contendere has always existed in the Federal courts, *Hudson v United States, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347; United States v Norris, 281 U.S. 619, 50 S.Ct. 424, 74 L.Ed. 1076.* The use of the plea is recognized by the Probation Act, *18 U.S.C. [former] § 724* [see § 3651]. While at times criticized as theoretically lacking in logical basis, experience has shown that it performs a useful function from a practical standpoint.

Notes of Advisory Committee on 1966 amendments. The great majority of all defendants against whom indictments or informations are filed in the federal courts plead guilty. Only a comparatively small number go to trial. United States Attorney Statistical Report, Fiscal Year 1964, p 1. The fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all the federal costs.

Three changes are made in the second sentence. The first change makes it clear that before accepting either a plea of guilty or nolo contendere the court must determine that the plea is made voluntarily with understanding of the nature of the charge. The second change expressly requires the court to address the defendant personally in the course of determining that the plea is made voluntarily and with understanding of the nature of the charge. The reported cases reflect some confusion over this matter. Compare *United States v Diggs, 304 F.2d 929 (6th Cir. 1962); Domenica v United States, 292 F.2d 483 (1st Cir. 1961); Gundlach v United States, 262 F.2d 72 (4th Cir. 1958),* cert den *360 U.S. 904, 3 L.Ed.2d 1255, 79 S.Ct. 1283 (1959);* and *Julian v United States, 236 F.2d 155 (6th Cir. 1956),* which contain the implication that personal interrogation of the defendant is the better practice even when he is represented by counsel, with *Meeks v United States, 298 F.2d 204 (5th Cir. 1962); Nunley v United States, 294 F.2d 579 (10th Cir. 1961),* cert den *368 U.S. 991, 7 L.Ed. 2d 527, 82 S.Ct. 607 (1962);* and *United States v Von der Heide, 169 F. Supp. 560 (D.D.C. 1959).*

The third change in the second sentence adds the words "and the consequences of his plea" to state what clearly is the law. See, e.g., *Von Moltke v Gillies, 332 U.S. 708, 724, 92 L.Ed. 309, 68 S.Ct. 316 (1948); Kerchevel v United States, 274 U.S. 220, 223, 71 L.Ed. 1009, 47 S.Ct. 582 (1927); Munich v United States, 337 F.2d 356* (9th Cir. 1964);

Pilkington v United States, 315 F.2d 204 (4th Cir. 1963); Smith v United States, 324 F.2d 436 (D.C. Cir. 1963); but cf. *Marvel v United States, 335 F.2d 101 (5th Cir. 1964).*

A new sentence is added at the end of the rule to impose a duty on the court in cases where the defendant pleads guilty to satisfy itself that there is a factual basis for the plea before entering judgment. The court should satisfy itself, by inquiry of the defendant or the attorney for the government, or by examining the presentence report, or otherwise, that the conduct which the defendant admits constitutes the offense charged in the indictment or information or an offense included therein to which the defendant has pleaded guilty. Such inquiry should, e.g., protect a defendant who is in the position of pleading voluntarily with an understanding of the nature of the charge but without realizing that his conduct does not actually fall within the charge. For a similar requirement see Mich. Stat. Ann. § 28.1058 (1954); Mich. Sup. Ct. Rules 35A; *In re Valle, 364 Mich. 471, 110 N.W.2d 673 (1961); People v Barrows, 358 Mich. 267, 99 N.W.2d 347 (1959); People v Bumpus, 355 Mich. 374, 94 N.W.2d 854 (1959); People v Coates, 337 Mich. 56, 59 N.W.2d 83 (1953).* See also *Stinson v United States, 316 F.2d 554 (5th Cir. 1963).* The normal consequence of a determination that there is not a factual basis for the plea would be for the court to set aside the plea and enter a plea of not guilty.

For a variety of reasons it is desirable in some cases to permit entry of judgment upon a plea of nolo contendere without inquiry into the factual basis for the plea. The new third sentence is not, therefore, made applicable to pleas of nolo contendere. It is not intended by this omission to reflect any view upon the effect of a plea of nolo contendere in relation to a plea of guilty. That problem has been dealt with by the courts. See, e.g., *Lott v United States, 367 U.S. 421, 426, 6 L.Ed.2d 940, 81 S.Ct. 1563 (1961).*

Notes of Advisory Committee on 1974 amendments. The amendments to rule 11 are designed to achieve two principal objectives:

(1) Subdivision (c) prescribes the advice which the court must give to insure that the defendant who pleads guilty has made an informed plea.

(2) Subdivision (e) provides a plea agreement procedure designed to give recognition to the propriety of plea discussions; to bring the existence of a plea agreement out into the open in court; and to provide methods for court acceptance or rejection of a plea agreement.

Other less basic changes are also made. The changes are discussed in the order in which they appear in the rule.

Subdivision (b) retains the requirement that the defendant obtain the consent of the court in order to plead nolo contendere. It adds that the court shall, in deciding whether to accept the plea, consider the views of the prosecution and of the defense and also the larger public interest in the administration of criminal justice.

Although the plea of nolo contendere has long existed in the federal courts, *Hudson v. United States, 272 U.S. 451, 47 S.Ct. 127, 71 L.Ed. 347 (1926),* the desirability of the plea has been a subject of disagreement. Compare Lane-Reticker, Nolo Contendere in North Carolina, *34 N.C.L.Rev. 280, 290-291 (1956),* with Note. The Nature and Consequences of the Plea of Nolo Contendere, *33 Neb.L.Rev. 428, 434 (1954),* favoring the plea. The American Bar Association Project on Standards for Criminal Justice takes the position that "the case for the nolo plea is not strong enough to justify a minimum standard supporting its use," but because "use of the plea contributes in some degree to the avoidance of unnecessary trials" it does not proscribe use of the plea. ABA, Standards Relating to Pleas of Guilty § 1.1(a) Commentary at 16 (Approved Draft, 1968).

A plea of nolo contendere is, for purposes of punishment, the same as the plea of guilty. See discussion of the history of the nolo plea in *North Carolina v. Alford, 400 U.S. 25, 35-36 n. 8, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).* Note, The Nature and Consequences of the Plea of Nolo Contendere, *33 Neb.L.Rev. 428, 430 (1954).* A judgment upon the plea is a conviction and may be used to apply multiple offender statutes. Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, *51 Yale L.J. 1255, 1265 (1942).* Unlike a plea of guilty, however, it cannot be used against a defendant as an admission in a subsequent criminal or civil case. 4 Wigmore § 1066(4), at 58 (3d ed. 1940, Supp. 1970); Rules of Evidence for United States Courts and Magistrates, rule 803(22) (Nov. 1971). See Lenvin and Meyers, Nolo Contendere: Its Nature and Implications, *51 Yale L.J. 1255 (1942);* ABA Standards Relating to Pleas of Guilty §§ 1.1(a) and (b), Commentary at 15-18 (Approved Draft, 1968).

The factors considered relevant by particular courts in determining whether to permit the plea of nolo contendere vary. Compare *United States v. Bagliore, 182 F.Supp. 714, 716 (E.D.N.Y. 1960),* where the view is taken that the plea should be rejected unless a compelling reason for acceptance is established, with *United States v. Jones, 119 F.Supp. 288, 290 (S.D.Cal. 1954),* where the view is taken that the plea should be accepted in the absence of a compelling reason to the contrary.

A defendant who desires to plead nolo contendere will commonly want to avoid pleading guilty because the plea of guilty can be introduced as an admission in subsequent civil litigation. The prosecution may oppose the plea of nolo contendere because it wants a definite resolution of the defendant's guilty or innocence either for correctional purposes or for reasons of subsequent litigation. ABA Standards Relating to Pleas of Guilty § 1.1(b) Commentary at 16-18

(Approved Draft, 1968). Under subdivision (b) of the new rule the balancing of the interests is left to the trial judge, who is mandated to take into account the larger public interest in the effective administration of justice.

Subdivision (c) prescribes the advice which the court must give to the defendant as a prerequisite to the acceptance of a plea of guilty. The former rule required that the court determine that the plea was made with "understanding of the nature of the charge and the consequences of the plea." The amendment identifies more specifically what must be explained to the defendant and also codifies, in the rule, the requirements of *Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969),* which held that a defendant must be apprised of the fact that he relinquishes certain constitutional rights by pleading guilty.

Subdivision (c) retains the requirement that the court address the defendant personally. See *McCarthy v. United States, 394 U.S. 459, 466, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).* There is also an amendment to rule 43 to make clear that a defendant must be in court at the time of the plea.

Subdivision (c)(1) retains the current requirement that the court determine that the defendant understands the nature of the charge. This is a common requirement. See ABA Standards Relating to Pleas of Guilty § 1.4(a) (Approved Draft, 1968); Illinois Supreme Court Rule 402(a)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(a)(1). The method by which the defendant's understanding of the nature of the charge is determined may vary from case to case, depending on the complexity of the circumstances and the particular defendant. In some cases, a judge may do this by reading the indictment and by explaining the elements of the offense to the defendants. Thompson, The Judge's Responsibility on a Plea of Guilty *62 W.Va.L.Rev. 213, 220 (1960);* Resolution of Judges of U.S. District Court for D.C., June 24, 1959.

Former rule 11 required the court to inform the defendant of the "consequences of the plea." Subdivision (c)(2) changes this and requires instead that the court inform the defendant of and determine that he understands "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law for the offense to which the plea is offered." The objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty.

It has been suggested that it is desirable to inform a defendant of additional consequences which might follow from his plea of guilty. *Durant v. United States, 410 F.2d 689 (1st Cir. 1969),* held that a defendant must be informed of his ineligibility for parole. *Trujillo v. United States, 377 F.2d 266 (5th Cir. 1967),* cert denied *389 U.S. 899, 88 S.Ct. 224, 19 L.Ed.2d 221 (1967),* held that advice about eligibility for parole is not required. It has been suggested that a defendant be advised that a jury might find him guilty only of a lesser included offense. C. Wright, Federal Practice and Procedure: Criminal § 173 at 374 (1969). See contra *Dorrough v. United States, 385 F.2d 887 (5th Cir. 1967).* The ABA Standards Relating to Pleas of Guilty § 1.4(c)(iii) (Approved Draft, 1968) recommend that the defendant be informed that he may be subject to additional punishment if the offense charged is one for which a different or additional punishment is authorized by reason of the defendant's previous conviction.

Under the rule the judge is not required to inform a defendant about these matters, though a judge is free to do so if he feels a consequence of a plea of guilty in a particular case is likely to be of real significance to the defendant. Currently, certain consequences of a plea of guilty, such as parole eligibility, may be so complicated that it is not feasible to expect a judge to clearly advise the defendant. For example, the judge may impose a sentence under *18 U.S.C. § 4202* making the defendant eligible for parole when he has served one third of the judicially imposed maximum; or, under *18 U.S.C. § 4208(a)(1)*, making parole eligibility after a specified period of time less than one third of the maximum; or, under *18 U.S.C. § 4208(a)(2)*, leaving eligibility to the discretion of the parole board. At the time the judge is required to advise the defendant of the consequences of his plea, the judge will usually not have seen the presentence report and thus will have no basis for giving a defendant any very realistic advice as to when he might be eligible for parole. Similar complications exist with regard to other, particularly collateral, consequences of a plea of guilty in a given case.

Subdivisions (c)(3) and (4) specify the constitutional rights that the defendant waives by a plea of guilty or nolo contendere. These subdivisions are designed to satisfy the requirements of understanding waiver set forth in *Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969).* Subdivision (c)(3) is intended to require that the judge inform the defendant and determine that he understands that he waives his fifth amendment rights. The rule takes the position that the defendant's right not to incriminate himself is best explained in terms of his right to plead not guilty and to persist in that plea if it has already been made. This is language identical to that adopted in Illinois for the same purpose. See Illinois Supreme Court Rule 402(a)(3) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402(a)(3).

Subdivision (c)(4) assumes that a defendant's right to have his guilt proved beyond a reasonable doubt and the right to confront his accusers are best explained by indicating that the right to trial is waived. Specifying that there will be no future trial of any kind makes this fact clear to those defendants who though knowing they have waived trial by jury, are

under the mistaken impression that some kind of trial will follow. Illinois has recently adopted similar language. Illinois Supreme Court Rule 402(a)(4) (1970), Ill. Rev.Stat. 1973, ch. 110A, § 402(a)(4). In explaining to a defendant that he waives his right to trial, the judge may want to explain some of the aspects of trial such as the right to confront witnesses, to subpoena witnesses, to testify in his own behalf, or, if he chooses, not to testify. What is required, in this respect, to conform to *Boykin* is left to future case-law development.

Subdivision (d) retains the requirement that the court determine that a plea of guilty or nolo contendere is voluntary before accepting it. It adds the requirement that the court also inquire whether the defendant's willingness to plead guilty or nolo contendere results from prior plea discussions between the attorney for the government and the defendant or his attorney. See *Santobello v. New York, 404 U.S. 257, 261-262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971):* "The plea must, of course, be voluntary and knowing and if it was induced by promises, the essence of those promises must in some way be made known." Subdivisions (d) and (e) afford the court adequate basis for rejecting an improper plea agreement induced by threats or inappropriate promises.

The new rule specifies that the court personally address the defendant in determining the voluntariness of the plea.

By personally interrogating the defendant, not only will the judge be better able to ascertain the plea's voluntariness, but he will also develop a more complete record to support his determination in a subsequent post-conviction attack. . . . Both of these goals are undermined in proportion to the degree the district judge resorts to "assumptions" not based upon recorded responses to his inquiries. *McCarthy v. United States, 394 U.S. 459, 466, 467, 89 S.Ct. 1166, 22 L.Ed.2d 418 (1969).*

Subdivision (e) provides a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements provided that they are disclosed in open court and subject to acceptance or rejection by the trial judge.

Although reliable statistical information is limited, one recent estimate indicated that guilty pleas account for the disposition of as many as 95% of all criminal cases. ABA Standards Relating to Pleas of Guilty, pp. 1-2 (Approved Draft, 1968). A substantial number of these are the result of plea discussions. The President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 9 (1967); D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 3 (1966); L. Weinreb, Criminal Process 437 (1969); Note, Guilty Plea Bargaining: Compromises by Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865 (1964).*

There is increasing acknowledgement of both the inevitability and the propriety of plea agreements. See, e.g., ABA Standards Relating to Pleas of Guilty § 3.1 (Approved Draft, 1968); Illinois Supreme Court Rule 402 (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402.

In *Brady v. United States, 397 U.S. 742, 752-753, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970),* the court said:

Of course, that the prevalence of guilty pleas is explainable does not necessarily validate those pleas or the system which produces them. But we cannot hold that it is unconstitutional for the State to extend a benefit to a defendant who in turn extends a substantial benefit to the State and who demonstrates by his plea that he is ready and willing to admit his crime and to enter the correctional system in a frame of mind that affords hope for success in rehabilitation over a shorter period of time than might otherwise be necessary.

In *Santobello v. New York, 404 U.S. 257, 260, 92 S.Ct. 495, 498, 30 L.Ed.2d 427 (1971),* the court said:

The disposition of criminal charges by agreement between the prosecutor and the accused, sometimes loosely called "plea bargaining," is an essential component of the administration of justice. Properly administered, it is to be encouraged.

Administratively, the criminal justice system has come to depend upon pleas of guilty and, hence, upon plea discussions. See, e.g., President's Commission on Law Enforcement and Administration of Justice, Task Force Report. The Courts 9 (1967); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865 (1964).* But expediency is not the basis for recognizing the propriety of a plea agreement practice. Properly implemented, a plea agreement procedure is consistent with both effective and just administration of the criminal law. *Santobello v. New York, 404 U.S. 257, 92 S.Ct. 495, 30 L.Ed.2d 427.* This is the conclusion reached in the ABA Standards Relating to Pleas of Guilty § 1.8 (Approved Draft, 1968); the ABA Standards Relating to The Prosecution Function and The Defense Function pp. 243-253 (Approved Draft, 1971); and the ABA Standards Relating to the Function of the Trial Judge, § 4.1 (App.Draft, 1972). The Supreme Court of California recently recognized the propriety of plea bargaining. See *People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970).* A plea agreement procedure has recently been decided in the District of Columbia Court of General Sessions upon the recommendation of the *United States Attorney. See 51 F.R.D. 109 (1971).*

Where the defendant by his plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. Cf. Note, The Influence of the Defendant's Plea on Judicial

Determination of Sentence, *66 Yale L.J. 204, 211 (1956).* Where the defendant has acknowledged his guilt and shown a willingness to assume responsibility for his conduct, it has been thought proper to recognize this in sentencing. See also ALI, Model Penal Code § 7.01 (P.O.D. 1962); NPPA Guides for Sentencing (1957). Granting a charge reduction in return for a plea of guilty may give the sentencing judge needed discretion, particularly where the facts of a case do not warrant the harsh consequences of a long mandatory sentence or collateral consequences which are unduly severe. A plea of guilty avoids the necessity of a public trial and may protect the innocent victim of a crime against the trauma of direct and cross-examination.

Finally, a plea agreement may also contribute to the successful prosecution of other more serious offenders. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial, chs. 2 and 3 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865, 881 (1964).*

Where plea discussions and agreements are viewed as proper, it is generally agreed that it is preferable that the fact of the plea agreement be disclosed in open court and its propriety be reviewed by the trial judge.

We have previously recognized plea bargaining as an ineradicable fact. Failure to recognize it tends not to destroy it but to drive it underground. We reiterate what we have said before: that when plea bargaining occurs it ought to be spread on the record [The Bench Book prepared by the Federal Judicial Center for use by United States District Judges now suggests that the defendant be asked by the court "if he believes there is any understanding or if any predictions have been made to him concerning the sentence he will receive." Bench Book for United States District Judges, Federal Judicial Center (1969) at 1.05.3.] and publicly disclosed. *United States v. Williams, 407 F.2d 940 (4th Cir. 1969).* . . . In the future we think that the district judges should not only make the general inquiry under Rule 11 as to whether the plea of guilty has been coerced or induced by promises, but should specifically inquire of counsel whether plea bargaining has occurred. Logically the general inquiry should elicit information about plea bargaining, but it seldom has in the past. *Raines v. United States, 423 F.2d 526, 530 (4th Cir. 1970).*

In the past, plea discussions and agreements have occurred in an informal and largely invisible manner. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 115 (1967). There has often been a ritual of denial that any promises have been made, a ritual in which judges, prosecutors, and defense counsel have participated. ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60-69 (Approved Draft 1968); Task Force Report: The Courts 9. Consequently, there has been a lack of effective judicial review of the propriety of the agreements, thus increasing the risk of real or apparent unfairness. See ABA Standards Relating to Pleas of Guilty § 3.1, Commentary at 60 et seq.; Task Force Report: The Courts 9-13.

The procedure described in subdivision (e) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Subdivision (e)(1) specifies that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may" participate in plea discussions. The inclusion of "the defendant when acting pro se" is intended to reflect the fact that there are situations in which a defendant insists upon representing himself. It may be desirable that an attorney for the government not enter plea discussions with a defendant personally. If necessary, counsel can be appointed for purposes of plea discussions. (Subdivision (d) makes it mandatory that the court inquire of the defendant whether his plea is the result of plea discussions between him and the attorney for the government. This is intended to enable the court to reject an agreement reached by an unrepresented defendant unless the court is satisfied that acceptance of the agreement adequately protects the rights of the defendant and the interests of justice.) This is substantially the position of the ABA Standards Relating to Pleas of Guilty § 3.1(a), Commentary at 65-66 (Approved Draft, 1968). Apparently, it is the practice of most prosecuting attorneys to enter plea discussions only with defendant's counsel. Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865, 904 (1964).* Discussions without benefit of counsel increase the likelihood that such discussions may be unfair. Some courts have indicated that plea discussions in the absence of defendant's attorney may be constitutionally prohibited. See *Anderson v. North Carolina, 221 F.Supp. 930, 935 (W.D.N.C.1963); Shape v. Sigler, 230 F.Supp. 601, 606 (D.Neb. 1964).*

Subdivision (e)(1) is intended to make clear that there are four possible concessions that may be made in a plea agreement. First, the charge may be reduced to a lesser or related offense. Second, the attorney for the government may promise to move for dismissal of other charges. Third, the attorney for the government may agree to recommend or not oppose the imposition of a particular sentence. Fourth, the attorneys for the government and the defense may agree that a given sentence is an appropriate disposition of the case. This is made explicit in subdivision (e)(2) where reference is made to an agreement made "in the expectation that a specific sentence will be imposed." See Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865, 898 (1964).*

Subdivision (e)(1) prohibits the court from participating in plea discussions. This is the position of the ABA Standards Relating to Pleas of Guilty § 3.3(a) (Approved Draft, 1968).

It has been stated that it is common practice for a judge to participate in plea discussions. See D. Newman, Conviction: The Determination of Guilt or Innocence Without Trial 32-52, 78-104 (1966); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865, 891, 905 (1964).*

There are valid reasons for a judge to avoid involvement in plea discussions. It might lead the defendant to believe that he would not receive a fair trial, were there a trial before the same judge. The risk of not going along with the disposition apparently desired by the judge might induce the defendant to plead guilty, even if innocent. Such involvement makes it difficult for a judge to objectively assess the voluntariness of the plea. See ABA Standards Relating to Pleas of Guilty § 3.3(a), Commentary at 72-74 (Approved Draft, 1968); Note, Guilty Plea Bargaining: Compromises By Prosecutors To Secure Guilty Pleas, *112 U.Pa.L.Rev. 865, 891-892 (1964);* Comment, Official Inducements to Plead Guilty: Suggested Morals for a Marketplace, *32 U.Chi.L.Rev. 167, 180-183 (1964);* Informal Opinion No. 779 ABA Professional Ethics Committee ("A judge should not be a party to advance arrangements for the determination of sentence, whether as a result of a guilty plea or a finding of guilt based on proof."). *51 A.B.A.J. 444 (1965).* As has been recently pointed out:

The unequal positions of the judge and the accused, one with the power to commit to prison and the other deeply concerned to avoid prison, as once raise a question of fundamental fairness. When a judge becomes a participant in plea bargaining he brings to bear the full force and majesty of his office. His awesome power to impose a substantially longer or even maximum sentence in excess of that proposed is present whether referred to or not. A defendant needs no reminder that if he rejects the proposal, stands upon his right to trial and is convicted, he faces a significantly longer sentence. *United States ex rel. Elksnis v. Gilligan, 256 F.Supp. 244, 254 (S.D.N.Y. 1966).*

On the other hand, one commentator has taken the position that the judge may be involved in discussions either after the agreement is reached or to help elicit facts and an agreement. Enker, Perspectives on Plea Bargaining, in President's Commission on Law Enforcement and Administration of Justice, Task Force Report: The Courts 108, 117-118 (1967).

The amendment makes clear that the judge should not participate in plea discussions leading to a plea agreement. It is contemplated that the judge may participate in such discussions as may occur when the plea agreement is disclosed in open court. This is the position of the recently adopted Illinois Supreme Court Rule 402(d)(1) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(1). As to what may constitute "participation," contrast *People v. Earegood, 12 Mich.App. 256, 268-269, 162 N.W.2d 802, 809-810 (1968),* with *Kruse v. State, 47 Wis.2d 460, 177 N.W.2d 322 (1970).*

Subdivision (e)(2) provides that the judge shall require the disclosure of any plea agreement in open court. In *People v. West, 3 Cal.3d 595, 91 Cal.Rptr. 385, 477 P.2d 409 (1970),* the court said:

[T]he basis of the bargain should be disclosed to the court and incorporated in the record. . . .

Without limiting that court to those we set forth, we note four possible methods of incorporation: (1) the bargain could be stated orally and recorded by the court reporter, whose notes then must be preserved or transcribed; (2) the bargain could be set forth by the clerk in the minutes of the court; (3) the parties could file a written stipulation stating the terms of the bargain; (4) finally, counsel or the court itself may find it useful to prepare and utilize forms for the recordation of plea bargains. *91 Cal.Rptr. 393, 394, 477 P.2d at 417, 418.*

The District of Columbia Court of General Sessions is using a "Sentence-Recommendation Agreement" form.

Upon notice of the plea agreement, the court is given the option to accept or reject the agreement or defer its decision until receipt of the presentence report.

The judge may, and often should, defer his decision until he examines the presentence report. This is made possible by rule 32 which allows a judge, with the defendant's consent, to inspect a presentence report to determine whether a plea agreement should be accepted. For a discussion of the use of conditional plea acceptance, see ABA Standards Relating to Pleas of Guilty § 3.3(b), Commentary at 74-76, and Supplement, Proposed Revisions § 3.3(b) at 2-3 (Approved Draft, 1968); Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(2).

The plea agreement procedure does not attempt to define criteria for the acceptance or rejection of a plea agreement. Such a decision is left to the discretion of the individual trial judge.

Subdivision (e)(3) makes is mandatory, if the court decides to accept the plea agreement, that it inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This serves the purpose of informing the defendant immediately that the agreement will be implemented.

Subdivision (e)(4) requires the court, if it rejects the plea agreement, to inform the defendant of this fact and to advise the defendant personally, in open court, that the court is not bound by the plea agreement. The defendant must be afforded an opportunity to withdraw his plea and must be advised that if he persists in his guilty plea or plea of nolo contendere, the disposition of the case may be less favorable to him than that contemplated by the plea agreement. That

the defendant should have the opportunity to withdraw his plea if the court rejects the plea agreement is the position taken in ABA Standards Relating to Pleas of Guilty, Supplement, Proposed Revisions § 2.1(a)(ii)(5) (Approved Draft, 1968). Such a rule has been adopted in Illinois. Illinois Supreme Court Rule 402(d)(2) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(d)(2).

If the court rejects the plea agreement and affords the defendant the opportunity to withdraw the plea, the court is not precluded from accepting a guilty plea from the same defendant at a later time, when such plea conforms to the requirements of rule 11.

Subdivision (e)(5) makes it mandatory that, except for good cause shown, the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the government. ABA Standards Relating to Pleas of Guilty § 1.3 (Approved Draft, 1968). The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

Subdivision (e)(6) is taken from rule 410, Rules of Evidence for United States Courts and Magistrates (Nov. 1971). See Advisory Committee Note thereto. See also the ABA Standards Relating to Pleas of Guilty § 2.2 (Approved Draft, 1968); Illinois Supreme Court Rule 402(f) (1970), Ill. Rev. Stat. 1973, ch. 110A, § 402(f).

Subdivision (f) retains the requirement of old rule 11 that the court should not enter judgment upon a plea of guilty without making such an inquiry as will satisfy it that there is a factual basis for the plea. The draft does not specify that any particular type of inquiry be made. See *Santobello v. New York, 404 U.S. 257, 261, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971); "Fed.Rule Crim.Proc. 11*, governing pleas in federal courts, now makes clear that the sentencing judge must develop, on the record, the factual basis for the plea, as, for example, by having the accused describe the conduct that gave rise to the charge." An inquiry might be made of the defendant, of the attorneys for the government and the defense, of the presentence report when one is available, or by whatever means is appropriate in a specific case. This is the position of the ABA Standards Relating to Pleas of Guilty § 1.6 (Approved Draft, 1968). Where inquiry is made of the defendant himself it may be desirable practice to place the defendant under oath. With regard to a determination that there is a factual basis for a plea of guilty to a "lessor or related offense," compare ABA Standards Relating to Pleas of Guilty § 3.1(b)(ii), Commentary at 67-68 (Approved Draft, 1968), with ALI, Model Penal Code § 1.07(5) (P.O.D. 1962). The rule does not speak directly to the issue of whether a judge may accept a plea of guilty where there is a factual basis for the plea but the defendant asserts his innocence. *North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).* The procedure in such case would seem to be to deal with this as a plea of nolo contendere, the acceptance of which would depend upon the judge's decision as to whether acceptance of the plea is consistent with "the interest of the public in the effective administration of justice" [new rule 11(b)]. The defendant who asserts his innocence while pleading guilty or nolo contendere is often difficult to deal with in a correctional setting, and it may therefore be preferable to resolve the issue of guilt or innocence at the trial stage rather than leaving that issue unresolved, thus complicating subsequent correctional decisions. The rule is intended to make clear that a judge may reject a plea of nolo contendere and require the defendant either to plead not guilty or to plead guilty under circumstances in which the judge is able to determine that the defendant is in fact guilty of the crime to which he is pleading guilty.

Subdivision (g) requires that a verbatim record be kept of the proceedings. If there is a plea of guilty or nolo contendere, the record must include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea and the plea agreement, and the inquiry into the accuracy of the plea. Such a record is important in the event of a post-conviction attack. ABA Standards Relating to Pleas of Guilty § 1.7 (Approved Draft, 1968). A similar requirement was adopted in Illinois: Illinois Supreme Court Rule 402(e) (1970), Ill.Rev.Stat. 1973, ch. 110A, § 402(e).

Notes of Committee on the Judiciary on 1975 amendments (House Report No. 94-247). A. Amendments Proposed by the Supreme Court. *Rule 11 of the Federal Rules of Criminal Procedure* deals with pleas. The Supreme Court has proposed to amend this rule extensively.

Rule 11 provides that a defendant may plead guilty, not guilty, or nolo contendere. The Supreme Court's amendments to Rule 11(b) provide that a nolo contendere plea "shall be accepted by the court only after due consideration of the views of the parties and the interest of the public in the effective administration of justice."

The Supreme Court amendments to Rule 11(c) spell out the advise that the court must give to the defendant before accepting the defendant's plea of guilty or nolo contendere. The Supreme Court amendments to Rule 11(d) set forth the steps that the court must take to insure that a guilty or nolo contendere plea has been voluntarily made.

The Supreme Court amendments to Rule 11(e) establish a plea agreement procedure. This procedure permits the parties to discuss disposing of a case without a trial and sets forth the type of agreements that the parties can reach

concerning the disposition of the case. The procedure is not mandatory; a court is free not to permit the parties to present plea agreements to it.

The Supreme Court amendments to Rule 11(f) require that the court, before entering judgment upon a plea of guilty, satisfy itself that "there is a factual basis for the plea." The Supreme Court amendments to Rule 11(g) require that a verbatim record be kept of the proceedings at which the defendant enters a plea.

B. Committee Action. The proposed amendments to Rule 11, particularly those relating to the plea negotiating procedure, have generated much comment and criticism. No observer is entirely happy that our criminal justice system must rely to the extent it does on negotiated dispositions of cases. However, crowded court dockets make plea negotiating a fact that the Federal Rules of Criminal Procedure should contend with. The Committee accepts the basic structure and provisions of Rule 11(e).

Rule 11(e) as proposed permits each federal court to decide for itself the extent to which it will permit plea negotiations to be carried on within its own jurisdiction. No court is compelled to permit any plea negotiations at all. Proposed Rule 11(e) regulates plea negotiations and agreements if, and to the extent that, the court permits such negotiations and agreements. [Proposed Rule 11(e) has been criticized by some federal judges who read it to mandate the court to permit plea negotiations and the reaching of plea agreements. The Advisory Committee stressed during its testimony that the rule does not mandate that a court permit any form of plea agreement to be presented to it. See, e.g., the remarks of United States Circuit Judge William H. Webster in Hearings II, at 196. See also the exchange of correspondence between Judge Webster and United States District Judge Frank A. Kaufman in Hearings II, at 289-90.]

Proposed Rule 11(e) contemplates 4 different types of plea agreements. First, the defendant can plead guilty or nolo contendere in return for the prosecutor's reducing the charge to a less serious offense. Second, the defendant can plead guilty or nolo contendere in return for the prosecutor dropping, or not bringing, a charge or charges relating to other offenses. Third, the defendant can plead guilty or nolo contendere in return for the prosecutor's recommending a sentence. Fourth, the defendant and prosecutor can agree that a particular sentence is the appropriate disposition of the case. [It is apparent, though not explicitly stated, that Rule 11(e) contemplates that the plea agreement may bind the defendant to do more than just plead guilty or nolo contendere. For example, the plea agreement may bind the defendant to cooperate with the prosecution in a different investigation. The Committee intends by its approval of Rule 11(e) to permit the parties to agree on such terms in a plea agreement.]

The Committee added language in subdivisions (e)(2) and (e)(4) to permit a plea agreement to be disclosed to the court, or rejected by it, in camera. There must be a showing of good cause before the court can conduct such proceedings in camera. The language does not address itself to whether the showing of good cause may be made in open court or in camera. That issue is left for the courts to resolve on a case-by-case basis. These changes in subdivisions (e)(2) and (e)(4) will permit a fair trial when there is substantial media interest in a case and the court is rejecting a plea agreement.

The Committee added an exception to subdivision (e)(6). That subdivision provides:

> Evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

The Committee's exception permits the use of such evidence in a perjury or false statement prosecution where the plea, offer, or related statement was made by the defendant on the record, under oath and in the presence of counsel. The Committee recognizes that even this limited exception may discourage defendants from being completely candid and open during plea negotiations and may even result in discouraging the reaching of plea agreements. However, the Committee believes hat, on balance, it is more important to protect the integrity of the judicial process from willful deceit and untruthfulness. [The Committee does not intend its language to be construed as mandating or encouraging the swearing-in of the defendant during proceedings in connection with the disclosure and acceptance or rejection of a plea agreement.]

The Committee recast the language of Rule 11(c), which deals with the advice given to a defendant before the court can accept his plea of guilty or nolo contendere. The Committee acted in part because it believed that the warnings given to the defendant ought to include those that *Boykin v. Alabama, 395 U.S. 238 (1969),* said were constitutionally required. In addition, and as a result of its change in subdivision (e)(6), the Committee thought if only fair that the defendant be warned that his plea of guilty (later withdrawn) or nolo contendere, or his offer of either plea, or his statements made in connection with such pleas or offers, could later be used against him in a perjury trial if made under oath, on the record, and in the presence of counsel.

Notes of Conference Committee on 1975 amendments (House Report No. 94-414). Subdivision (c). Rule 11(c) enumerates certain things that a judge must tell a defendant before the judge can accept that defendant's plea of guilty or

nolo contendere. The House version expands upon the list originally proposed by the Supreme Court. The Senate version adopts the Supreme Court's proposal.

The Conference adopts the House provision.

Subdivision (e)(1). Rule 11(e)(1) outlines some general considerations concerning the plea agreement procedure. The Senate version makes nonsubstantive change in the House version.

The Conference adopts the Senate provision.

Subdivision (e)(6). Rule 11(e)(6) deals with the use of statements made in connection with plea agreements. The House version permits a limited use of pleas of guilty, later withdrawn, or nolo contendere offers of such pleas, and statements made in connection with such pleas or offers. Such evidence can be used in a perjury or false statement prosecution if the plea, offer, or related statement was made under oath on the record, and in the presence of counsel. The Senate version permits evidence of voluntary and reliable statements made in court on the record to be used for the purpose of impeaching the credibility of the declarant or in a perjury or false statement prosecution.

The Conference adopts the House version with changes. The Conference agrees that neither a plea nor the offer of a plea ought to be admissible for any purpose. The Conference-adopted provision, therefore, like the Senate provision, permits only the use of statements made in connection with a plea of guilty, later withdrawn, or a plea of nolo contendere, or in connection with an offer of a guilty or nolo contendere plea.

Notes of Advisory Committee on 1979 amendments. *Note to Subdivision (e)(2).* The amendment to rule 11(e)(2) is intended to clarify the circumstances in which the court may accept or reject a plea agreement, with the consequences specified in subdivisions (e)(3) and (4). The present language has been the cause of some confusion and has led to results which are not entirely consistent. Compare *United States v. Sarubbi, 416 F.Supp. 633 (D.N.J. 1976);* with *United States v. Hull, 413 F.Supp. 145 (E.D.Tenn. 1976).*

Rule 11(e)(1) specifies three types of plea agreements, namely, those in which the attorney for the government might

(A) move for dismissal of other charges; or

(B) make a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding upon the court; or

(C) agree that a specific sentence is the appropriate disposition of the case.

A (B) type of plea agreement is clearly of a different order than the other two, for an agreement to recommend or not to oppose is discharged when the prosecutor performs as he agreed to do. By comparison, critical to a type (A) or (C) agreement is that the defendant receive the contemplated charge dismissal or agreed-to sentence. Consequently, there must ultimately be an acceptance or rejection by the court of a type (A) or (C) agreement so that it may be determined whether the defendant shall receive the bargained-for concessions or shall instead be afforded an opportunity to withdraw his plea. But this is not so as to a type (B) agreement; there is no "disposition provided for" in such a plea agreement so as to make the acceptance provisions of subdivision (e)(3) applicable, nor is there a need for rejection with opportunity for withdrawal under subdivision (e)(4) in light of the fact that the defendant knew the nonbinding character of the recommendation or request. *United States v. Henderson, 565 F.2d 1119* (9th Cir. 1977); *United States v. Savage, 561 F.2d 554 (4th Cir. 1977).*

Because a type (B) agreement is distinguishable from the others in that it involves only a recommendation or request not binding upon the court, it is important that the defendant be aware that this is the nature of the agreement into which he has entered. The procedure contemplated by the last sentence of amended subdivision (e)(2) will establish for the record that there is such awareness. This provision conforms to ABA Standards Relating to Pleas of Guilty § 1.5 (Approved Draft, 1968), which provides that "the court must advise the defendant personally that the recommendations of the prosecuting attorney are not binding on the court."

Sometimes a plea agreement will be partially but not entirely of the (B) type, as where a defendant, charged with counts 1, 2 and 3, enters into an agreement with the attorney for the government wherein it is agreed that if defendant pleads guilty to count 1, the prosecutor will recommend a certain sentence as to that count and will move for dismissal of counts 2 and 3. In such a case, the court must take particular care to ensure that the defendant understands which components of the agreement involve only a (B) type recommendation and which do not. In the above illustration, that part of the agreement which contemplates the dismissal of counts 2 and 3 is an (A) type agreement, and thus under rule 11(e) the court must either accept the agreement to dismiss these counts or else reject it and allow the defendant to withdraw his plea. If rejected, the defendant must be allowed to withdraw the plea on count 1 even if the type (B) promise to recommend a certain sentence on that count is kept, for a multi-faceted plea agreement is nonetheless a single agreement. On the other hand, if counts 2 and 3 are dismissed and the sentence recommendation is made, then the defendant is not entitled to withdraw his plea even if the sentence recommendation is not accepted by the court, for the defendant received all he was entitled to under the various components of the plea agreement.

Note to Subdivision (e)(6). The major objective of the amendment to rule 11(e)(6) is to describe more precisely, consistent with the original purpose of the provision, what evidence relating to pleas or plea discussions is inadmissible. The present language is susceptible to interpretation which would make it applicable to a wide variety of statements made under various circumstances other than within the context of those plea discussions authorized by rule 11(e) and intended to be protected by subdivision (e)(6) of the rule. See *United States v Herman, 544 F.2d 791 (5th Cir. 1977),* discussed herein.

Fed.R.Ev. 410, as originally adopted by Pub.L. 93-595, provided in part that "evidence of a plea of guilty, later withdrawn, or a plea of nolo contendere, or of an offer to plead guilty or nolo contendere to the crime charged or any other crime, or of statements made in connection with any of the foregoing pleas or offers, is not admissible in any civil or criminal action, case, or proceeding against the person who made the plea or offer." (This rule was adopted with the proviso that it "shall be superseded by any amendment to the Federal Rules of Criminal Procedure which is inconsistent with this rule.") As the Advisory Committee Note explained: "Exclusion of offers to plead guilty or nolo has as its purpose the promotion of disposition of criminal cases by compromise." The amendment of *Fed.R.Crim.P. 11*, transmitted to Congress by the Supreme Court in April 1974, contained a subdivision (e)(6) essentially identical to the rule 410 language quoted above, as a part of a substantial revision of rule 11. The most significant feature of this revision was the express recognition given to the fact that the "attorney for the government and the attorney for the defendant or the defendant when acting pro se may engage in discussions with a view toward reaching" a plea agreement. Subdivision (e)(6) was intended to encourage such discussions. As noted in H.R. Rep. No. 94-247, 94th Cong., 1st Sess. 7 (1975), the purpose of subdivision (e)(6) is to not "discourage defendants from being completely candid and open during plea negotiations." Similarly, H.R. Rep. No. 94-414, 94th Cong., 1st Sess. 10 (1975), states that "Rule 11(e)(6) deals with the use of statements made in connection with plea agreements." (Rule 11(e)(6) was thereafter enacted, with the addition of the proviso allowing use of statements in a prosecution for perjury, and with the qualification that the inadmissible statements must also be "relevant to" the inadmissible pleas or offers. Pub.L. 94-64; *Fed.R.Ev. 410* was then amended to conform. Pub.L. 94-149.)

While this history shows that the purpose of *Fed.R.Ev. 410* and *Fed.R.Crim.P. 11(e)(6)* is to permit the unrestrained candor which produces effective plea discussions between the "attorney for the government and the attorney for the defendant or the defendant when acting pro se," given visibility and sanction in rule 11(e), a literal reading of the language of these two rules could reasonably lead to the conclusion that a broader rule of inadmissibility obtains. That is, because "statements" are generally inadmissible if "made in connection with, and relevant to" an "offer to plead guilty," it might be thought that an otherwise voluntary admission to law enforcement officials is rendered inadmissible merely because it was made in the hope of obtaining leniency by a plea. Some decisions interpreting rule 11(e)(6) point in this direction. See *United States v Herman, 544 F.2d 791 (5th Cir. 1977)* (defendant in custody of two postal inspectors during continuance of removal hearing instigated conversation with them and at some point said he would plead guilty to armed robbery if the murder charge was dropped; one inspector stated they were not "in position" to make any deals in this regard; held, defendant's statement inadmissible under rule 11(e)(6) because the defendant "made the statements during the course of a conversation in which he sought concessions from the government in return for a guilty plea"); *United States v Brooks, 536 F.2d 1137 (6th Cir. 1976)* (defendant telephoned postal inspector and offered to plead guilty if he got 2-year maximum; statement inadmissible).

The amendment makes inadmissible statements made "in the course of any proceedings under this rule regarding" either a plea of guilty later withdrawn or a plea of nolo contendere, and also statements "made in the course of plea discussions with an attorney for the government which do not result in a plea of guilty or which result in a plea of guilty later withdrawn." It is not limited to statements by the defendant himself, and thus would cover statements by defense counsel regarding defendant's incriminating admissions to him. It thus fully protects the plea discussion process authorized by rule 11 without attempting to deal with confrontations between suspects and law enforcement agents, which involve problems of quite different dimensions. See, e.g., ALI Model Code of Pre-Arraignment Procedure art. 140 and § 150.2(8) (Proposed Official Draft, 1975) (latter section requires exclusion if "a law enforcement officer induces any person to make a statement by promising leniency"). This change, it must be emphasized, does not compel the conclusion that statements made to law enforcement agents, especially when the agents purport to have authority to bargain, are inevitably admissible. Rather, the point is that such cases are not covered by the per se rule of 11 (e)(6) and thus must be resolved by that body of law dealing with police interrogations.

If there has been a plea of guilty later withdrawn or a plea of nolo contendere, subdivision (e)(6)(C) makes inadmissible statements made "in the course of any proceedings under this rule" regarding such pleas. This includes, for example, admissions by the defendant when he makes his plea in court pursuant to rule 11 and also admissions made to provide the factual basis pursuant to subdivision (f). However, subdivision (e)(6)(C) is not limited to statements made in court. If the court were to defer its decision on a plea agreement pending examination of the presentence report, as

authorized by subdivision (e)(2), statements made to the probation officer in connection with the preparation of that report would come within this provision.

This amendment is fully consistent with all recent and major law reform efforts on this subject. ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), and ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968) both provide:

Unless the defendant subsequently enters a plea of guilty or nolo contendere which is not withdrawn, the fact that the defendant or his counsel and the prosecuting attorney engaged in plea discussions or made a plea agreement should not be received in evidence against or in favor of the defendant in any criminal or civil action or administrative proceedings.

The Commentary to the latter states:

The above standard is limited to discussions and agreements with the prosecuting attorney. Sometimes defendants will indicate to the police their willingness to bargain, and in such instances these statements are sometimes admitted in court against the defendant. *State v Christian, 245 S.W.2d 895 (Mo. 1952).* If the police initiate this kind of discussion, this may have some bearing on the admissibility of the defendant's statement. However, the policy considerations relevant to this issue are better dealt with in the context of standards governing in-custody interrogation by the police.

Similarly, Unif.R.Crim.P. 441(d) (Approved Draft, 1974), provides that except under limited circumstances "no discussion between the parties or statement by the defendant or his lawyer under this Rule," i.e., the rule providing "the parties may meet to discuss the possibility of pretrial diversion . . . or of a plea agreement," are admissible. The amendment is likewise consistent with the typical state provision on this subject; see, e.g., Ill.S.Ct. Rule 402(f).

The language of the amendment identifies with more precision than the present language the necessary relationship between the statements and the plea or discussion. See the dispute between the majority and concurring opinions in *United States v Herman, 544 F.2d 791 (5th Cir. 1977),* concerning the meanings and effect of the phrases "connection to" and "relevant to" in the present rule. Moreover, by relating the statements to "plea discussions" rather than "an offer to plead," the amendment ensures "that even an attempt to open plea bargaining [is] covered under the same rule of inadmissibility." *United States v Brooks, 536 F.2d 1137 (6th Cir. 1976).*

The last sentence of Rule 11(e)(6) is amended to provide a second exception to the general rule of nonadmissibility of the described statements. Under the amendment, such a statement is also admissible "in any proceeding wherein another statement made in the course of the same plea or plea discussions has been introduced and the statement ought in fairness be considered contemporaneously with it." This change is necessary so that, when evidence of statements made in the course of or as a consequence of a certain plea or plea discussions are introduced under circumstances not prohibited by this rule (e.g., not "against" the person who made the plea), other statements relating to the same plea or plea discussions may also be admitted when relevant to the matter at issue. For example, if a defendant upon a motion to dismiss a prosecution on some ground were able to admit certain statements made in aborted plea discussions in his favor, then other relevant statements made in the same plea discussions should be admissible against the defendant in the interest of determining the truth of the matter at issue. The language of the amendment follows closely that in *Fed.R.Evid. 106*, as the considerations involved are very similar.

The phrase "in any civil or criminal proceeding" has been moved from its present position, following the word "against," for purposes of clarity. An ambiguity presently exists because the word "against" may be read as referring either to the kind of proceeding in which the evidence is offered or the purpose for which is is offered. The change makes it clear that the latter construction is correct. No change is intended with respect to provisions making evidence rules inapplicable in certain situations. See, e.g., *Fed.R.Evid. 104(a)* and *1101(d)*.

Unlike ABA Standards Relating to Pleas of Guilty § 3.4 (Approved Draft, 1968), and ALI Model Code of Pre-Arraignment Procedure § 350.7 (Proposed Official Draft, 1975), rule 11(e)(6) does not also provide that the described evidence is inadmissible "in favor of" the defendant. This is not intended to suggest, however, that such evidence will inevitably be admissible in the defendant's favor. Specifically, no disapproval is intended of such decisions as *United States v Verdoorn, 528 F.2d 103 (8th Cir. 1976),* holding that the trial judge properly refused to permit the defendants to put into evidence at their trial the fact the prosecution had attempted to plea bargain with them, as "meaningful dialogue between the parties would, as a practical matter, be impossible if either party had to assume the risk that plea offers would be admissible in evidence."

Effective date of 1979 amendment of subsec. (e)(6). The amendment of subsec. (e)(6) by Order of the United States Supreme Court of April 30, 1979, is effective 12/1/80 as provided by Act July 31, 1979, P.L. 96-42, § 1(1), 93 Stat. 326, which appears as *18 USCS § 3771* note.

Notes of Advisory Committee on 1982 amendments. *Note to Subdivision (c)(1).* Subdivision (c)(1) has been amended by specifying "the effect of any special parole term" as one of the matters about which a defendant who has tendered a plea of guilty or nolo contendere is to be advised by the court. This amendment does not make any change in

the law, as the courts are in agreement that such advice is presently required by Rule 11. See, e.g., *Moore v. United States, 592 F.2d 753 (4th Cir. 1979); United States v. Eaton, 579 F.2d 1181 (10th Cir. 1978); Richardson v. United States, 577 F.2d 447 (8th Cir. 1978); United States v. Del Prete, 567 F.2d 928* (9th Cir. 1978); *United States v. Watson, 548 F.2d 1058 (D.C. Cir. 1977); United States v. Crusco, 536 F.2d 21 (2d Cir. 1976); United States v. Yazbeck, 524 F.2d 641 (1st Cir. 1975); United States v. Wolak, 510 F.2d 164 (6th Cir. 1975).* In *United States v. Timmreck, 441 U.S. 780 (1979), 99 S.Ct. 2085, 60 L.Ed.2d 634 (1979),* the Supreme Court assumed that the judge's failure in that case to describe the mandatory special parole term constituted "a failure to comply with the formal requirements of the Rule."

The purpose of the amendment is to draw more specific attention to the fact that advice concerning special parole terms is a necessary part of Rule 11 procedure. As noted in *Moore v. United States, supra:*

Special parole is a significant penalty. . . . Unlike ordinary parole, which does not involve supervision beyond the original prison term set by the court and the violation of which cannot lead to confinement beyond that sentence, special parole increases the possible period of confinement. It entails the possibility that a defendant may have to serve his original sentence plus a substantial additional period, without credit for time spent on parole. Explanation of special parole in open court is therefore essential to comply with the Rule's mandate that the defendant be informed of "the maximum possible penalty provided by law."

As the aforecited cases indicate, in the absence of specification of the requirement in the rule, it has sometimes happened that such advice has been inadvertently omitted from Rule 11 warnings.

The amendment does not attempt to enumerate all of the characteristics of the special parole term which the judge ought to bring to the defendant's attention. Some flexibility in this respect must be preserved, although it is well to note that the unique characteristics of this kind of parole are such that they may not be readily perceived by laymen. *Moore v. United States, supra,* recommends that in an appropriate case the judge inform the defendant and determine that he understands the following:

(1) that a special parole term will be added to any prison sentence he receives;

(2) the minimum length of the special parole term that must be imposed and the absence of a statutory maximum;

(3) that special parole is entirely different from--and in addition to--ordinary parole; and

(4) that if the special parole is violated, the defendant can be returned to prison for the remainder of his sentence and the full length of his special parole term.

The amendment should not be read as meaning that a failure to comply with this particular requirement will inevitably entitle the defendant to relief. See *United States v. Timmreck, supra.* Likewise, the amendment makes no change in the existing law to the effect that many aspects of traditional parole need not be communicated to the defendant by the trial judge under the umbrella of Rule 11. For example, a defendant need not be advised of all conceivable consequences such as when he may be considered for parole or that, if he violates his parole, he will again be imprisoned. *Bunker v. Wise, 550 F.2d 1155, 1158* (9th Cir. 1977).

Note to Subdivision (c)(4). The amendment to subdivision (c)(4) is intended to overcome the present conflict between the introductory language of subdivision (c), which contemplates the advice being given "[b]efore accepting a plea of guilty or nolo contendere," and thus presumably after the plea has been tendered, and the "if he pleads" language of subdivision (c)(4) which suggests the plea has not been tendered.

As noted by Judge Doyle in *United States v. Sinagub, 468 F.Supp. 353 (W.D.Wis. 1979):*

Taken literally, this wording of subsection (4) of 11(c) suggests that before eliciting any plea at an arraignment, the court is required to insure that a defendant understands that if he or she pleads guilty or nolo contendere, the defendant will be waiving the right to trial. Under subsection (3) of 11(c), however, there is no requirement that at this pre-plea stage, the court must insure that the defendant understands that he or she enjoys the right to a trial and, at trial, the right to the assistance of counsel, the right to confront and cross-examine witnesses against him or her, and the right not to be compelled to incriminate himself or herself. It would be incongruous to require that at the pre-plea stage the court insure that the defendant understands that if he enters a plea of guilty or nolo contendere he will be waiving a right, the existence and nature of which need not be explained until after such a plea has been entered. I conclude that the insertion of the words "that if he pleads guilty or nolo contendere," as they appear in subsection (4) of 11(c), was an accident of draftsmanship which occurred in the course of Congressional rewriting of 11(c) as it has been approved by the Supreme Court. Those words are to be construed consistently with the words "Before accepting a plea of guilty or nolo contendere," as they appear in the opening language of 11(c), and consistently with the omission of the words "that if he pleads" from subsections (1), (2), and (3) of 11(c). That is, as they appear in subsection (4) of 11(c), the words, "that if he pleads guilty or nolo contendere" should be construed to mean "that if his plea of guilty or nolo contendere is accepted by the court."

Although this is a very logical interpretation of the present language, the amendment will avoid the necessity to engage in such analysis in order to determine the true meaning of subdivision (c)(4).

Note to Subdivision (c)(5). Subdivision (c)(5), in its present form, may easily be read as contemplating that in every case in which a plea of guilty or nolo contendere is tendered, warnings must be given about the possible use of defendant's statements, obtained under oath, on the record and in the presence of counsel, in a later prosecution for perjury or false statement. The language has prompted some courts to reach the remarkable result that a defendant who pleads guilty or nolo contendere without receiving those warnings must be allowed to overturn his plea on appeal even though he was never questioned under oath, on the record, in the presence of counsel about the offense to which he pleaded. *United States v. Artis,* No. 78-5012 (4th Cir. March 12, 1979); *United States v. Boone, 543 F.2d 1090 (4th Cir. 1976).* Compare *United States v. Michaelson, 552 F.2d 472 (2d Cir. 1977)* (failure to give subdivision (c)(5) warnings not a basis for reversal, "at least when, as here, defendant was not put under oath before questioning about his guilty plea"). The present language of subdivision (e)(5) may also have contributed to the conclusion, not otherwise supported by the rule, that "Rule 11 requires that the defendant be under oath for the entirety of the proceedings" conducted pursuant to that rule and that failure to place the defendant under oath would itself make necessary overturning the plea on appeal. *United States v. Aldridge, 553 F.2d 922 (5th Cir. 1977).*

When questioning of the kind described in subdivision (c)(5) is not contemplated by the judge who is receiving the plea, no purpose is served by giving the (c)(5) warnings, which in such circumstances can only confuse the defendant and detract from the force of the other warnings required by Rule 11. As correctly noted in *United States v. Sinagub, supra,*

subsection (5) of section (c) of Rule 11 is qualitatively distinct from the other sections of the Rule. It does not go to whether the plea is knowingly or voluntarily made, nor to whether the plea should be accepted and judgment entered. Rather, it does go to the possible consequences of an event which may or may not occur during the course of the arraignment hearing itself, namely, the administration of an oath to the defendant. Whether this event is to occur is wholly within the control of the presiding judge. If the event is not to occur, it is pointless to inform the defendant of its consequences. If a presiding judge intends that an oath not be administered to a defendant during an arraignment hearing, but alters that intention at some point, only then would the need arise to inform the defendant of the possible consequences of the administration of the oath.

The amendment to subdivision (c)(5) is intended to make it clear that this is the case.

The amendment limits the circumstances in which the warnings must be given, but does not change the fact, as noted in *Sinagub,* that these warnings are "qualitatively distinct" from the other advice required by Rule 11(c). This being the case, a failure to give the subdivision (c)(5) warnings even when the defendant was questioned under oath, on the record and in the presence of counsel would in no way affect the validity of the defendant's plea. Rather, this failure bears upon the admissibility of defendant's answers pursuant to subdivision (e)(6) in a later prosecution for perjury or false statement.

Notes of Advisory Committee on 1983 amendments. Subdivision (a). There are many defenses, objections and requests which a defendant must ordinarily raise by pretrial motion. See, e.g., *18 U.S.C. § 3162(a)(2); Fed.R.Crim.P.12(b).* Should that motion be denied, interlocutory appeal of the ruling by the defendant is seldom permitted. See *United States v. MacDonald, 435 U.S. 850 (1978)* (defendant may not appeal denial of his motion to dismiss based upon Sixth Amendment speedy trial grounds); *DiBella v. United States, 369 U.S. 121 (1962)* (defendant may not appeal denial of pretrial motion to suppress evidence); compare *Abney v. United States, 431 U.S. 651 (1977)* (interlocutory appeal of denial of motion to dismiss on double jeopardy grounds permissible). Moreover, should the defendant thereafter plead guilty or nolo contendere, this will usually foreclose later appeal with respect to denial of the pretrial motion. "When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea." *Tollett v. Henderson, 411 U.S. 258,* (1973). Though a nolo plea differs from a guilty plea in other respects, it is clear that it also constitutes a waiver of all nonjurisdictional defects in a manner equivalent to a guilty plea. *Lott v. United States, 367 U.S. 421 (1961).*

As a consequence, a defendant who has lost one or more pretrial motions will often go through an entire trial simply to preserve the pretrial issues for later appellate review. This results in a waste of prosecutorial and judicial resources, and causes delay in the trial of other cases, contrary to the objectives underlying the Speedy Trial Act of 1974, *18 U.S.C. § 3161* et seq. These unfortunate consequences may be avoided by the conditional plea device expressly authorized by new subdivision (a)(2).

The development of procedures to avoid the necessity for trials which are undertaken for the sole purpose of preserving pretrial objections has been consistently favored by the commentators. See ABA Standards Relating to the Administration of Criminal Justice, standard 21-1.3(c) (2d ed. 1978); Model Code of Pre-Arraignment Procedure § SS 290.1(4)(b) (1975); Uniform Rules of Criminal Procedure, rule 444(d) (Approved Draft, 1974); 1 C. Wright, Federal Practice and Procedure--Criminal § 175 (1969); 3 W. LaFave, Search and Seizure § 11.1 (1978). The Supreme Court

has characterized the New York practice, whereby appeals from suppression motions may be appealed notwithstanding a guilty plea, as a "commendable effort to relieve the problem of congested trial calendars in a manner that does not diminish the opportunity for the assertion of rights guaranteed by the Constitution." *Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975).* That Court has never discussed conditional pleas as such, but has permitted without comment a federal appeal on issues preserved by a conditional plea. *Jaben v. United States, 381 U.S. 214 (1965).* In the absence of specific authorization by statute or rule for a conditional plea, the circuits have divided on the permissibility of the practice. Two circuits have actually approved the entry of conditional pleas, *United States v. Burke, 517 F.2d 377 (2d Cir. 1975); United States v. Moskow, 588 F.2d 882 (3d Cir. 1978);* and two others have praised the conditional plea concept, *United States v. Clark, 459 F.2d 977 (8th Cir. 1972); United States v. Dorsey, 449 F.2d 1104 (D.C.Cir. 1971).* Three circuits have expressed the view that a conditional plea is logically inconsistent and thus improper, *United States v. Brown, 499 F.2d 829 (7th Cir. 1974); United States v. Sepe, 472 F.2d 784,* aff'd en banc, *486 F.2d 1044 (5th Cir. 1973); United States v. Cox, 464 F.2d 937 (6th Cir. 1972);* three others have determined only that conditional pleas are not now authorized in the federal system, *United States v. Benson, 579 F.2d 508* (9th Cir. 1978); *United States v. Nooner, 565 F.2d 633 (10th Cir. 1977); United States v. Matthews, 472 F.2d 1173 (4th Cir. 1973);* while one circuit has reserved judgment on the issue, *United States v. Warwar, 478 F.2d 1183 (1st Cir. 1973).* (At the state level, a few jurisdictions by statute allow appeal from denial of a motion to suppress notwithstanding a subsequent guilty plea, *Cal. Penal Code § 1538.5(m); N.Y.Crim. Proc. Law § 710.20(1); Wis.Stat.Ann. § 971.31(10),* but in the absence of such a provision the state courts are also in disagreement as to whether a conditional plea is permissible; see cases collected in Comment, *26 U.C.L.A.L.Rev. 360, 373 (1978).)*

The conditional plea procedure provided for in subdivision (a)(2) will, as previously noted, serve to conserve prosecutorial and judicial resources and advance speedy trial objectives. It will also produce much needed uniformity in the federal system on this matter; see *United States v. Clark, supra,* noting the split of authority and urging resolution by statute or rule. Also, the availability of a conditional plea under specified circumstances will aid in clarifying the fact that traditional, unqualified pleas do constitute a waiver of nonjurisdictional defects. See *United States v. Nooner, supra* (defendant sought appellate review of denial of pretrial suppression motion, despite his prior unqualified guilty plea, claiming the Second Circuit conditional plea practice led him to believe a guilty plea did not bar appeal of pretrial issues).

The obvious advantages of the conditional plea procedure authorized by subdivision (a)(2) are not outweighed by any significant or compelling disadvantages. As noted in Comment, supra, at 375: "Four major arguments have been raised by courts disapproving of conditioned pleas. The objections are that the procedure encourages a flood of appellate litigation, militates against achieving finality in the criminal process, reduces effectiveness of appellate review due to the lack of a full trial record, and forces decision on constitutional questions that could otherwise be avoided by invoking the harmless error doctrine." But, as concluded therein, those "arguments do not withstand close analysis." Ibid.

As for the first of those arguments, experience in states which have permitted appeals of suppression motions notwithstanding a subsequent plea of guilty is most relevant, as conditional pleas are likely to be most common when the objective is to appeal that kind of pretrial ruling. That experience has shown that the number of appeals has not increased substantially. See Comment, *9 Hous.L.Rev. 305, 315-19 (1971).* The minimal added burden at the appellate level is certainly a small price to pay for avoiding otherwise unnecessary trials.

As for the objection that conditional pleas conflict with the government's interest in achieving finality, it is likewise without force. While it is true that the conditional plea does not have the complete finality of the traditional plea of guilty or nolo contendere because "the essence of the agreement is that the legal guilt of the defendant exists only if the prosecution's case" survives on appeal, the plea

> continues to serve a partial state interest in finality, however, by establishing admission of the defendant's factual guilt. The defendant stands guilty and the proceedings come to an end if the reserved issue is ultimately decided in the government's favor.

Comment, 26 U.C.L.A.L.Rev. 360, 378 (1978).

The claim that the lack of a full trial record precludes effective appellate review may on occasion be relevant. Cf. *United States v. MacDonald, supra* (holding interlocutory appeal not available for denial of defendant's pretrial motion to dismiss on speedy trial grounds, and noting that "most speedy trial claims . . . are best considered only after the relevant facts have been developed at trial"). However, most of the objections which would likely be raised by pretrial motion and preserved for appellate review by a conditional plea are subject to appellate resolution without a trial record. Certainly this is true as to the very common motion to suppress evidence, as is indicated by the fact that appellate courts presently decide such issues upon interlocutory appeal by the government.

With respect to the objection that conditional pleas circumvent application of the harmless error doctrine, it must be acknowledged that "[a]bsent a full trial record, containing all the government's evidence against the defendant, invocation of the harmless error rule is arguably impossible." Comment, supra, at 380. But, the harmless error standard with respect to constitutional objections is sufficiently high, see *Chapman v. California, 386 U.S. 18 (1967),* that relatively few appellate decisions result in affirmance upon that basis. Thus it will only rarely be true that the conditional plea device will cause an appellate court to consider constitutional questions which could otherwise have been avoided by invocation of the doctrine of harmless error.

To the extent that these or related objections would otherwise have some substance, they are overcome by the provision in Rule 11(a)(2) that the defendant may enter a conditional plea only "with the approval of the court and the consent of the government." (In this respect, the rule adopts the practice now found in the Second Circuit.) The requirement of approval by the court is most appropriate, as it ensures, for example, that the defendant is not allowed to take an appeal on a matter which can only be fully developed by proceeding to trial; cf. *United States v. MacDonald, supra.* As for consent by the government, it will ensure that conditional pleas will be allowed only when the decision of the court of appeals will dispose of the case either by allowing the plea to stand or by such action as compelling dismissal of the indictment or suppressing essential evidence. Absent such circumstances, the conditional plea might only serve to postpone the trial and require the government to try the case after substantial delay, during which time witnesses may be lost, memories dimmed, and the offense grown so stale as to lose jury appeal. The government is in a unique position to determine whether the matter at issue would be case-dispositive, and, as a party to the litigation, should have an absolute right to refuse to consent to potentially prejudicial delay. Although it was suggested in *United States v. Moskow, supra,* that the government should have no right to prevent the entry of a conditional plea because a defendant has no comparable right to block government appeal of a pretrial ruling pursuant to *18 U.S.C. § 3731*, that analogy is unconvincing. That statute requires the government to certify that the appeal is not taken for purposes of delay. Moreover, where the pretrial ruling is case-dispositive, § 3731 is the only mechanism by which the government can obtain appellate review, but a defendant may always obtain review by pleading not guilty.

Unlike the state statutes cited earlier, Rule 11 (a)(2) is not limited to instances in which the pretrial ruling the defendant wishes to appeal was in response to defendant's motion to suppress evidence. Though it may be true that the conditional plea device will be most commonly employed as to such rulings, the objectives of the rule are well served by extending it to other pretrial rulings as well. See, e.g., ABA Standards, supra (declaring the New York provision "should be enlarged to include other pretrial defenses"); Uniform Rules of Criminal Procedure, rule 444 (d) (Approved Draft, 1974) ("any pretrial motion which, if granted, would be dispositive of the case").

The requirement that the conditional plea be made by the defendant "reserving in writing the right to appeal from the adverse determination of any specified pretrial motion," though extending beyond the Second Circuit practice, will ensure careful attention to any conditional plea. It will document that a particular plea was in fact conditional, and will identify precisely what pretrial issues have been preserved for appellate review. By requiring this added step, it will be possible to avoid entry of a conditional plea without the considered acquiescence of the government (see *United States v. Burke, supra,* holding that failure of the government to object to entry of a conditional plea constituted consent) and post-plea claims by the defendant that his plea should be deemed conditional merely because it occurred after denial of his pretrial motions (see *United States v. Nooner, supra).*

It must be emphasized that the only avenue of review of the specified pretrial ruling permitted under a rule 11(a)(2) conditional plea is an appeal, which must be brought in compliance with *Fed.R.App.P. 4(b).* Relief via *28 U.S.C. § 2255* is not available for this purpose.

The Supreme Court has held that certain kinds of constitutional objections may be raised after a plea of guilty. *Menna v. New York, 423 U.S. 61 (1975)* (double jeopardy violation); *Blackledge v. Perry, 417 U.S. 21 (1974)* (due process violation by charge enhancement following defendant's exercise of right to trial de novo). Subdivision 11(a)(2) has no application to such situations, and should not be interpreted as either broadening or narrowing the *Menna-Blackledge* doctrine or as establishing procedures for its application.

Note to Subdivision (h). Subdivision (h) makes clear that the harmless error rule of Rule 52(a) is applicable to Rule 11. The provision does not, however, attempt to define the meaning of "harmless error," which is left to the case law. Prior to the amendments which took effect on Dec. 1, 1975, Rule 11 was very brief; it consisted of but four sentences. The 1975 amendments increased significantly the procedures which must be undertaken when a defendant tenders a plea of guilty or nolo contendere, but this change was warranted by the "two principal objectives" then identified in the Advisory Committee Note: (1) ensuring that the defendant has made an informed plea; and (2) ensuring that plea agreements are brought out into the open in court. An inevitable consequence of the 1975 amendments was some increase in the risk that a trial judge, in a particular case, might inadvertently deviate to some degree from the procedure which a very literal reading of Rule 11 would appear to require.

This being so, it became more apparent than ever that Rule 11 should not be given such a crabbed interpretation that ceremony was exalted over substance. As stated in *United States v. Scarf, 551 F.2d 1124 (8th Cir. 1977),* concerning amended Rule 11: "It is a salutary rule, and district courts are required to act in substantial compliance with it although . . . ritualistic compliance is not required." As similarly pointed out in *United States v. Saft, 558 F.2d 1073 (2d Cir. 1977),*

the Rule does not say that compliance can be achieved only by reading the specified items in haec verba. Congress meant to strip district judges of freedom to decide what they must explain to a defendant who wishes to plead guilty, not to tell them precisely how to perform this important task in the great variety of cases that would come before them. While a judge who contents himself with literal application of the Rule will hardly be reversed, it cannot be supposed that Congress preferred this to a more meaningful explanation, provided that all the specified elements were covered.

Two important points logically flow from these sound observations. One concerns the matter of construing Rule 11: it is not to be read as requiring a litany or other ritual which can be carried out only by word-for-word adherence to a set "script." The other, specifically addressed in new subdivision (h), is that even when it may be concluded Rule 11 has not been complied with in all respects, it does not inevitably follow that the defendant's plea of guilty or nolo contendere is invalid and subject to being overturned by any remedial device then available to the defendant.

Notwithstanding the declaration in Rule 52(a) that "[a]ny error, defect, irregularity or variance which does not affect substantial rights shall be disregarded," there has existed for some years considerable disagreement concerning the applicability of the harmless error doctrine to Rule 11 violations. In large part, this is attributable to uncertainty as to the continued vitality and the reach of *McCarthy v. United States, 394 U.S. 459 (1969).* In *McCarthy,* involving a direct appeal from a plea of guilty because of noncompliance with Rule 11, the Court concluded

that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards, which are designed to facilitate a more accurate determination of the voluntariness of his plea. Our holding [is] that a defendant whose plea has been accepted in violation of Rule 11 should be afforded the opportunity to plead anew . . . .

McCarthy has been most frequently relied upon in cases where, as in that case, the defendant sought relief because of a Rule 11 violation by the avenue of direct appeal. It has been held that in such circumstances a defendant's conviction must be reversed whenever the "district court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11," *United States v. Boone, 543 F.2d 1090 (4th Cir. 1976),* and that in this context any reliance by the government on the Rule 52(a) harmless error concept "must be rejected." *United States v. Journet, 544 F.2d 633 (2d Cir. 1976).* On the other hand, decisions are to be found taking a harmless error approach on direct appeal where it appeared the nature and extent of the deviation from Rule 11 was such that it could not have had any impact on the defendant's decision to plead or the fairness in now holding him to his plea. *United States v. Peters,* No. 77-1700 (4th Cir., Dec. 22, 1978) (where judge failed to comply fully with Rule 11(c)(1), in that defendant not correctly advised of maximum years of special parole term but was told it is at least 3 years, and defendant thereafter sentenced to 15 years plus 3-year special parole term, government's motion for summary affirmance granted, as "the error was harmless"); *United States v. Coronado, 554 F.2d 166 (5th Cir. 1977)* (court first holds that charge of conspiracy requires some explanation of what conspiracy means to comply with Rule 11(c)(1), but then finds no reversible error "because the rule 11 proceeding on its face discloses, despite the trial court's failure sufficiently to make the required explication of the charges, that Coronado understood them").

But this conflict has not been limited to cases involving nothing more than a direct appeal following defendant's plea. For example, another type of case is that in which the defendant has based a post-sentence motion to withdraw his plea on a Rule 11 violation. Rule 32(d) says that such a motion may be granted "to correct manifest injustice," and some courts have relied upon this latter provision in holding that post-sentence plea withdrawal need not be permitted merely because Rule 11 was not fully complied with and that instead the district court should hold an evidentiary hearing to determine "whether manifest injustice will result if the conviction based on the guilty plea is permitted to stand." *United States v. Scarf, 551 F.2d 1124 (8th Cir. 1977).* Others, however, have held that *McCarthy* applies and prevails over the language of Rule 32(d), so that "a failure to scrupulously comply with Rule 11 will invalidate a plea without a showing of manifest injustice." *United States v. Cantor, 469 F.2d 435 (3d Cir. 1972).*

Disagreement has also existed in the context of collateral attack upon pleas pursuant to *28 U.S.C. § 2255.* On the one hand, it has been concluded that "[n]ot every violation of Rule 11 requires that the plea be set aside" in a § 2255 proceeding, and that "a guilty plea will be set aside on collateral attack only where to not do so would result in a miscarriage of justice, or where there exists exceptional circumstances justifying such relief." *Evers v. United States, 579 F.2d 71 (10th Cir. 1978).* The contrary view was that *McCarthy* governed in § 2255 proceedings because "the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11." *Timmreck v. United States, 577 F.2d 377 (6th Cir. 1978).* But a unanimous Supreme Court resolved this conflict in *United States v. Timmreck, 441 U.S.*

780 (1979), where the Court concluded that the reasoning of *Hill v. United States, 368 U.S. 424 (1962)* (ruling a collateral attack could not be predicated on a violation of Rule 32(a))

is equally applicable to a formal violation of Rule 11. . . .

Indeed, if anything, this case may be a stronger one for foreclosing collateral relief than the *Hill* case. For the concern with finality served by the limitation on collateral attack has special force with respect to convictions based on guilty pleas.

"Every inroad on the concept of finality undermines confidence in the integrity of our procedures; and, by increasing the volume of judicial work, inevitably delays and impairs the orderly administration of justice. The impact is greatest when new grounds for setting aside guilty pleas are approved because the vast majority of criminal convictions result from such pleas. Moreover, the concern that unfair procedures may have resulted in the conviction of an innocent defendant is only rarely raised by a petition to set aside a guilty plea."

This interest in finality is strongest in the collateral attack context the Court was dealing with in *Timmreck,* which explains why the Court there adopted the *Hill* requirement that in a § 2255 proceeding the rule violation must amount to "a fundamental defect which inherently results in a complete miscarriage of justice" or "an omission inconsistent with the rudimentary demands of fair procedure." The interest in finality of guilty pleas described in *Timmreck* is of somewhat lesser weight when a direct appeal is involved (so that the *Hill* standard is obviously inappropriate in that setting), but yet is sufficiently compelling to make unsound the proposition that reversal is required even where it is apparent that the Rule 11 violation was of the harmless error variety.

Though the *McCarthy* per se rule may have been justified at the time and in the circumstances which obtained when the plea in that case was taken, this is no longer the case. For one thing, it is important to recall that *McCarthy* dealt only with the much simpler pre-1975 version of Rule 11, which required only a brief procedure during which the chances of a minor, insignificant and inadvertent deviation were relatively slight. This means that the chances of a truly harmless error (which was not involved in *McCarthy* in any event, as the judge made no inquiry into the defendant's understanding of the nature of the charge, and the government had presented only the extreme argument that a court "could properly assume that petitioner was entering that plea with a complete understanding of the charge against him" merely from the fact he had stated he desired to plead guilty) are much greater under present Rule 11 than under the version before the Court in *McCarthy.* It also means that the more elaborate and lengthy procedures of present Rule 11, again as compared with the version applied in *McCarthy,* make it more apparent than ever that a guilty plea is not "a mere gesture, a temporary and meaningless formality reversible at the defendant's whim," but rather " 'a grave and solemn act,' which is 'accepted only with care and discernment.' " *United States v. Barker, 514 F.2d 208 (D.C.Cir.1975),* quoting from *Brady v. United States, 397 U.S. 742 (1970).* A plea of that character should not be overturned, even on direct appeal, when there has been a minor and technical violation of Rule 11 which amounts to harmless error.

Secondly, while *McCarthy* involved a situation in which the defendant's plea of guilty was before the court of appeals on direct appeal, the Supreme Court appears to have been primarily concerned with § 2255-type cases, for the Court referred exclusively to cases of that kind in the course of concluding that a per se rule was justified as to Rule 11 violations because of "the difficulty of achieving [rule 11's] purposes through a post-conviction voluntariness hearing." But that reasoning has now been substantially undercut by *United States v. Timmreck, supra,* for the Court there concluded § 2255 relief "is not available when all that is shown is a failure to comply with the formal requirements of the Rule," at least absent "other aggravating circumstances," which presumably could often only be developed in the course of a later evidentiary hearing.

Although all of the aforementioned considerations support the policy expressed in new subdivision (h), the Advisory Committee does wish to emphasize two important cautionary notes. The first is that subdivision (h) should not be read as supporting extreme or speculative harmless error claims or as, in effect, nullifying important Rule 11 safeguards. There would not be harmless error under subdivision (h) where, for example, as in McCarthy, there had been absolutely no inquiry by the judge into defendant's understanding of the nature of the charge and the harmless error claim of the government rests upon nothing more than the assertion that it may be "assumed" defendant possessed such understanding merely because he expressed a desire to plead guilty. Likewise, it would not be harmless error if the trial judge totally abdicated to the prosecutor the responsibility for giving to the defendant the various Rule 11 warnings, as this "results in the creation of an atmosphere of subtle coercion that clearly contravenes the policy behind Rule 11." *United States v. Crook, 526 F.2d 708 (5th Cir. 1976).*

Indeed, it is fair to say that the kinds of Rule 11 violations which might be found to constitute harmless error upon direct appeal are fairly limited, as in such instances the matter "must be resolved solely on the basis of the Rule 11 transcript" and the other portions (e.g., sentencing hearing) of the limited record made in such cases. *United States v. Coronado, supra.* Illustrative are: where the judge's compliance with subdivision (c)(1) was not absolutely complete, in that some essential element of the crime was not mentioned, but the defendant's responses clearly indicate his awareness

of that element, see *United States v. Coronado, supra;* where the judge's compliance with subdivision (c)(2) was erroneous in part in that the judge understated the maximum penalty somewhat, but the penalty actually imposed did not exceed that indicated in the warnings, see *United States v. Peters,* supra; and where the judge completely failed to comply with subdivision (c)(5), which of course has no bearing on the validity of the plea itself, cf. *United States v. Sinagub, supra.*

The second cautionary note is that subdivision (h) should not be read as an invitation to trial judges to take a more casual approach to Rule 11 proceedings. It is still true, as the Supreme Court pointed out in *McCarthy,* that thoughtful and careful compliance with Rule 11 best serves the cause of fair and efficient administration of criminal justice, as it will help reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the original record is inadequate. It is, therefore, not too much to require that, before sentencing defendants to years of imprisonment, district judges take the few minutes necessary to inform them of their rights and to determine whether they understand the action they are taking.

Subdivision (h) makes no change in the responsibilities of the judge at Rule 11 proceedings, but instead merely rejects the extreme sanction of automatic reversal.

It must also be emphasized that a harmless error provision has been added to Rule 11 because some courts have read *McCarthy* as meaning that the general harmless error provision in Rule 52(a) cannot be utilized with respect to Rule 11 proceedings. Thus, the addition of subdivision (h) should not be read as suggesting that Rule 52(a) does not apply in other circumstances because of the absence of a provision comparable to subdivision (h) attached to other rules.

Notes of Advisory Committee on 1985 amendments. *Note to Subdivision (c)(1).* Section 5 of the Victim and Witness Protection Act of 1982, Pub. L. No. 97-291, 96 Stat. 1248 (1982), adds *18 U.S.C. § 3579,* providing that when sentencing a defendant convicted of a Title 18 offense or of violating various subsections of the Federal Aviation Act of 1958, the court "may order, in addition to or in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of the offense." Under this law restitution is favored; if the court "does not order restitution, or orders only partial restitution, . . . the court shall state on the record the reasons therefor." Because this restitution is deemed an aspect of the defendant's sentence, S. Rept. No. 97-532, 97th Cong., 2d Sess., 30-33 (1982), it is a matter about which a defendant tendering a plea of guilty or nolo contendere should be advised.

Because this new legislation contemplates that the amount of the restitution to be ordered will be ascertained later in the sentencing process, this amendment to Rule 11(c)(1) merely requires that the defendant be told of the court's power to order restitution. The exact amount or upper limit cannot and need not be stated at the time of the plea. Failure of a court to advise a defendant of the possibility of a restitution order would constitute harmless error under subdivision (h) if no restitution were thereafter ordered.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1989 amendments. The Committee believes that a technical change, adding the words "or supervised release," is necessary to recognize that defendants sentenced under the guideline approach will be concerned about supervised release rather than special parole. See *18 U.S.C. 3583,* and *3624(e).* The words "special parole" are left in the rule, since the district courts continue to handle pre-guideline cases.

The amendment mandates that the district court inform a defendant that the court is required to consider any applicable guidelines but may depart from them under some circumstances. This requirement assures that the existence of guidelines will be known to a defendant before a plea of guilty or nolo contendere is accepted. Since it will be impracticable, if not impossible, to know which guidelines will be relevant prior to the formulation of a presentence report and resolution of disputed facts, the amendment does not require the court to specify which guidelines will be important or which grounds for departure might prove to be significant. The advice that the court is required to give cannot guarantee that a defendant who pleads guilty will not later claim a lack of understanding as to the importance of guidelines at the time of the plea. No advice is likely to serve as a complete protection against post-plea claims of ignorance or confusion. By giving the advice, the court places the defendant and defense counsel on notice of the importance that guidelines may play in sentencing and of the possibility of a departure from those guidelines. A defendant represented by competent counsel will be in a position to enter an intelligent plea.

The amended rule does not limit the district court's discretion to engage in a more extended colloquy with the defendant in order to impart additional information about sentencing guidelines or to inquire into the defendant's knowledge concerning guidelines. The amended rule sets forth only the minimum advice that must be provided to the defendant by the court.

Notes of Advisory Committee on 1999 amendments. *Note to Subdivision (a).* The amendment deletes use of the term "corporation" and substitutes in its place the term "organization," with a reference to the definition of that term in *18 U.S.C. § 18.*

Note to Subdivision (c)(6). Rule 11(c) has been amended specifically to reflect the increasing practice of including provisions in plea agreements which require the defendant to waive certain appellate rights. The increased use of such provisions is due in part to the increasing number of direct appeals and collateral reviews challenging sentencing decisions. Given the increased use of such provisions, the Committee believed it was important to insure that first, a complete record exists regarding any waiver provisions, and second, that the waiver was voluntarily and knowingly made by the defendant. Although a number of federal courts have approved the ability of a defendant to enter into such waiver agreements, the Committee takes no position on the underlying validity of such waivers.

Note to Subdivision (e). Amendments have been made to Rule 11(e)(1)(B) and (C) to reflect the impact of the Sentencing Guidelines on guilty pleas. Although Rule 11 is generally silent on the subject, it has become clear that the courts have struggled with the subject of guideline sentencing vis a vis plea agreements, entry and timing of guilty pleas, and the ability of the defendant to withdraw a plea of guilty. The amendments are intended to address two specific issues.

First, both subdivisions (e)(1)(B) and (e)(1)(C) have been amended to recognize that a plea agreement may specifically address not only what amounts to an appropriate sentence, but also a sentencing guideline, a sentencing factor, or a policy statement accompanying a sentencing guideline or factor. Under an (e)(1)(B) agreement, the government, as before, simply agrees to make a recommendation to the court, or agrees not to oppose a defense request concerning a particular sentence or consideration of a sentencing guideline, factor, or policy statement. The amendment makes it clear that this type of agreement is not binding on the court. Second, under an (e)(1)(C) agreement, the government and defense have actually agreed on what amounts to an appropriate sentence or have agreed to one of the specified components. The amendment also makes it clear that this agreement is binding on the court once the court accepts it. As is the situation under the current Rule, the court retains absolute discretion whether to accept a plea agreement.

Notes of Advisory Committee on 2002 amendments. The language of Rule 11 has been amended and reorganized as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Amended Rule 11(b)(1) requires the court to apprise the defendant of his or her rights before accepting a plea of guilty or nolo contendere. The Committee determined to expand upon the incomplete listing in the current rule of the elements of the "maximum possible penalty" and any "mandatory minimum" penalty to include advice as to the maximum or minimum term of imprisonment, forfeiture, fine, and special assessment, in addition to the two types of maximum and minimum penalties presently enumerated: restitution and supervised release. The outmoded reference to a term of "special parole" has been eliminated.

Amended Rule 11(b)(2), formerly Rule 11(d), covers the issue of determining that the plea is voluntary, and not the result of force, threats, or promises (other than those in a plea agreement). The reference to an inquiry in current Rule 11(d) whether the plea has resulted from plea discussions with the government has been deleted. That reference, which was often a source of confusion to defendants who were clearly pleading guilty as part of a plea agreement with the government, was considered unnecessary.

Rule 11(c)(1)(A) includes a change, which recognizes a common type of plea agreement -- that the government will "not bring" other charges.

The Committee considered whether to address the practice in some courts of using judges to facilitate plea agreements. The current rule states that "the court shall not participate in any discussions between the parties concerning such plea agreement." Some courts apparently believe that that language acts as a limitation only upon the judge taking the defendant's plea and thus permits other judges to serve as facilitators for reaching a plea agreement between the government and the defendant. See, e.g., *United States v. Torres, 999 F.2d 376, 378* (9th Cir. 1993) (noting practice and concluding that presiding judge had not participated in a plea agreement that had resulted from discussions involving another judge). The Committee decided to leave the Rule as it is with the understanding that doing so was in no way intended either to approve or disapprove the existing law interpreting that provision.

Amended Rules 11(c)(3) to (5) address the topics of consideration, acceptance, and rejection of a plea agreement. The amendments are not intended to make any change in practice. The topics are discussed separately because in the past there has been some question about the possible interplay between the court's consideration of the guilty plea in conjunction with a plea agreement and sentencing and the ability of the defendant to withdraw a plea. See *United States v. Hyde, 520 U.S. 670 [137 L. Ed. 2d 935]* (1997) (holding that plea and plea agreement need not be accepted or rejected as a single unit; "guilty pleas can be accepted while plea agreements are deferred, and the acceptance of the two can be

separated in time."). Similarly, the Committee decided to more clearly spell out in Rule 11(d) and 11(e) the ability of the defendant to withdraw a plea. See *United States v. Hyde, supra.*

Amended Rule 11(e) is a new provision, taken from current Rule 32(e), that addresses the finality of a guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

The reference to a "motion under *28 U.S.C. § 2255*" has been changed to the broader term "collateral attack" to recognize that in some instances a court may grant collateral relief under provisions other than § 2255. See *United States v. Jeffers, 234 F.3d 277 (5th Cir. 2000)* (petition under § 2241 may be appropriate where remedy under § 2255 is ineffective or inadequate).

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an ongoing investigation in a related case. In the end, the Committee believed that, on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Finally, revised Rule 11(f), which addresses the issue of admissibility or inadmissibility of pleas and statements made during the plea inquiry, cross references *Federal Rule of Evidence 410.*

Notes of Advisory Committee on 2007 amendments. *Note to subdivision (b)(1)(M).* The amendment conforms *Rule 11 to the Supreme Court*'s decision in *United States v. Booker, 543 U.S. 220 (2005). Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, *18 U.S.C. § 3553(b)(1)* (Supp.2004), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act "makes the Guidelines effectively advisory," and "requires a sentencing court to consider Guidelines ranges, see *18 U.S.C.A. § 3553(a)(4)* (Supp.2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see § 3553(a) (Supp.2004)." *Id. at 245-46.* Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

NORTH CAROLINA v. ALFORD

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 14. Argued November 17, 1969—Reargued October 14, 1970—Decided November 23, 1970

Appellee was indicted for the capital crime of first-degree murder. At that time North Carolina law provided for the penalty of life imprisonment when a plea of guilty was accepted to a first-degree murder charge; for the death penalty following a jury verdict of guilty, unless the jury recommended life imprisonment; and for a penalty of from two to 30 years' imprisonment for second-degree murder. Appellee's attorney, in the face of strong evidence of guilt, recommended a guilty plea, but left the decision to appellee. The prosecutor agreed to accept a plea of guilty to second-degree murder. The trial court heard damaging evidence from certain witnesses before accepting a plea. Appellee pleaded guilty, although disclaiming guilt, because of the threat of the death penalty, and was sentenced to 30 years' imprisonment. The Court of Appeals, on an appeal from a denial of a writ of habeas corpus, found that appellee's guilty plea was involuntary because it was motivated principally by fear of the death penalty. *Held:* The trial judge did not commit constitutional error in accepting appellee's guilty plea. Pp. 31–39.

(a) A guilty plea that represents a voluntary and intelligent choice among the alternatives available to a defendant, especially one represented by competent counsel, is not compelled within the meaning of the Fifth Amendment because it was entered to avoid the possibility of the death penalty. *Brady* v. *United States,* 397 U. S. 742. P. 31.

(b) *Hudson* v. *United States,* 272 U. S. 451, which held that a federal court may impose a prison sentence after accepting a plea of *nolo contendere,* implicitly recognized that there is no constitutional bar to imposing a prison sentence upon an accused who is unwilling to admit guilt but who is willing to waive trial and accept the sentence. Pp. 35–36.

(c) An accused may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even though he is unwilling to admit participation in the crime, or even if his

guilty plea contains a protestation of innocence, when, as here, he intelligently concludes that his interests require a guilty plea and the record strongly evidences guilt. Pp. 37–38.

(d) The Fourteenth Amendment and the Bill of Rights do not prohibit the States from accepting pleas to lesser included offenses. P. 39.

405 F. 2d 340, vacated and remanded.

WHITE, J., delivered the opinion of the Court, in which BURGER, C. J., and HARLAN, STEWART, and BLACKMUN, JJ., joined. BLACK, J., filed a statement concurring in the judgment, *post*, p. 39. BRENNAN, J., filed a dissenting opinion, in which DOUGLAS and MARSHALL, JJ., joined, *post*, p. 39.

Jacob L. Safron reargued the cause for appellant. With him on the briefs were *Robert Morgan*, Attorney General of North Carolina, and *Andrew A. Vanore, Jr.*, joined in and adopted by the Attorneys General for their respective States as follows: *Joe Purcell* of Arkansas, *David P. Buckson* of Delaware, *William J. Scott* of Illinois, *John B. Breckinridge* of Kentucky, *Joe T. Patterson* of Mississippi, and *Robert L. Woodahl* of Montana; by the Government of the Virgin Islands; and by the National District Attorneys Association.

Doris R. Bray, by appointment of the Court, 394 U. S. 1010, reargued the cause and filed briefs for appellee.

Jack Greenberg, James M. Nabrit III, Michael Meltsner, Norman C. Amaker, Charles Stephen Ralston, Anthony G. Amsterdam, J. LeVonne Chambers, and *James E. Ferguson II* filed a brief for Albert Bobby Childs et al. as *amici curiae*.

MR. JUSTICE WHITE delivered the opinion of the Court.

On December 2, 1963, Alford was indicted for first-degree murder, a capital offense under North Carolina

law.[1] The court appointed an attorney to represent him, and this attorney questioned all but one of the various witnesses who appellee said would substantiate his claim of innocence. The witnesses, however, did not support Alford's story but gave statements that strongly indicated his guilt. Faced with strong evidence of guilt and no substantial evidentiary support for the claim of innocence, Alford's attorney recommended that he plead guilty, but left the ultimate decision to Alford himself. The prosecutor agreed to accept a plea of guilty to a charge of second-degree murder, and on December 10, 1963, Alford pleaded guilty to the reduced charge.

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[1] Under North Carolina law, first-degree murder is punished with death unless the jury recommends that the punishment shall be life imprisonment:

"A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration or attempt to perpetrate any arson, rape, robbery, burglary or other felony, shall be deemed to be murder in the first degree and shall be punished with death: Provided, if at the time of rendering its verdict in open court, the jury shall so recommend, the punishment shall be imprisonment for life in the State's prison, and the court shall so instruct the jury. All other kinds of murder shall be deemed murder in the second degree, and shall be punished with imprisonment of not less than two nor more than thirty years in the State's prison." N. C. Gen. Stat. § 14–17 (1969).

At the time Alford pleaded guilty, North Carolina law provided that if a guilty plea to a charge of first-degree murder was accepted by the prosecution and the court, the penalty would be life imprisonment rather than death. The provision permitting guilty pleas in capital cases was repealed in 1969. See *Parker* v. *North Carolina*, 397 U. S. 790, 792–795 (1970). Though under present North Carolina law it is not possible for a defendant to plead guilty to a capital charge, it seemingly remains possible for a person charged with a capital offense to plead guilty to a lesser charge.

Before the plea was finally accepted by the trial court, the court heard the sworn testimony of a police officer who summarized the State's case. Two other witnesses besides Alford were also heard. Although there was no eyewitness to the crime, the testimony indicated that shortly before the killing Alford took his gun from his house, stated his intention to kill the victim, and returned home with the declaration that he had carried out the killing. After the summary presentation of the State's case, Alford took the stand and testified that he had not committed the murder but that he was pleading guilty because he faced the threat of the death penalty if he did not do so.[2] In response to the questions of his counsel, he acknowledged that his counsel had informed him of the difference between second- and first-degree

[2] After giving his version of the events of the night of the murder, Alford stated:

"I pleaded guilty on second degree murder because they said there is too much evidence, but I ain't shot no man, but I take the fault for the other man. We never had an argument in our life and I just pleaded guilty because they said if I didn't they would gas me for it, and that is all."

In response to questions from his attorney, Alford affirmed that he had consulted several times with his attorney and with members of his family and had been informed of his rights if he chose to plead not guilty. Alford then reaffirmed his decision to plead guilty to second-degree murder:

"Q [by Alford's attorney]. And you authorized me to tender a plea of guilty to second degree murder before the court?

"A. Yes, sir.

"Q. And in doing that, that you have again affirmed your decision on that point?

"A. Well, I'm still pleading that you all got me to plead guilty. I plead the other way, circumstantial evidence; that the jury will prosecute me on—on the second. You told me to plead guilty, right. I don't—I'm not guilty but I plead guilty."

murder and of his rights in case he chose to go to trial.[3] The trial court then asked appellee if, in light of his denial of guilt, he still desired to plead guilty to second-degree murder and appellee answered, "Yes, sir. I plead guilty on—from the circumstances that he [Alford's attorney] told me." After eliciting information about Alford's prior criminal record, which was a long one,[4] the trial court sentenced him to 30 years' imprisonment, the maximum penalty for second-degree murder.[5]

Alford sought post-conviction relief in the state court. Among the claims raised was the claim that his plea of guilty was invalid because it was the product of fear and coercion. After a hearing, the state court in 1965 found that the plea was "willingly, knowingly, and understandingly" made on the advice of competent counsel and in the face of a strong prosecution case. Subsequently, Alford petitioned for a writ of habeas corpus, first in the United States District Court for the Middle District of North Carolina, and then in the Court of Appeals for the Fourth Circuit. Both courts denied the writ on the basis of the state court's findings that Alford voluntarily

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[3] At the state court hearing on post-conviction relief, the testimony confirmed that Alford had been fully informed by his attorney as to his rights on a plea of not guilty and as to the consequences of a plea of guilty. Since the record in this case affirmatively indicates that Alford was aware of the consequences of his plea of guilty and of the rights waived by the plea, no issues of substance under *Boykin* v. *Alabama*, 395 U. S. 238 (1969), would be presented even if that case was held applicable to the events here in question.

[4] Before Alford was sentenced, the trial judge asked Alford about prior convictions. Alford answered that, among other things, he had served six years of a ten-year sentence for murder, had been convicted nine times for armed robbery, and had been convicted for transporting stolen goods, forgery, and carrying a concealed weapon. App. 9–11.

[5] See n. 1, *supra*.

and knowingly agreed to plead guilty. In 1967, Alford again petitioned for a writ of habeas corpus in the District Court for the Middle District of North Carolina. That court, without an evidentiary hearing, again denied relief on the grounds that the guilty plea was voluntary and waived all defenses and nonjurisdictional defects in any prior stage of the proceedings, and that the findings of the state court in 1965 clearly required rejection of Alford's claim that he was denied effective assistance of counsel prior to pleading guilty. On appeal, a divided panel of the Court of Appeals for the Fourth Circuit reversed on the ground that Alford's guilty plea was made involuntarily. 405 F. 2d 340 (1968). In reaching its conclusion, the Court of Appeals relied heavily on *United States* v. *Jackson*, 390 U. S. 570 (1968), which the court read to require invalidation of the North Carolina statutory framework for the imposition of the death penalty because North Carolina statutes encouraged defendants to waive constitutional rights by the promise of no more than life imprisonment if a guilty plea was offered and accepted. Conceding that *Jackson* did not require the automatic invalidation of pleas of guilty entered under the North Carolina statutes, the Court of Appeals ruled that Alford's guilty plea was involuntary because its principal motivation was fear of the death penalty. By this standard, even if both the judge and the jury had possessed the power to impose the death penalty for first-degree murder or if guilty pleas to capital charges had not been permitted, Alford's plea of guilty to second-degree murder should still have been rejected because impermissibly induced by his desire to eliminate the possibility of a death sentence.[6] We noted

[6] Thus if Alford had entered the same plea in the same way in 1969 after the statute authorizing guilty pleas to capital charges had been repealed, see n. 1, *supra*, the result reached by the Court of Appeals should have been the same under that court's reasoning.

probable jurisdiction. 394 U. S. 956 (1969). We vacate the judgment of the Court of Appeals and remand the case for further proceedings.

We held in *Brady* v. *United States*, 397 U. S. 742 (1970), that a plea of guilty which would not have been entered except for the defendant's desire to avoid a possible death penalty and to limit the maximum penalty to life imprisonment or a term of years was not for that reason compelled within the meaning of the Fifth Amendment. *Jackson* established no new test for determining the validity of guilty pleas. The standard was and remains whether the plea represents a voluntary and intelligent choice among the alternative courses of action open to the defendant. See *Boykin* v. *Alabama*, 395 U. S. 238, 242 (1969); *Machibroda* v. *United States*, 368 U. S. 487, 493 (1962); *Kercheval* v. *United States*, 274 U. S. 220, 223 (1927). That he would not have pleaded except for the opportunity to limit the possible penalty does not necessarily demonstrate that the plea of guilty was not the product of a free and rational choice, especially where the defendant was represented by competent counsel whose advice was that the plea would be to the defendant's advantage. The standard fashioned and applied by the Court of Appeals was therefore erroneous and we would, without more, vacate and remand the case for further proceedings with respect to any other claims of Alford which are properly before that court, if it were not for other circumstances appearing in the record which might seem to warrant an affirmance of the Court of Appeals.

As previously recounted, after Alford's plea of guilty was offered and the State's case was placed before the judge, Alford denied that he had committed the murder but reaffirmed his desire to plead guilty to avoid a possible death sentence and to limit the penalty to the 30-year maximum provided for second-degree murder.

Ordinarily, a judgment of conviction resting on a plea of guilty is justified by the defendant's admission that he committed the crime charged against him and his consent that judgment be entered without a trial of any kind. The plea usually subsumes both elements, and justifiably so, even though there is no separate, express admission by the defendant that he committed the particular acts claimed to constitute the crime charged in the indictment. See *Brady* v. *United States, supra,* at 748; *McCarthy* v. *United States,* 394 U. S. 459, 466 (1969). Here Alford entered his plea but accompanied it with the statement that he had not shot the victim.

If Alford's statements were to be credited as sincere assertions of his innocence, there obviously existed a factual and legal dispute between him and the State. Without more, it might be argued that the conviction entered on his guilty plea was invalid, since his assertion of innocence negatived any admission of guilt, which, as we observed last Term in *Brady*, is normally "[c]entral to the plea and the foundation for entering judgment against the defendant . . . ." 397 U. S., at 748.

In addition to Alford's statement, however, the court had heard an account of the events on the night of the murder, including information from Alford's acquaintances that he had departed from his home with his gun stating his intention to kill and that he had later declared that he had carried out his intention. Nor had Alford wavered in his desire to have the trial court determine his guilt without a jury trial. Although denying the charge against him, he nevertheless preferred the dispute between him and the State to be settled by the judge in the context of a guilty plea proceeding rather than by a formal trial. Thereupon, with the State's telling evidence and Alford's denial before it,

the trial court proceeded to convict and sentence Alford for second-degree murder.

State and lower federal courts are divided upon whether a guilty plea can be accepted when it is accompanied by protestations of innocence and hence contains only a waiver of trial but no admission of guilt. Some courts, giving expression to the principle that "[o]ur law only authorizes a conviction where guilt is shown," *Harris* v. *State*, 76 Tex. Cr. R. 126, 131, 172 S. W. 975, 977 (1915), require that trial judges reject such pleas. See, *e. g.*, *Hulsey* v. *United States*, 369 F. 2d 284, 287 (CA5 1966); *United States ex rel. Elksnis* v. *Gilligan*, 256 F. Supp. 244, 255–257 (SDNY 1966); *People* v. *Morrison*, 348 Mich. 88, 81 N. W. 2d 667 (1957); *State* v. *Reali*, 26 N. J. 222, 139 A. 2d 300 (1958); *State* v. *Leyba*, 80 N. M. 190, 193, 453 P. 2d 211, 214 (1969); *State* v. *Stacy*, 43 Wash. 2d 358, 361–364, 261 P. 2d 400, 402–403 (1953). But others have concluded that they should not "force any defense on a defendant in a criminal case," particularly when advancement of the defense might "end in disaster . . . ." *Tremblay* v. *Overholser*, 199 F. Supp. 569, 570 (DC 1961). They have argued that, since "guilt, or the degree of guilt, is at times uncertain and elusive," "[a]n accused, though believing in or entertaining doubts respecting his innocence, might reasonably conclude a jury would be convinced of his guilt and that he would fare better in the sentence by pleading guilty . . . ." *McCoy* v. *United States*, 124 U. S. App. D. C. 177, 179, 363 F. 2d 306, 308 (1966). As one state court observed nearly a century ago, "[r]easons other than the fact that he is guilty may induce a defendant to so plead, . . . [and] [h]e must be permitted to judge for himself in this respect." *State* v. *Kaufman*, 51 Iowa 578, 580, 2 N. W. 275, 276 (1879) (dictum). Accord, *e. g.*, *Griffin* v. *United States*, 132 U. S. App. D. C. 108,

Filed Oct. 22, 1975

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

State of North Dakota, Plaintiff, Appellee

v.

Floyd McKay, Defendant, Appellant

Crim. No. 517.

[234 N.W.2d 855]

Syllabus of the Court

1. The right to counsel guaranteed by the Sixth Amendment of the United States Constitution does not mean errorless counsel nor counsel judged ineffective by hindsight, but counsel reasonably likely to render, and rendering, reasonably effective assistance.
2. Where identification of the defendant is made by the victim-witness during routine police investigation and identification procedures prior to indictment or its equivalent, such identification will not be subject to the exclusionary rule.
3. The defendant has failed to show that, under the current standard for effective counsel, the failure of his counsel to object to the identification procedure used here has deprived him of his right to effective counsel.
4. Counsel is presumed to be competent and adequate and the burden of proof to show inadequacy or incompetency of counsel lies upon the defendant.
5. Where the facts show that an in-court identification of the defendant was based on a previous viewing by the victim-witness, independent of a police station identification in conjunction with police investigatory processes, pre-indictment or its equivalent, at which the defendant was not represented by counsel, admission of the in-court identification is not reversible error.
6. An individual accused of a crime may voluntarily, knowingly, and understandingly plead guilty to a crime even if he is unable to admit his Participation in the acts constituting the crime, provided evidence is introduced from which it can be concluded that defendant committed the crime.
7. Where the record shows that the court complied with Rule 11, N.D.R.Crim.P., in insuring that the plea of guilty was knowingly and voluntarily made and that the evidence showed that there was a factual basis for the plea, the decision of the trial court to accept the

plea of guilty will be affirmed on appeal.

Appeal from an Order of the District Court of Ramsey County, the Honorable Douglas B. Heen, Judge.
AFFIRMED.
Opinion of the Court by Sand, Judge.
Ralph R. LePera (on the briefs and pleadings) and South Jane Bickford, 3315 Airport Road, Bismarck, for defendant, appellant; argued by Jeffrey Edelman (appearance permitted by special motion).
Lewis C. Jorgenson, Assistant State's Attorney, Ramsey County Courthouse, Devils Lake, for plaintiff, appellee.

State v. McKay

Crim. No. 517

Sand, Judge.

The defendant-appellant, Floyd McKay, pleaded guilty to robbery in the second degree and was sentenced by the district court of Ramsey County on June 21, 1974, to not less than eight years nor more than ten years in the State Penitentiary.

Thereafter, defendant applied to the same trial court for post-conviction relief under Chapter 29-32, North Dakota

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[234 N.W.2d 856]

Century Code. The defendant made a motion, which was granted, to amend and supplement the original application. The State responded to both the original and the amended or supplemented application. The trial court considered the matter without holding a hearing and, on October 16, 1974, issued its order dismissing the application, from which the defendant appeals.

The defendant was originally charged with robbery in the first degree. He was represented at the trial by court-appointed counsel. The defendant pleaded not guilty to the charge of first degree robbery but offered to Plead guilty to robbery in the second degree. Before accepting the plea of guilty, the trial court, pursuant to Rule 11, North Dakota Rules of Civil Procedure, questioned the defendant to determine if the plea was voluntarily and knowingly given. Defendant claimed that because of his state of intoxication at the time of the alleged robbery he could remember none of the events of that day. Because the defendant did not remember any of the acts constituting the crime to which he was offering to plead guilty, the court conducted an Alford 1 hearing to determine if there was a factual basis for accepting the plea by the court and to ensure that

the defendant's plea was knowingly and intelligently made, and to give defendant an opportunity to judge for himself if he should plead guilty to second degree robbery.

After the presentation of evidence, McKay was again asked if he wished to plead guilty to robbery in the second degree. He reaffirmed his plea of guilty. The plea of guilty was accepted by the court and sentence was passed.

The defendant asserts as error the following:

> (1) The defendant was denied effective assistance of counsel due to the failure to object at the hearing to a suggestive in-court identification based on a prejudicial out-of-court identification and the failure to "probe, impeach, and investigate."
>
> (2) The guilty plea entered into by defendant should not have been accepted by the court as it was based on misleading, conflicting, and contradictory testimony.
>
> (3) There was not sufficient evidence to substantiate a factual basis for acceptance of such a guilty plea.
>
> (4) The guilty plea is in fact void because the defendant was not made entirely aware of all the consequences of entering such a plea.

The defendant asks that the charges be dismissed and that a hearing be held to determine the issues presented, or that a trial by jury be ordered.

The defendant's first contention is that he was denied effective counsel at the hearing.

The proceeding or hearing held by the trial court before the plea was accepted was not a trial to determine guilt or innocence. Its purpose was to present evidence so that defendant could understandingly, knowingly, and intelligently make his plea, and to provide evidence for the court to determine if it should accept a plea. Defendant claims that because his counsel failed to object to certain testimony and to further probe and investigate, he was not given an accurate picture of the evidence against him; therefore, his guilty plea was not knowingly made.

The right to effective counsel at trial is granted by the Sixth Amendment of the United States Constitution, and applies to State courts through the Fourteenth Amendment of the United States Constitution. Gideon v. Wainwright, 372 U.S. 335, 85 S.Ct. 792, 9 L.Ed.2d 799 (1963).

Lack of counsel at trial will render a judgment void and require reversal of a conviction. State v. Magrum, 76 N.D. 527, 38 N.W.2d 358 (1949).

[234 N.W.2d 857]

Ineffective, incompetent, or inadequate representation is the same as no counsel at all, and, as such, will equal a denial of due process. State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929).

This court in State v. Bragg, 221 N.W.2d 793 (N.D. 1974), set the following standard, as stated in West v. State of Louisiana, 478 F.2d 1026, 1033 (5th Cir. 1973):

> "We interpret the right to counsel as the right to effective counsel. We interpret counsel to mean not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance."

Defendant points to discrepancies in the testimony which counsel failed to object to or to probe into, and claims these affected his decision to plead guilty. The fact that counsel did not object to the introduction and admission of several items of evidence does not show incompetency. Under the circumstances it could have been considered good strategy. As the State pointed out in its brief, one of the purposes of the hearing was to present evidence for the benefit of the defendant. In such a situation, counsel for the defendant is concerned with discovering as much of the State's case as he can. Objections to testimony would not serve any purpose. Counsel can better determine the strength of the State's case by letting it present everything it has. After the presentation he can evaluate the evidence and inform his client what the best course would be. Counsel's decision in this situation not to object to the discrepancies in the testimony does not constitute a showing that defendant has been deprived of effective counsel.

Counsel is presumed to be competent and adequate and the burden of proof to show inadequacy or incompetency of counsel lies upon the defendant. State v. Berger, 148 N.W.2d 331 (N.D. 1966). Defendant has not met that burden.

Defendant claims, however, that under Saltys v. Adams, 465 F.2d 1023 (2d Cir. 1972), counsel's failure to object to the in-court identification of the defendant shows lack of effectiveness of counsel. The court in Saltys found reversible error in counsel's failure to object to the admission of an incorrect identification based upon an illegal out-of-court identification, without which the defendant could not have been convicted. Victim Wilson had first pointed out McKay as his robber at the police station and later identified him at the trial.

Defendant claims that under the holding of United States v. Wade, 388 U.S. 218, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967), and United States v. Gilbert, 388 U.S. 263, 87 S.Ct. 1951, 18 L.Ed.2d 1178 (1967), such an identification would not be allowed at trial, and that counsel's failure to object to it at the hearing influenced the defendant in his decision to plead guilty. Wade held that courtroom identification of the accused would be excluded from evidence whenever the accused was exhibited to the witness before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's counsel. The Court in Wade also said that the government must be given an opportunity to establish by clear and convincing evidence that the in-court identification was based upon observation of the suspect under other than lineup identification. In the instant case there is ample evidence that the victim's identification of the defendant was based upon his personal observation, which will be stated later, and was not the result of identification at the police station, The Court in Wade listed as factors to be considered in application of the test the prior opportunity of the witness to observe the crime, the existence of any discrepancy between any prelineup description and the defendant's actual description, and the lapse of time between the act and the identification.

The Alford hearing brought out the following evidence:

[234 N.W.2d 858]

The victim of the robbery, Fred Wilson, testified at the hearing that on May 20, 1974, at approximately 5:00 p.m., he was in the basement of the Presbyterian church at Devils Lake and as he was coming up the stairway to the entry he saw the defendant. The defendant came to him, grabbed him and threatened to kill him unless he gave defendant some money. When he tried to escape, defendant held and choked him. The defendant held his arm to prevent him from escaping, walked him across the street and half a block down the street to an alley into which he was forced. He did not remember what happened after that because he was "out." When he (Wilson) "came to" he noticed that his glasses were gone and that he had been beaten. L. A. Braunagel testified that he was across the street from the alley and saw Wilson with another man who had a cast on his hand and was wearing a powder blue coat. Braunagel stated that Wilson was bleeding and had told him that this man wanted to take his money and to kill him. Braunagel then took Wilson to the police station, where Wilson told police what he "remembered happening." Defendant, McKay was picked up by the police from the description given to the police. He had in his possession a watch and ring belonging to Wilson. Wilson testified that approximately forty-five minutes after his initial trip to the police station he returned to identify the defendant. The defendant was in a cell at the station at that time and was without counsel. Wilson stated that he identified the defendant at the jail from the cast

on his right hand and from his face.

The fact that Wilson had a chance to closely observe the defendant for several minutes, had talked to him, had given a description to the police of the man who had robbed him which fit the defendant, and had identified him shortly after the crime, are sufficient to show that Wilson's in-court identification of the defendant was not based on a suggestive Viewing of him at the police station, but had a basis independent of that viewing. In this instance the defendant was picked up by police on the description given by the victim. The question of whether the police station showing was suggestive or whether defendant had a right to counsel at the show-up need not be discussed any further here because any technical error in procedure would be harmless error. Counsel's failure to object to the identification has not harmed defendant in any way.

The comments and observations in Smith v. Paderick, 519 F.2d 70 (4th Cir. 1975), made by the Fourth Circuit Court have application to the instant case on the question whether testimony relating to prior identification by the witness should have been admitted. The Court said:

> "Had Smith's state trial been to a jury we would be inclined to agree with him that failure to exclude it amounted to reversible error. But Smith's case was tried to a judge, and that makes a difference. The line between an identification that is admissible but likely to carry little weight, and one that is inadmissible under Stoval because it is so untrustworthy as to violate due process, is not a bright one. See Foster v. California, 394 U.S. 440, 442, n.2, 82 S.Ct. 1127, 22 L.Ed.2d 402 (1969). The Supreme Court has suggested approximate coordinates of the line in several jury trial cases, but has not indicated whether the line lies in the same place for both judge and jury trials. We think it does not.
>
> "We have previously expressed our awareness of the danger and our confidence in experienced trial judges to guard against it. United States v. Levi, 405 F.2d 380, 383 (4th Cir. 1968). Tainted identification evidence cannot be allowed to go to a jury because they are likely to accept it uncritically. An experienced trial judge will doubtless receive it skeptically, and accord it no more weight than it deserves."

[234 N.W.2d 859]

In the instant case the trial judge was an experienced and highly qualified jurist.

In Kirby v. Illinois, 406 U.S. 682, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972), the United States Supreme Court refused to apply the Wade exclusionary rule of law to routine police investigation and identification procedures prior to indictment or its equivalent. The holding in the Kirby case has application to the instant situation as this was a routine Police investigation and identification process, rather than an identification after indictment or its equivalent.

With reference to the victim's alleged discrepancies regarding the identification of the defendant, we have examined the record and find that there are minor variances, but of no significance. These variances comport with human nature. We must realize that a person under the trying circumstances in which the victim found himself in this instance does not give attention to exact detail in every respect as a general rule. Exact detailed description is not a necessary requirement for identification purposes.

Defendant contends that his plea of guilty to robbery in the second degree should not have been accepted by the court because it was not voluntarily and knowingly made and there was no factual basis for the court to accept it. Because a plea of guilty results in a waiver of the privilege of self-incrimination, the right to jury trial, and the right to confront one's accusers, the utmost care must be taken to ensure that the accused has a full understanding of what his plea connotes and of its consequences. Boykin v. Alabama, 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969); Rust v. State, 218 N.W.2d 482 (S.D. 1974);

[234 N.W.2d 861]

Singletary v. State, 227 N.W.2d 424 (S.D. 1975).

Rule 11 of the Rules of Criminal Procedure details the procedure to be followed and determinations that must be made by the court before accepting a plea of guilty. The procedure was followed and proper determinations were made by the trial court.

The trial court, before asking the defendant to plead, explained at length and in detail the effect of a plea of guilty and the consequences thereof. The trial court even went beyond the requirements of Rule 11 and also explained to the defendant the possible effect a plea of guilty could have on future employment.

After the Alford hearing, the court again briefly advised the defendant the effect of a plea of guilty to the crime of robbery in the second degree and the sentence that may be imposed. The court specifically asked Mr. McKay if he understood the effect of the plea of guilty, to which McKay responded, "Yes, sir." The court then asked, "Is this what you want to do?" McKay responded, "Yes."

> "THE COURT: You have conferred with Mr. Rutten and talked this matter over? "McKAY: Yes, sir.
>
> "THE COURT: Mr. Rutten, what is your position with respect to defendant's plea of guilty to the crime of Robbery in the Second Degree?
>
> "MR. RUTTEN: Your Honor, we have discussed the facts and we believe that this would be in the best interest since we feel that if there was a trial the chances of conviction on even Robbery in the First Degree are very good."

The court again addressed the defendant:

> "THE COURT: Do you stand with your plea of guilty to Robbery in the Second Degree, or do you withdraw your plea of guilty to that charge?
>
> "MR. McKAY: I will stay with guilty please, sir.
>
> "THE COURT: Mr. Rutten?
>
> "MR. RUTTEN: That is correct."

Defendant's plea of guilty was accompanied by a statement that he did not remember committing the crime, but this does not render the Plea of guilty invalid.

> "An individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a

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[234 N.W.2d 860]

> prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime." North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162, 171 (1970).

See also, State v. Tahash, 116 N.W.2d 666 (Minn. 1962); State v. Fisher, 193 N.W.2d 819 (Minn. 1972).

An accused who cannot remember committing the crime may be convinced by the evidence against him that he did do it, and that he may be able to get a better deal by pleading guilty. He should not be forced to defend against a suit he cannot win. In Alford, supra, defendant did not merely claim "no recollection," but professed innocence, but the Court concluded that a plea of guilty could stand. In the instant case defendant merely claims no recollection.

The decision on how to plead must be based on an understanding of the evidence against him and of the consequences of his plea. The trial court must ensure that the facts on which defendant will base his decision are accurate and properly presented. Boykin, supra.

This court on appeal must look at the record to determine if defendant's plea met the requirements of Rule 11 and Alford. The record shows that defendant was informed of his rights and the consequences of a plea of guilty. Defendant was present at the hearing and was assisted by experienced and competent counsel.2 No coercion has been shown.

By pleading guilty to second degree robbery defendant was able to escape possible conviction for robbery in the first degree.

The evidence presented at the Alford hearing was sufficient to support the finding of the court that the plea was knowingly and voluntarily given and that there was a factual basis for accepting the plea.

A charge of incompetent counsel is easily made, but difficult to defend against. Even though precaution is exercised, nevertheless the hindsight thought processes unconsciously seep ever so quietly into the mental process where retrospective evaluation is involved. In retrospect, it is always easier to suggest what should have been done because as a subjunctive proposition it is not necessary to carry out what would have resulted and seldom, if ever, is it recognized that if something were done in a certain manner something else would have been done in a different manner, which puts the entire matter in an "iffy" situation.

Counsel is not expected to perform superhuman efforts or miracles. The defendant and his appellate counsel failed to come up with any single item of evidence which would have been beneficial to the defendant at the time of the hearing on his plea of guilty, or now, which should have been discovered or uncovered by due diligence by the original counsel appointed for the defendant at the time of the Alford hearing. Appellant's counsel, we presume, had the opportunity to investigate and would have presented any exculpatory evidence if there in fact were any.

The memorandum opinion of the trial judge dated October 15, 1974, which served as a basis for the order dated October 16, 1974, dismissing defendant's application for post-conviction relief, stated in part that defendant's appointed counsel "is experienced counsel and the record is barren of any inferences that defendant was not competently represented."

As to the other points raised on appeal, they have been adequately discussed herein and are not deserving of any further attention.

The order of the district court is affirmed.

Paul M. Sand
Ralph J. Erickstad, C.J.
William L. Paulson
Robert Vogel
Vernon R. Pederson

Footnotes:

1. North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).

2. The district court so stated in its Memorandum Opinion dated 15 October 1975.

Rule 3.172. Acceptance of Guilty or Nolo Contendere Plea

(a) *Voluntariness; Factual Basis.* --Before accepting a plea of guilty or nolo contendere, the trial judge shall determine that the plea is voluntarily entered and that a factual basis for the plea exists. Counsel for the prosecution and the defense shall assist the trial judge in this function.

(b) *Open Court.* --All pleas shall be taken in open court, except that when good cause is shown a plea may be taken in camera.

(c) *Determination of Voluntariness.* --Except when a defendant is not present for a plea, pursuant to the provisions of rule 3.180(d), the trial judge should, when determining voluntariness, place the defendant under oath and shall address the defendant personally and shall determine that he or she understands:

(1) the nature of the charge to which the plea is offered, the maximum possible penalty, and any mandatory minimum penalty provided by law;

(2) if not represented by an attorney, that the defendant has the right to be represented by an attorney at every stage of the proceeding and, if necessary, an attorney will be appointed to represent him or her;

(3) the right to plead not guilty or to persist in that plea if it has already been made, the right to be tried by a jury, and at that trial the defendant has the right to the assistance of counsel, the right to compel attendance of witnesses on his or her behalf, the right to confront and cross-examine witnesses against him or her, and the right not to testify or be compelled to incriminate himself or herself;

(4) that upon a plea of guilty, or nolo contendere without express reservation of the right to appeal, he or she gives up the right to appeal all matters relating to the judgment, including the issue of guilt or innocence, but does not impair the right to review by appropriate collateral attack;

(5) that if the defendant pleads guilty or is adjudged guilty after a plea of nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he or she waives the right to a trial;

(6) that if the defendant pleads guilty or nolo contendere, the trial judge may ask the defendant questions about the offense to which he or she has pleaded, and if the defendant answers these questions under oath, on the record, and in the presence of counsel, the answers may later be used against him or her in a prosecution for perjury;

(7) the complete terms of any plea agreement, including specifically all obligations the defendant will incur as a result;

(8) that if he or she pleads guilty or nolo contendere, if he or she is not a United States citizen, the plea may subject him or her to deportation pursuant to the laws and regulations governing the United States Immigration and Naturalization Service. It shall not be necessary for the trial judge to inquire as to whether the defendant is a United States citizen, as this admonition shall be given to all defendants in all cases; and

(9) that if the defendant pleads guilty or nolo contendere, and the offense to which the defendant is pleading is a sexually violent offense or a sexually motivated offense, or if the defendant has been previously convicted of such an offense, the plea may subject the defendant to involuntary civil commitment as a sexually violent predator upon completion of his or her sentence. It shall not be necessary for the trial judge to determine whether the present or prior offenses were sexually motivated, as this admonition shall be given to all defendants in all cases.

(10) that if the defendant pleads guilty or nolo contendere and the offense to which the defendant is pleading is one for which automatic, mandatory driver's license suspension or revocation is required by law to be imposed (either by the court or by a separate agency), the plea will provide the basis for the suspension or revocation of the defendant's driver's license.

(d) *DNA Evidence Inquiry.* --Before accepting a defendant's plea of guilty or nolo contendere to a felony, the judge must inquire whether counsel for the defense has reviewed the discovery disclosed by the state, whether such discovery included a listing or description of physical items of evidence, and whether counsel has reviewed the nature of

the evidence with the defendant. The judge must then inquire of the defendant and counsel for the defendant and the state whether physical evidence containing DNA is known to exist that could exonerate the defendant. If no such physical evidence is known to exist, the court may accept the defendant's plea and impose sentence. If such physical evidence is known to exist, upon defendant's motion specifying the physical evidence to be tested, the court may postpone the proceeding and order DNA testing.

(e) *Acknowledgment by Defendant.* --Before the trial judge accepts a guilty or nolo contendere plea, the judge must determine that the defendant either (1) acknowledges his or her guilt or (2) acknowledges that he or she feels the plea to be in his or her best interest, while maintaining his or her innocence.

(f) *Proceedings of Record.* --The proceedings at which a defendant pleads guilty or nolo contendere shall be of record.

(g) *Withdrawal of Plea Offer or Negotiation.* --No plea offer or negotiation is binding until it is accepted by the trial judge formally after making all the inquiries, advisements, and determinations required by this rule. Until that time, it may be withdrawn by either party without any necessary justification.

(h) *Withdrawal of Plea When Judge Does Not Concur.* --If the trial judge does not concur in a tendered plea of guilty or nolo contendere arising from negotiations, the plea may be withdrawn.

(i) *Evidence.* --Except as otherwise provided in this rule, evidence of an offer or a plea of guilty or nolo contendere, later withdrawn, or of statements made in connection therewith, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.

(j) *Prejudice.* --Failure to follow any of the procedures in this rule shall not render a plea void absent a showing of prejudice.

HISTORY: *Added eff. July 1, 1977 (343 So.2d 1247);* amended eff. *Sept. 21, 2006 (938 So. 2d 978); Mar. 29, 2007 (953 So.2d 513); Oct. 1, 2009 (2009 Fla. LEXIS 1664); Jan. 1, 2010 (2009 Fla. Lexis 1948)*

NOTES:

COMMITTEE NOTES

1977 Adoption. New in Florida. In view of the supreme court's emphasis on the importance of this procedure as set forth in *Williams v. State, 316 So.2d 267 (Fla. 1975),* the committee felt it appropriate to expand the language of former rule 3.170(j) (deleted) and establish a separate rule. Incorporates *Federal Rule of Criminal Procedure 11(c)* and allows for pleas of convenience as provided in *North Carolina v. Alford, 400 U.S. 25, 91 S.Ct. 160, 27 L.Ed.2d 162 (1970).*

(a), (b) Mandatory record of voluntariness and factual predicate is proper responsibility of counsel as well as the court.

(c)(iv) This waiver of right to appeal is a change from the proposed amendments to the rules of criminal procedure now pending. A sentence if lawful is not subject to appellate review; a judgment, however, is. The committee was of the opinion that the proposed rule should be expanded to include a waiver of appeal from the judgment as well as the sentence. Waivers of appeal have been approved. *United States ex rel. Amuso v. LaValle, 291 F.Supp. 383 (E.D.N.Y. 1968), aff'd 427 F.2d 328 (2d Cir. 1970); State v. Gibson, 68 N.J. 499, 348 A.2d 769 (1975); People v. Williams, 36 N.Y.2d 829, 370 N.Y.S.2d 904, 331 N.E.2d 684 (1975).*

(vii) Requires the court to explain the plea agreement to the defendant, including conditions subsequent such as conditions of probation.

(e) Provides a readily available record (either oral or by use of standard forms) in all cases where a felony is charged.

(h) Rewording of federal rule 11(e)(6).

2005 Amendment. Rule 3.172(c)(9) added. See *section 394.910, et seq., Fla. Stat.*; and *State v. Harris, 881 So.2d 1079 (Fla. 2004).*

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 16, 2013

RE: Rule 43, N.D.R.Civ.P., Evidence; Rule 28, N.D.R.Crim.P., Interpreters; Rule 6.10, N.D.R.Ct., Courtroom Oaths

During the committee's discussion of N.D.R.Ev 604 (Interpreters) at the April and September meetings, the issue of the state's interpreter statutes was brought up. By the end of the September discussion, it was the consensus of the committee that N.D.C.C. §§ 31-01-11 and 31-01-12 were outmoded and should be superseded.

Examination of N.D.R.Crim.P. 28 and N.D.R.Ct. 6.10 show that some steps have already been taken to supersede these statutes. Rule 28 supersedes § 31-01-12, the fee statute, "for criminal process only." Rule 6.10 supersedes the part of § 31-01-11 that refers to the oath or affirmation of an interpreter. The drafters of N.D.R.Civ.P. 43, on the other hand, decided not to include the federal language on interpreters in the rule because it was "not needed in these rules, as it is adequately covered in N.D.C.C. § 31-01-11."

Proposed amendments to Rule 43, Rule 28 and Rule 6.10 are attached. Under the proposed amendments, N.D.C.C. §§ 31-01-11 and 31-01-12 would be wholly superseded.

The main textual change proposed to the rules would be adding a section on interpreters, based on the federal language, to Rule 43. The proposal would also amend the explanatory notes of Rules 28 and 6.10 to update cross references and reflect the superseding of §§ 31-01-11 and 31-01-12. N.D.Sup.Ct.Admin.R. 50, a copy of which is attached, provides guidance on interpreter qualifications and requirements and it would also be cross-referenced as part of the proposed rule amendments.

The first part of N.D.C.C. § 31-01-11, which has not been superseded before, provides:

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

The committee may wish to discuss whether it would be useful to include any of this language in the proposed rule amendments or whether Rules 43, 28 and 6.10 as amended, along with Admin. Rule 50, adequately cover the field.

RULE 43. EVIDENCE

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a statute, the Rules of Evidence, these rules, or other court rules provide otherwise. For good cause, or on agreement of the parties, and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location. A party must give notice if a witness is unable to testify orally or if testimony by contemporaneous transmission may be necessary.

(b) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(c) Interpreter. The court may appoint an interpreter; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

EXPLANATORY NOTE

Rule 43 was amended, effective 1976; January 1, 1980; March 1, 1999; March 1, 2011.

Subdivision (a) was amended, effective March 1, 1999, to follow the 1996 federal amendment. See 1996 Advisory Committee Note, Fed.R.Civ.P. 43. The requirement for testimony to be taken orally is deleted.

Former subdivision (b) on scope of examination and cross-examination was deleted,

22 effective March 1, 2011. These topics are covered in the Rules of Evidence. The federal rule
23 contains a subdivision entitled "Affirmation Instead of an Oath." Affirmations and oaths are
24 governed by N.D.R.Ct. 6.10 (Courtroom Oaths).

25 ~~The federal rule contains a subdivision (f) governing the appointment of interpreters.~~
26 ~~This is not needed in these rules, as it is adequately covered in N.D.C.C. § 31-01-11.~~

27 Subdivision (c) on interpreters was added, effective _____.
28 It is based on Fed.R.Civ.P. 43(d). N.D.Sup.Ct.Admin.R. 50 provides guidance on interpreter
29 qualifications and requirements.

30 Rule 43 was amended, effective March 1, 2011, in response to the December 1, 2007,
31 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
32 were changed to make the rule more easily understood and to make style and terminology
33 consistent throughout the rules.

34 Sources: Joint Procedure Committee Minutes of _____; January
35 29-30, 2009, pages 34-35; January 29-30, 1998, pages 11-13; September 25-26, 1997, pages
36 10-11; November 29-30, 1979, page 16; April 26-27, 1979, pages 17-18; September 23-24,
37 1976, page 79; June 3-4, 1976, pages 16-18; ~~Rule~~ Fed.R.Civ.P. 43~~, FRCivP~~.

38 Statutes Affected:

39 Superseded: N.D.C.C. § 31-01-12.

40 Considered: N.D.C.C. ch. 28-33; § 31-01-11.

41 Cross Reference: N.D.R.Ev. 101 (Scope), N.D.R.Ev. 103 (Rules on Evidence),
42 N.D.R.Ev. 104 (Preliminary Questions), N.D.R.Ev. 603 (Oath or Affirmation), N.D.R.Ev.

43 604 (Interpreters), N.D.R.Ev. 607 (Who May Impeach), and N.D.R.Ev. 611 (Mode and Order

44 of Interrogation and Presentation); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D.Sup.Ct.Admin.R.

45 50 (Court Interpreter Qualifications and Procedures).

RULE 28. INTERPRETERS

The court may select, appoint, and set the reasonable compensation for an interpreter. The compensation must be paid from funds provided by law or as the court directs.

EXPLANATORY NOTE

Rule 28 was amended, effective March 1, 2006;_____.

Rule 28 is an adaptation of ~~F.R.Crim.P.~~ Fed.R.Crim.P. 28. It differs from the federal rule by providing that compensation for interpreters may be paid out of funds as provided by state law or as the court directs.

Former subdivision (a) provided for the appointment of expert witnesses. This provision was deleted, effective March 1, 2006, because N.D.R.Ev. 706 covers the topic of court-appointed expert witnesses in detail.

Rule 28 is consistent with existing state law, N.D.C.C. § 31-01-11, which authorizes the court to appoint ~~and provide for the compensation of~~ interpreters. Rule 28 permits the court to appoint interpreters in ~~all~~ appropriate circumstances. The purpose of the rule is to assist non-English-speaking defendants in understanding the proceedings or in communicating with assigned counsel. N.D.Sup.Ct.Admin.R. 50 provides guidance on interpreter qualifications and requirements.

Rule 28 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

22 terminology consistent throughout the rules.

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

24 28, 2005, pages 22-23; October 17-20, 1972, pages 32-33; February 20-21, 1969, pages 4-5;

25 Fed.R.Crim.P. 28.

26 Statutes Affected:

27 Superseded ~~for criminal process only~~: N.D.C.C. § 31-01-12

28 Considered: N.D.C.C. §§ 28-26-06, 31-01-11, ch. ~~29-20~~ 28-33.

29 Cross References: N.D.R.Ev. 604 (Interpreters); N.D.R.Ev. 706 (Court Appointed

30 Experts); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D. Sup. Ct. Admin. R. 50 (Court Interpreter

31 Qualifications and Procedures).

RULE 6.10. COURTROOM OATHS

(a) Oath. Unless an affirmation is used, an oath substantially in the following form must be administered:

(1) To a prospect juror. Do you solemnly swear to truthfully answer the questions you are asked about your qualifications to be a juror? So help you God.

(2) To a jury. Do you solemnly swear that you will consider all the evidence in this case, follow the instructions given to you, deliberate fairly and impartially and reach a fair verdict? So help you God.

(3) To a witness. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth? So help you God.

(4) To an interpreter. Do you solemnly swear to justly, truly, and impartially act as an interpreter and make a true translation to the best of your ability? So help you God.

(5) To a bailiff to keep jury after cause submitted. Do you solemnly swear to keep the jury together until they are returned to the Court and not permit anyone to communicate with them unless you are ordered to do so by the Court? So help you God.

(6) To a grand jury. Do you solemnly swear to listen to, examine, and consider all of the evidence, to follow all of the Court's instructions, and to decide matters placed before you in accordance with the law and evidence presented? So help you God.

(7) To a grand jury witness. Do you solemnly swear to tell the truth, the whole truth, and nothing but the truth, and you will keep secret all of the proceedings of the grand jury

22 conducted in your presence? So help you God.

23 (8) To a grand jury reporter. Do you solemnly swear you will keep secret the
24 testimony taken and evidence considered by the grand jury except as you may be required by
25 law to disclose? So help you God.

26 (9) To a grand jury bailiff. Do you solemnly swear to impartially perform the duties
27 of your office to the best of your ability, to obey your instructions, and not to eavesdrop or
28 communicate with the grand jurors regarding any matter being considered by them? So help
29 you God.

30 (b) Affirmation. A person must be allowed to make an affirmation instead of taking
31 an oath, by substituting the word "affirm" for the word "swear" and substituting the phrase
32 "under the pains and penalties of perjury" for the phrase "so help you God."

33 EXPLANATORY NOTE

34 Rule 6.10 was adopted, effective March 1, 1999. Rule 6.10 was amended,
35 effective _____.

36 The intent of the rule is to modernize the language used in courtroom oaths and to
37 consolidate the various oaths into one location.

38 Sources: Joint Procedure Committee Minutes of _____; January
39 29-30, 1998, pages 3-10; September 25-26, 1997, pages 11-12.

40 Statutes Affected:

41 Superseded: ~~Sections~~ N.D.C.C. §§ 28-14-08; 28-33-04; 29-10.1-12; ~~and~~ 29-10.1-25;
42 29-17-14. In ~~Section~~ N.D.C.C. § 29-17-12, the language regarding an oath or affirmation.

43 ~~Section 29-17-14.~~ In ~~Section~~ N.D.C.C. § 31-01-11, the oath or affirmation for an interpreter.

44 Cross Reference: N.D.R.Ev. 603 (Oath or Affirmation).

FEDERAL RULES OF CIVIL PROCEDURE
TITLE VI. TRIALS

Rule 43. Taking Testimony

(a) In Open Court. At trial, the witnesses' testimony must be taken in open court unless a federal statute, the Federal Rules of Evidence, these rules, or other rules adopted by the Supreme Court provide otherwise. For good cause in compelling circumstances and with appropriate safeguards, the court may permit testimony in open court by contemporaneous transmission from a different location.

(b) Affirmation Instead of an Oath. When these rules require an oath, a solemn affirmation suffices.

(c) Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavits or may hear it wholly or partly on oral testimony or on depositions.

(d) Interpreter. The court may appoint an interpreter of its choosing; fix reasonable compensation to be paid from funds provided by law or by one or more parties; and tax the compensation as costs.

HISTORY:
(Amended July 1, 1966; July 1, 1975; Aug. 1, 1987; Dec. 1, 1996.)
(As amended Dec. 1, 2007.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee on Rules. *Subdivision (a).* The first sentence is a restatement of the substance of USC, Title 28, former § 635 (Proof in common-law actions), formerly § 637 (now §§ 2072, 2073) (Proof in equity and admiralty), and former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). This rule abolishes in patent and trademark actions, the practice under former Equity Rule 48 of setting forth in affidavits the testimony in chief of expert witnesses whose testimony is directed to matters of opinion. The second and third sentences on admissibility of evidence and Subdivision (b) on contradiction and cross-examination modify USC, Title 28, formerly § 725 (now § 1652) (Laws of states as rules of decision) insofar as that statute has been construed to prescribe conformity to state rules of evidence. Compare Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure, *45 Yale LJ 622 (1936),* and Same; 2, *47 Yale LJ 195 (1937).* The last sentence modifies to the extent indicated *USC, Title 28, § 631* (Competency of witnesses governed by State laws).

Subdivision (b). See 4 Wigmore on Evidence (2d ed, 1923) §§ 1885 et seq.

Subdivision (c). See former Equity Rule 46 (Trial--Testimony Usually Taken in Open Court--Rulings on Objections to Evidence). With the last sentence compare *Dowagiac v Lochren, 143 Fed 211* (CCA8th, 1906). See also *Blease v Garlington, 92 US 1, 23 L Ed 521 (1876); Nelson v United States, 201 US 92, 114, 26 S Ct 358, 50 L Ed 673 (1906); Unkle v Wills, 281 Fed 29* (CCA8th, 1922).

See Rule 61 for harmless error in either the admission or exclusion of evidence.

Subdivision (d). See former Equity Rule 78 (Affirmation in Lieu of Oath) and *USC, Title 1, § 1* (Words importing singular number, masculine gender, etc.; extended application), providing for affirmation in lieu of oath.

Supplementary note of Advisory Committee regarding Rules 43 and 44. These rules have been criticized and suggested improvements offered by commentators. 1 Wigmore on Evidence, 3d ed 1940, 200-204; Green, the Admissibility of Evidence Under the Federal Rules, 1941, *55 Harv L Rev 197.* Cases indicate, however, that the rule is working better than these commentators had expected. *Boerner v United States, CCA2d, 1941, 117 F2d 387,* cert den 1941, *313 US 587, 85 L Ed 1542, 61 S Ct 1120; Mosson v Liberty Fast Freight Co. CCA2d, 1942, 124 F2d 448; Hartford Accident & Indemnity Co. v Olivier, CCA5th, 1941, 123 F2d 709; Anzano v Metropolitan Life Ins. Co. of New York, CCA3d, 1941, 118 F2d 430; Franzen v E. I. DuPont De Nemours & Co. CCA3d, 1944, 146 F2d 837; Fakouri v Cadais, CCA5th, 1945, 147 F2d 667; In re C. & P. Co. SD Cal 1945, 63 F Supp 400, 408.* But cf. *United States v Aluminum Co. of America, SD NY 1938, 1 Fed Rules Serv 43a.*3, Case 1; Note, 1946, *46 Col L Rev 267.* While consideration of a comprehensive and detailed set of rules of evidence seems very desirable, it has not been feasible for

the Committee so far to undertake this important task. Such consideration should include the adaptability to federal practice of all or parts of the proposed Code of Evidence of the American Law Institute. See *Armstrong, Proposed Amendments to Federal Rules of Civil Procedure, 4 FRD 124, 137-138.*

Notes of Advisory Committee on 1966 amendments. This new subdivision authorizes the court to appoint interpreters (including interpreters for the deaf), to provide for their compensation, and to tax the compensation as costs. Compare proposed subdivision (b) of *Rule 28 of the Federal Rules of Criminal Procedure.*

Notes of Advisory Committee on 1975 amendments. Rule 43, entitled Evidence, has heretofore served as the basic rule of evidence for civil cases in federal courts. Its very general provisions are superseded by the detailed provisions of the new Rules of Evidence. The original title and many of the provisions of the rule are, therefore, no longer appropriate.

Subdivision (a). The provision for taking testimony in open court is not duplicated in the Rules of Evidence and is retained. Those dealing with admissibility of evidence and competency of witnesses, however, are no longer needed or appropriate since those topics are covered at large in the Rules of Evidence. They are accordingly deleted. The language is broadened, however, to take account of acts of Congress dealing with the taking of testimony, as well as of the Rules of Evidence and any other rules adopted by the Supreme Court.

Subdivision (b). The subdivision is no longer needed or appropriate since the matters with which it deals are treated in the Rules of Evidence. The use of leading questions, both generally and in the interrogation of an adverse party or witness identified with him, is the subject of Evidence Rule 611(c). Who may impeach is treated in Evidence Rule 607, and scope of cross-examination is covered in Evidence Rule 611(b). The subdivision is accordingly deleted.

Subdivision (c). Offers of proof and making a record of excluded evidence are treated in Evidence Rule 103. The subdivision is no longer needed or appropriate and is deleted.

Effective date of 1975 amendments. Act Jan. 2, 1975, P.L. 93-595, 88 Stat. 1926, provided in § 3 that the amendment of Rule 43 "shall take effect on the one hundred and eightieth day beginning after the date of enactment of this Act.".

Notes of Advisory Committee on 1987 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 1996 amendments. Rule 43(a) is revised to conform to the style conventions adopted for simplifying the present Civil Rules. The only intended changes of meaning are described below.

The requirement that testimony be taken "orally" is deleted. The deletion makes it clear that testimony of a witness may be given in open court by other means if the witness is not able to communicate orally. Writing or sign language are common examples. The development of advanced technology may enable testimony to be given by other means. A witness unable to sign or write by hand may be able to communicate through a computer or similar device.

Contemporaneous transmission of testimony from a different location is permitted only on showing good cause in compelling circumstances. The importance of presenting live testimony in court cannot be forgotten. The very ceremony of trial and the presence of the factfinder may exert a powerful force for truthtelling. The opportunity to judge the demeanor of a witness face-to-face is accorded great value in our tradition. Transmission cannot be justified merely by showing that it is inconvenient for the witness to attend the trial.

The most persuasive showings of good cause and compelling circumstances are likely to arise when a witness is unable to attend trial for unexpected reasons, such as accident or illness, but remains able to testify from a different place. Contemporaneous transmission may be better than an attempt to reschedule the trial, particularly if there is a risk that other--and perhaps more important--witnesses might not be available at a later time.

Other possible justifications for remote transmission must be approached cautiously. Ordinarily depositions, including video depositions, provide a superior means of securing the testimony of a witness who is beyond the reach of a trial subpoena, or of resolving difficulties in scheduling a trial that can be attended by all witnesses. Deposition procedures ensure the opportunity of all parties to be represented while the witness is testifying. An unforeseen need for the testimony of a remote witness that arises during trial, however, may establish good cause and compelling circumstances. Justification is particularly likely if the need arises from the interjection of new issues during trial or from the unexpected inability to present testimony as planned from a different witness.

Good cause and compelling circumstances may be established with relative ease if all parties agree that testimony should be presented by transmission. The court is not bound by a stipulation, however, and can insist on live testimony. Rejection of the parties' agreement will be influenced, among other factors, by the apparent importance of the testimony in the full context of the trial.

A party who could reasonably foresee the circumstances offered to justify transmission of testimony will have special difficulty in showing good cause and the compelling nature of the circumstances. Notice of a desire to transmit testimony from a different location should be given as soon as the reasons are known, to enable other parties to arrange

a deposition, or to secure an advance ruling on transmission so as to know whether to prepare to be present with the witness while testifying.

No attempt is made to specify the means of transmission that may be used. Audio transmission without video images may be sufficient in some circumstances, particularly as to less important testimony. Video transmission ordinarily should be preferred when the cost is reasonable in relation to the matters in dispute, the means of the parties, and the circumstances that justify transmission. Transmission that merely produces the equivalent of a written statement ordinarily should not be used.

Safeguards must be adopted that ensure accurate identification of the witness and that protect against influence by persons present with the witness. Accurate transmission likewise must be assured.

Other safeguards should be employed to ensure that advance notice is given to all parties of foreseeable circumstances that may lead the proponent to offer testimony by transmission. Advance notice is important to protect the opportunity to argue for attendance of the witness at trial. Advance notice also ensures an opportunity to depose the witness, perhaps by video record, as a means of supplementing transmitted testimony.

Notes of Advisory Committee on 2007 amendments. The language of Rule 43 has been amended as part of the general restyling of the Civil 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.

Rule 50. Court Interpreter Qualifications and Procedures

Section 1. Policy.

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

Section 2. Court Interpreter qualifications.

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

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

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

Section 3. Qualifications Exception.

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

Section 4. General Procedures -- Requirements.

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

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

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

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

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

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

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

(1) is unable to adequately interpret the proceedings;

(2) knowingly makes a false interpretation;

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

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

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

Section 5. Effective Date.

This rule is effective March 1, 2005.

HISTORY: Adopted effective February 9, 2005.

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

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

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

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

the following:

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

31-01-12. Fees for interpreters.

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

CHAPTER 28-33
INTERPRETERS FOR DEAF PERSONS

28-33-01. Definitions.

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

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

28-33-02. Interpreter required.

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

28-33-03. Proof of disability.

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

28-33-04. Oath of interpreter.

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

28-33-05. Compensation.

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

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

28-33-06. Privileged communications.

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

28-33-07. Visual recording.

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

28-33-08. Coordination of interpreter requests.

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

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 17, 2013

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

The committee discussed Rule 707 at the April and September meetings. In September, it decided to table the rule to see whether the Supreme Court would provide additional insight on the interpretation of the rule's terms.

As of the date of this memo, the Court had issued one new opinion on Rule 707: State, ex rel. Madden v. Rustad, 2012 ND 242. In this case, the defense requested that the director of the state crime laboratory be produced to testify about an analytical report at a DUI trial. The judge ordered the state to produce the director. The state sought a supervisory writ from the Court to vacate the order. The Court vacated the order because it concluded that the director did not make any testimonial statements in the analytical report at issue. Specifically, the Court held: "The State need not produce designated persons for confrontation purposes if those persons do not make testimonial statements in analytical reports." Rustad, ¶19.

For the sake of discussion, proposed amendments to Rule 707 are attached that incorporate the Rustad standard in the rule.

Judge Gary Lee submitted a letter, dated Dec. 7, 2012, requesting amendment of Rule 707. The letter is attached. In the letter, Judge Lee criticizes the time lines in the rule and suggests they cause defendants to always wait until 14 days before trial to object to admission of an analytical report. He says this causes trial delay and a waste of judicial resources. He suggests that the time lines be changed to run from the date of the initial appearance rather

than from before the date of the trial. Staff has incorporated Judge Lee's suggestions in the attached proposal.

The issue of whether the rule is still needed was raised at the September meeting. It was pointed out that the rule was enacted because North Dakota has statutes that allow "automatic" admission of analytical reports, contrary to Melendez-Diaz and the cases that followed. Rule 707 did not supersede these provisions because they are arguably substantive, not procedural. Instead, the rule superseded provisions that set out procedures for subpoenaing witnesses to testify about analytical reports. A copy of N.D.C.C. § 19-03.1-37 is attached so that the committee can see how these statutes are structured and what provisions were superseded. Rule 707 accepts the "prima-facie" nature of an analytical report under § 19-03.1-37(4), but if there is an objection to the report, it provides a procedure consistent with Melendez-Diaz to fulfill the defendant's confrontation clause rights. The committee may wish to discuss whether this could be accomplished in the absence of the rule.

The Committee asked how other jurisdictions are responding to Melendez-Diaz. The federal government is proposing a fairly simple amendment to Rule 803. A copy is attached. The amendment contains a "notice and demand" procedure similar to the procedure in Rule 707, but with shorter timelines. The committee may wish to discuss whether following the federal approach would be advantageous in North Dakota.

RULE 707. ANALYTICAL REPORT ADMISSION; CONFRONTATION

(a) Notification to defendant. If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney ~~at least~~ no later than 30 days ~~before the trial~~ after the initial appearance.

(b) Objection. ~~At least 14 days before the trial, the~~ Within 30 days of receiving the copy of the report, the defendant may object in writing to the introduction of the report and identify ~~the name or job title of the witness~~ a person who made a testimonial statement in the report to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.

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

(d) Juvenile proceedings. This procedure applies to juvenile proceedings that involve analytical reports issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20.

EXPLANATORY NOTE

Rule 707 was adopted effective February 1, 2010. Rule 707 was amended, effective

22 March 1, 2011.

23 Rule 707 requires the prosecution to notify a defendant if it intends to introduce an
24 analytical report in a criminal trial. If the defendant objects to the admission of the report, the
25 defendant must identify the witness it seeks to examine about the report at trial and the
26 prosecution must produce the witness.

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

33 Under North Dakota law, if the person who prepared the report does not testify at trial,
34 a certified copy of an analytical report must be accepted as prima facie evidence of the results
35 of a chemical analysis. See N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-
36 20-07(8), and 39-24.1-08(6).

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

39 Statutes Affected:

40 Superseded: N.D.C.C. §§ 19-03.1-37(5), 20.1-13.1-10(7), 20.1-15-11(9), 39-20-07(9),
41 and 39-24.1-08(7).

42 Considered: N.D.C.C. §§ 19-03.1-37(4), 20.1-13.1-10(6), 20.1-15-11(8), 39-20-07(8),

43 and 39-24.1-08(6).

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2012 ND 242

State of North Dakota, ex rel. Nathan Kirke Madden, Assistant State's Attorney, Williams County, Petitioner
v.
The Honorable Joshua B. Rustad, Judge of the District Court, Northwest Judicial District, and James Duane Christianson, Respondents

No. 20120305

Petition for Writ of Supervision.
SUPERVISORY WRIT GRANTED.
Opinion of the Court by Maring, Justice.
Nathan K. Madden, Assistant State's Attorney, P.O. Box 2047, Williston, N.D. 58802, for petitioner. Michael R. Hoffman, P.O. Box 1056, Bismarck, N.D. 58502-1056, for respondents.
Paul H. Myerchin, P.O. Box 995, Bismarck, N.D. 58502-0995, for amicus curiae North Dakota Association of Criminal Defense Lawyers.

State, ex rel. Madden v. Rustad

No. 20120305

Maring, Justice.

[¶1] The State of North Dakota, through Williams County Assistant State's Attorney Nathan Kirke Madden, petitions this Court for a supervisory writ directing the district court to vacate a pretrial order requiring the State to produce the Director of the State Crime Laboratory at trial in the prosecution of James Christianson for driving while under the influence of alcohol. The State argues the district court misinterpreted N.D.R.Ev. 707 to require the State to produce the Director for Christianson's criminal trial. We exercise our supervisory jurisdiction and direct the district court to vacate its order, concluding this record does not establish the Director made any testimonial statements in an analytical report assessing

Christianson's blood-alcohol content.

I

[¶2] Christianson was arrested for driving while under the influence of alcohol and submitted to a blood draw at a Williston hospital. The analytical report from the blood draw showed Christianson's blood-alcohol content was above the legal limit, and the State charged him with driving or being in actual physical control of a motor vehicle while under the influence of alcohol, or with a blood alcohol content above the legal limit. The State notified Christianson under N.D.R.Ev. 707(a) that it intended to introduce into evidence at trial the analytical report from his blood test, which had been certified by a forensic scientist at the State Crime Laboratory, Roberta Grieger-Nimmo. Christianson objected to the introduction of the analytical report under N.D.R.Ev. 707(b) and identified four witnesses to be produced at trial to testify about the report, including the specimen collector, the analyst, and the Director of the State Crime Laboratory. The State thereafter moved to allow the introduction of the analytical report without the testimony of the Director, Hope Olson.

[¶3] In a decision rendered before this Court's decisions in State, ex rel. Roseland v. Herauf, 2012 ND 151, 819 N.W.2d 546 and State v. Lutz, 2012 ND 156, 820 N.W.2d 111, the district court denied the State's motion to permit the admission into evidence of the analytical report without the testimony of Olson, ruling the State must produce Olson at trial under the plain language of N.D.R.Ev. 707:

> First of all, with regard to the State's Motion for Admissibility of Lab Results Without the Testimony of Hope Olson, it is important to note that the cases cited by the State, Melendez-Diaz v. Massachusetts, 557 U.[S]. 305, 326-327 (2009) and State v. Gietzen, 2010 ND 8[]2, 786 N.W.2d 1, both predate North Dakota Rules of Evidence 707, which was adopted effective February 1, 2010, and amended March 1, 2011. While the Gietzen case was filed May 11, 2010, and modified June 30, 2010, trial was held on October 14, 2009, and that decision made no reference to, and did not rely on, Rule 707 in rendering its decision. As such, the Court has not been directed to any cases addressing the issue.
>
> The Court finds that Rule 707 is clear in that if an analytical report is intended to be offered by the State, the Defendant must be notified in writing of its intent to introduce the report. The Defendant may object, and identify the name or job title of the witness to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. (emphasis added) The Court finds that the plain language of Rule 707

> requires that Hope Olson be required to testify as Defendant has identified her and as she was listed on the State's Notice of Rule 707 Evidence. As such, the State's motion for admissibility of analytical reports without the testimony of Ms. Olson is hereby DENIED.

II

[¶4] The State petitions this Court to exercise its original jurisdiction and issue a supervisory writ, arguing it is not required to produce Olson at trial because she made no testimonial statements in the analytical report and it has no alternative remedy available to address the district court's interpretation of N.D.R.Ev. 707.

[¶5] Under N.D. Const. art. VI, § 2, and N.D.C.C. § 27-02-04, we may review a district court decision under our supervisory authority. Herauf, 2012 ND 151, ¶ 3, 819 N.W.2d 546. We exercise our authority to issue supervisory writs rarely and cautiously on a case-by-case basis and only to rectify errors and prevent injustice in extraordinary cases when no adequate alternative remedy exists. Id. Our authority to issue a supervisory writ is discretionary. State v. Paulson, 2001 ND 82, ¶ 6, 625 N.W.2d 528. We generally will not exercise our supervisory jurisdiction where the proper remedy is an appeal. Id.

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

[¶7] The North Dakota Association of Criminal Defense Lawyers, as amicus curiae, argue this is not an extraordinary case necessary to rectify an error or prevent an injustice and the State has at least two adequate alternative remedies. The Association of Criminal Defense Lawyers argues the State can either produce the Director at trial, or depose her and offer her deposition in lieu of her testimony. Both alternatives require the State to comply with the district court order and, seemingly, reserve any challenge to the order for appeal. However, as we explained above, the State would likely not be able to raise the issue on appeal, making the proposed remedies inadequate. We therefore conclude this is an appropriate case to exercise our supervisory jurisdiction.

III

[¶8] The State argues the district court misinterpreted N.D.R.Ev. 707 to require the State to produce the Director at trial, because the State claims the Director had no part in the analysis of Christianson's blood sample and made no testimonial statements in the analytical report. The State argues forensic scientist Grieger-Nimmo conducted the analytical test in this case and certified the results in the analytical report. The State argues N.D.R.Ev. 707 does not require the State to produce whoever a defendant identifies in an objection, regardless of that person's ability to testify about the analytical report. Christianson responds that N.D.R.Ev. 707, when construed with N.D.C.C. § 39-20-07, requires the State to produce the Director if a defendant objects to the introduction of an analytical report under N.D.R.Ev. 707(b) and identifies the Director as a witness to be produced at trial.

[¶9] The issue in this case involves the admissibility of the analytical report in the context of N.D.R.Ev. 707, N.D.C.C. § 39-20-07, and the Confrontation Clause of the Sixth Amendment of the United States Constitution. The Confrontation Clause, made applicable to the States under the Fourteenth Amendment, Pointer v. Texas, 380 U.S. 400, 403 (1965), provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

[¶10] In Crawford v. Washington, 541 U.S. 36, 51 (2004), the United States Supreme Court reviewed the historical underpinnings of the Confrontation Clause. The Court said the Confrontation Clause guarantees an accused's right to confront "'witnesses' . . . who 'bear testimony'" against the accused and "'[t]estimony,' in turn, is typically '[a] solemn declaration or affirmation made for the purpose of establishing or proving some fact.'" Id. (citations omitted). The Court explained the "constitutional text . . . reflects an especially acute concern with a specific type of out-of-court statement" and said "[a]n accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." Id. The Court described the type of "testimonial statements" invoking an accused's confrontation rights:

> Various formulations of this core class of "testimonial" statements exist: "ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially"; "extrajudicial statements . . . contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions"; "statements that were made under circumstances which would lead an

> objective witness reasonably to believe that the statement would be available for use at a later trial[.]"

Crawford, at 51-52 (citations omitted). The Crawford Court held a statement taken by law enforcement officers in the course of the interrogation of a witness was a testimonial statement under the Confrontation Clause and reversed a defendant's conviction because the statement was admitted into evidence without affording the defendant the right to confront that witness, who was unavailable for trial. Id. at 53, 68-69.

[¶11] In Melendez-Diaz v. Massachusetts, 557 U.S. 305, 310-11 (2009), the United States Supreme Court applied Crawford to the results of the forensic analysis performed on seized substances thought to be cocaine and held certificates of analysis, which were in affidavit form and showed the results of the forensic analysis, were within the "core class of testimonial statements" for confrontation purposes. The Court reiterated the meaning of the "core class of testimonial statements" from Crawford, 541 U.S. at 51-52, and explained the certificates of analysis were within that core class because they were "solemn declaration[s] or affirmation[s] made for the purpose of establishing or proving . . . that the substance . . . was, as the prosecution claimed, cocaine--the precise testimony the analyst would be expected to provide if called at trial." Melendez-Diaz, 557 U.S. at 310 (quoting Crawford, 541 U.S. at 51). The Court said the certificates of analysis were functionally identical to live, in-court testimony and were made under circumstances that would lead an objective, reasonable witness to believe the certificates would be used later at trial. Melendez-Diaz, at 310-11. The Court explained "under Massachusetts law the sole purpose of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance[.]" Id. at 311 (quoting Mass. Gen. Laws, ch. 111, § 13 (2004)). The Court held absent a showing the analysts who prepared the certificates of analysis were unavailable for trial and the defendant had a prior opportunity to cross-examine them, the defendant was entitled to confront the analysts at trial and the prosecution could not introduce the certificates without providing the analysts to testify to the truth of the statements made in the reports. Melendez-Diaz, 557 U.S. at 311. The Court explained the scope of its holding, however:

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

Id. at 311, n.1.

[¶12] In Bullcoming v. New Mexico, 131 S.Ct. 2705, 2709 (2011), the Supreme Court applied Melendez-Diaz in the context of a prosecution for driving under the influence of alcohol and the State's introduction into evidence of a forensic report certifying the defendant's blood-alcohol concentration was over the legal limit. The analyst who prepared and signed the certification was not available at trial, and the State called a different analyst, who was familiar with the laboratory's testing procedures but did not participate in or observe the test on the defendant's blood sample. Id. The Court held the admission of the certified report violated the defendant's confrontation rights because the report was created for an evidentiary purpose as part of a police investigation and was testimonial. Id. at 2710, 2717. The Court said the fact the report was unsworn was not dispositive in deciding it was testimonial, because the formalities accompanying the report, including the preparer's signature, were sufficient to bring the report within the "core class of testimonial statements." Id. at 2717.

[¶13] Rule 707, N.D.R.Ev., was adopted effective February 1, 2010, to address confrontation issues involving the admissibility of analytical reports in North Dakota courts in response to Melendez-Diaz. See N.D.R.Ev. 707, Explanatory Note and Sources. Rule 707, N.D.R.Ev., provides in part:

> (a) Notification to Defendant. If the prosecution intends to introduce an analytical report issued under N.D.C.C. chs. 19-03.1, 19-03.2, 19-03.4, 20.1-13.1, 20.1-15, 39-06.2, or 39-20 in a criminal trial, it must notify the defendant or the defendant's attorney in writing of its intent to introduce the report and must also serve a copy of the report on the defendant or the defendant's attorney at least 30 days before the trial.
> (b) Objection. At least 14 days before the trial, the defendant may object in writing to the introduction of the report and identify the name or job title of the witness to be produced to testify about the report at trial. If objection is made, the prosecutor must produce the person requested. If the witness is not available to testify, the court must grant a continuance.
> (c) Waiver. If the defendant does not timely object to the introduction of the report, the defendant's right to confront the person who prepared the report is waived.

[¶14] In Herauf, 2012 ND 151, ¶ 15, 819 N.W.2d 546, a majority of this Court held a blood drawer's signed statement that a blood sample was properly drawn was a testimonial statement because that statement was prima facie evidence the sample was properly drawn under N.D.C.C. § 39-20-07(10). The majority explained N.D.R.Ev. 707 must be interpreted in light of N.D.C.C. § 39-20-07, which

governs the admission of analytical reports into evidence under North Dakota law. Herauf, at ¶ 11. The majority said the legislature intertwined analytical reports and blood draws under the statute, which required interpreting N.D.R.Ev. 707 to include blood draws as well as analytical reports. Herauf, ¶ 11. The majority explained Melendez-Diaz and N.D.R.Ev. 707 essentially negated the shortcut provisions of N.D.C.C. § 39-20-07(5) and (8) for admission of an analytical report if a defendant objects to the admission of the report without the analyst's testimony. Herauf, at ¶ 13. In considering those evidentiary shortcuts, the majority concluded the signed statement of the blood drawer under N.D.C.C. § 39-20-07(10) was a testimonial statement, explaining:

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

Herauf, at ¶ 14. In Herauf, at ¶ 15, the majority concluded "N.D.R.Ev. 707, when construed with N.D.C.C. § 39-20-07 and the constitutional rights it provides, requires the State to produce the individual who drew the defendant's blood sample if the defendant objects under N.D.R.Ev. 707(b) and identifies the individual who drew the defendant's blood as a witness to be produced at trial."

[¶15] In Lutz, 2012 ND 156, ¶ 5, 820 N.W.2d 111, a majority of this Court reaffirmed Herauf as it pertains to the person signing a statement as a blood drawer. However, we held N.D.R.Ev. 707 did not require the State to produce at trial the individual who prepared

the volatiles solution used in the chemical test, because there was no statute similar to N.D.C.C. § 39-20-07(10) for the individual who prepared that solution and that individual's expected testimony fell squarely within the rule for establishing the chain of custody, authenticity of the sample, or accuracy of the testing device. Lutz, at ¶¶ 6-11 (citing Melendez-Diaz, 557 U.S. at 311, n.1). We explained "nothing in the record . . . suggest[ed] that the solution or the [preparer's] statement were prepared under circumstances that would lead the [preparer] or an objective witness to reasonably believe the solution or statement would be used for prosecutorial purposes at a later trial or that the solution was even prepared for the purpose of testing any person's blood for intoxication while driving." Lutz, at ¶ 8. We also held the State was not required to produce at trial mail carriers or other evidence custodians involved with the blood sample because their roles related to the chain of custody and not to testimonial statements in the analytical report. Lutz, at ¶ 12.

[¶16] In Herauf and Lutz, we construed N.D.R.Ev. 707 in conjunction with the evidentiary shortcuts authorized under N.D.C.C. § 39-20-07 and the rights protected by the Confrontation Clause and held an accused may require the State to produce at trial witnesses who make testimonial statements in the prima facie evidence authorized under the evidentiary shortcuts, including the analytical reports and the statement signed by a medically qualified blood drawer. In Herauf and Lutz, the substance of those statements were prepared for a prima facie evidentiary purpose and were testimonial.

[¶17] This record does not establish the Director conducted the blood analysis or otherwise participated in any manner in the analysis. Although the Director's job title is mentioned in forensic scientist Grieger-Nimmo's certification to the extent Grieger-Nimmo is a "designee" of the Director, nothing in the certification or analytical report constitutes a testimonial statement by the Director for confrontation purposes. There is no statutory language like the language in N.D.C.C. § 39-20-07(10), which requires the Director to make testimonial statements in the prima facie evidence established under the evidentiary shortcuts in N.D.C.C. § 39-20-07. Nothing in the Director's expected testimony would prove the substance of the results of the analytical report, or that the blood sample was properly drawn. Under Herauf and Lutz in conjunction with N.D.R.Ev. 707 and the evidentiary shortcuts authorized by N.D.C.C. § 39-20-07, the State is not required to provide the Director as a witness at trial to satisfy the Confrontation Clause because this record does not establish the Director conducted or otherwise participated in the blood analysis or made any testimonial statements in analytical reports.

[¶18] During oral argument to this Court, Christianson candidly admitted he identified the Director in his objection under N.D.R.Ev.

707(b) to preserve a possible foundation objection at trial. The requirements of N.D.R.Ev. 707 deal with confrontation issues and not foundation issues, and an objection under N.D.R.Ev. 707(b) is not a necessary precursor to preserve a foundation objection for trial. See N.D.R.Ev. 707(c) ("If the defendant does not timely object to the introduction of the [analytical] report, the defendant's right to confront the person who prepared the report is waived.).

[¶19] We conclude the district court's interpretation of N.D.R.Ev. 707(b) that any requested witness "must" be produced at trial is too broad. The State need not produce designated persons for confrontation purposes if those persons do not make testimonial statements in analytical reports. See Lutz, 2012 ND 156, ¶¶ 6-12, 820 N.W.2d 111. Christianson may subpoena the Director, but the State is not required to provide the Director at trial for confrontation purposes. See id. at ¶¶ 11-12.

IV

[¶20] We exercise our supervisory jurisdiction and direct the district court to vacate its order.

[¶21]

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

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RECEIVED BY
Justice Maring
Supreme Court

DEC 1 [illegible]

STATE OF
NORTH DAKOTA

December 7, 2012

The Honorable William McLees
District Judge
Ward County Courthouse
PO Box 5005
Minot, North Dakota 58702-5005

Re: Revision of Rule 707, NDRE

Dear Judge McLees:

Please consider presenting Rule 707, NDRE, to the Joint Procedures Committee for possible revision.

The rule provides that the State may, in certain cases, present scientific evidence by introducing an analytical report. The defendant may object to the report and request that a witness be produced to testify. The State must then produce that witness.

The problem with the rule is the unrealistic time lines. First, the State must announce its intention to use the analytical report at least 30 days before trial. Second, the defendant may wait until 14 days before trial to announce his objection to the report. The practical effect of this is that even if the State announces its intent to use a lab report early on in the process, the defendant invariably waits until the 14th day before announcing his objection. There are only a handful of State Crime lab analysts available. They are tied up in cases across the State. In the usual case, the analyst will be unavailable on the date set for trial. The State must then ask for a continuance. The rule provides that if the witness is not available, the Court must grant a continuance.

Continuances cause delay and waste judicial resources. Sound case flow management practices recognize that continuances disrupt not only the case in which the continuance is granted, but affect the entire court calendar, adding delay, cost and an increased workload for everyone.

I would suggest moving both time lines. If the rule required the State to announce its intentions to use a lab report early in the process (30 days after the initial appearance) and then tied the defendant's objection to the State's disclosure (30 days from the State's notice)rather than 14 days before trial, everyone would be in a better position to know the availability of the lab analyst. A firm trial date could then be set. I believe this would go a long way to eliminate continuances and allow for better case management.

Sincerely,

Gary H. Lee, District Judge

19-03.1-37. Burden of proof - Liabilities.

1. It is not necessary for the state to negate any exemption or exception in this chapter in any complaint, information, indictment, or other pleading or in any trial, hearing, or other proceeding under this chapter. The burden of proof of any exemption or exception is upon the person claiming it.

2. In the absence of proof that a person is the duly authorized holder of an appropriate registration or order form issued under this chapter, the person is presumed not to be the holder of the registration or form. The burden of proof is upon the person to rebut the presumption.

3. No liability is imposed by this chapter upon any authorized state, county, or municipal officer engaged in the lawful performance of the officer's duties.

4. In all prosecutions under this chapter, chapter 19-03.2, or chapter 19-03.4 involving the analysis of a substance or sample thereof, a certified copy of the analytical report signed by the director of the state crime laboratory or the director's designee must be accepted as prima facie evidence of the results of the analytical findings.

5. Notwithstanding any statute or rule to the contrary, a defendant who has been found to be indigent by the court in the criminal proceeding at issue may subpoena the director or an employee of the state crime laboratory to testify at the preliminary hearing and trial of the issue at no cost to the defendant. If the director or an employee of the state crime laboratory is subpoenaed to testify by a defendant who is not indigent and the defendant does not call the witness to establish relevant evidence, the court shall order the defendant to pay costs to the witness as provided in section 31-01-16.

6. In all cases of conspiracy to violate chapter 19-03.1, 19-03.2, or 19-03.4, the state is not required to prove or establish that a conspirator knew the other person to the agreement intended to deliver or possess with intent to deliver a controlled substance, an imitation controlled substance, or drug paraphernalia to a third person.

COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

Agenda E-19 (Appendix E)
Rules
September 2012

MARK R. KRAVITZ
CHAIR

PETER G. McCABE
SECRETARY

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JEFFREY S. SUTTON
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BANKRUPTCY RULES

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CIVIL RULES

REENA RAGGI
CRIMINAL RULES

SIDNEY A. FITZWATER
EVIDENCE RULES

MEMORANDUM

TO: Honorable Mark R. Kravitz, Chair
Standing Committee on Rules of Practice and Procedure

FROM: Honorable Sidney A. Fitzwater, Chair
Advisory Committee on Evidence Rules

DATE: May 3, 2012

RE: Report of the Advisory Committee on Evidence Rules

I. Introduction

The Advisory Committee on Evidence Rules (the "Committee") met on April 4, 2012 in Dallas at the SMU Dedman School of Law.

The Committee seeks final Standing Committee approval and transmittal to the Judicial Conference of the United States of one proposal: an amendment to Evidence Rule 803(10)—the hearsay exception for absence of public record or entry—to address a constitutional infirmity in light of the Supreme Court's decision in *Melendez-Diaz v. Massachusetts*.

* * * * *

II. Action Items

A. Proposed Amendment to Evidence Rule 803(10)

At its June 2011 meeting, the Standing Committee approved releasing for public comment an amendment to Rule 803(10). Rule 803(10) currently allows the government to prove in a criminal case, through the introduction of a certificate, that a public record does not exist. Under *Melendez-Diaz v. Massachusetts* such a certificate would be "testimonial" within the meaning of the Confrontation Clause, as construed by *Crawford v. Washington*. Therefore, the admission of such certificates (in lieu of testimony) violates the accused's right of confrontation. The proposed amendment to Rule 803(10) addresses the Confrontation Clause problem in the current rule by adding a "notice-and-demand" procedure. In *Melendez-Diaz* the Court stated that the use of a notice-and-demand procedure (and the defendant's failure to demand production under that procedure) would cure an otherwise unconstitutional use of testimonial certificates. As amended, Rule 803(10) would permit a prosecutor who intends to offer a certification to provide written notice of that intent at least 14 days before trial. If the defendant does not object in writing within 7 days of receiving the notice, the prosecutor would be permitted to introduce a certification that a diligent search failed to disclose a public record or statement rather than produce a witness to so testify. The amended Rule would allow the court to set a different time for the notice or the objection.

At its Spring 2012 meeting, the Committee considered the two comments received on the proposed amendment. The Magistrate Judges' Association favors the proposal. The National Association of Criminal Defense Lawyers ("NACDL") agrees in principle with a notice-and-demand solution, but it has several objections to the proposed amendment. The Committee unanimously voted to amend Rule 803(10) by adopting the language published for public comment, and to transmit the proposed rule to the Standing Committee with the recommendation that it be approved and sent to the Judicial Conference. The proposed Rule and Committee Note are set out in an appendix to this Report.

Recommendation: The Committee recommends that the proposed amendment to Evidence Rule 803(10) be approved and transmitted to the Judicial Conference of the United States.

* * * * *

Appendix to Report to the Standing Committee from the Advisory Committee on Evidence Rules

June 2012

Advisory Committee on Evidence Rules
Proposed Amendment: Rule 803(10)

1 **Rule 803. Exceptions to the Rule Against Hearsay —**
2 **Regardless of Whether the Declarant Is Available as a**
3 **Witness**
4
5 The following are not excluded by the rule against
6 hearsay, regardless of whether the declarant is available as a
7 witness:
8 * * * * *
9 **(10)** ***Absence of a Public Record.*** Testimony — or
10 a certification under Rule 902 — that a diligent search failed
11 to disclose a public record or statement if ~~the testimony or~~
12 ~~certification is admitted to prove that~~:
13 (A) the testimony or certification is admitted
14 to prove that
15 (~~A~~ i) the record or statement does
16 not exist; or

17 (~~B~~ ii) a matter did not occur or exist,

18 if a public office regularly kept a

19 record or statement for a matter of that

20 kind; and

21 (B) in a criminal case, a prosecutor who

22 intends to offer a certification provides written

23 notice of that intent at least 14 days before

24 trial, and the defendant does not object in

25 writing within 7 days of receiving the notice

26 — unless the court sets a different time for

27 the notice or the objection.

28 * * * * *

Committee Note

Rule 803(10) has been amended in response to *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). The *Melendez-Diaz* Court declared that a testimonial certificate could be admitted if the accused is given advance notice and does not timely demand the presence of the official who prepared the certificate. The amendment incorporates, with minor variations, a "notice-and-demand" procedure that was approved by the *Melendez-Diaz* Court. See Tex. Code Crim. P. Ann., art. 38.41.

CHANGES MADE AFTER PUBLICATION AND COMMENT

No changes were made to the proposed amendment or Committee Note as they were issued for public comment.

* * * * *

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 22, 2013

RE: Rule 803, N.D.R.Ev., Hearsay Exceptions; Availability of Declarant Immaterial; Rule 902, N.D.R.Ev., Self Authentication

The committee discussed proposed amendments to Rules 803 and 902 at the September meeting. The committee had a lengthy discussion about what kind of certification is required to be consistent with proposed new provisions in Rule 803(6) and Rule 902(11) and (12).

Weinstein's Federal Evidence § 902.13 discusses the certification language in Fed.R.Ev. 902(11) and (12). A copy is attached. Weinstein suggests that the intent of the amendments was to allow foundation for a document under the business records exception to Rule 803 to be established by a certificate rather than live testimony. What form the certificate was to take was not detailed in the rule – the essential element, however, was that it be made under penalty of perjury so it would be an adequate substitute for live testimony. A notice requirement was also made part of the rule so the opposing party could challenge the certificate if necessary.

Much of the discussion at the September meeting centered on language in the proposal, based on the federal rule, that would allow any sort of certificate in compliance with a state statute or rule to be used. The committee located a certificate statute, N.D.C.C. § 31-04-10 (Form and contents of certificate for certifying copies to be used as evidence), and discussed whether documents certified under the statute would satisfy the Rule 902 certificate requirement. A copy of N.D.C.C. ch. 31-04 is attached. Some members argued that allowing certification under the statute would not be consistent with the intent of the rule

because the statute did not require that all the elements of the business records exception be certified and it did not require the certificate to be made under penalty of perjury.

The proposed language of Rule 902 (11) and (12) specifically requires all the elements of the business records exception to be satisfied under the certification. Further, the notes to the federal rules indicate that some sort of declaration made under penalty of perjury, in a form similar to the declaration set out in 28 U.S.C. § 1746, is required for the certificate. A copy of this statute is attached.

Staff has prepared revised amendments to Rule 902(11) and (12) that would require the certificate to be "in the form of an affidavit or an unsworn declaration made under penalty of perjury." A new bill just introduced in the legislature, copy attached, would allow for this sort of declaration under N.D.C.C. § 31-04-10, the affidavit statute. Pending approval of this bill, staff has added language to the explanatory note setting out the elements of an acceptable unsworn declaration. The revised proposals are attached.

RULE 803. ~~HEARSAY EXCEPTIONS; AVAILABILITY OF DECLARANT IMMATERIAL~~ EXCEPTIONS TO THE RULE AGAINST HEARSAY – REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

~~The following are not excluded by the hearsay rule, even though the declarant is available as a witness:~~

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

~~(1) Present sense impression. A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter.~~

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

~~(2) Excited utterance. A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.~~

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

~~(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to~~

22 ~~the execution, identification, or terms of declarant's will.~~

23 (3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the
24 declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory,
25 or physical condition (such as mental feeling, pain, or bodily health), but not including a
26 statement of memory or belief to prove the fact remembered or believed unless it relates to
27 the validity or terms of the declarant's will.

28 ~~(4) Statements for purposes of medical diagnosis or treatment. Statements made for~~
29 ~~purposes of medical diagnosis or treatment and describing medical history, or past or present~~
30 ~~symptoms, pain, or sensations, or the inception or general character of the cause or external~~
31 ~~source thereof insofar as reasonably pertinent to diagnosis or treatment.~~

32 (4) Statement Made for Medical Diagnosis or Treatment. A statement that:

33 (A) is made for, and is reasonably pertinent to, medical diagnosis or treatment; and

34 (B) describes medical history; past or present symptoms or sensations; their inception;
35 or their general cause.

36 ~~(5) Recorded recollection. A memorandum or record concerning matter about which~~
37 ~~a witness once had knowledge but now has insufficient recollection to enable the witness to~~
38 ~~testify fully and accurately, shown to have been made or adopted by the witness when the~~
39 ~~matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted,~~
40 ~~the memorandum or record may be read into evidence but may not itself be received as an~~
41 ~~exhibit unless offered by an adverse party.~~

42 (5) Recorded Recollection. A record that:

43 (A) is on a matter the witness once knew about but now cannot recall well enough to

44 testify fully and accurately;

45 (B) was made or adopted by the witness when the matter was fresh in the witness's

46 memory; and

47 (C) accurately reflects the witness's knowledge.

48 If admitted, the record may be read into evidence but may be received as an exhibit

49 only if offered by an adverse party.

50 ~~(6) Records of regularly conducted business activity. A memorandum, report, record,~~

51 ~~or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made~~

52 ~~at or near the time by, or from information transmitted by, a person with knowledge, if kept~~

53 ~~in the course of a regularly conducted business activity, and if it was the regular practice of~~

54 ~~that business activity to make the memorandum, report, record or data compilation, all as~~

55 ~~shown by the testimony of the custodian or other qualified witness, unless the source of~~

56 ~~information or the method or circumstance of preparation indicate lack of trustworthiness.~~

57 ~~The term "business" as used in this paragraph, includes business, institution, association,~~

58 ~~profession, occupation, and calling of every kind, whether or not conducted for profit.~~

59 (6) Records of a Regularly Conducted Activity. A record of an act, event, condition,

60 opinion, or diagnosis if:

61 (A) the record was made at or near the time by, or from information transmitted by,

62 someone with knowledge;

63 (B) the record was kept in the course of a regularly conducted activity of a business,

64 organization, occupation, or calling, whether or not for profit;

65 (C) making the record was a regular practice of that activity;

66 (D) all these conditions are shown by the testimony of the custodian or another

67 qualified witness, or by a certification that complies with Rule 902(11) or (12); and

68 (E) neither the source of information nor the method or circumstances of preparation

69 indicate a lack of trustworthiness.

70 ~~(7) Absence of entry in records kept in accordance with the provisions of paragraph~~

71 ~~(6). Evidence a matter is not included in the memoranda, reports, records, or data~~

72 ~~compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove~~

73 ~~the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a~~

74 ~~memorandum, report, record, or data compilation was regularly made and preserved, unless~~

75 ~~the sources of information or other circumstances indicate lack of trustworthiness.~~

76 (7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter

77 is not included in a record described in paragraph (6) if:

78 (A) the evidence is admitted to prove that the matter did not occur or exist;

79 (B) a record was regularly kept for a matter of that kind; and

80 (C) neither the possible source of the information nor other circumstances indicate a

81 lack of trustworthiness.

82 ~~(8) Public records and reports. Records, reports, statements, or data compilations, in~~

83 ~~any form, of public offices or agencies, setting forth (i) the activities of the office or agency,~~

84 ~~or (ii) matters observed pursuant to duty imposed by law as to which matters there was a duty~~

85 ~~to report, excluding, however, in criminal cases matters observed by police officers and other~~

86 ~~law enforcement personnel, or (iii) in civil actions and proceedings and against the State in~~

87 ~~criminal cases, factual findings resulting from an investigation made pursuant to authority~~

88 ~~granted by law, unless the sources of information or other circumstances indicate lack of~~

89 ~~trustworthiness. However, factual findings may not be admitted under this exception unless~~

90 ~~the proponent furnishes to the party against whom they are offered a copy of the factual~~

91 ~~findings, or portion thereof as relates to the controversy, sufficiently in advance of its offer~~

92 ~~in evidence to provide the adverse party with a fair opportunity to prepare. The adverse party~~

93 ~~may cross-examine under oath any person making the report or factual findings or any person~~

94 ~~furnishing information contained therein, but the lack of availability of that testimony does~~

95 ~~not affect admissibility of the report or factual findings unless, in the opinion of the court,~~

96 ~~the adverse party would be prejudiced unfairly.~~

97 (8) Public Records. A record or statement of a public office if:

98 (A) it sets out:

99 (i) the office's activities;

100 (ii) a matter observed while under a legal duty to report, but not including, in a

101 criminal case, a matter observed by law-enforcement personnel; or

102 (iii) in a civil case or against the government in a criminal case, factual findings from

103 a legally authorized investigation; and

104 (B) neither the source of information nor other circumstances indicate a lack of

105 trustworthiness.

106 Before offering factual findings in evidence under this exception, a party must provide
107 the opposing party a copy of the findings, or the portion that relates to the controversy. The
108 opposing party may cross-examine under oath the person who prepared a record, statement
109 or factual findings submitted under this exception, or any person furnishing information
110 recorded in the record, statement or findings. If the person is unavailable for cross-
111 examination, the record, statement, or findings may be admitted under this exception unless
112 the court decides the opposing party would be prejudiced unfairly.

113 ~~(9) Records of vital statistics. Records or data compilations, in any form, of births,~~
114 ~~fetal deaths, deaths, or marriages, if the report was made to a public office under~~
115 ~~requirements of law.~~

116 (9) Public Records of Vital Statistics. A record of a birth, fetal death, death, or
117 marriage, if reported to a public office in accordance with a legal duty.

118 ~~(10) Absence of public record or entry. To prove the absence of a record, report,~~
119 ~~statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter~~
120 ~~of which a record, report, statement, or data compilation, in any form, was regularly made~~
121 ~~and preserved by a public office or agency, evidence in the form of a certification in~~
122 ~~accordance with Rule 902, or testimony, that diligent search failed to disclose the record,~~
123 ~~report, statement or data compilation, or entry.~~

124 (10) Absence of a Public Record. Testimony, or a certification under Rule 902, that
125 a diligent search failed to disclose a public record or statement if the testimony or
126 certification is admitted to prove that:

127 (A) the record or statement does not exist; or

128 (B) a matter did not occur or exist, if a public office regularly kept a record or

129 statement for a matter of that kind.

130 ~~(11) Records of religious organizations. Statements of births, marriages, divorces,~~

131 ~~deaths, parentages, ancestry, relationship by blood or marriage, or other similar facts of~~

132 ~~personal or family history, contained in a regularly kept record of a religious organization.~~

133 (11) Records of Religious Organizations Concerning Personal or Family History. A

134 statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or

135 marriage, or similar facts of personal or family history, contained in a regularly kept record

136 of a religious organization.

137 ~~(12) Marriage, baptismal, and similar certificates. Statements of fact, contained in a~~

138 ~~certificate that the maker performed a marriage or other ceremony or administered a~~

139 ~~sacrament, made by a clergyman, public official, or other person authorized by the rules or~~

140 ~~practices of a religious organization or by law to perform the act certified, and purported to~~

141 ~~have been issued at the time of the act or within a reasonable time thereafter.~~

142 (12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact

143 contained in a certificate:

144 (A) made by a person who is authorized by a religious organization or by law to

145 perform the act certified;

146 (B) attesting that the person performed a marriage or similar ceremony or

147 administered a sacrament; and

148 (C) purporting to have been issued at the time of the act or within a reasonable time

149 after it.

150 ~~(13) Family records. Statements of fact concerning personal or family history~~

151 ~~contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family~~

152 ~~portraits, engravings on urns, crypts, or tombstones, or the like.~~

153 (13) Family Records. A statement of fact about personal or family history contained

154 in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a

155 portrait, or engraving on an urn or burial marker.

156 ~~(14) Records of documents affecting an interest in property. The record of a document~~

157 ~~purporting to establish or affect an interest in property, as proof of the content of the original~~

158 ~~recorded document and its execution and delivery by each person by whom it purports to~~

159 ~~have been executed, if the record is a record of the public office and an applicable statute~~

160 ~~authorizes the recording of documents of that kind in that office.~~

161 (14) Records of Documents That Affect an Interest in Property. The record of a

162 document that purports to establish or affect an interest in property if:

163 (A) the record is admitted to prove the content of the original recorded document,

164 along with its signing and its delivery by each person who purports to have signed it;

165 (B) the record is kept in a public office; and

166 (C) a statute authorizes recording documents of that kind in that office.

167 ~~(15) Statements in documents affecting an interest in property. A statement contained~~

168 ~~in a document purporting to establish or affect an interest in property if the matter stated was~~

169 ~~relevant to the purpose of the document, unless dealings with the property since the~~

170 ~~document was made have been inconsistent with the truth of the statement or the purport of~~

171 ~~the document.~~

172 (15) Statements in Documents That Affect an Interest in Property. A statement

173 contained in a document that purports to establish or affect an interest in property if the

174 matter stated was relevant to the document's purpose, unless later dealings with the property

175 are inconsistent with the truth of the statement or the purport of the document.

176 ~~(16) Statements in ancient documents. Statements in a document in existence twenty~~

177 ~~years or more the authenticity of which is established.~~

178 (16) Statements in Ancient Documents. A statement in a document that is at least 20

179 years old and whose authenticity is established.

180 ~~(17) Market reports, commercial publications. Market quotations, tabulations, lists,~~

181 ~~directories, or other published compilations, generally used and relied upon by the public or~~

182 ~~by persons in particular occupations.~~

183 (17) Market Reports and Similar Commercial Publications. Market quotations, lists,

184 directories, or other compilations that are generally relied on by the public or by persons in

185 particular occupations.

186 ~~(18) Learned treatises. To the extent called to the attention of an expert witness upon~~

187 ~~cross-examination or relied upon by the expert witness in direct examination, statements~~

188 ~~contained in published treatises, periodicals or pamphlets on a subject of history, medicine,~~

189 ~~or other science or art, established as a reliable authority by the testimony or admission of the~~

190 ~~witness or by other expert testimony or by judicial notice. If admitted, the statements may be~~

191 ~~read into evidence but may not be received as exhibits.~~

192 (18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement

193 contained in a treatise, periodical, or pamphlet if:

194 (A) the statement is called to the attention of an expert witness on cross-examination

195 or relied on by the expert on direct examination; and

196 (B) the publication is established as a reliable authority by the expert's admission or

197 testimony, by another expert's testimony, or by judicial notice.

198 If admitted, the statement may be read into evidence but not received as an exhibit.

199 ~~(19) Reputation concerning personal or family history. Reputation among members~~

200 ~~of a person's family by blood, adoption, or marriage, or among a person's associates, or in the~~

201 ~~community, concerning a person's birth, adoption, marriage, divorce, death, parentage,~~

202 ~~relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's~~

203 ~~personal or family history.~~

204 (19) Reputation Concerning Personal or Family History. A reputation among a

205 person's family by blood, adoption, or marriage, or among a person's associates or in the

206 community, concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce,

207 death, relationship by blood, adoption, or marriage, or similar facts of personal or family

208 history.

209 ~~(20) Reputation concerning boundaries or general history. Reputation in a community,~~

210 ~~arising before the controversy, as to boundaries of or customs affecting lands in the~~

211 ~~community, and reputation as to events of general history important to the community or~~

212 ~~State or nation in which located.~~

213 (20) Reputation Concerning Boundaries or General History. A reputation in a

214 community, arising before the controversy, concerning boundaries of land in the community

215 or customs that affect the land, or concerning general historical events important to that

216 community, state, or nation.

217 ~~(21) Reputation as to character. Reputation of a person's character among associates~~

218 ~~or in the community.~~

219 (21) Reputation Concerning Character. A reputation among a person's associates or

220 in the community concerning the person's character.

221 ~~(22) Judgment of previous conviction. Evidence of a final judgment, entered after a~~

222 ~~trial or upon a plea of guilty, adjudging a person guilty of a felony, to prove any fact essential~~

223 ~~to sustain the judgment, but not including, when offered by the prosecution in a criminal~~

224 ~~prosecution for purposes other than impeachment, judgments against people other than the~~

225 ~~accused. The pendency of an appeal or post-conviction proceeding may be shown but does~~

226 ~~not affect admissibility.~~

227 (22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction

228 if:

229 (A) the judgment was entered after a trial or guilty plea;

230 (B) the conviction was for a crime punishable by death or by imprisonment for more

231 than a year;

232 (C) the evidence is admitted to prove any fact essential to the judgment; and

233 (D) when offered by the prosecutor in a criminal case for a purpose other than

234 impeachment, the judgment was against the defendant.

235 The pendency of an appeal or post-conviction proceeding may be shown but does not

236 affect admissibility.

237 ~~(23) Judgment as to personal, family, or general history, or boundaries. Judgments as~~

238 ~~matters of proof of matters of personal, family, or general history, or boundaries, essential~~

239 ~~to the judgment, if the same would be provable by evidence reputation.~~

240 (23) Judgments Involving Personal, Family, or General History, or a Boundary. A

241 judgment that is admitted to prove a matter of personal, family, or general history, or

242 boundaries, if the matter:

243 (A) was essential to the judgment; and

244 (B) could be proved by evidence of reputation.

245 (24) Child's statement about sexual abuse. ~~An out-of-court~~ A statement by a child

246 under the age of 12 years about sexual abuse of that child or witnessed by that child ~~is~~

247 ~~admissible as evidence (when not otherwise admissible under another hearsay exception)~~ if:

248 ~~(a) The~~ (A) the trial court finds, after hearing ~~upon~~ on notice in advance of the trial

249 of the sexual abuse issue, that the time, content, and circumstances of the statement provide

250 sufficient guarantees of trustworthiness; and

251 ~~(b) The~~ (B) the child either:

252 (i) ~~Testifies~~ testifies at the ~~proceedings~~ trial; or

253 (ii) ~~Is~~ is unavailable as a witness and there is corroborative evidence of the act which

254 is the subject of the statement.

255 (25) [Other Exceptions.] [Transferred to Rule 807]

256 EXPLANATORY NOTE

257 Rule 803 was amended, effective March 1, 1990; March 1, 2000; _____.

258 Rule 803 is ~~an adoption of Rule 803 of the Federal Rules of Evidence~~ is based on

259 Fed.R.Ev. 803.

260 The last two sentences in ~~803(8)~~ paragraph (8) ~~are~~ were derived from N.D.C.C. §§ 31-

261 09-11 and 31-09-12, which ~~are~~ were superseded by these rules.

262 The excepted situations listed in this rule traditionally have been deemed to have

263 circumstantial guarantees of trustworthiness which render hearsay evidence reliable and

264 admissible, even though the declarant may be available to testify.

265 ~~The first three exceptions listed comprise what has been loosely termed the "res~~

266 ~~gestae" exception. That phrase is not used in this rule. The use of the specific exceptions,~~

267 ~~rather than the vague and elusive "res gestae" is felt to depict a clearer picture of which~~

268 ~~statements are within the exception, and the justification for their admissibility.~~

269 ~~Subdivision~~ Paragraph (22) provides in certain instances, evidence of a previous final

270 judgment comes within a hearsay exception. The ~~subdivision~~ paragraph differs from its

271 federal counterpart. The federal exception for pleas of nolo contendere has been deleted as

272 that plea is not used in the ~~State~~ state courts of North Dakota. ~~Rules 11 and 12, NDRCrimP.~~

273 The ~~subdivision~~ paragraph also was changed by adding post-conviction proceedings, like

274 appeals, do not affect the admissibility of previous convictions.

275 It should also be noted these exceptions remove only the hearsay objection to
276 evidence. Evidence of a past conviction sought to be introduced under paragraph (22) ~~sought~~
277 ~~to be introduced~~ must also meet the requirements of Rule 609~~, NDREv~~.

278 Rule 803 was amended, effective March 1, 1990, to provide a hearsay exception for
279 a child victim of sexual abuse and is modeled in part after the Colorado and Utah statutes on
280 a child victim's out-of-court statement regarding sexual abuse. Former paragraph (24) was
281 renumbered to paragraph (25) and all other amendments are technical in nature and no
282 substantive change is intended.

283 Rule 803 was amended, effective March 1, 2000, to follow the December 1, 1997,
284 federal amendment. The contents of Rule 803(25) are transferred to new Rule 807.

285 Paragraph (6)(d) was amended, effective _____, to allow the foundation for
286 admission of a record of a regularly conducted activity to be established by a certification that
287 complies with Rule 902(11) or (12).

288 Rule 803 was amended, effective _____, in response to the December 1,
289 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
290 were changed to make the rule more easily understood and to make style and terminology
291 consistent throughout the rules. There is no intent to change any result in any ruling on
292 evidence admissibility.

293 Sources: Supreme Court Conference Minutes~~: Rule 803(24);~~ of October 23 and
294 ~~October~~ 25, 1989 [Rule 803 (24)]. Joint Procedure Committee Minutes~~:~~

295 of _____; Rule 803(25), September 24-25, 1998, page 4; April 30-May 1, 1998,
296 page 16; Rule 803(24), April 20, 1989, pages 6-8; March 24, 1988, pages 2-6 and 15-16;
297 December 3, 1987, pages 6-7; May 21, 1987, pages 6-7; Rule 803(5), (18), (19), (21), (25),
298 December 3, 1987, pages 15-16; Rule 803, June 3, 1976, page 15; Rule 803(1), (2), January
299 29, 1976, page 19; Rule 803(3), January 29, 1976, page 19; October 1, 1975, page 7; Rule
300 803(4), (5), January 29, 1976, page 19; Rule 803(6), January 29, 1976, page 20; Rule 803(7),
301 January 29, 1976, page 20; October 1, 1975, page 7; Rule 803(8), January 29, 1976, page 21;
302 October 11, 1975, page 7; Rule 803(9), (10), (12), (13), (14), (15), (16), (17), (18), (20), (21),
303 January 29, 1976, pages 21-23; Rule 803(11), June 3, 1976, page 15; January 29, 1976, page
304 22; Rule 803(19), June 3, 1976, page 15; January 29, 1976, page 23; Rule 803(22), January
305 29, 1976, page 23, 24; October 1, 1975, page 7; Rule 803(23), January 29, 1976, page 24;
306 Rule 803(24), April 8, 1976, pages 8a, 9; January 29, 1976, page 24. ~~Rule~~ Fed.R.Ev. 803~~;~~
307 ~~Federal Rules of Evidence~~; Rule 803, SBAND proposal.

308 Statutes Affected:

309 Superseded: N.D.C.C. §§ 31-09-11, 31-09-12.

310 Considered: N.D.C.C. §§ 2-06-05, 4-09-05, 4-09-07, 4-10-03, 4-10-12, 4-11-15, 4-11-
311 19, 4-11-20, 4-22-15, 6-03-32, 6-08-10, 7-01-12, 7-08-02, 7-08-03, 10-04-19, 10-15-08, 10-
312 19-55, 10-23-13, 10-24-31, 10-28-09, 11-11-38, 11-13-08, 11-15-16, 11-18-09, 11-20-01,
313 11-20-05, 11-20-13, 12-44-18, 14-03-24, 15-29-10, 15-51-10, 16-13-11, 16-20-08, 19-01-10,
314 19-03.1-37, 19-20.1-17, 23-02-40, 23-24-04, 24-07-15, 26-08-07, 26-12-09, 26-12-13, 26-12-
315 15, 26-15-04, 26-15-26, 26-29-12, 28-20-31, 28-23-12, 31-04-05, 31-04-06, 31-08-01, 31-08-

316 02, 31-08-05, 32-19-26, 32-25-03, 32-25-04, 33-01-13, 33-04-17, 35-21-05, 35-22-11, 35-22-
317 16, 36-09-08, 36-09-20, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-11-08, 40-16-09, 40-42-
318 01, 40-58-08, 41-03-66, 42-02-07, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-10-07, 43-11-
319 10, 43-13-12, 43-17-11, 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17,
320 44-06-08, 44-06-09, 47-19-06, 47-19-12, 47-19-23, 47-19-24, 47-19-45, 48-02-15, 49-01-14,
321 49-06-14, 49-19-16, 57-24-29, 57-38-46, 61-03-06, 61-04-25, 61-05-19, 61-16-06.

322 Cross Reference: N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal
323 Conviction; N.D.R.Ev. 807 (Residual Exception); N.D.R.Crim.P. 11 (Pleas); N.D.R.Crim.P
324 12 (Pleadings and Pretrial Motions).

RULE 902. ~~SELF-AUTHENTICATION~~ EVIDENCE THAT IS SELF-AUTHENTICATING

~~Extrinsic evidence of authenticity as a condition precedent to admissibility is not required with respect to the following:~~

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

~~(1) Domestic public documents under seal. A document bearing a seal purporting to be that of the United States, or of any State, district, commonwealth, territory, or insular possession thereof, or of the Panama Canal Zone, or the Trust Territory of the Pacific Islands, or of a political subdivision, department, officer, or agency thereof, and a signature purporting to be an attestation or execution.~~

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

~~(2) Domestic public documents not under seal. A document purporting to bear the signature in the official capacity of an officer or employee of any entity included in paragraph (1), having no seal, if a public officer having a seal and having official duties in the district~~

22 ~~or political subdivision of the officer or employee certifies under seal that the signer has the~~

23 ~~official capacity and that the signature is genuine.~~

24 (2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified.

25 A document that bears no seal if:

26 (A) it bears the signature of an officer or employee of an entity named in Rule

27 902(1)(A); and

28 (B) another public officer who has a seal and official duties within that same entity

29 certifies under seal, or its equivalent, that the signer has the official capacity and that the

30 signature is genuine.

31 ~~(3) Foreign public documents. A document purporting to be executed or attested in~~

32 ~~an official capacity by a person authorized by the laws of a foreign country to make the~~

33 ~~execution or attestation, and accompanied by a final certification as to the genuineness of the~~

34 ~~signature and official position (i) of the executing or attesting person, or (ii) of any foreign~~

35 ~~official whose certificate of genuineness of signature and official position relates to the~~

36 ~~execution or attestation or is in a chain of certificates of genuineness of signature and official~~

37 ~~position relating to the execution or attestation. A final certification may be made by a~~

38 ~~secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the~~

39 ~~United States, or a diplomatic or consular official of the foreign country assigned or~~

40 ~~accredited to the United States. If reasonable opportunity has been given to all parties to~~

41 ~~investigate the authenticity and accuracy of official documents, the court, for good cause~~

42 ~~shown, may order that they be treated as presumptively authentic without final certification~~

43 ~~or permit them to be evidenced by an attested summary with or without final certification.~~

44 (3) Foreign Public Documents. A document that purports to be signed or attested by

45 a person who is authorized by a foreign country's law to do so. The document must be

46 accompanied by a final certification that certifies the genuineness of the signature and

47 official position of the signer or attester, or of any foreign official whose certificate of

48 genuineness relates to the signature or attestation or is in a chain of certificates of

49 genuineness relating to the signature or attestation. The certification may be made by a

50 secretary of a United States embassy or legation; by a consul general, vice consul, or consular

51 agent of the United States; or by a diplomatic or consular official of the foreign country

52 assigned or accredited to the United States. If all parties have been given a reasonable

53 opportunity to investigate the document's authenticity and accuracy, the court may, for good

54 cause, either:

55 (A) order that it be treated as presumptively authentic without final certification; or

56 (B) allow it to be evidenced by an attested summary with or without final

57 certification.

58 ~~(4) Certified copies of public records. A copy of an official record or report or entry~~

59 ~~therein, or of a document authorized by law to be recorded or filed and actually recorded or~~

60 ~~filed in a public office, including data compilations in any form, certified as correct by the~~

61 ~~custodian or other person authorized to make the certification, by certificate complying with~~

62 ~~paragraph (1), (2), or (3) or complying with any law of the United States or of this state.~~

63 (4) Certified Copies of Public Records. A copy of an official record, or a copy of a

64 document that was recorded or filed in a public office as authorized by law, if the copy is

65 certified as correct by:

66 (A) the custodian or another person authorized to make the certification; or

67 (B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule

68 prescribed by the North Dakota Supreme Court.

69 ~~(5) Official publications. Books, pamphlets, or other publications purporting to be~~

70 ~~issued by public authority.~~

71 (5) Official Publications. A book, pamphlet, or other publication purporting to be

72 issued by a public authority.

73 ~~(6) Newspapers and periodicals. Printed materials purporting to be newspapers or~~

74 ~~periodicals.~~

75 (6) Newspapers and Periodicals. Printed material purporting to be a newspaper or

76 periodical.

77 ~~(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to~~

78 ~~have been affixed in the course of business and indicating ownership, control, or origin.~~

79 (7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to

80 have been affixed in the course of business and indicating origin, ownership, or control.

81 ~~(8) Acknowledged documents. Documents accompanied by a certificate of~~

82 ~~acknowledgement executed in the manner provided by law by a notary public or other officer~~

83 ~~authorized by law to take acknowledgements.~~

84 (8) Acknowledged Documents. A document accompanied by a certificate of

85 acknowledgment that is lawfully executed by a notary public or another officer who is
86 authorized to take acknowledgments.

87 ~~(9) Commercial paper and related documents. Commercial paper, signatures thereon,~~
88 ~~and documents relating thereto to the extent provided by general commercial law.~~

89 (9) Commercial Paper and Related Documents. Commercial paper, a signature on it,
90 and related documents, to the extent allowed by general commercial law.

91 ~~(10) Matters declared by statute. Any signature, document, or other matter declared~~
92 ~~by statute to be presumptively or prima facie genuine or authentic.~~

93 (10) Presumptions Under a Statute. A signature, document, or anything else that a
94 statute declares to be presumptively or prima facie genuine or authentic.

95 (11) Certified Domestic Records of a Regularly Conducted Activity. The original or
96 a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by
97 a certification of the custodian or another qualified person in the form of an affidavit or an
98 unsworn declaration made under penalty of perjury. Before the trial or hearing, the proponent
99 must give an adverse party reasonable written notice of the intent to offer the record, and
100 must make the record and certification available for inspection, so that the party has a fair
101 opportunity to challenge them.

102 (12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the
103 original or a copy of a foreign record that meets the requirements of Rule 902(11), modified
104 as follows: the certification must be signed in a manner that, if falsely made, would subject the
105 maker to a criminal penalty in the country where the certification is signed. The proponent must also

106 meet the notice requirements of Rule 902(11).

107 EXPLANATORY NOTE

108 Rule 902 was amended, effective March 1, 1990; _____.

109 Rule 902 is based on Fed.R.Ev. 902. It represents a relaxation of the common law
110 requirement of authentication by creating a presumption that certain documents and records are
111 authentic and ~~thereby~~ placing the burden of showing lack of genuineness on the party opposing
112 introduction of the offered evidence. ~~This has been done by statute for certain public documents,~~
113 ~~records, and certified copies. Rule 902 extends the benefits of this presumption to private documents~~
114 ~~in which the risk of falsification is slight.~~

115 Rule 902 was amended, effective March 1, 1990. The amendment is technical in nature and
116 no substantive change is intended.

117 Paragraphs (11) and (12) were added to the rule, effective _____. The intent of
118 these provisions is to allow the foundation for admission of a record of a regularly conducted activity
119 to be established by a certificate made under penalty of perjury rather than by live testimony. The
120 certificate may be in affidavit form or in the form of a declaration containing the required foundation
121 and stating: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the State
122 of North Dakota that the foregoing is true and correct. Executed on (date). (Signature)." Paragraphs
123 (11) and (12) also establish a notice requirement, which is intended to provide an opposing
124 party a fair opportunity to test the adequacy of the foundation provided in the certification.

125 Rule 902 was amended, effective _____, in response to the December 1,
126 2011, revision of the Federal Rules of Evidence. The language and organization of the rule
127 were changed to make the rule more easily understood and to make style and terminology

128 consistent throughout the rules. There is no intent to change any result in any ruling on

129 evidence admissibility.

130 Sources: Joint Procedure Committee Minutes~~:~~ of _____; March 24-25,

131 1988, pages 15-16; December 3, 1987, page 15; June 3, 1976, pages 10-12, 14; October 1,

132 1975, pages 8, 9. ~~Rule 902, Federal Rules of Evidence~~ Fed.R.Ev. 902; Rule 902, SBAND

133 proposal.

134 Statutes Affected:

135 Considered: 11-18-11, 16-13-11, 31-08-02, 31-08-02.1, 31-08-06, Ch. 31-09,43-13-

136 12, NDCC.

137 ~~Rules:~~

138 ~~Considered: Rule 44(a), NDRCivP;Rule 27, NDRCrimP.~~

139 Cross Reference: N.D.R.Ev. 803 (Exceptions to the Rule Against Hearsay –

140 Regardless of Whether the Declarant is Available as a Witness); N.D.R.Civ.P. 44 (Proving

141 an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

FEDERAL RULES OF EVIDENCE
ARTICLE VIII. HEARSAY

Rule 803. Exceptions to the Rule Against Hearsay--Regardless of Whether the Declarant Is Available as a Witness

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) *Present Sense Impression.* A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.

(2) *Excited Utterance.* A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.

(3) *Then-Existing Mental, Emotional, or Physical Condition.* A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) *Statement Made for Medical Diagnosis or Treatment.* A statement that:

(A) is made for--and is reasonably pertinent to--medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) *Recorded Recollection.* A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) *Records of a Regularly Conducted Activity.* A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by--or from information transmitted by--someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and

(E) neither the source of information nor the method or circumstances of preparation indicate a lack of trustworthiness.

(7) *Absence of a Record of a Regularly Conducted Activity.* Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) neither the possible source of the information nor other circumstances indicate a lack of trustworthiness.

(8) *Public Records.* A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but not including, in a criminal case, a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) neither the source of information nor other circumstances indicate a lack of trustworthiness.

(9) *Public Records of Vital Statistics.* A record of a birth, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) *Absence of a Public Record.* Testimony--or a certification under Rule 902--that a diligent search failed to disclose a public record or statement if the testimony or certification is admitted to prove that:

(A) the record or statement does not exist; or

(B) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind.

(11) *Records of Religious Organizations Concerning Personal or Family History.* A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) *Certificates of Marriage, Baptism, and Similar Ceremonies.* A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) *Family Records.* A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) *Records of Documents That Affect an Interest in Property.* The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) *Statements in Documents That Affect an Interest in Property.* A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose--unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) *Statements in Ancient Documents.* A statement in a document that is at least 20 years old and whose authenticity is established.

(17) *Market Reports and Similar Commercial Publications.* Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) *Statements in Learned Treatises, Periodicals, or Pamphlets.* A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) *Reputation Concerning Personal or Family History.* A reputation among a person's family by blood, adoption, or marriage--or among a person's associates or in the community--concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) *Reputation Concerning Boundaries or General History.* A reputation in a community--arising before the controversy--concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) *Reputation Concerning Character.* A reputation among a person's associates or in the community concerning the person's character.

(22) *Judgment of a Previous Conviction.* Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea, but not a nolo contendere plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal may be shown but does not affect admissibility.

(23) *Judgments Involving Personal, Family, or General History, or a Boundary.* A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) [*Other Exceptions.*] [Transferred to Rule 807.]

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1939; Dec. 12, 1975, P.L. 94-149, § 1(11), 89 Stat. 905; Oct. 1, 1987; Dec. 1, 1997; Dec. 1, 2000.)

(As amended Dec. 1, 2011.)

Amendments:

1975. Act Dec. 12, 1975, in catchline of subsec. (23), inserted comma after "family".

Notes of Advisory Committee on Rules. The exceptions are phrased in terms of nonapplication of the hearsay rule, rather than in positive terms of admissibility, in order to repel any implication that other possible grounds for exclusion are eliminated from consideration.

The present rule proceeds upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness sufficient to justify nonproduction of the declarant in person at the trial even though he may be available. The theory finds vast support in the many exceptions to the hearsay rule developed by the common law in which unavailability of the declarant is not a relevant factor. The present rule is a synthesis of them, with revision where modern developments and conditions are believed to make that course appropriate.

In a hearsay situation, the declarant is, of course, a witness, and neither this rule nor Rule 804 dispenses with the requirement of firsthand knowledge. It may appear from his statement or be inferable from circumstances. See Rule 602.

Exceptions (1) and (2). In considerable measure these two examples overlap, though based on somewhat different theories. The most significant practical difference will lie in the time lapse allowable between event and statement.

The underlying theory of Exception [paragraph] (1) is that substantial contemporaneity of event and statement negative the likelihood of deliberate of conscious misrepresentation. Moreover, if the witness is the declarant, he may be examined on the statement. If the witness is not the declarant, he may be examined as to the circumstances as an aid in evaluating the statement. Morgan, Basic Problems of Evidence 340-341 (1962).

The theory of Exception [paragraph] (2) is simply that circumstances may produce a condition of excitement which temporarily stills the capacity of reflection and produces utterances free of conscious fabrication. 6 Wigmore § 1747, p. 135. Spontaneity is the key factor in each instance, though arrived at by somewhat different routes. Both are needed in order to avoid needless niggling.

While the theory of Exception [paragraph] (2) has been criticized on the ground that excitement impairs accuracy of observation as well as eliminating conscious fabrication. Hutchins and Slesinger, Some Observations on the Law of Evidence: Spontaneous Exclamations, *28 Colum.L.Rev. 432 (1928),* it finds support in cases without number. See cases in 6 Wigmore § 1750; Annot., *53 A.L.R.2d 1245* (statements as to cause of or responsibility for motor vehicle accident); Annot., *4 A.L.R.3d 149* (accusatory statements by homicide victims). Since unexciting events are less likely to evoke comment, decisions involving Exception [paragraph] (1) are far less numerous. *Illustrative are Tampa Elec. Co. v. Getrost, 151 Fla. 558, 10 So.2d 83 (1942); Houston Oxygen Co. v. Davis, 139 Tex. 1, 161 S.W.2d 474 (1942);* and cases cited in McCormick § 273, p. 585, n. 4.

With respect to the time element, Exception [paragraph] (1) recognizes that in many, if not most, instances precise contemporaneity is not possible, and hence a slight lapse is allowable. Under Exception [paragraph] (2) the standard of measurement is the duration of the state of excitement. "How long can excitement prevail? Obviously there are no pat answers and the character of the transaction or event will largely determine the significance of the time factor." Slough, Spontaneous Statements and State of Mind, *46 Iowa L.Rev. 224, 243 (1961);* McCormick § 272, p. 580.

Participation by the declarant is not required: a nonparticipant may be moved to describe what he perceives, and one may be startled by an event in which he is not an actor. Slough, supra; McCormick, supra; 6 Wigmore § 1755; Annot., *78 A.L.R.2d 300.*

Whether proof of the startling event may be made by the statement itself is largely an academic question, since in most cases there is present at least circumstantial evidence that something of a startling nature must have occurred. For cases in which the evidence consists of the condition of the declarant (injuries, state of shock), see *Insurance Co. v. Mosely, 75 U.S. (8 Wall.), 397, 19 L.Ed. 437 (1869);* Wheeler v. United States, 93 U.S.A.App. D.C. 159, *211 F.2d 19 (1953);* cert. denied *347 U.S. 1019, 74 S.Ct. 876, 98 L.Ed. 1140; Wetherbee v. Safety Casualty Co., 219 F.2d 274 (5th Cir. 1955); Lampe v. United States, 97 U.S.App.D.C. 160, 229 F.2d 43 (1956).* Nevertheless, on occasion the only evidence may be the content of the statement itself, and rulings that it may be sufficient are described as "increasing," Slough, supra at 246, and as the "prevailing practice," McCormick § 272, p. 579. *Illustrative are Armour & Co. v. Industrial Commission, 78 Colo. 569, 243 P. 546 (1926); Young v. Stewart, 191 N.C. 297, 131 S.E. 735 (1926).* Moreover, under Rule 104(a) the judge is not limited by the hearsay rule in passing upon preliminary questions of fact.

Proof of declarant's perception by his statement presents similar considerations when declarant is identified. *People v. Poland, 22 Ill.2d 175, 174 N.E.2d 804 (1961).* However, when declarant is an unidentified bystander, the cases indicate hesitancy in upholding the statement alone as sufficient, *Garrett v. Howden, 73 N.M. 307, 387 P.2d 874 (1963); Beck v. Dye, 200 Wash. 1, 92 P.2d 1113 (1939),* a result which would under appropriate circumstances be consistent with the rule.

Permissible subject matter of the statement is limited under Exception [paragraph] (1) to description or explanation of the event or condition, the assumption being that spontaneity, in the absence of a startling event, may extend no farther.

In Exception [paragraph] (2), however, the statement need only "relate" to the startling event or condition, thus affording a broader scope of subject matter coverage. 6 Wigmore §§ 1750, 1754. See *Sanitary Grocery Co. v. Snead, 67 App.D.C. 129, 90 F.2d 374 (1937),* slip-and-fall case sustaining admissibility of clerk's statement, "That has been on the floor for a couple of hours," and *Murphy Auto Parts Co., Inc. v. Ball, 101 U.S.App.D.C. 416, 249 F.2d 508 (1957),* upholding admission, on issue of driver's agency, of his statement that he had to call on a customer and was in a hurry to get home. Quick, Hearsay, Excitement, Necessity and the Uniform Rules: A Reappraisal of Rule 63(4), *6 Wayne L.Rev. 204, 206-209 (1960).*

Similar provisions are found in Uniform Rule 63(4)(a) and (b); *California Evidence Code § 1240* (as to Exception (2) only); Kansas Code of Civil Procedure § 60-460(d)(1) and (2); New Jersey Evidence Rule 63(4).

Exception (3) is essentially a specialized application of Exception [paragraph] (1), presented separately to enhance its usefulness and accessibility. See McCormick §§ 265, 268.

The exclusion of "statements of memory or belief to prove the fact remembered or believed" is necessary to avoid the virtual destruction of the hearsay rule which would otherwise result from allowing state of mind, provable by a hearsay statement, to serve as the basis for an inference of the happening of the event which produced the state of mind). *Shepard v. United States, 290 U.S. 96, 54 S.Ct. 22, 78 L.Ed. 196 (1933);* Maguire, The Hillmon Case--Thirty-three Years After, *38 Harv.L.Rev. 709, 719-731 (1925);* Hinton, States of Mind and the Hearsay Rule, *1 U.Chi.L.Rev. 394, 421-423 (1934).* The rule of *Mutual Life Ins. Co. v. Hillman, 145 U.S. 285, 12 S.Ct. 909, 36 L.Ed. 706 (1892),* allowing evidence of intention as tending to prove the doing of the act intended, is of course, left undisturbed.

The carving out, from the exclusion mentioned in the preceding paragraph, of declarations relating to the execution, revocation, identification, or terms of declarant's will represents an *ad hoc* judgment which finds ample reinforcement in the decisions, resting on practical grounds of necessity and expediency rather than logic. McCormick § 271, pp. 577-578; Annot., *34 A.L.R.2d 588, 62 A.L.R.2d 855.* A similar recognition of the need for and practical value of this kind of evidence is found in *California Evidence Code § 1260.*

Exception (4). Even those few jurisdictions which have shied away from generally admitting statements of present condition have allowed them if made to a physician for purposes of diagnosis and treatment in view of the patient's strong motivation to be truthful. McCormick § 266, p. 563. The same guarantee of trustworthiness extends to statements of past conditions and medical history, made for purposes of diagnosis or treatment. It also extends to statements as to causation, reasonably pertinent to the same purposes, in accord with the current trend, *Shell Oil Co. v. Industrial Commission, 2 Ill.2d 590, 119 N.E.2d 224 (1954);* McCormick § 266, p. 564; New Jersey Evidence Rule 63(12)(c). Statements as to fault would not ordinarily qualify under this latter language. Thus a patient's statement that he was struck by an automobile would qualify but not his statement that the car was driven through a red light. Under the exception the statement need not have been made to a physician. Statements to hospital attendants, ambulance drivers, or even members of the family might be included.

Conventional doctrine has excluded from the hearsay exception, as not within its guarantee of truthfulness, statements to a physician consulted only for the purpose of enabling him to testify. While these statements were not admissible as substantive evidence, the expert was allowed to state the basis of his opinion, including statements of this kind. The distinction thus called for was one most unlikely to be made by juries. The rule accordingly rejects the limitation. This position is consistent with the provision of Rule 703 that the facts on which expert testimony is based need not be admissible in evidence if of a kind ordinarily relied upon by experts in the field.

Exception (5). A hearsay exception for recorded recollection is generally recognized and has been described as having "long been favored by the federal and practically all the state courts that have had occasion to decide the question." *United States v. Kelly, 349 F.2d 720, 770 (2d Cir. 1965),* citing numerous cases and sustaining the exception against a claimed denial of the right of confrontation. Many additional cases are cited in Annot., *82 A.L.R.2d 473, 520.* The guarantee of trustworthiness is found in the reliability inherent in a record made while events were still fresh in mind and accurately reflecting them. *Owens v. State, 67 Md. 307, 316, 10 A. 210, 212 (1887).*

The principal controversy attending the exception has centered, not upon the propriety of the exception itself, but upon the question whether a preliminary requirement of impaired memory on the part of the witness should be imposed. The authorities are divided. If regard be had only to the accuracy of the evidence, admittedly impairment of the memory of the witness adds nothing to it and should not be required. McCormick § 277, p. 593; 3 Wigmore § 738, p. 76; *Jordan v. People, 151 Colo. 133, 376 P.2d 699 (1962),* cert. denied *373 U.S. 944, 83 S.Ct. 1553, 10 L.Ed.2d 699; Hall v. State, 223 Md. 158, 162 A.2d 751 (1960); State v. Bindhammer, 44 N.J. 372, 209 A.2d 124 (1965).* Nevertheless, the absence of the requirement, it is believed, would encourage the use of statements carefully prepared for purposes of litigation under the supervision of attorneys, investigators, or claim adjusters. Hence the example includes a requirement that the witness not have "sufficient recollection to enable him to testify fully and accurately." To the same effect are *California Evidence Code § 1237* and New Jersey Rule 63(1)(b), and this has been the position of the federal courts. *Vicksburg &*

Meridian R.R. v. O'Brien, 119 U.S. 99, 7 S.Ct. 118, 30 L.Ed. 299 (1886); Ahern v. Webb, 268 F.2d 45 (10th Cir. 1959); and see *N.L.R.B. v. Hudson Pulp and Paper Corp., 273 F.2d 660, 665 (5th Cir. 1960); N.L.R.B. v. Federal Dairy Co., 297 F.2d 487 (1st Cir. 1962).* But cf. *United States v. Adams, 385 F.2d 548 (2d Cir. 1967).*

No attempt is made in the exception to spell out the method of establishing the initial knowledge or the contemporaneity and accuracy of the record, leaving them to be dealt with as the circumstances of the particular case might indicate. Multiple person involvement in the process of observing and recording, as in *Rathbun v. Brancatella, 93 N.J.L. 222, 107 A. 279 (1919),* is entirely consistent with the exception.

Locating the exception at this place in the scheme of the rules is a matter of choice. There were two other possibilities. The first was to regard the statement as one of the group of prior statements of a testifying witness which are excluded entirely from the category of hearsay by Rule 801(d)(1). That category, however, requires that declarant be "subject to cross-examination," as to which the impaired memory aspect of the exception raises doubts. The other possibility was to include the exception among those covered by Rule 804. Since unavailability is required by that rule and lack of memory is listed as a species of unavailability by the definition of the term in Rule 804(a)(3), that treatment at first impression would seem appropriate. The fact is, however, that the unavailability requirement of the exception is of a limited and peculiar nature. Accordingly, the exception is located at this point rather than in the context of a rule where unavailability is conceived of more broadly.

Exception (6) represents an area which has received much attention from those seeking to improve the law of evidence. The Commonwealth Fund Act was the result of a study completed in 1927 by a distinguished committee under the chairmanship of Professor Morgan. Morgan et al., The Law of Evidence: Some Proposals for its Reform 63 (1927). With changes too minor to mention, it was adopted by Congress in 1936 as the rule for federal courts. *28 U.S.C. § 1732.* A number of states took similar action. The Commissioners on Uniform State Laws in 1936 promulgated the Uniform Business Records as Evidence Act, 9A U.L.A. 506, which has acquired a substantial following in the states. Model Code Rule 514 and Uniform Rule 63(13) also deal with the subject. Difference of varying degrees of importance exist among these various treatments.

These reform efforts were largely within the context of business and commercial records, as the kind usually encountered, and concentrated considerable attention upon relaxing the requirement of producing as witnesses, or accounting for the nonproduction of, all participants in the process of gathering, transmitting, and recording information which the common law had evolved as a burdensome and crippling aspect of using records of this type. In their areas of primary emphasis on witnesses to be called and the general admissibility of ordinary business and commercial records, the Commonwealth Fund Act and the Uniform Act appear to have worked well. The exception seeks to preserve their advantages.

On the subject of what witnesses must be called, the Commonwealth Fund Act eliminated the common law requirement of calling or accounting for all participants by failing to mention it. *United States v. Mortimer, 118 F.2d 266 (2d Cir. 1941); La Porte v. United States, 300 F.2d 878* (9th Cir. 1962); McCormick § 290, p. 608. Model Code Rule 514 and Uniform Rule 63(13) did likewise. The Uniform Act, however, abolished the common law requirement in express terms, providing that the requisite foundation testimony might be furnished by "the custodian or other qualified witness." Uniform Business Records as Evidence Act, § 2; 9A U.L.A. 506. The exception follows the Uniform Act in this respect.

The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation. McCormick §§ 281, 286, 287; Laughlin, Business Entries and the Like, 46 Iowa, L.Rev. 276 (1961). The model statutes and rules have sought to capture these factors and to extend their impact by employing the phrase "regular course of business," in conjunction with a definition of "business" far broader than its ordinarily accepted meaning. The result is a tendency unduly to emphasize a requirement of routineness and repetitiveness and an insistence that other types of records be squeezed into the fact patterns which give rise to traditional business records. The rule therefore adopts the phrase "the course of a regularly conducted activity" as capturing the essential basis of the hearsay exception as it has evolved and the essential element which can be abstracted from the various specifications of what is a "business."

Amplification of the kinds of activities producing admissible records has given rise to problems which conventional business records by their nature avoid. They are problems of the source of the recorded information, of entries in opinion form, of motivation, and of involvement as participant in the matters recorded.

Sources of information presented no substantial problem with ordinary business records. All participants, including the observer or participant furnishing the information to be recorded, were acting routinely, under a duty of accuracy, with employer reliance on the result, or in short "in the regular course of business." If, however, the supplier of the information does not act in the regular course, an essential link is broken; the assurance of accuracy does not extend to

the information itself, and the fact that it may be recorded with scrupulous accuracy is of no avail. An illustration is the police report incorporating information obtained from a bystander: the officer qualifies as acting in the regular course but the informant does not. The leading case, *Johnson v. Lutz, 253 N.Y. 124, 170 N.E. 517 (1930),* held that a report thus prepared was inadmissible. Most of the authorities have agreed with the decision. *Gencarella v. Fyfe, 171 F.2d 419 (1st Cir. 1948); Gordon v. Robinson, 210 F.2d 192 (3d Cir. 1954); Standard Oil Co. of California v. Moore, 251 F.2d 188, 214* (9th Cir. 1957), cert. denied *356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148; Yates v. Bair Transport, Inc., 249 F.Supp. 681 (S.D.N.Y. 1965);* Annot., *69 A.L.R.2d 1148.* Cf. *Hawkins v. Gorea Motor Express, Inc., 360 F.2d 933 (2d Cir 1966).* Contra, 5 Wigmore § 1530a, n. 1, pp. 391-392. The point is not dealt with specifically in the Commonwealth Fund Act, the Uniform Act, or Uniform Rule 63(13). However, Model Code Rule 514 contains the requirement "that it was the regular course of that business for one with personal knowledge . . . to make such a memorandum or record or to transmit information thereof to be included in such a memorandum or record . . ." The rule follows this lead in requiring an informant with knowledge acting in the course of the regularly conducted activity.

Entries in the form of opinions were not encountered in traditional business records in view of the purely factual nature of the items recorded, but they are now commonly encountered with respect to medical diagnoses, prognoses, and test results, as well as occasionally in other areas. The Commonwealth Fund Act provided only for records of an "act, transaction, occurrence, or event," while the Uniform Act, Model Code Rule 514, and Uniform Rule 63(13) merely added the ambiguous term "condition." The limited phrasing of the Commonwealth Fund Act, *28 U.S.C. § 1732*, may account for the reluctance of some federal decisions to admit diagnostic entries. *New York Life Ins. Co. v. Taylor, 79 U.S.App.D.C. 66, 147 F.2d 297 (1945); Lyles v. United States, 103 U.S.App.D.C. 22, 254 F.2d 725 (1957),* cert. denied *356 U.S. 961, 78 S.Ct. 997, 2 L.Ed.2d 1067; England v. United States, 174 F.2d 466 (5th Cir. 1949); Skogen v. Dow Chemical Co., 375 F.2d 692 (8th Cir. 1967).* Other federal decisions, however, experienced no difficulty in freely admitting diagnostic entries. *Reed v. Order of United Commercial Travelers, 123 F.2d 252 (2d Cir. 1941); Buckminster's Estate v. Commissioner of Internal Revenue, 147 F.2d 331 (2d Cir. 1944); Medina v. Erickson, 226 F.2d 475* (9th Cir. 1955); *Thomas v. Hogan, 308 F.2d 355 (4th Cir. 1962); Glawe v. Rulon, 284 F.2d 495 (8th Cir. 1960).* In the state courts, the trend favors admissibility. *Borucki v. MacKenzie Bros. Co., 125 Conn. 92, 3 A.2d 224 (1938); Allen v. St. Louis Public Service Co., 365 Mo. 677, 285 S.W.2d 663, 55 A.L.R.2d 1022 (1956); People v. Kohlmeyer, 284 N.Y. 366, 31 N.E.2d 490 (1940); Weis v. Weis, 147 Ohio St. 416, 72 N.E.2d 245 (1947).* In order to make clear its adherence to the latter position, the rule specifically includes both diagnoses and opinions, in addition to acts, events, and conditions, as proper subjects of admissible entries.

Problems of the motivation of the informant have been a source of difficulty and disagreement. In *Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943),* exclusion of an accident report made by the since deceased engineer, offered by defendant railroad trustees in a grade crossing collision case, was upheld. The report was not "in the regular course of business," not a record of the systematic conduct of the business as a business, said the Court. The report was prepared for use in litigating, not railroading. While the opinion mentions the motivation of the engineer only obliquely, the emphasis on records of routine operations is significant only by virtue of impact on motivation to be accurate. Absence of routineness raises lack of motivation to be accurate. The opinion of the Court of Appeals had gone beyond mere lack of motive to be accurate: the engineer's statement was "dripping with motivations to misrepresent." *Hoffman v. Palmer, 129 F.2d 976, 991 (2d Cir. 1942).* The direct introduction of motivation is a disturbing factor, since absence of motivation to misrepresent has not traditionally been a requirement of the rule; that records might be self-serving has not been a ground for exclusion. Laughlin, Business Records and the Like, *46 Iowa L.Rev. 276, 285 (1961).* As Judge Clark said in his dissent, "I submit that there is hardly a grocer's account book which could not be excluded on that basis." *129 F.2d at 1002.* A physician's evaluation report of a personal injury litigant would appear to be in the routine of his business. If the report is offered by the party at whose instance it was made, however, it has been held inadmissible, *Yates v. Bair Transport, Inc., 249 F.Supp. 681 (S.D.N.Y. 1965),* otherwise if offered by the opposite party, *Korte v. New York, N.H. & H.R. Co., 191 F.2d 86 (2d Cir. 1951),* cert. denied *342 U.S. 868, 72 S.Ct. 108, 96 L.Ed. 652.*

The decisions hinge on motivation and which party is entitled to be concerned about it. Professor McCormick believed that the doctor's report or the accident report were sufficiently routine to justify admissibility. McCormick § 287, p. 604. Yet hesitation must be experienced in admitting everything which is observed and recorded in the course of a regularly conducted activity. Efforts to set a limit are illustrated by *Hartzog v. United States, 217 F.2d 706 (4th Cir. 1954),* error to admit worksheets made by since deceased deputy collector in preparation for the instant income tax evasion prosecution, and *United States v. Ware, 247 F.2d 698 (7th Cir. 1957),* error to admit narcotics agents' records of purchases. See also Exception [paragraph] (8), infra, as to the public record aspects of records of this nature. Some decisions have been satisfied as to motivation of an accident report if made pursuant to statutory duty, *United States v. New York Foreign Trade Zone Operators, 304 F.2d 792 (2d Cir. 1962); Taylor v. Baltimore & O. R. Co., 344 F.2d 281 (2d Cir. 1965),* since the report was oriented in a direction other than the litigation which ensued. Cf. *Matthews v.*

United States, 217 F.2d 409 (5th Cir. 1954). The formulation of specific terms which would assure satisfactory results in all cases is not possible. Consequently the rule proceeds from the base that records made in the course of a regularly conducted activity will be taken as admissible but subject to authority to exclude if "the sources of information or other circumstances indicate lack of trustworthiness."

Occasional decisions have reached for enhanced accuracy by requiring involvement as a participant in matters reported. *Clainos v. United States, 82 U.S.App.D.C. 278, 163 F.2d 593 (1947),* error to admit police records of convictions; *Standard Oil Co. of California v. Moore, 251 F.2d 188* (9th Cir. 1957), cert. denied *356 U.S. 975, 78 S.Ct. 1139, 2 L.Ed.2d 1148,* error to admit employees' records of observed business practices of others. The rule includes no requirement of this nature. Wholly acceptable records may involve matters merely observed, e.g. the weather.

The form which the "record" may assume under the rule is described broadly as a "memorandum, report, record, or data compilation, in any form." The expression "data compilation" is used as broadly descriptive of any means of storing information other than the conventional words and figures in written or documentary form. It includes, but is by no means limited to, electronic computer storage. The term is borrowed from revised Rule 34(a) of the Rules of Civil Procedure.

Exception (7). Failure of a record to mention a matter which would ordinarily be mentioned is satisfactory evidence of its nonexistence. Uniform Rule 63(14), Comment. While probably not hearsay as defined in *Rule 801, supra,* decisions may be found which class the evidence not only as hearsay but also as not within any exception. In order to set the question at rest in favor of admissibility, it is specifically treated here. McCormick § 289, p. 609; Morgan, Basic Problems of Evidence 314 (1962); 5 Wigmore § 1531; Uniform Rule 63(14); *California Evidence Code § 1272*; Kansas Code of Civil Procedure § 60-460(n); New Jersey Evidence Rule 63(14).

Exception (8). Public records are a recognized hearsay exception at common law and have been the subject of statutes without number. McCormick § 291. See, for example, *28 U.S.C. § 1733*, the relative narrowness of which is illustrated by its nonapplicability to nonfederal public agencies, thus necessitating report to the less appropriate business record exception to the hearsay rule. *Kay v. United States, 255 F.2d 476 (4th Cir. 1958).* The rule makes no distinction between federal and nonfederal offices and agencies.

Justification for the exception is the assumption that a public official will perform his duty properly and the unlikelihood that he will remember details independently of the record. *Wong Wing Foo v. McGrath, 196 F.2d 120* (9th Cir. 1952), and see *Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919).* As to items (a) and (b), further support is found in the reliability factors underlying records of regularly conducted activities generally. See Exception [paragraph] (6), supra.

(a) Cases illustrating the admissibility of records of the office's or agency's own activities are numerous. *Chesapeake & Delaware Canal Co. v. United States, 250 U.S. 123, 39 S.Ct. 407, 63 L.Ed. 889 (1919),* Treasury records of miscellaneous receipts and disbursements; *Howard v. Perrin, 200 U.S. 71, 26 S.Ct. 195, 50 L.Ed. 374 (1906),* General Land Office records; *Ballew v. United States, 160 U.S. 187, 16 S.Ct. 263, 40 L.Ed. 388 (1895),* Pension Office records.

(b) Cases sustaining admissibility of records of matters observed are also numerous. *United States v. Van Hook, 284 F.2d 489 (7th Cir. 1960),* remanded for resentencing *365 U.S. 609, 81 S.Ct. 823, 5 L.Ed.2d 821,* letter from induction officer to District Attorney, pursuant to army regulations, stating fact and circumstances of refusal to be inducted; *T'Kach v. United States, 242 F.2d 937 (5th Cir. 1957),* affidavit of White House personnel officer that search of records showed no employment of accused, charged with fraudulently representing himself as an envoy of the President; *Minnehaha County v. Kelley, 150 F.2d 356 (8th Cir. 1945);* Weather Bureau records of rainfall; *United States v. Meyer, 113 F.2d 387 (7th Cir. 1940),* cert. denied *311 U.S. 706, 61 S.Ct. 174, 85 L.Ed. 459,* map prepared by government engineer from information furnished by men working under his supervision.

(c) The more controversial area of public records is that of the so-called "evaluative" report. The disagreement among the decisions has been due in part, no doubt, to the variety of situations encountered, as well as to differences in principle. Sustaining admissibility are such cases as *United States v. Dumas, 149 U.S. 278, 13 S.Ct. 872, 37 L.Ed. 734 (1893),* statement of account certified by Postmaster General in action against postmaster; *McCarty v. United States, 185 F.2d 520 (5th Cir. 1950),* reh. denied *187 F.2d 234,* Certificate of Settlement of General Accounting Office showing indebtedness and letter from Army official stating Government had performed, in action on contract to purchase and remove waste food from Army camp; *Moran v. Pittsburgh-Des Moines Steel Co., 183 F.2d 467 (3d Cir. 1950),* report of Bureau of Mines as to cause of gas tank explosion; *Petition of W--, 164 F.Supp. 659 (E.D.Pa.1958),* report by Immigration and Naturalization Service investigator that petitioner was known in community as wife of man to whom she was not married. To the opposite effect and denying admissibility are *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944),* State Fire Marshal's report of cause of gas explosion; *Lomax Transp. Co. v. United States, 183 F.2d 331 (9th Cir. 1950),* Certificate of Settlement from General Accounting Office in action for naval supplies lost in warehouse fire; *Yung Jin Teung v. Dulles, 229 F.2d 244 (2d Cir. 1956),* "Status Reports" offered to justify delay in

processing passport applications. Police reports have generally been excluded except to the extent to which they incorporate firsthand observations of the officer. Annot., *69 A.L.R.2d 1148.* Various kinds of evaluative reports are admissible under federal statutes; *7 U.S.C. § 78*, findings of Secretary of Agriculture prima facie evidence of true grade of grain; *7 U.S.C. § 210(f)*, findings of Secretary of Agriculture prima facie evidence in action for damages against stockyard owner; *7 U.S.C. § 292*, order by Secretary of Agriculture prima facie evidence in judicial enforcement proceedings against producers association monopoly; *7 U.S.C. § 1622(h)*, Department of Agriculture inspection certificates of products shipped in interstate commerce prima facie evidence; *8 U.S.C. § 1440(c)*, separation of alien from military service on conditions other than honorable provable by certificate from department in proceedings to revoke citizenship; *18 U.S.C. § 4245*, certificate of Director of Prisons that convicted person has been examined and found probably incompetent at time of trial prima facie evidence in court hearing on competency; *42 U.S.C. § 269(b)*, bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations; *46 U.S.C. § 679*, certificate of consul presumptive evidence of refusal of master to transport destitute seamen to United States. While these statutory exceptions to the hearsay rule are left undisturbed, Rule 802, the willingness of Congress to recognize a substantial measure of admissibility for evaluative reports is a helpful guide.

Factors which may be of assistance in passing upon the admissibility of evaluative reports include; (1) the timeliness of the investigation, McCormack, Can the Courts Make Wider Use of Reports of Official Investigations? *42 Iowa L.Rev. 363 (1957);* (2) the special skill or experience of the official, id., (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co., 141 F.2d 568 (10th Cir. 1944);* (4) possible motivation problems suggested by *Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).* Others no doubt could be added.

The formulation of an approach which would give appropriate weight to all possible factors in every situation is an obvious impossibility. Hence the rule, as in Exception [paragraph] (6), assumes admissibility in the first instance but with ample provision for escape if sufficient negative factors are present. In one respect, however, the rule with respect to evaluate reports under item (c) is very specific; they are admissible only in civil cases and against the government in criminal cases in view of the almost certain collision with confrontation rights which would result from their use against the accused in a criminal case.

Exception (9). Records of vital statistics are commonly the subject of particular statutes making them admissible in evidence. Uniform Vital Statistics Act, 9C U.L.A. 350 (1957). The rule is in principle narrower than Uniform Rule 63(16) which includes reports required of persons performing functions authorized by statute, yet in practical effect the two are substantially the same. Comment Uniform Rule 63(16). The exception as drafted is in the pattern of *California Evidence Code § 1281.*

Exception (10). The principle of proving nonoccurrence of an event by evidence of the absence of a record which would regularly be made of its occurrence, developed in Exception [paragraph] (7) with respect to regularly conducted activities, is here extended to public records of the kind mentioned in Exceptions [paragraphs] (8) and (9). 5 Wigmore § 1633(6), p. 519. Some harmless duplication no doubt exists with Exception [paragraph] (7). For instances of federal statutes recognizing this method of proof, see *8 U.S.C. § 1284(b)*, proof of absence of alien crewman's name from outgoing manifest prima facie evidence of failure to detain or deport, and *42 U.S.C. § 405(c)(3)*, (4)(B), (4)(C), absence of HEW [Department of Health, Education, and Welfare] record prima facie evidence of no wages or self-employment income.

The rule includes situations in which absence of a record may itself be the ultimate focal point of inquiry, e.g. *People v. Love, 310 Ill. 558, 142 N.E. 204 (1923),* certificate of Secretary of State admitted to show failure to file documents required by Securities Law, as well as cases where the absence of a record is offered as proof of the nonoccurrence of an event ordinarily recorded.

The refusal of the common law to allow proof by certificate of the lack of a record or entry has no apparent justification, 5 Wigmore § 1678(7), p. 752. The rule takes the opposite position, as do Uniform Rule 63(17); *California Evidence Code § 1284*; Kansas Code of Civil Procedure § 60-460(c); New Jersey Evidence Rule 63(17). Congress has recognized certification as evidence of the lack of a record. *8 U.S.C. § 1360(d)*, certificate of Attorney General or other designated officer that no record of Immigration and Naturalization Service of specified nature or entry therein is found, admissible in alien cases.

Exception (11). Records of activities of religious organizations are currently recognized as admissible at least to the extent of the business records exception to the hearsay rule, 5 Wigmore § 1523, p. 371, and Exception [paragraph] (6) would be applicable. However, both the business record doctrine and Exception [paragraph] (6) require that the person furnishing the information be one in the business or activity. The result is such decisions as *Daily v. Grand Lodge, 311 Ill. 184, 142 N.E. 478 (1924),* holding a church record admissible to prove fact, date, and place of baptism, but not age of child except that he had at least been born at the time. In view of the unlikelihood that false information would be

furnished on occasions of this kind, the rule contains no requirement that the informant be in the course of the activity. See *California Evidence Code § 1315* and Comment.

Exception (12). The principle of proof by certification is recognized as to public officials in Exceptions [paragraphs] (8) and (10), and with respect to authentication in Rule 902. The present exception is a duplication to the extent that it deals with a certificate by a public official, as in the case of a judge who performs a marriage ceremony. The area covered by the rule is, however, substantially larger and extends the certification procedure to clergymen and the like who perform marriages and other ceremonies or administer sacraments. Thus certificates of such matters as baptism or confirmation, as well as marriage, are included. In principle they are as acceptable evidence as certificates of public officers. See 5 Wigmore § 1645, as to marriage certificates. When the person executing the certificate is not a public official, the self-authenticating character of documents purporting to emanate from public officials, see Rule 902, is lacking and proof is required that the person was authorized and did make the certificate. The time element, however, may safely be taken as supplied by the certificate, once authority and authenticity are established, particularly in view of the presumption that a document was executed on the date it bears.

For similar rules, some limited to certificates of marriage, with variations in foundation requirements, see Uniform Rule 63(18); *California Evidence Code § 1316*; Kansas Code of Civil Procedure § 60-460(p); New Jersey Evidence Rule 63(18).

Exception (13). Records of family history kept in family Bibles have by long tradition been received in evidence. 5 Wigmore §§ 1495, 1496, citing numerous statutes and decisions. See also Regulations, Social Security Administration, *20 C.F.R. § 404.703(c)*, recognizing family Bible entries as proof of age in the absence of public or church records. Opinions in the area also include inscriptions on tombstones, publicly displayed pedigrees, and engravings on rings. Wigmore, supra. The rule is substantially identical in coverage with *California Evidence Code § 1312.*

Exception (14). The recording of title documents is a purely statutory development. Under any theory of the admissibility of public records, the records would be receivable as evidence of the contents of the recorded document, else the recording process would be reduced to a nullity. When, however, the record is offered for the further purpose of proving execution and delivery, a problem of lack of first-hand knowledge by the recorder, not present as to contents, is presented. This problem is solved, seemingly in all jurisdictions, by qualifying for recording only those documents shown by a specified procedure, either acknowledgement or a form of probate, to have been executed and delivered. 5 Wigmore §§ 1647-1651. Thus what may appear in the rule, at first glance, as endowing the record with an effect independently of local law and inviting difficulties of an Erie nature under *Cities Service Oil Co. v. Dunlap, 308 U.S. 208, 60 S.Ct. 201, 84 L.Ed. 196 (1939),* is not present, since the local law in fact governs under the example.

Exception (15). Dispositive documents often contain recitals of fact. Thus a deed purporting to have been executed by an attorney in fact may recite the existence of the power of attorney, or a deed may recite that the grantors are all the heirs of the last record owner. Under the rule, these recitals are exempted from the hearsay rule. The circumstances under which dispositive documents are executed and the requirement that the recital be germane to the purpose of the document are believed to be adequate guarantees of trustworthiness, particularly in view of the nonapplicability of the rule if dealings with the property have been inconsistent with the document. The age of the document is of no significance, though in practical application the document will most often be an ancient one. See Uniform Rule 63(29), Comment.

Similar provisions are contained in Uniform Rule 63(29); *California Evidence Code § 1330*; Kansas Code of Civil Procedure § 60-460(aa); New Jersey Evidence Rule 63(29).

Exception (16). Authenticating a document as ancient, essentially in the pattern of the common law, as provided in Rule 901(b)(8), leaves open as a separate question the admissibility of assertive statements contained therein as against a hearsay objection. 7 Wigmore § 2145a. Wigmore further states that the ancient document technique of authentication is universally conceded to apply to all sorts of documents, including letters, records, contracts, maps, and certificates, in addition to title documents, citing numerous decisions. Id. § 2145. Since most of these items are significant evidentially only insofar as they are assertive, their admission in evidence must be as a hearsay exception. But see 5 id. § 1573, p. 429, referring to recitals in ancient deeds as a "limited" hearsay exception. The former position is believed to be the correct one in reason and authority. As pointed out in McCormick § 298, danger of mistake is minimized by authentication requirements, and age affords assurance that the writing antedates the present controversy. See *Dallas County v. Commercial Union Assurance Co., 286 F.2d 388 (5th Cir. 1961),* upholding admissibility of 58-year-old newspaper story. Cf. Morgan, Basic Problems of Evidence 364 (1962), but see id. 254.

For a similar provision, but with the added requirement that "the statement has since generally been acted upon as true by persons having an interest in the matter," see *California Evidence Code § 1331.*

Exception (17). Ample authority at common law supported the admission in evidence of items falling in this category. While Wigmore's text is narrowly oriented to lists, etc., prepared for the use of a trade or profession, 6 Wigmore § 1702,

authorities are cited which include other kinds of publications, for example, newspaper market reports, telephone directories, and city directories. Id. §§ 1702-1706. The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate.

For similar provisions, see Uniform Rule 63(30); *California Evidence Code § 1340*; Kansas Code of Civil Procedure § 60-460(bb); New Jersey Evidence Rule 63(30). Uniform Commercial Code § 2-724 provides for admissibility in evidence of "reports in official publications or trade journals or in newspapers or periodicals of general circulation published as the reports of such [established commodity] market."

Exception (18). The writers have generally favored the admissibility of learned treatises, McCormick § 296, p. 621; Morgan, Basic Problems of Evidence 366 (1962); 6 Wigmore § 1692, with the support of occasional decisions and rules, *City of Dothan v. Hardy, 237 Ala. 603, 188 So. 264 (1939); Lewandowski v. Preferred Risk Mut. Ins. Co., 33 Wis.2d 69, 146 N.W.2d 505 (1966), 66 Mich.L.Rev. 183 (1967);* Uniform Rule 63(31); Kansas Code of Civil Procedure § 60-460(ce), but the great weight of authority has been that learned treatises are not admissible as substantive evidence though usable in the cross-examination of experts. The foundation of the minority view is that the hearsay objection must be regarded as unimpressive when directed against treatises since a high standard of accuracy is engendered by various factors: the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake. 6 Wigmore § 1692. Sound as this position may be with respect to trustworthiness, there is, nevertheless, an additional difficulty in the likelihood that the treatise will be misunderstood and misapplied without expert assistance and supervision. This difficulty is recognized in the cases demonstrating unwillingness to sustain findings relative to disability on the basis of judicially noticed medical texts. *Ross v. Gardner, 365 F.2d 554 (6th Cir. 1966); Sayers v. Gardner, 380 F.2d 940 (6th Cir. 1967); Colwell v. Gardner, 386 F.2d 56 (6th Cir. 1967); Glendenning v. Ribicoff, 213 F.Supp. 301 (W.D.Mo. 1962); Cook v. Celebrezze, 217 F Supp. 366 (W.D.Mo. 1963); Sosna v. Celebrezze, 234 F.Supp. 289 (E.D.Pa. 1964);* and see *McDaniel v. Celebrezze, 331 F.2d 426 (4th Cir. 1964).* The rule avoids the danger of misunderstanding and misapplication by limiting the use of treatises as substantive evidence to situations in which an expert is on the stand and available to explain and assist in the application of the treatise if declared. The limitation upon receiving the publication itself physically in evidence, contained in the last sentence, is designed to further this policy.

The relevance of the use of treatises on cross-examination is evident. This use of treatises has been the subject of varied views. The most restrictive position is that the witness must have stated expressly on direct his reliance upon the treatise. A slightly more liberal approach still insists upon reliance but allows it to be developed on cross-examination. Further relaxation dispenses with reliance but requires recognition as an authority by the witness, developable on cross-examination. The greatest liberality is found in decisions allowing use of the treatise on cross-examination when its status as an authority is established by any means. Annot., *60 A.L.R.2d 77.* The exception is hinged upon this last position, which is that of the Supreme Court, *Reilly v. Pinkus, 338 U.S. 269, 70 S.Ct. 110, 94 L.Ed. 63 (1949),* and of recent well considered state court decisions, *City of St. Petersburg v. Ferguson, 193 So.2d 648 (Fla.App. 1967),* cert. denied *Fla., 201 So.2d 556; Darling v. Charleston Memorial Community Hospital, 33 Ill.2d 326, 211 N.E.2d 253 (1965); Dabroe v. Rkodes Co., 64 Wash.2d 431, 392 P.2d 317 (1964).*

In Reilly v. Pinkus, supra, the Court pointed out that testing of professional knowledge was incomplete without exploration of the witness' knowledge of and attitude toward established treatises in the field. The process works equally well in reverse and furnishes the basis of the rule.

The rule does not require that the witness rely upon or recognize the treatise as authoritative, thus avoiding the possibility that the expert may at the outset block cross-examination by refusing to concede reliance or authoritativeness. *Dabroe v. Rhodes Co., supra.* Moreover, the rule avoids the unreality of admitting evidence for the purpose of impeachment only, with an instruction to the jury not to consider it otherwise. The parallel to the treatment of prior inconsistent statements will be apparent. See Rules 6130(b) and 801(d)(1).

Exceptions (19), (20), and (21). Trustworthiness in reputation evidence is found "when the topic is such that the facts are likely to have been inquired about and that persons having personal knowledge have disclosed facts which have thus been discussed in the community; and thus the community's conclusion, if any has been formed, is likely to be a trustworthy one." 5 Wigmore § 1580, p. 444, and see also § 1583. On this common foundation, reputation as to land boundaries, customs, general history, character, and marriage have come to be regarded as admissible. The breadth of the underlying principle suggests the formulation of an equally broad exception, but tradition has in fact been much narrower and more particularized, and this is the pattern of these exceptions in the rule.

Exception [paragraph] (19) is concerned with matters of personal and family history. Marriage is universally conceded to be a proper subject of proof by evidence of reputation in the community. 5 Wigmore § 1602. As to such items as legitimacy, relationship, adoption, birth, and death, the decisions are divided. Id. § 1605. All seem to be susceptible to being the subject of well founded repute. The "world" in which the reputation may exist may be family, associates, or

community. This world has proved capable of expanding with changing times from the single uncomplicated neighborhood, in which all activities take place, to the multiple and unrelated worlds of work, religious affiliation, and social activity, in each of which a reputation may be generated. *People v. Reeves, 360 Ill. 55, 195 N.E. 443 (1935); State v. Axilrod, 248 Minn. 204, 79 N.W.2d 677 (1956);* Mass.Stat. 1947, c. 410, M.G.L.A. c. 233 § 21A; 5 Wigmore § 1616. The family has often served as the point of beginning for allowing community reputation. 5 Wigmore § 1488. For comparable provisions see Uniform Rule 63(26), (27)(c); *California Evidence Code §§ 1313, 1314*; Kansas Code of Civil Procedure § 60-460(x), (y)(3); New Jersey Evidence Rule 63(26), (27)(c).

The first portion of Exception [paragraph] (20) is based upon the general admissibility of evidence of reputation as to land boundaries and land customs, expanded in this country to include private as well as public boundaries. McCormick § 299, p. 625. The reputation is required to antedate the controversy, though not to be ancient. The second portion is likewise supported by authority, id., and is designed to facilitate proof of events when judicial notice is not available. The historical character of the subject matter dispenses with any need that the reputation antedate the controversy with respect to which it is offered. For similar provisions see Uniform Rule 63(27)(a), (b); *California Evidence Code §§ 1320-1322*; Kansas Code of Civil Procedure § 60-460(y), (1), (2); New Jersey Evidence Rule 63(27)(a), (b).

Exception [paragraph] (21) recognizes the traditional acceptance of reputation evidence as a means of proving human character. McCormick §§ 44, 158. The exception deals only with the hearsay aspect of this kind of evidence. Limitations upon admissibility based on other grounds will be found in Rules 404, relevancy of character evidence generally, and 608, character of witness. The exception is in effect a reiteration, in the context of hearsay, of Rule 405(a). Similar provisions are contained in Uniform Rule 63(28); *California Evidence Code § 1324*; Kansas Code of Civil Procedure § 60-460(z); New Jersey Evidence Rule 63(28).

Exception (22). When the status of a former judgment is under consideration in subsequent litigation, three possibilities must be noted: (1) the former judgment is conclusive under the doctrine of res judicata, either as a bar or a collateral estoppel; or (2) it is admissible in evidence for what it is worth; or (3) it may be of no effect at all. The first situation does not involve any problem of evidence except in the way that principles of substantive law generally bear upon the relevancy and materiality of evidence. The rule does not deal with the substantive effect of the judgment as a bar or collateral estoppel. When, however, the doctrine of res judicata does not apply to make the judgment either a bar or a collateral estoppel, a choice is presented between the second and third alternatives. The rule adopts the second for judgments of criminal conviction of felony grade. This is the direction of the decisions, Annot., *18 A.L.R.2d 1287, 1299,* which manifest an increasing reluctance to reject *in toto* the validity of the law's factfinding processes outside the confines of res judicata and collateral estoppel. While this may leave a jury with the evidence of conviction but without means to evaluate it, as suggested by Judge Hinton, Note *27 Ill.L.Rev. 195 (1932),* it seems safe to assume that the jury will give it substantial effect unless defendant offers a satisfactory explanation, a possibility not foreclosed by the provision. But see *North River Ins. Co. v. Militello, 104 Colo. 28, 88 P.2d 567 (1939),* in which the jury found for plaintiff on a fire policy despite the introduction of his conviction for arson. For supporting federal decisions see Clark, J., in *New York & Cuba Mail S.S. Co. v. Continental Cas. Co., 117 F.2d 404, 411 (2d Cir. 1941); Connecticut Fire Ins. Co. v. Farrara, 277 F.2d 388 (8th Cir. 1960).*

Practical considerations require exclusion of convictions of minor offenses, not became the administration of justice in its lower echelons must be inferior, but because motivation to defend at this level is often minimal or nonexistent. *Cope v. Goble, 39 Cal.App.2d 448, 103 P.2d 598 (1940); Jones v. Talbot, 87 Idaho 498, 394 P.2d 316 (1964); Warren v. Marsh, 215 Minn. 615, 11 N.W.2d 528 (1943);* Annot., *18 A.L.R.2d 1287, 1295-1297; 16 Brooklyn L.Rev. 286 (1950); 50 Colum.L.Rev. 529 (1950); 35 Cornell L.Q. 872 (1950).* Hence the rule includes only convictions of felony grade, measured by federal standards.

Judgments of conviction based upon pleas of *nolo contendere* are not included. This position is consistent with the treatment of *nolo* pleas in Rule 410 and the authorities cited in the Advisory Committee's Note in support thereof.

While these rules do not in general purport to resolve constitutional issues, they have in general been drafted with a view to avoiding collision with constitutional principles. Consequently the exception does not include evidence of the conviction of a third person, offered against the accused in a criminal prosecution to prove any fact essential to sustain the judgment of conviction. A contrary position would seem clearly to violate the right of confrontation. *Kirby v. United States, 174 U.S. 47, 19 S.Ct. 574, 43 L.Ed. 890 (1899),* error to convict of possessing stolen postage stamps with the only evidence of theft being the record of conviction of the thieves The situation is to be distinguished from cases in which conviction of another person is an element of the crime, e.g. *15 U.S.C. § 902*(d), interstate shipment of firearms to a known convicted felon, and, as specifically provided, from impeachment.

For comparable provisions see Uniform Rule 63(20); *California Evidence Code § 1300*; Kansas Code of Civil Procedure § 60-460(r); New Jersey Evidence Rule 63(20).

Exception (23). A hearsay exception in this area was originally justified on the ground that verdicts were evidence of reputation. As trial by jury graduated from the category of neighborhood inquests, this theory lost its validity. It was never valid as to chancery decrees. Nevertheless the rule persisted, though the judges and writers shifted ground and began saying that the judgment or decree was as good evidence as reputation. See *City of London v. Clerke, Carth. 181, 90 Eng.Rep. 710 (K.B. 1691);* Neill v. Duke of Devonshire, 8 App.Cas. 135 (1882). The shift appears to be correct, since the process of inquiry, sifting, and scrutiny which is relied upon to render reputation reliable is present in perhaps greater measure in the process of litigation. While this might suggest a broader area of application, the affinity to reputation is strong, and paragraph [paragraph] (23) goes no further, not even including character.

The leading case in the *United States, Patterson v. Gaines, 47 U.S. (6 How.) 550, 599, 12 L.Ed. 553 (1847),* follows in the pattern of the English decisions, mentioning as illustrative matters thus provable: manorial rights, public rights of way, immemorial custom, disputed boundary, and pedigree. More recent recognition of the principle is found in *Grant Bros. Construction Co. v. United States, 232 U.S. 647, 34 S.Ct. 452, 58 L.Ed. 776 (1914),* in action for penalties under Alien Contract Labor Law, decision of board of inquiry of Immigration Service admissible to prove alienage of laborers, as a matter of pedigree; *United States v. Mid-Continent Petroleum Corp., 67 F.2d 37 (10th Cir. 1933),* records of commission enrolling Indians admissible on pedigree; *Jung Yen Loy v. Cahill, 81 F.2d 809* (9th Cir. 1936), board decisions as to citizenship of plaintiff's father admissible in proceeding for declaration of citizenship. Contra, *In re Estate of Cunha, 49 Haw. 273, 414 P.2d 925 (1966).*

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 803(3) was approved in the form submitted by the Court to Congress. However, the Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285, 295-300 (1892),* so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person.

After giving particular attention to the question of physical examination made solely to enable a physician to testify, the Committee approved Rule 803(4) as submitted to Congress, with the understanding that it is not intended in any way to adversely affect present privilege rules or those subsequently adopted.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The Committee amended this Rule to add the words "or adopted by the witness" after the phrase "shown to have been made", a treatment consistent with the definition of "statement" in the Jencks Act, *18 U.S.C. 3500.* Moreover, it is the Committee's understanding that a memorandum or report, although barred under this Rule, would nonetheless be admissible if it came within another hearsay exception. This last stated principle is deemed applicable to all the hearsay rules.

Rule 803(6) as submitted by the Court permitted a record made "in the course of a regularly conducted activity" to be admissible in certain circumstances. The Committee believed there were insufficient guarantees of reliability in records made in the course of activities falling outside the scope of "business" activities as that term is broadly defined in *28 U.S.C. 1732.* Moreover, the Committee concluded that the additional requirement of Section 1732 that it must have been the regular practice of a business to make the record is a necessary further assurance of its trustworthiness. The Committee accordingly amended the Rule to incorporate these limitations.

Rule 803(7) as submitted by the Court concerned the *absence* of entry in the records of a "regularly conducted activity." The Committee amended this Rule to conform with its action with respect to Rule 803(6).

The Committee approved Rule 803(8) without substantive change from the form in which it was submitted by the Court. The Committee intends that the phrase "factual findings" be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this Rule.

The Committee approved this Rule in the form submitted by the Court, intending that the phrase "Statements of fact concerning personal or family history" be read to include the specific types of such statements enumerated in Rule 803(11).

Notes of Committee on the Judiciary, Senate Report No. 93-1277. The House approved this rule as it was submitted by the Supreme Court "with the understanding that it is not intended in any way to adversely affect present privilege rules." We also approve this rule, and we would point out with respect to the question of its relation to privileges, it must be read in conjunction with *rule 35 of the Federal Rules of Civil Procedure* which provides that whenever the physical or mental condition of a party (plaintiff or defendant) is in controversy, the court may require him to submit to an examination by a physician. It is these examinations which will normally be admitted under this exception.

Rule 803(5) as submitted by the Court permitted the reading into evidence of a memorandum or record concerning a matter about which a witness once had knowledge but now has insufficient recollection to enable him to testify

accurately and fully, "shown to have been made when the matter was fresh in his memory and to reflect that knowledge correctly." The House amended the rule to add the words "or adopted by the witness" after the phrase "shown to have been made," language parallel to the Jencks Act [*18 U.S.C. § 3500*].

The committee accepts the House amendment with the understanding and belief that it was not intended to narrow the scope of applicability of the rule. In fact, we understand it to clarify the rule's applicability to a memorandum adopted by the witness as well as one made by him. While the rule as submitted by the Court was silent on the question of who made the memorandum, we view the House amendment as a helpful clarification, noting, however, that the Advisory Committee's note to this rule suggests that the important thing is the accuracy of the memorandum rather than who made it.

The committee does not view the House amendment as precluding admissibility in situations in which multiple participants were involved.

When the verifying witness has not prepared the report, but merely examined it and found it accurate, he has adopted the report, and it is therefore admissible. The rule should also be interpreted to cover other situations involving multiple participants, e.g., employer dictating to secretary, secretary making memorandum at direction of employer, or information being passed along a chain of persons, as in *Curtis v. Bradley [65 Conn. 99, 31 Atl. 591 (1894);* see, also *Rathbun v. Brancatella, 93 N.J.L. 222, 107 Atl. 279 (1919);* see, also McCormick on Evidence, § 303 (2d ed. 1972)].

The committee also accepts the understanding of the House that a memorandum or report, although barred under rule, would nonetheless be admissible if it came within another hearsay exception. We consider this principle to be applicable to all the hearsay rules.

Rule 803(6) as submitted by the Supreme Court permitted a record made in the course of a regularly conducted activity to be admissible in certain circumstances. This rule constituted a broadening of the traditional business records hearsay exception which has been long advocated by scholars and judges active in the law of evidence.

The House felt there were insufficient guarantees of reliability of records not within a broadly defined business records exception. We disagree. Even under the House definition of "business" including profession, occupation, and "calling of every kind," the records of many regularly conducted activities will, or may be, excluded from evidence. Under the principle of ejusdem generis, the intent of "calling of every kind" would seem to be related to work-related endeavors--e.g., butcher, baker, artist, etc.

Thus, it appears that the records of many institutions or groups might not be admissible under the House amendments. For example, schools, churches, and hospitals will not normally be considered businesses within the definition. Yet, these are groups which keep financial and other records on a regular basis in a manner similar to business enterprises. We believe these records are of equivalent trustworthiness and should be admitted into evidence.

Three states, which have recently codified their evidence rules, have adopted the Supreme Court version of rule 803(6), providing for admission of memoranda of a "regularly conducted activity." None adopted the words "business activity" used in the House amendment. [See Nev. Rev. Stats. § 15.135; N. Mex. Stats. (1973 Supp.) § 20-4-803(6); West's Wis. Stats. Anno. (1973 Supp.) § 908.03(6).]

Therefore, the committee deleted the words "business" as it appears before the word "activity". The last sentence then is unnecessary and was also deleted.

It is the understanding of the committee that the use of the phrase "person with knowledge" is not intended to imply that the party seeking to introduce the memorandum, report, record, or data compilation must be able to produce, or even identify, the specific individual upon whose first-hand knowledge the memorandum, report, record or data compilation was based. A sufficient foundation for the introduction of such evidence will be laid if the party seeking to introduce the evidence is able to show that it was the regular practice of the activity to base such memorandums, reports, records, or data compilations upon a transmission from a person with knowledge, e.g., in the case of the content of a shipment of goods, upon a report from the company's receiving agent or in the case of a computer printout, upon a report from the company's computer programmer or one who has knowledge of the particular record system. In short, the scope of the phrase "person with knowledge" is meant to be coterminous with the custodian of the evidence or other qualified witness. The committee believes this represents the desired rule in light of the complex nature of modern business organizations.

The House approved rule 803(8), as submitted by the Supreme Court, with one substantive change. It excluded from the hearsay exception reports containing matters observed by police officers and other law enforcement personnel in criminal cases. Ostensibly, the reason for this exclusion is that observations by police officers at the scene of the crime or the apprehension of the defendant are not as reliable as observations by public officials in other cases because of the adversarial nature of the confrontation between the police and the defendant in criminal cases.

The committee accepts the House's decision to exclude such recorded observations where the police officer is available to testify in court about his observation. However, where he is unavailable as unavailability is defined in rule

804(a)(4) and (a)(5), the report should be admitted as the best available evidence. Accordingly, the committee has amended rule 803(8) to refer to the provision of [proposed] rule 804(b)(5) [deleted], which allows the admission of such reports, records or other statements where the police officer or other law enforcement officer is unavailable because of death, then existing physical or mental illness or infirmity, or not being successfully subject to legal process.

The House Judiciary Committee report contained a statement of intent that "the phrase 'factual findings' in subdivision (c) be strictly construed and that evaluations or opinions contained in public reports shall not be admissible under this rule." The committee takes strong exception to this limiting understanding of the application of the rule. We do not think it reflects an understanding of the intended operation of the rule as explained in the Advisory Committee notes to this subsection. The Advisory Committee notes on subsection (c) of this subdivision point out that various kinds of evaluative reports are now admissible under Federal statutes. *7 U.S.C. § 78*, findings of Secretary of Agriculture prima facie evidence of true grade of grain; *42 U.S.C. § 269(b)*, bill of health by appropriate official prima facie evidence of vessel's sanitary history and condition and compliance with regulations. These statutory exceptions to the hearsay rule are preserved. Rule 802. The willingness of Congress to recognize these and other such evaluative reports provides a helpful guide in determining the kind of reports which are intended to be admissible under this rule. We think the restrictive interpretation of the House overlooks the fact that while the Advisory Committee assumes admissibility in the first instance of evaluative reports, they are not admissible if, as the rule states, "the sources of information or other circumstances indicate lack of trustworthiness."

The Advisory Committee explains the factors to be considered:

. . . . .

Factors which may be assistance in passing upon the admissibility of evaluative reports include: (1) the timeliness of the investigation, McCormick, Can the Courts Make Wider Use of Reports of Official Investigation? *42 Iowa L.Rev. 363 (1957);* (2) the special skill or experience of the official, id.; (3) whether a hearing was held and the level at which conducted, *Franklin v. Skelly Oil Co., 141 F.2d 568* (19th Cir. 1944); (4) possible motivation problems suggested by *Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477, 87 L.Ed. 645 (1943).* Others no doubt could be added.

. . . . .

The committee concludes that the language of the rule together with the explanation provided by the Advisory Committee furnish sufficient guidance on the admissibility of evaluative reports.

The proposed Rules of Evidence submitted to Congress contained identical provisions in rules 803 and 804 (which set forth the various hearsay exceptions), admitting any hearsay statement not specifically covered by any of the stated exceptions, if the hearsay statement was found to have "comparable circumstantial guarantees of trustworthiness." The House deleted these provisions (proposed rules 803(24) and 804(b)(6) [(5)]) as injecting "too much uncertainty" into the law of evidence and impairing the ability of practitioners to prepare for trial. The House felt that rule 102, which directs the courts to construe the Rules of Evidence so as to promote growth and development, would permit sufficient flexibility to admit hearsay evidence in appropriate cases under various factual situations that might arise.

We disagree with the total rejection of a residual hearsay exception. While we view rule 102 as being intended to provide for a broader construction and interpretation of these rules, we feel that, without a separate residual provision, the specifically enumerated exceptions could become tortured beyond any reasonable circumstances which they were intended to include (even if broadly construed). Moreover, these exceptions, while they reflect the most typical and well recognized exceptions to the hearsay rule, may not encompass every situation in which the reliability and appropriateness of a particular piece of hearsay evidence make clear that it should be heard and considered by the trier of fact.

The committee believes that there are certain exceptional circumstances where evidence which is found by a court to have guarantees of trust worthiness equivalent to or exceeding the guarantees reflected by the presently listed exceptions, and to have a high degree of prolativeness and necessity could properly be admissible.

The case of *Dallas County v. Commercial Union Assoc. Co., Ltd., 286 F.2d 388 (5th Cir. 1961)* illustrates the point. The issue in that case was whether the tower of the county courthouse collapsed because it was struck by lightning (covered by insurance) or because of structural weakness and deterioration of the structure (not covered). Investigation of the structure revealed the presence of charcoal and charred timbers. In order to show that lightning may not have been the cause of the charring, the insurer offered a copy of a local newspaper published over 50 years earlier containing an unsigned article describing a fire in the courthouse while it was under construction. The Court found that the newspaper did not qualify for admission as a business record or an ancient document and did not fit within any other recognized hearsay exception. The court concluded, however, that the article was trustworthy because it was inconceivable that a newspaper reporter in a small town would report a fire in the courthouse if none had occurred. See also *United States v. Barbati, 284 F. Supp. 409 (E.D.N.Y. 1968).*

Because exceptional cases like the Dallas County case may arise in the future, the committee has decided to reinstate a residual exception for rules 803 and 804(b).

The committee, however, also agrees with those supporters of the House version who felt that an overly broad residual hearsay exception could emasculate the hearsay rule and the recognized exceptions or vitiate the rationale behind codification of the rules.

Therefore, the committee has adopted a residual exception for rules 803 and 804(b) of much narrower scope and applicability than the Supreme Court version. In order to qualify for admission, a hearsay statement not falling within one of the recognized exceptions would have to satisfy at least four conditions. First, it must have "equivalent circumstantial guarantees of trustworthiness." Second, it must be offered as evidence of a material fact. Third, the court must determine that the statement "is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts." This requirement is intended to insure that only statements which have high probative value and necessity may qualify for admission under the residual exceptions. Fourth, the court must determine that "the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence."

It is intended that the residual hearsay exceptions will be used very rarely, an only in exceptional circumstances. The committee does not intend to establish a broad license for trial judges to admit hearsay statements that do not fall within one of the other exceptions contained in rules 803 and 804(b). The residual exceptions are not meant to authorize major judicial revisions of the hearsay rule, including its present exceptions. Such major revisions are best accomplished by legislative action. It is intended that in any case in which evidence is sought to be admitted under these subsections, the trial judge will exercise no less care, reflection and caution than the courts did under the common law in establishing the now-recognized exceptions to the hearsay rule.

In order to establish a well-defined jurisprudence, the special facts and circumstances which, in the court's judgment, indicates that the statement has a sufficiently high degree of trustworthiness and necessity to justify its admission should be stated on the record. It is expected that the court will give the opposing party a full and adequate opportunity to contest the admission of any statement sought to be introduced under these subsections.

Notes of Conference Committee, House Report No. 93-1597. Rule 803 defines when hearsay statements are admissible in evidence even though the declarant is available as a witness. The Senate amendments make three changes in this rule.

The House bill provides in subsection (6) that records of a regularly conducted "business" activity qualify for admission into evidence as an exception to the hearsay rule. "Business" is defined as including "business, profession, occupation and calling of every kind." The Senate amendment drops the requirement that the records be those of a "business" activity and eliminates the definition of "business." The Senate amendment provides that records are admissible if they are records of a regularly conducted "activity."

The Conference adopts the House provision that the records must be those of a regularly conducted "business" activity. The Conferees changed the definition of "business" contained in the House provision in order to make it clear that the records of institutions and associations like schools, churches and hospitals are admissible under this provision. The records of public schools and hospitals are also covered by Rule 803(8), which deals with public records and reports.

The Senate amendment adds language, not contained in the House bill, that refers to another rule that was added by the Senate in another amendment ([proposed] Rule 804(b)(5)--Criminal law enforcement records and reports [deleted]).

In view of its action on [proposed] Rule 804(b)(5) (Criminal law enforcement records and reports) [deleted], the Conference does not adopt the Senate amendment and restores the bill to the House version.

The Senate amendment adds a new subsection, (24), which makes admissible a hearsay statement not specifically covered by any of the previous twenty-three subsections, if the statement has equivalent circumstantial guarantees of trustworthiness and if the court determines that (A) the statement is offered as evidence of a material fact; (B) the statement is more probative on the point for which it is offered than any other evidence the proponent can procure through reasonable efforts; and (C) the general purposes of these rules and the interests of justice will best be served by admission of the statement into evidence.

The House bill eliminated a similar, but broader, provision because of the conviction that such a provision injected too much uncertainty into the law of evidence regarding hearsay and impaired the ability of a litigant to prepare adequately for trial.

The Conference adopts the Senate amendment with an amendment that provides that a party intending to request the court to use a statement under this provision must notify any adverse party of this intention as well as of the particulars of the statement, including the name and address of the declarant. This notice must be given sufficiently in advance of the trial or hearing to provide any adverse party with a fair opportunity to prepare to contest the use of the statement.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1997 amendments. The contents of Rule 803(24) and Rule 804(b)(5) have been combined and transferred to a new Rule 807. This was done to facilitate additions to Rules 803 and 804. No change in meaning is intended.

Notes of Advisory Committee on 2000 amendments. The amendment provides that the foundation requirements of Rule 803(6) can be satisfied under certain circumstances without the expense and inconvenience of producing time-consuming foundation witnesses. Under current law, courts have generally required foundation witnesses to testify. *See, e.g., Tongil Co., Ltd. v. Hyundai Merchant Marine Corp., 968 F.2d 999* (9th Cir. 1992) (reversing a judgment based on business records where a qualified person filed an affidavit but did not testify). Protections are provided by the authentication requirements of Rule 902(11) for domestic records, Rule 902(12) for foreign records in civil cases, and *18 U.S.C. § 3505* for foreign records in criminal cases.

Notes of Advisory Committee on 2011 amendments. The language of Rule 803 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

FEDERAL RULES OF EVIDENCE
ARTICLE IX. AUTHENTICATION AND IDENTIFICATION

Rule 902. Evidence That Is Self-Authenticating

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) *Domestic Public Documents That Are Sealed and Signed.* A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) *Domestic Public Documents That Are Not Sealed but Are Signed and Certified.* A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal--or its equivalent--that the signer has the official capacity and that the signature is genuine.

(3) *Foreign Public Documents.* A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and official position of the signer or attester--or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) *Certified Copies of Public Records.* A copy of an official record--or a copy of a document that was recorded or filed in a public office as authorized by law--if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a federal statute, or a rule prescribed by the Supreme Court.

(5) *Official Publications.* A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) *Newspapers and Periodicals.* Printed material purporting to be a newspaper or periodical.

(7) *Trade Inscriptions and the Like.* An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) *Acknowledged Documents.* A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) *Commercial Paper and Related Documents.* Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) *Presumptions Under a Federal Statute.* A signature, document, or anything else that a federal statute declares to be presumptively or prima facie genuine or authentic.

(11) *Certified Domestic Records of a Regularly Conducted Activity.* The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court. Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them.

(12) *Certified Foreign Records of a Regularly Conducted Activity.* In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

HISTORY:

(Jan. 2, 1975, P.L. 93-595, § 1, 88 Stat. 1944; Oct. 1, 1987; Nov. 1, 1988; Dec. 1, 2000.)

(As amended Dec. 1, 2011.)

Notes of Advisory Committee on Rules. Case law and statutes have, over the years, developed a substantial body of instances in which authenticity is taken as sufficiently established for purposes of admissibility without extrinsic evidence to that effect, sometimes for reasons of policy but perhaps more often because practical considerations reduce the possibility of unauthenticity to a very small dimension. The present rule collects and incorporates these situations, in some instances expanding them to occupy a larger area which their underlying considerations justify. In no instance is the opposite party foreclosed from disputing authenticity.

Paragraph (1). The acceptance of documents bearing a public seal and signature, most often encountered in practice in the form of acknowledgments or certificates authenticating copies of public records, is actually of broad application. Whether theoretically based in whole or in part upon judicial notice, the practical underlying considerations are that forgery is a crime and detection is fairly easy and certain. 7 Wigmore § 2161, p. 638; *California Evidence Code § 1452*. More than 50 provisions for judicial notice of official seals are contained in the United States Code.

Paragraph (2). While statutes are found which raise a presumption of genuineness of purported official signatures in the absence of an official seal, 7 Wigmore § 2167; *California Evidence Code § 1453*, the greater ease of effecting a forgery under these circumstances is apparent. Hence this paragraph of the rule calls for authentication by an officer who has a seal. Notarial acts by members of the armed forces and other special situations are covered in paragraph (10).

Paragraph (3) provides a method for extending the presumption of authenticity to foreign official documents by a procedure of certification. It is derived from Rule 44(a)(2) of the Rules of Civil Procedure but is broader in applying to public documents rather than being limited to public records.

Paragraph (4). The common law and innumerable statutes have recognized the procedure of authenticating copies of public records by certificate. The certificate qualifies as a public document, receivable as authentic when in conformity with paragraph (1), (2), or (3). Rule 44(a) of the Rules of Civil Procedure and Rule 27 of the Rules of Criminal Procedure have provided authentication procedures of this nature for both domestic and foreign public records. It will be observed that the certification procedure here provided extends only to public records, reports, and recorded documents, all including data compilations, and does not apply to public documents generally. Hence documents provable when presented in original form under paragraphs (1), (2), or (3) may not be provable by certified copy under paragraph (4).

Paragraph (5). Dispensing with preliminary proof of the genuineness of purportedly official publications, most commonly encountered in connection with statutes, court reports, rules, and regulations, has been greatly enlarged by statutes and decisions. 5 Wigmore § 1684. Paragraph (5), it will be noted, does not confer admissibility upon all official publications; it merely provides a means whereby their authenticity may be taken as established for purposes of admissibility. Rule 44(a) of the Rules of Civil Procedure has been to the same effect.

Paragraph (6). The likelihood of forgery of newspapers or periodicals is slight indeed. Hence no danger is apparent in receiving them. Establishing the authenticity of the publication may, of course, leave still open questions of authority and responsibility for items therein contained. See 7 Wigmore § 2150. Cf. *39 U.S.C. § 4005(b)*, public advertisement prima facie evidence of agency of person named, in postal fraud order proceeding; Canadian Uniform Evidence Act, Draft of 1936, printed copy of newspaper prima facie evidence that notices or advertisements were authorized.

Paragraph (7). Several factors justify dispensing with preliminary proof of genuineness of commercial and mercantile labels and the like. The risk of forgery is minimal. Trademark infringement involves serious penalties. Great efforts are devoted to inducing the public to buy in reliance on brand names, and substantial protection is given them. Hence the fairness of this treatment finds recognition in the cases. *Curtiss Candy Co. v. Johnson, 163 Miss. 426, 141 So. 762 (1932)*, Baby Ruth candy bar; *Doyle v. Continental Baking Co., 262 Mass. 516, 160 N.E. 325 (1928)*, loaf of bread; *Weiner v. Mager & Throne, Inc., 167 Misc 338, 3 N.Y.S.2d 918 (1938)*, same. And see W.Va. Code 1966, § 47-3-5, trade-mark on bottle prima facie evidence of ownership. Contra, *Keegan v. Green Giant Co., 150 Me. 283, 110 A.2d 599 (1954); Murphy v. Campbell Soup Co., 62 F.2d 564 (1st Cir. 1933)*. Cattle brands have received similar acceptance in the western states. Rev.Code Mont.1947, § 46-606; *State v. Wolfley, 75 Kan. 406, 89 P. 1046 (1907)*; Annot., *11 L.R.A. (N.S.) 87*. Inscriptions on trains and vehicles are held to be prima facie evidence of ownership or control. *Pittsburgh, Ft. W. & C. Ry. v. Callaghan, 157 Ill. 406, 41 N.E. 909 (1895)*; 9 Wigmore § 2510a. See also the provision of *19 U.S.C. § 1615(2)* that marks, labels, brands, or stamps indicating foreign origin are prima facie evidence of foreign origin of merchandise.

Paragraph (8). In virtually every state, acknowledged title documents are receivable in evidence without further proof. Statutes are collected in 5 Wigmore § 1676. If this authentication suffices for documents of the importance of those affecting titles, logic scarcely permits denying this method when other kinds of documents are involved. Instances of broadly inclusive statutes are *California Evidence Code § 1451* and *N.Y.CPLR 4538*, McKinney's Consol. Laws 1963.

Paragraph (9). Issues of the authenticity of commercial paper in federal courts will usually arise in diversity cases, will involve an element of a cause of action or defense, and with respect to presumptions and burden of proof will be controlled by *Erie Railroad Co. v. Tompkins, 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188 (1938).* Rule 302, supra. There may, however, be questions of authenticity involving lesser segments of a case or the case may be one governed by federal common law. *Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943).* Cf. *United States v. Yazell, 382 U.S. 341, 86 S.Ct. 500, 15 L.Ed.2d 404 (1966).* In these situations, resort to the useful authentication provisions of the Uniform Commercial Code is provided for. While the phrasing is in terms of "general commercial law," in order to avoid the potential complication inherent in borrowing local statutes, today one would have difficulty in determining the general commercial law without referring to the Code. See *Williams v Walker-Thomas-Furniture Co., 121 U.S.App.D.C. 315, 350 F.2d 445 (1965).* Pertinent Code provisions are sections 1-202, 3-307, and 3-510, dealing with third-party documents, signatures on negotiable instruments, protests, and statements of dishonor.

Paragraph (10). The paragraph continues in effect dispensations with preliminary proof of genuineness provided in various Acts of Congress. See, for example, *10 U.S.C. § 936*, signature, without seal, together with title, prima facie evidence of authenticity of acts of certain military personnel who are given notarial power; *15 U.S.C. § 77f(a)*, signature on SEC registration presumed genuine; *26 U.S.C. § 6064*, signature to tax return prima facie genuine.

Notes of Committee on the Judiciary, House Report No. 93-650. Rule 902(8) as submitted by the Court referred to certificates of acknowledgment "under the hand and seal of" a notary public or other officer authorized by law to take acknowledgments. The Committee amended the Rule to eliminate the requirement, believed to be inconsistent with the law in some States, that a notary public must affix a seal to a document acknowledged before him. As amended the Rule merely requires that the document be executed in the manner prescribed by State law.

The Committee approved Rule 902(9) as submitted by the Court. With respect to the meaning of the phrase "general commercial law", the Committee intends that the Uniform Commercial Code, which has been adopted in virtually every State, will be followed generally, but that federal commercial law will apply where federal commercial paper is involved. See *Clearfield Trust Co. v. United States, 318 U.S. 363 (1943).* Further, in those instances in which the issues are governed by *Erie R. Co. v. Tompkins, 304 U.S. 64 (1938),* State law will apply irrespective of whether it is the Uniform Commercial Code.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 1988 amendments. The amendment is technical. No substantive change is intended.

Notes of Advisory Committee on 2000 amendments. The amendment adds two new paragraphs to the rule on self-authentication. It sets forth a procedure by which parties can authenticate certain records of regularly conducted activity, other than through the testimony of a foundation witness. See the amendment to Rule 803(6). *18 U.S.C. § 3505* currently provides a means for certifying foreign records of regularly conducted activity in criminal cases, and this amendment is intended to establish a similar procedure for domestic records, and for foreign records offered in civil cases.

A declaration that satisfies *28 U.S.C. § 1746* would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.

The notice requirement in Rules 902(11) and (12) is intended to give the opponent of the evidence a full opportunity to test the adequacy of the foundation set forth in the declaration.

Notes of Advisory Committee on 2011 amendments. The language of Rule 902 has been amended as part of the restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent to change any result in any ruling on evidence admissibility.

18 U.S.C. § 3505

(a)(1) In a criminal proceeding in a court of the United States, a foreign record of regularly conducted activity, or a copy of such record, shall not be excluded as evidence by the hearsay rule if a foreign certification attests that -
(A) such record was made, at or near the time of the occurrence of the matters set forth, by (or from information transmitted by) a person with knowledge of those matters;
(B) such record was kept in the course of a regularly conducted business activity;
(C) the business activity made such a record as a regular practice; and
(D) if such record is not the original, such record is a duplicate of the original;
unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.
(2) A foreign certification under this section shall authenticate such record or duplicate.
(b) At the arraignment or as soon after the arraignment as practicable, a party intending to offer in evidence under this section a foreign record of regularly conducted activity shall provide written notice of that intention to each other party. A motion opposing admission in evidence of such record shall be made by the opposing party and determined by the court before trial. Failure by a party to file such motion before trial shall constitute a waiver of objection to such record or duplicate, but the court for cause shown may grant relief from the waiver.
(c) As used in this section, the term -
(1) "foreign record of regularly conducted activity" means a memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, maintained in a foreign country;
(2) "foreign certification" means a written declaration made and signed in a foreign country by the custodian of a foreign record of regularly conducted activity or another qualified person that, if falsely made, would subject the maker to criminal penalty under the laws of that country; and
(3) "business" includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

§ 902.13 Certified Records of a Regularly Conducted Activity

[1] Domestic Records

Certified domestic records of a regularly conducted activity are self-authenticating.[1] Under Rule 902(11), the original or a copy[2] of a domestic record of a regularly conducted activity is self-authenticating if it meets the requirements of Rule 803(6)(A)–(C), "as shown by a certification of the custodian or another qualified person that complies with a federal statute or a rule prescribed by the Supreme Court."[3] In other words, Rule 902(11) extends Rule 803(6) "by allowing a written foundation in lieu of an oral one."[4] See § 803.08 concerning the foundation for the business records exception.

Rule 803(6)(D) provides that a document may be qualified as a record of a regularly conducted activity "by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification."[5] Thus, a certificate complying with Rule 902(11) could replace the testimony of the record's custodian.[6] A declaration that complies with Title 26, Section 1746 of the United States Code would satisfy the declaration requirement of Rule 902(11), as would any comparable certification under oath.[7]

There is a notice requirement when offering a record of a regularly conducted activity by certificate. The proponent of the evidence must give an adverse party reasonable notice of the intention to offer that evidence, and must make the record and certification available for inspection, "so that the party has a fair opportunity to challenge them."[8] This notice requirement is intended to give the adverse party a full opportunity to test the adequacy of the foundation set forth in the certification.[9] Thus, this provision does not affect the right of the opponent to challenge the authenticity of the records; it only relieves the proponent of the burden of presenting a live witness

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[1] Fed. R. Evid. 902(11).

[2] *See* Fed. R. Evid. 1001(d), (e) (definitions of "original" and "duplicate" for purposes of best evidence rule).

[3] Fed. R. Evid. 902(11).

[4] **Written foundation.** United States v. Adefehinti, 510 F.3d 319, 326–327 (D.C. Cir. 2007) (foundation was sufficient because witness "was sufficiently familiar with the [business's] practice and testified that such [records] were made as part of that practice").

[5] Fed. R. Evid. 803(D).

[6] *See* Fed. R. Evid. 803(6); *see* § 803.11[1].

[7] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2]; *see* 28 U.S.C. § 1746 (requirements for unsworn declarations under penalty of perjury).

[8] Fed. R. Evid. 902(11); *compare* United States v. Jordan, 544 F.3d 656, 669–670 (6th Cir. 2008) (trial court did not abuse its discretion when it ordered government to correct its Rule 902(11) notice of intent to offer T-Mobile records to reflect correct telephone number, and when it ordered government to promptly serve defendant in person) *with* Latman v. Burdette, 2004 U.S. App. LEXIS 11212 (9th Cir. 2004) (unpublished opinion; bank account records alleged to be records of debtors' undisclosed bank account were inadmissible as self-authenticating, in part because notice and inspection requirements of Fed. R. Evid. 902(11) were not met).

[9] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2].

at trial. An opponent who believes that the declarant has not established a sufficient foundation will have to present evidence that demonstrates the failure.

[2] Foreign Records

Certified foreign records of a regularly conducted activity are self-authenticating.[10] Under Rule 902(12), in a civil case, the original or a copy[11] of a foreign record of a regularly conducted activity is self-authenticating if it meets the requirements for a self-authenticating domestic record under Rule 902(11) (see [1], *above*), "modified as follows: the certification, rather than complying with a federal statute or Supreme Court rule, must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed."[12]

Under Rule 803(6), that a document may be qualified as a record of a regularly conducted activity "by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification."[13] Thus, a certificate complying with Rule 902(12) could replace the testimony of the record's custodian.[14]

Rule 902(12) is intended to establish a procedure for foreign records of a regularly conducted activity in civil cases that is similar to the procedure set forth in Title 18 of the United States Code, Section 3505 for certifying foreign records in criminal cases.[15]

There is a notice requirement when offering a business record by certificate. The proponent of the evidence must give an adverse party reasonable notice of the intention to offer that evidence, and must make the record and certification available for inspection, "so that the party has a fair opportunity to challenge them."[16] This notice requirement is intended to give an adverse party a full opportunity to test the adequacy of the foundation set forth in the declaration.[17] Thus, this provision does not affect the right of the adverse party to challenge the authenticity of the business records; it only relieves the proponent of the burden of presenting a live witness at trial. An adverse party who believes that the declarant has not established a sufficient

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[10] Fed. R. Evid. 902(12).

[11] *See* Fed. R. Evid. 1001(d), (e)(definitions of "original" and "duplicate" for purposes of best evidence rule), which are discussed in detail in Ch. 1001, *Definitions That Apply to This Article.*

[12] Fed. R. Evid. 902(12).

[13] Fed. R. Evid. 803(6)(D).

[14] *See* Fed. R. Evid. 803(6)(D).

[15] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2]; *see* 18 U.S.C. § 3505 (very similar provisions for admitting foreign records of regularly conducted activity in criminal cases); *see, e.g.*, United States v. Jawara, 474 F.3d 565, 584–585 (9th Cir. 2007) (test of 18 U.S.C. § 3505 for admission of foreign records was derived from Fed. R. Evid. 803(6); Gambian school examination records were properly admitted when accompanied by high school principal's certification confirming accuracy of test records prepared by examination agency).

[16] Fed. R. Evid. 902(11), 902(12); *see* United States v. Olguin, 684 F.3d 384, 390–391 (5th Cir. 2011) (government satisfied Rule 902(11)'s pre-trial notice requirement by providing records six months before trial and giving written notice of its intent to introduce records five days before trial).

[17] Advisory Committee Note to 2000 Amendment, reprinted in § 902App.04[2].

foundation will have to present evidence that demonstrates the failure.

CHAPTER 31-04
GENERAL PROVISIONS

31-04-01. Methods of taking testimony of witnesses.
Testimony of witnesses may be taken by:
1. Affidavit.
2. Deposition.
3. Oral examination.

31-04-02. Affidavit defined.
An affidavit is a written declaration under oath made without notice to the adverse party.

31-04-03. Deposition defined.
A deposition is a written declaration under oath made upon notice to the adverse party for the purpose of enabling the adverse party to attend and cross-examine, or upon written interrogatories.

31-04-04. Oral examination defined.
An oral examination is an examination in the presence of the jury or tribunal which is to decide the fact or act upon it, the testimony being heard by the jury or tribunal from the lips of the witness.

31-04-04.1. Videotaped statement of child sexual offense victim - Criteria for admission as evidence.
1. In any prosecution for a violation of section 12.1-20-03, 12.1-20-03.1, 12.1-20-04, 12.1-20-05, 12.1-20-06, 12.1-20-07, or 12.1-20-11 in which the victim is less than fifteen years of age, the oral statement of the child victim may be recorded before trial and, subject to subsection 2, is admissible as evidence in any court proceeding regarding the offense if the following conditions are satisfied:
   a. The court determines there is reasonable cause to believe that the child victim would experience serious emotional trauma as a result of in-court participation in the proceeding;
   b. The accused must be given reasonable written notice of the time and place for taking the videotaped statement;
   c. The accused must be afforded the opportunity to hear and view the testimony from outside the presence of the child by means of a two-way mirror or other similar method that will ensure that the child cannot hear or see the accused;
   d. The accused must have the opportunity to communicate orally with counsel by electronic means while the videotaped statement is being made; and
   e. All questioning must be done by the prosecutor or counsel for the defendant unless the defendant is an attorney pro se. An attorney pro se must conduct all questioning from outside the presence of the child. Upon request of any of the parties or upon the determination of the court that it would be appropriate, the court may appoint a person who is qualified as an expert and who has dealt with the child in a therapeutic setting to aid the court throughout proceedings conducted under this section and the court may appoint a guardian ad litem to protect the interests of the child.
2. A child victim's videotaped statement is admissible pursuant to subsection 1 if the court finds that the child is unavailable as a witness to testify at trial and, upon viewing the videotape recording before it is shown to the jury, determines that it is sufficiently reliable and trustworthy and that the interests of justice will best be served by admission of the statement into evidence. For purposes of this subsection, "unavailable" includes a determination, based on medical or psychological evidence or expert testimony, that the child would suffer serious emotional or psychological strain if

required to testify at trial. The court, in making its findings and determinations under this subsection, shall consider at least the following:

a. The nature of the offense;
b. The significance of the child's testimony to the case;
c. The child's age;
d. The child's psychological maturity and understanding; and
e. The nature, degree, and duration of potential injury to the child from testifying.

31-04-05. Use of affidavits.

An affidavit may be used:

1. To verify a pleading.
2. To prove the service of a summons, notice, or other process in an action.
3. To obtain a provisional remedy.
4. To obtain an examination of a witness.
5. To obtain a stay of proceedings.
6. Upon a motion.
7. In any other case permitted by law.

31-04-06. How proof of publication made.

Proof of the publication of a document or notice required by law or by court order to be published in a newspaper may be made by the affidavit of the publisher of the newspaper, or the publisher's designee, annexed to a copy of the document or notice, specifying the paper in which and the times when the publication was made.

31-04-07. Where and how affidavits may be made.

An affidavit may be made in or out of this state before any person authorized to administer an oath.

31-04-08. Procedure for securing affidavit of person refusing to make the same.

When any party intends to make or oppose a motion in any court and it shall be necessary for the party to have the affidavit of any person who shall have refused to make the same, such court, by order, may appoint a referee to take the affidavit or deposition of such person. Such person may be subpoenaed and compelled to attend and make an affidavit before such referee the same as before a referee to whom an action is referred to try an issue, and the fees of such referee for such service shall be three dollars per day.

31-04-09. No title required to affidavits.

It shall not be necessary to entitle an affidavit in the action, but an affidavit made without a title or with a defective title shall be as valid and effectual for every purpose as if it were duly entitled, if it intelligibly refers to the action or proceeding in which it is made.

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.

31-04-11. Mediation - Inadmissibility of evidence - Exception.

When persons agree to conduct and participate in a mediation for the purpose of compromising, settling, or resolving a dispute, evidence of anything said or of any admission made in the course of the mediation is inadmissible as evidence and disclosure may not be compelled in any subsequent civil proceeding except as provided in this section. This section does not limit the compulsion nor the admissibility of evidence if:

1. The evidence relates to a crime, civil fraud, or a violation under the Uniform Juvenile Court Act;
2. The evidence relates to a breach of duty by the mediator;
3. The validity of the mediated agreement is in issue; or
4. All persons who conducted or otherwise participated in the mediation consent to disclosure.

31-04-12. Expressions of empathy.

1. A statement, affirmation, gesture, or conduct of a health care provider, or health care provider's employee or agent, which expresses apology, sympathy, commiseration, condolence, compassion, or benevolence to a patient or to a patient's relative or representative is not admissible as evidence of liability or as an admission against interest in a civil action, arbitration proceeding, or administrative hearing regarding the health care provider.
2. For purposes of this section, unless the context otherwise requires:
   a. "Health care provider" means:
      (1) An individual licensed or certified by the state to deliver health care;
      (2) A hospital or clinic, including an ambulatory surgery center or group of physicians operating a clinic or outpatient care facility, or a professional corporation or other professional entity comprised of such health care providers as permitted by the laws of this state; and
      (3) A nursing, basic, or assisted living facility licensed by this state or by any other health care organization.
   b. "Relative" means an individual who has a relationship to the patient by marriage, blood, or adoption.
   c. "Representative" means a legal guardian, attorney, person designated to make decisions on behalf of a patient under a health care directive, or any person recognized in law or custom as a patient's agent.

UNITED STATES CODE SERVICE

TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE
PART V. PROCEDURE
CHAPTER 115. EVIDENCE; DOCUMENTARY

§ 1746. Unsworn declarations under penalty of perjury

Wherever, under any law of the United States or under any rule, regulation, order, or requirement made pursuant to law, any matter is required or permitted to be supported, evidenced, established, or proved by the sworn declaration, verification, certificate, statement, oath, or affidavit, in writing of the person making the same (other than a deposition, or an oath of office, or an oath required to be taken before a specified official other than a notary public), such matter may, with like force and effect, be supported, evidenced, established, or proved by the unsworn declaration, certificate, verification, or statement, in writing of such person which is subscribed by him, as true under penalty of perjury, and dated, in substantially the following form:

(1) If executed without the United States: "I declare (or certify, verify, or state) under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on (date).

(Signature)".

(2) If executed within the United States, its territories, possessions, or commonwealths: "I declare (or certify, verify, or state) under penalty of perjury that the foregoing is true and correct. Executed on (date).

(Signature)".

HISTORY:

(Added Oct. 18, 1976, P.L. 94-550, § 1(a), 90 Stat. 2534.)

13.0744.01000

Sixty-third
Legislative Assembly
of North Dakota

HOUSE BILL NO. 1406

Introduced by

Representatives Hogan, K. Koppelman, Silbernagel

Senators Axness, Grabinger

A BILL for an Act to create and enact a new section to chapter 31-04 of the North Dakota Century Code, relating to unsworn declarations; and to amend and reenact sections 31-04-02 and 31-04-07 of the North Dakota Century Code, relating to affidavits; and to provide a penalty.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. AMENDMENT. Section 31-04-02 of the North Dakota Century Code is amended and reenacted as follows:

31-04-02. Affidavit defined.

An affidavit ~~is a written declaration under oath made without notice to the adverse party~~means a sworn written declaration made before an officer authorized to administer oaths or an unsworn written declaration made under penalty of perjury as provided in section 3 of this Act.

SECTION 2. AMENDMENT. Section 31-04-07 of the North Dakota Century Code is amended and reenacted as follows:

31-04-07. Where ~~and how~~ affidavits may be made.

An affidavit may be made in or out of this state ~~before any person authorized to administer an oath~~.

SECTION 3. A new section to chapter 31-04 of the North Dakota Century Code is created and enacted as follows:

Unsworn declarations under penalty of perjury - Penalty.

1. Except as provided in subsection 3, whenever, under any law of this state or under any rule, regulation, order, or requirement made under the law of this state, any matter is required or permitted to be supported, evidenced, established, or proved by an individual's sworn written declaration, verification, certificate, oath, or affidavit, the matter may with like force and effect be supported, evidenced, established, or proved

1 by the unsworn written declaration, certificate, verification, or statement that is
2 subscribed by the individual as true under penalty of perjury in substantially the
3 following form:
4 a. If executed within the state: "I declare (or certify, verify, or state) under penalty of
5 perjury that the foregoing is true and correct.
6 _____ _____
7 (Date and place) (Signature)"
8 b. If executed in any place outside the state: "I declare (or certify, verify, or state)
9 under penalty of perjury under the laws of the state of North Dakota that the
10 foregoing is true and correct.
11 _____ _____
12 (Date and place) (Signature)"
13 2. A deliberate falsification in any declaration under this section constitutes the offense of
14 perjury as provided in section 12.1-11-01 and is punishable as the offense of false
15 statements as provided in section 12.1-11-02. A declaration under penalty of perjury
16 executed in accordance with any provision of state law is not limited to the official
17 proceedings referenced in section 12.1-11-01.
18 3. This section does not apply to writings requiring an acknowledgment, deposition, oath
19 of office, or oath required to be taken before a special official other than a notary
20 public.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 17, 2013

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

The Supreme Court has approved amendments to Rule 45 that will take effect March 1, 2013. The Court also approved amendments to N.D.R.Civ.P. 26 on discovery that will take effect at the same time. During the discussion of the amendments to Rule 45, a member of the Court asked why there was no metadata language in Rule 45 similar to the new language approved for Rule 26. The Court requested that the committee discuss this issue.

The metadata language in Rule 26 was based on amendments to North Carolina's Rule 26. As discussed in the attached article, "Metadata, E-Discovery, and E-Public Records in North Carolina," including metadata in the definition of "electronically stored information" is a step forward because this establishes that at least some metadata is discoverable. On the other hand, the definition of metadata in Rule 26 is fairly restrictive and this places limits on the discovery of metadata.

Because Rule 45 is not part of the "Depositions and Discovery" chapter of the Rules of Civil Procedure, the Rule 26 metadata definition does not directly apply to gathering of evidence under Rule 45. North Carolina did not include the metadata language in their Rule 45 amendments, copy attached.

In discussing the amendments to Rules 26 and 45, the Court concluded that there could be some rationale that would support having limits on the collection of metadata in the formal discovery process while not imposing similar limits on metadata gathering through a subpoena. At the same time, it seems likely that parties seeking to limit production of

metadata evidence in response to a subpoena would use the definition in Rule 26 to support arguments against expansive metadata gathering.

For the sake of discussion, proposed amendments to Rule 45 that integrate language from Rule 26 on metadata are attached.

1

2 RULE 45. SUBPOENA

3 (a) In General.

4 (1) Form and Contents.

5 (A) Requirements. Every subpoena must:

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

7 number;

8 (ii) command each person to whom it is directed to do the following at a specified

9 time and place: attend and testify; produce designated documents, electronically stored

10 information, or tangible things in that person's possession, custody or control; or permit the

11 inspection of premises; and

12 (iii) if the subpoena seeks only pretrial or prehearing production of documents,

13 electronically stored information, or tangible things or the inspection of premises , set out the

14 text of the notice in Rule 45(f).

15 (B) Command to Attend a Deposition; Notice of the Recording Method. A subpoena

16 commanding attendance at a deposition must state the method for recording the testimony.

17 (C) Combining or Separating a Command to Produce or Permit Inspection; Specifying

18 the Form for Electronically Stored Information. A command to produce documents,

19 electronically stored information, or tangible things or to permit the inspection of premises

20 may be included in a subpoena commanding attendance at a deposition, hearing or trial or

21 may be set out in a separate subpoena. A subpoena may specify the form or forms in which

22 electronically stored information is to be produced. The phrase "electronically stored
23 information" includes reasonably accessible metadata that will enable the party seeking
24 production to have the ability to access such information as the date sent, date received,
25 author, and recipients. The phrase does not include other metadata unless the party seeking
26 production and the subject of the subpoena agree otherwise or the court orders otherwise on
27 motion and a showing of good cause for the production of certain metadata.

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

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

36 (3) Subpoena in Out-of-State Action. N.D.R.Ct. 5.1 defines the procedure for
37 discovery or depositions in an out-of-state action.

38 (b) Service; Notice.

39 (1) Service of Subpoena.

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

42 (B) If the subpoena requires the person's attendance, fees for one day's attendance,

43 mileage and travel expense allowed by law must be tendered. If fees, mileage and travel
44 expense are not tendered with the subpoena, the person need not obey the subpoena. Fees,
45 mileage and travel expense need not be tendered if they are to be paid by the state or a
46 political subdivision.

47 (2) Service of Notices.

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

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

56 (C) Notice Mandatory Before Service of Subpoena. The notice required by Rule
57 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a
58 pretrial deposition, for pretrial production of documents, electronically stored information,
59 or tangible things or for the inspection of premises may be served.

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

61 (1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible
62 for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue
63 burden or expense on a person subject to the subpoena. The issuing court must enforce this

64 duty and impose an appropriate sanction, which may include lost earnings and reasonable
65 attorney's fees, on a party or attorney who fails to comply.
66 (2) Command to Produce Materials or Permit Inspection.
67 (A) Appearance Not Required. A person commanded to produce documents,
68 electronically stored information, or tangible things, or to permit the inspection of premises
69 need not appear in person at the place of production or inspection unless also commanded
70 to appear for a deposition, hearing or trial.
71 (B) Objections. A person commanded to produce documents or tangible things or to
72 permit inspection may serve on the party or attorney designated in the subpoena a written
73 objection to inspecting, copying, testing or sampling any or all of the materials or to
74 inspecting the premises or to producing electronically stored information in the form or forms
75 requested. The objection must be received before the earlier of 24 hours before the time
76 specified for compliance or ten days after the subpoena is served. If an objection is made, the
77 following rules apply:
78 (i) At any time, on notice to the commanded person, the serving party may move the
79 issuing court for an order compelling production or inspection.
80 (ii) These acts may be required only as directed in the order, and the order must
81 protect a person who is neither a party nor a party's officer from significant expense resulting
82 from compliance.
83 (3) Location.
84 (A) Resident Witness. A subpoena may require a resident of this state to attend a

85 deposition only in the county where the person resides, is employed or transacts business in
86 person, or at a convenient place ordered by the issuing court. A resident may be required to
87 attend a hearing or trial any place within this state.
88 (B) Nonresident Witness. A subpoena may require a nonresident of this state who is
89 served with a subpoena within this state to attend a deposition ,hearing or trial in any county
90 of this state.
91 (4) Quashing or Modifying a Subpoena.
92 (A) When Required. On timely motion, the issuing court must quash or modify a
93 subpoena that:
94 (i) fails to allow a reasonable time to comply;
95 (ii) requires attendance beyond the location requirements of Rule 45 (c)(3);
96 (iii) requires disclosure of privileged or other protected matter, if no exception or
97 waiver applies; or
98 (iv) subjects a person to undue burden.
99 (B) When Permitted. To protect a person subject to or affected by a subpoena, the
100 issuing court may, on motion, quash or modify the subpoena if it requires:
101 (i) disclosing a trade secret or other confidential research, development, or commercial
102 information; or
103 (ii) disclosing an unretained expert's opinion or information that does not describe
104 specific occurrences in dispute and results from the expert's study that was not requested by
105 a party.

106 (C) Specifying Conditions as an Alternative. In the circumstances described in Rule
107 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance
108 or production under specified conditions if the serving party:
109 (i) shows a substantial need for the testimony or material that cannot otherwise be met
110 without undue hardship; and
111 (ii) ensures that the subpoenaed person will be reasonably compensated.
112 (d) Duties in Responding to a Subpoena.
113 (1) Producing Documents or Electronically Stored Information.
114 (A) Documents. A person responding to a subpoena to produce documents shall
115 produce them as they are kept in the ordinary course of business or shall organize and label
116 them to correspond to the categories in the demand.
117 (B) Form for Producing Electronically Stored Information. If a subpoena does not
118 specify a form for producing electronically stored information, the person responding must
119 produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable
120 form or forms.
121 (C) Electronically Stored Information Produced in Only One Form. The person
122 responding need not produce the same electronically stored information in more than one
123 form.
124 (D) Inaccessible Electronically Stored Information. The person responding need not
125 provide discovery of electronically stored information from sources that the person identifies
126 as not reasonably accessible because of undue burden or cost. On motion to compel discovery

127 or to quash, the person from whom discovery is sought must show that the information
128 sought is not reasonably accessible because of undue burden or cost. If that showing is made,
129 the court may nonetheless order discovery from such sources if the requesting party shows
130 good cause, considering the limitations of Rule ~~26(b)(2)(A)~~ 26(b)(1)(B). The court may
131 specify conditions for discovery.

132 (2) Claiming Privilege or Protection.

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

135 (i) expressly make the claim; and

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

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

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

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

155 "You may object to this subpoena by sending or delivering a written objection, stating
156 your valid reason, to [Insert the name and address of the party, or attorney representing the
157 party seeking production of documents, electronically stored information, or tangible things
158 or the inspection of premises]. Any objection must be received within ten days after you
159 receive the subpoena. If the time specified in the subpoena for compliance is less than ten
160 days, any objection must be received at least 24 hours before the time specified for
161 compliance.

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

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

168 EXPLANATORY NOTE

169 Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995;
170 March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1,
171 2012; March 1, 2013;_____.

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

180 Rule 45 was amended, effective March 1, 2008, in response to the 2006 federal
181 revision. Language was added to the rule to clarify that production of electronically stored
182 materials may be demanded by subpoena and to provide guidance in dealing with requests
183 for electronically stored materials.

184 Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments
185 to Fed.R.Civ.P. 45. The language and organization of the rule were changed to make the rule
186 more easily understood and to make style and terminology consistent throughout the rules.

187 Subparagraph (a)(1)(A)(iii) was amended, effective March 1, 2013, to clarify that the
188 notice required by subdivision (f) must be made part of the subpoena when the subpoena
189 seeks only pretrial or prehearing production of documents, electronically stored information,

190 or tangible things or the inspection of premises.

191 (Paragraph (a)(3) was amended, effective March 1, 2013, to direct persons to
192 N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in an action
193 pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for interstate depositions
194 and discovery.

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

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

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

203 Sources: Joint Procedure Committee Minutes of _____;
204 September 27, 2012, pages 8-10; January 26-27, 2012, pages 3-7; September 30, 2011, pages
205 12-15; April 28-29, 2011, page 25; September 23-24, 2010, pages 32-33; April 24-25, 2008,
206 pages 22-25; September 28-29, 2006, pages 25-27; April 27-28, 2006, pages 14-15; January
207 29-30, 1998, page 20; January 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April
208 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3;
209 February 19-20, 1987, pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979,
210 page 12; Fed.R.Civ.P. 45.

211 Statutes Affected:

212 Superseded: N.D.C.C. § 31-05-22

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

Metadata, E-Discovery, and E-Public Records in North Carolina

Posted By Kara Millonzi On September 15, 2011 @ 10:02 AM In Open Government | 2 Comments

The "digital age" has been upon us for many years, but the legal system continues to struggle to keep pace with the fundamental transformation it has caused in the way people communicate and generate and store information. The discovery of electronic information in civil litigation (e-discovery) is one area that presents particular difficulties for public sector entities. Providing access to electronic information pursuant to public records laws is another. The sheer volume of data that is now created and stored electronically and the dispersion of that data across multiple platforms and repositories poses ever-increasing costs and burdens on governments forced to search, retrieve, and review electronic information pursuant to even routine public records or discovery requests. A significant body of case law has developed over the last several years to address the myriad of issues posed by operating (and litigating) in the digital age. One of the many issues that continue to vex litigants, courts, and commentators is the preservation and production of metadata.

As described in a previous post [1], metadata is information describing the history, tracking, or management of an electronic document. There is no single, "dictionary" definition of metadata. The term has come to be understood, at least in the legal community, to describe a variety of information associated with electronic documents or files. Examples of metadata include a document's or file's designation, dates it was created, last accessed, or modified, its author, and its edit history. Metadata also may include information that is recorded by a computer to assist in storing and retrieving a file, or aid in its searchability. Finally, metadata allows the functioning of routines within a document or file, such as cell formulae in spreadsheets. Some metadata is supplied by the creator or author of electronic information; other metadata is created automatically by a computer. Metadata often is not static—at least some of the metadata associated with a particular electronic record may be modified multiple times and even deleted.

This post details the newly amended North Carolina Rules of Civil Procedure as they relate to the discovery of metadata in civil litigation in North Carolina courts. It compares the new North Carolina requirements regarding the production of metadata with those imposed under the Federal Rules of Civil Procedure and discusses potential implications for North Carolina litigants. Finally, the post suggests that the newly-amended NCRCP may provide some guidance to public sector entities as to the extent that metadata must be produced pursuant to public records requests.

Metadata and the FRCP

Recognizing the difficulties of operating in the digital age, at least with respect to e-discovery, the United States Supreme Court promulgated amendments to the Federal Rules of Civil Procedure (FRCP) in 2006, which were subsequently approved by the United States Congress, to specifically address the discovery of electronic information in federal courts. Among other things, the 2006 amendments explicitly authorize the discovery of electronically stored information (ESI). *See* FRCP 34. ESI is defined to include "writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations stored in any medium from which information can be obtained…." According to the committee note to FRCP 34, the definition of ESI is "intended to be broad enough to cover all current types of computer-based information, and flexible enough to encompass future changes and developments." The definition allows discovery obligations to adjust to new technologies and, at least in theory, prevents litigants from evading discovery obligations by claiming that the definition of document does not keep pace with the technological changes.

The FRCP, however, do not directly address whether, and to what extent, metadata is subject to civil discovery. FRCP 26 emphasizes the need of parties to litigation to discuss the form or forms of production, including any issues relating to metadata, and resolve any differences without resorting to court intervention. In the event that parties do not agree, the producing party has the option to produce ESI either as it is "ordinarily maintained" or in a form or forms that are "reasonably usable." *See* FRCP 34. If

the receiving party is not satisfied it may file a motion to compel production in a specified form, including a form that includes any and all of the metadata associated with the ESI.

To date courts have articulated conflicting views over whether the default production forms include metadata. For example, in *Williams v. Sprint/United Management Co.*, 230 F.R.D. 640 (D.Kan. 2005), a federal district court held that "[b]ased on [] emerging standards, ... when a party is ordered to produce electronic documents as they are maintained in the ordinary course of business, the producing party should produce the electronic documents with their metadata intact . . . ." Contrast that with *Wyeth v. Impax Laboratories, Inc.*, 248 F.R.D. 169 (D.Del. 2006), in which another federal district court held that "[e] merging standards of electronic discovery appear to articulate a general presumption against the production of metadata." Although these cases are several years old, they continue to accurately represent the spectrum of divergent views about the discoverability of metadata. And these views are largely informed both by the specific metadata at issue and the specific context of a particular case. Collectively, the decisions provide no firm rules and offer very little prospective guidance to current and future litigants on whether, when, and what metadata must be preserved and produced.

Metadata and the NCRCP

The General Assembly recently adopted amendments to the North Carolina Rules of Civil Procedure (NCRCP) to address the discovery of electronic information in North Carolina state courts. *See* **S.L. 2011-199 (HB 380).** [2] (The amendments are effective as of October 1, 2011.) The NCRCP amendments mirror the 2006 amendments to the FRCP in many respects, including specifically authorizing the discovery of ESI. There is one significant difference, though. The newly amended NCRCP 26 defines "electronically stored information" to include

> reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata.

NCRCP 26 arguably is more expansive than FRCP 34 because it appears to require the production of at least some metadata. At the same time, it also appears to limit the types of metadata that must be produced, at least absent consent of the producing party or court order. So, what type or types of metadata are discoverable under NCRCP 26? First, the metadata must be "reasonably accessible." The term "reasonably accessible" has come to be understood in the e-discovery realm as information that may be retrieved, stored, and produced without undue burden or cost to a party. Thus, whether metadata is reasonably accessible will depend on a variety of factors, including the type of metadata at issue, and the manner in which the party creates and stores information.

In addition to being reasonably accessible, NCRCP 26 seems to further limit automatic access to metadata to certain types of information. The Rule specifies that the type of metadata that is discoverable is "such information as the date sent, date received, author, and recipients." This is a non-exclusive list but it does appear to set some parameters as to what type of metadata a party may be required to produce. The listed metadata items all relate to e-mail transmissions. One possible interpretation of this provision is that the only metadata that is automatically discoverable is reasonably accessible metadata associated with e-mails or other electronic transmissions. That seems unduly restrictive, though. For example, it is hard to imagine that the General Assembly intended to allow the discovery of e-mail header information, but not the formulae that underlie spreadsheet information. The requirement may be better understood as allowing discovery of reasonably accessible metadata that provides necessary contextual information about the underlying information (which likely will vary on a case-by-case basis).

There is a further wrinkle to the analysis. Newly amended NCRCP 34 specifies that unless otherwise agreed by the parties to the litigation or ordered by the court, a party must produce ESI "in a reasonably usable form or forms." FRCP 34 imposes a similar requirement and the committee note to that requirement states that "if the responding party ordinarily maintains the information it is producing in a way that makes it searchable by electronic means, the information should not be produced in a form that removes or significantly degrades this feature." If North Carolina courts interpret NCRCP 34 analogously, then a party may be required to produce ESI with enough additional metadata to maintain the searchability of the information.

Only time (and judicial or legislative guidance) will tell how expansive (or restrictive) the requirement to produce metadata is under NCRCP 26. (Note that the new Act directs the Revisor of Statutes to publish as annotations to the amended rules "all explantory comments of the drafters of this act, the North Carolina Bar Association Litigation Section E-Discovery Committee, as the Revisor may deem appropriate." The explanatory comments also may give some insight as to how to interpret this requirement.) Until further direction is provided, litigants are well-advised to attempt to work together to address issues relating to the preservation and production of metadata.

Metadata, the NCRCP and E-Public Records

Public sector officials may have reason to focus on the recent amendments to NCRCP even if they currently are not involved in civil litigation. That is because public agencies in North Carolina routinely provide copies of ESI pursuant to public records requests. As discussed in previous posts (see **here** [1], **here** [3], **here** [4], and **here** [5]) it is unclear whether, and to what extent, the metadata associated with a public record is part of that public record for purposes of public access. Based on the few reported decisions in other states, it is likely that at least some metadata associated with a public record that is retained in an electronic format must be produced (at least upon specific request). And the courts that have addressed this issue in the public records context have relied heavily on the emerging case law relating to the discovery of metadata in civil litigation. Given this, North Carolina courts may look to the newly amended NCRCP 26 (and eventual case law interpretations of this Rule) for guidance as to the types of metadata that must be produced pursuant to a public records request.

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[1] post: **http://sogweb.sog.unc.edu/blogs/localgovt/?p=1984**
[2] S.L. 2011-199 (HB 380).:
http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H380v4.pdf
[3] here: **http://sogweb.sog.unc.edu/blogs/localgovt/?p=2064**
[4] here: **http://sogweb.sog.unc.edu/blogs/localgovt/?p=3417**
[5] here: **http://sogweb.sog.unc.edu/blogs/localgovt/?p=4023**

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

"**Rule 45. Subpoena.**

(a) Form; Issuance. –

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

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

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

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

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

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

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

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

(b) Service. –

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

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

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

(c) Protection of Persons Subject to Subpoena. –

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

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

business, or if no such records are in the custodian's custody, an affidavit to that effect. When the copies of records are personally delivered under this subdivision, a receipt shall be obtained from the person receiving the records. Any original or certified copy of records or an affidavit delivered according to the provisions of this subdivision, unless otherwise objectionable, shall be admissible in any action or proceeding without further certification or authentication. Copies of hospital medical records tendered under this subdivision shall not be open to inspection or copied by any person, except to the parties to the case or proceedings and their attorneys in depositions, until ordered published by the judge at the time of the hearing or trial. Nothing contained herein shall be construed to waive the physician-patient privilege or to require any privileged communication under law to be disclosed.

(3) Written objection to subpoenas. – Subject to subsection (d) of this rule, a person commanded to appear at a deposition or to produce and permit the inspection and copying of ~~records~~ records, books, papers, documents, electronically stored information, or tangible things may, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, serve upon the party or the attorney designated in the subpoena written objection to the subpoena, setting forth the specific grounds for the objection. The written objection shall comply with the requirements of Rule 11. Each of the following grounds may be sufficient for objecting to a subpoena:

a. The subpoena fails to allow reasonable time for compliance.

b. The subpoena requires disclosure of privileged or other protected matter and no exception or waiver applies to the privilege or protection.

c. The subpoena subjects a person to an undue ~~burden.~~burden or expense.

d. The subpoena is otherwise unreasonable or oppressive.

e. The subpoena is procedurally defective.

(4) Order of court required to override objection. – If objection is made under subdivision (3) of this subsection, the party serving the subpoena shall not be entitled to compel the subpoenaed person's appearance at a deposition or to inspect and copy materials to which an objection has been made except pursuant to an order of the court. If objection is made, the party serving the subpoena may, upon notice to the subpoenaed person, move at any time for an order to compel the subpoenaed person's appearance at the deposition or the production of the materials designated in the subpoena. The motion shall be filed in the court in the county in which the deposition or production of materials is to occur.

(5) Motion to quash or modify subpoena. – A person commanded to appear at a trial, hearing, deposition, or to produce and permit the inspection and copying of records, books, papers, documents, electronically stored information, or other tangible things, within 10 days after service of the subpoena or before the time specified for compliance if the time is less than 10 days after service, may file a motion to quash or modify the subpoena. The court shall quash or modify the subpoena if the subpoenaed person demonstrates the existence of any of the reasons set forth in subdivision (3) of this subsection. The motion shall be filed in the court in the county in which the trial, hearing, deposition, or production of materials is to occur.

(6) Order to compel; expenses to comply with subpoena. – When a court enters an order compelling a deposition or the production of records, books, papers, documents, electronically stored information, or other tangible things, the order shall protect any person who is not a party or an agent of a party from significant expense resulting from complying with the subpoena. The court may order that the person to whom the subpoena is addressed will be reasonably compensated for the cost of producing the records, books, papers,

documents, electronically stored information, or tangible things specified in the subpoena.

(7) Trade secrets; confidential information. – When a subpoena requires disclosure of a trade secret or other confidential research, development, or commercial information, a court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or when the party on whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship, the court may order a person to make an appearance or produce the materials only on specified conditions stated in the order.

(8) Order to quash; expenses. – When a court enters an order quashing or modifying the subpoena, the court may order the party on whose behalf the subpoena is issued to pay all or part of the subpoenaed person's reasonable expenses including attorney's fees.

(d) Duties in Responding to Subpoenas. –

(1) Form of response. – A person responding to a subpoena to produce ~~documents~~ records, books, documents, electronically stored information, or tangible things shall produce them as they are kept in the usual course of business or shall organize and label ~~the documents~~ them to correspond with the categories in the request.

(2) Form of producing electronically stored information not specified. – If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it ordinarily is maintained or in a reasonably useable form or forms.

(3) Electronically stored information in only one form. – The person responding need not produce the same electronically stored information in more than one form.

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

~~(2)~~(5) Specificity of objection. – When information subject to a subpoena is withheld on the objection that it is subject to protection as trial preparation materials, or that it is otherwise privileged, the objection shall be made with specificity and shall be supported by a description of the nature of the communications, records, books, papers, documents, electronically stored information, or other tangible things not produced, sufficient for the requesting party to contest the objection.

(d1) Opportunity for Inspection of Subpoenaed Material. – A party or attorney responsible for the issuance and service of a subpoena shall, within five business days after the receipt of material produced in compliance with the subpoena, serve all other parties with notice of receipt of the material produced in compliance with the subpoena and, upon request, shall provide all other parties a reasonable opportunity to copy and inspect such material at the expense of the inspecting party.

(e) Contempt; Expenses to Force Compliance With Subpoena. –

(1) Failure by any person without adequate excuse to obey a subpoena served upon the person may be deemed a contempt of court. Failure by any party without adequate cause to obey a subpoena served upon the party shall also subject the party to the sanctions provided in Rule 37(d).

(2) The court may award costs and attorney's fees to the party who issued a subpoena if the court determines that a person objected to the subpoena or filed a motion to quash or modify the subpoena, and the objection or motion

was unreasonable or was made for improper purposes such as unnecessary delay."

SECTION 7. The Revisor of Statutes shall cause to be printed, as annotations to the published General Statutes, all explanatory comments of the drafters of this act, the North Carolina Bar Association Litigation Section E-Discovery Committee, as the Revisor may deem appropriate.

SECTION 8. This act becomes effective October 1, 2011, and shall apply to actions filed on or after that date.

In the General Assembly read three times and ratified this the 14th day of June, 2011.

s/ Walter H. Dalton
President of the Senate

s/ Thom Tillis
Speaker of the House of Representatives

s/ Beverly E. Perdue
Governor

Approved 11:42 a.m. this 23rd day of June, 2011

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 17, 2013

RE: Rule 65, N.D.R.Civ.P., Injunctions

The extensive rewrite of Rule 65 that the committee prepared took effect July 1, 2012. Committee member Larry Boschee has examined it and suggests that some amendments could be made to clarify that the rule applies to permanent injunctions in addition to temporary restraining orders and preliminary injunctions.

Mr. Boschee has outlined his proposed changes in an e-mail, copy attached. Staff has prepared proposed amendments, attached, based on his suggestions. Also attached is a copy of Fed.R.Civ.P. 65 for reference.

1

2 RULE 65. INJUNCTIONS

3 (a) Temporary restraining order. A temporary restraining order is short-lived
4 injunctive relief that the court may issue with less notice than required for a preliminary
5 injunction. It prevents irreparable injury until the court decides whether to issue a preliminary
6 injunction.

7 (1) Motion; Proposed complaint; Filing. The party moving for a temporary restraining
8 order must submit a proposed complaint seeking injunctive relief with the motion. The
9 moving party must file the motion, proposed complaint, and other supporting documents no
10 later than the next court business day after submission. If the moving party does not timely
11 file these documents, an issued temporary restraining order terminates at the end of that next
12 business day.

13 (2) Notice. The party moving for a temporary restraining order must submit an
14 affidavit reciting the efforts made to give the opposing party's attorney, if known, or if not
15 known, the opposing party, reasonable notice of the motion or the reasons why notice should
16 not be required. Reasonable notice means any form of notice reasonably calculated to give
17 actual notice of the date and time of submission of the motion to the court, affording the
18 opposing party an opportunity to be heard.

19 (3) Basis for relief. The court may issue a temporary restraining order only if it finds:

20 (A) appropriate injunction grounds;

21 (B) a clear need for immediate relief; and

22 (C) either:

23 (i) the moving party gave reasonable notice or made reasonable efforts to give

24 reasonable notice to the opposing party's attorney, if known, or if not known, to the opposing

25 party; or

26 (ii) a substantial reason exists for not giving notice.

27 (4) Preliminary injunction hearing date. Unless for good cause the court directs

28 otherwise, a party that obtains a temporary restraining order must obtain a preliminary

29 injunction hearing time no less than 21 days, and no more than 28 days, from the temporary

30 restraining order date.

31 (5) Temporary restraining order expiration. A temporary restraining order expires at

32 the end of the 28th day after issuance unless the court for good cause directs a shorter time

33 or the opposing party consents to a longer time. If the party that obtained the temporary

34 restraining order cannot obtain a preliminary-injunction hearing within 21 to 28 days of the

35 temporary restraining order date, the court may extend the temporary restraining order until

36 the earliest possible time the motion may be heard. At or after the preliminary injunction

37 hearing, the court may extend the temporary restraining order for no more than 14 days if

38 necessary for deciding the preliminary injunction motion, unless for good cause a longer time

39 is necessary. The court must enter the reasons for any extension in the record.

40 (6) Temporary restraining order service. A party that obtains a temporary restraining

41 order must serve the order and the notice for the preliminary injunction hearing on the

42 opposing party as follows:

43 (A) Summons and complaint not served. If the summons and complaint have not yet
44 been served under Rule 4, then with the summons and complaint under Rule 4.
45 (B) Summons and complaint served. If the summons and complaint have been served
46 under Rule 4, then under Rule 5.
47 (7) Motion to dissolve or modify.
48 (A) Notice and hearing. If the opposing party received less than four days actual
49 notice of the temporary restraining order motion before the temporary restraining order was
50 issued, the opposing party may move to dissolve or modify the order on four days actual
51 notice, or on shorter notice the court for good cause sets, to the party that obtained the order.
52 (B) Burden. The party that obtained the temporary restraining order has the burden of
53 justifying its continuation.
54 (8) Not extended by implication. A temporary restraining order remains a temporary
55 restraining order even if the opposing party appears in opposition to the temporary restraining
56 order motion or the court denies a motion to dissolve or modify the temporary restraining
57 order.
58 (b) Preliminary injunction. A preliminary injunction prevents irreparable injury until
59 the court decides whether to issue a permanent injunction at trial. A court may issue a
60 preliminary injunction only after the Rule 65(b)(1) required notice of hearing. The moving
61 party must file and serve the summons and complaint under Rule 4 no later than the time the
62 party serves and files the notice of motion and motion for a preliminary injunction.
63 (1) Notice and hearing. Unless for good cause the court directs otherwise, the court

64 may issue a preliminary injunction only when the moving party serves the preliminary
65 injunction motion, supporting brief, and supporting materials on the opposing party at least
66 14 days before the hearing date.

67 (2) Briefing schedule. Unless for good cause the court directs otherwise, the briefing
68 schedule for a preliminary-injunction motion is as follows:

69 (A) Temporary restraining order in place. When the moving party moves for a
70 preliminary injunction with a temporary restraining order in place, the moving party must
71 serve the preliminary injunction motion, supporting brief, and supporting materials within
72 seven days after the temporary restraining order date. The opposing party must serve the
73 response brief and supporting materials within seven days after service of the moving party's
74 brief. Only on order of the court, for good cause shown, may the moving party serve a reply
75 brief. Unless good cause is shown, the court must dissolve the temporary restraining order
76 if the party that obtained it does not timely serve the preliminary injunction motion,
77 supporting brief, and supporting materials.

78 (B) Temporary restraining order not in place. When the moving party moves for a
79 preliminary injunction without a temporary restraining order in place, the moving party must
80 serve the preliminary-injunction motion, supporting brief, and supporting materials on the
81 opposing party. The opposing party must serve the response brief and supporting materials
82 within seven days after service of the moving party's brief. The moving party must serve any
83 reply brief within five days after service of the opposing party's response brief.

84 (3) Interim relief. If at the hearing on a preliminary injunction motion brought without

85 a temporary restraining order in place, the moving party shows appropriate injunction
86 grounds and the clear need for immediate relief, the court may on its own motion issue a
87 temporary restraining order effective for no more than 14 days. The court may extend this
88 order for good cause, but must enter the reasons for any extension in the record.

89 (c) Unnamed parties. Any unnamed party that a temporary restraining order or
90 preliminary injunction would or does directly affect may be heard at an injunction hearing.

91 (d) Evidence.

92 (1) Temporary restraining order evidence. Unless the court directs otherwise, evidence
93 on a motion for a temporary restraining order, or a motion to dissolve or modify a temporary
94 restraining order, must be by affidavit. An affidavit supporting or opposing a motion for a
95 temporary restraining order or a motion to dissolve or modify a temporary restraining order
96 may be based on information and belief. The affiant must identify those parts of the affidavit
97 based on personal knowledge and those based on information and belief.

98 (2) Preliminary injunction evidence. Unless the court directs otherwise, evidence on
99 a motion for a preliminary injunction may be by oral testimony. An affidavit supporting or
100 opposing a preliminary injunction must be based on personal knowledge and served with the
101 parties' briefs. The court may permit additional affidavits to be filed at or after the hearing.

102 (e) Trial on permanent injunction. If the court issues a preliminary injunction, the trial
103 must be held within 180 days from the date a temporary restraining order or preliminary
104 injunction was first issued unless the court for good cause extends the time or the opposing
105 party consents to a longer time. The court should issue its decision within 60 days after the

106 trial, unless for good cause a longer time is necessary. The court must enter the reasons for
107 any extension in the record.
108 (f) Previous denial. A party moving for a temporary restraining order or preliminary
109 injunction must state in the motion whether a judge previously denied the motion or a similar
110 motion based on the same transaction or occurrence or series of transactions or occurrences,
111 and if so, the identity of the judge or judges who denied the motion.
112 (g) Findings; Contents and scope of injunction.
113 (1) Findings. The court must state its findings of fact and conclusions of law under
114 Rule 52 supporting the denial, issuance, dissolution or modification of an injunction. If the
115 court issues a temporary restraining order without reasonable notice to the opposing party's
116 attorney or the opposing party, the court must state why it issued the order without that
117 notice.
118 (2) Contents.
119 (A) In general. ~~A~~ Every temporary restraining order, ~~or~~ preliminary injunction, and
120 permanent injunction must:
121 (i) state its terms specifically.
122 (ii) describe in reasonable detail, and not by referring to the complaint or other
123 document, the acts restrained or required.
124 (B) Temporary restraining order. Unless the court specifically finds the opposing party
125 received four day's actual notice of the temporary restraining order motion before the
126 temporary restraining order was issued, the temporary restraining order must state that the

127 opposing party may move to dissolve or modify the order under Rule 65(a)(7) on four day's
128 actual notice, or on shorter notice the court for good cause sets, to the party that obtained the
129 order.

130 (3) Persons bound. A temporary restraining order, ~~or~~ preliminary injunction, and
131 permanent injunction binds only the following that receive actual notice of it by personal
132 service or otherwise:

133 (A) the parties;

134 (B) the parties' officers, agents, servants, employees, and attorneys; and

135 (C) other parties that are in active concert or participation with anyone described in
136 Rule 65(g)(3)(A) or (B).

137 (4) Clarification. Any party subject to, or potentially subject to, a temporary
138 restraining order, ~~or~~ preliminary injunction, or permanent injunction may move the court to
139 clarify whether the order or injunction would apply to specified conduct.

140 (h) Security.

141 (1) In general. Except for good cause shown and recited in the record, a temporary
142 restraining order or preliminary injunction does not become effective for enforcement until
143 the moving party posts security in a form and amount that the court considers sufficient to
144 pay the enjoined party's costs and damages if the court ultimately decides the moving party
145 was not entitled to the order or injunction.

146 (2) No security required. The United States, the State of North Dakota, or an agency
147 or political subdivision of either, or an officer of any of these acting in an official capacity,

148 need not provide security.

149 (3) Form of security. The moving party may give the security in any form the court
150 considers sufficient to secure the opposing party. Security may include a surety on a bond or
151 other undertaking, a cashier's check, a certified check, a letter of credit, or a negotiable bond.

152 (4) Additional security. A party enjoined under a temporary restraining order or
153 preliminary injunction may move the court for security if the court did not initially require
154 it, or additional or different security if the court did require it. If the court decides on motion
155 that security, or different or additional security, is required, it must vacate the order or
156 injunction unless the party that obtained it provides the form and amount of security that the
157 court requires within a reasonable time established by the court.

158 (5) Not a cap. The amount of security does not limit the costs and damages a
159 wrongfully-enjoined party may recover from the party that obtained the temporary restraining
160 order or preliminary injunction.

161 (i) Contempt. The court may punish disobedience of a temporary restraining order,
162 preliminary injunction, or permanent injunction as a contempt.

163 (j) Other laws not modified. This rule does not modify statutes or rules that prescribe
164 specific procedures for obtaining injunctive relief in any of the following actions:

165 (1) actions affecting employer and employee;

166 (2) actions for divorce, child or spousal support, parental rights and responsibilities,
167 or domestic violence; or

168 (3) actions involving disorderly conduct.

169 EXPLANATORY NOTE

170 Rule 65 was amended, effective July 1, 1981; July 1, 2012; _____.

171 ~~As amended,~~ Rule 65 is designed to provide a framework for injunction procedure in
172 North Dakota. It integrates elements of the state's injunction procedure statutes, now
173 superseded, with the federal rule on injunctions, Fed.R.Civ.P. 65, and concepts from
174 injunction rules from other states.

175 Grounds for granting a permanent injunction are listed in N.D.C.C. § 32-05-04.
176 Grounds for granting a temporary restraining order or preliminary injunction are listed in
177 N.D.C.C. § 32-06-02.

178 The court should promptly hear and decide a motion to dissolve or modify a temporary
179 restraining order. If the parties stipulate, the court may convert the hearing on the motion to
180 dissolve or modify into the preliminary injunction hearing.

181 If the parties stipulate, the court may advance the trial and consolidate it with the
182 preliminary injunction hearing. The parties and the court should take care, however, to
183 preserve the right a party may have to a jury trial on issues separate from the issue of
184 injunctive relief.

185 An opposing party may combine a Rule 65(h)(4) motion for security, or additional or
186 different security, with a Rule 65(a)(7) motion to dissolve or modify a temporary restraining
187 order.

188 Subdivision (g) was amended, effective _____, to include references
189 to permanent injunctions.

190 Sources: Joint Procedure Committee Minutes of _____; April 28-

191 29, 2011, pages 2-8; January 27-28, 2011, pages 2-29; April 29-30, 2010, pages 27-28;

192 January 28-29, 2010, page 14; January 17-18, 1980, pages 5-6.

193 Statutes Affected:

194 Superseded: N.D.C.C. §§ 32-06-03, 32-06-04, 32-06-05, 32-06-06, 32-06-07, 32-06-

195 08, 32-06-09, 32-06-10, 32-06-11.

196 Considered: N.D.C.C. chs. 12.1-31.2, 14-07.1, 32-05; §§ 32-06-01, 32-06-02.

FEDERAL RULES OF CIVIL PROCEDURE
TITLE VIII. PROVISIONAL AND FINAL REMEDIES

Rule 65. Injunctions and Restraining Orders

(a) Preliminary Injunction.
(1) *Notice.* The court may issue a preliminary injunction only on notice to the adverse party.
(2) *Consolidating the Hearing with the Trial on the Merits.* Before or after beginning a hearing on a motion for a preliminary injunction, the court may advance the trial on the merits and consolidate it with the hearing. Even when consolidation is not ordered, evidence that is received on the motion and that would be admissible at trial becomes part of the trial record and need not be repeated at trial. But the court must preserve any party's right to a jury trial.

(b) Temporary Restraining Order.
(1) *Issuing Without Notice.* The court may issue a temporary restraining order without written or oral notice to the adverse party or its attorney only if:
(A) specific facts in an affidavit or a verified complaint clearly show that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition; and
(B) the movant's attorney certifies in writing any efforts made to give notice and the reasons why it should not be required.
(2) *Contents; Expiration.* Every temporary restraining order issued without notice must state the date and hour it was issued; describe the injury and state why it is irreparable; state why the order was issued without notice; and be promptly filed in the clerk's office and entered in the record. The order expires at the time after entry--not to exceed 14 days--that the court sets, unless before that time the court, for good cause, extends it for a like period or the adverse party consents to a longer extension. The reasons for an extension must be entered in the record.
(3) *Expediting the Preliminary-Injunction Hearing.* If the order is issued without notice, the motion for a preliminary injunction must be set for hearing at the earliest possible time, taking precedence over all other matters except hearings on older matters of the same character. At the hearing, the party who obtained the order must proceed with the motion; if the party does not, the court must dissolve the order.
(4) *Motion to Dissolve.* On 2 days' notice to the party who obtained the order without notice--or on shorter notice set by the court--the adverse party may appear and move to dissolve or modify the order. The court must then hear and decide the motion as promptly as justice requires.

(c) Security. The court may issue a preliminary injunction or a temporary restraining order only if the movant gives security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. The United States, its officers, and its agencies are not required to give security.

(d) Contents and Scope of Every Injunction and Restraining Order.
(1) *Contents.* Every order granting an injunction and every restraining order must:
(A) state the reasons why it issued;
(B) state its terms specifically; and
(C) describe in reasonable detail--and not by referring to the complaint or other document--the act or acts restrained or required.
(2) *Persons Bound.* The order binds only the following who receive actual notice of it by personal service or otherwise:
(A) the parties;
(B) the parties' officers, agents, servants, employees, and attorneys; and
(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

(e) Other Laws Not Modified. These rules do not modify the following:
(1) any federal statute relating to temporary restraining orders or preliminary injunctions in actions affecting employer and employee;
(2) *28 U.S.C. § 2361*, which relates to preliminary injunctions in actions of interpleader or in the nature of interpleader; or
(3) *28 U.S.C. § 2284*, which relates to actions that must be heard and decided by a three-judge district court.

(f) Copyright Impoundment. This rule applies to copyright-impoundment proceedings.

HISTORY:
(Amended March 19, 1948; Oct. 20, 1949; July 1, 1966; Aug. 1, 1987; Dec. 1, 2001; Dec. 1, 2007.)
(As amended Dec. 1, 2009.)

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Other provisions:

Notes of Advisory Committee. *Note to Subdivisions (a) and (b).* These are taken from U.S.C., Title 28, former § 381 (Injunctions; preliminary injunctions and temporary restraining orders).

Note to Subdivision (c). Except for the last sentence, this is substantially U.S.C., Title 28, former § 382 (Injunctions; security on issuance of). The last sentence continues the following and similar statutes which expressly except the United States or an officer or agency thereof from such security requirements: *U.S.C., Title 15, §§ 77t(b), 78u(e)*, and *79r(f)* (Securities and Exchange Commission). It also excepts the United States or an officer or agency thereof from such security requirements in any action in which a restraining order or interlocutory judgment of injunction issues in its favor whether there is an express statutory exception from such security requirements or not.

See U.S.C., Title 6 (Official and Penal Bonds) for bonds by surety companies.

Note to Subdivision (d). This is substantially U.S.C., Title 28, former § 383 (Injunctions; requisites of order; binding effect).

Note to Subdivision (e). The words "relating to temporary restraining orders and preliminary injunctions in actions affecting employer and employee" are words of description and not of limitation.

Compare former Equity Rule 73 (Preliminary Injunctions and Temporary Restraining Orders) which is substantially equivalent to the statutes.

For other statutes dealing with injunctions which are continued, see e.g.:

U.S.C., Title 28, former:

§ 46 (Suits to enjoin orders of Interstate Commerce Commission to be against United States)
§ 47 (Injunctions as to orders of Interstate Commerce Commission; appeal to Supreme Court; time for taking)
§ 378 (Injunctions; when granted)
§ 379 (Injunctions; stay in State courts)
§ 380 (Injunctions; alleged unconstitutionality of State statutes; appeal to Supreme Court)
§ 380a (Injunctions; constitutionality of Federal statute; application for hearing; appeal to Supreme Court)

U.S.C., Title 7:

§ 216 (Court proceedings to enforce orders; injunction)
§ 217 (Proceedings for suspension of orders)

U.S.C., Title 15:

§ 4 (Jurisdiction of courts; duty of district attorney; procedure)
§ 25 (Restraining violations; procedure)
§ 26 (Injunctive relief for private parties; exceptions)
§ 77t(b) (Injunctions and prosecutions of offenses)

Notes of Advisory Committee on 1946 amendments. It has been held that in actions on preliminary injunction bonds the district court has discretion to grant relief in the same proceeding or to require the institution of a new action on the bond. *Russell v. Farley, 105 U.S. 433, 466, 26 L. Ed. 1060 (1881).* It is believed, however, that in all cases the litigant should have a right to proceed on the bond in the same proceeding, in the manner provided in Rule 73(f) for a similar situation. The paragraph added to Rule 65(c) insures this result and is in the interest of efficiency. There is no reason why Rules 65(c) and 73(f) should operate differently. Compare § 50, sub. n of the Bankruptcy Act, *11 U.S.C. § 78*, sub. n, under which actions on all bonds furnished pursuant to the Act may be proceeded upon summarily in the bankruptcy court. See 2 Collier on Bankruptcy, 14th ed. by Moore and Oglebay, 1853-1854.

Notes of Advisory Committee on 1948 amendments. The amendment changed subdivision (e) in the following respects: in the first clause the amendment substituted the words "any statute of the United States" for the words "the Act of October 15, 1914, ch. 323, §§ 1 and 20 (38 Stat. 730), *U.S.C., Title 29, §§ 52* and *53*, or the Act of March 23, 1932, ch. 90 (47 Stat. 70), U.S.C., Title 29, ch. 6"; in the second clause of subdivision (e) the amendment substituted

the reference to "*Title 28, U.S.C., § 2361*" for the reference to "Section 24(26) of the Judicial Code as amended, *U.S.C., Title 28, § 41(26)*"; and the third clause was amended to read "*Title 28, U.S.C., § 2284*," etc., as at present, instead of "the Act of August 24, 1937, ch. 754, § 3, relating to actions to enjoin the enforcement of acts of Congress."

Notes of Advisory Committee on 1961 amendments. These changes conform to the amendment of Rule 54(b).

Notes of Advisory Committee on 1966 amendments. *Note to Subdivision (a)(2).* This new subdivision provides express authority for consolidating the hearing of an application for a preliminary injunction with the trial on the merits. The authority can be exercised with particular profit when it appears that a substantial part of the evidence offered on the application will be relevant to the merits and will be presented in such form as to qualify for admission on the trial proper. Repetition of evidence is thereby avoided. The fact that the proceedings have been consolidated should cause no delay in the disposition of the application for the preliminary injunction, for the evidence will be directed in the first instance to that relief, and the preliminary injunction, if justified by the proof, may be issued in the course of the consolidated proceedings. Furthermore, to consolidate the proceedings will tend to expedite the final disposition of the action. It is believed that consolidation can be usefully availed of in many cases.

The subdivision further provides that even when consolidation is not ordered, evidence received in connection with an application for a preliminary injunction which would be admissible on the trial on the merits forms part of the trial record. This evidence need not be repeated on the trial. On the other hand, repetition is not altogether prohibited. That would be impractical and unwise. For example, a witness testifying comprehensively on the trial who has previously testified upon the application for a preliminary injunction might sometimes be hamstrung in telling his story if he could not go over some part of his prior testimony to connect it with his present testimony. So also, some repetition of testimony may be called for where the trial is conducted by a judge who did not hear the application for the preliminary injunction. In general, however, repetition can be avoided with an increase of efficiency in the conduct of the case and without any distortion of the presentation of evidence by the parties. Since an application for a preliminary injunction may be made in an action in which, with respect to all or part of the merits, there is a right to trial by jury, it is appropriate to add the caution appearing in the last sentence of the subdivision. In such a case the jury will have to hear all the evidence bearing on its verdict, even if some part of the evidence has already been heard by the judge alone on the application for the preliminary injunction.

The subdivision is believed to reflect the substance of the best current practice and introduces no novel conception.

Note to Subdivision (b). In view of the possibly drastic consequences of a temporary restraining order, the opposition should be heard, if feasible, before the order is granted. Many judges have properly insisted that, when time does not permit of formal notice of the application to the adverse party, some expedient, such as telephonic notice to the attorney for the adverse party, be resorted to if this can reasonably be done. On occasion, however, temporary restraining orders have been issued without any notice when it was feasible for some fair, although informal notice to be given. See the emphatic criticisms in *Pennsylvania Rd. Co. v. Transport Workers Union, 278 F.2d 693, 694 (3d Cir. 1960); Arvida Corp. v. Sugarman, 259 F.2d 428, 429 (2d Cir. 1958); Lummus Co. v. Commonwealth Oil Ref. Co., Inc., 297 F.2d 80, 83 (2d Cir. 1961),* cert. denied *368 U.S. 986, 7 L. Ed. 2d 524, 82 S. Ct. 601 (1962).*

Heretofore the first sentence of subdivision (b), in referring to a notice "served" on the "adverse party" on which a "hearing" could be held, perhaps invited the interpretation that the order might be granted without notice if the circumstances did not permit of a formal hearing on the basis of a formal notice. The subdivision is amended to make it plain that informal notice, which may be communicated to the attorney rather than the adverse party, is to be preferred to no notice at all.

Before notice can be dispensed with, the applicant's counsel must give his certificate as to any efforts made to give notice and the reasons why notice should not be required. This certificate is in addition to the requirement of an affidavit or verified complaint setting forth the facts as to the irreparable injury which would result before the opposition could be heard.

The amended subdivision continues to recognize that a temporary restraining order may be issued without any notice when the circumstances warrant.

Note to Subdivision (c). Original Rules 65 and 73 contained substantially identical provisions for summary proceedings against sureties on bonds required or permitted by the rules. There was fragmentary coverage of the same subject in the *Admiralty Rules.* Clearly, a single comprehensive rule is required, and is incorporated as Rule 65.1.

Notes of Advisory Committee on 1987 amendments. The amendments are technical. No substantive change is intended.

Notes of Advisory Committee on 2001 amendments. *Note to Subdivision (f).* New subdivision (f) is added in conjunction with abrogation of the antiquated Copyright Rules of Practice adopted for proceedings under the 1909 Copyright Act. Courts have naturally turned to Rule 65 in response to the apparent inconsistency of the former Copyright Rules with the discretionary impoundment procedure adopted in 1976, *17 U.S.C. § 503(a)*. Rule 65 procedures also have assuaged well-founded doubts whether the Copyright Rules satisfy more contemporary requirements of due process. See, e.g., *Religious Technology Center v. Netcom On-Line Communications Servs., Inc., 923 F. Supp. 1231, 1260-1265 (N.D. Cal. 1995); Paramount Pictures Corp. v. Doe, 821 F. Supp. 82 (E.D.N.Y. 1993); WPOW, Inc. v. MRLJ Enterprises, 584 F. Supp. 132 (D.D.C. 1984).*

A common question has arisen from the experience that notice of a proposed impoundment may enable an infringer to defeat the court's capacity to grant effective relief. Impoundment may be ordered on an ex parte basis under subdivision (b) if the applicant makes a strong showing of the reasons why notice is likely to defeat effective relief. Such no-notice procedures are authorized in trademark infringement proceedings, see *15 U.S.C. § 1116(d)*, and courts have provided clear illustrations of the kinds of showings that support ex parte relief. See *Matter of Vuitton et Fils S.A., 606 F.2d 1 (2d Cir. 1979); Vuitton v. White, 945 F.2d 569 (3d Cir. 1991).* In applying the tests for no-notice relief, the court should ask whether impoundment is necessary, or whether adequate protection can be had by a less intrusive form of no-notice relief shaped as a temporary restraining order.

This new subdivision (f) does not limit use of trademark procedures in cases that combine trademark and copyright claims. Some observers believe that trademark procedures should be adopted for all copyright cases, a proposal better considered by Congressional processes than by rulemaking processes.

Notes of Advisory Committee on 2007 amendments. The language of Rule 65 has been amended as part of the general restyling of the Civil 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.

The final sentence of former Rule 65(c) referred to Rule 65.1. It is deleted as unnecessary. Rule 65.1 governs of its own force.

Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former *28 U.S.C. § 363*, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute, and also makes clear the proposition that an injunction can be enforced against a person who acts in concert with a party's officer, agent, servant, employee, or attorney.

Notes of Advisory Committee on 2009 amendments. The time set in the former rule at 10 days has been revised to 14 days. See the Note to Rule 6.

Hagburg, Mike

From: Larry L. Boschee [llb@pearce-durick.com]
Sent: Thursday, January 26, 2012 8:10 PM
To: Hagburg, Mike
Subject: Rule 65

Mike,

As we discussed, I believe the court may want to consider changing the language of proposed rule 65(g)(2)(A) and 65(g)(3) so that they will apply to permanent injunctions in addition to temporary restraining orders and preliminary injunctions, consistent with their federal counterparts.

I propose that the lead-in language for rule 65(g)(2)(A) state as follows: "Every temporary restraining order, preliminary injunction, and permanent injunction must:"

I propose that the lead-in language for rule 65(g)(3) state as follows: "A temporary restraining order, preliminary injunction, and permanent injunction binds only the following that receive actual notice of it by personal service or otherwise:"

I believe the court may also want to consider changing the language of proposed Rule 65(g)(4). I believe that this rule should also apply to permanent injunctions. I propose that this rule state as follows: "Any party subject to, or potentially subject to, a temporary restraining order, preliminary injunction, or permanent injunction may move the court to clarify whether the order or injunction would apply to specified conduct." Rule 65(g)(4) does not have a counterpart in the federal rules.

Best Regards,

Larry

Larry L. Boschee

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Note: This e-mail contains information from the law firm of Pearce & Durick that may be proprietary, confidential, or privileged. If you are not the intended recipient and have received this email in error, please delete it and contact me.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 17, 2013

RE: Rule 68, N.D.R.Civ.P., Offer of Settlement or Confession of Judgment; Tender

Attorney Steven Leibel has requested that the committee consider amendments to Rule 68 that would encourage plaintiffs to make offers of settlement by making it possible for them to receive double costs if the defendant rejects the offer and the plaintiff later obtains a more favorable result at trial. Mr. Leibel argues that the present rule provides no incentive for plaintiffs to make offers of settlement because, if they prevail at trial, they will receive costs regardless of how a defendant may have responded to an offer of settlement. Attorney Dave Peterson has submitted a letter supporting Mr. Leibel's proposal. Copies of both letters are attached.

Mr. Leibel, who has practiced in New Mexico, suggests that we use the New Mexico rule as a model. A copy of the New Mexico rule is attached as are proposed amendments to Rule 68 based on the New Mexico rule.

Mr. Leibel points out in his letter that Minnesota also provides incentives for plaintiffs to make offers of settlement. A copy of the Minnesota rule is attached.

Mr. Leibel has also provided an article, attached, that examines offers of settlement under Rule 68 and the New Mexico approach.

RULE 68. OFFER OF SETTLEMENT OR CONFESSION OF JUDGMENT; TENDER

(a) Offer of Settlement.

(1) Making an offer; Judgment on an accepted offer. At least 14 days before the trial begins, a party may serve on an opposing party an offer of settlement on specified terms, with the costs then accrued and to enter into a stipulation dismissing the claim or allowing judgment to be entered accordingly. A plaintiff may not make an offer of settlement under this rule until 120 days after the filing of a responsive pleading by the party defending against that claim. If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment on order of the court.

(2) Unaccepted offer. An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

(3) Offer after liability is determined. When one party's liability to another has been determined but the amount or extent of liability remains to be determined by further proceedings, any party may make an offer of settlement. It must be served at least seven days before a hearing to determine the amount or extent of liability, or as otherwise ordered by the court.

(4) Paying costs after an unaccepted offer. ~~If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs~~

22 ~~incurred after the offer was made.~~ If an offer of settlement made by a plaintiff is not accepted
23 and the judgment finally obtained by the plaintiff is more favorable than the offer, the
24 defendant must pay the plaintiff's costs, excluding attorney's fees, including double the
25 amount of costs incurred after the making of the offer. If an offer of settlement made by a
26 defendant is not accepted and the judgment finally obtained by the plaintiff is not more
27 favorable than the offer, the plaintiff must pay the costs, excluding attorney's fees, incurred
28 by the defendant after the making of the offer and the plaintiff may not recover its own costs
29 incurred after the making of the offer.
30 (b) Tender of money in lieu of judgment.
31 (1) Making a tender. If the action is for the recovery of money, instead of the offer of
32 settlement provided for in subdivision (a), any party may, at least 14 days before the trial
33 begins, tender to the other party the full amount to which that other party is entitled, together
34 with costs and disbursements then accrued.
35 (2) Unaccepted tender. If the tender is not accepted within 14 days, the offeree may
36 not have costs and disbursements unless the recovery is more than the sum tendered. The
37 offeror's costs and disbursements must be deducted from the recovery, but if they exceed the
38 recovery, the offeror is entitled to judgment for the excess. Evidence of the tender is not
39 admissible except in a proceeding to determine costs.
40 (c) Confession of judgment.
41 (1) A judgment by confession may be entered without action, either for money due or
42 to become due, or to secure any person against contingent liability on behalf of the defendant,

43 or both, in the manner prescribed by this subdivision.

44 (2) A written statement must be made, signed by the defendant, and verified by oath,

45 stating the following:

46 (A) the amount for which judgment may be entered and authorizing the entry of

47 judgment; and

48 (B) if the judgment to be confessed is for money due or to become due, the concise

49 facts underlying the debt, and showing that the debt is justly due or to become due; or

50 (C) if the judgment to be confessed is for the purpose of securing the plaintiff against

51 a contingent liability, it must state concisely the facts constituting the liability and must show

52 that the sum confessed does not exceed the amount of that liability.

53 (3) The statement must be presented to the court and, if it is found sufficient, the court

54 must order the clerk to enter judgment. The statement, order for judgment, and judgment

55 entered constitute the judgment roll.

56 (4) Execution of the judgment may be issued and enforced according to the statutes

57 of this state. If the amount due on the judgment is payable in installments that are not

58 currently due, the execution may be issued on that judgment for the collection of installments

59 due.

60 (5) The execution must be in the usual form, and must contain:

61 (A) a direction to the sheriff to collect the amount due on the judgment;

62 (B) the amount due on the judgment, including interest and costs; and

63 (C) the signature of the attorney or person issuing the execution.

64 (6) Notwithstanding the issue and collection of the execution, the judgment remains
65 as security for the future installments to become due. When future installments become due,
66 execution may be issued for its collection and enforcement.

67 EXPLANATORY NOTE

68 Rule 68 was amended, effective March 1, 2011;_____.

69 Subdivision (a) is derived from N.D.R.Civ.P. 68.

70 Paragraph (a)(1) was amended, effective March 1, 2011, to change the time period to
71 make an offer of settlement from 10 to 14 days before a trial begins.

72 Paragraph (a)(1) was amended, effective_____, to require the
73 plaintiff to wait 120 after receiving a responsive pleading to make an offer of settlement
74 under this rule.

75 Paragraph (a)(3) was amended, effective March 1, 2011, to change the time for
76 making an offer after liability is determined from 10 to 7 days before a hearing.

77 Paragraph (a)(4) was amended, effective_____, to provide
78 specifics on how costs are awarded if an offer of settlement is rejected and to increase the
79 amount of costs that may be awarded to the plaintiff. The amended language is derived from
80 N.M. Dist. Ct. R.C.P. 1-068.

81 Subdivision (b) is similar to subdivision (a) except the defendant may tender money
82 instead of making an offer of settlement. Unlike the offer of settlement, this can only be
83 made in an action for the recovery of money.

84 Subdivision (c) authorizes a judgment by confession to be entered without

85 commencing an action. ~~This subdivision is the same as Chapter 28-10, NDRC 1943, which~~

86 ~~previously governed the subject.~~ However, depending upon the facts of a particular case, a

87 confession of judgment obtained without notice and hearing may be vulnerable to

88 constitutional attack on due process grounds. See D. H. Overmyer Co. v. Frick Co., 405 U.S.

89 174, 92 S.Ct. 775, 31 L.Ed.2d 124 (1972). ~~Early in its history, the~~ The North Dakota

90 Supreme Court has ruled that the authority to confess judgment must be clear and explicit

91 and must be strictly followed. Underwood Farmers Elevator v. Leidholm, 460 N.W.2d 711

92 (N.D. 1990), Rasmussen v. Hagler, 108 N.W. 541 (N.D. 1906).

93 Rule 68 was amended, effective March 1, 2011, in response to the December 1, 2007,

94 revision of the Federal Rules of Civil Procedure. The language and organization of the rule

95 were changed to make the rule more easily understood and to make style and terminology

96 consistent throughout the rules.

97 Sources: Joint Procedure Committee Minutes of _____; April 29-

98 30, 2010, pages 16-17, 18-19; January 28-29, 2010, pages 19-20; May 21-22, 1987, pages

99 3-5; February 19-20, 1987, pages 17-19; September 18-19, 1986, pages 4-7; September 26-

100 27, 1985, pages 6, 9-10;January 17-18, 1980, pages 6-7; Fed.R.Civ.P. 68. Preliminary Draft

101 of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of

102 Civil Procedure, Federal Rules of Criminal Procedure and Rules Governing Section 2254

103 cases and Section 2255 proceedings in the United States District Courts, Proposed

104 Amendment to Fed.R.Civ.P. 68 (not adopted), September 1984. Preliminary Draft of

105 Proposed Amendments to the Federal Rules of Civil Procedure, Proposed Amendment to

106 Fed.R.Civ.P. 68 (not adopted), August 1983.

107 Cross Reference: N.D.R.Civ.P. 12 (Defenses and Objections When and How
108 Presented By Pleading or Motion - Motion for Judgment on Pleadings) and N.D.R.Civ.P. 67
109 (Deposit in Court); N.D.R.Ev. 408 (Compromise and Offers to Compromise).

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January 11, 2013

Hon. Mary Muehlen Maring
Justice of the Supreme Court
Chair of Joint Procedure Committee
State Capitol
Bismarck, ND 58505-0530

RE: Proposed Changes to North Dakota Rule of Civil Procedure 68

Dear Justice Maring,

I am writing to respectfully request that the Joint Committee on the Rules of Civil Procedure consider an amendment to North Dakota's Rule of Civil Procedure 68. In its current form, Rule 68 only provides half the parties to a lawsuit with incentive to realistically evaluate his or her contentions. Both basic fairness and North Dakota public policy should compel the Joint Committee to amend Rule 68 and make this procedure available to all.

North Dakota has a public policy of encouraging settlements and providing speedy economic relief to injured parties. *E.g. Blackburn, Nickels & Smith, Inc. v. Nat'l Farmers Union Property & Cas. Co.*, 452 N.W.2d 319, 323 (1990). Rule 68 is North Dakota's rule pertaining to offers of settlement, and is similar to the Federal rule. The purpose of Fed.R.Civ. P. 68 is to encourage settlement of litigation. *See Jundt v. Jurassic Resources Development, N.A., LLC.*, 2004 ND 65, ¶ 15, 677 N.W.2d 209, 214. Like its Federal counterpart, N.D.R.Civ.P. 68 contains a cost-shifting provision. This cost-shifting provision provides a "disincentive for plaintiffs from continuing to litigate a case after being presented with a reasonable offer." *Id.* (internal citation omitted). If a defendant serves an offer of settlement that is not accepted, and the plaintiff subsequently fails to obtain a judgment that is more favorable than the offer, the offeree must pay the costs incurred after the offer is made. *See* N.D.R.Civ.P. 68(a)(4).

However, Rule 68 is a one-way street that only empowers a defendant to invoke the cost-shifting provision. This is because the only financial incentive provided by Rule 68 is recovery of costs—something a plaintiff is entitled to anyway if he or she prevails. Consequently, Rule 68 fails to provide a "disincentive" for a *defendant* to continue "to litigate a case after being presented with a reasonable offer." Because of this unfairness, among other things, the Federal version of Rule 68 has been criticized by both commentators and the Federal Rules Advisory Committee. *See, e.g.* Hon. William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the*

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New Mexico Experience, Vol. 39, N.M. Law Rev., pg. 349, 351-52 (2009). In contrast to the Federal stalemate, state courts have been much more proactive in empowering claimants to also invoke Rule 68. In Judge Lynch's thoughtful 2009 law review article, cited above, he notes that the modern trend is moving away from Federal Rule 68's one-way street. For your convenience, I have enclosed a copy of this law review article which was printed from the University of New Mexico Law School website.

Specifically, I request that the Joint Committee amend North Dakota's Rule 68 to provide a financial incentive for a plaintiff to make an offer of settlement. Because a North Dakota plaintiff is already entitled to costs and disbursements under Rule 54 if the plaintiff prevails at trial, the amendment to Rule 68 should provide an additional financial incentive for defendants to seriously consider a reasonable offer of settlement. I believe an award of double costs and disbursements if the plaintiff recovers more than its offer of settlement is a modest and appropriate incentive. Any amendment should also explicitly bar a claimant from making an offer of settlement prior to the expiration of a reasonable time after commencement of the lawsuit. In my experience, 120 days is sufficient to allow a defendant to do discovery and arrive at its own evaluation of the case. I have attached to this letter a copy of New Mexico's Rule 1-068, which was the subject of Judge Lynch's article. I believe this rule is an appropriate template for an amendment to North Dakota's Rule 68 because New Mexico is generally consistent with North Dakota's effort to maintain the simplicity of the Federal rules. After comparing the two rules, I believe that only subpart (a) of Rule 68, N.D.R.Civ.P. would probably need to be modified. As another example of how states have modified this rule, I am also enclosing with this letter a copy of Minnesota's Rule 68, *et seq*. This rule is similar in its effect to New Mexico's rule, but the format reflects Minnesota's departure from the simplicity of the Federal rules of civil procedure. To the extent the Joint Committee wishes to review other rules, Judge Lynch, at fn. 50, cites rules in other states that the Joint Committee may also wish to review.

I practiced as an insurance defense lawyer in an Albuquerque litigation firm for 11 years prior to moving to Bismarck to raise my young family. As part of my practice in New Mexico, I made and received offers of settlement on a weekly basis. In my experience, empowering a plaintiff to make offers of settlement benefits all parties because it encourages settlement in a number of ways. First, the ability to recover double costs provides an incentive to a claimant to make a "bottom line" offer of settlement. Obviously, the lower the offer is, the more likely a claimant is to get a judgment better than the offer. Second, a claimant is not the only party to a lawsuit that can be unreasonable. Allowing a plaintiff to recover double costs if he or she beats an offer of settlement can be very effective in thawing an intransigent defendant. This is especially true in smaller cases, where a defendant with means may have a financial incentive to litigate irrespective of liability or damages. Perhaps most importantly, allowing both sides to make offers of settlement opens up a line of communication that provides a financial incentive for all parties to be reasonable. While I would guess that less than 5% of the offers I sent or received were formally accepted by either party, in 100% of the cases Rule 68's effect was discussed with my clients, and in 100% of the cases an offer of settlement forced the offeree to

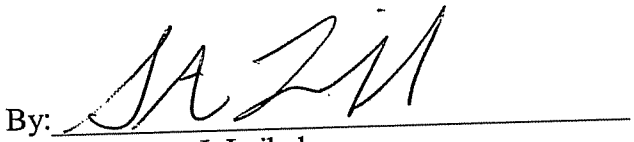
take a hard look at his or her position. Often times, settlement followed. The survey results cited by Judge Lynch are consistent with my experience.

There should be no question that North Dakota's growth in population and corresponding growth in litigation will place a burden on the judges, lawyers, and parties charged with administering the judicial system. Chief Justice VandeWalle's January 9, 2013 State of the Judiciary speech makes clear that North Dakota is facing an unprecedented strain on judicial resources. Even placing aside the fundamental issue of fairness that demands equal access to the remedies provided by the Rules, anything the Joint Committee can do to help parties resolve their disputes short of trial and alleviate this strain on the system is a worthwhile endeavor. This is the modern trend in the United States, and North Dakota should not hesitate to join the states that have made Rule 68 a two-way street.

For these reasons, I respectfully request that the Joint Committee propose an amendment to Rule 68 that removes the unfairness inherent in Rule 68's one-way street and encourages all parties to a dispute to assess and resolve claims prior to trial. Please feel free to contact me with any questions regarding this letter, or if you would like me to assist the Joint Committee in any way.

Respectfully yours,

LARSON LATHAM HUETTL LLP



By: _____
Steven J. Leibel

Encl: 1) Hon. William P. Lynch, *Rule 68 Offers of Judgment: Lessons from the New Mexico Experience*, Vol. 39, N.M. Law Rev., pg. 349, 351-52 (2009);
2) N.M.R.A. 1-068; and,
3) Minn.R.Civ.P. 68.01-68.04.

cc(w/encl): Mike Hagburg.

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RECEIVED BY
Justice Maring
Supreme Court
JAN 1 1
STATE OF
NORTH DAKOTA

January 11, 2013

Hon. Mary Muehlen Maring
Justice of the Supreme Court
Chair of Joint Procedure Committee
State Capitol
Bismarck, ND 58505-0530

RE: Proposed Changes to North Dakota Rule of Civil Procedure 68

Dear Justice Maring,

I am sending this letter to you in support of the request Steve Leibel is sending to you as Chair of the Joint Procedures Committee.

Steve is suggesting the committee consider amending Rule 68. He is providing information, including his own experience in New Mexico, regarding the reasons and potential benefit of his suggested amendment.

I agree with Steve that the provisions of Rule 68 are one sided and I believe the amendments he suggests are reasonable and will somewhat level the playing field. Such amendments might actually also relieve some pressure on the courts because it just might prompt some settlements that might otherwise take up court time.

Thank you for considering this request and best wishes to you for the New Year.

Sincerely,

LARSON LATHAM HUETTL LLP

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RULE 68 OFFERS OF JUDGMENT: LESSONS FROM THE NEW MEXICO EXPERIENCE

WILLIAM P. LYNCH*

I. INTRODUCTION

Rule 68 of the Federal Rules of Civil Procedure allows a defendant to make an offer of judgment and shifts costs if the plaintiff rejects the offer and recovers less than the offer at trial.[1] Until very recently, all commentators agreed that offers of judgment are intended to encourage settlement, and Rule 68 has been criticized because it is rarely used and is considered to be largely ineffective in helping to settle cases.[2] Although there have been many proposals to amend Rule 68 during the last twenty-five years, none has been implemented, and Rule 68 remains unchanged and underutilized.

Prior to 2003, New Mexico's offer of judgment rule, Rule 1-068 NMRA, was virtually identical to Rule 68. In 2003 New Mexico, following the lead of a number of other states, amended Rule 1-068 to allow plaintiffs to make such offers and to award the plaintiff double costs if the verdict exceeds the Rule 1-068 offer. Because New Mexico provides a broader definition of the "costs" that may be shifted, including expert witness fees, the incentives to accept such an offer are increased.

In late 2007 and early 2008 I surveyed 200 New Mexico lawyers about their experience with Rule 1-068 offers both before and after the 2003 amendments. The survey sought to obtain objective empirical evidence concerning the use of Rule 1-068 in New Mexico.[3] Survey evidence has been admissible in court for over forty-five years and has several potential advantages over less systematic approaches to gathering information.[4] This article will report on the findings of this survey.[5]

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* United States Magistrate Judge, District of New Mexico. University of Illinois (J.D., 1979); University of Nevada, Reno (M.J.S., 2001). I am grateful to the New Mexico Trial Lawyers Association and the New Mexico Defense Lawyers Association for providing their membership lists to me. Ted Occhialino, Greg Roth, and Bob Schuster contributed helpful comments on an early draft of this article. In addition to the survey results and the data on costs, this article also relies upon my experience with New Mexico practice as a trial attorney (Atwood, Malone, Mann & Turner, 1979–95) and as a state district court judge (Fifth Judicial District Court, State of New Mexico, 1995–2005).

1. FED. R. CIV. P. 68.

2. There is a spirited debate about whether efforts should be made to increase settlement of cases, given the small number of cases that go to trial and the standard-setting effect that trials have on the cases that are settled. *See* ADMINISTRATIVE OFFICE OF THE U.S. COURTS, 2006 ANNUAL REPORT OF THE DIRECTOR tbl.4.10 (showing that in 2006, only 1.3 percent of civil cases in federal court terminated during or after trial); Stephen McG. Bundy, *The Policy in Favor of Settlement in an Adversary System*, 44 HASTINGS L. J. 1, 78 (1992) ("Settling pending cases is not an unqualified good. Often the parties and the public interest will be better served by continuing litigation."); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 29 (2000) (Rule 68 "facilitate[s] strategic settlement and precedent manipulation [by defendants] with noneconomic motives to deter litigation ").

3. While most of the articles addressing Rule 68 are theoretical, a few authors have conducted empirical studies concerning the use of Rule 68 or a state variation of Rule 68. *See* JOHN E. SHAPARD, FED. JUDICIAL CTR., LIKELY CONSEQUENCES OF AMENDMENTS TO RULE 68, FEDERAL RULES OF CIVIL PROCEDURE (1995); Harold S. Lewis, Jr. & Thomas A. Eaton, *Rule 68 Offers of Judgment: The Practices and Opinions of Experienced Civil Rights and Employment Discrimination Attorneys*, 241 F.R.D. 332 (June 1, 2007); Albert Yoon & Tom Baker, *Offer-of-Judgment Rules and Civil Litigation: An Empirical Study of Automobile Insurance Litigation in the East*, 59 VAND. L. REV. 155 (2006).

4. *See* Shari Seidman Diamond, *Reference Guide on Survey Research*, *in* REFERENCE MANUAL ON SCIENTIFIC EVIDENCE 229, 231–35 (2d ed. 2000).

5. A copy of the survey is attached as Appendix A.

Part II of this article describes the use (or, more accurately, non-use) of Rule 68 in federal court, and outlines a few of the many proposals to amend it. Part II also briefly reviews the experience with offers of judgment in state court, which reflects the increasing rejection of Rule 68 as a model as states adopt innovative offer of judgment rules or statutes. Since Rule 68 shifts costs, Part III attempts to quantify the amount of costs awarded in federal court in New Mexico, and contrasts those awards with the costs awarded in New Mexico state courts. Because New Mexico allows a party to recover a greater variety of costs, the costs awarded in state court in New Mexico are much higher than the costs awarded in federal court.

Part IV describes the 2003 amendments to New Mexico's offer of judgment rule. Part V describes the methodology of the survey. Part VI reports on the experience of New Mexico's lawyers with Rule 1-068 offers, concentrating on their use of the rule after the 2003 amendments. In marked contrast to Rule 68, a very high percentage of lawyers (76 percent of plaintiffs' and 95 percent of defense lawyers) have advised their clients to make Rule 1-068 offers after the amendments. While most of the lawyers have made relatively few such offers, substantial numbers of lawyers make significant use of the rule. Although few Rule 1-068 offers are accepted, these offers lead to increased communication between the parties and further settlement discussions that often lead to settlement of the case outside the formal Rule 1-068 process. New Mexico's lawyers are much more satisfied with Rule 1-068 than are lawyers who use Rule 68 in federal court.

Part VII discusses five potential amendments to Rule 68: (1) changing the terminology of the rule to offer of "settlement" and allowing the case to be dismissed with prejudice instead of requiring the entry of a judgment; (2) allowing plaintiffs to make Rule 68 offers; (3) increasing the sanctions available under the rule by including expert witness fees as part of the costs that are shifted; (4) adding a margin-of-error provision to ensure that parties are not sanctioned when they make a serious offer but miscalculate slightly the amount the jury awards; and (5) precluding parties from making offers of judgment for a short period of time to allow the opposing party a fair opportunity to evaluate the merits of the claim.

II. OFFER OF JUDGMENT RULES IN FEDERAL AND STATE COURT

A. Offers of Judgment in Federal Court

Rule 68 of the Federal Rules of Civil Procedure allows a party defending against a claim to make an offer of judgment. This rule allows a defendant to make an offer of judgment in all cases, but precludes a plaintiff from making an offer of judgment unless the defendant has filed a counterclaim against the plaintiff.[6] If the plaintiff accepts the offer of judgment, the offer of judgment and notice of acceptance are filed with the court and a judgment against the defendant is entered by the clerk.[7] If the plaintiff does not accept the offer and receives a judgment at trial that is less favorable than the offer of judgment, the plaintiff is not entitled to the costs incurred

6. CHARLES ALAN WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE AND PROCEDURE § 3002 (2d ed. 1997).

7. FED. R. CIV P. 68(a).

after the offer and must also pay the defendant's costs incurred after that date.[8] To determine whether the plaintiff's judgment is less favorable than the offer, the court compares the defendant's offer of judgment to the judgment actually obtained, and the court is not required to examine the reasonableness of the defendant's offer.[9]

Since prevailing plaintiffs usually receive an award of costs under Rule 54(d), although judges retain the discretion to deny them, Rule 68 reverses the operation of Rule 54 and makes mandatory the award of defendant's post-offer costs, leaving no room for the court's discretion.[10] The costs that can be recovered under Rule 68 include fees to the clerk, marshal, court reporter, witnesses, court appointed experts and interpreters, and fees for printing, copying, and docketing.[11]

Unlike most procedural rules, which generate relatively little controversy and appellate review, Rule 68 has been the subject of two decisions by the U.S. Supreme Court. In 1981, in *Delta Air Lines, Inc. v. August*, the Court held that Rule 68 does not apply if the defendant, rather than the plaintiff, obtains judgment.[12] Justice Powell, in his concurrence, commented on the anomaly that a defendant may obtain costs under Rule 68 "against a plaintiff who *prevails in part* but not against a plaintiff who *loses entirely*."[13] Since the defendant, Delta Air Lines, prevailed at trial, it was not entitled to a mandatory award of costs under Rule 68, but was subject to the court's discretion to award costs under Rule 54(d).[14]

Four years later, in *Marek v. Chesny*, the Court held that where the underlying statute defines "costs" to include attorney's fees, such fees are to be included as costs for the purposes of Rule 68.[15] Thus, in those cases that award attorney's fees as part of costs, a plaintiff who does not recover more than the offer of judgment at trial not only forfeits his post-offer costs and must pay the defendant's post-offer costs, he also forfeits the post-offer attorney's fees that would otherwise be recoverable by statute.[16] There were vigorous dissents in both cases, and both *Delta Air Lines* and *Marek* have been the subject of much critical commentary.[17]

Rule 68 was adopted in 1938 as part of the original Federal Rules of Civil

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8. WRIGHT, MILLER & MARCUS, *supra* note 6, § 3006.

9. *See* Lentomyynti Oy v. Medivac, Inc., 997 F.2d 364, 368 (7th Cir. 1993). It can be difficult to compare an offer of judgment for money and a judgment that includes non-monetary elements such as equitable relief. *See, e.g.*, Reiter v. MTA New York City Transit Authority, 457 F.3d 224, 229–33 (2d Cir. 2006) (reversing the district court's determination that the defendant's offer of judgment for $20,001 was worth more than the $10,000 the plaintiff accepted on remittitur together with an injunction that restored the plaintiff to his former position with all of its perquisites); Thomas L. Cubbage III, *Federal Rule 68 Offers of Judgment and Equitable Relief: Where Angels Fear to Tread*, 70 TEX. L. REV. 465, 478–79 (1991).

10. *See, e.g.*, Pouillon v. Little, 326 F.3d 713, 718 (6th Cir. 2003) ("Although normally a district court's award or denial of costs is reviewed for abuse of discretion, Rule 68's language is mandatory and leaves a district court without any discretion.").

11. *See* 28 U.S.C. § 1920 (2006 & Supp. 2009).

12. 450 U.S. 346, 352 (1981).

13. *Id.* at 362 (Powell, J., concurring).

14. *Id.* at 353–54 (majority opinion).

15. 473 U.S. 1, 9 (1985).

16. *Id.* at 10–11.

17. *See Delta Air Lines*, 450 U.S. at 366 (Rehnquist, J., dissenting); *Marek*, 473 U.S. at 13 (Brennan, J., dissenting); *see, e.g.*, Edward H. Cooper, *Rule 68, Fee Shifting, and the Rulemaking Process*, *in* REFORMING THE CIVIL JUSTICE SYSTEM 108, 128–29 (Larry Kramer ed., 1996); Roy D. Simon, Jr., *The Riddle of Rule 68*, 54 GEO. WASH. L. REV. 1, 9–10, 19–24 (1985).

Procedure.[18] The conventional view of Rule 68 is that it was meant to encourage settlement of cases and decrease litigation.[19] Studies show that lawyers rarely use Rule 68 and its state counterparts, and Rule 68 has been criticized for years because it is considered to be largely ineffective in settling cases.[20] According to the Federal Rules Advisory Committee, Rule 68 is ineffective for two principal reasons: (1) an award of post-offer costs is an insufficient sanction to motivate parties to use the rule, and (2) only parties defending against claims may make such offers, which precludes plaintiffs from making offers unless a claim has been made against them.[21] There have been numerous proposals since the early 1980s to amend Rule 68 to make it more effective.

In 1983 and 1984, the Federal Rules Advisory Committee published two proposals to amend Rule 68.[22] Both proposals allowed all parties to make offers of judgment and expanded the definition of "costs" to include attorney's fees.[23] Both proposals also allowed the case to be dismissed with prejudice without requiring that a judgment be entered against the party who made the offer.[24] The 1983 proposal gave the court discretion to refuse to award costs if the court found the offer was made in bad faith, and the court could refuse to award expenses and interest if the court found such an award was unjustified or excessive.[25] The 1984 proposal abandoned a monetary comparison between the offer and the final judgment and proposed to award sanctions if an offer of judgment "was unreasonably rejected," and granted significant discretion to the court to determine whether to award sanctions.[26] Both proposals were heavily criticized, and the

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18. *See* Robert G. Bone, *"To Encourage Settlement": Rule 68, Offers of Judgment, and the History of the Federal Rules of Civil Procedure*, 102 NW. U. L. REV. 1561, 1564 (2008). In 2007 the language of Rule 68 was amended as part of the general restyling of the Civil Rules to make them more easily understood. The style amendments are not supposed to make substantive changes unless specifically noted. *See* FED. R. CIV. P. 68 advisory committee's note to 2007 Amendments.

19. *Marek*, 473 U.S. at 5, 10; *Delta Air Lines*, 450 U.S. at 352; Simon, *supra* note 17, at 24–25. Professor Bone has recently challenged this view of Rule 68's purpose. After reviewing the records of the 1938 Advisory Committee proceedings, he concluded that the original drafters did not adopt Rule 68 as a settlement promotion tool. Instead, Rule 68 was adopted to deal with unreasonable plaintiffs who insisted on litigating a case even after the defendant offers what the plaintiff is entitled to receive at trial. Professor Bone believes that Rule 68 has been transformed by a pro-settlement ideology that began in the mid-1970s when critics began to search for alternatives to the costs and delays attendant to litigation. Bone, *supra* note 18, at 1562.

20. *See* SHAPARD, *supra* note 3, at 8–9 (noting that a survey of 800 civil cases drawn from all the federal district court cases that terminated in the first six months of 1993 found that Rule 68 offers were made in 24 percent of the civil rights cases that settled and 12 percent of the civil rights cases that went to trial); Lewis & Eaton, *supra* note 3, at 349 ("Rule 68 offers of judgment are rarely used [in federal court] in either employment discrimination or civil rights cases."); Russell C. Fagg, *Montana Offer of Judgment Rule: Let's Provide Bonafide Settlement Incentives*, 60 MONT. L. REV. 39, 43 (1999) (stating that offers of judgment were made in fifty-nine of the 4,653 civil cases filed in Yellowstone County, Montana, between January 1, 1994, and December 31, 1997 (approximately 1.3 percent)); *see also* Leslie S. Bonney et al., *Rule 68: Awakening a Sleeping Giant*, 65 GEO. WASH. L. REV. 379, 380–81 (1997); Simon, *supra* note 17, at 7–8 (1985).

21. *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 98 F.R.D. 337, 363 (1983).

22. *Id.* at 361–67 (1983); *Preliminary Draft of Proposed Amendments to the Federal Rules of Civil Procedure*, 102 F.R.D. 407, 432–37 (1984).

23. 98 F.R.D. at 361–62; 102 F.R.D. at 432–33.

24. 98 F.R.D. at 361–62; 102 F.R.D. at 432–33.

25. 98 F.R.D. at 362–63.

26. 102 F.R.D. at 433.

Advisory Committee subsequently withdrew them.[27]

In 1992 Judge William Schwarzer, director of the Federal Judicial Center, published a proposal to amend Rule 68.[28] Judge Schwarzer proposed to permit all parties to make offers of judgment and to allow the recovery of attorney's fees as part of costs, but his proposal limited the recovery of costs in two ways.[29] First, he proposed to limit recoverable costs to the amount of the judgment.[30] For example, if the defendant's offer of judgment was $50,000, the plaintiff recovered only $40,000 and the defendant incurred post-offer costs of $60,000, the defendant could recover costs of only $40,000. Second, Judge Schwarzer also limited recoverable costs to an amount that would make the offeror whole.[31] Thus, if, after the plaintiff rejects defendant's offer of $50,000, the plaintiff receives a $40,000 judgment and the defendant incurs reasonable attorney's fees of $15,000, the defendant is entitled to recover $5,000. This award would put the defendant in the same position as if the offer had been accepted. Finally, this proposal gave the court discretion to reduce costs when necessary to avoid the infliction of undue hardship on a party.[32] The Advisory Committee reviewed Judge Schwarzer's proposal in 1994, and after discussions about its complexity, considered whether to abrogate Rule 68 entirely, but decided not to take any formal action until it had additional information about the effects of Rule 68 or state variations of Rule 68.[33]

In 1996 the American Bar Association (ABA) House of Delegates adopted a policy position in support of amending Rule 68.[34] The ABA proposal allowed all parties to make offers of judgment, provided that "costs" include attorney's fees but not expert witness fees and costs, and capped the amount of the attorney's fee award at the total amount of damages awarded.[35] The proposal introduced a 25 percent margin-of-error provision to mitigate the harshness of requiring cost-shifting when a party receives a judgment that is slightly less than a rejected offer.[36] The proposal further provided that the district court could refuse to impose sanctions under the rule based upon "any other compelling reason" offered by the moving party.[37] The ABA proposal also contained several procedural changes to the rule: no offer of

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27. *See* Michael E. Solimine & Bryan Pacheco, *State Court Regulation of Offers of Judgment and its Lessons for Federal Practice*, 13 OHIO ST. J. ON DISP. RESOL. 51, 56–58 (1997).

28. *See* William W. Schwarzer, *Fee Shifting Offers of Judgment—An Approach to Reducing the Cost of Litigation*, 76 JUDICATURE 147 (1992).

29. *Id.* at 149.

30. *Id.* at 149–50.

31. *Id.*

32. *Id.* Many experienced lawyers thought that Judge Schwarzer's proposal was too complicated to understand and administer easily. Cooper, *supra* note 17, at 148 n.6.

33. Excerpts from the notes of the October 1994 meeting of the Federal Rules Advisory Committee are available at http://www.uscourts.gov/rules/Agenda Books/CV2008-11.pdf. from page 175 to 176.

34. *See ABA Urges Offer of Judgment Changes to Counter Movement to "Loser Pays" Rule*, 64 U.S.L.W. 2495 (Feb. 13, 1996); *see also* Bonney et al., *supra* note 20, at 415–18 (discussing the ABA proposal).

35. *See ABA Urges Offer of Judgment Changes to Counter Movement to "Loser Pays" Rule*, 64 U.S.L.W. at 2495.

36. *Id.* A margin-of-error provision gives a party some leeway to guess incorrectly about the result at trial without being subject to sanctions. Under the ABA proposal, if a defendant made an offer of judgment for $10,000, the plaintiff would have to pay defendant's costs if plaintiff recovered less than $7,500 at trial, while if the plaintiff made an offer of judgment of $10,000, the defendant would pay plaintiff's costs if plaintiff recovered more than $12,500.

37. *Id.*

judgment could be made sooner than sixty days after service of process or less than sixty days before trial, and an offer of judgment must remain open for sixty days.[38]

In contrast to proposals for substantive changes to Rule 68, in 2007 Professor Danielle Shelton proposed re-writing Rule 68 to clear up uncertainties regarding the validity and interpretation of offers of judgment.[39] According to Professor Shelton, because the rule is ambiguous and cursory in form, it does not alert the parties to its many nuances.[40] Thus, defendants often draft offers that have unintended consequences, and plaintiffs who receive such offers face uncertainty when considering them. For example, because Rule 68 does not specifically address whether offers of judgment may disclaim liability, whether they may be revoked, and whether they must provide both injunctive and monetary relief when the case requests both types of relief, courts must determine whether such offers are valid.[41] In other cases the court must determine whether the amount of the Rule 68 offer includes costs or attorney's fees.[42] Professor Shelton argues that amending the rule to provide predictability and clarity about Rule 68 offers would help attorneys intelligently advise their clients about offers of judgment and allow courts to enforce such offers with uniformity and certainty.[43]

As commentators Michael Solimine and Bryan Pacheco stated a dozen years ago, "[S]eldom has so much talk resulted in so little action. Despite (or perhaps because of) the cacophony of voices, Federal Rule 68 remains unchanged."[44]

B. Offers of Judgment in State Court

In stark contrast to the gridlock at the federal level, many states have either revised or enacted innovative offer of judgment rules or statutes. New Jersey was one of the first states to vary from Rule 68. Almost forty years ago, in 1971, New Jersey adopted an offer of judgment rule that allowed any party to make an offer of judgment and that provided for shifting attorney's fees up to a cap of $750.[45] In 1985, both Michigan and Minnesota amended their offer of judgment rules to allow plaintiffs to make offers of judgment.[46] Arizona amended its rule in 1990 to allow all parties to make offers of judgment and also provided for an award of double costs plus reasonable expert witness fees if a party failed to receive a judgment that exceeded the offer.[47]

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38. *See* Bonney et al., *supra* note 20, at 415–16.
39. *See* Danielle M. Shelton, *Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment*, 91 MINN. L. REV. 865, 867–69 (2007).
40. *Id.* at 867–68.
41. *Id.* at 880–88.
42. *Id.* at 888–911.
43. *Id.* at 869. Numerous other commentators have proposed changes to Rule 68. *See, e.g.*, Bonney et al., *supra* note 20, at 427–28; Simon, *supra* note 17, at 53–75; Solimine & Pacheco, *supra* note 27, at 76–77; Jay N. Varon, *Promoting Settlements and Limiting Litigation Costs by Means of the Offer of Judgment: Some Suggestions for Using and Revising Rule 68*, 33 AM. U. L. REV. 813, 845–47 (1984). Others have proposed that Rule 68 should be abolished. *See* Bone, *supra* note 18, at 1618 & n.194; Bruce P. Merenstein, *More Proposals to Amend Rule 68: Time to Sink the Ship Once and For All*, 184 F.R.D. 145, 148 (1999).
44. Solimine & Pacheco, *supra* note 27, at 52.
45. N.J. CT. R. 4:58.
46. MICH. CT. R. 2.405, 1985 staff comment; MINN. R. CIV. P. 68 advisory committee note.
47. ARIZ. R. CIV. P. 68 committee notes to amendments.

By 1997, although twenty-eight states, plus the District of Columbia, had provisions that were identical to or substantially similar to Rule 68, thirteen states had provisions that departed from Rule 68 in significant ways.[48] Some of the states allowed plaintiffs to make offers of judgment to defendants, while other states increased the potential sanctions for failing to accept an offer that was more favorable than the actual judgment received.[49]

The trend away from Rule 68 has accelerated since that time. By my count, twenty-three states now allow all parties to make offers of judgment.[50] Nine of those states shift attorney's fees as a sanction for failing to receive a judgment that exceeds an offer of judgment.[51]

Although almost half the states now allow plaintiffs to make offers of judgment, several states have resisted the trend and have declined to enact proposals that allow plaintiffs to do so or that shift attorney's fees as part of the costs allowed under the rule. In 1996 the Ohio Rules Advisory Committee proposed an offer of judgment rule that allowed all parties to make offers of judgment and awarded the plaintiff double costs if the plaintiff's offer of judgment was not accepted and was less than the judgment obtained by the plaintiff at trial.[52] The proposal was opposed by the Ohio Academy of Trial Lawyers, a group of plaintiffs' lawyers, and the Ohio Supreme Court withdrew the proposal.[53] In 1998 the Montana Supreme Court proposed to amend its offer of judgment rule to allow plaintiffs to make offers and to include attorney's fees as part of the costs that may be shifted under the rule.[54] This proposal was rejected, and Montana's current Rule 68 is substantially similar to Federal Rule 68.[55]

III. COSTS AWARDED IN FEDERAL AND STATE COURT IN NEW MEXICO

While all commentators agree that the costs that may be shifted under Rule 68 are too small to be a significant incentive to accept an offer under the rule,[56] no one has attempted to quantify the amount of costs actually awarded in federal court. To

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48. Solimine & Pacheco, *supra* note 27, at 63–64.

49. *Id.* at 64–65.

50. ALASKA R. CIV. P. 68; ARIZ. R. CIV. P. 68; CAL. CIV. PROC. CODE § 998 (West 2009); COLO. REV. STAT. ANN § 13-17-202 (West 2005 & Supp. 2008); CONN. GEN. STAT. ANN. §§ 52-192a, 52-193 (West 2005 & Supp. 2009); FLA. R. CIV. P. 1.442; GA. CODE ANN. § 9-11-68 (2006 & Supp. 2008); HAW. R. CIV. P. 68; LA. CODE CIV. PROC. ANN. art. 970 (2005 & Supp. 2009); MICH. CT. R. 2.405; MINN. R. CIV. P. 68; NEV. R. CIV. P. 68; N.J. CT. R. 4:58; Rule 1-068 NMRA; N.D. R. CIV. P. 68; OKLA. STAT. ANN. tit. 12, § 1101.1 (West 2000 & Supp. 2009); S.C. R. CIV. P. 68; S.D. Codified Laws § 15-6-68 (2005); TENN. R. CIV. P. 68; TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–.005 (Vernon 2008) (the plaintiff may make an offer once the defendant makes the initial declaration to implicate fee shifting, see § 42.002(c)); UTAH R. CIV. P. 68; WIS. STAT. ANN. § 807.01 (West 1994 & Supp. 2008); WYO. R. CIV. P. 68.

51. ALASKA R. CIV. P. 68; CONN. GEN. STAT. ANN. §§ 52-192a, 52-193; FLA. R. CIV. P. 1.442; GA. CODE ANN. § 9-11-68; MICH. CT. R. 2.405; NEV. R. CIV. P. 68; N.J. CT. R. 4:58; OKLA. STAT. ANN. tit. 12, § 1101.1; TEX. CIV. PRAC. & REM. CODE ANN. §§ 42.001–.005.

52. Solimine & Pacheco, *supra* note 27, at 66.

53. *Id.* at 68–69.

54. *See* Fagg, *supra* note 20, at 45–47.

55. *See* MONT. R. CIV. P. 68.

56. Bonney et al., *supra* note 20, at 392 ("In most cases, 'costs' are relatively insignificant compared to the amount in controversy."); Lewis & Eaton, *supra* note 3, at 333 (stating that costs awarded under 28 U.S.C. § 1920 are "modest"); Yoon & Baker, *supra* note 3, at 158 (noting that post-offer costs "are trivial").

determine the amount of costs awarded, I searched the electronic database of the U.S. District Court for the District of New Mexico for orders awarding costs entered from January 1, 2007, through October 17, 2008.[57] During that time, four orders awarding costs were entered for cases that were resolved by jury trial.[58] Two of the cases alleged claims for violation of civil rights, and two involved product liability claims. The trials lasted from four to seven days in length, and the costs awarded by the district court ranged from a low of $6,079 to a high of $21,326.[59]

Because this was such a small sample, I examined the costs awarded during the past eight years after other jury trials in federal court in New Mexico, and found great consistency in the amount of costs awarded. After a medical malpractice trial that lasted nine days, the court awarded costs of $6,539.[60] Three cases involving claims for civil rights violations had jury trials that lasted five, seven, and eleven days, and the court awarded costs of $3,282, $4,229, and $10,798 respectively.[61] The court awarded costs of $4,025 after a wrongful death trial that lasted five days.[62] And in a case involving a claim for products liability where the trial lasted twelve days, the clerk approved the plaintiff's costs in the amount of $17,053 and defense costs of $9,022 before the district court reduced those amounts for comparative fault.[63]

The costs that may be recovered under Rule 1-068 in state court are considerably broader than the costs that may be recovered in federal court. In addition to the costs that may be recovered under 28 U.S.C. § 1920, litigants in New Mexico may recover jury fees, expert witness fees, and expenses involved in the production of exhibits admitted into evidence.[64] Expert witness fees in New Mexico are limited by the provisions of section 38-6-4(B) NMSA 1978, which allows (1) per diem and mileage, and (2) "a reasonable fee to compensate the witness for the time required in preparation or investigation prior to the giving of the witness's testimony."[65]

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57. I used the terms "Clerk's Order Settling Costs" and "Order on Motion for Bill of Costs."

58. While there were other jury trials during that time period, no costs were awarded by the court, presumably because the parties resolved that issue without court intervention. *See, e.g.*, Joyce v. Clarke, No. CV 06-1154 (D.N.M. verdict June 10, 2008).

59. *See* Order Affirming Clerk's Order Settling Costs, Martinez v. Caterpillar, Inc., No. CV 06-236 (D.N.M. June 17, 2008) (awarding costs of $17,802); Clerk's Orders Settling Costs, Trujillo v. Board of Educ., No. CV 02-1146 & 03-1185 (D.N.M. Oct. 26, 2007) (awarding costs of $4,764 and $1,315); Clerk's Order Settling Costs, Rivera v. Smith's Food and Drug Ctrs, No. CV 05-1049 (D.N.M. June 26, 2007) (awarding costs of $10,840); Clerk's Order Settling Costs, Moreland v. Ford Motor Co., No. CV 05-323 (D.N.M. Mar. 27, 2007) (awarding costs of $21,326).

60. *See* Clerk's Order Settling Costs, Domann v. Vigil, No. CV 99-192 (D.N.M. Sept. 1, 2000) (awarding costs of $9,726). *But see* Order, Domann v. Vigil, No. CV 99-192 (D.N.M. Feb. 21, 2001) (subsequently disallowing costs of $3,186).

61. *See* Memorandum Opinion and Order Granting in Part and Denying in Part Defendant's Request to Tax Costs, Martinez White v. Board of County Comm'rs, No. CV 04-565 (D.N.M. Dec. 28, 2005) (awarding costs of $3,282); Memorandum Opinion and Order on Defendants' Motion to Dismiss Plaintiffs' Appeal of Order Settling Costs and Plaintiffs' Appeal of Clerk's Order of Costs, Williams v. W.D. Sports N.M., Inc., No. CV 03-1195 (D.N.M. Aug. 3, 2005) (awarding costs of $10,798); Clerk's Order Settling Costs, Huerta v. City of Santa Fe, No. CV 01-968 (D.N.M. Feb. 18, 2003) (awarding costs of $4,229).

62. *See* Clerk's Order Settling Costs, Bain v. IMC Global Operations, Inc., No. CV 03-1354 (D.N.M. Sept. 26, 2005).

63. *See* Memorandum Opinion and Order, Mariposa Farms, L.L.C. v. Westfalia-Surge, Inc., No. CV 03-779 (D.N.M. Oct. 7, 2005).

64. The costs recoverable by operation of Rule 1-068 are described in Rule 1-054(D) NMRA.

65. NMSA 1978, § 38-6-4(B) (1983). Some states limit the practical scope of this cost item, not only by

During the time period covered by the survey, the statute required that the expert testify in person or by deposition, and allowed recovery for only one liability expert and one damage expert "unless the court finds that additional expert testimony was reasonably necessary to the prevailing party and the expert testimony was not cumulative."[66]

There is no centralized data base to search to obtain cost bills entered in New Mexico state courts, so I contacted plaintiffs' and defense lawyers in New Mexico and asked them to provide me with cost bills entered after the completion of a trial in state court. Because New Mexico allows a party to recover a wider variety of costs, the amount of costs awarded in New Mexico state courts is much higher than the costs awarded in federal court. Costs of $30,000 to $60,000 and more are not uncommon in more complicated cases, and the predominant amount of costs is often for expert witness fees. For example, in a medical malpractice case with a five-day jury trial, one court awarded costs of $68,174; over $40,000 of that amount was for expert witness fees.[67] In a wrongful death case where the trial lasted six days, the court awarded costs of $66,770; $38,802 of that amount was for expert witness fees.[68] In a case involving claims for negligence and breach of contract, where the trial lasted eight days, the court awarded two defendants costs in excess of $60,000; the expert witness fees exceeded $29,000.[69] In another malpractice case, the clerk taxed costs of $48,012, and $17,357 of that amount was for expert witness fees.[70] In other cases a party sought or the court awarded costs in excess of $30,000.[71]

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imposing a "reasonableness" requirement on the amount of the fees but also by constraining the compensable time to the actual time spent testifying and excluding charges for pre-trial conferences and time spent at trial waiting to testify. *See* Hashimoto v. Marathon Pipe Line Co., 767 P.2d 158, 168–69 (Wyo. 1989).

66. NMSA 1978, § 38-6-4(B) (1983). In *Fernandez v. Espanola Pub. Sch. Dist.*, 2005-NMSC-026, ¶¶ 1–2, 119 P.3d 163, 164, the New Mexico Supreme Court affirmed the district court's decision that it did not have discretion to award expert witness fees as costs because the expert witnesses had not testified by deposition or at trial. Two members of the court concurred in the opinion and suggested that district courts should be given more flexibility to award costs for expert witnesses without requiring the expert to testify. *Id.* ¶¶ 14–20, 119 P.3d at 167–69 (Bosson, J., concurring). Effective May 23, 2008, Rule 1-054(D) was amended to give the district court discretion to award expert witness fees when the expert has not testified if the court determines that "the expert witness was reasonably necessary to the litigation." *See* Rule 1-054(D) NMRA.

67. *See* Order Granting Plaintiff's Motion for Taxation of Costs, Pre-Judgment and Post-Judgment Interest Pursuant to Rule 1-068 NMRA 2008, Estate of Cardon v. Ham, No. D1314-CV-07-221 (N.M. 13th Jud. Dist. Aug. 28, 2008).

68. *See* Notice Taxing Costs, Talbot v. Roswell Hospital Corp., No. CV-2002-132 (N.M. 5th Jud. Dist. Nov. 6, 2003); Plaintiffs' Cost Bill, Talbot v. Roswell Hospital Corp., No. CV-2002-132 (N.M. 5th Jud. Dist. Oct. 15, 2003).

69. *See* Order and Judgment Awarding Defendant['s] Costs, Ballas v. Tierra Concepts, Inc., No. D-101-CV-2005-02477 (N.M. 1st Jud. Dist. Mar. 31, 2008); Itemized and Verified Cost Bill, Ballas v. Tierra Concepts, Inc., No. D-101-CV-2005-02477 (N.M. 1st Jud. Dist. Jan. 22, 2008).

70. *See* [Plaintiff's] Cost Bill, Grassie v. Roswell Hospital Corp., No. CV-2006-00286 (N.M. 5th Jud. Dist. Sept. 27, 2007); Notice Taxing Costs, *Grassie*, No. CV-2006-00286 (Sept. 27, 2007). Plaintiff's cost bill was later denied as untimely. *See* Order on Plaintiff's Cost Bill, *Grassie*, No. CV-2006-00286 (Nov. 30, 2007).

71. *See* Apodaca v. AAA Gas Co., 2003-NMCA-085, ¶96, 73 P.3d 215, 243 (defendants' cost bill exceeded $43,000); Final Order on Attorney's Fees and Costs, Sombra Cosmetics, Inc. v. Alivia Labs., Inc., No. CV-2005-09898 (N.M. 2d Jud. Dist. Sept. 18, 2008) (awarding costs of $32,128, of which $24,589 were expert witness fees, *see* Plaintiff's Bill of Costs, *Sombra Cosmetics*, No. CV-2005-09898 (July 31, 2008)); Order Settling Cost Bill, Speero v. Rodrigues, No. CV-2003-434 (N.M. 5th Jud. Dist. Aug. 30, 2007) (awarding costs of $32,871 before awarding double costs under Rule 1-068); Order Granting [Defendant's] Bill of Costs and Cost Award, Pearson v. Bd. of Regents of Univ. of Cal., No. D-0101-CV-2004-1665 (N.M. 1st Jud. Dist. Aug. 21, 2007) (awarding one defendant costs of $40,878 of which over $33,000 were expert witness fees, *see* [Defendant's] Bill of Costs, *Pearson*, No. D-0101-CV-2004-1665 (July 17, 2007)); Order on Pre- and Post-Judgment Interest and Plaintiffs'

These cost awards in state court are not anomalies. I was provided with cost bills and orders awarding costs in which parties sought or the court awarded much higher costs. In *Kilgore v. Fuji Heavy Industries LTD*, a products liability case, the defendants sought to recover costs in excess of $421,000; the expert witness fees claimed in the cost bill exceeded $397,000.[72] In a products liability case against Ford Motor Company, the clerk taxed costs of $215,725; the expert witness fees exceeded $196,000.[73] Large cost awards have been made in other cases.[74] Even in smaller, less complicated cases where the award of costs is more modest, expert witness fees are generally the largest element of costs.[75]

IV. AMENDMENTS TO NEW MEXICO'S OFFER OF JUDGMENT RULE

Prior to its amendment, New Mexico's offer of judgment rule, Rule 1-068, was virtually identical to Rule 68: It allowed only parties defending against claims to make an offer of judgment, and closely tracked the language of Rule 68.[76] In September of 2002 the New Mexico Supreme Court proposed amending Rule 1-068.[77] The proposal suggested three major changes to the rule. First, the proposal allowed all parties to make an offer of judgment.[78] Second, because the plaintiff is normally entitled to costs under Rule 1-054(D) if the plaintiff prevails at trial,[79] the proposal allowed the plaintiff to recover double costs if the plaintiff received more than its offer of judgment at trial.[80] Third, the proposal precluded a plaintiff from making an offer of judgment prior to the expiration of 120 days after service of process on the defendant to allow the defendant time to do initial discovery to

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Bill of Costs, Guest v. Allstate Ins. Co., No. D-101-CV-2005-01297 (N.M. 1st Jud. Dist. Dec. 6, 2006) (awarding costs of $51,172).

72. *See* Verified Cost Bill, Kilgore v. Fuji Heavy Indus. LTD., No. D-0101-CV-2003-00941 (N.M. 1st Jud. Dist. Dec. 22, 2006). The district court declined to award defendants' costs under Rule 1-054, citing the economic disparity between the parties. *See* Order Denying Cost Bills, Kilgore v. Fuji Heavy Indus. LTD., No. D-0101-CV-2003-00941 (N.M. 1st Jud. Dist. Mar. 1, 2007).

73. *See* Defendant's Cost Bill, Coles v Ford Motor Co., No. D-307-CV-2005-00943 (N.M. 3d Jud. Dist. Nov. 29, 2007); Taxation of Costs, Coles v. Ford Motor Co., No. D-307-CV-2005-00943 (N.M. 3d Jud. Dist. Dec. 14, 2007).

74. *See* Order on Plaintiff's Costs, Keith v. Manorcare, Inc., No. CV 2005-8066 (N.M. 2d Jud. Dist. Sept. 11, 2007) (awarding costs of $107,392, plus double costs of $73,517, for a total cost award of $180,909); Order & Judgment Granting Plaintiff's Motion and Supplemental Motion for Costs, Valley Bank of Commerce v. W. Auto. Rentals and Sales, Inc., No. CV-2001-395 (N.M. 5th Jud. Dist. Sept. 29, 2004) (awarding costs of $96,818).

75. *See* Cost Bill of Plaintiff, Munoz v. Castillo, No. CV-07-637 (N.M. 3d Jud. Dist. June 26, 2008) (for $4,741 including expert witness fees of $2,999); Defendant's Cost Bill, Chavez v. Gonzales, No. CV-2004-5881 (N.M. 2d Jud. Dist. July 5, 2006) (for $8,541 including expert witness fees of $5,737); Cost Bill, Strata Prod. Co. v. McGee Drilling Corp., No. CV-96-388 (N.M. 5th Jud. Dist. Aug. 17, 1999) (seeks $23,151 in costs, including $15,280 and $5,497 for expert witness fees for a petroleum engineer and accountant).

76. The only difference between the rules concerned how judgment was entered when an offer of judgment was accepted. Rule 68 provides that "the clerk shall enter judgment" once the offer of judgment and notice of acceptance have been filed, while Rule 1-068 provided that "judgment may be entered as the court may direct." *Compare* FED. R. CIV. P. 68 *with* Rule 1-068 NMRA. *See also* Shelton v. Sloan, 1999-NMCA-048, ¶ 42, 977 P.2d 1012, 1020.

77. *See Proposed Revisions to Rule 1-068 of the Rules of Civil Procedure for the District Courts*, N.M. BAR BULL., Sept. 19, 2002, at 15 [hereinafter *2002 Proposed Revisions to Rule 1-068*].

78. *Id.* In 2002 at least sixteen states had rules that allowed plaintiffs as well as defendants to make offers of judgment. *See* Rule 1-068 NMRA committee commentary to 2002 Proposed Amendment.

79. *2002 Proposed Revisions to Rule 1-068*, *supra* note 77, at 15.

80. *Id.*

evaluate the plaintiff's claim.[81] The proposal also stated explicitly what had been the universal construction of the rule: that when a party does not obtain a judgment more favorable than the offer, the party must not only pay the other party's costs but also is not entitled to recover its costs incurred after the offer.[82]

The proposed amendment to Rule 1-068 generated considerable comment by New Mexico lawyers. It was enthusiastically received by the plaintiffs' bar, although several lawyers suggested that plaintiffs should be allowed to submit Rule 1-068 offers sooner, perhaps sixty days after the defendant filed an answer.[83] The proposal was adamantly opposed by the New Mexico Defense Lawyers Association and many defense lawyers. They particularly objected to a plaintiff recovering double costs under the rule, and labeled the proposal "entirely one-sided," "inherently unfair" and "patently inequitable."[84] They also reported three main concerns about Rule 1-068. First, they stated that defendants often will not make offers of judgment because they object to a formal entry of judgment, and suggested that the rule be titled "Offer of Consent Disposition" or "Offer of Settlement" and allow dismissal of the case without entry of a judgment.[85] Second, they claimed that defendants would not have enough time to evaluate the merits of a plaintiff's claim within 120 days of service of process, and suggested that plaintiffs be precluded from making a Rule 1-068 offer for six months after the filing of a responsive pleading to allow further time for discovery. Third, several lawyers requested that Rule 1-068 explicitly state that "costs" do not include attorney's fees and that domestic relations cases be exempted from the rule.[86]

After considering the comments by the trial bar, the New Mexico Supreme Court revised Rule 1-068 and again circulated it for comment. The revised Rule 1-068 continued to allow all parties to make Rule 1-068 offers and to allow the plaintiff to recover double costs if plaintiff received more than its offer of judgment at trial, but differed from the first proposal in four significant ways.[87] First, the proposal changed the title of the rule to "Offer of Settlement" and allowed a case to be dismissed with prejudice instead of having a judgment entered against the party that made the offer.[88] Second, to allow defendants sufficient time to gather information to evaluate an offer from the plaintiff, the proposal precluded a plaintiff from making a Rule 1-068 offer prior to the expiration of 120 days after the filing of a responsive pleading by a party.[89] Third, the proposal provided that the district court could not award the plaintiff both double costs under Rule 1-068 plus prejudgment interest under New Mexico law.[90] Fourth, the proposal explicitly stated that

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81. *Id.*

82. *Id.* (citing Crossman v. Marcoccio, 806 F.2d 329, 333 (1st Cir. 1986)).

83. Letters on file with author. In the fall of 2002 and spring of 2003, thirty-two letters were sent to the New Mexico Rules of Civil Procedure Committee commenting on the proposed revisions to Rule 1-068. The author was the chair of the Rules Committee at that time.

84. *Id.*

85. *Id.*

86. *Id.*

87. *See Proposed Revisions to Rule 1-068 of the Rules of Civil Procedure for the District Courts*, N.M. BAR BULL., Mar. 13, 2003, at 10–11 [hereinafter *2003 Proposed Revisions to Rule 1-068]*.

88. *Id.*

89. *Id.*

90. *Id.* Section 56-8-4(B) of the New Mexico Statutes allows the court to award pre-judgment interest of

attorney's fees are excluded from the costs shifted under the rule and that the rule did not apply to domestic relations cases.[91] The Defense Lawyers Association again vigorously protested any change to Rule 1-068, but the New Mexico Supreme Court adopted the revised proposal, and it became effective for cases filed after August 1, 2003.[92]

V. SURVEY DESIGN

In late 2007 and early 2008 I sent questionnaires to 200 New Mexico attorneys asking about their experience with Rule 1-068 offers in New Mexico state court from 1998 to the present. Both of the main organizations representing New Mexico's trial lawyers—the New Mexico Trial Lawyers Association (NMTLA) and the New Mexico Defense Lawyers Association (NMDLA)—provided their membership lists to me. After eliminating members of both associations who listed an address outside New Mexico, 100 attorneys were randomly selected from each membership list to participate in the survey.

To establish a baseline, the survey first sought information about how many cases each attorney handled in the five years before August 1, 2003—when the revised Rule 1-068 took effect—in which the attorney advised his or her client on decisions to make, accept, or reject offers under Rule 1-068. The remainder of the survey addressed the attorneys' experience with Rule 1-068 offers for cases filed after August 1, 2003. Thus, the survey compares five years of data concerning the use of Rule 1-068 offers of judgment before the amendments with approximately four to four-and-a-half years of data concerning the use of Rule 1-068 offers after the amendments.

The survey sought two major categories of information for cases filed after August 1, 2003: (1) whether the lawyer had advised his or her clients to make a Rule 1-068 offer of settlement, and (2) whether the lawyer had received any Rule 1-068 offers of settlement from opposing counsel. The survey asked how many Rule 1-068 offers each lawyer made, in what percentage of his or her cases the lawyer made such offers, and how many of the offers were accepted. The survey next asked how many Rule 1-068 offers each lawyer received, how many of those offers were accepted, and whether the lawyer made a Rule 1-068 offer in response to receiving a Rule 1-068 offer from opposing counsel. The survey asked whether the lawyer believed that making a Rule 1-068 offer of settlement increased the chances of settling the case or helped the case settle earlier. The survey also sought additional comments from counsel about their experience with how Rule 1-068 offers worked in their practices.

One hundred and forty lawyers responded after receiving the survey, seventy from each list. Six lawyers on the NMTLA list were defense lawyers who were

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up to 10 percent from the date the complaint is served upon the defendant under certain circumstances if the defendant fails to make a reasonable and timely offer of settlement to the plaintiff. NMSA 1978, § 56-8-4(B) (2004). A plaintiff who recovers more than her offer of judgment is entitled to either interest under Section 56-8-4(B) plus costs awarded under Rule 1-054(D)(2) or double costs under Rule 1-068, but not both statutory interest and double costs. *See* Rule 1-068(C) NMRA.

91. *2003 Proposed Revisions to Rule 1-068*, *supra* note 87, at 11.

92. *See* Rule 1-068 NMRA.

associate members of the NMTLA, so their responses were included for analysis with the responses from the defense lawyers on the NMDLA list. The responses from ten plaintiffs' lawyers and two defense lawyers were excluded from further analysis because they indicated that they had no experience with Rule 1-068 offers for cases filed after August 1, 2003, primarily because they practiced in federal court or practiced domestic relations law only. Thus, fifty-four plaintiffs' lawyers and seventy-four defense lawyers completed the survey, for a response rate of 64 percent.[93]

VI. SURVEY RESULTS

A. Use of Rule 1-068 Offers of Judgment Prior to the 2003 Amendments

To determine whether the 2003 amendments increased the use of Rule 1-068 offers in New Mexico, I needed to find out to what extent New Mexico lawyers made offers of judgment before the rule was changed. The first survey question asked how many cases the lawyers handled from August 1, 1998, to August 1, 2003, in which they advised their clients on decisions to make, accept, or reject offers of judgment under Rule 1-068. The responses from the plaintiffs' and defense lawyers were very similar, as Table 1, below, indicates.

Table 1

Number of Cases Handled from August 1, 1998, to August 1, 2003, in Which Attorney Advised Client to Make, Accept, or Reject Rule 1-068 Offer		
	Plaintiff	Defendant
None	26%	29%
Less than 25	61%	45%
Between 25 and 100	7%	21%
More than 100	6%	5%

Most commentators have concluded that offers of judgment are rarely used, yet 74 percent of the plaintiffs' lawyers and 71 percent of the defense lawyers reported they advised their clients concerning Rule 1-068 offers in the five years before the 2003 amendments.[94] Since plaintiffs could not make Rule 1-068 offers in cases filed before August 1, 2003, it is surprising that approximately the same percentage of plaintiffs' and defense lawyers advised their clients about Rule 1-068 offers.

93. John Shapard, in analyzing the results of a Federal Judicial Center survey that sought information about proposed amendments to Rule 68, reported a response rate of 55 percent, which he stated was "typical of the response rate obtained in other Federal Judicial Center surveys of counsel." SHAPARD, *supra* note 3, at 5.

94. All percentages were computed by excluding from consideration those attorneys who did not answer the relevant question.

Although the vast majority of lawyers reported either no or only modest exposure to the rule, other lawyers reported more significant use of the rule: 7 percent of the plaintiffs' lawyers and 21 percent of the defense lawyers advised their clients concerning offers of judgment in between twenty-five and one hundred cases, and 6 percent of the plaintiffs' lawyers and 5 percent of the defense lawyers reported advising their clients concerning offers of judgment in more than one hundred cases in the five-year time period.

B. Use of Rule 1-068 Offers of Settlement After the 2003 Amendments

The next step was to find out to what extent lawyers advised their clients about Rule 1-068 offers after the amendments. Once again, the responses from the plaintiffs' and defense lawyers were very similar, as shown in Table 2, below.

Table 2

Number of Cases Filed After August 1, 2003, in Which Attorney Advised Client to Make, Accept, or Reject Rule 1-068 Offer		
	Plaintiff	Defendant
None	15%	13%
Less than 25	70%	63%
Between 25 and 100	11%	21%
More than 100	4%	3%

Since the 2003 amendments allowed plaintiffs for the first time to make Rule 1-068 offers, I expected that the data would show a sharp increase in the use of Rule 1-068 by plaintiffs' lawyers as they began to make Rule 1-068 offers to defendants, and a smaller increase by defense lawyers as they advised their clients about plaintiffs' offers under the rule. The data did not confirm my hunch, and instead showed a greater increase in the use of the rule by defense lawyers. The percentage of lawyers who did not advise their clients about Rule 1-068 offers in any cases declined: for plaintiffs' lawyers, from 26 percent to 15 percent, a 42 percent decline (p-value 0.0759); and for defense lawyers, from 29 percent to 13 percent, a 55 percent decline (p-value 0.0106).[95] The data show slight increases in the percentages of plaintiffs' lawyers who advised their clients about Rule 1-068 offers, from 61 percent to 70 percent in fewer than twenty-five cases, and from 7 percent to 11

95. All tests of differences in proportions were performed using a one-tailed test. The statistical term "level of significance" (or p-value) indicates the probability that a difference in the proportions could be observed in a sample by chance alone. The lower the level of significance that results from the test, the greater the chance that the difference in sample proportions is representative of the entire population. The typical choices for levels of significance are .01, .05, and .10. GEORGE CASELLA & ROGER L. BERGER, STATISTICAL INFERENCE 361 (1990).

percent in between twenty-five and one hundred cases, but these increases are not statistically significant (p-values 0.1553 and 0.2534 respectively). In contrast, 29 percent more of the defense lawyers (from 45 percent to 63 percent) advised their clients about Rule 1-068 offers in fewer than twenty-five cases (p-value 0.0166), while 21 percent of the defense lawyers advised their clients concerning offers of settlement in between twenty-five and one hundred cases, the same percentage as before the 2003 amendments. Consistent with the earlier findings, very small percentages of lawyers reported advising their clients concerning Rule 1-068 offers in more than one hundred cases.

1. Details Concerning Rule 1-068 Offers Made

In cases filed after August 1, 2003, 76 percent of the plaintiffs' lawyers and 95 percent of the defense lawyers advised their clients to make Rule 1-068 offers of settlement. The surprisingly high percentage of lawyers that advised their clients to make offers is tempered by the fact that most lawyers made relatively few such offers, and they made them in a fairly small percentage of their cases, as Tables 3 and 4, below, show.

Table 3

Number of Rule 1-068 Offers Made[96]		
	Plaintiff	Defendant
None	3%	3%
One	18%	10%
3 or less	44%	36%
5 or less	65%	57%
Between 10 and 20	26%	
Between 10 and 25		23%
Over 20	6%	
Over 25		17%

96. The lawyers surveyed provided narrative responses to this question, and it was impossible to neatly categorize their responses.

Table 4

Percentage of Cases in Which Rule 1-068 Offers Were Made		
	Plaintiff	Defendant
5% or less	33%	26%
10% or less	48%	46%
20% or less	60%	60%
33% or less	76%	72%
From 50 to 100%[97]	24%	28%

Tables 3 and 4 reflect the variability of the use of Rule 1-068 offers by New Mexico lawyers. A majority of the lawyers (68 percent of plaintiffs' lawyers and 60 percent of defense lawyers) made five or fewer Rule 1-068 offers, or on average, fewer than one per year. Approximately three-fourths of the lawyers made Rule 1-068 offers in 33 percent or less of their cases. Yet a substantial number of lawyers reported more significant use of the rule: 32 percent of the plaintiffs' lawyers and 40 percent of the defense lawyers made more than ten Rule 1-068 offers, and approximately 25 percent of both plaintiffs' and defense lawyers reported that they made Rule 1-068 offers in 50 percent to 100 percent of their cases.

The data in Table 5, below, show that very few of the Rule 1-068 offers of settlement made by counsel were accepted by opposing counsel.

Table 5

Number of Rule 1-068 Offers Accepted by Opposing Parties		
	Plaintiff	Defendant
None	76%	43%
One	15%	17%
From 2 to 4	6%	24%
5 or more	3%	16%

97. None of the lawyers reported that they made offers in 33 percent to 49 percent of their cases.

2. Details Concerning Rule 1-068 Offers Received

The survey next asked how many Rule 1-068 offers each lawyer had received from the opposing lawyer. 78 percent of the plaintiffs' lawyers reported that they had received Rule 1-068 offers from defense counsel, but only 52 percent of the defense lawyers received Rule 1-068 offers from plaintiff's counsel. This shows that, despite the amendment to allow plaintiffs to make offers, far fewer plaintiffs' lawyers than defense lawyers made Rule 1-068 offers (p-value 0.0026).

As Table 6, below, indicates most of the lawyers did not receive many Rule 1-068 offers from opposing counsel.

Table 6

Number of Rule 1-068 Offers Received		
	Plaintiff	Defendant
3 or less	46%	40%
5 or less	69%	73%
10 or less	89%	88%
More than 10	11%	12%

Finally, as evidenced in Table 7, below, most lawyers did not accept many of the Rule 1-068 offers they received from opposing counsel.

Table 7

Number of Rule 1-068 Offers Accepted		
	Plaintiff	Defendant
None	57%	73%
One	14%	12%
From 2 to 3	17%	9%
More than 3	12%	6%

Looking solely at the number of Rule 1-068 offers accepted, one might conclude that Rule 1-068 is a dismal failure in helping to settle cases in New Mexico state courts. While the number of Rule 1-068 offers accepted is small, that tells only part of the story. Many plaintiffs' and defense lawyers wrote comments on the survey instrument that give additional insight into how Rule 1-068 offers work in their

practice. The comment most often made (by nineteen defense lawyers and ten plaintiffs' lawyers) is that Rule 1-068 offers increase communication between the parties and encourage additional settlement discussions. They reported that, even when a Rule 1-068 offer is not accepted, it elicits both Rule 1-068 counter-offers and non-Rule 1-068 counter-offers that often lead to settlement. Professors Harold Lewis and Thomas Eaton, in their study of the use of Rule 68 offers of judgment in civil rights and employment discrimination cases, suggested that defense lawyers who do not currently counsel clients to make Rule 68 offers would do so routinely if they received an offer of judgment from the plaintiff.[98] The survey results support this position, but take it one step further. Not only did 52 percent of defense lawyers report that they had made a Rule 1-068 offer in response to receiving a Rule 1-068 offer from the plaintiff, the exact same percentage of plaintiffs' lawyers, 52 percent, reported that they had made a Rule 1-068 offer in response to receiving a Rule 1-068 offer from the defendant.

Several lawyers noted a practical difficulty faced by plaintiffs' lawyers when deciding whether to make a Rule 1-068 offer. To put pressure on the defendant, the plaintiff's offer must be close to the value of the case. Yet the plaintiff may be reluctant to disclose her "bottom line" position too early in the litigation and risk setting a ceiling on her demands if the defendant does not accept the offer. This is especially true if the parties plan to engage in mediation or will be ordered to participate in a settlement conference in federal court, as most mediators/facilitators discourage a party from increasing its settlement demand at the mediation or settlement conference. This explains why several lawyers stated that Rule 1-068 offers are more effective if not made too early in the case, and are often made after an unsuccessful mediation or when the parties have reached an impasse in their settlement discussions.

Even when a Rule 1-068 offer does not lead to resolution of the case, lawyers reported that making the offer had been helpful. Three lawyers stated that such offers helped define or narrow the settlement range with opposing counsel. Three other lawyers reported that making a rejected Rule 1-068 offer was helpful later in the case, because it was factored into subsequent settlement discussions. These comments are consistent with the findings of Professors Yoon and Baker in their study of the use of offers of judgment in New Jersey. They reported that allowing all parties to make offers of judgment may encourage litigants to make more attractive offers.[99] They posit that, while a bilateral offer of judgment rule may not compel parties to reach a settlement, it may draw them closer together than they would have been in the absence of the rule.[100] Professors Lewis and Eaton suggest that if offers of judgment are thoughtfully made, each offer might be made at a more realistic level than the extreme initial demands and responses often seen in standard positional bargaining, which could lead to quicker settlements.[101]

The survey results suggest that this dynamic may be occurring in New Mexico because New Mexico's plaintiffs' and defense lawyers seem to be pleased with how

98. Lewis & Eaton, *supra* note 3, at 364.
99. Yoon & Baker, *supra* note 3, at 189.
100. *Id.* at 189–90.
101. Lewis & Eaton, *supra* note 3, at 364.

Rule 1-068 works in practice. Fifty-nine percent of the plaintiffs' lawyers and 69 percent of the defense lawyers surveyed believe that Rule 1-068 leads more cases to settle or helps them to settle earlier.[102] In contrast, a 1994 Federal Judicial Center survey of the use of Rule 68 in civil rights cases found that only 31 percent of plaintiffs' counsel and 47 percent of defense counsel thought Rule 68 led more cases to reach settlement.[103]

There were scattered additional comments about Rule 1-068. Although a few lawyers stated that the amount of costs shifted by Rule 1-068 is too small to matter, a majority of the lawyers who voiced an opinion on this issue thought that the rule provides sufficient incentives to make parties seriously consider Rule 1-068 offers. Two defense lawyers complained that the rule is not fair because only plaintiffs can recover double costs, and another suggested that awarding double costs to defendants would encourage more plaintiffs to accept such offers. One plaintiffs' lawyer reported that many plaintiffs' lawyers do not yet understand the 2003 amendments to Rule 1-068. This supposition was strengthened when a very experienced plaintiffs' lawyer stated that he had not made Rule 1-068 offers in the past but was currently considering advising several of his clients to make such offers.[104] Only one plaintiffs' lawyer complained about having to wait until 120 days after the filing of a responsive pleading by the defendant to make a Rule 1-068 offer. One defense lawyer stated that, because most cases settle before trial, the threat of having to pay costs under Rule 1-068 is illusory. None of the lawyers surveyed complained about the amendment from offer of judgment, with its formal entry of judgment, to offer of settlement, which allows a case to be dismissed with prejudice.

VII. POTENTIAL AMENDMENTS TO FEDERAL RULE 68

The Advisory Committee on Civil Rules is once again considering whether to attempt any revisions to Rule 68.[105] New Mexico's experience with amending Rule 1-068, together with the empirical studies and the experience of other states in amending their offer of judgment rules, provide valuable insight on potential amendments to Rule 68.

A. Dismissal with Prejudice

Rule 68 should be changed to an "offer of settlement" or "offer of consent

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102. Twenty-seven percent of the plaintiffs' lawyers and 21 percent of the defense lawyers do not think Rule 1-068 leads more cases to settle or helps them to settle earlier, while 14 percent of the plaintiffs' lawyers and 10 percent of the defense lawyers were not sure.

103. The survey randomly sampled 800 civil cases that had been closed in federal court in the first six months of 1993. In this question, the survey asked counsel in civil rights cases how Rule 68 influenced settlement in cases similar to the case selected for the survey. The statistics were worse when reviewing only the cases identified for the survey. In those cases, Rule 68 had no influence in 61 percent of the cases that settled and in 85 percent of the cases that proceeded to trial. SHAPARD, *supra* note 3, at 3, 8–9.

104. There is anecdotal evidence that lawyers who understand offer of judgment rules make more offers under such rules. *See Revitalizing FRCP 68: Can Offers of Judgment Provide Adequate Incentives for Fair, Early Settlement of Fee-Recovery Cases? Session Three: "Changes to Rule 68,"* 57 MERCER L. REV. 791, 801 (2006).

105. Revising Rule 68 was a topic on the Committee's agenda for its meeting in November of 2008. *See* Advisory Committee on Civil Rules, November 2008 Agenda, http://www.uscourts.gov/rules/Agenda Books/CV2008-11.pdf.

disposition" rule and allow the case to be dismissed with prejudice instead of having a judgment entered against the defendant. Defendants may object to the entry of judgment for a number of reasons: because of adverse publicity or concerns that it might encourage copycat litigation, invoke collateral estoppel with cases that share a common factual basis, or impair credit worthiness or career advancement for individual defendants.[106] Both of the proposals by the Federal Rules Advisory Committee in 1983 and 1984 allowed the case to be dismissed with prejudice without requiring the entry of a judgment.[107] Lewis and Eaton noted "almost universal support" among the lawyers they surveyed for changing the rule's terminology to an offer of "settlement" or "agreement."[108] None of the New Mexico lawyers surveyed complained about this amendment to Rule 1-068, and it has the potential to increase the number of offers made by defendants.

B. Offers by Plaintiffs

Rule 68 should allow plaintiffs to make offers of judgment.[109] Allowing plaintiffs to make offers of judgment is not particularly novel or controversial; twenty-three states already do so.[110] A 1994 Federal Judicial Center survey about the use of Rule 68 reported that nearly 75 percent of the attorneys favored amending Rule 68 to permit offers by all parties and to allow the recovery of something more than the costs allowed under 28 U.S.C. § 1920.[111] Lewis and Eaton found that plaintiffs' lawyers overwhelmingly supported this change, and that while many defense lawyers strongly opposed it, a significant number of defense lawyers supported such a change.[112] New Mexico's experience demonstrates that allowing plaintiffs to make Rule 68 offers will increase the number of offers made under the rule and will trigger both Rule 68 counter-offers and regular settlement offers that will lead to settlement or will help define or narrow the settlement range for the case.

C. Increase in Available Sanctions

Rule 68 should be amended to increase the sanctions available under the rule. Some states allow a plaintiff who receives more than her offer of judgment at trial to recover the normal costs that the plaintiff would recover under Rule 54(D).[113] Since prevailing plaintiffs usually receive an award of costs under Rule 54(D)—although judges retain the discretion to deny them—this provides little additional incentive for plaintiffs to make offers of judgment. All commentators

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106. Teresa Rider Built, *Practical Use and Risky Consequences of Rule 68 Offers of Judgment*, LITIG., Spring 2007, at 26, 27; Lewis & Eaton, *supra* note 3, at 350.

107. *See supra* text accompanying note 24.

108. Lewis & Eaton, *supra* note 3, at 356.

109. Rule 1-068 explicitly states that attorney's fees are excluded from the costs shifted under the rule. I agree with Lewis's and Eaton's recommendation to have a separately numbered subdivision of Rule 68 for cases that arise under federal fee-shifting statutes. Harold S. Lewis, Jr. & Thomas A. Eaton, *The Contours of a New FRCP, Rule 68.1: A Proposed Two-Way Offer of Settlement Provision for Federal Fee-Shifting Cases*, 252 F.R.D. 551 (2008).

110. *See supra* note 50 and accompanying text.

111. SHAPARD, *supra* note 3, at 2.

112. Lewis & Eaton, *supra* note 3, at 361–62.

113. *See, e.g.*, Haw. R. Civ. P. 68; N.D. R. Civ. P. 68.

agree that the costs that may be shifted under Rule 68 are too small to be a significant incentive to make or accept an offer under the rule, and the costs that have been awarded in federal court in New Mexico from 2000 to 2008 support this proposition.[114]

Nine states have chosen to increase the sanctions available under the rule by shifting attorney's fees.[115] In 1994 New Jersey amended its offer of judgment rule to allow the imposition of uncapped attorney's fees as a cost-shifting sanction.[116] Yoon and Baker found that, after the rule was amended, suits in New Jersey were resolved more quickly (by an average of 2.3 months, or roughly 7 percent), which translated into a decrease in attorney's fees for the defendants' insurer of approximately 20 percent.[117] They concluded that offer of judgment rules that allow for substantial cost-shifting would increase the efficacy of the rules.[118]

While increasing the sanctions available under Rule 68 should increase its use, the Federal Rules Advisory Committee, and states that are considering amending their offer of judgment rules, should decline to shift attorney's fees under the rule. Shifting attorney's fees is too draconian a penalty for failing to accept an offer of judgment because attorney's fees often account for the vast majority of litigation expenses.[119] A proposal to shift attorney's fees under Rule 68 is likely to generate intense controversy and doom any proposed amendment, as it did with the proposals by the Advisory Committee in 1983 and 1984.[120] Further, many commentators are concerned that shifting attorney's fees is too much a matter of substantive right to be accomplished through amending a rule of civil procedure and would violate the Rules Enabling Act.[121]

Even if those concerns can be addressed, states that have adopted attorney's fee shifting under their offer of judgment rules have ignored the experience in Alaska with partial attorney's fee shifting in civil litigation. Susanne Di Pietro and Teresa Carns studied Alaska Civil Rule 82, which allows partial attorney's fee shifting, and concluded that shifting attorney's fees seldom played a significant role in civil litigation in Alaska.[122] They found that attorney's fees were awarded in only a small percentage of cases, and that parties paid the fee award less than half the time.[123]

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114. *See supra* text accompanying notes 56–63.

115. *See supra* text accompanying note 51.

116. Yoon & Baker, *supra* note 3, at 163–64.

117. *Id.* at 185–86. The data Yoon and Baker reviewed did not report whether either party made an offer of judgment, whether such offers were accepted or rejected, and whether the offeree who rejected the offer did worse at trial. *Id.* at 169.

118. *Id.* at 191–93.

119. *See, e.g.*, Ellison v. Plumbers and Steam Fitters Union Local 375, 118 P.3d 1070, 1078 (Alaska 2005) (ordering the unsuccessful plaintiff in a sexual harassment case to pay her former union and union stewards attorney's fees of $227,000 and $142,000 respectively); SHAPARD, *supra* note 3, at 6 (stating that attorney's fees account for approximately 80 percent of litigation expenses).

120. As Professor Cooper observed, shifting attorney's fees under Rule 68 is a "lightning rod for controversy." Cooper, *supra* note 17, at 110.

121. *See, e.g.*, Marek v. Chesny, 473 U.S. 1, 21 (1985) (Brennan, J., dissenting); Edward H. Cooper, *Symposium Reflections: A Rulemaking Perspective*, 57 MERCER L. REV. 839, 845–47 (2006); Merenstein, *supra* note 43, at 155–57.

122. *See* Susanne Di Pietro & Teresa W. Carns, *Alaska's English Rule: Attorneys Fee Shifting in Civil Cases*, 13 ALASKA L. REV. 33, 77 (1996).

123. *Id.* at 78.

They found that the rule did not affect decisions to file a claim, and did not often affect litigation or settlement strategies.[124] In those cases where fee shifting did have an effect, Rule 82 discouraged (1) some parties of moderate means from filing cases that either wealthy or poor plaintiffs would file, (2) some claims of questionable merit, and (3) early settlement of strong claims because the fee award increased the likelihood of a greater recovery.[125] They cautioned against adopting fee shifting in hopes of decreasing litigation, speeding up the disposition of cases, or inducing settlement, because the impact of Rule 82 in those areas has been "complex, subtle and often contradictory."[126] They also found that Rule 82 did not significantly deter frivolous litigation, and that two-way fee shifting in theory becomes a one-way shift in practice because defendants are unable to collect fees from unsuccessful plaintiffs.[127]

The sanctions available under Rule 68 must be significant enough to influence pre-trial negotiations. The experience with New Mexico's Rule 1-068 suggests that there is a middle way between the current Rule 68, which does not shift significant costs, and those states that shift attorney's fees, which can be a crushing burden. Because New Mexico allows for the recovery of a broader variety of costs, including expert witness fees, the cost awards in New Mexico state court are much higher than the costs awarded in federal court.[128] Amending 28 U.S.C. § 1920 to include expert witness fees would create greater incentives under Rule 68.[129]

Under Rule 1-068, New Mexico awards double costs to plaintiffs who receive more than their offer of settlement at trial.[130] Since this change was fiercely opposed by New Mexico's defense lawyers, it is surprising that only three defense lawyers mentioned this issue when responding to the survey. While allowing double costs to plaintiffs, and only single costs to defendants, may seem asymmetrical, it is not because two negative consequences occur when a plaintiff receives a judgment that is less than the defendant's offer of judgment; the plaintiff must pay the defendant's costs incurred after the date of the offer, and she is also denied her costs incurred after the offer, even though, as the prevailing party, she would normally recover such costs.[131] Judge Posner, a leading scholar of law and economics, believes that awarding double costs to the plaintiff is equivalent to the sanction imposed on a plaintiff who rejects an offer of judgment from the defendant and then recovers less at trial.[132] Rule 68 should be amended to allow double costs to plaintiffs when they

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124. *Id.*

125. *Id.* at 79–84.

126. *Id.* at 87.

127. *Id.* at 88–89.

128. *See supra* text accompanying notes 64–66. Other states that allow the recovery of expert witness fees include Arizona, California, and Colorado. *See* ARIZ. R. CIV. P. 68(g); CAL. CIV. PROC. CODE § 998(c)(1) (West 2005); COLO. REV. STAT. ANN. § 13-17-202(1)(b) (West 2005 & Supp. 2008).

129. *See, e.g.*, Cooper, *supra* note 17, at 131.

130. *See* Order on Plaintiff's Costs, Keith v. Manorcare, Inc., No. CV 2005-8066 (N.M. 2d Jud. Dist. Sept. 11, 2007) (awarding pre-offer costs of $107,392 and double the post-offer costs of $36,758, for a total cost award in excess of $180,000); Order Settling Cost Bill, Speero v. Rodrigues, No. CV-2003-434 (N.M. 5th Jud. Dist. Aug. 30, 2007) (awarding pre-offer costs of $13,296 and double the post-offer costs of $19,575 for a total cost recovery in excess of $52,000). Minnesota has recently amended its offer of judgment rule to award double costs to plaintiffs when they receive more than their offer of judgment at trial. *See* MINN. R. CIV. P. 68.03 (effective July 1, 2008).

131. *See* Crossman v. Marcoccio, 806 F.2d 329, 331–33 (1st Cir. 1986).

132. *See* S.A. Healy Co. v. Milwaukee Metro. Sewerage Dist., 60 F.3d 305, 308 (7th Cir. 1995).

receive more than their offer of judgment at trial.

D. Margin of Error

If more severe sanctions are to be imposed for failure to accept an offer of judgment, Rule 68 should be amended to add a margin-of-error provision. As currently drafted, Rule 68 imposes sanctions whenever the "judgment finally obtained by the offeree is not more favorable than the offer."[133] Some cases present difficult issues of liability, while others present genuine uncertainty as to damages, and jury unpredictability is an ever-present danger even for experienced trial lawyers.[134] Rule 68 should not impose sanctions because a party cannot predict to the penny what the jury might award.[135] For example, in *Bright v. Land O'Lakes*, the Seventh Circuit affirmed an award of costs under Rule 68 even though it concluded that the offer of judgment came "surprisingly close" to the actual damage award.[136] The proposal by the ABA House of Delegates in 1996 included a 25 percent margin-of-error provision to mitigate the harshness of requiring cost-shifting when a party receives a judgment that is slightly less than a rejected Rule 68 offer.[137] Several states have 25 percent margin-of-error provisions, while New Jersey has a 20 percent provision and Alaska has a 5 percent margin-of-error provision.[138] Including a margin-of-error provision of 10 percent to 20 percent would ensure that parties are not sanctioned when they made a serious offer but miscalculated slightly what the jury would award.

E. Timing of Offer

If plaintiffs are allowed to make Rule 68 offers, they should be precluded from doing so for a period of time to allow the defendant a fair opportunity to evaluate the merits of the case.[139] Otherwise, the plaintiff could make a Rule 68 offer when suit was filed.[140] How long it takes to evaluate a case depends upon its complexity and whether the parties have informally exchanged information before suit is filed.

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133. FED. R. CIV. P. 68(d).

134. *See* Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339, 1347 (1994) (noting that there can be enormous variability in trial results "because lawyers, judges, and juries may produce very different results in the same case").

135. Many years ago, when I was a young attorney struggling to value a case, one of my senior partners told me: "Anyone can tell the difference between cases that are worth $15,000 and $150,000, but no one can tell what will make one jury award $10,000 and another $15,000 in similar cases."

136. The defendants made an offer of judgment for $225,000, and the plaintiff won "either $250,000 or $226,608.91, which is the $250,000 amount less the $23,391.09 counterclaim won" by one of the defendants. Bright v. Land O'Lakes, Inc., 844 F.2d 436, 443 (7th Cir. 1988). *See also* Gilmore v. Duderstadt, 1998-NMCA-086, ¶ 36, 961 P.2d 175, 185 (costs were awarded under Rule 1-068 even though the defendants' offer of judgment for $75,000 was quite close to the final judgment, which included an award of prejudgment interest, of $76,747.31).

137. *See supra* note 36 and accompanying text.

138. *See* ALASKA R. CIV. P. 68(b) (5 percent); GA. CODE ANN. § 9-11-68(b) (2008) (25 percent); LA. CODE CIV. PROC. ANN. art. 970(c) (25 percent); N.J. CT. R. 4:58-2(a) (20 percent).

139. Likewise, defendants who file counterclaims should be precluded from making an offer of judgment for a period of time after the counterclaim has been filed to allow the plaintiff an opportunity to evaluate the merits of the counterclaim.

140. Rule 68(a) provides that an offer of judgment may be made any time more "than 10 days before the trial begins."

In many cases some discovery may be necessary before the parties can estimate the likely outcome of the case. An experienced defense attorney may be able to evaluate simple cases—such as tort litigation arising out of an automobile accident—fairly quickly, but more complicated cases will take more time to evaluate. Lewis and Eaton reported that the lawyers they surveyed overwhelmingly agreed that a defense lawyer can value a civil rights or employment discrimination case within four to six months after the case is filed.[141]

New Mexico precludes a plaintiff from making a Rule 1-068 offer prior to the expiration of 120 days after the filing of a responsive pleading by a party. Only one plaintiff's lawyer complained that he could not make an offer before that time, and none of the defense lawyers claimed that they did not have enough time to evaluate a Rule 1-068 offer.[142] Given Lewis's and Eaton's finding and the responses from New Mexico's lawyers, precluding plaintiffs' offers until 120 days after a responsive pleading has been filed appears to allow a reasonable time period for defendants to evaluate offers under Rule 68.

VIII. CONCLUSIONS

Although Rule 68 has been in existence for many years, a consensus has developed over the last thirty years that it is in serious need of reform. This consensus is reflected in the literature and in the trend by the states to vary from the Rule 68 pattern and adopt innovative offer of judgment rules. The recent empirical studies by Harold Lewis, Thomas Eaton, Albert Yoon, and Tom Baker, together with the earlier work done by John Shapard, demonstrate that Rule 68 could be enhanced by allowing all parties to make offers of judgment and by increasing the sanctions available under the rule.

New Mexico's experience with its amended Rule 1-068 suggests that including expert witness fees as part of the costs that can be shifted will increase the incentives to make offers of judgment, but not to the level of attorney's fee shifting, which is too draconian a penalty. If Rule 68 is to be amended, the Federal Rules Advisory Committee should also consider (1) changing the terminology of the rule to "offer of settlement" and allow the case to be dismissed without entry of a judgment, (2) adding a margin-of-error provision, and (3) prohibiting the parties from making offers of judgment for a period of time to allow the opposing party a fair opportunity to evaluate the merits of the claim. New Mexico's experience with its amendments demonstrates that they increase the use of Rule 1-068 offers and that, even though such offers are not often accepted, they lead to further settlement discussions that often lead to settlement of the case outside the formal Rule 1-068 process. Adopting these amendments will have the potential to transform Rule 68 from a one-way rule with limited incentives into a rule with more significant incentives that may assist all parties to resolve litigation more quickly.

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141. Lewis & Eaton, *supra* note 3, at 353.

142. Rule 1-068 supplements but does not supplant the traditional settlement process. Plaintiffs in New Mexico remain free to make settlement offers immediately after the case has been filed; they simply are precluded from making a Rule 1-068 offer, with its increased sanctions, for the specified period of time.

APPENDIX A

QUESTIONNAIRE CONCERNING RULE 1-068

1. Approximately how many cases did you handle in the five years before August 1, 2003, in which you advised your client on decisions to make, accept, or reject offers under Rule 1-068?

_____ a. none
_____ b. less than 25
_____ c. between 25 and 100
_____ d. more than 100

2. Approximately how many cases filed after August 1, 2003, have you handled in which you advised your client on decisions to make, accept, or reject offers under Rule 1-068?

_____ a. none
_____ b. less than 25
_____ c. between 25 and 100
_____ d. more than 100

3. Whom do you primarily represent?

_____ a. plaintiffs
_____ b. defendants

If you primarily represent plaintiffs, please answer question 4.
If you primarily represent defendants, please answer question 5.
If you wish to make additional comments about Rule 1-068, please make them here or on the back of this page.

4(A). If you primarily represent plaintiffs, have you advised your client (plaintiff) to make a Rule 1-068 offer of settlement in cases filed after August 1, 2003?

_____ a. yes
_____ b. no

If you answered yes to this question:

1. How many Rule 1-068 offers of settlement have you made?
2. In what percentage of your cases did you make such offers?
3. How many of your offers of settlement were accepted?
4. In general, do you believe that making a Rule 1-068 offer of settlement increases the chances of settling the case, or helps the case settle earlier? Please explain.

4(B). Since August 1, 2003, have you received offers of settlement from defendants under Rule 1-068?

_____ a. yes
_____ b. no

If you answered yes:

1. How many Rule 1-068 offers of settlement did you receive?
2. How many Rule 1-068 offers of settlement did you accept?

3. Did you make a Rule 1-068 offer of settlement in response to receiving a Rule 1-068 offer from defendant?

5(A). If you primarily represent defendants, have you advised your client (defendant) to make a Rule 1-068 offer of settlement in cases filed after August 1, 2003?

_____ a. yes
_____ b. no

If you answered yes to this question:

1. How many Rule 1-068 offers of settlement have you made?
2. In what percentage of your cases did you make such offers?
3. How many of your offers of settlement were accepted?
4. In general, do you believe that making a Rule 1-068 offer of settlement increases the chances of settling the case, or helps the case settle earlier? Please explain.

5(B). Since August 1, 2003, have you received offers of settlement from plaintiffs under Rule 1-068?

_____ a. yes
_____ b. no

If you answered yes:

1. How many Rule 1-068 offers of settlement did you receive?
2. How many Rule 1-068 offers of settlement did you accept?
3. Did you make a Rule 1-068 offer of settlement in response to receiving a Rule 1-068 offer from plaintiff?

RULES OF CIVIL PROCEDURE FOR THE DISTRICT COURTS
ARTICLE 8. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PROCEEDINGS

N.M. Dist. Ct. R.C.P. 1-068 (2012)

1-068 Offer of settlement

A. Offer of settlement. Except as provided in this rule, at any time more than ten (10) days before the trial begins, any party may serve upon any adverse party an offer to allow an appropriate judgment to be entered in the action in accordance with the terms and conditions specified in the offer. A claimant may not make an offer of settlement under this rule until one hundred twenty (120) days after the filing of a responsive pleading by the party defending against that claim. If within ten (10) days after the service of the offer the adverse party serves written notice that the offer is accepted, either party may then file the offer and notice of acceptance together with proof of service thereof and thereupon such judgment may be entered as the court may direct. An offer not accepted shall be deemed withdrawn and evidence thereof is not admissible except in a proceeding to determine costs.

If an offer of settlement made by a claimant is not accepted and the judgment finally obtained by the claimant is more favorable than the offer, the defending party must pay the claimant's costs, excluding attorney's fees, including double the amount of costs incurred after the making of the offer. If an offer of settlement made by a defending party is not accepted and the judgment finally obtained by the claimant is not more favorable than the offer, the claimant must pay the costs, excluding attorney's fees, incurred by the defending party after the making of the offer and shall not recover costs incurred thereafter.

The fact that an offer has been made but not accepted does not preclude a subsequent offer. When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, any party may make an offer of settlement, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten (10) days prior to the commencement of hearings to determine the amount or extent of liability.

B. Domestic relations actions excluded. This rule shall not apply to domestic relations actions.

C. Awards not cumulative. In those cases where a claimant would be entitled to double costs under Rule 1-068 and also entitled to interest pursuant to the statute, the court should award double costs or interest plus the costs awarded to the prevailing party pursuant to Rule 1-054(D)(2) NMRA, but not both statutory interest and double costs.

[As amended, effective August 1, 2003.]

COMMITTEE COMMENTARY.

2003 AMENDMENT

Rule 1-068 NMRA formerly was titled "Offer of judgment" and required that the accepting party "allow judgment to be taken against him for the money or to the effect specified in the offer." Rule 1-068 NMRA (superseded). Requiring that a judgment be entered for the amount of the agreed-upon offer was a disincentive to some litigants to make offers because those litigants preferred to make the Rule 1-068 NMRA offer, tender full payment of the amount of the offer and then obtain a dismissal of the lawsuit with prejudice pursuant to Rule 1-041(A) NMRA when the offer and tender were accepted. The rule now titles the procedure an "Offer of settlement" to make explicit that when either party makes an offer of settlement which is accepted, the party who thereby agreed to make a payment may tender full payment of the agreed-upon sum before a judgment is entered. When this is done, the court should enter a judgment of dismissal with prejudice rather than a money judgment in the amount specified in the offer of settlement. Because the form of judgment will depend upon whether full payment is tendered before the accepted offer results in a judgment, the offer of settlement shall not be conditioned on the form that the judgment might take, but only upon the substantive content of the settlement proposal.

This rule also applies to actions seeking relief other than money damages. *See e.g., Assoc. of Apartment Owners of Wailea Elua v. Wailea Resort Co., Ltd., 58 P.2d 608,* (Hawaii 2002) ("[F]ederal courts have overwhelmingly applied Rule 68 to cases dealing with equitable relief.").

Rule 1-068 NMRA previously permitted only a party defending against a claim to make an offer of judgment. At least sixteen states have rules that allow the claimant as well as the defending party to do so. Allowing either party to make

offers of settlement increases the likelihood that settlement will occur and provides equality of opportunity to all parties to initiate the settlement process.

Rule 1-068 NMRA has always provided that when a defending party's offer of judgment is not accepted and the claimant fails to obtain a judgment more favorable than the offer, the claimant must pay the costs of the defending party incurred after the making of the offer. The rule continues to provide this remedy. Rule 1-068 NMRA also now makes explicit what has been the universal construction of the rule -- that when the claimant does not obtain a judgment more favorable than the offer, the claimant not only must pay the defending party's costs, but also is not entitled to its costs incurred after the making of the offer. *E.g., Crossman v. Maroccio, 806 F.2d 329, 333 (1st Cir. 1986),* cert. denied, *481 U.S. 1029 (1987); see Moore's Federal Practice Digest* P68.08[2] (3rd ed. 2002).

When a claimant's offer of settlement is declined and the claimant obtains a judgment greater than the offer, the appropriate sanction is more complicated. Because the claimant is normally entitled to costs if the claimant prevails in obtaining a judgment in any amount, *see* Rule 1-054(D)(1) NMRA, an award only of costs would not provide additional incentive for the defending party to accept the offer. To provide additional incentive, the rule provides that costs incurred by the claimant after the making of the offer of settlement shall be doubled and the doubled amount awarded as costs.

The plaintiff often has the opportunity for extensive investigation and preparation of the claim prior to filing suit. The claimant thus may be in a position to make an offer of settlement very early in the proceedings, before the defending party has had a fair opportunity through discovery to determine the relative merits of claimant's case. For this reason, the rule provides that an offer of settlement may not be made by a claimant until one hundred twenty days after the service of a responsive pleading by the defending party who thus has additional time to evaluate the offer before deciding whether to accept or reject it. For example, if the claimant is the plaintiff, the time for making an offer begins upon service of the answer by the defendant. If the claimant is a defendant who has filed a counterclaim, the time for making an offer begins upon service of the plaintiff's reply to the counterclaim. *See* Rule 1-007(A) NMRA.

"Costs" awardable pursuant to this rule are those provided for in Rule 1-054(D) NMRA. Attorney's fees are not included in Rule 1-054(D) NMRA, *see* Rule 1-054(E) NMRA, and are excluded from the cost-shifting provisions of this rule even if attorney's fees are included as costs for other purposes or in other contexts. *E.g., 28 U.S.C. Sec. 1988*(b) (attorney's fees included as costs awardable in cases involving civil rights actions). While a cost award is mandatory under the conditions specified in Rule 1-068 NMRA, the amount of those costs is separately determined by the trial court pursuant Rule 1-054(D) NMRA. *See Key v. Chrysler Motors Corp.*, 2000-*NMSC-010, 128 N.M. 739, 998 P.2d 575.*

This rule does not apply to domestic relations actions because such actions frequently provide for the award of attorney's fees in the discretion of the court and this provides sufficient incentive for parties in domestic relations cases to seek to settle their disputes. The excluded "domestic relations actions" are those described in the Committee commentary to Rule 1-120 NMRA.

A statute, *Section 56-8-4B NMSA* 1978, authorizes the court to award interest to a plaintiff under certain circumstances if the defendant fails to make reasonable and timely offers of settlement to the plaintiff. This statute operates differently from Rule 1-068 NMRA in that the statute penalizes a defendant for not making offers rather than providing an incentive for plaintiffs to make offers of settlement. Nonetheless, awarding plaintiffs both double costs under this rule and interest pursuant to the statute is unduly punitive.

The broader terms "claimant" and "defending party" are used in the Rule instead of "plaintiff" and "defendant" because, for example, when a defendant files a counterclaim, the defendant also become a claimant and the plaintiff also becomes a defending party.

MINNESOTA RULES OF CIVIL PROCEDURE
VII. PROVISIONAL AND FINAL REMEDIES AND SPECIAL PLEADINGS
RULE 68. OFFER OF JUDGMENT OR SETTLEMENT

68.01 OFFER

(a) Time of Offer. At any time more than ten days before the trial begins, any party may serve upon an adverse party a written damages-only or total-obligation offer to allow judgment to be entered to the effect specified in the offer, or to settle the case on the terms specified in the offer.

(b) Applicability of Rule. An offer does not have the consequences provided in Rules 68.02 and 68.03 unless it expressly refers to Rule 68.

(c) Damages-only Offers. An offer made under this rule is a "damages-only" offer unless the offer expressly states that it is a "total-obligation" offer. A damages-only offer does not include then-accrued applicable prejudgment interest, costs and disbursements, or applicable attorney fees, all of which shall be added to the amount states as provided in Rules 68.02(b)(2) and (c).

(d) Total-obligation Offers. The amount stated in an offer that is expressly identified as a "total-obligation" offer includes then-accrued applicable prejudgment interest, costs and disbursements, and applicable attorney fees.

(e) Offer Following Determination of Liability. When the liability of one party to another has been determined by verdict, order, or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of judgment, which shall have the same effect as an offer made before trial if it is served within a reasonable time not less than ten days before the commencement of a hearing or trial to determine the amount or extent of liability.

(f) Filing. Notwithstanding the provisions of Rule 5.04, no offer under this rule need be filed with the court unless the offer is accepted.

68.02 ACCEPTANCE OR REJECTION OF OFFER

(a) Time for Acceptance. Acceptance of the offer shall be made by service of written notice of acceptance within ten days after service of the offer. During the ten-day period the offer is irrevocable.

(b) Effect of Acceptance of Offer of Judgment. If the offer accepted is an offer of judgment, either party may file the offer and the notice of acceptance, together with the proof of service thereof, and the court shall order entry of judgment as follows:

(1) If the offer is a total-obligation offer as provided in Rule 68.01(d), judgment shall be for the amount of the offer.

(2) If the offer is a damages-only offer, applicable prejudgment interest, the plaintiff-offeree's costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer, shall be determined by the court and included in the judgment.

(c) Effect of Acceptance of Offer of Settlement. If the offer accepted is an offer of settlement, the settled claim(s) shall be dismissed upon:

(1) the filing of a stipulation of dismissal stating that the terms of the offer, including payment of applicable prejudgment interest, costs and disbursements, and applicable attorney fees, all accrued to the date of the offer, have been satisfied; or

(2) order of the court implementing the terms of the agreement.

(d) Offer Deemed Withdrawn. If the offer is not accepted within the ten-day period, it shall be deemed withdrawn.

(e) Subsequent Offers. The fact that an offer is made but not accepted does not preclude a subsequent offer. Any subsequent offer by the same party under this rule supersedes all prior offers by that party.

68.03 EFFECT OF UNACCEPTED OFFER

(a) Unaccepted Offer Not Admissible. Evidence of an unaccepted offer is not admissible, except in a proceeding to determine costs and disbursements.

(b) Effect of Offer on Recovery of Costs. An unaccepted offer affects the parties' obligations and entitlements regarding costs and disbursements as follows:

(1) If the offeror is a defendant, and the defendant-offeror prevails or the relief awarded to the plaintiff-offeree is less favorable than the offer, the plaintiff-offeree must pay the defendant-offeror's costs and disbursements incurred in the defense of the action after service of the offer, and the plaintiff-offeree shall not recover its costs and disbursements incurred after service of the offer, provided that applicable attorney fees available to the plaintiff-offeree shall not be affected by this provision.

(2) If the offeror is a plaintiff, and the relief awarded is less favorable to the defendant-offeree than the offer, the defendant-offeree must pay, in addition to the costs and disbursements to which the plaintiff-offeror is entitled under Rule 54.04, an amount equal to the plaintiff-offeror's costs and disbursements incurred after service of the offer. Applicable attorney fees available to the plaintiff-offeror shall not be affected by this provision.

(3) If the court determines that the obligations imposed under this rule as a result of a party's failure to accept an offer would impose undue hardship or otherwise be inequitable, the court may reduce the amount of the obligations to eliminate the undue hardship or inequity.

(c) Measuring Result Compared to Offer. To determine for purposes of this rule if the relief awarded is less favorable to the offeree than the offer:

(1) a damages-only offer is compared with the amount of damages awarded to the plaintiff; and

(2) a total-obligation offer is compared with the amount of damages awarded to the plaintiff, plus applicable prejudgment interest, the plaintiff's taxable costs and disbursements, and applicable attorney fees, all as accrued to the date of the offer.

68.04 APPLICABLE ATTORNEY FEES AND PREJUDGMENT INTEREST

(a) "Applicable Attorney Fees" Defined. "Applicable attorney fees" for purposes of Rule 68 means any attorney fees to which a party is entitled by statute, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to attorney fees not provided for under the applicable substantive law.

(b) "Applicable Prejudgment Interest" Defined. "Applicable prejudgment interest" for the purposes of Rule 68 means any prejudgment interest to which a party is entitled by statute, rule, common law, or contract for one or more of the claims resolved by an offer made under the rule. Nothing in this rule shall be construed to create a right to prejudgment interest not provided for under the applicable substantive law.

Advisory Committee Comment - 2008 Amendment

Rule 68 is extensively revamped both to clarify its operation and to make it more effective in its purpose of encouraging the settlement of litigation. The overarching goal of this set of amendments is to add certainty to the operation of the rule and to remove surprises both to parties making offers and those receiving and deciding whether to accept them. Additionally, Rule 68.03 is revised to make the mechanism of Rule 68 better address the goal of providing incentives for both claimants and parties opposing claims. This rule is not as closely modeled on its federal counterpart, Fed. R. Civ. P. 68, as is the existing rule, so that rule and decisions construing it may not be persuasive guidance in construing this rule.

Rule 68 uses the term "offer" to include offers to settle made by any party. Thus, both an offer by a defendant to pay a sum in return for a dismissal of a claim and an offer by a claimant to accept a sum in return for dismissal--often termed a "demand" and not an "offer"--are offers for the purposes of the rule.

Rule 68.01(b) is a new provision that requires that in order to be given the cost-shifting effect of the rule an offer must include express reference to the rule. See Matheiu v. Freeman, 472 N.W.2d 187 (Minn. App. 1991). This provision is intended to make it unlikely that an offer would come within the scope of the rule without the offeror intending that and the offeree having notice that it is an offer with particular consequences as defined in the rule.

The revised rule caries forward the former rule's application both to offers of judgment and to offers of settlement. The effects of these two types of offer are different, and are clarified in Rule 68.02. Rules 68.01(c) and (d) create an additional dichotomy in the rule, creating new categories of "damages-only" and "total-obligation" offers. This dichotomy is important to the operation of the rule, and is intended to remove a significant "trap for the unwary" where an accepted offer may be given two substantially different interpretations by offeror and offeree. Under the former rule, if a statute allowed the recovery of attorney fees as costs and a Rule 68 offer were made and did not expressly include reference to attorney fees, fees could be recovered in addition to the amount offered. See, e.g., Collins v. Minn. Sch. of Business, Inc., 655 N.W.2d 320 (Minn. 2003). Fees recoverable by contract, rather than statute, would be subsumed

within the offer, and not be recoverable in addition to the amount of the accepted offer. See, e.g., Schwickert, Inc. v. Winnegabo Seniors, Ltd., 680 N.W.2d 79 (Minn 2004). Similar uncertainty may exist as to whether prejudgment interest is included in or to be added to the amount of an offer. See, e.g., Collins; Stinson v. Clark Equip. Co., 743 N.W.2d 333 (Minn. App. 1991). Discussion of other ambiguities under the federal counterpart to Rule 68, Fed. R. Civ. P. 68, is included in Danielle M. Shelton, Rewriting Rule 68: Realizing the Benefits of the Federal Settlement Rule by Injecting Certainty into Offers of Judgment, 91 MINN. L. REV. 865 (2007).

The "damages-only" or "total-obligation" offer choice allows the party making the offer to control and understand the effect of the offer, if accepted; similarly, a party deciding how to respond to an offer should be able to determine the total cost of accepting an offer. Rule 68.01(c) creates a presumption that an offer made under Rule 68 is a "damages-only" offer unless it expressly meets the criteria of Rule 68.01(d) by stating that it is a "total-obligation" offer. The added precision allowed by distinguishing the types of offers permits the new rule to provide greater clarity and certainty as to the effect both of accepted offers and unaccepted offers.

Rule 68.03(b)(1) changes the effect of Rule 68 on costs and disbursements when a defendant's offer is rejected and the judgment is less favorable to the plaintiff offeree. Under the former rule, the offeree would nevertheless recover its costs and disbursements from the offeror. Borchert v. Maloney, 581 N.W.2d 838 (Minn. 1998). The revised rule provides that the offeree does not recover its costs and disbursements incurred after service of the offer. But this change does not affect a prevailing plaintiff's right to attorney fees to which it is entitled under law or contract. In this respect the revised rule, like the former rule, does not incorporate the cut-off of attorney fees that occurs under the federal Rule 68 as interpreted in Marek v. Chesney, 473 U.S. 1 (1986). Additionally, under the former rule, the offeror was entitled to its costs and disbursements incurred from the beginning of the case. Vandenheuvel v. Wagner, 690 N.W.2d 757 (Minn. 2005). As to this issue, the revised rule now has the same effect as the federal rule (although with language that is not identical), requiring the offeree to pay the offeror's costs and disbursements incurred after service of the offer.

Rule 68.03(b)(2) introduces a consequence for a defendant's rejection of a plaintiff's Rule 68 offer if the judgment is less favorable to the defendant offeree. In that circumstance, this new provision requires the defendant to pay double the offeror's costs and disbursements incurred after service of the offer. If the defendant is merely required to pay the offeror's costs, as under the current rule, there is no adverse consequence for a defendant who rejects a Rule 68 offer. In contrast, under the revised rule, a plaintiff who rejects a Rule 68 offer suffers dual adverse consequences: loss of the right to recover his costs and required payment of the defendant's costs.

Rule 68.04(a) expressly provides that the rule does not create a right to recover attorney fees. This provision is intended only to avoid confusion. The rule might affect the extent of fees recoverable by statute, common law, or by contract, but it does not create any right to recover fees that does not exist outside of Rule 68.

Similarly, Rule 68.04(b) expressly provides that the rule does not create a right to recover prejudgment interest, which right must rather be drawn from an applicable statute, rule, contract, or common law. It is noteworthy that MINN. STAT. [#xa7] 549.09, subd. 1(b), which governs prejudgment interest in most cases, contains a mechanism analogous to this rule that adjusts calculation of prejudgment interest based on the relationship between the parties' offers of settlement and the ultimate judgment or award in the case.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 2, 2013

RE: Rule 5, N.D.R.App.P., Appellate Mediation Program; Rule 8.9, N.D.R.Ct., Roster of Alternative Dispute Resolution Neutrals; Appendix B, N.D.R.App.P., Appellate Mediation Protocol

The Supreme Court has referred Rule 5, Rule 8.9 and the appellate mediation protocol to the committee for review and comment. The Court would like the committee to examine these proposals and make suggestions for improvement. It would also like the committee to provide general comments on the proposals.

These proposals were developed by the Joint Alternative Dispute Resolution Committee. They have been submitted to the Court and reviewed by the SBAND Board of Governors.

Proposed Rule 5 is a completely new rule. It would establish an appellate mediation program for a limited category of family law and probate appeals.

The amendments to Rule 8.9 would create a roster of appellate mediation neutrals to serve as mediators for the program. Under the current draft, these neutrals would need to be licensed attorneys. Members of the Court asked whether it would be advisable to amend the proposal to allow retired, non-licensed attorneys to act as appellate mediators. This is something the committee may wish to discuss.

The appellate mediation protocol, which would be Appendix B to the Rules of Appellate Procedure, is basically the guidebook on how the program is supposed to run.

Members of the court wondered whether the case closing procedure at the very end of the protocol needs to be modified to ensure that any agreement that comes out of the mediation is properly prepared and filed with the district court. This is something the committee may wish to discuss.

The appellate mediation proposals are attached.

RULE 5. APPELLATE MEDIATION PROGRAM

(a) Eligible Cases. Only final and appealable judgments and orders in the following types of cases are eligible for participation in appellate mediation:

(1) divorce cases involving property or spousal support;

(2) cases involving parenting rights, except for termination of parental rights cases;

(3) cases involving residential responsibilities or support of minor children; and

(4) cases arising under the Uniform Probate Code or the Uniform Trust Code.

(b) Exemption from Mediation. Either party may request referral of an eligible case to appellate mediation. Referral must be granted unless a party requests an order from the court exempting the case from appellate mediation. The party requesting exemption must file a motion and an affidavit with the supreme court clerk. The Court may exempt the case if:

(1) the issues raised are limited to questions of law; or

(2) prior appellate mediation has been attempted and the issues are substantially similar; or

(3) other good cause is shown.

(c) Time to Request Mediation. Any party contemplating an appeal may forward a request for mediation to the Family Mediation Program Administrator, identified in N.D.Sup.Ct.Admin.O. 17, no later than 60 days after the service of notice of entry of judgment or order, or 10 days after service of the notice of appeal, in any eligible case. The request must be simultaneously served on every party under N.D R.App. P. 25. The time for

22 filing a notice of appeal under N.D R.App. P. 4 is not affected by any request or assignment
23 for mediation.

24 (d) Screening and Assignment of Mediator. The Family Mediation Program
25 Administrator must determine whether a case meets the requirements for eligibility and
26 appropriateness for mediation. Once a case has been approved for appellate mediation, the
27 Family Mediation Program Administrator must forward a notice of mediation to counsel, any
28 unrepresented party, and the supreme court clerk. The notice of mediation must identify the
29 mediator who has been assigned, and contain a deadline for completion of the mediation.

30 (e) Appellate Mediators. Any lawyer qualified as an appellate mediator under
31 N.D.R.Ct. 8.9 may be assigned to mediate.

32 (f) Time Limitations/Period for Mediation. The mediation must be completed within
33 45 days of the assignment of an appellate mediator.

34 (g) Transcripts and Appellate Briefs. To expedite the mediation process and spare the
35 parties as much initial expense as possible, the ordering of the transcript in cases eligible for
36 and assigned to mediation, must be extended to a date 15 days after the filing of the notice
37 of appeal.

38 (h) Extensions/Tolling. The time for filing briefs is not automatically tolled pending
39 mediation. In cases in which mediation has been requested, any motions for enlargement of
40 time for briefs must be filed with the clerk of the Supreme Court under N.D R.App.P. 26(b).

41 (i) Mediation Outcome. In appeals settled in whole or in part under this rule, the
42 parties must file a stipulation with the Supreme Court within 5 days of completion of the

43 mediation, requesting the court to enter an appropriate order, which may include voluntary
44 dismissal under N.D R.App.P. 43. In appeals not settled and terminated after mediation,
45 briefing and oral argument will proceed under the rules. In those cases settled by mediation
46 prior to the filing of a notice of appeal, the requesting party is responsible for filing any
47 appropriate document with the district court.

48 (h) Confidentiality. Statements and comments made during mediation conferences and
49 in related discussions, and any record of those statements, are confidential and may not be
50 disclosed by anyone, including the Family Mediation Program Administrator, counsel, or the
51 parties, or their agents or employees, to anyone not participating in the appellate mediation
52 process. Mediators may not be called as witnesses, and the information and records of the
53 Family Mediation Program Administrator may not be disclosed to judges, staff, or employees
54 of any court.

55 EXPLANATORY NOTE

56 Rule 5 was adopted, effective_____.

RULE 8.9. ROSTER OF ALTERNATIVE DISPUTE RESOLUTION NEUTRALS

(a) Roster of neutrals. The State Court Administrator shall maintain and monitor a roster of neutrals for civil arbitration, civil mediation, and domestic relations/contested child proceedings mediation. Each roster must include the neutral's name, address, and credentials. Each roster must be updated and published on an annual basis and be available for inspection in the clerk of the district court's office. The State Court Administrator may establish a reasonable fee for placement on the roster and a reasonable yearly renewal fee.

(b) Qualifications. To be listed on a roster, a neutral shall provide the State Court Administrator with written credentials indicating the neutral meets the following requirements:

(1) Civil arbitrator roster. An arbitrator shall complete 30 hours minimum of arbitration training. The training must include the following topics:

(A) Pre-hearing communications between parties and between parties and the neutral;

(B) Components of the hearing process including evidence, presentation of the case, witnesses, exhibits, objectives, awards, and dismissals;

(C) Settlement techniques;

(D) Rules, statutes, and practices covering arbitration, including these rules.

(E) An arbitrator must also complete nine hours of continued arbitration training during each three-year period.

(2) Civil mediator roster. A mediator shall complete 30 hours minimum of mediation

22 training, including a minimum of 15 hours of role-playing. The training must include the
23 following topics:
24 (A) Conflict resolution and mediation theory, including causes of conflict and interest-
25 based versus positional bargaining and models of conflict resolution;
26 (B) Mediation skills and techniques, including information gathering skills,
27 communication skills, problem solving skills, interaction skills, conflict management skills,
28 negotiation techniques, caucusing, cultural and gender issues, and power balancing;
29 (C) Components in the mediation process, including an introduction to the mediation
30 process, fact gathering, interest identification, option building, problem solving, agreement
31 building, decision making, closure, drafting agreements, and evaluation of the mediation
32 process;
33 (D) Mediator conduct, including conflicts of interest, confidentiality, neutrality, ethics,
34 standards of practice, and mediator introduction;
35 (E) Rules, statutes, and practices governing mediation in the trial court system,
36 including these rules.
37 (F) A mediator must also complete nine hours of continued mediation training during
38 each three-year period.
39 (3) Domestic relations mediator/contested child proceedings mediator roster. A
40 domestic relations mediator or a contested child proceedings mediator under N.D.C.C. ch.
41 14-09.1 shall complete 40 hours minimum of domestic relations mediation training, including
42 two hours minimum of domestic abuse training, and nine hours of continued domestic

43 relations mediation training during each three-year period; and

44 (A) have a Bachelor's Degree in Behavioral Science with two years of experience in

45 family/child intervention service; or

46 (B) have a Master's Degree in Behavioral Science with one year of experience in

47 family/child intervention service; or

48 (C) have a license to practice law supplemented with two years of experience in

49 domestic relations cases.

50 (4) Appellate Domestic Relations Mediator Roster. A domestic relations proceedings

51 mediator shall complete 40 hours minimum of domestic relations mediation training,

52 including two hours minimum of domestic abuse training, and nine hours of continued

53 domestic relations mediation training during each three-year period, and have a license to

54 practice law supplemented with two years of experience in domestic relations.

55 (5) Appellate Estate Mediator Roster. An estate proceedings mediator shall complete

56 40 hours minimum of domestic relations or civil mediation training, and nine hours of

57 continued trust and estate law training during each three-year period, and have a license to

58 practice law.

59 ~~(4)~~(6) A qualified neutral may not provide services during a period of suspension of

60 a professional license.

61 ~~(5)~~(7) If a neutral is rostered in Minnesota within 60 days of the effective date of this

62 rule, the neutral may be placed on the appropriate North Dakota roster within one year of the

63 effective date of this rule as long as the neutral is still in good standing with the Minnesota

64 rostering system.

65 (c) Selection of neutral. The parties may select a neutral who is not listed on the State
66 Court Administrator's roster. A court-appointed contested child proceedings mediator under
67 N.D.C.C. § 14-09.1-03 must have the qualifications specified in subdivision (b)(3) of this
68 rule.

69 (d) Continuing training. Training requirements may be attained through course work
70 and attendance at state and national ADR conferences. The neutral is responsible for
71 maintaining attendance records and shall disclose the information to program administrators
72 and the parties to any dispute. The neutral shall submit continuing education credit
73 information to the State Court Administrator's office every three years.

74 (e) Certification of training programs. Neutrals shall attend initial and continuing
75 training programs that are approved by the Joint Committee on Alternative Dispute
76 Resolution.

77 (f) Disclaimer. Each roster must include the following disclaimer:

78 The qualifications for listing a neutral on a roster are minimum standards, and the
79 State Court Administrator's listing of a neutral does not imply the neutral has the requisite
80 degree of skill or competency for a particular case. When choosing a neutral, the parties must
81 make further inquiry about the qualifications and experience of the neutral. The rosters are
82 intended to assist people in locating an appropriate neutral by serving as a starting point.

83 (g) Ethics Enforcement Procedure.

84 (1) Introduction. The purpose of the Code of Mediation Ethics, Appendix A, is to

85 provide standards of ethical conduct to guide mediators who provide mediation services, to
86 inform and protect consumers of mediation services, and to ensure the integrity of the
87 mediation process. In order for mediation to be effective, there must be broad public
88 confidence in the integrity of the process. Mediators have a responsibility not only to the
89 parties and the legal system, but also to the continuing improvement of the process. They
90 must observe high standards of ethical conduct. These provisions should be construed to
91 advance these objectives.

92 Failure to comply with any provision in the Code of Ethics may be the basis for
93 removal from the roster of mediators maintained by the State Court Administrator and for
94 such other action as may be taken by the North Dakota Supreme Court or the State Bar
95 Association of North Dakota, or other professional organizations. Violation of a provision
96 of the Code should not itself give rise to a cause of action nor should it create any
97 presumption that a legal duty has been breached. Nevertheless, since the rules do establish
98 standards of conduct for mediators, a mediator's violation of a rule may be evidence of
99 breach of the applicable standard of conduct.

100 (2) Scope. This procedure applies to complaints against any individual mediator or
101 mediation organization listed on the statewide mediation roster pursuant to this rule.

102 Advisory Comment

103 A mediator is subject to this complaint procedure when providing any mediation
104 services. The complaint procedure applies whether the services are court ordered or not, and
105 whether the services are or are not pursuant to North Dakota Rules of Court. The Alternative

106 Dispute Resolution Review Board will consider the fullcontext of the alleged misconduct,
107 including whether the mediator was subject to other applicable codes of ethics, or was
108 representing a mediation organization at the time of the alleged misconduct.

109 (3) Board. The Alternative Dispute Resolution Review Board will consist of three (3)
110 experienced mediators appointed by the Chief Justice of the North Dakota Supreme Court
111 after consultation with the President of the State Bar Association of North Dakota. At least
112 one member appointed must be a non-lawyer mediator. Each member will serve for a term
113 not to exceed three years; however, at the time of the creation of the Board one member will
114 serve one year before being eligible for reappointment, one member will serve two years
115 before being eligible for reappointment and one member will serve three years before being
116 eligible for reappointment. No member may serve more than two consecutive three year
117 terms. The Chief Justice shall designate a Chair of the Board.

118 (4) Procedure.

119 (A) A complaint must be in writing, signed by the complainant, and mailed or
120 delivered to the Alternative Dispute Resolution Review Board. The complaint must identify
121 the mediator and make a short and plain statement of the conduct forming the basis of the
122 complaint.

123 (B) The Board shall review the complaint to determine whether the allegations(s), if
124 true, constitute a violation of the Code of Ethics.

125 (C) If the allegations(s) of the complaint do not constitute a violation of the Code of
126 Ethics, the complaint must be dismissed and the complainant and the mediator must be

127 notified in writing.

128 (D) If the Board concludes that the allegations of the complaint, if true, constitute a
129 violation of the Code of Ethics, the Board will undertake such review, investigation, and
130 action it deems appropriate. In all such cases, the Board shall send to the mediator, by
131 certified mail, a copy of the complaint, a list identifying the ethical rules that may have been
132 violated, and a request for a written response to the allegations and to any specific questions
133 posed by the Board. It may not be considered a violation of the Code of Ethics for the
134 mediator to disclose notes, records, or recollections of the mediation process complained of
135 as part of the complaint procedure. Confidentiality will be upheld by the Board and only the
136 records and notes relevant to the complaint will be considered in order to protect the parties
137 and the integrity of the mediation process. Except for good cause shown, if the mediator fails
138 to respond to the complaint in writing within thirty (30) days, the allegations(s) shall will be
139 considered admitted.

140 (E) The Board, at its discretion, may refer the complainant and mediator to mediation
141 conducted by a neutral and qualified mediator to resolve the issues raised by the complainant.
142 Mediation may proceed only if both the complainant and mediator consent. If the complaint
143 is resolved through mediation, the Board shall dismiss the complaint, unless the resolution
144 includes sanctions to be imposed by the Board. If no agreement is reached in mediation, the
145 Board shall determine whether to proceed further.

146 (F) After review and investigation, the Board shall advise the complainant and
147 mediator of the Board's action in writing by certified mail sent to their respective last known

148 addresses. Upon request within 14 days from receipt of the Board's action on the complaint,
149 the mediator and the complainant are entitled to a hearing before the Board to contest
150 proposed sanctions or findings, and have the right to bring or defend against all charges, to
151 be represented by an attorney, and to examine and cross-examine witnesses. The Board shall
152 receive evidence that the Board considers necessary to understand and determine the dispute.
153 Relevancy must be liberally construed in favor of admission. The Board shall make an
154 electronic recording of the proceedings. The Board at its own initiative, or by request of the
155 complainant or mediator, may issue subpoenas for the attendance of witnesses and the
156 production of documents and other evidentiary matter. The Board's decision is final.
157 (5) Sanctions.
158 (A) The Board may impose sanctions, including but not limited to:
159 (i) issuing a private reprimand;
160 (ii) designating the corrective action necessary for the mediator to remain on the
161 statewide roster;
162 (iii) notifying the appointing court and any professional licensing authority with which
163 the mediator is affiliated of the complaint and its disposition;
164 (iv) publishing the mediator's name, a summary of the violation, and any sanctions
165 imposed;
166 (v) removing the mediator from the roster of qualified mediators and setting
167 conditions for reinstatement; and
168 (vi) assessing costs and expenses of proceedings against the mediator, including

169 without limitation, the costs of investigations, service of process, witness fees, and a court
170 reporter's services.
171 (B) Sanctions may only be imposed if supported by clear and convincing evidence.
172 Conduct considered in previous or concurrent ethical complaints against the mediator is
173 admissible to show a pattern of related conduct, the cumulative effect of which constitutes
174 an ethical violation, and in consideration of appropriate sanctions.
175 (6) Confidentiality.
176 (A) Unless and until sanctions are imposed, all files, records, and proceedings of the
177 Board that relate to or arise out of any complaint shall be confidential, except:
178 (i) as between Board members and staff;
179 (ii) on request of the mediator, the file maintained by the Board, excluding its work
180 product, must be provided to the mediator;
181 (iii) as otherwise required or permitted by rule or statute; and
182 (iv) to the extent that the mediator and complainant both waive confidentiality.
183 (B) If sanctions are imposed against any mediator under Section III A (2)-(5), the
184 sanction must be of public record, and the Board file must remain confidential.
185 (C) Nothing in this rule may be construed to require the disclosure of the mental
186 processes or communications of the Board or staff.
187 (7) Privilege; Immunity.
188 (A) Privilege. A statement made in these proceedings is absolutely privileged and may
189 not serve as a basis for liability in any civil lawsuit brought against the person who made the

190 statement.

191 (B) Immunity. Board members and staff are immune from suit for any conduct in the

192 course of their official duties.

193 EXPLANATORY NOTE

194 Rule 8.9 was adopted, effective March 1, 2001; amended effective August 1,

195 2009;_____.

196 A neutral is an individual or an organization offering an alternative dispute resolution

197 process.

198 Arbitration is the process through which each party presents its case before a neutral

199 third party who renders a binding or non-binding decision.

200 Mediation is an informal, non-adversarial process through which a neutral third party

201 facilitates communication between the parties to promote settlement. Decision-making

202 authority remains with the parties; the mediator has no authority to render a judgment on any

203 issue of the dispute.

204 Subdivision (b) was amended, effective_____, to add new paragraphs

205 4 and 5 on appellate mediator qualifications.

206 Subdivision (g) was added, effective August 1, 2009, to provide an enforcement

207 procedure for the Code of Mediation Ethics attached to this rule as Appendix A.

208 Sources: Joint Procedure Committee Minutes of January 28-29, 1999, pages 7-12;

209 May 6-7, 1999, pages 7-11.

210 Statutes Affected:

211 Repealed: N.D. Sup. Ct. Admin. R. 28, effective March 1, 2001.

212 Cross Reference: N.D.R.App.P. 5 (Appellate Mediation Program); N.D.R.Ct. 8.8

213 (Alternative Dispute Resolution).

APPENDIX B. APPELLATE MEDIATION PROTOCOL

(a) Purpose.

(1) Mission Statement. To improve the lives of families who appear before the court by trying to resolve disputes through mediation in order to minimize family conflict, encourage shared decision-making, and support healthy relationships and communication among family members.

(2) Objectives.

(A) To support improved family decision-making and to promote agreement and compromise

v. further litigation and competition;

(B) To improve access to mediation by providing funding;

(C) To improve post litigation family problem-solving and communication capacities by reestablishing communication through mediation;

(D) To decrease litigation costs for litigants;

(E) To create incentives to pursue mediation including flexibility to negotiate critical issues without judicial intervention;

(F) To determine best practices for family mediation in North Dakota;

(G) To improve rural access to post litigation mediation services, as well as access by underprivileged and minority persons;

21 (H) To work with the domestic violence services community in order to assess risk
22 and provide services where appropriate; and to ensure proper protections are put in place and
23 mediators are well-trained in signposts, risks, and exit planning strategies;
24 (I) To reduce post-decree litigation and conflict in family cases; and
25 (J) To help the public, judiciary, and bar become more aware of the benefits and
26 nature of the mediation process.
27 (3) Policies & Procedures. This program is created under the auspices of the North
28 Dakota Supreme Court. The Court has appointed the Joint Committee on Alternative
29 Dispute Resolution and the Subcommittee on Appellate Mediation to collaborate on the
30 program and provide guidance.
31 (b) Program Management.
32 (1) The Family Mediation Program Administrator, identified in North Dakota
33 Supreme Court Administrative Order 17, will manage and oversee the operation of the
34 program under the auspice of the North Dakota Supreme Court.
35 (2) The University of North Dakota Conflict Resolution Center will offer assistance
36 to the program as needed by providing expertise, professional assistance, training and
37 education. Compensation will be negotiated as required.
38 (c) Research and Evaluation. The program will include evaluation components.
39 (d) Mediation Process.
40 (1) Request for Mediation. Any party contemplating appeal may forward a request for
41 mediation to the Family Mediation Program Administrator, no later than 60 days after the

42 service of notice of entry of judgment or order in any final and appealable judgments and
43 orders in the following types of cases:
44 (A) divorce cases involving property or spousal support;
45 (B) any case involving parenting rights, residential responsibilities or support of minor
46 children; and
47 (C) any case arising under the Uniform Probate Code or the Uniform Trust Code.
48 (2) Exemption from Mediation. On request of either party, a case that meets the
49 Appellate Mediation Program criteria will be referred to mediation. A party may request an
50 order from the Court exempting the case from the Appellate Mediation Program by filing a
51 motion and an affidavit with the Clerk of the Supreme Court. The Court may exempt the
52 case if:
53 (A) The issues raised are limited to a question of law; or
54 (B) Prior appellate mediation has been attempted and the issues are substantially
55 similar; or
56 (C) Other good cause is shown.
57 The request must be simultaneously served on every party under N.D R.App. P. 25.
58 The time for filing a notice of appeal under N.D.R. App. P. 4 is not affected by any request
59 or assignment for mediation.
60 (3) Exclusion from Mediation. The Family Mediation Program Administrator may not
61 refer proceedings where a current domestic violence protection order or other order for

62 protection between the parties currently exists. In these cases, the court may not proceed
63 with mediation except in unusual cases where:
64 (A) Mediation is requested by the victim of the domestic violence or sexual abuse, and
65 an exception to the order of protection is made by the court;
66 (B) The mediation is provided by a mediator trained to address the needs and safety
67 of victims where domestic violence is at issue;
68 (C) The victim of domestic violence is provided the opportunity for separate meetings
69 during the mediation, and to mediate using separate rooms if they choose;
70 (D) The mediation takes place in a courthouse or other building where security
71 measures are in place; and
72 (E) The victim has an advocate or support person of their choice in the mediation.
73 (4) Mediation Orientation. The Appellate Mediation Program will automatically
74 provide up to 6 hours of combined pre-mediation orientations and mediation. Mediators will
75 be compensated at the rate of $170/hour with a cap of $1020 per case. The Appellate
76 Mediation Program requires the parties to individually attend a pre-mediation orientation and
77 screening with a designated mediator, and at least one joint mediation session. The program
78 will provide up to 6 hours of mediation without charge to the parties. Should the parties
79 require additional sessions, they may purchase mediation from the mediator. Parties may also
80 apply to the Administrator for additional mediation sessions and may apply for a fee waiver
81 or sliding scale fee should they qualify based on economic factors. If the parties qualify for
82 a fee reduction and have been approved for additional mediation, any "gap" between

83 $170/hour and their ability to pay will be paid to the mediator under this program.

84 (5) Court Procedures. On receipt of a request for appellate mediation, the Family
85 Mediation Program Administrator must determine whether a case meets the requirements for
86 eligibility and appropriateness for mediation. Once a case has been approved for appellate
87 mediation, the Family Mediation Program Administrator must forward a Notice of Mediation
88 to counsel, any unrepresented party, and the Clerk of the Supreme Court. The Notice of
89 Mediation must identify the mediator who has been assigned, and a deadline for completion
90 of the mediation. The mediation must be completed within 45 days of the assignment of an
91 appellate mediator.

92 (6) Ordering of Transcript and Filing of Briefs. In order to expedite the mediation
93 process and spare the parties as much initial expense as possible, the ordering of the
94 transcript in respect to cases eligible for and assigned for mediation must be extended to a
95 date 15 days from the filing of the notice of appeal. The time for filing briefs is not
96 automatically tolled pending mediation. In cases in which mediation has been requested, any
97 motions for enlargement of time for briefs must be filed with the clerk of the Supreme Court
98 under N.D.R.App.P. 26(b).

99 (7) Mediation Statement. On request of the mediator, the parties should each supply
100 to the mediator, at least 2 days before the scheduled conference, a "Mediation Statement,"
101 no more than 4 pages in length. The statement should include:

102 (A) a brief history of the litigation;

103 (B) a brief statement of facts;

104 (C) the history of any efforts to settle the case, including any offers or demands;

105 (D) a summary of the parties' legal positions;

106 (E) the present posture of the case, including any related litigation; and

107 (F) any proposals for settlement.

108 The Mediation Statement must not be filed in the office of the supreme court clerk.

109 Telephonic mediation may be used if all parties and the mediator agree.

110 (e) Selection of Mediators.

111 (1) Eligibility. Any lawyer qualified as an appellate mediator under N.D.R.Ct. 8.9 may

112 apply to be added to the roster of appellate mediators and will be approved by the Family

113 Mediation Program Administrator. Mediators must carry malpractice insurance that covers

114 their mediation practice.

115 (2) Mediation Assignment. Mediators will be assigned cases by the Family Mediation

116 Program Administrator and will manage cases assigned to them from orientation and

117 screening through conclusion of mediation.

118 (3) Conflicts of Interest & Bias. A mediator may not be removed unless the mediator

119 and/or the parties' petition the Family Mediation Program Administrator based on bias or

120 conflicts of interest. Parties and attorneys may not request a change of mediator unless they

121 present clear evidence of bias or conflict of interest.

122 (4) Confidentiality. Statements and comments made during mediation conferences and

123 in related discussions, and any record of those statements, are confidential and may not be

124 disclosed by anyone (including the Family Mediation Program Administrator, counsel, or the

125 parties; and their agents or employees) to anyone not participating in the appellate mediation
126 process. Mediators may not be called as witnesses, and the information and records of the
127 Family Mediation Program Administrator may not be disclosed to judges, staff, or employees
128 of any court.

129 (f) Mediation Outcome. In appeals settled in whole or in part under Rule 5, a
130 stipulation of the parties must be filed with the court, within five days of completion of the
131 mediation, requesting the court to enter an appropriate order, which may include voluntary
132 dismissal under Rule 43. In appeals not settled and terminated from mediation, briefing and
133 oral argument will proceed under the rules. In those cases settled by mediation prior to the
134 filing of a notice of appeal, the requesting party is responsible for filing any appropriate
135 document with the district court.

136 (g) Closing.

137 (1) Decision. At the close of every mediation case, the mediator and parties must
138 create a written decision summary for the parties that notes any and all agreements made and
139 uses the parties' own language. The parties will have five business days to reconsider the
140 decisions made in mediation. If neither party files a written request to reconsider within five
141 business days, the mediator must send a copy of the decision summary to the parties and their
142 attorneys, along with the Mediation Case Closing Form. (Form A).

143 (2) Evaluation. At the close of every mediation case, the mediator and the parties will
144 complete the required evaluation forms and the mediator must submit those to the
145 Administrator along with closing form, and the mediator's invoice form. The Mediator is

146 responsible for collecting fees from the parties if appropriate.

147 (3) Case Closing/Notification: The mediator must notify the Family Mediation
148 Program Administrator when a mediation case has concluded for any reason, and offer the
149 following reasons:

150 (A) Agreement has been reached in whole or part; or

151 (B) The parties were unable to reach agreement. If the parties and the mediator believe
152 more mediation sessions would help to resolve the case, the parties and the mediator can join
153 in a request for additional sessions that will be paid by the parties on a sliding fee basis
154 directly to the mediator.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 3.5, N.D.R.Ct., Electronic Filing in the District Courts; Rule 5, N.D.R.Civ.P., Service and Filing of Pleadings and Other Papers

The committee discussed N.D.Sup.Ct.Admin.O. 16 on electronic filing at the September meeting and made several suggestions for amendment. The Supreme Court referred the committee's suggestions to the Court Technology Committee, which made further suggestions. The Court approved amendments to the order, and accepted the committee's proposal that the order be made a rule, and these amendments took effect January 15.

In discussing the amendments, the Court admitted that the rule was not yet perfect and made several suggestions for the committee to consider. In addition, Attorney Michael McIntee submitted a letter to the committee requesting amendments to the electronic filing rule. Attorney Rob Pagel later sent an e-mail suggesting that some e-service issues have not been resolved.

Mr. McIntee has proposed an amendment to address "ambush" service made late Friday or on a long weekend. He suggested that the rule be amended so that time would not begin to run for a response to a document served after 3 p.m. Friday until the following "regular business day." His letter is attached, and it will be referred to again in relation to the next two agenda items.

Proposed amendments to Rule 3.5 are also attached, but Mr. McIntee's proposed amendment is not included in the proposal because it is contrary to the "day is a day"

principle the Court has adopted for counting time periods. A copy of N.D.R.Civ.P. 6 is attached to explain this principle. A Saturday, Sunday or holiday is not counted differently than any other day unless it is the last day of a period, in which case the next day that is not a Saturday, Sunday or holiday is considered the end of the period. In addition, an e-served document is treated as if it were mailed on the day it was served, with three days being added to any response period. This approach possibly negates any "ambush" aspect to a document e-served on a Friday.

In discussing Rule 3.5's time lines the Court agreed that some attorneys do seem to take advantage of weekends and holidays to inconvenience other attorneys. The committee may wish to discuss whether there are any ways to address Mr. McIntee's concerns that are consistent with the Court's existing time counting rules.

In discussing the rule at the September meeting, the committee raised two issues that the Court also considered significant when it addressed amendments to the rule. First, the Court approved the Technology Committee's proposal to require e-filing of the complaint after June 1. The Court recognizes, as the committee recognized in September, that e-filing the complaint is the first act in opening an electronic file in a case, but that there is currently no mechanism to let the other parties know this act has happened. The attached Rule 3.5 proposal contains an amendment which would require the party who e-files a complaint to give notice to other parties of this event. The committee may wish to discuss whether this is the best approach.

In addition, the Court also discussed the paragraph numbering requirement the committee addressed at the September meeting. The rule's paragraph numbering provision would seem to require all e-filed documents, even those used as exhibits or created long before the filing of a case, to be numbered. The attached Rule 3.5 proposal contains an amendment which would except certain documents from the e-filing requirement. The list of excepted documents needs to be exclusive, so the committee may wish to discuss whether the proposal goes far enough.

In his e-mail, Mr. Pagel told how he had run into some problems in court when he had filed and served some documents via Odyssey. The opposing counsel received the Odyssey service notice, but asserted that Mr. Pagel should also have e-mailed the documents and that service through Odyssey alone was inadequate. The judge apparently agreed with this position. Mr. Pagel suggests that Rule 5 be amended to make clear that service through Odyssey under Rule 3.5 is adequate service. Proposed amendments to Rule 5 are attached. The committee may wish to discuss whether any additional amendments should be made to Rule 3.5 to clarify what constitutes adequate electronic service. It is possible that deletion of the first sentence of Rule 3.5(e)(1), which will be superfluous after April 1, would resolve any confusion about whether additional service steps need to be taken beyond service through the Odyssey system.

RULE 3.5. ELECTRONIC FILING IN THE DISTRICT COURTS

(a) Electronic Filing.

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

(2) After April 1, 2013, all documents filed after the initiating pleadings must be filed electronically except for documents filed by self-represented litigants and prisoners. After June 1, 2013, initiating pleadings must be filed electronically in civil, non-juvenile, cases. A party who files a complaint in a civil case must give notice of filing to the other parties.

(3) On a showing of good cause, an attorney may be granted leave of court to file paper documents. Original wills, codicils and other documents of independent legal significance may be filed as paper documents. Colored or shaded documents may be filed as paper documents if necessary to ensure legibility.

(4) A document filed electronically has the same legal effect as a paper document.

(5) Any signature on a document filed electronically is considered that of the officer of the court or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court must strike the filing.

(b) Filing Formats.

(1) Approved formats for documents filed electronically are WordPerfect (.wpd), Word (.doc or.docx), Tagged Image File (.tif), Portable Document File (.pdf) and ASCII (.txt).

22 (2) All paragraphs must be numbered in documents filed electronically. Reference to
23 material in such documents must be to paragraph number, not page number. Paragraph
24 numbering is not required in exhibits, documents prepared before the action was commenced,
25 ~~and~~ or in documents not prepared by the parties.
26 (c) Time of Filing.
27 (1) A document in compliance with the rules and submitted electronically to the
28 district court clerk by 11:59 p.m. local time is considered filed on the date submitted.
29 (2) After reviewing an electronically filed document, the district court clerk must
30 inform the filer, through an e-mail generated by the Odyssey® system, whether the document
31 has been accepted or rejected.
32 (3) If a document submitted for electronic filing is rejected, the time for filing is tolled
33 from the time of submission to the time the e-mail generated by the Odyssey® system
34 notifying the filer of rejection is sent. The document will be considered timely filed if
35 resubmitted within three days after the notice of rejection. A party seeking to take advantage
36 of this tolling provision must file and serve a separate document providing notice that the
37 rejected document is being resubmitted under N.D.R.Ct. 3.5(c)(3).
38 (4) Any required filing fee must be paid by credit card or debit card at the time the
39 document is filed.
40 (d) Confidentiality. In documents prepared for filing with the court, information that
41 would otherwise be included in the document but required by N.D.R.Ct. 3.4 to be redacted
42 in court documents must be separately filed in a reference sheet (confidential information

43 form, see appendix) and may be included in those documents only by reference. Any
44 document not complying with this order is subject to N.D.R.Ct. 3.4(g).
45 (e) Electronic Service.
46 (1) A party who files a document electronically must serve the document by electronic
47 means if the recipient consents to accept documents served electronically. After April 1,
48 2013, all documents filed electronically after the initiating pleadings must be served
49 electronically through the Odyssey® system except for documents served on or by self-
50 represented litigants and prisoners. On a showing of good cause, an attorney may be granted
51 leave of court to serve paper documents or to be exempt from receiving electronic service.
52 (2) Electronic service is not effective if the party making service learns through any
53 means that the attempted service did not reach the person to be served.
54 (3) After April 1, 2013, any party not exempt from electronic filing must designate an
55 e-mail address for accepting electronic service.
56 (4) For purposes of computation of time, any document electronically served must be
57 treated as if it were mailed on the date of transmission.
58 (f) Technical Issues; Relief. On a showing of good cause, the court may grant
59 appropriate relief if electronic filing or electronic service was not completed due to technical
60 problems.
61 EXPLANATORY NOTE
62 Adopted effective January 15, 2013.
63 Rule 3.5 was originally adopted as N.D.Sup.Ct.Admin.O. 16 on March 1, 2006. Order

64 16 was later amended, effective March 1, 2008; March 1, 2009; August 1, 2010; March 1,

65 2011; and July 1, 2012.

66 Order 16 was amended, effective July 1, 2012, to incorporate the provisions of the

67 Order 16 Addendum (Filing in the District Court where Odyssey® Electronic Filing is

68 Available) and N.D.Sup.Ct.Admin.O. 18 (Filing in Counties Using the Odyssey® Case

69 Management System). The Order 16 Addendum and Order 18 were repealed, effective July

70 1, 2012.

71 Sources: Joint Procedure Committee Minutes of _____;

72 September 27, 2012, pages 14-21; April 29-30, 2010, page 21; April 24-25, 2008, pages 12-

73 16; October 11-12, 2007, pages 3-5; April 26-27, 2007, pages 16-18; January 25, 2007, pages

74 15-16; Sept 23-24, 2004, pages 18-27.

75 Cross References: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court).

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER PAPERS

(a) Service--When required.

(1) In general. Other than service of a summons and complaint under Rule 4, each of the following papers must be served under this rule on every party, unless the rules provide otherwise:

(A) an order, unless the court orders otherwise;

(B) a pleading served after the original summons and complaint, unless the court orders otherwise under Rule 5(c) because there are numerous defendants;

(C) a discovery paper required to be served on a party, unless the court orders otherwise;

(D) a written motion, except one that may be heard ex parte; and

(E) a written notice, appearance, demand, or offer of judgment, or any similar paper; and

(F) every paper filed with the clerk or submitted to the judge.

(2) If a party fails to appear. No service is required on a party who is in default for failing to appear. But a pleading that asserts a new claim for relief against such a party must be served on that party under Rule 4.

(3) Seizing property. If an action is begun by seizing property and no person is or need be named as a defendant, any service required before the filing of an answer, claim, or appearance must be made on the person who had custody or possession of the property when

22 it was seized.

23 (b) Service -- How made.

24 (1) Serving an attorney. If a party is represented by an attorney, service under this rule

25 must be made on the attorney unless the court orders service on the party. If an attorney is

26 providing limited representation under Rule 11(e), service must be made on the party and on

27 the attorney for matters within the scope of the limited representation.

28 (2) Service in general. A paper is served under this rule by:

29 (A) handing it to the person;

30 (B) leaving it:

31 (i) at the person's office with a clerk or other person in charge, or, if no one is in

32 charge, leaving it in a conspicuous place in the office; or

33 (ii) if the person has no office or the office is closed at the person's dwelling or usual

34 place of abode with someone of suitable age and discretion who resides there;

35 (C) mailing it to the person's last known address, in which event service is complete

36 upon mailing;

37 (D) sending it by a third-party commercial carrier to the person's last known address,

38 in which event service is complete upon deposit of the paper to be served with the

39 commercial carrier;

40 (E) if no address is known, on order of the court by leaving it with the clerk of the

41 court;

42 (F) sending it by electronic means ~~if the person consented in writing~~ under the

43 procedure specified in N.D.R.Ct. 3.5, in which event service is complete on transmission, but

44 is not effective if the serving party learns that is did not reach the person to be served; or

45 (G) delivering it by any other means that the person consented to in writing.

46 (c) Serving numerous defendants.

47 (1) In general. If an action involves an unusually large number of defendants, the court

48 may, on motion or on its own, order that:

49 (A) defendants' pleadings and replies to them need not be served on other defendants;

50 (B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings

51 and replies to them will be treated as denied or avoided by all other parties; and

52 (C) filing any such pleading and serving it on the plaintiff constitutes notice of the

53 pleading to all parties.

54 (2) Notifying parties. A copy of every such order must be served on the parties as the

55 court directs.

56 (d) Filing.

57 (1) In general. Unless a statute, these rules, or court order provides otherwise, all

58 papers in an action must be filed with the clerk.

59 (2) Initiating pleading.

60 (A) The Summons and Complaint.

61 (i) The summons and complaint, or other initiating pleading, must be filed before a

62 subpoena may be issued. Unless otherwise authorized by rule or statute, a party seeking to

63 file an initiating pleading must provide proof that the pleading was served under Rule 4. The

64 proof of service must be filed with the initiating pleading.

65 (ii) The plaintiff must serve notice of filing the complaint or initiating pleading on the

66 defendant or respondent.

67 (iii) The defendant may demand that the plaintiff file the complaint.

68 – Service of the demand must be made under Rule 5(b) on the plaintiff's attorney or

69 under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney.

70 – In cases with multiple defendants, service of a demand by one defendant is effective

71 for all the defendants.

72 – If the plaintiff does not file the complaint within 20 days after service of the

73 demand, service of the summons is void.

74 – The demand must contain notice that if the complaint is not filed within 20 days,

75 service of the summons will be void, unless, after motion made within 60 days after service

76 of the demand for filing, the court finds excusable neglect.

77 (iv) The defendant may file the summons and complaint, and the costs incurred on

78 behalf of the plaintiff may be taxed as provided in Rule 54(e).

79 (B) The Answer. Within a reasonable time after service of the notice of filing the

80 complaint or initiating pleading, the defendant or respondent must file the answer and notify

81 the plaintiff of the filing.

82 (3) Discovery materials. A party must not file discovery materials with the clerk

83 unless:

84 (A) the materials are being submitted to the court for disposition of a pending motion;

85 (B) the court orders them to be filed; or

86 (C) a party certifies that the filing is necessary for safekeeping of the papers or
87 exhibits pending case completion, in which event the party must state the reasons safekeeping
88 is necessary.

89 (4) Return of discovery materials.

90 (A) The clerk shall return the following documents to the filing party upon final
91 disposition of an appeal or, if no appeal is filed, upon expiration of the time for appeal:

92 (i) depositions;

93 (ii) interrogatories;

94 (iii) requests for admission;

95 (iv) requests for interrogatories;

96 (v) requests for production of documents; and

97 (vi) answers and responses to the above documents.

98 (B) If the filing party does not claim a filed document within 60 days after notification
99 to do so, the clerk may dispose of the document as directed by court order.

100 (C) The clerk must take a receipt for all documents returned.

101 (5) Papers to be used on hearing. Unless otherwise directed by the court, all affidavits,
102 notices, and other papers designed to be used on the hearing of a motion or order to show
103 cause must be filed at least 24 hours before the hearing.

104 (6) Failure to comply. If a party fails to comply with this subdivision, the court, on
105 motion of any party or its own motion, may order the papers to be filed. If the order is not

106 obeyed, the court may order them to be regarded as stricken and their service to be
107 ineffective.

108 (7) Rejection. Except as otherwise provided under Rules 13, 14, or 15, the clerk must
109 reject for filing any document that adds a party to an action or proceeding without a court
110 order. The clerk must endorse on the document a notation that it is rejected for filing under
111 this rule and return the document to the person who tendered it for filing.

112 (e) Removal of pleadings for service. Upon a filing party's request, an original
113 pleading or paper in any civil action, which by law is required to be filed in the clerk of
114 court's office where the action is pending, may be removed from the files for the purpose of
115 serving it either inside or outside the state but must be returned without delay.

116 (f) Proof of service. Proof of service under this rule is made as provided in Rule 4 or
117 by an attorney's or court personnel's certificate showing that service was made under
118 subdivision (b).

119 EXPLANATORY NOTE

120 Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988;
121 March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995;
122 March 1, 1998; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2009; March 1,
123 2011; March 1, 2013;_____.

124 Rule 5 applies to service of papers other than "process." In contrast, Rule 4 governs
125 civil jurisdiction and service of process. When a statute or rule requiring service does not
126 pertain to service of process, nor require personal service under Rule 4, nor specify how

127 service is to be made, service may be made as provided in Rule 5(b).

128 Subdivision (a) was amended, effective March 1, 2008, to improve organization and
129 to make the subdivision easier to understand.

130 Paragraph (b)(1) was amended, effective March 1, 2009, to make it clear that, when
131 an attorney has served notice of limited representation under Rule 11(e), service of papers
132 on the attorney is not required except for papers within the scope of the limited
133 representation. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to
134 assist otherwise self-represented parties on a limited basis without undertaking full
135 representation of the party.

136 Paragraph (b)(2) was amended, effective March 1, 2009, to provide for service by
137 electronic means and to improve organization. Parties seeking to serve papers by electronic
138 means must consult ~~N.D.Sup.Ct.Admin. Order 16~~ N.D.R.Ct. 3.5 for electronic service
139 instructions.

140 Subdivision (b) was amended, effective March 1, 1999, to permit service via a third-
141 party commercial carrier as an alternative to the Postal Service. The requirement for a "third-
142 party commercial carrier" means the carrier may not be a party to nor interested in the action,
143 and it must be the regular business of the carrier to make deliveries for profit. A law firm
144 may not act as or provide its own commercial carrier service with service complete upon
145 deposit. In addition, the phrase "commercial carrier" does not include electronic delivery
146 services.

147 Paragraph (d)(1) was amended, March 1, 2008, to delete a reference to the note of

148 issue and certificate of readiness.

149 Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to require that proof
150 of service be provided and filed by a party seeking to file an initiating pleading. Under Rule
151 3, an action is commenced on service of the initiating pleading, not on filing. Unless a rule
152 specifically provides otherwise, service under Rule 4 must be accomplished before any
153 pleadings in an action may be filed.

154 Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to include language
155 allowing the defendant to demand filing of the complaint or to file the complaint itself. This
156 language was transferred from Rule 4.

157 Subdivision (f) was amended, effective March 1, 2003, to permit proof of service to
158 be made by court personnel as well as by an attorney. Proof of service may also be made in
159 the same manner as provided by Rule 4(i).

160 Rule 5 was amended, effective March 1, 2011, in response to the December 1, 2007,
161 revision of the Federal Rules of Civil Procedure. The language and organization of the rule
162 were changed to make the rule more easily understood and to make style and terminology
163 consistent throughout the rules.

164 Sources: Joint Procedure Committee Minutes of _____; January 26-
165 27, 2012, pages 13-16; September 24-25, 2009, pages 12-13; April 24-25, 2008, pages 18-21;
166 January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-27; April 26-27, 2007, pages
167 19-22; September 27-28, 2001, pages 11-12; April 30-May 1, 1998, page 3; January 29-30,
168 1998, page 18; September 26-27, 1996, pages 16-17, 20; September 23-24, 1993, pages 19-

169 20; April 29-30, 1993, pages 20-21; November 7-8, 1991, page 3; October 25-26, 1990,
170 pages 10-12; April 20, 1989, page 2; December 3, 1987, page 11; May 21-22, 1987, pages
171 17-18; February 19-20, 1987, page 4; September 18-19, 1986, page 8; November 30, 1984,
172 pages 26-27; October 18, 1984, pages 8-11; November 29-30, 1979, page 2; September 20-
173 21, 1979, pages 4-5; Fed.R.Civ.P. 5.

174 Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction -- Process --
175 Service), N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 77 (District Courts and Clerks);
176 N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.Ct. 3.1 (Pleadings); N.D.R.Ct. 3.5
177 (Electronic Filing in the District Courts); N.D.R.Ct. 6.4 (Exhibits), N.D.R.Ct. 7.1
178 (Judgments, Orders and Decrees).

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RECEIVED BY
Justice Maring
Supreme Court

DEC 13

STATE OF
NORTH DAKOTA

December 12, 2012

Hon. Justice Mary Maring
Justice of the Supreme Court
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

RE: Joint Procedure Issues

Dear Justice Maring:

At a recent family law seminar held in Bismarck, certain procedural issues were discussed. Justice Kapsner was present at the conference and we discussed some of these issues with her. She advised me that you are the Committee Chair for the Joint Procedure Committee and that I should contact you with these issues.

The first issue that was discussed at the conference was in regard to Rule 8.2 [b] [e] [2] of Rules of Court. As recently as amended, the rule requires that a party wishing to exercise a right of cross examine of any affiant must notify the party offering the affidavit testimony at least 24 hours before the start of the hearing. We find that this requirement as to the other party appears to be unnecessary and perhaps a waste of time and resources for the parties in the divorce. We find that the Motions for Interim Order are always supported by an affidavit from the opposing party. There of course may be supplemental or additional affidavits from non-party members and I can understand this rule as applying to those non-party individuals. There would be no need for the non-party individual to appear at a hearing to support his or her affidavit unless the notice was given.

But as to the moving party and the opposing party, it seems a little bit ridiculous that the party must give notice that they intend to call the opposing party. Obviously the affidavits are going to be contrary to each other and as to those disputed issues, the other party is going to be calling the offering party for cross-examination.

After discussion, we would recommend to change the rule so that an additional sentence would be added at the end of "cross-examination". 'This requirement does not apply to the opposing party who will automatically be subject to cross-examination.'

The second issue is relative to the filing of documents electronically. At the present time, a party can file a document electronically at 11:59 p.m. on a particular day and that begins the process of the time for when the other party must respond. We are finding that documents are being served either by fax or electronically sometimes at 4:59 p.m. and sometimes it is late in the evening on a Friday or the day before a long holiday. This of course cuts short the opposing party's time in which to respond to any motion or other pleading.

We would recommend that the rule be amended so that any document electronically served or served by fax only after 3:00 p.m. on a Friday or a day before a legal holiday, the date of service is the following regular business day. North Dakota has worked hard to do away with "ambush" trial tactics. The filing and serving documents at the last minute is a form of ambush pleading.

The third issue again addresses Rule 8.3 of the Rules of Court. I am specifically speaking about Rule 8.3 [c] [4] which deals with the parties filing a property and debt listing 14 days prior to the hearing. There are several issues which are of a concern in this area.

The first is that the rule does not indicate which of the parties is to prepare the property and debt listing. It is my opinion as a practitioner that the Plaintiff who brought the proceeding should provide the first draft to the Defendant's counsel in order to give the Defendant time in which to insert their numbers, add any property that was missed and make whatever changes are necessary and then send it back to the Plaintiff's attorney for review, signature, and filing. The problem I have found is that we have some lawyers who just absolutely refuse to prepare the property and debt listing and will only rely upon opposing counsel. This leads to possible abuse in that if the party who refuses to prepare the property and debt listing knows of an asset and fails to disclose that asset on the property and debt listing, it may never be located until much later. I realize that both parties have to sign this but we do find abuses.

In addition, the timing is very difficult. If it is only 14 days before the trial, it is almost impossible to get it back and forth between the attorneys and the parties. Our recommendation is that the rule be changed so that the party who began the proceeding must provide a draft copy to the opposing counsel no later than 21 days prior to the proceeding and then that attorney would then have perhaps five days in which to respond leaving the ability to have it filed within the 14 days prior to the proceeding.

The other alternative is to move this back so that we can leave the 14 days filing but the party who presents the first draft must have it prepared within 30 days of the proceeding and then it goes back and forth between the lawyers.

We do recognize that the law requires that the value be established as of the date of the trial and the balances in the bank accounts and investment accounts might have to be supplemented at the day of the hearing; however, if they are included in the initial property and debt listing and the amounts as to the values of those accounts 30 days before trial is made known, then modifications or motions to amend can be made at the time of the proceeding.

It may sound like this is an issue that should not have to be governed by rule but I am finding in my practice that we often don't receive the information or the numbers until 24 hours before the proceeding and sometimes even the morning of the trial the opposing counsel will walk in with the completed property and debt listing. I know the judges do not like this but they do want to get the cases completed.

Some change need to be done on these issues. If it is necessary to appear before your committee and explain my reasoning, I would be happy to do so if I would be able to get some advance notice.

I thank you for listening to my issues. Again, these were all discussed at the recent family law seminar in Bismarck which was an excellent conference and I wish more attorneys had attended the same.

Very Truly Yours,
MCINTEE LAW FIRM

Michael S. McIntee
MsMc:lh

Cc: Michael Hurly, Chairman of Family Law Section, NDSBA

Hagburg, Mike

From: Rod Pagel <rpagel@pagelweikum.com>
Sent: Friday, January 18, 2013 2:25 PM
To: Hagburg, Mike
Subject: RE: Question on Filing / Service procedures under ND Rules of Civil Procedure / Rules of Court

Thanks, Mike.

I had a hearing the other day and we had filed the documents via Odyssey and then also actually mailed the documents out. At the hearing the opposing attorney asserted ineffective service. They admitted having received the Odyssey e-mail but asserted they did not receive a separate e-mailed copy (and I agree they did not). They did admit to receiving a separate mailed copy but asserted that this was untimely. The court took the eventual position that the mailed copy was not untimely, so I ended up being fine. However, I felt we went over and above and that the Odyssey e-mail should have been effective service… which is what led to my questions.

From my perspective, I think it would be helpful to clarify in Rule 5 that service via Odyssey is deemed to be effective electronic service and is the only service required…. Maybe you were intending to include that language already.

Thanks again.

Rodney E. Pagel
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From: Hagburg, Mike [mailto:MHagburg@ndcourts.gov]
Sent: Friday, January 18, 2013 2:15 PM
To: Rod Pagel
Subject: RE: Question on Filing / Service procedures under ND Rules of Civil Procedure / Rules of Court

Petra forwarded your email to me. I have been in on most of the deliberations behind this rule and I do not remember there being any intent that anything but service through the Odyssey system would be required to achieve effective service on another attorney involved in the same action. Presumably, you have some certificate of service language in your document just as you have in a mailed document and this would seem to satisfy any requirement under Rule 5. Are they asking you for a separate certificate of service? We are having a Joint Procedure Committee meeting in a couple of weeks and Rule 3.5 is on the agenda. I will present your questions to the Committee and they can discuss whether we need to do anything to clarify procedures. Thanks for your input. Mike

---

From: Rod Pagel [mailto:rpagel@pagelweikum.com]
Sent: Friday, January 18, 2013 1:07 PM

To: (SUP) Clerk of Court Office
Subject: Question on Filing / Service procedures under ND Rules of Civil Procedure / Rules of Court

I have a couple of questions on Filing / Service procedures under Rule 5 of the Civil Rules and Rule 3.5 of the Rules of Court:

1. Currently, under Rule 3.5(e)(1), if an attorney files a document through Odyssey and the other attorney is served via Odyssey, does anything else need to be done to establish service upon the other attorney? Rule 5 provides for electronic service and it would seem that filing through Odyssey under 3.5(e)(1) would suffice, but the issue has arisen with some Judges and there is some dissention on whether or not additional steps need to be taken to serve under Rule 5(b)(2) of the Rules of Civil Procedure.
2. Under Rule 3.5(e)(1), as of April 1, 2013, we are required to file documents electronically after the initial pleading and MUST serve those documents through the Odyssey system. As such, it would seem that this, by and of itself, establishes appropriate service under Rule 5(b)(2)(F). Am I correct in this understanding?

Any guidance you can provide (or if you can forward this to the appropriate party for guidance), is appreciated.

Sincerely,

Rodney E. Pagel
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Rule 6. Computing and extending time; Time for motion papers.

(a) Computing time.

The following rules apply in computing any time period specified in these rules, or in any local rule, court order, or statute, that does not specify a method of computing time.

(1) Period stated in days or a longer unit.

When the period is stated in days or a longer unit of time:

(A) exclude the day of the event that triggers the period;

(B) count every day, including intermediate Saturdays, Sundays, and legal holidays; and

(C) include the last day of the period, but if the last day is a Saturday, Sunday, or legal holiday, the period continues to run until the end of the next day that is not a Saturday, Sunday, or legal holiday.

(2) Period stated in hours.

When the period is stated in hours:

(A) begin counting immediately on the occurrence of the event that triggers the period;

(B) count every hour, including hours during intermediate Saturdays, Sundays, and legal holidays; and

(C) if the period would end on a Saturday, Sunday, or legal holiday, the period continues to run until the same time on the next day that is not a Saturday, Sunday, or legal holiday.

(3) Inaccessibility of the clerk's office.

Unless the court orders otherwise, if the clerk's office is inaccessible:

(A) on the last day for filing under Rule 6(a)(1), then the time for filing is extended to the first accessible day that is not a Saturday, Sunday, or legal holiday; or

(B) during the last hour for filing under Rule 6(a)(2), then the time for filing is extended to the same time on the first accessible day that is not a Saturday, Sunday, or legal holiday.

(4) "Last Day" defined.

Unless a different time is set by a statute, local rule, or court order, the last day ends:

(A) for electronic filing, at midnight in the court's time zone; and

(B) for filing by other means, when the clerk's office is scheduled to close.

(5) "Next Day" defined.

The "next day" is determined by continuing to count forward when the period is measured after an event and backward when measured before an event.

(b) Extending time.

(1) In general.

When an act may or must be done within a specified time, the court may, for good cause, extend the time:

(A) with or without motion or notice if the court acts, or if a request is made, before the original time or its extension expires; or

(B) on motion made after the time has expired if the party failed to act because of excusable neglect.

(2) Exceptions.

A court cannot extend the time to act under Rules 4(e)(7), 52(b), 59(c), (i) and (j), and 60(b).

(c) [Rescinded]

(d) Motions and notices of hearing.

(1) In general.

A written motion, and notice of the motion must be served at least 21 days before the motion may be heard, with the following exceptions:

(A) when the motion may be heard ex parte;

(B) when these rules set a different period; or

(C) when a court order - which a party may, for good cause, apply for ex parte - sets a different period.

(e) Service made electronically, by mail or third-party commercial carrier.

(1) Whenever a party must or may act within a prescribed period after service and service is made electronically, by mail or third-party commercial carrier under Rule 5, three days are added after the prescribed period would otherwise expire under N.D.R.Civ.P. 6(a).

(2) If service is made by mail or third-party commercial carrier under Rule 4, the prescribed period begins running upon delivery.

(3) For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission.

NOTES:

EXPLANATORY NOTE

Rule 6 was amended, effective 1971; March 1, 1990; on an emergency basis, March 1, 1992; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2001; March 1, 2004: March 1, 2007; March 1, 2009; March 1, 2011.

Legal holidays in North Dakota are listed in N.D.C.C. ch. 1-03.

Rule 6 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 2011, to simplify and clarify the provisions that describe how deadlines are computed. Under the previous rule, intermediate weekends and holidays were omitted when computing short periods but included when computing longer periods. Under the amended rule, intermediate weekends and holidays are counted regardless of the length of the specified period.

Paragraph (b)(2) was amended, effective March 1, 2011, to eliminate the exception for extending the times set by provisions in Rules 4(e)(7), 52(b), 59(c), (i) and (j), and 60(b).

Subdivision (d) was amended, effective March 1, 1997, because Rule 3.2, N.D.R.Ct., governs when papers supporting or opposing a motion must be served. The March 1, 2001 amendment changes from 14 to 18 days when a motion must be served before it may be heard.

Paragraph (d)(1) was amended, effective March 1, 2011, to change from 18 to 21 days when a motion must be served before it may be heard.

Subdivision (e) was amended, effective March 1, 1999, to make the three-day extension for service by mail applicable when service is via third-party commercial carrier. The proof of service must contain the date of mailing or deposit with the third-party commercial carrier.

Subdivision (e) was amended, effective March 1, 2004, to restrict applicability of the three-day extension for service by mail or third-party commercial carrier to items served under Rule 5. The time of service for an item served by mail or third-party commercial carrier under Rule 4 is the time the item is delivered to or refused by the recipient.

Subdivision (e) was amended, effective March 1, 2007, to clarify how to count the three-day extension for service by mail or third-party commercial carrier.

Subdivision (e) was amended, effective March 1, 2009, to provide that a document served by electronic means is treated as if it were mailed on the date of transmission. Service by electronic means includes facsimile transmission.

Sources: Joint Procedure Committee Minutes of April 29-30, 2010, pages 4-5; April 24-25, 2008; January 24, 2008, page 15; April 27-28, 2006, pages 6-7; January 26, 2006, page 11; January 30-31, 2003, pages 4-6; September 26-27, 2002, pages 15-18; January 27-28, 2000, pages 16-17; September 23-24, 1999, pages 20-21; January 29-30, 1998, page 18; April 25, 1996, pages 8-11; April 28-29, 1994, pages 15-17; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 14-16 and 20; April 29-30, 1993, page 20; November 7-8, 1991, page 3; October 25-26, 1990, page 12; April 20, 1989, page 2; December 3, 1987, page 11; June 22, 1984, pages 30-31; September 20-21, 1979, pages 5-6; *Fed.R.Civ.P. 6.*

Statutes Affected:

Considered: N.D.C.C. ch. 1-03.

Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction -- Process -- Service), N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers), N.D.R.Civ.P. 52 (Findings by the Court), N.D.R.Civ.P. 59 (New Trials -- Amendment of Judgments), and N.D.R.Civ.P. 60 (Relief From Judgment or Order); N.D.R.Crim.P. 45 (Time); N.D.R.Ct. 3.2 (Motions).

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 8.2, N.D.R.Ct., Interim Orders in Domestic Relations Cases

Mr. McIntee's letter, which the committee referred to in discussing Rule 3.5, also included suggestions on amendments to Rule 8.2. The letter discusses Rule 8.2 requirement that notice must be given if a party wishes to cross-examine a person who provided testimony by affidavit. Mr. McIntee states that is makes sense to apply the notice requirement to cross-examination of non-party affiants, who would have no reason to attend the hearing, but that it does not make sense to apply the requirement to parties who will be at the hearing.

Mr. McIntee suggests that Rule 8.2 be amended to allow parties to be cross-examined at hearings regardless of whether notice has been given on intent to cross-examine. A draft Rule 8.2 proposal containing the suggested amendments are attached.

RULE 8.2. INTERIM ORDERS IN DOMESTIC RELATIONS CASES

(a) Ex parte interim order.

(1) No interim order may be issued except on notice and hearing unless the court specifically finds exceptional circumstances. Exceptional circumstances include:

(A) threat of imminent danger to any party or minor child of the party; or

(B) circumstances indicating that an ex parte interim order is necessary to protect the parties, any minor children of the parties, or the marital estate.

(2) No ex parte interim order may be issued unless the moving party executes an affidavit setting forth specific facts justifying the issuance of the order. A restraining and eviction order may not be issued ex parte unless the moving party also appears personally and good cause is shown for issuance of the order.

(3) An ex parte interim order may include provisions relating to temporary parental rights and responsibilities, support and other appropriate expenses, use of real or personal property, restraining and eviction.

(4) If there has been an appearance in the action by the opposing party, or if the attorney for the moving party has knowledge that the opposing party is represented by an attorney, the attorney for the moving party must notify the court. After receiving notice of the appearance or representation, the court must attempt to hold an emergency hearing, either in person or by telephonic conference, at which both parties may be heard, before issuing any order. The issuance of an order following an emergency hearing will in no manner affect a

22 party's right to a further hearing on the merits of the order as provided in N.D.R.Ct. 8.2(a)(5).

23 (5) An ex parte interim order must specifically provide:

24 (A) that a hearing upon the necessity for the issuance of the order or the amounts to

25 be paid be held within 30 days of the issuance of the ex parte interim order, unless an earlier

26 hearing is required under N.D.C.C. ch. 14-07.1, or an application for change of venue is

27 pending. If the ex parte interim order contains provisions delineated in N.D.C.C. ch. 14-07.1,

28 the hearing must be scheduled in a timely manner under the chapter;

29 (B) that the party obtaining the ex parte interim order must secure a hearing date and

30 personally serve the ex parte interim order and a notice of hearing on the opposing party; and

31 (C) that the hearing on the ex parte interim order may be waived if the opposing party

32 files a written waiver with the court no later than two days before the hearing date. The

33 written waiver must be served on the moving party.

34 (6) The ex parte interim order remains in effect until it is amended following a court

35 hearing.

36 (7) An ex parte interim order modifying parenting time may be issued postjudgment.

37 (8) No ex parte interim order modifying primary residential responsibility may be

38 issued postjudgment.

39 (b) Interim orders on motion and hearing.

40 (1) Support. An interim order may provide for payment of support and other

41 appropriate expenses. In the event support is ordered, a current mailing address must be listed

42 for both parties.

43 (2) Parental Rights and Responsibilities. An interim order providing for temporary
44 parental rights and responsibilities and a parenting schedule for minor children may be
45 granted, in which case the order must provide for reasonable parenting time for each parent,
46 unless the evidence establishes that parenting time should be restricted to certain times and
47 places or prohibited.
48 (3) Attorney's fees and costs. An interim order may provide for payment of attorney's
49 fees and costs if evidence establishes that a party has insufficient personal income or funds
50 with which to pay attorney's fees and costs.
51 (4) Use of property. An interim order may provide for the use of real or personal
52 property, and for restraining and eviction.
53 (5) An interim order may not be amended except upon stipulation of the parties or in
54 the event of a material change of circumstances.
55 (c) Payment. The interim order must provide for any spousal support payment, child
56 support payment, or combined payment of child support and spousal support, to be paid to
57 and through the State Disbursement Unit. Payment must be in a manner acceptable to the
58 State Disbursement Unit unless otherwise ordered by the court.
59 (d) Time for hearing upon notice. If a notice of motion and motion are served to
60 obtain an interim order, the court shall hold a hearing no later than 30 days from the date of
61 filing the motion. If venue is changed before the hearing for an interim order is held, the
62 hearing for an interim order must be held no later than 30 days after venue is changed.
63 (e) Submission of evidence.

64 (1) Financial statement. In any proceedings under this rule, each party must file an
65 itemized financial statement prepared as illustrated in appendix B.
66 (2) Affidavit. Unless the court otherwise orders, evidence either in support of or in
67 opposition to the interim order must be presented by affidavit. Evidence presented by
68 affidavit may not be considered unless the party offering the affidavit makes the affiant
69 available for cross-examination. A party wishing to exercise his or her right to cross-examine
70 any affiant must notify the party proffering the affidavit testimony at least 24 hours before
71 the start of the hearing or may be considered to have waived the right to cross-examination.
72 <u>This notice requirement does not apply to an opposing party who will automatically be</u>
73 <u>subject to cross-examination.</u>
74 (3) Time for service and filing.
75 (A) Moving Party. The affidavits and itemized financial statement of the moving party
76 must be served and filed no later than 21 days prior to the hearing.
77 (B) Responding to Initial Motion. If the respondent does not raise any new issues, the
78 respondent's affidavits and itemized financial statement must be served and filed no later than
79 seven days prior to the hearing.
80 (C) Respondent Raising New Issues. If the respondent raises new issues other than
81 those raised in the initial motion, the respondent's affidavits and itemized financial statement
82 must be served and filed no later than 14 days prior to the hearing. If the moving party
83 responds to new issues raised by the respondent, any affidavits must be served and filed no
84 later than seven days prior to the hearing. A new issue means any issue listed in subdivision

85 (b) not raised by the moving party.

86 (4) Order of proceeding. The party initially seeking interim relief must proceed first

87 at the hearing.

88 EXPLANATORY NOTE

89 Rule 8.2 was amended, effective September 1, 1983; January 1, 1995; March 1, 1996;

90 March 1, 1999; March 1, 2001; October 9, 2002; August 1, 2009; March 1, 2010; March 1,

91 2011;_____.

92 A motion for a change of venue must be promptly ruled on to accomplish the

93 Committee's intent for interim orders to be expeditiously heard.

94 Subdivision (a)(5) was amended, effective March 1, 2010, to provide, unless waived,

95 a mandatory hearing upon the necessity for the issuance of the order or the amounts to be

96 paid be held within 30 days of the issuance of an ex parte interim order.

97 Subdivision (a) was amended, effective March 1, 2011, to add new paragraphs (8) and

98 (9), clarifying types of ex parte interim orders that may be requested post judgment. Under

99 N.D.C.C. § 14-09-06.6, notice is required prior to postjudgment modification of primary

100 residential responsibility. If exceptional circumstances exist, a postjudgment modification

101 of parenting time may be made ex parte.

102 Subdivision (b)(5) was added, effective March 1, 2001.

103 Subdivision (c) was amended, effective March 1, 2001; October 9, 2002. When an

104 order for child support or spousal support is entered, the order must provide for payment to

105 and through the State Disbursement Unit.

106 Paragraph (e)(2) was amended, effective March 1, 2011, to require a party wishing
107 to cross-examine an affiant to provide pre-hearing notice to the party offering the affidavit.
108 Paragraph (e)(2) was amended, effective _____, to clarify that a party
109 wishing to cross-examine an opposing party does not need to provided pre-hearing notice.
110 Paragraph (e)(3) was amended, effective March 1, 2011, to change the time for service
111 and filing of affidavits.
112 Sources: Joint Procedure Committee Minutes of _____; September
113 23-24, 2010, pages 3-7; April 29-30, 2010, pages 7-9, 27; January 28-29, 2010, pages 7-8;
114 September 24-25, 2009, pages 10-11; May 21-22, 2009, page 44-45; September 26-27, 2002;
115 September 28-29, 2000, pages 9-10; January 27-28, 2000, pages 19-21; April 30-May 1,
116 1998, pages 8-9; April 27-28, 1995, pages 9-15; September 23-24, 1993, pages 16-17; April
117 20, 1989, page 17; April 26, 1984, page 17; September 30-October 1, 1982, pages 18-21;
118 December 11-12, 1980, pages 3-4 and 7.
119 Statutes Affected:
120 Considered: N.D.C.C. § 14-09-06.6.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 8.3, N.D.R.Ct., Case Management (Divorce Cases)

Mr. McIntee's letter, which the committee referred to in discussing Rule 3.5 and Rule 8.2, also included suggestions on amendments to Rule 8.3. The letter discusses Rule 8.3 joint property and debt listing requirement. Mr. McIntee states that parties do not cooperate very much in drafting this document and that the time deadlines imposed by the rule are often ignored.

Mr. McIntee suggests that Rule 8.3 be amended to require the plaintiff to prepare a draft property and debt listing and to provide it to the defendant at least 21 days before the hearing. The idea is the defendant would then be able to make additions and corrections so that the document could be finalized by 14 days before the hearing, when the rule requires it to be submitted. Mr. McIntee alternatively suggests that some mechanism be imposed that would require the parties to work together on the document in the 30 days before the 14 day deadline for submission.

A draft Rule 8.3 proposal containing Mr. McIntee's "21-day" suggestion is attached. The committee may wish to review his comments and the experience of family law attorneys on the committee to determine the appropriate approach.

RULE 8.3. CASE MANAGEMENT (DIVORCE CASES)

(a) Compulsory meeting. Within 30 days after service of the complaint, the parties and their attorneys must meet in person or by electronic means to prepare a joint informational statement (in the form shown in appendix C) and a preliminary property and debt listing. The complaint and joint informational statement must be filed no later than seven days after the compulsory meeting. The parties must exchange information and documentary evidence relating to the existence and valuation of assets and liabilities. At a minimum, the parties must be prepared to exchange current paystubs, employment and income information, tax returns, preliminary pension information, and asset, debt and expense documentation. The parties must determine at the meeting what additional information is necessary in order to complete the case. The parties must decide at the meeting whether alternative dispute resolution methods are appropriate.

(b) Scheduling order. Within 30 days after the informational statement is filed, the court must issue its scheduling order. The court may issue the order after either a telephone or in-court scheduling conference, or without a conference or hearing if none is needed. The scheduling order may establish any of the following deadlines:

(1) specific dates for the completion of discovery and other pretrial preparations;

(2) specific dates for serving, filing, or hearing motions;

(3) specific dates for completion of mediation/alternative dispute resolution;

(4) a specific date for the parties to complete parent/divorce education;

22 (5) a specific date for filing the property and debt listing;

23 (6) specific dates for completion of parenting evaluation;

24 (7) a specific date by which the parties will be prepared for the pretrial conference;

25 (8) a specific date by which the parties will be prepared for the trial;

26 (9) a specific date for identification of witnesses and documents; and

27 (10) a specific date by which the parties will submit the parenting plans.

28 (c) Pretrial conferences.

29 (1) Each party must complete a pretrial conference statement substantially in the form

30 set forth in appendix D which must be served upon all parties and filed with the court at least

31 14 days prior to the date of the pretrial conference.

32 (2) Unless excused by the court for good cause, the parties and attorneys who will try

33 the proceedings must attend the pretrial conference, prepared to discuss settlement. If a

34 stipulation is reduced to writing prior to the pretrial conference, the case may be heard as a

35 default at the time scheduled for the conference. In that event, only one party need appear.

36 If a party fails to appear at a pretrial conference, the court may dispose of the proceedings

37 without further notice to that party.

38 (3) If the parties are unable to resolve the case, in whole or in part, at the pretrial

39 conference, the court must issue an order concerning any remaining discovery and motions,

40 and identifying the contested issues for trial.

41 (4) Unless otherwise ordered, at least ~~14~~ 21 days before trial, the ~~parties~~ plaintiff must

42 ~~file~~ serve a draft joint property and debt listing on the defendant. The defendant must review

43 and finalize the document and file it with the court at least 14 days prior to trial. The
44 document as filed must be substantially in the form set forth in appendix E. Each asset or
45 liability must be numbered separately.

46 EXPLANATORY NOTE

47 Rule 8.3 was amended, effective March 1, 1986; August 1, 1996; March 1, 2008;
48 August 1, 2009; March 1, 2011.

49 Subdivision (a) was amended, effective March 1, 2011, to increase the time to file the
50 complaint and joint informational statement from five to seven days after the compulsory
51 meeting.

52 Paragraph (b)(8) was amended, March 1, 2008, to delete a reference to the note of
53 issue and certificate of readiness.

54 Paragraph (c)(1) was amended, effective March 1, 2011, to change the time to serve
55 a pretrial conference statement from 10 to 14 days before the date of the pretrial conference.

56 Paragraph (c)(4) was amended, effective March 1, 2011, to change the time to file a
57 joint property and debt listing from 10 to 14 days before trial.

58 Paragraph (c)(4) was amended, effective _____, to provide a
59 procedure for the parties to both submit information for the joint property and debt listing
60 form.

61 Sources: Joint Procedure Committee Minutes of _____; April 29-30,
62 2010, page 21; May 21-22, 2009, pages 44-45; April 26-27, 2007, pages 14-15; January 25-
63 26, 1996, pages 3-6; September 28-29, 1995, pages 3-11; June 22, 1984, page 10.

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 13, N.D.Sup.Ct.Admin.R., Judicial Referees

Judge Reich has submitted an e-mail with questions regarding whether referee proceedings under Rule 13 should be recorded and subject to district court review when the referee is overseeing a small claims court or non-criminal traffic case.

Under N.D.C.C. § 27-08.1-04, attached, parties in small claims court waive the right to appeal the decision in any other court. Under N.D.C.C. § 39-06.1-03(5)(a), attached, a person may not appeal from a traffic violation finding by a district judge or magistrate. The Supreme Court in City of Grand Forks v. Riemers, 2008 ND 153, ¶ 5, attached, explained that "[t]he right to appeal is governed solely by statute." A district court review of a referee decision in a small claims or traffic case under Rule 13, §11, seems to be equivalent of an appeal and an such an appeal is not be authorized by statute.

Proposed amendments to Rule 13 that would exempt small claims and traffic matters from district court review under §11 are attached.

Rule 13, §7, requires referee proceedings to be on the record. Under N.D.C.C. § 27-08.1-03, a court reporter is not "required to be present" at a small claims court hearing and a party who wants a court reporter must pay for one. Staff was not able to locate language in N.D.C.C. ch. 39-06.1 addressing whether a traffic violation hearing should be recorded. The fact that municipal court traffic violation hearings are appealable under N.D.C.C. § 39-06.1-03 suggests that hearings at the municipal court level should be on the record.

The record hearing requirement was part of Rule 13 when it was first approved in 1985 and has not been amended. The committee may wish to discuss whether it would be appropriate to amend this provision to exempt small claims and traffic violation hearings from the recording requirement.

RULE 13. JUDICIAL REFEREES

Section 1. Authority.

The 1985 Legislative Assembly provided for appointment of judicial referees under H.B. 1586. Under N.D. Const. art. VI, § 3, and N.D.C.C. § 27-05-30, the Supreme Court adopts the following administrative rule relating to judicial referees.

Section 2. Statement of Policy.

The North Dakota Judicial System's policy is to provide for the qualifications, the extent and assignment of authority, procedure and the conduct of the role of judicial referees within the North Dakota Judicial System in each judicial district.

Section 3. Qualifications of Judicial Referees.

Minimum qualifications for a judicial referee include:

(a) United States citizenship;

(b) physical residence in the judicial district of the appointment after appointment unless physical residence is waived by the presiding judge of the judicial district; and

(c) a license to practice law in the state of North Dakota; or a juvenile supervisor/referee meeting the requirements of N.D.C.C. § 27-20-06(1)(i).

Section 4. Appointment.

The presiding judge, on behalf of all of the district court judges of the judicial district, must execute in writing the appointment of all judicial referees, to serve at the pleasure of the district court judges of the judicial district. Judicial referees must be compensated under

22 the personnel system of the North Dakota Judicial System.

23 Section 5. Scope of Delegable Duties.

24 (a) A presiding judge, after consultation with the district court judges of the judicial
25 district, may authorize a judicial referee to preside in any individual proceeding or class of
26 proceedings under:

27 (1) N.D.C.C title 14, except contested divorce trials;

28 (2) N.D.C.C ch. 27-20; and

29 (3) N.D.C.C ch. 28-25.

30 (b) A presiding judge, after consultation with the district court judges of the judicial
31 district, may authorize a judicial referee, while serving and acting as a magistrate appointed
32 under N.D. Sup. Ct. Admin. R. 20, to preside in any individual proceeding or class of
33 proceedings under:

34 (1) N.D.C.C. ch. 12.1-31.2; and

35 (2) N.D.C.C. §§ 50-09-08.6(6) and 50-09-14(2).

36 (c) A judicial referee has such other authority of a district court judge as is necessary
37 to carry out the delegated duties, including the issuance of orders to show cause, temporary
38 restraining orders, temporary injunctions, and the power to impose remedial sanctions for
39 contempt of court.

40 (d) The order issued under Subsection (a) of this section must be reduced to writing
41 and signed by the presiding judge of the judicial district. The order must be filed with the
42 clerk of district court of each county of the judicial district. The presiding judge must send

43 a copy of this document to the State Court Administrator. A copy must be made available to
44 any party upon request.
45 (e) Within the limits set forth in the written order of the presiding judge, district court
46 judges may refer individual cases or classes of cases to a judicial referee by written order.
47 (f) After July 1, 1987, a judicial referee who hears matters under N.D.C.C. ch. 27-20
48 may not exercise supervision of personnel who supervise juveniles.
49 Section 6. Geographical Jurisdiction.
50 Each judicial referee will have jurisdiction only within the judicial district of
51 appointment and is expected to maintain an office as assigned by the presiding judge of the
52 judicial district. A judicial referee may be appointed to temporary duty in another judicial
53 district by the presiding judge of the judicial district, with the consent of the presiding judge
54 of the receiving judicial district or by the Chief Justice under N.D.Const. art. VI, § 3.
55 Section 7. Proceedings on the Record.
56 Proceedings must be heard on the record.
57 Section 8. Removal from Referee.
58 Any party to a proceeding before a judicial referee is entitled to have the matter heard
59 by a district court judge, if written request is filed by the party within seven days after service
60 of either the initiating documents or other notice informing the party of this right.
61 Section 9. Standard of Conduct.
62 The Rules of Judicial Conduct must be observed by each judicial referee.
63 Section 10. Findings and Order.

64 (a) The findings and order of the judicial referee have the effect of the findings and
65 order of the district court until superseded by a written order of a district court judge.
66 (b) Copies of the findings and order together with written notice of the right of review
67 must be promptly served on the parties under N.D.R.Civ.P. 5.
68 Section 11. Procedure for Review.
69 (a) Except in small claims court cases under N.D.C.C. ch. 27-08.1 and in traffic cases
70 under N.D.C.C. § 39-06.1-03, ~~A~~ a review of the findings and order of a judicial referee may
71 be ordered at any time by a district court judge and must be ordered if a party files a written
72 request for review within seven days after service of the notice in Section 10(b). The request
73 for review must state the reasons for the review. A party requesting review must give notice
74 to all other parties. A party seeking to respond to a request for review must file a response
75 within 14 days after service of notice of the request.
76 (b) The review by a district court judge must be a de novo review of the record. The
77 district court may:
78 (1) adopt the referee's findings;
79 (2) remand to the referee for additional findings; or
80 (3) reject the referee's findings.
81 (c) If the district court judge rejects the referee's findings, the court shall issue its own
82 findings of fact, with or without a hearing.
83 EXPLANATORY NOTE
84 Section 5 was amended, effective March 1, 2012, to allow a presiding judge to

85 authorize a judicial referee to preside in proceedings involving disorderly conduct restraining
86 orders.

87 Section 8 was amended, effective March 1, 2011, to increase the time to request a
88 district court judge from five to seven days after service of initiating documents.

89 Section 11(a) was amended, effective March 1, 2011, to increase the time to request
90 a review from a district court judge from five to seven days after service of the right to
91 review. The time to respond to a request for review was increased from 10 to 14 days after
92 service of notice of the request.

93 Section 11(a) was amended, effective _____, to clarify that small claims
94 court and traffic actions decided by a judicial referree are not reviewable or appealable.

95 Source: Joint Procedure Committee Meeting Minutes of _____;
96 September 23-24, 2010, pages 14-15, 21; April 29-30, 2010, page 21; April 24-25, 2003,
97 page 3; January 30-31, 2003, pages 21-23; April 25-26, 2002, pages 16-17; May 6-7, 1999,
98 pages 14-15; April 29-30, 1993, page 2. Court Services Administration Committee Meeting
99 Minutes of May 17, 1985, pages 2-4. Family Caselaw Referee Study Subcommittee of Court
100 Services Administration Committee Meeting Minutes of April 19, 1985, pages 3-8; March
101 15, 1985, pages 1-6; February 22, 1985, pages 1-9; January 11, 1985, pages 2-8; and
102 December 17, 1984, page 5. N.D. Const. art. VI, § 3; and N.D.C.C. § 27-05-30.

103 [Adopted as emergency rule effective June 13, 1985; readopted September 17, 1985;
104 amended effective March 1, 1994; January 1, 1995; March 1, 2000; March 1, 2003; March
105 1, 2004; March 1, 2011; March 1, 2012; June 1, 2012.]

Hagburg, Mike

From: Reich, David
Sent: Friday, September 21, 2012 11:29 AM
To: Maring, Justice Mary; Hagburg, Mike
Cc: Goter, Wayne; Grinsteiner, John
Subject: FW: Rule 13, Section 7

Re: Joint Procedure Committee Review of AR 13

Dear Mary and Mike,

I am forwarding a series of e-mail messages I received from Referees Wayne Goter and John Grinsteiner with questions regarding some of the provisions of Administrative Rule 13. AR 13(7) requires that proceedings before a referee must be heard on the record. AR 13(11) permits review of a referee's order upon timely written request by a party. These provisions appear to be inconsistent with certain statutory procedures for small claims and non-criminal traffic cases. No record of the proceedings is required in small claims and non-criminal traffic matters and orders in these matters are not appealable. See, N.D.C.C. sections 27-08.1-03, 27-08.1-04, and 39-06.1-03. Judge Hagerty suggested that this matter might be appropriate for review by the Joint Procedure Committee, so I am forwarding these e-mails to you.

I have received the agenda for the September 27 meeting. I hope to be there, but as of today that is the second day of a three day divorce trial on my calendar. I thought I had previously cleared all of the dates for the Joint Procedure Committee meetings, but this one got scheduled over anyway. With a little luck, the divorce case will settle and my calendar will clear.

Thank you for your consideration of this matter. Have a great weekend!

Dave

September 11, 2012 e-mail from Referee Wayne Goter:

Judge Reich, I have a couple of questions about the applicability of some of the provisions of Administrative Rule 13 to cases assigned to judicial referees that may need some clarification. The first question is whether Subsection 7 requires all proceedings before a referee to be recorded. The second question is whether Subsection 11 requires that all parties appearing in a case before a judicial referee be advised that they have a right to have the decision of the judicial referee reviewed by a district judge. (The concern is that a request for review could be expected in virtually all small claims and protection order cases) I had raised these issues a couple of weeks ago with Referee Grinsteiner and he forwarded the question on to Judge Hagerty. Judge Hagerty thought that maybe this is an issue that should be brought to the Joint Procedure Committee. The question came up again today during the judges' meeting in the Southwest Judicial District. Judge Herauf asked me to communicate these questions to you (since you are on the Joint Procedure Committee). Thank you. Judicial Referee Wayne Goter

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From: Grinsteiner, John
Sent: Tuesday, September 11, 2012 3:03 PM
To: Reich, David
Subject: FW: Rule 13, Section 7

Judge, I am forwarding the email chain below to you. Once you have had a chance to read them and if you wish to visit, I will make myself available.

From: Hagerty, Gail
Sent: Tuesday, September 11, 2012 2:25 PM
To: Grinsteiner, John; Goter, Wayne
Subject: RE: Rule 13, Section 7

I think that should be proposed to the Joint Procedure Committee. I think Judge Reich is on the committee, and you might want to visit with him. Gail

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From: Grinsteiner, John
Sent: Tuesday, September 11, 2012 1:53 PM
To: Goter, Wayne; Hagerty, Gail
Subject: RE: Rule 13, Section 7

I offer this comment with some trepidation. My understanding is that the idea of review under Rule 13 came about many years ago before Referees were required to be law trained. It has become, in effect, a free, somewhat informal, and quick appeal process. I wonder if the Joint Procedure Committee might consider amending Rule 13 to take away the right of review to a district judge (no disrespect meant) and simply require parties to appeal decisions made by referees directly to the Supreme Court. This would seem to fit the rest of the Rule that referee orders carry the same weight and would render the concerns raised moot.

From: Goter, Wayne
Sent: Tuesday, September 11, 2012 1:43 PM
To: Hagerty, Gail; Grinsteiner, John
Subject: RE: Rule 13, Section 7

Judge Hagerty: the subject of Admin Rule 13 came up today during the judges' meeting in Dickinson. The inquiry is whether Rule 13 also requires ALL hearings (including small claims) presided over by a referee to be subject to a right of review by a district judge. The concern here is that district judges will be inundated with requests to review by the losing party in virtually all small claims cases. Judge Herauf wanted you to also address this issue with the Joint Procedure Committee. Wayne Goter

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From: Hagerty, Gail
Sent: Wednesday, August 29, 2012 3:36 PM
To: Grinsteiner, John; Goter, Wayne
Subject: Re: Rule 13, Section 7

The answer is "I don't know." We should ask Joint Procedure Committee to review that. Until then, operate as you have been.

From: Grinsteiner, John
Sent: Wednesday, August 29, 2012 04:18 PM
To: Goter, Wayne
Cc: Hagerty, Gail
Subject: RE: Rule 13, Section 7

I see the confusion, we might want to check with Judge Hagerty on how she wants us to proceed. I have copied her on this email. Good catch Wayne!

JWG

From: Goter, Wayne
Sent: Wednesday, August 29, 2012 4:14 PM
To: Grinsteiner, John
Subject: Rule 13, Section 7

John, I was paging through the August Supplement to the NDCC Rules. Admin Rule 13, Section 7 says proceedings before a referee must be recorded. Do they mean all proceedings (non-criminal traffic or small claims)? Just wondering.
Wayne

27-08.1-03. Informal hearing - Answer and counterclaim - Filing and service fees - Examination of debtor.
No formal pleadings other than the claim affidavit and order for appearance may be required, and the hearing and disposition of actions must be informal. A court reporter is not required to be present to take the testimony unless arranged for and paid for by one of the parties to the action. The defendant may file an answer, and file a claim affidavit setting forth any new matter constituting a counterclaim, not to exceed ten thousand dollars, which must be served upon the plaintiff by a person of legal age, not a party to or interested in the action, or mailed to the plaintiff by certified mail, not later than forty-eight hours before the hearing set for the appearance of the defendant. The compulsory counterclaim rule does not apply to counterclaims in excess of ten thousand dollars. At the hearing, the plaintiff and the defendant may appear without counsel. The court will conduct the proceedings and may make its own inquiry before, during, or after the hearing. After the court has found that money is owing by any party to the proceeding, the court may, in the presence of the prevailing party, inquire of the debtor as to plans for payment of the debt. The court may examine the debtor concerning the property owned by the debtor, at the hearing, as would be made under chapter 28-25. The examination may be made without first having issued an execution against the property of the debtor and without further notice as otherwise provided in chapter 28-25. A trial by jury is not allowed in small claims court. A fee as prescribed in subdivision c of subsection 1 of section 27-05.2-03 must be charged for filing the claim affidavit.

27-08.1-04. Election to proceed in small claims court irrevocable.
Election by the plaintiff to use the procedures provided for in this chapter is irrevocable. In the event the plaintiff elects to discontinue the proceedings, the court shall enter its order accordingly, and unless otherwise provided in the order the dismissal must be deemed to be with prejudice. By election to proceed in small claims court, the plaintiff waives the right to appeal to any other court from the decision of the small claims court. The defendant waives the right to appeal from the decision of the small claims court upon receiving the order for appearance as required herein, unless the defendant elects to remove the action from the small claims court to district court. If the defendant elects to remove the action to district court, the defendant must serve upon the plaintiff a notice of the removal and file with the clerk of the court to which the action is removed a copy of the claim affidavit and the defendant's answer along with the filing fee, except for an answer fee, required for civil actions. If the defendant elects to remove the action from small claims court to district court, the district court shall award attorney's fees to a prevailing plaintiff.

39-06.1-03. Administrative hearing - Procedures - Appeals - Stay orders.

1. A person cited for a traffic violation, other than an offense listed in section 39-06.1-05, who does not follow one of the procedures set forth in section 39-06.1-02, may request a hearing on the issue of commission of the violation charged. The hearing must be held at the time scheduled in the citation, at the time scheduled in response to the person's request, or at some future time, not to exceed ninety days later, set at that first appearance.
2. At the time of a request for a hearing on the issue of commission of the violation, the person charged shall deposit with the official having jurisdiction an appearance bond equal to the statutory fee for the violation charged.
3. If a person cited for a traffic violation, other than an offense listed in section 39-06.1-05, has requested a hearing on the issue of the commission of the violation charged and appears at the time scheduled for the hearing, and the state or city, as the case may be, does not appear or is not ready to prove the commission of a charged violation at the hearing, the official shall dismiss the charge.
4. If the official finds that the person had committed the traffic violation, the official shall notify the licensing authority of that fact, and whether the person was driving more than nine miles [14.48 kilometers] per hour in excess of the lawful limit, stating specifically the miles [kilometers] per hour in excess of the lawful limit, if charged with a speeding violation, within ten days of the date of the hearing. The fact that a person has admitted a violation, or has, in any proceeding, been found to have committed a violation, may not be referred to in any way, nor be admissible as evidence in any court, civil, equity, or criminal, except in an action or proceeding involving that person's driving license or privilege.
5. a. A person may not appeal a finding from a district judge or magistrate that the person committed the violation. If a person is aggrieved by a finding in the municipal court that the person committed the violation, the person may, without payment of a filing fee, appeal that finding to the district court for trial anew. If, after trial in the appellate court, the person is again found to have committed the violation, there may be no further appeal. Notice of appeal under this subsection must be given within thirty days after a finding of commission of a violation is entered by the official. Oral notice of appeal may be given to the official at the time that the official adjudges that a violation has been committed. Otherwise, notice of appeal must be in writing and filed with the official, and a copy of the notice must be served upon the prosecuting attorney. An appeal taken under this subsection may not operate to stay the reporting requirement of subsection 4, nor to stay appropriate action by the licensing authority upon receipt of that report.
b. The appellate court upon application by the appellant may:
(1) Order a stay of any action by the licensing authority during pendency of the appeal, but not to exceed a period of one hundred twenty days;
(2) Order a stay and that the appellant be issued a temporary restricted driving certificate by the licensing authority to be effective for no more than one hundred twenty days; or
(3) Deny the application.
An application for a stay or temporary certificate under this subdivision must be accompanied by a certified copy of the appellant's driving record, for the furnishing of which the licensing authority may charge a fee of three dollars. Any order granting a stay or a temporary certificate must be forwarded forthwith by the clerk of court to the licensing authority, which immediately shall issue a temporary certificate in accordance with the order in the manner provided by law. A court

may not make a determination on an application under this subdivision without notice to the appropriate prosecuting attorney. A person who violates or exceeds the restrictions contained in any temporary restricted driving certificate issued pursuant to this subdivision is guilty of a traffic violation and must be assessed a fee of twenty dollars.

c. If the person charged is found not to have committed the violation by the appellate court, the clerk of court shall report that fact to the licensing authority immediately. Unless the appropriate state's attorney consents to prosecute the appeal, if an appeal under this subsection is from a violation of a city ordinance, the city attorney for the city wherein the alleged violation occurred shall prosecute the appeal. In all other cases, the appropriate state's attorney shall prosecute the appeal.

6. The state or the city, as the case may be, must prove the commission of a charged violation at the hearing or appeal under this section by a fair preponderance of the evidence. Upon an appeal under subsection 5, the court and parties shall follow, to the extent applicable, the North Dakota Rules of Civil Procedure. If on the appeal from the finding of the official the finding is affirmed, costs may be assessed at the discretion of the trial judge.

7. As used in sections 39-06.1-02, 39-06.1-03, and 39-06.1-04, the word "official" means a municipal judge, or a magistrate or other qualified person appointed by the presiding judge of the judicial district, to serve as such official for all or a specified part of the judicial district.

IN THE SUPREME COURT

STATE OF NORTH DAKOTA

2008 ND 153

City of Grand Forks, Plaintiff and Appellee
v.
Roland C. Riemers, Defendant and Appellant

No. 20070379

Appeal from the District Court of Grand Forks County, Northeast Central Judicial District, the Honorable Debbie Gordon Kleven, Judge.
DISMISSED.
Opinion of the Court by Kapsner, Justice.
Kristen Sue Pettit, City Prosecutor, 311 South 4th Street, Suite 103, Grand Forks, N.D. 58201, for plaintiff and appellee.
Roland C. Riemers, pro se, 108 Cairns Avenue, Emerado, North Dakota, 58228, for defendant and appellant.

City of Grand Forks v. Riemers

No. 20070379

Kapsner, Justice.

[¶1] Roland Riemers appealed from a district court order finding him guilty of speeding in violation of a municipal ordinance. We conclude we do not have jurisdiction, and we dismiss the appeal.

I

[¶2] On July 6, 2007, Riemers received a traffic citation charging him with traveling 50 miles per hour in a 40-mile-per-hour zone, in violation of a Grand Forks municipal ordinance. Riemers filed with the municipal court a written response to the citation, in which he (1) objected to posting bond, (2) requested a written complaint, (3) requested a delay of the initial hearing, (4) demanded a jury trial, and (5) objected to "improper service and procedures." Riemers did not, however, seek a transfer of the matter to district court in accordance with N.D.C.C. § 40-18-15.1. The municipal court issued

a written order denying Riemers' demand for a jury trial. The matter was tried to the municipal court on August 30, 2007, and the court found Riemers guilty and imposed a fine of $51 and a $15 hearing fee.

[¶3] On August 31, 2007, Riemers filed a written notice of appeal seeking trial de novo in the district court and requesting a jury trial. The district court denied Riemers' request for a jury trial, and the matter was tried to the court on October 18, 2007. The court found Riemers had violated the municipal ordinance and imposed a $51 fine and a $15 hearing fee. Riemers has attempted to appeal to this Court, alleging he had a right to a jury trial.

II

[¶4] The City contends this Court lacks subject matter jurisdiction over an appeal from a district court's decision after a trial anew on a noncriminal traffic violation. Riemers argues that he has a constitutional right under N.D. Const. art. VI, § 2, to appeal to this Court and that "this Court has the inherent right to discretionary review of any matter."

[¶5] Riemers has misconstrued the nature and extent of this Court's appellate jurisdiction. Under N.D. Const. art. VI, § 6, "[a]ppeals shall be allowed from decisions of lower courts to the supreme court as may be provided by law." Accordingly, this Court has consistently held that the right to appeal in this state is "purely statutory." E.g., State v. Keilen, 2002 ND 133, ¶ 7, 649 N.W.2d 224; State v. Bell, 2000 ND 58, ¶ 17, 608 N.W.2d 232; Whitaker v. Century 21, 466 N.W.2d 114 (N.D. 1991). There is no federal or state constitutional right to an appeal. E.g., State v. Causer, 2004 ND 75, ¶¶ 22, 25, 678 N.W.2d 552; Bell, at ¶ 17; State v. Robideaux, 475 N.W.2d 915, 916 (N.D. 1991); Reub's Minot Camera, Inc. v. General Elec. Credit Corp., 201 N.W.2d 877, 879 (N.D. 1972). The right of appeal is governed solely by statute, and if there is no statutory basis for an appeal we must take notice of the lack of jurisdiction and dismiss the appeal. State v. Grager, 2006 ND 102, ¶ 4, 713 N.W.2d 531; In re A.B., 2005 ND 216, ¶ 5, 707 N.W.2d 75.

[¶6] In this case, not only is there no statutory authority for an appeal to this Court, but there is an express statutory provision prohibiting an appeal. The procedures for prosecuting a noncriminal traffic offense are set out in N.D.C.C. § 39-06.1-03. Subsection (5)(a) of the statute provides for an appeal from the municipal court to the district court for trial anew, but prohibits any further appeal:

> If a person is aggrieved by a finding that the person committed the violation, the person may, without payment of a filing fee, appeal that finding to the district court for trial anew. If, after trial in the appellate court, the person is

> again found to have committed the violation, there may be no further appeal.

This Court has interpreted N.D.C.C. § 39-06.1-03(5)(a) to confer appellate jurisdiction upon the district court, not this Court, and once a new trial is held in the district court there is no further appeal. State v. Walch, 499 N.W.2d 602, 603 (N.D. 1993). The Court expressly concluded: "We read the prohibition against a further appeal to wholly exclude the North Dakota Supreme Court from the appeal process," and "a noncriminal traffic case may not be appealed to this court." Id.; see also Bland v. Commission on Med. Competency, 557 N.W.2d 379, 384 (N.D. 1996); State v. Silkman, 317 N.W.2d 124, 125 (N.D. 1982).

[¶7] The municipal court found that Riemers had violated the municipal ordinance. Riemers then invoked the appellate jurisdiction of the district court by appealing to that court for trial anew under N.D.C.C. § 39-06.1-03(5)(a). By the clear language of the statute there is no further appeal. Accordingly, we conclude that we do not have jurisdiction and must dismiss the appeal. See Grager, 2006 ND 102, ¶ 4, 713 N.W.2d 531; A.B., 2005 ND 216, ¶ 5, 707 N.W.2d 75.

[¶8] Although we conclude that we lack jurisdiction over Riemers' attempted appeal, we note that an appropriate procedure was available for him to challenge the denial of a jury trial. If Riemers believed he had a right to a jury trial on the charged offense, he should have immediately sought a transfer of the matter from the municipal court to the district court under N.D.C.C. § 40-18-15.1, which provides in part: "A matter may be transferred to district court for trial only if within twenty-eight days after arraignment the defendant has requested in writing to transfer the case to district court and to exercise the defendant's right to a jury trial." This Court has clarified that unless the defendant makes a timely request under the statute to transfer the matter to district court "the right to a jury trial is lost." City of Bismarck v. Fettig, 1999 ND 193, ¶ 13, 601 N.W.2d 247. If Riemers had filed a timely request to transfer the matter to district court under N.D.C.C. § 40-18-15.1, and the municipal court had denied the transfer or the district court, after transfer, had denied Riemers' request for a jury trial, Riemers could then have sought a supervisory writ from this Court. See Silkman, 317 N.W.2d at 125 n.1. This would have been the appropriate procedure to seek this Court's review of whether a defendant has a right to a jury trial in a noncriminal traffic case. Riemers did not follow this procedure, and never sought a supervisory writ from this Court. Rather, he made a demand for a jury trial in municipal court and, after being found guilty in a municipal court bench trial, invoked the appellate jurisdiction of the district court for a trial anew. At that point, further appellate review by this Court was precluded by N.D.C.C. § 39-06.1-03(5)(a).

III

[¶9] We conclude that we are without jurisdiction, and we dismiss the appeal.

[¶10]

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

MEMO

TO: Joint Procedure Committee

FROM: Mike Hagburg

DATE: January 18, 2013

RE: Rule 8.1, N.D.R.Ct., Uniform Collaborative Law Rule

Judge Hagerty has requested the committee consider adoption of the Uniform Collaborative Law Rule in North Dakota. A proposed new Rule 8.1 containing the text of the uniform rule is attached.

According to the Uniform Law Commission, "collaborative law is a voluntary, client-driven form of alternative dispute resolution practiced in all 50 states." The uniform act was promulgated in 2009 "because of the need for a comprehensive statute addressing the practice of collaborative law."

Judge Hagerty states in her proposal letter that collaborative law would be a useful option in family law cases. She states that it also would be beneficial in Eastern North Dakota because collaborative law is practiced in Minnesota. She included with her letter an article from the Grand Forks Herald discussing collaborative law and how it can be applied in divorce cases. This material is attached.

Judge Hagerty also provided a copy of the uniform rule including the text of the rule and comments and explanatory material about the different provisions, which is attached.

RULE 8.1. UNIFORM COLLABORATIVE LAW RULE

(a) Definitions.

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A: is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

22 (A) marriage, divorce, dissolution, annulment, and property distribution;

23 (B) child custody, visitation, and parenting time;

24 (C) alimony, maintenance, and child support;

25 (D) adoption;

26 (E) parentage; and

27 (F) premarital, marital, and post-marital agreements.

28 Alternative B: is described in a collaborative law participation agreement.

29 (6) "Law firm" means:

30 (A) lawyers who practice law together in a partnership, professional corporation, sole

31 proprietorship, limited liability company, or association; and

32 (B) lawyers employed in a legal services organization, or the legal department of a

33 corporation or other organization, or the legal department of a government or governmental

34 subdivision, agency, or instrumentality.

35 (7) "Nonparty participant" means a person, other than a party and the party's

36 collaborative lawyer, that participates in a collaborative law process.

37 (8) "Party" means a person that signs a collaborative law participation agreement and

38 42

39 whose consent is necessary to resolve a collaborative matter.

40 (9) "Person" means an individual, corporation, business trust, estate, trust, partnership,

41 limited liability company, association, joint venture, public corporation, government or

42 governmental subdivision, agency, or instrumentality, or any other legal or commercial

43 entity.

44 (10) "Proceeding" means:

45 (A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal,

46 including related prehearing and post-hearing motions, conferences, and discovery; or

47 (B) a legislative hearing or similar process.

48 (11) "Prospective party" means a person that discusses with a prospective

49 collaborative lawyer the possibility of signing a collaborative law participation agreement.

50 (12) "Record" means information that is inscribed on a tangible medium or that is

51 stored in an electronic or other medium and is retrievable in perceivable form.

52 (13) "Related to a collaborative matter" means involving the same parties, transaction

53 or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

54 (14) "Sign" means, with present intent to authenticate or adopt a record:

55 (A) to execute or adopt a tangible symbol; or

56 (B) to attach to or logically associate with the record an electronic symbol, sound, or

57 process.

58 (15) "Tribunal" means:

59 (A) a court, arbitrator, administrative agency, or other body acting in an adjudicative

60 capacity which, after presentation of evidence or legal argument, has jurisdiction to render

61 a decision affecting a party's interests in a matter; or

62 (B) a legislative body conducting a hearing or similar process.

63 (b) Collaborative Law Participation Agreement.

64 (1) A collaborative law participation agreement must:

65 (A) be in a record;

66 (B) be signed by the parties;

67 (C) state the parties' intention to resolve a collaborative matter through a collaborative

68 law process under these rules;

69 (D) describe the nature and scope of the matter;

70 (E) identify the collaborative lawyer who represents each party in the process; and

71 (F) contain a statement by each collaborative lawyer confirming the lawyer's

72 representation of a party in the collaborative law process.

73 (2) Parties may agree to include in a collaborative law participation agreement

74 additional provisions not inconsistent with these rules.

75 (c) Beginning and Concluding Collaborative Law Process.

76 (1) A collaborative law process begins when the parties sign a collaborative law

77 participation agreement.

78 (2) A tribunal may not order a party to participate in a collaborative law process over

79 that party's objection.

80 (3) A collaborative law process is concluded by a:

81 (A) resolution of a collaborative matter as evidenced by a signed record;

82 (B) resolution of a part of the collaborative matter, evidenced by a signed record, in

83 which the parties agree that the remaining parts of the matter will not be resolved in the

84 process; or

85 (C) termination of the process.

86 (4) A collaborative law process terminates:

87 (A) when a party gives notice to other parties in a record that the process is ended;

88 (B) when a party:

89 (i) begins a proceeding related to a collaborative matter without the 52

90 agreement of all parties; or

91 (ii) in a pending proceeding related to the matter:

92 -- initiates a pleading, motion, order to show cause, or request for a conference with

93 the tribunal;

94 -- requests that the proceeding be put on the [tribunal's active calendar]; or

95 -- takes similar action requiring notice to be sent to the parties; or

96 (C) except as otherwise provided by Rule 8.1 (c)(7), when a party discharges a

97 collaborative lawyer or a collaborative lawyer withdraws from further representation of a

98 party.

99 (5) A party's collaborative lawyer shall give prompt notice to all other parties in a

100 record of a discharge or withdrawal.

101 (6) A party may terminate a collaborative law process with or without cause.

102 (7) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a

103 collaborative law process continues, if not later than 30 days after the date that the notice of

104 the discharge or withdrawal of a collaborative lawyer required by paragraph (e) is sent to the

105 parties:

106 (A) the unrepresented party engages a successor collaborative lawyer; and

107 (B) in a signed record:

108 (i) the parties consent to continue the process by reaffirming the collaborative law

109 participation agreement;

110 (ii) the agreement is amended to identify the successor collaborative lawyer; and

111 (iii) the successor collaborative lawyer confirms the lawyer's representation of a party

112 in the collaborative process. 53

113 (8) A collaborative law process does not conclude if, with the consent of the parties,

114 a party requests a tribunal to approve a resolution of the collaborative matter or any part

115 thereof as evidenced by a signed record.

116 (9) A collaborative law participation agreement may provide additional methods of

117 concluding a collaborative law process.

118 (d) Proceedings Pending Before Tribunal; Status Report.

119 (1) Persons in a proceeding pending before a tribunal may sign a collaborative law

120 participation agreement to seek to resolve a collaborative matter related to the proceeding.

121 The parties shall file promptly with the tribunal a notice of the agreement after it is signed.

122 Subject to paragraph (c) and Rules 7 and 8, the filing operates as an application for a stay of

123 the proceeding.

124 (2) The parties shall file promptly with the tribunal notice in a record when a

125 collaborative law process concludes. The stay of the proceeding under paragraph (a) is lifted

126 when the notice is filed. The notice may not specify any reason for termination of the

127 process.

128 (3) A tribunal in which a proceeding is stayed under paragraph (a) may require the
129 parties and collaborative lawyers to provide a status report on the collaborative law process
130 and the proceeding. A status report may include only information on whether the process is
131 ongoing or concluded. It may not include a report, assessment, evaluation, recommendation,
132 finding, or other communication regarding a collaborative law process or collaborative law
133 matter.

134 (4) A tribunal may not consider a communication made in violation of paragraph (c).

135 (5) A tribunal shall provide parties notice and an opportunity to be heard before
136 dismissing a proceeding in which a notice of collaborative process is filed based on delay or
137 failure to prosecute.

138 (e) Emergency Order. During a collaborative law process, a tribunal may issue
139 emergency orders to protect the health, safety, welfare, or interest of a party or [insert term
140 for family or household member as defined in [state civil protection order statute]].

141 (f) Approval of Agreement by Tribunal. A tribunal may approve an agreement
142 resulting from a collaborative law process.

143 (g) Disqualification of Collaborative Lawyer and Lawyers in Associated Law Firm.

144 (1) Except as otherwise provided in Rule 8.1(g)(3), a collaborative lawyer is
145 disqualified from appearing before a tribunal to represent a party in a proceeding related to
146 the collaborative matter.

147 (2) Except as otherwise provided in paragraph (c) and Rules 10 and 11, a lawyer in

148 a law firm with which the collaborative lawyer is associated is disqualified from appearing
149 before a tribunal to represent a party in a proceeding related to the collaborative matter if the
150 collaborative lawyer is disqualified from doing so under paragraph (a).
151 (3) A collaborative lawyer or a lawyer in a law firm with which the collaborative
152 lawyer is associated may represent a party:
153 (A) to ask a tribunal to approve an agreement resulting from the collaborative law
154 process; or
155 (B) to seek or defend an emergency order to protect the health, safety, welfare, or
156 interest of a party, or [insert term for family or household member as defined in [state civil
157 protection order statute]] if a successor lawyer is not immediately available to represent that
158 person.
159 (4) If Rule 8.1 (3)(B) applies, a collaborative lawyer, or lawyer in a law firm with
160 which the collaborative lawyer is associated, may represent a party or [insert term for family
161 or household member] only until the person is represented by a successor lawyer or
162 reasonable measures are taken to protect the health, safety, welfare, or interest of the person.
163 (h) Low Income Parties.
164 (1) The disqualification of Rule 8.1(g)(1) applies to a collaborative lawyer representing
165 a party with or without fee.
166 (b) After a collaborative law process concludes, another lawyer in a law firm with
167 which a collaborative lawyer disqualified under Rule 8.1(g)(1) is associated may represent
168 a party without fee in the collaborative matter or a matter related to the collaborative matter

169 if:

170 (A) the party has an annual income that qualifies the party for free legal representation

171 under the criteria established by the law firm for free legal representation;

172 (B) the collaborative law participation agreement so provides; and

173 (C) the collaborative lawyer is isolated from any participation in the collaborative

174 matter or a matter related to the collaborative matter through procedures within the law firm

175 which are reasonably calculated to isolate the collaborative lawyer from such participation.

176 (i) Governmental Entity as Party.

177 (1) The disqualification of Rule 8.1(g)(1) applies to a collaborative lawyer

178 representing a party that is a government or governmental subdivision, agency, or

179 instrumentality.

180 (2) After a collaborative law process concludes, another lawyer in a law firm with

181 which the collaborative lawyer is associated may represent a government or governmental

182 subdivision, agency, or instrumentality in the collaborative matter or a matter related to the

183 collaborative matter if:

184 (A) the collaborative law participation agreement so provides; and

185 (B) the collaborative lawyer is isolated from any participation in the collaborative

186 matter or a matter related to the collaborative matter through procedures within the law firm

187 which are reasonably calculated to isolate the collaborative lawyer from such participation.

188 (j) Disclosure of Information. Except as provided by law other than these rules, during

189 the collaborative law process, on the request of another party, a party shall make timely, full,

190 candid, and informal disclosure of information related to the collaborative matter without
191 formal discovery. A party also shall update promptly previously disclosed information that
192 has materially changed. The parties may define the scope of disclosure during the
193 collaborative law process.

194 (k) Standards of Professional Responsibility and Mandatory Reporting Not Affected.
195 These rules do not affect:

196 (1) the professional responsibility obligations and standards applicable to a lawyer or
197 other licensed professional; or

198 (2) the obligation of a person to report abuse or neglect, abandonment, or exploitation
199 of a child or adult under the law of this state.

200 (l) Appropriateness of Collaborative Law Process. Before a prospective party signs
201 a collaborative law participation agreement, a prospective collaborative lawyer shall:

202 (1) assess with the prospective party factors the lawyer reasonably believes relate to
203 whether a collaborative law process is appropriate for the prospective party's matter;

204 (2) provide the prospective party with information that the lawyer reasonably believes
205 is sufficient for the party to make an informed decision about the material benefits and risks
206 of a collaborative law process as compared to the material benefits and risks of other
207 reasonably available alternatives for resolving the proposed collaborative matter, such as
208 litigation, mediation, arbitration, or expert evaluation; and

209 (3) advise the prospective party that:

210 (A) after signing an agreement if a party initiates a proceeding or seeks tribunal

211 intervention in a pending proceeding related to the collaborative matter, the collaborative law
212 process terminates;
213 (B) participation in a collaborative law process is voluntary and any party has the right
214 to terminate unilaterally a collaborative law process with or without cause; and
215 (C) the collaborative lawyer and any lawyer in a law firm with which the collaborative
216 lawyer is associated may not appear before a tribunal to represent a party in a proceeding
217 related to the collaborative matter, except as authorized by Rule 8.1 (g)(1), (h)(2), or (i)(2).
218 (m) Coercive or Violent Relationship.
219 (1) Before a prospective party signs a collaborative law participation agreement, a
220 prospective collaborative lawyer shall make reasonable inquiry whether the prospective party
221 has a history of a coercive or violent relationship with another prospective party.
222 (2) Throughout a collaborative law process, a collaborative lawyer reasonably and
223 continuously shall assess whether the party the collaborative lawyer represents has a history
224 of a coercive or violent relationship with another party.
225 (3) If a collaborative lawyer reasonably believes that the party the lawyer represents
226 or the prospective party who consults the lawyer has a history of a coercive or violent
227 relationship with another party or prospective party, the lawyer may not begin or continue
228 a collaborative law process unless:
229 (A) the party or the prospective party requests beginning or continuing a process; and
230 (B) the collaborative lawyer reasonably believes that the safety of the party or
231 prospective party can be protected adequately during a process.

232 (n) Confidentiality of Collaborative Law Communication. A collaborative law
233 communication is confidential to the extent agreed by the parties in a signed record or as
234 provided by law of this state other than these rules.
235 (o) Privilege Against Disclosure for Collaborative Law Communication;
236 Admissibility; Discovery.
237 (1) Subject to Rules 18 and 19, a collaborative law communication is privileged under
238 Rule 8.1(o) (2), is not subject to discovery, and is not admissible in evidence.
239 (2) In a proceeding, the following privileges apply:
240 (A) A party may refuse to disclose, and may prevent any other person from disclosing,
241 a collaborative law communication.
242 (B) A nonparty participant may refuse to disclose, and may prevent any other person
243 from disclosing, a collaborative law communication of the nonparty participant.
244 (3) Evidence or information that is otherwise admissible or subject to discovery does
245 not become inadmissible or protected from discovery solely because of its disclosure or use
246 in a collaborative law process.
247 (p) Waiver and Preclusion of Privilege.
248 (1) A privilege under Rule 8.1(o) may be waived in a record or orally during a
249 proceeding if it is expressly waived by all parties and, in the case of the privilege of a
250 nonparty participant, it is also expressly waived by the nonparty participant.
251 (2) A person that makes a disclosure or representation about a collaborative law
252 communication which prejudices another person in a proceeding may not assert a privilege

253 under Rule 8.1(o), but this preclusion applies only to the extent necessary for the person
254 prejudiced to respond to the disclosure or representation.
255 (q) Limits of Privilege.
256 (1) There is no privilege under Rule 8.1(o) for a collaborative law communication
257 that is:
258 (A) available to the public under [state open records act] or made during a session of
259 a collaborative law process that is open, or is required by law to be open, to the public;
260 (B) a threat or statement of a plan to inflict bodily injury or commit a crime of
261 violence;
262 (C) intentionally used to plan a crime, commit or attempt to commit a crime, or
263 conceal an ongoing crime or ongoing criminal activity; or
264 (D) in an agreement resulting from the collaborative law process, evidenced by a
265 record signed by all parties to the agreement.
266 (2) The privileges under Rule 8.1(o) for a collaborative law communication do not
267 apply to the extent that a communication is:
268 (A) sought or offered to prove or disprove a claim or complaint of professional
269 misconduct or malpractice arising from or related to a collaborative law process; or
270 (B) sought or offered to prove or disprove abuse, neglect, abandonment, or
271 exploitation of a child or adult, unless the [child protective services agency or adult
272 protective services agency] is a party to or otherwise participates in the process.
273 (3) There is no privilege under Rule 8.1(o) if a tribunal finds, after a hearing in

274 camera, that the party seeking discovery or the proponent of the evidence has shown the
275 evidence is not otherwise available, the need for the evidence substantially outweighs the
276 interest in protecting confidentiality, and the collaborative law communication is sought or
277 offered in:

278 (A) a court proceeding involving a felony [or misdemeanor]; or

279 (B) a proceeding seeking rescission or reformation of a contract arising out of the 67
280 collaborative law process or in which a defense to avoid liability on the contract is asserted.

281 (4) If a collaborative law communication is subject to an exception under paragraph
282 (2) or (3), only the part of the communication necessary for the application of the exception
283 may be disclosed or admitted.

284 (5) Disclosure or admission of evidence excepted from the privilege under paragraph
285 (2) or (3) does not make the evidence or any other collaborative law communication
286 discoverable or admissible for any other purpose.

287 (6) The privileges under Rule 8.1(o) do not apply if the parties agree in advance in
288 a signed record, or if a record of a proceeding reflects agreement by the parties, that all or
289 part of a collaborative law process is not privileged. This paragraph does not apply to a
290 collaborative law communication made by a person that did not receive actual notice of the
291 agreement before the communication was made.

292 (r) Authority of Tribunal in Case of Noncompliance.

293 (1) If an agreement fails to meet the requirements of Rule 8.1(b), or a lawyer fails to
294 comply with Rule 8.1(l) or (m), a tribunal may nonetheless find that the parties intended to

295 enter into a collaborative law participation agreement if they:

296 (A) signed a record indicating an intention to enter into a collaborative law

297 participation agreement; and

298 (B) reasonably believed they were participating in a collaborative law process.

299 (2) If a tribunal makes the findings specified in paragraph (1), and the interests of

300 justice require, the tribunal may:

301 (A) enforce an agreement evidenced by a record resulting from the process in which

302 the parties participated;

303 (B) apply the disqualification provisions of Rule 8.1 (c), (d), (g), (h), and (i); and

304 (C) apply a privilege under Rule 8.1(o).

305 EXPLANATORY NOTE

306 Rule 8.1 took effect _____.

STATE OF NORTH DAKOTA

DISTRICT COURT
SOUTH CENTRAL JUDICIAL DISTRICT
P.O. BOX 1013
BISMARCK, NORTH DAKOTA 58502

GAIL HAGERTY
PRESIDING DISTRICT JUDGE

(701) 222-6682
FAX (701) 222-6689
GHAGERTY@NDCOURTS.GOV

RECEIVED BY
Justice Maring
Supreme Court

NOV 2[illegible]

STATE OF
NORTH DAKOTA

November 28, 2012

Justice Mary Maring
Chair, Joint Procedure Committee
Supreme Court
Judicial Wing, 1st Floor
600 E. Boulevard Ave.
Bismarck, ND 58505-0530

Dear Justice Maring:

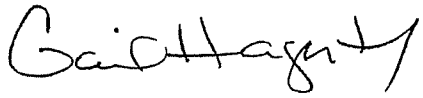
Please find enclosed a recent article from the Fargo Form concerning collaborative law in divorce cases and a copy of the Uniform Collaborative Law Act as amended by the Uniform Law Commission in 2010.

On behalf of North Dakota's Uniform Law Commission, I request that the Joint Procedure Committee consider adopting the Uniform Collaborative Law Act by rule as a useful option for family law cases. Adoption of the Act would be particularly beneficial to attorneys in the eastern part of North Dakota, since collaborative law is practiced in Minnesota.

The Uniform Law Conference's website has additional information and resources concerning the Act. The website address is: http://www.uniformlaws.org. If there are questions or issues which can be addressed by those involved in drafting the Act, please let me know and I will assist in making contacts.

Thank you for your consideration.

Sincerely,



Gail Hagerty

Copy: Peter Munson
Eric Fish

INFORUM
The Forum of Fargo-Moorhead

Published November 26, 2012, 11:40 PM

A civil separation: Collaborative divorce aims for balanced approach

FARGO – A couple's split can be messy and contentious, but some Fargo-Moorhead attorneys, mental health professionals and financial advisers are bringing a different way to divorce to the area.

By: Tracy Frank, INFORUM

FARGO – A couple's split can be messy and contentious, but some Fargo-Moorhead attorneys, mental health professionals and financial advisers are bringing a different way to divorce to the area.

Collaborative divorce is an approach in which the divorcing couple and attorneys agree to stay out of court, exchange information honestly and work together to find the best solution for the couple and their children.

"Our system is really good at applying pressure toward more peaceful resolutions," said Michael Gjesdahl, a family law attorney with Gjesdahl Law in Fargo.

With collaborative divorce, a couple works with a team to help ensure the financial, emotional and legal security of both parties and their children.

Financial specialists review assets and incomes and help plan feasible financial options as well as work through issues like the tax implications of divorce.

"When people are financially stable after a divorce, it makes them feel much more confident about their future," said Angie McCarthy, a financial adviser with Ameriprise Financial Services in Fargo.

Mental health professionals work as divorce coaches and child specialists. Divorce coaches help their clients manage the emotional turmoil of divorce and focus on their plans and goals. Child specialists help children express their feelings and concerns about the divorce and make sure their voices are heard when working with the collaborative divorce team.

"As counselors, we see a lot of times the damage and struggles of kids who are living with parents who are still in conflict during and following divorce," said Peter Moynihan, a child specialist and divorce coach with Solutions Behavioral Healthcare Professionals in Moorhead.

"We're all interested in minimizing the long-term risk factors for families and children and want to engage in a process that has more of a protective factor for families and give people more control in their divorce process," said Krislea Wegner, a divorce coach and child specialist with Wegner Psychological and Therapeutic Services in Fargo.

"This process tries to create an intervention at the front-end to avoid a lot of those potential negative factors," Wegner adds.

It can be extremely difficult to resolve issues after a couple has been through months and even years of litigation, said Carolyn Meske, a divorce coach and child specialist with Solutions Behavioral Healthcare Professionals in Moorhead.

"Our intent is to help make it as nondestructive as possible," she said.

If after attempting the collaborative process the couple still decides to go through a divorce in court, the attorneys involved withdraw from the case.

NEW APPROACH

Collaborative divorce has been around for a while. Minneapolis lawyer Stuart Webb founded the approach in 1990 as a way to help his clients settle and negotiate their problems outside the courtroom and avoid the road blocks and frustrations he kept running into by settling divorce issues in court, according to collaborativedivorce.net.

But the method is still new to the Fargo-Moorhead area. The group of Fargo-Moorhead attorneys, mental health professionals and financial advisers went through training with Collaborative Family Law out of Minneapolis earlier this year and now offers the service locally.

"Employers are starting to look at it as a model because they know their employees are taken off track by the divorce process and if there's some way of helping them not be so completely stressed out, they will have more energy and attention for their jobs," said Gail Nelson, a divorce coach with Journey Counseling in Fargo. "People are realizing this process helps everybody – the kids, the employer, the families."

One of the biggest differences between traditional divorce and collaborative divorce is in a traditional divorce the parties are focused on filing motions like temporary custody, child-support and alimony and putting themselves in a better position for litigation, said Krista Andrews, a family law attorney with Anderson, Bottrell, Sanden & Thompson law firm in Fargo.

Even the process of being served divorce papers can feel like an attack that immediately puts someone in a defensive position, the attorneys and mental health professionals said.

But the collaborative process changes the entire emotional dynamic, Wegner said.

Alyssa Krakowski, of Bloomington, Minn., said having a team help guide her through the process of divorce was one of the biggest benefits to using collaborative divorce.

"I just felt really supported," she said.

She said judging from her own experience and the experience of friends of hers who have divorced, the collaborative process seems the healthiest way to go through it.

"It really did keep it more civil," Krakowski said. "It did keep it more amicable between us."

With a collaborative divorce, everyone is focused on restructuring the family, Andrews said.

"From the get-go, it doesn't get amped up right away," she said. "The most striking difference is the tone of the meeting. You can openly discuss things with the other attorney. We're all on the same page. There's nothing adversarial in that room because we're all there simply to get the case settled."

Where the traditional approach is more lawyer-led, the collaborative process is led by the clients, Gjesdahl said.

The traditional system is adversarial by design, he said.

"The benefit of this is you can create your own solution rather than having a judge impose a solution," said Timothy McLarnan, a family law attorney with McLarnan & Skatvold law firm in Moorhead.

—

Learn more about collaborative divorce or to find local collaborative divorce professionals, visit: www.collaborativedivorce.net, www.collaborativepractice.com or www.collaborativelaw.org.

Tags:shesays, family

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- Want to Avoid Depression? Stop Doing This (Health Guru)

[?]

UNIFORM COLLABORATIVE LAW RULES

and

UNIFORM COLLABORATIVE LAW ACT

(Last Revised or Amended in 2010)

Drafted by the

NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

and by it

APPROVED AND RECOMMENDED FOR ENACTMENT
IN ALL THE STATES

at its

ANNUAL CONFERENCE
MEETING IN ITS ONE-HUNDRED-AND-EIGHTEENTH YEAR
IN SANTA FE, NEW MEXICO
JULY 9-16, 2009

WITH PREFATORY NOTE AND COMMENTS

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NATIONAL CONFERENCE OF COMMISSIONERS
ON UNIFORM STATE LAWS

October 12, 2010

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UNIFORM COLLABORATIVE LAW RULES AND UNIFORM COLLABORATIVE LAW ACT

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Note for enacting states: *The provisions for regulation of collaborative law are presented in two formats for enactment- by court rules or legislation. The substantive provisions of each format are identical with the exception of several standard form clauses typically found in legislation. Each state considering adopting the Uniform Collaborative Law Rules (UCLR) or the Uniform Collaborative Law Act (UCLA) should review its practices and precedent to first determine whether the substantive provisions are best adopted by court rule or statute. The decision may vary from state to state depending on the allocation of authority between the legislature and the judiciary for regulation of contracts, alternative dispute resolution, and the legal profession. States may also decide to enact part of the substantive provisions by court rule and part by legislation. Specific comments following some particular rules or sections indicate whether the Drafting Committee recommends enactment by court rule or legislation. Drafting agencies may need to renumber sections and cross references depending on their decision concerning the appropriate method of enactment.*

UNIFORM COLLABORATIVE LAW RULES

RULE 1. SHORT TITLE. These rules may be cited as the Uniform Collaborative Law Rules.

RULE 2. DEFINITIONS. In these rules:

(1) "Collaborative law communication" means a statement, whether oral or in a record, or verbal or nonverbal, that:

(A) is made to conduct, participate in, continue, or reconvene a collaborative law process; and

(B) occurs after the parties sign a collaborative law participation agreement and before the collaborative law process is concluded.

(2) "Collaborative law participation agreement" means an agreement by persons to participate in a collaborative law process.

(3) "Collaborative law process" means a procedure intended to resolve a collaborative matter without intervention by a tribunal in which persons:

(A) sign a collaborative law participation agreement; and

(B) are represented by collaborative lawyers.

(4) "Collaborative lawyer" means a lawyer who represents a party in a collaborative law

process.

(5) "Collaborative matter" means a dispute, transaction, claim, problem, or issue for resolution, including a dispute, claim, or issue in a proceeding, which

Alternative A

is described in a collaborative law participation agreement and arises under the family or domestic relations law of this state, including:

(A) marriage, divorce, dissolution, annulment, and property distribution;

(B) child custody, visitation, and parenting time;

(C) alimony, maintenance, and child support;

(D) adoption;

(E) parentage; and

(F) premarital, marital, and post-marital agreements.

Alternative B

is described in a collaborative law participation agreement.

End of Alternatives

(6) "Law firm" means:

(A) lawyers who practice law together in a partnership, professional corporation, sole proprietorship, limited liability company, or association; and

(B) lawyers employed in a legal services organization, or the legal department of a corporation or other organization, or the legal department of a government or governmental subdivision, agency, or instrumentality.

(7) "Nonparty participant" means a person, other than a party and the party's collaborative lawyer, that participates in a collaborative law process.

(8) "Party" means a person that signs a collaborative law participation agreement and

whose consent is necessary to resolve a collaborative matter.

(9) "Person" means an individual, corporation, business trust, estate, trust, partnership, limited liability company, association, joint venture, public corporation, government or governmental subdivision, agency, or instrumentality, or any other legal or commercial entity.

(10) "Proceeding" means:

(A) a judicial, administrative, arbitral, or other adjudicative process before a tribunal, including related prehearing and post-hearing motions, conferences, and discovery; or

(B) a legislative hearing or similar process.

(11) "Prospective party" means a person that discusses with a prospective collaborative lawyer the possibility of signing a collaborative law participation agreement.

(12) "Record" means information that is inscribed on a tangible medium or that is stored in an electronic or other medium and is retrievable in perceivable form.

(13) "Related to a collaborative matter" means involving the same parties, transaction or occurrence, nucleus of operative fact, dispute, claim, or issue as the collaborative matter.

(14) "Sign" means, with present intent to authenticate or adopt a record:

(A) to execute or adopt a tangible symbol; or

(B) to attach to or logically associate with the record an electronic symbol, sound, or process.

(15) "Tribunal" means:

(A) a court, arbitrator, administrative agency, or other body acting in an adjudicative capacity which, after presentation of evidence or legal argument, has jurisdiction to render a decision affecting a party's interests in a matter; or

(B) a legislative body conducting a hearing or similar process.

Comment

"Collaborative law process" and "collaborative law participation agreement." A collaborative law process is created by written contract, a collaborative law participation agreement. It requires parties to engage collaborative lawyers. The minimum requirements for collaborative law participation agreements are specified in Rule 4.

"Collaborative law communication." Rule 17 creates an evidentiary privilege for collaborative law communications, a term defined here.

The definition of "collaborative law communication" parallels the definition of "mediation communication" in the Uniform Mediation Act Section 2(2). Collaborative law communications are statements that are made orally, through conduct, or in writing or other recorded activity. This definition is similar to the general rule, as reflected in Federal Rule of Evidence 801(a), which defines a "statement" as "an oral or written assertion or nonverbal conduct of a person, if it is intended by the person as an assertion." FED. R. EVID. 801(a).

Understandable confusion has sometimes resulted because the terms "oral *or* . . . verbal" are both used in Rule 2(1) and some think the terms are synonymous. They are not. "Oral" can be defined as "[u]ttered by the mouth or in words; spoken, not written." BLACK'S LAW DICTIONARY 1095 (6th ed. 1990). Although commonly used interchangeably with "oral," "verbal" is defined strictly as "of or pertaining to words; expressed in words, whether spoken or written." *Id.* at 1558. "Thus, 'verbal' is a broader term, and it is possible for something to be verbal but not oral." Gary M. McLaughlin, Note, *Oral Contracts in the Entertainment Industry*, 1 VA. SPORTS & ENT. L.J. 101, 102 n.6 (2001); *see also* Lynn E. MacBeth, *Lessons In Legalese: Words Commonly Misused by Lawyers ... or, Sounds Like*, LAW. J., May 2002, at 6 ("Unfortunately, the word verbal has been so misused that . . . it has come to mean 'oral.' However, in standard English verbal means 'consisting of words,' as opposed to nonverbal, which is communication by signs, symbols, and means other than words. . . . The correct adjective for a spoken communication is *oral*, or if you want to sound more erudite, *parol*. Verbal communication encompasses both written and spoken communication that consists of words.").

Most generic mediation privileges cover communications but do not cover conduct that is not intended as an assertion. ARK. CODE ANN. § 16-7-206 (1999); CAL. EVID. CODE § 1119 (West 1997); IOWA CODE ANN. §§ 679C.102, 679C.104 (West Supp. 2009); KAN. STAT. ANN. § 60-452a (2008) (assertive representations); MASS. GEN. LAWS ch. 233, § 23C (1986); MONT. CODE ANN. § 26-1-813 (2009); NEB. REV. STAT. § 25-2914 (LexisNexis 2004); NEV. REV. STAT. ANN. § 48.109 (West 2004); N.J. STAT. ANN. § 2A:23A-9 (West 2000); OHIO REV. CODE ANN. § 2317.023 (West 2004); OKLA. STAT. ANN. TIT. 12, § 1805 (West 1993); OR. REV. STAT. ANN. § 36.220 (West 2003); 42 PA. CONS. STAT. ANN. § 5949 (West 2000); R.I. GEN. LAWS § 9-19-44 (1997); S.D. CODIFIED LAWS § 19-13-32 (2004); VA. CODE ANN. § 8.01-576.10 (2007); WASH. REV. CODE ANN. § 5.60.070 (West 2009); WIS. STAT. § 904.085 (West 2000); WYO. STAT. ANN. § 1-43-102 (2009). The same is true of the privilege created by these rules.

The mere fact that a person attended a collaborative law session—in other words, the physical presence of a person—is not a communication. By contrast, nonverbal conduct such as nodding in response to a question would be a "communication" because it is meant as an

assertion; however nonverbal conduct such as smoking a cigarette during the collaborative law session typically would not be a "communication" because it was not meant by the actor as an assertion.

Mental impressions that are based even in part on collaborative law communications would generally be protected by privilege. More specifically, communications include both statements and conduct meant to inform, because the purpose of the privilege is to promote candid collaborative law communications. *But see* U.S. v. Robinson, 121 F.3d 971, 975 (5th Cir. 1997) (finding that ordinarily the act of giving a document to an attorney will not be privileged). By analogy to the attorney-client privilege, silence in response to a question may be a communication, if it is meant to inform. *But see* U.S. v. White, 950 F.2d 426, 430 & n.2 (7th Cir. 1991) (noting the distinction between communication and lack of communication). Further, conduct meant to explain or communicate a fact, such as the re-enactment of an accident, is a communication. *See* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.14[3][a] (Joseph M. McLaughlin, ed., 2nd ed. 1997). Similarly, a client's revelation of a hidden scar to an attorney in response to a question is a communication if meant to inform. In contrast, a purely physical phenomenon, such as a tattoo or the color of a suit of clothes, observable by all, is not a communication.

If evidence of mental impressions would reveal, even indirectly, collaborative law communications, then that evidence would be blocked by the privilege. *See* Gunther v. U.S., 230 F.2d 222, 223-24 (D.C. Cir. 1956). For example, a party's mental impressions of the capacity of another party to enter into a binding settlement agreement would be privileged if that impression was in part based on the statements that the party made during the collaborative law process, because the testimony might reveal the content or character of the collaborative law communications upon which the impression is based. In contrast, the mental impression would not be privileged if it was based exclusively on the party's observation of that party wearing heavy clothes and an overcoat on a hot summer day because the choice of clothing was not meant to inform. *See e.g.* Darrow v. Gunn, 594 F.2d 767, 774 (9th Cir. 1979) (discussing California law which states that observations and impressions of clients are not privileged).

The definition of "collaborative law communication" has a fixed time element—it only includes communications that occur between the time a collaborative law participation agreement is signed and before a collaborative law process is concluded. The methods and requirements for beginning and concluding a collaborative law process are specified in Rule 5. The defined time period and methods for ascertaining are designed to make it easier for tribunals to determine the applicability of the privilege to a proposed collaborative law communication.

The definition of collaborative law communication does include some communications that are not made during actual negotiation sessions, such as those made for purposes of convening or continuing a negotiation session after a collaborative law process begins. It also includes "briefs" and other reports that are prepared by the parties for the collaborative law process.

Whether a document is prepared for a collaborative law process is a crucial issue in determining whether it is a "collaborative law communication." For example, a tax return brought to a collaborative law negotiation session for a divorce settlement would not be a "collaborative law communication," even though it may have been used extensively in the

process, because it was not created for "purposes of conducting, participating in, continuing, or reconvening a collaborative law process," but rather because it is a requirement of federal law. However, a note written on the tax return to clarify a point for other participants during a negotiation session would be a collaborative law communication. Similarly, a memorandum specifically prepared for the collaborative law process by a party or a party's counsel explaining the rationale behind certain positions taken on the tax return would be a collaborative law communication. Documents prepared for a collaborative law process by experts retained by the parties would also be covered by this definition.

"Collaborative lawyer." A collaborative lawyer represents a party in a collaborative law process. As discussed in the Preface, a party must be represented by a lawyer to participate in a collaborative law process; it is not an option for the self-represented. Rule 4(a)(5) requires that a collaborative law participation identify the collaborative lawyer who represents each party and Rule 4(a)(6a) requires that the agreement contain a statement by the designated lawyer confirming the representation.

"Collaborative matter." The act uses the term "matter" rather the narrower term "dispute" to describe what the parties may attempt to resolve through a collaborative law process. Matter can include some or all of the issues in litigation or potential litigation, or can include issues between the parties that have not or may never ripen into litigation. The broader term emphasizes that parties have great autonomy to decide what to submit to a collaborative law process and encourages them to use the process creatively and broadly.

The drafting committee provides two alternatives for enacting states to define "collaborative matter" and thus the scope of matters that can be submitted to the collaborative law process. Alternative A limits "collaborative matter" to those which arise under the family or domestic relations law of a state. States which choose to include this language will thus limit the collaborative law process to those substantive areas where it has so far achieved the greatest acceptance and growth and in which collaborative lawyers have the greatest experience. They will, however, exclude matters which do not arise under the family or domestic relations law of a state from the collaborative law process.

Alternative B, in contrast, places no substantive limitation on matters that can be submitted to a collaborative law process, relying instead on the informed consent of parties based on the information provided by their counsel under the standards for informed consent specified in Rules 12 and 13. Under Alternative B collaborative law participation agreements can be entered into to attempt to resolve everything from contractor-subcontractor disagreements, estate disputes, employer-employee rights, statutory based claims, customer-vendor disagreements, or any other matter.

Under either Alternative A or B, the parties must describe the matter that they seek to resolve through a collaborative law process in their collaborative law participation agreement. *See* Rule 4(a)(4). That requirement is essential to determining the scope of the disqualification requirement for collaborative lawyers under Rule 9, which is applicable to the collaborative matter and matters "related to the collaborative matter," and the application of the evidentiary privilege under Rule 17.

"Law firm." This definition of "law firm" is adapted from the definition of the term in

the American Bar Association's Model Rules of Professional Conduct Rule 1.0 (c). It includes lawyers representing governmental entities whether employed by the government or by a private law firm. It is included to help define the scope of the imputed disqualification requirement of Rule 9.

"Nonparty participant." This definition parallels the definition of "nonparty participant" in the Uniform Mediation Act Section 2(4). It covers experts, friends, support persons, potential parties, and others who participate in the collaborative law process. Nonparty participants are entitled to assert a privilege before a tribunal for their own collaborative law communications under Rule 17(b) (2). This provision is designed to encourage mental health and financial professionals to participate in a collaborative law process without fear of becoming embroiled in litigation without their consent should the process terminate.

Nonparty participants do not, however, include a collaborative lawyer for a party. The attorney-client privilege is applicable to communications between a collaborative lawyer and the party whom he or she represents. The collaborative attorney thus has the obligation placed upon all lawyers to maintain client confidences and assert evidentiary privilege for client communications. The obligations of professional responsibility for a lawyer are not altered by the lawyer's representation of a party in collaborative law. Rule 13. Under the Model Rules of Professional Conduct the attorney-client privilege is held by the client and can only be waived by the client, even over the attorney's objection. *See* MODEL RULES OF PROF'L CONDUCT R 1.6(a) (2002) ("A lawyer shall not reveal information relating to the representation of a client *unless the client gives informed consent* . . . .") (emphasis added); *see also* Hunt v. Blackburn, 128 U.S. 464, 470 (1888) (stating that "the [attorney-client] privilege is that of the client alone, and no rule prohibits the latter from divulging his own secrets; and if the client has voluntarily waived the privilege, it cannot be insisted on to close the mouth of the attorney."). An attorney does not have the right to override a client's decision to waive privilege, and including collaborative lawyers in the category of nonparty participants entitled to independently assert privilege might be thought of as changing that traditional view. *See, e.g.*, Comm'r v. Banks, 543 U.S. 426, 436 (2005) (stating that "[t]he attorney is an agent who is duty bound to act only in the interests of the principal . . . ."); *see also* MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2009) (stating that "a lawyer shall abide by a client's decisions concerning the objectives of representation . . . ."); RESTATEMENT (SECOND) OF AGENCY § 1(3) cmt. e (1958) (stating that an attorney is an agent authorized to act under the control of another). A collaborative lawyer thus does not have any additional right to independently assert privilege because of the lawyer's participation in the collaborative law process as a "nonparty."

A few states declare ADR neutrals incompetent to testify about communications in the ADR processes. The declaration of incompetence to testify normally does not apply to lawyers representing clients, but is limited to third party neutrals, such as mediators and arbitrators. CAL. EVID. CODE § 703.5 (West 1995). In Minnesota, the competency standard has been extended to lawyers participating in mediation as well. *See* MINN. STAT. ANN. § 114.08 (West 2008); MINN. STAT. ANN. § 595.02(1)(b) (West 2000).

"Party." The act's definition of "party" is central to determining who has rights and obligations under the rules, especially the right to assert the evidentiary privilege for collaborative law communications. Fortunately, parties to a collaborative law process are relatively easy to identify—they are signatories to a collaborative law participation agreement

and they engage designated collaborative lawyers.

Participants in a collaborative law process who do not meet the definition of "party," such as an expert retained jointly by the parties to provide input, do not have the substantial rights under additional rules that are provided to parties. Rather, these nonparty participants are granted a more limited evidentiary privilege under Rule 17(b)(2)—they can prevent disclosure of their own collaborative law communications but not those of parties or others who participate in the process. Parties seeking to apply broader restrictions on disclosures by such nonparty participants should consider drafting such a confidentiality obligation into a valid and binding agreement that the nonparty participant signs as a condition of participation in the collaborative law process.

"Person." Rule 2(9) adopts the standard language recommended by the Uniform Law Commission for the drafting of statutory language, and the term should be interpreted in a manner consistent with that usage.

"Proceeding." The definition of "proceeding" is drawn from Section 2(7) of the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 2(7), 7A U.L.A. 105–06 (2006). Its purpose is to define the adjudicative type proceedings to which the rules apply, and should be read broadly to effectuate the intent of the rules. It was added to allow the Drafting Committee to delete repetitive language throughout the act, such as "judicial, administrative, arbitral, or other adjudicative processes, including related pre-hearing and post-hearing motions, conferences, and discovery; or . . . a legislative hearing or similar process." *Id.*

"Prospective party." The definition of "prospective party" is drawn from the ABA Model Rules of Professional Conduct Rule 1.18(a) which defines a lawyer's duty to a prospective client. MODEL RULES OF PROF'L CONDUCT R. 1.18(a) (2009). The rules use the term "party" rather than "client" to clarify that it does not change the standards of professional responsibility applicable to lawyers. The collaborative lawyer's obligations to prospective parties are described in rules 14 and 15.

"Related to a collaborative matter." Under Rule 9, a collaborative lawyer and lawyers in a law firm with which the collaborative law is associated are disqualified from representing parties in court in a matter "related to a collaborative matter" when a collaborative law process concludes. The definition of "related to a collaborative matter" thus determines the scope of the disqualification provision. The rationale and application of the definition of "related to a collaborative matter" is discussed in detail in the Prefatory Note. *See supra.*

"Sign." The definitions of "record" and "sign" adopt standard language approved by the Uniform Law Commission intended to conform Uniform Acts with the Uniform Electronic Transactions Act ("UETA") and its federal counterpart, Electronic Signatures in Global and National Commerce Act ("E-Sign"). Electronic Signatures in Global and National Commerce Act, 15 U.S.C.A. §§ 7001–7002 (2009); UNIF. ELECTRONIC TRANSACTION ACT § 2 (1999), *available at* http://www.law.upenn.edu/bll/archives/ulc/fnact99/1990s/ueta99.pdf. Both UETA and E-Sign were written in response to broad recognition of the commercial and other uses of electronic technologies for communications and contracting and the consensus that the choice of medium should not control the enforceability of transactions. UNIF. ELECTRONIC TRANSACTION ACT (Prefatory Note) (1999); DEPARTMENT OF COMMERCE & FEDERAL TRADE COMMISSION,

ELECTRONIC SIGNATURES IN GLOBAL AND NATIONAL COMMERCE ACT: THE CONSUMER CONSENT PROVISION IN SECTION 101(s)(1)(c)(ii) i (2001). These rules are consistent with both UETA and E-Sign. UETA has been adopted by the Commission and received the approval of the American Bar Association House of Delegates. *See* UNIF. ELECTRONIC TRANSACTION ACT (1999); Richard L. Field & Michael H. Byowitz, *Recommendation in Support of the United Nations Convention on the Use of Electronic Communications in International Contracts*, 2006 A.B.A. SEC. SCI. & TECH. LAW 303, *available at* http://www.abanet.org/intlaw/policy/investment/unelectroniccomm0806.pdf; The Uniform Law Commissioners, The National Conference of Commissioners on Uniform State Laws, A Few Facts on the Uniform Electronic Transactions Act, http://nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ueta.asp (last visited Oct. 19, 2009). As of December 2001, it had been enacted in more than 35 states. The National Conference of State Legislatures, Uniform Electronic Transactions Act, http://www.ncsl.org/default.aspx?tabid=13484 (last visited Oct. 19, 2009).

The practical effect of these definitions is to make clear that electronic signatures and documents have the same authority as written ones for such purposes as establishing the validity of a collaborative law participation agreement under Rule 4, notice to terminate the collaborative law process under Rule 5(d)(1), party agreements concerning the confidentiality of collaborative law communications under Rule 16, and party waiver of the collaborative law communication privilege under Rule 19(f).

"Tribunal." The definition of "tribunal" is adapted from Rule 1.0(m) of the ABA Model Rules of Professional Conduct. MODEL RULES OF PROF'L CONDUCT R. 1.0(m) (2009). It is included to insure the provisions of these rules are applicable in judicial and other forums such as arbitration and is consistent with the broad definition of "proceeding" in subsection (10).

RULE 3. APPLICABILITY. These rules apply to a collaborative law participation agreement that meets the requirements of Rule 4 signed [on or] after [the effective date of the rules].

Comment

Rule 3 defines the scope of the rules and limits its applicability to collaborative law participation agreements that meet the requirements of Rule 4. While parties are free to collaborate in any other way they choose, if parties want the benefits and protections of these rules they must meet its requirements, subject to the "savings" provisions of Rule 20.

Rule 3 also sets an effective date for the rules so that the parties can decide when to "opt in" to its provisions. It precludes application of the rules to collaborative law participation agreements before the effective date on the assumption that most of those making these agreements did not take into account the changes in law. The evidentiary privilege created by the rules in Rule 17, for example, does not apply retroactively to agreements made before the rules' effective date. If parties to these collaborative law participation agreements seek to be covered by the rules, they can sign a new agreement on or after the effective date of the rules, or amend

an existing agreement to conform to the rules' requirements.

RULE 4. COLLABORATIVE LAW PARTICIPATION AGREEMENT; REQUIREMENTS.

(a) A collaborative law participation agreement must:

(1) be in a record;

(2) be signed by the parties;

(3) state the parties' intention to resolve a collaborative matter through a collaborative law process under these rules;

(4) describe the nature and scope of the matter;

(5) identify the collaborative lawyer who represents each party in the process; and

(6) contain a statement by each collaborative lawyer confirming the lawyer's representation of a party in the collaborative law process.

(b) Parties may agree to include in a collaborative law participation agreement additional provisions not inconsistent with these rules.

Comment

Subsection (a) sets minimum conditions for the validity of collaborative law participation agreements. They are designed to insure that a written record evidences the parties' agreement and intent to participate in a collaborative law process under the rules. They were formulated to require collaborative law participation agreements to be fundamentally fair, but simple and thus to make collaborative law more accessible to potential parties.

To qualify as a collaborative law participation agreement, the parties must explicitly state their intention to proceed "under these rules." The participation agreement must thus specifically reference these rules to make its provisions such as the evidentiary privilege for collaborative law communications applicable. This requirement is designed to help insure that parties make a deliberate decision to "opt into" in a collaborative law process rather than participate by inadvertence. It is also designed to differentiate a collaborative law process under these rules from other types of cooperative or collaborative behavior or dispute resolution involving parties and lawyers.

The requirements of subsection (a) are also designed to help tribunals and parties more easily administer and interpret the disqualification and evidentiary privileges provisions of the

rules. It is, for example, difficult to determine the scope of the disqualification requirement unless the parties describe the matter submitted to collaborative law in their participation agreement and designate collaborative lawyers.

Rule 4(a)(6) requires that participation agreements "contain a statement by each collaborative lawyer confirming the lawyer's representation of the party in the collaborative law process. The confirmation of representation required by this rule does not make the collaborative lawyer to be a "party" to the participation agreement, a status which, as discussed in the Preface, would raise professional responsibility concerns. See Preface, supra. The rules explicitly note that they do not change in any way the lawyer's responsibilities to the client under the rules of professional responsibility. Rule 13(1). The requirement of a confirmation of representation simply is designed to identify the party's collaborative lawyer so that the disqualification provision can be more easily administered.

The requirements of subsection (a) are subject to the provisions of Rule 20 which give a tribunal discretion to find that, despite flaws in their written participation agreement, parties reasonably believed they were participating in a collaborative law process and thus to apply the provisions of the act "in the interests of justice."

Many collaborative law participation agreements are far more detailed than the minimum form requirements of subsection (a) contemplate and contain numerous additional provisions. In the interest of encouraging further continuing growth and development of collaborative law, subsection (b) authorizes additional provisions to be included in participation agreements if they are not inconsistent with the rules.

Subsection (b), however, does not give unlimited discretion to add provisions to a collaborative law participation agreement. They cannot modify the defining characteristics of the collaborative law process or agree to waive the rules protections for prospective parties. Parties thus cannot waive the a party's right to terminate collaborative law with or without cause, for any reason at any time during the process set forth in Rule 5, the disqualification requirements of rules 9, 10, and 11, the informed consent requirements of Rule 14, or the prospective collaborative lawyer's duty to inquire into a history of coercive and violent relationships between parties required by Rule 15. This provision of the rules should thus be interpreted as analogous to those which set minimum provisions for valid arbitration agreements, which also cannot be waived. *See* UNIF. ARBITRATION ACT § 4(b) (2000) (provisions that parties cannot waive in a pre-dispute arbitration clause such as the right to counsel).

Parties are, however, free to supplement the required provisions under the rules with additional terms that meet their particular needs and circumstances that are not inconsistent with the fundamental nature of the collaborative law process. For example, they may define the scope of voluntary disclosure under Rule 12. They may provide for broader protection for the confidentiality of collaborative law communications than the privilege against disclosure in legal proceedings provided in Rule 16. *See supra.* They may provide, as do many models of collaborative law practice, for the engagement of jointly retained neutral experts to participate in collaborative law and prohibit parties from retaining their own experts. They may provide that experts retained for the purpose of consulting with parties during the collaborative law process may testify at trial if the collaborative law process concludes. They may provide that if the collaborative law process terminates, litigation may not be instituted for a short, set period of

time, a common provision in collaborative law participation agreements. They may agree to toll applicable statutes of limitations during the collaborative law process or include choice of law clauses in their participation agreements. *See, e.g.*, Mastrobuono v. Shearson Lehman Hutton Inc., 514 U.S. 52, 63–64 (1995) (holding that "the choice-of-law provision covers the rights and duties of the parties, while the arbitration provision covers arbitration; neither sentence intrudes upon the other."); Homa v. Am. Express Co., 558 F.3d 225, 228 (3d Cir. 2009) (stating that New Jersey courts will uphold choice-of-law provisions so long as they do not violate public policy); Badger v. Boulevard Bancorp, Inc., 970 F.2d 410, 410-11 (7th Cir. 1992) (enforcing an agreement tolling the statue of limitations); SEC v. DiBella, 409 F. Supp. 2d 122, 129 (D. Conn. 2006) (finding the tolling agreement of the statute of limitations valid and binding); DeSantis v. Wackenhut Corp., 793 S.W.2d 670, 677 (Tex. 1990) (stating that judicial respect for the parties' choice of law advances the policy party autonomy).

Appropriate bar groups should be encouraged to develop form collaborative law participation agreements for use by lawyers and parties that comply with the requirements of these rules. *See* Fawzy v. Fawzy, 973 A.2d 347, 363 (N.J. 2009) (New Jersey Supreme Court makes similar suggestion for arbitration agreements in family law).

RULE 5. BEGINNING AND CONCLUDING COLLABORATIVE LAW PROCESS.

(a) A collaborative law process begins when the parties sign a collaborative law participation agreement.

(b) A tribunal may not order a party to participate in a collaborative law process over that party's objection.

(c) A collaborative law process is concluded by a:

(1) resolution of a collaborative matter as evidenced by a signed record;

(2) resolution of a part of the collaborative matter, evidenced by a signed record, in which the parties agree that the remaining parts of the matter will not be resolved in the process; or

(3) termination of the process.

(d) A collaborative law process terminates:

(1) when a party gives notice to other parties in a record that the process is ended;

(2) when a party:

(A) begins a proceeding related to a collaborative matter without the agreement of all parties; or

(B) in a pending proceeding related to the matter:

(i) initiates a pleading, motion, order to show cause, or request for a conference with the tribunal;

(ii) requests that the proceeding be put on the [tribunal's active calendar]; or

(iii) takes similar action requiring notice to be sent to the parties; or

(3) except as otherwise provided by subsection (g), when a party discharges a collaborative lawyer or a collaborative lawyer withdraws from further representation of a party.

(e) A party's collaborative lawyer shall give prompt notice to all other parties in a record of a discharge or withdrawal.

(f) A party may terminate a collaborative law process with or without cause.

(g) Notwithstanding the discharge or withdrawal of a collaborative lawyer, a collaborative law process continues, if not later than 30 days after the date that the notice of the discharge or withdrawal of a collaborative lawyer required by subsection (e) is sent to the parties:

(1) the unrepresented party engages a successor collaborative lawyer; and

(2) in a signed record:

(A) the parties consent to continue the process by reaffirming the collaborative law participation agreement;

(B) the agreement is amended to identify the successor collaborative lawyer; and

(C) the successor collaborative lawyer confirms the lawyer's

representation of a party in the collaborative process.

(h) A collaborative law process does not conclude if, with the consent of the parties, a party requests a tribunal to approve a resolution of the collaborative matter or any part thereof as evidenced by a signed record.

(i) A collaborative law participation agreement may provide additional methods of concluding a collaborative law process.

Comment

Rule 5 protects a party's right to terminate participation in a collaborative law process at any time, with or without reason or cause for any or for no reason. Subsection (b) emphasizes the voluntary nature of participation in a collaborative law process by prohibiting tribunals from ordering a person to participate in a collaborative law process over that person's objection.

Rule 5 is also designed to make it as administratively easy for parties and tribunals as possible to determine when a collaborative law process begins and ends. To the extent feasible, it links those events to signed records communicated between the parties and collaborative lawyers or events that are documented in the record of a tribunal. Establishing the beginning and end of a collaborative law process is particularly important for application of the evidentiary privilege for collaborative law communications recognized by Rule 17 which applies only to communications in that period.

The evidentiary privilege for collaborative law communications ends when the collaborative law process concludes. The rules specify two methods of concluding a collaborative law process: (1) agreement for resolution of all or part of a matter in a signed record (assuming that the parties do not agree to continue the collaborative law process to resolve the remaining issues); and (2) termination of the process. A party can terminate the process in several ways, including sending notice in a record of termination and by taking acts that are inconsistent with the continuation of collaborative law, such as commencing or recommencing an action in court. Withdrawal or discharge of a collaborative lawyer also terminates the process, and triggers an obligation to give notice on the former collaborative lawyer. *See supra* Rule 5(e).

Rule 5(g) allows for continuation of a collaborative law proves even if a party and a collaborative lawyer terminate their lawyer-client relationship, if a successor collaborative lawyer is engaged in a defined period of time and under conditions and with documentation which indicate that the parties want the collaborative law process to continue.

Rule 5(h) allows the parties to agree to present an agreement resulting from a collaborative law process to a tribunal for approval under Rule 8 without terminating the process. Read together, these rules allow, for example, collaborative lawyers in divorce proceedings to present uncontested settlement agreements to the court for approval and incorporation into a court order as local practice dictates. The collaborative law process—and the evidentiary

privilege for collaborative law communications—is not terminated by presentation of the settlement agreement to the court.

RULE 6. PROCEEDINGS PENDING BEFORE TRIBUNAL; STATUS REPORT.

(a) Persons in a proceeding pending before a tribunal may sign a collaborative law participation agreement to seek to resolve a collaborative matter related to the proceeding. The parties shall file promptly with the tribunal a notice of the agreement after it is signed. Subject to subsection (c) and Rules 7 and 8, the filing operates as an application for a stay of the proceeding.

(b) The parties shall file promptly with the tribunal notice in a record when a collaborative law process concludes. The stay of the proceeding under subsection (a) is lifted when the notice is filed. The notice may not specify any reason for termination of the process.

(c) A tribunal in which a proceeding is stayed under subsection (a) may require the parties and collaborative lawyers to provide a status report on the collaborative law process and the proceeding. A status report may include only information on whether the process is ongoing or concluded. It may not include a report, assessment, evaluation, recommendation, finding, or other communication regarding a collaborative law process or collaborative law matter.

(d) A tribunal may not consider a communication made in violation of subsection (c).

(e) A tribunal shall provide parties notice and an opportunity to be heard before dismissing a proceeding in which a notice of collaborative process is filed based on delay or failure to prosecute.

Legislative Note: *In enacting this Rule, states should review existing provisions concerning stays of pending proceedings when the parties agree to engage in alternative dispute resolution. As noted in the comment to Rule 6, some states treat party entry into an alternative dispute resolution procedure such as collaborative law or mediation as an application for a stay, which the court has discretion to grant or deny, while other states make the stay mandatory. Enacting states may wish to duplicate the practice currently applicable to collaborative law, mediation, or other forms of alternative dispute resolution.*

Comment

Rule 6 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 6 be enacted by judicial rule rather than legislation.

This rule authorizes parties to enter into a collaborative law participation agreement to attempt to resolve matters in pending proceedings, a subject discussed in the Prefatory Note. *See supra*. To give the collaborative law process time and breathing space to operate, it creates an application for a stay of proceedings upon the filing of a collaborative law participation agreement. The stay should normally be granted from the time the tribunal receives written notice that the parties have executed a collaborative law participation agreement until it receives written notice that the collaborative law process is concluded.

Rule 6 and its accompanying legislative note give states an option to treat the signing of a participation agreement as the occasion for a mandatory stay of proceedings or to treat it as an application for a stay which the tribunal has the discretion to grant or deny. States differ on this subject. In some states, the signing of an agreement to mediate or collaborative law participation agreement creates an automatic stay of pending proceedings, while in other states the tribunal retains the discretion to continue previously scheduled hearing and trial dates. *Compare* 2010 Laws of Utah § 78B-19-106 (signing of collaborative law participation agreement treated as application for a discretionary stay) *and* Or. Rev. Stat. § 36.190(3) (2009) (same for an agreement to mediate},*with* N.C. Gen. Stat. § 50-74 (2009) (mandatory stay created by signing of a collaborative law participation agreement) and Tex, Fam. Code Ann. § 6.603(e) (Vernon 2006) (same).

The stay of proceedings is qualified by Rule 7, which authorizes a tribunal to issue emergency orders notwithstanding the stay and Rule 8, which authorizes a tribunal to approve an agreement resulting from a collaborative law process.

Rule 6(c) authorizes a tribunal to ask for status reports on the collaborative law process in pending proceedings while the stay created by party entry into a collaborative law process is in effect. It also put limitations on the scope of the information that can be requested by the status report. The provisions of these rules are based on Section 7 of the Uniform Mediation Act, adapted for collaborative law. *See* UNIF. MEDIATION ACT § 7, 7A U.L.A. 135–36 (2006). Rules 6(c) and (d) recognize that the tribunal asking for the status report may rule on the matter being negotiated in the collaborative law process and should not be influenced by the behavior of the parties or counsel therein. Its provisions would not permit the tribunal to ask in a status report whether a particular party engaged in "good faith" negotiation, or to state whether a party had been "the problem" in reaching a settlement. *See* Lande, *Using Dispute System Design Methods*, supra, at 104 & n.185. The status report only can ask for non-substantive information related to scheduling and whether the collaborative law process is ongoing.

Some jurisdictions use statistical analysis of the timeliness of case dispositions to evaluate judicial performance, and sometimes those statistics are made available to the public. *See* COLO. REV. STAT. ANN. §§ 13-5.5-103, -105 (West Supp. 2009); UTAH ADMIN. CODE r. 3-111.01, -111.02 (2009); Colorado Office of Judicial Performance Evaluation, Commissions on Judicial Performance, http://www.cojudicialperformance.com/index.cfm (last visited Oct. 20,

2009). Judicial administrators are encouraged to recognize that while cases in which a collaborative law participation agreement is signed are technically "pending," they should not be considered under active judicial management for statistical or evaluation purposes until the collaborative law process is terminated.

RULE 7. EMERGENCY ORDER. During a collaborative law process, a tribunal may issue emergency orders to protect the health, safety, welfare, or interest of a party or [insert term for family or household member as defined in [state civil protection order statute]].

Comment

Rule 7 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 7 be enacted by judicial rule rather than legislation.

The collaborative law process terminates if a party seeks an emergency order of the kind authorized by this rule. Rule 5(c)(2) ends the stay of proceedings created by Rule 6(a). Parties may, however, fail to provide notice of the termination of a collaborative law process to each other and the tribunal. Additionally, an emergency order might be sought in a new proceeding after a collaborative law process terminates.

To avoid any possible confusion, this rule authorizes tribunals to issue emergency orders despite the execution of a collaborative law participation agreement or a stay of proceedings under Rule 6(a). A collaborative lawyer is also authorized to seek or defend an application for an emergency order despite the termination of the collaborative law process under the time limited terms and conditions of Rule 9(c)(2).

Rule 7 is thus one of the rules' provisions addressing the safety needs of victims of coercion and violence in collaborative law. It is based on the concern that a party in a collaborative law process may be a victim of such violence or coercion or a dependent of a party such as a child may be threatened with abuse or abduction while a collaborative law process is ongoing. A party should not be left without access to a tribunal during such an emergency.

The reach of this rule is not limited to victims of coercion and violence themselves. It extends to members of their families and households. Each state is free to define the scope of this rule by cross referencing its civil protection order statute. *Compare* CAL. FAM. CODE § 6211 (West 2004) (defining family or household member to include current and former spouses, cohabitants, and persons in a dating relationship, as well as persons with a child in common, or any other person related by blood or marriage), *with* WASH. REV. CODE ANN. § 26.50.010 (West 2005) (includes current and former spouses, domestic partners, and cohabitants, persons with a child in common, persons in a current or former dating relationship, and persons related by blood or marriage), *and* S.C. CODE ANN. § 20-4-20(b) (Supp. 2008) (defining family or household member to mean current or former spouses, persons with a child in common, or a male and female who are or were cohabiting).

The reach of this rule is also not limited to emergencies involving threats to physical safety. The term "interest" encompasses financial interest or reputational interest as well. This rule, in effect, authorizes a tribunal otherwise authorized to do so to issue emergency provisional relief to protect a party in any critical area as it would in any civil dispute. A party who finds out that another party is secretly looting assets from a business, for example, while participating in a collaborative law process can seek an emergency restraining order under this rule and the court is authorized to grant it despite the stay of proceedings under Rule 6(b).

RULE 8. APPROVAL OF AGREEMENT BY TRIBUNAL. A tribunal may approve an agreement resulting from a collaborative law process.

Comment

Rule 8 regulates the relationship between the collaborative law process and the judicial process. The Drafting Committee recommends that Rule 8 be enacted by judicial rule rather than legislation.

Rule 5(h) authorizes parties who reach agreements to present them to a tribunal for approval without terminating a collaborative law process. This rule authorizes the tribunal to review and approve the agreement of the parties if required by law, as in, for example, many divorce settlements, settlements of infants' estates, or class action settlements. *See* UNIF. MARRIAGE & DIVORCE ACT § 306 (d) (1998) (Parties' agreement may be incorporated into the divorce decree if the court finds that it is "not unconscionable" regarding the property and maintenance and "not unsatisfactory" regarding support); FED. R. CIV. P. 23(e)(2) (standard for judicial evaluation of settlement of a class action, which is that the settlement must not be a result of fraud or collusion and that the settlement must be fair, adequate, and reasonable); Mnookin, *supra*, at 1015–16.

RULE 9. DISQUALIFICATION OF COLLABORATIVE LAWYER AND LAWYERS IN ASSOCIATED LAW FIRM.

(a) Except as otherwise provided in subsection (c), a collaborative lawyer is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter.

(b) Except as otherwise provided in subsection (c) and Rules 10 and 11, a lawyer in a law firm with which the collaborative lawyer is associated is disqualified from appearing before a tribunal to represent a party in a proceeding related to the collaborative matter if the collaborative lawyer is disqualified from doing so under subsection (a).

(c) A collaborative lawyer or a lawyer in a law firm with which the collaborative lawyer is associated may represent a party:

(1) to ask a tribunal to approve an agreement resulting from the collaborative law process; or

(2) to seek or defend an emergency order to protect the health, safety, welfare, or interest of a party, or [insert term for family or household member as defined in [state civil protection order statute]] if a successor lawyer is not immediately available to represent that person.

(d) If subsection (c)(2) applies, a collaborative lawyer, or lawyer in a law firm with which the collaborative lawyer is associated, may represent a party or [insert term for family or household member] only until the person is represented by a successor lawyer or reasonable measures are taken to protect the health, safety, welfare, or interest of the person.

Comment

Rule 9 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Rule 9 be enacted by judicial rule rather than legislation.

The disqualification requirement for collaborative lawyers after collaborative law concludes is a fundamental defining characteristic of collaborative law. As previously discussed in the Prefatory Note, this rule extends the disqualification provision to "matters related to the collaborative matter" in addition to the matter described in the collaborative law participation agreement. *See supra*. It also extends the disqualification provision to lawyers in a law firm with which the collaborative lawyer is associated in addition to the collaborative lawyer him or herself, so called "imputed disqualification." Appropriate exceptions to the disqualification requirement are made for representation to seek emergency orders for a limited time (see Rule 7) and to allow collaborative lawyers to present agreements to a tribunal for approval (Rule 5(f) and 8).

RULE 10. LOW INCOME PARTIES.

(a) The disqualification of Rule 9(a) applies to a collaborative lawyer representing a party with or without fee.

(b) After a collaborative law process concludes, another lawyer in a law firm with which a collaborative lawyer disqualified under Rule 9(a) is associated may represent a party without fee in the collaborative matter or a matter related to the collaborative matter if:

(1) the party has an annual income that qualifies the party for free legal representation under the criteria established by the law firm for free legal representation;

(2) the collaborative law participation agreement so provides; and

(3) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm which are reasonably calculated to isolate the collaborative lawyer from such participation.

Comment

Rule 10 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The Drafting Committee recommends that Rule 10 be enacted by judicial rule rather than legislation.

As previously discussed in the Prefatory Note, this rule allows parties to modify the imputed disqualification requirement by advance agreement for lawyers in a law firm which represents low-income clients without fee. *See supra.*

RULE 11. GOVERNMENTAL ENTITY AS PARTY.

(a) The disqualification of Rule 9(a) applies to a collaborative lawyer representing a party that is a government or governmental subdivision, agency, or instrumentality.

(b) After a collaborative law process concludes, another lawyer in a law firm with which the collaborative lawyer is associated may represent a government or governmental subdivision, agency, or instrumentality in the collaborative matter or a matter related to the collaborative matter if:

(1) the collaborative law participation agreement so provides; and

(2) the collaborative lawyer is isolated from any participation in the collaborative matter or a matter related to the collaborative matter through procedures within the law firm

which are reasonably calculated to isolate the collaborative lawyer from such participation.

Comment

Rule 11 regulates who can appear before a court (tribunal) to represent a party after a collaborative law process terminates. The drafting committee thus believes that Rule 11 might best be enacted by judicial rule rather than legislation.

This rule allows parties to agree in advance to modify the imputed disqualification requirement for lawyers in a law firm which represents the government or its agencies or subdivisions. The rationale for creating this exception to the imputed disqualification requirement is discussed in the Prefatory Note. *See supra.*

RULE 12. DISCLOSURE OF INFORMATION. Except as provided by law other than these rules, during the collaborative law process, on the request of another party, a party shall make timely, full, candid, and informal disclosure of information related to the collaborative matter without formal discovery. A party also shall update promptly previously disclosed information that has materially changed. The parties may define the scope of disclosure during the collaborative law process.

Comment

Voluntary informal disclosure of information related to a matter is a defining characteristic of collaborative law. The rationale for this rule is described in the Prefatory Note. *See supra.*

RULE 13. STANDARDS OF PROFESSIONAL RESPONSIBILITY AND MANDATORY REPORTING NOT AFFECTED. These rules do not affect:

(1) the professional responsibility obligations and standards applicable to a lawyer or other licensed professional; or

(2) the obligation of a person to report abuse or neglect, abandonment, or exploitation of a child or adult under the law of this state.

Comment

The relationship between the rules and the standards of professional responsibility for

collaborative lawyers is discussed in the Prefatory Note. *See supra*. In the interests of clarity, this rule reaffirms that the rules do not alter the professional responsibility or child abuse and neglect reporting obligations of all professionals, lawyers and non lawyers alike, who participate in a collaborative law process.

RULE 14. APPROPRIATENESS OF COLLABORATIVE LAW PROCESS.

Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall:

(1) assess with the prospective party factors the lawyer reasonably believes relate to whether a collaborative law process is appropriate for the prospective party's matter;

(2) provide the prospective party with information that the lawyer reasonably believes is sufficient for the party to make an informed decision about the material benefits and risks of a collaborative law process as compared to the material benefits and risks of other reasonably available alternatives for resolving the proposed collaborative matter, such as litigation, mediation, arbitration, or expert evaluation; and

(3) advise the prospective party that:

(A) after signing an agreement if a party initiates a proceeding or seeks tribunal intervention in a pending proceeding related to the collaborative matter, the collaborative law process terminates;

(B) participation in a collaborative law process is voluntary and any party has the right to terminate unilaterally a collaborative law process with or without cause; and

(C) the collaborative lawyer and any lawyer in a law firm with which the collaborative lawyer is associated may not appear before a tribunal to represent a party in a proceeding related to the collaborative matter, except as authorized by Rule 9(c), 10(b), or 11(b).

Comment

The policy behind and the rules' requirements for a prospective collaborative lawyer's facilitating the informed consent of a party to participate in a collaborative law process are

discussed in the Prefatory Note. *See supra.*

RULE 15. COERCIVE OR VIOLENT RELATIONSHIP.

(a) Before a prospective party signs a collaborative law participation agreement, a prospective collaborative lawyer shall make reasonable inquiry whether the prospective party has a history of a coercive or violent relationship with another prospective party.

(b) Throughout a collaborative law process, a collaborative lawyer reasonably and continuously shall assess whether the party the collaborative lawyer represents has a history of a coercive or violent relationship with another party.

(c) If a collaborative lawyer reasonably believes that the party the lawyer represents or the prospective party who consults the lawyer has a history of a coercive or violent relationship with another party or prospective party, the lawyer may not begin or continue a collaborative law process unless:

(1) the party or the prospective party requests beginning or continuing a process; and

(2) the collaborative lawyer reasonably believes that the safety of the party or prospective party can be protected adequately during a process.

Comment

This rule is a major part of the rules' overall approach to assuring safety for victims of coercive and violent relationships who are prospective parties or parties in collaborative law. The subject is discussed extensively in the Prefatory Note which covers the scope of the lawyer's duty under this rule. *See supra.*

RULE 16. CONFIDENTIALITY OF COLLABORATIVE LAW COMMUNICATION. A collaborative law communication is confidential to the extent agreed by the parties in a signed record or as provided by law of this state other than these rules.

Comment

In subsequent provisions, the rules create an evidentiary privilege for collaborative law communications that prevents them from being admitted into evidence in legal proceedings. As previously discussed in the Prefatory Note, the Drafting Committee recommends that a court rule only assure that aspect of confidentiality relating to evidence compelled in judicial and other legal proceedings. *See supra*. This rule encourages parties to a collaborative law process to reach agreement on broader confidentiality matters such as disclosure of collaborative law communications to third parties between themselves.

RULE 17. PRIVILEGE AGAINST DISCLOSURE FOR COLLABORATIVE LAW COMMUNICATION; ADMISSIBILITY; DISCOVERY.

(a) Subject to Rules 18 and 19, a collaborative law communication is privileged under subsection (b), is not subject to discovery, and is not admissible in evidence.

(b) In a proceeding, the following privileges apply:

(1) A party may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication.

(2) A nonparty participant may refuse to disclose, and may prevent any other person from disclosing, a collaborative law communication of the nonparty participant.

(c) Evidence or information that is otherwise admissible or subject to discovery does not become inadmissible or protected from discovery solely because of its disclosure or use in a collaborative law process.

Comment

In many states legislation is required to create a privileged communication. While the earliest recognized privileges were judicially created, this practice stopped over a century ago. *See* KENNETH S. BROUN ET AL., MCCORMICK ON EVIDENCE § 75 (6th ed. 2006). Today, evidentiary privileges are rooted within legislative action; some state legislatures have even passed statutes which bar court-created privileges. *See, e.g.*, CAL. EVID. CODE § 911 (West 2009); WIS. STAT. ANN. § 905.01 (West 2000). The Drafting Committee recommends that Rule 17 be enacted by legislation rather than court rule.

Overview

Rule 17 sets forth the rules' general structure for creating a privilege prohibiting disclosure of collaborative law communications in legal proceedings. It is based on similar provisions in the Uniform Mediation Act, whose commentary should be consulted for more

expansive discussion of the issues raised here.

Holders of the Privilege for Collaborative Law Communications Parties

Parties are holders of the collaborative law communications privilege. The privilege of the parties draws upon the purpose, rationale, and traditions of the attorney-client privilege, in that its paramount justification is to encourage candor by the parties, just as encouraging the client's candor is the central justification for the attorney-client privilege. Using the attorney-client privilege as a core base for the collaborative law communications privilege is also particularly appropriate since the extensive participation of attorneys is a hallmark of collaborative law.

The analysis for the parties as holders appears quite different at first examination from traditional communications privileges because collaborative law involves parties whose interests appear to be adverse, such as marital partners now seeking a divorce. However, the law of attorney-client privilege has considerable experience with situations in which multiple-client interests may conflict, and those experiences support the analogy of the collaborative law communications privilege to the attorney-client privilege. For example, the attorney-client privilege has been recognized in the context of a joint defense in which interests of the clients may conflict in part and yet one may prevent later disclosure by another. *See* United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979); Static Control Components, Inc. v. Lexmark Int'l, Inc., 250 F.R.D. 575, 578-79 (D. Colo. 2007); United States v. Pizzonia, 415 F. Supp. 2d 168, 178 (E.D.N.Y. 2006); Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 428–29 (Cal. Ct. App. 1989); Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987); Robert B. Cummings, *Get Your Own Lawyer! An Analysis of In-House Counsel Advising Across the Corporate Structure After Teleglobe*, 21 GEO. J. LEGAL ETHICS 683, 689–91 (2008). *But see* Dexia Credit Local v. Rogan, 231 F.R.D. 268, 273 (N.D. Ill. 2004) (stating that the joint defense doctrine can be waived if parties become adverse); Gulf Oil Corp. v. Fuller, 695 S.W.2d 769, 774 (Tex. Ct. App. 1985) (refusing to apply the joint defense doctrine to parties who were not directly adverse). *See generally* Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321 (1981) (exploring the logical extensions of the attorney-client privilege, including the doctrine of joint defense). Similarly, the attorney-client privilege applies in the insurance context, in which an insurer generally has the right to control the defense of an action brought against the insured, when the insurer may be liable for some or all of the liability associated with an adverse verdict. *See, e.g.*, Med. Protective Co. v. Pang, 606 F. Supp. 2d 1049, 1060 (D. Ariz. 2008); *In re* Rules of Prof'l Conduct, 2 P.3d 806, 812 (Mont. 2000); Aviva Abramovsky, *The Enterprise Model of Managing Conflicts of Interest in the Tripartite Insurance Defense Relationship*, 27 CARDOZO L. REV. 193, 200–01 (2005).

Nonparty Participants Such as Experts

Of particular note is the act's addition of a privilege for the nonparty participant, though limited to the communications by that individual in the collaborative law process. Joint party retention of experts such as mental health professionals and financial appraisers to perform various functions is a feature of many models of collaborative law, and this provision encourages and accommodates it. Extending the privilege to nonparties for their own communications seeks to facilitate the candid participation of experts and others who may have information and perspective that would facilitate resolution of the matter. This provision would also cover statements prepared by such persons for the collaborative law process and submitted as part of it, such as experts' reports. Any party who expects to use such an expert report prepared to submit

in a collaborative law process later in a legal proceeding would have to secure permission of all parties and the expert in order to do so. This is consistent with the treatment of reports prepared for a collaborative law process as collaborative law communications. *See* Rule 2(1).

As previously discussed in the comments to Rule 2(7), collaborative lawyers are not nonparty participants under the rules, as they maintain a traditional attorney-client relationship with parties, which allocates to clients the right to waive the attorney-client privilege, even over their lawyer's objection.

Collaborative Law Communications Do Not Shield Otherwise Admissible or Discoverable Evidence

Rule 17(c) concerning evidence otherwise discoverable and admissible makes clear that relevant evidence may not be shielded from discovery or admission at trial merely because it is communicated in a collaborative law process. *See* CAL. EVID. CODE §§ 1119–20 (2009); U.S. Fid. & Guar. Co. v. Dick Corp., 215 F.R.D. 503, 506 (W.D. Pa. 2003); Rojas v. Superior Court, 93 P.3d 260, 266 (Cal. 2004). For purposes of the collaborative law communication privilege, it is the communication that is made in the collaborative law process that is protected by the privilege, not the underlying evidence giving rise to the communication. Evidence that is communicated in collaborative law is subject to discovery, just as it would be if the collaborative law process had not taken place. There is no "fruit of the poisonous tree" doctrine in the collaborative law communication privilege. For example, a party who learns about a witness during a collaborative law proceeding is not precluded by the privilege from subpoenaing that witness should collaborative law terminate and the matter wind up in a courtroom. FED. R. EVID. 408 (evidence not excluded if offered for proving bias, prejudice, undue delay, or obstruction); Wimsatt v. Superior Court, 61 Cal. Rptr. 3d 200, 214 (Cal. App. Dep't Super. Ct. 2007); Feldman v. Kritch, 824 So. 2d 274, 276 (Fla. Dist. Ct. App. 2002) (citing FLA. STAT. ANN. § 44.102 (West Supp. 2009) and DR Lakes, Inc. v. Brandsmart U.S.A. 819 So. 2d 971, 974 (Fla. Dist. Ct. App. 2002) (holding that privilege does not bar evidence to correct a mutual mistake in settlement amount)).

RULE 18. WAIVER AND PRECLUSION OF PRIVILEGE.

(a) A privilege under Rule 17 may be waived in a record or orally during a proceeding if it is expressly waived by all parties and, in the case of the privilege of a nonparty participant, it is also expressly waived by the nonparty participant.

(b) A person that makes a disclosure or representation about a collaborative law communication which prejudices another person in a proceeding may not assert a privilege under Rule 17, but this preclusion applies only to the extent necessary for the person prejudiced to respond to the disclosure or representation.

Comment

The Drafting Committee recommends that Rule 18 be enacted by legislation rather than court rule. See comment to Rule 17 *supra*.

RULE 19. LIMITS OF PRIVILEGE.

(a) There is no privilege under Rule 17 for a collaborative law communication that is:

(1) available to the public under [state open records act] or made during a session of a collaborative law process that is open, or is required by law to be open, to the public;

(2) a threat or statement of a plan to inflict bodily injury or commit a crime of violence;

(3) intentionally used to plan a crime, commit or attempt to commit a crime, or conceal an ongoing crime or ongoing criminal activity; or

(4) in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement.

(b) The privileges under Rule 17 for a collaborative law communication do not apply to the extent that a communication is:

(1) sought or offered to prove or disprove a claim or complaint of professional misconduct or malpractice arising from or related to a collaborative law process; or

(2) sought or offered to prove or disprove abuse, neglect, abandonment, or exploitation of a child or adult, unless the [child protective services agency or adult protective services agency] is a party to or otherwise participates in the process.

(c) There is no privilege under Rule 17 if a tribunal finds, after a hearing in camera, that the party seeking discovery or the proponent of the evidence has shown the evidence is not otherwise available, the need for the evidence substantially outweighs the interest in protecting confidentiality, and the collaborative law communication is sought or offered in:

(1) a court proceeding involving a felony [or misdemeanor]; or

(2) a proceeding seeking rescission or reformation of a contract arising out of the collaborative law process or in which a defense to avoid liability on the contract is asserted.

(d) If a collaborative law communication is subject to an exception under subsection (b) or (c), only the part of the communication necessary for the application of the exception may be disclosed or admitted.

(e) Disclosure or admission of evidence excepted from the privilege under subsection (b) or (c) does not make the evidence or any other collaborative law communication discoverable or admissible for any other purpose.

(f) The privileges under Rule 17 do not apply if the parties agree in advance in a signed record, or if a record of a proceeding reflects agreement by the parties, that all or part of a collaborative law process is not privileged. This subsection does not apply to a collaborative law communication made by a person that did not receive actual notice of the agreement before the communication was made.

Comment

The Drafting Committee recommends that Rule 19 be enacted by legislation rather than court rule. See comment to Rule 17 *supra.*

Unconditional Exceptions to Privilege

The rules articulates specific and exclusive exceptions to the broad grant of privilege provided to collaborative law communications. They are based on limited but vitally important values such as protection against serious bodily injury, crime prevention and the right of someone accused of professional misconduct to respond that outweigh the importance of confidentiality in the collaborative law process. The exceptions are similar to those contained in the Uniform Mediation Act. *See* UNIF. MEDIATION ACT § 6, 7A U.L.A. 124 (2006).

As with other privileges, when it is necessary to consider evidence in order to determine if an exception applies, the rules contemplate that a court will hold an in camera proceeding at which the claim for exemption from the privilege can be confidentially asserted and defended.

Exception to Privilege for Written, But Not Oral, Agreements

Of particular note is the exception that permits evidence of a collaborative law communication "in an agreement resulting from the collaborative law process, evidenced by a record signed by all parties to the agreement." Rule 19(a)(4). The exception permits such evidence to be introduced in a subsequent proceeding convened to determine whether the terms

of that settlement agreement have been breached.

The words "agreement . . . evidenced by a record signed by all parties" in this exception refer to written and executed agreements, those recorded by tape recording and ascribed to by the parties on the tape, and other electronic means to record and sign, as defined in rules 2(12) and 2(14). In other words, a party's notes about an oral agreement would not be "an agreement . . . signed by all parties." On the other hand, the following situations would be considered a signed agreement: a handwritten agreement that the parties have signed, an e-mail exchange between the parties in which they agree to particular provisions, and a tape recording in which they state what constitutes their agreement.

This exception is noteworthy only for what is not included: oral agreements. The disadvantage of exempting oral settlements is that nearly everything said during a collaborative law session could bear on either whether the parties came to an agreement or the content of the agreement. In other words, an exception for oral agreements has the potential to swallow the rule of privilege. As a result, parties might be less candid, not knowing whether a controversy later would erupt over an oral agreement.

Despite the limitation on oral agreements, the rules leave parties other means to preserve the agreement quickly. For example, parties can state their oral agreement into the tape recorder and record their assent. One would also expect that counsel will incorporate knowledge of a writing requirement into their collaborative law representation practices.

Case by Case Exceptions

The exceptions in Rule 19(a) apply regardless of the need for the evidence because society's interest in the information contained in the collaborative law communications may be said to categorically outweigh its interest in the confidentiality of those communications. In contrast, the exceptions under Rule 19(b) would apply only in situations where the relative strengths of society's interest in a collaborative law communication and a party's interest in confidentiality can only be measured under the facts and circumstances of the particular case. The rules place the burden on the proponent of the evidence to persuade the court in a non-public hearing that the evidence is not otherwise available, that the need for the evidence substantially outweighs the confidentiality interests and that the evidence comes within one of the exceptions listed under Rule 19(b). In other words, the exceptions listed in Rule 19(b) include situations that should remain confidential but for overriding concerns for justice.

Limited Preservation of Party Autonomy Regarding Confidentiality

Rule 19(f) allows the parties to opt for a non-privileged collaborative law process or session of the collaborative law process by mutual agreement and thus furthers the rules' policy of party self-determination. If the parties so agree, the privilege provisions of the rules do not apply, thus fulfilling the parties reasonable expectations regarding the confidentiality of that session. Parties may use this option if they wish to rely on, and therefore use in evidence, statements made during the collaborative law process. It is the parties and their collaborative lawyers who make this choice. Even if the parties do not agree in advance, they and all nonparty participants can waive the privilege pursuant to Rule 18(a).

If the parties want to opt out, they should inform the nonparty participants of this agreement, because without actual notice, the privileges of the rules still apply to the

collaborative law communications of the persons who have not been so informed until such notice is actually received. Thus, for example, if a nonparty participant has not received notice that the opt-out has been invoked and speaks during the collaborative law process, that communication is privileged under the rules. If, however, one of the parties tells the nonparty participant that the opt-out has been invoked, the privilege no longer attaches to statements made after the actual notice has been provided, even though the earlier statements remain privileged because of the lack of notice.

RULE 20. AUTHORITY OF TRIBUNAL IN CASE OF NONCOMPLIANCE.

(a) If an agreement fails to meet the requirements of Rule 4, or a lawyer fails to comply with Rule 14 or 15, a tribunal may nonetheless find that the parties intended to enter into a collaborative law participation agreement if they:

(1) signed a record indicating an intention to enter into a collaborative law participation agreement; and

(2) reasonably believed they were participating in a collaborative law process.

(b) If a tribunal makes the findings specified in subsection (a), and the interests of justice require, the tribunal may:

(1) enforce an agreement evidenced by a record resulting from the process in which the parties participated;

(2) apply the disqualification provisions of Rules 5, 6, 9, 10, and 11; and

(3) apply a privilege under Rule 17.

Comment

The rules protect persons from inadvertently or inappropriately entering into a collaborative law participation agreements by establishing protections that cannot be waived by the parties. Rule 4 sets forth minimum standards for a collaborative law participation agreement. Rule 14 sets forth requirements for a lawyer's facilitating informed party consent to participate in collaborative law. Rule 15 requires a lawyer to inquire into potential coercive and violent relationships and take appropriate safety precautions.

Rule 20 anticipates, however, that, as collaborative law expands in use and popularity, claims will be made that agreements reached in collaborative law should not be enforced, collaborative lawyers should not be disqualified and evidentiary privilege should not be recognized because of the failure of collaborative lawyers to meet these requirements. This rule

takes the view that, while parties should not be forced to participate in collaborative law involuntarily (see Rule 5(b)), the failures of collaborative lawyers in drafting agreements and making required disclosures and inquiries should not be visited on parties whose conduct indicates an intention to participate in collaborative law.

By analogy to the doctrine established allowing enforcement of arguably flawed arbitration agreements, this rule places the burden of proof on the party seeking to enforce a collaborative law participation agreement or agreements resulting from a collaborative law process despite the failures of form, disclosure or inquiry. *See* Fleetwood Enterprises. v. Bruno, 784 So. 2d 277, 280 (Ala. 2000) ("The party seeking to compel arbitration has the burden of proving the existence of a contract calling for arbitration . . ."); Layton-Blumenthal, Inc. v. Jack Wasserman Co., 111 N.Y.S.2d 919, 920 (N.Y. App. Div. 1952) ("The burden is upon a party applying to compel another to arbitrate, to establish that there was a plain intent by agreement to limit the parties to that method of deciding disputes.").

Doubts about the parties' intentions should be resolved against enforcement. To invoke its discretion under this rule the tribunal must find that a signed record of some kind—usually a written agreement—indicates that the parties intended to participate in a collaborative law process. It cannot find that the parties entered into a collaborative law process solely on the basis of an oral agreement. The tribunal must also find that, despite the failings of the participation agreement or the required disclosures, the parties nonetheless intended to participate in a collaborative law process and reasonably believed that they were doing so. If the tribunal makes those findings this rule gives it the discretionary authority to enforce agreements resulting from the process the parties engaged in and the other provisions of these rules if the tribunal also finds that the interests of justice so require.

RULE 21. EFFECTIVE DATE. These rules take effect.....

Comment

States should choose an effective date for the rules that allows substantial time for notice to the bar and the public of its provisions and for the training of collaborative lawyers.