

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORIGINAL

ORDER OF ADOPTION

Supreme Court No. 20000212

FILED BY CLERK
SUPREME COURT

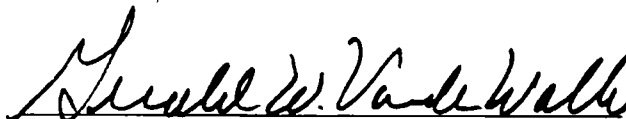
DEC 11, 2000

**Proposed Amendments to North Dakota Rules of Civil Procedure,
North Dakota Rules of Criminal Procedure, North Dakota Rules of
Evidence, North Dakota Rules of Appellate Procedure, North Dakota
Rules of Court, and Supreme Court Administrative Rules**

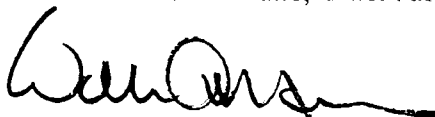
The Joint Procedure Committee filed proposed amendments to Rule 6, North Dakota Rules of Civil Procedure, Rules 18, 21, 44, 45, and 53, North Dakota Rules of Criminal Procedure, Rule 502, North Dakota Rules of Evidence, Rule 26, North Dakota Rules of Appellate Procedure, Rules 3.2, 8.2, and 10.1, North Dakota Rules of Court, and Rule 41, North Dakota Supreme Court Administrative Rules. Notice was provided under Section 7, N.D.R.Proc.R., and a hearing was held on the proposed amendments on October 10, 2000, at 2:45 p.m. At that time, any written comments received were also submitted to the Court. The Court considered the matter.

ORDERED, proposed amendments to Rule 502, North Dakota Rules of Evidence, as further amended, are **ADOPTED**, effective March 1, 2001.

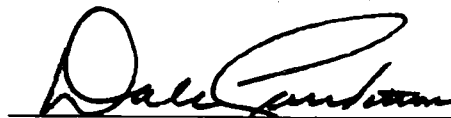
Dated at Bismarck, North Dakota, December 11, 2000.



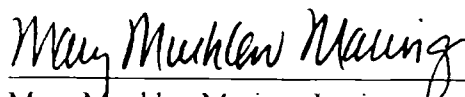
Gerald W. VandeWalle, Chief Justice



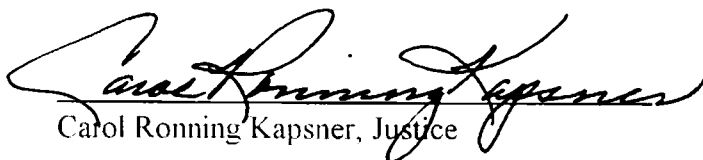
William A. Neumann, Justice



Dale V. Sandstrom, Justice

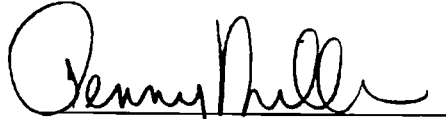


Mary Muehlen Maring, Justice



Carol Ronning Kapsner, Justice

ATTEST:



Penny Miller, Clerk

20 (4) A ~~"representative of the lawyer"~~ is one "Representative of the lawyer" means a
21 person employed by the lawyer to assist the lawyer in ~~the rendition of~~ rendering professional
22 legal services.

23 (5) A communication is "confidential" if not intended to be disclosed to third persons
24 other than those to whom disclosure is made in furtherance of the rendition of professional
25 legal services to the client or those reasonably necessary for the transmission of the
26 communication.

27 (b) General Rule of Privilege. A client has a privilege to refuse to disclose and to
28 prevent any other person from disclosing a confidential communications communication
29 made for the purpose of facilitating the rendition of professional legal services to the client,
30 if the communication was made:

31 (1) between ~~himself~~ the client or ~~his~~ a representative of the client and ~~his~~ the client's
32 lawyer or ~~his lawyer's~~ a representative of the lawyer.

33 (2) between ~~his~~ the lawyer and ~~the lawyer's~~ a representative of the lawyer.

34 (3) by ~~him~~ the client or ~~his~~ a representative of the client or ~~his~~ the client's lawyer or
35 a representative of the lawyer to a lawyer or a representative of a lawyer representing another
36 party in a pending action and concerning a matter of common interest therein.

37 (4) between representatives of the client or between the client and a representative
38 of the client, or

39 (5) among lawyers and their representatives representing the same client.

40 (c) Who May Claim the Privilege. The privilege may be claimed by the client, ~~his~~ the
41 client's guardian or conservator, the personal representative of a deceased client, or the
42 successor, trustee, or similar representative of a corporation, association, or other
43 organization, whether or not in existence. The person who was the lawyer or the lawyer's
44 representative at the time of the communication is presumed to have authority to claim the
45 privilege but only on behalf of the client.

46 (d) Exceptions. There is no privilege under this rule:

47 (1) Furtherance of Crime or Fraud. If the services of the lawyer were sought or
48 obtained to enable or aid anyone to commit or plan to commit what the client knew or
49 reasonably should have known to be a crime or fraud;

50 (2) Claimants Through Same Deceased Client. As to a communication relevant to
51 an issue between parties who claim through the same deceased client, regardless of whether
52 the claims are by testate or intestate succession or by ~~inter vivos~~ transaction inter vivos;

53 (3) Breach of Duty by a Lawyer or Client. As to a communication relevant to an issue
54 of breach of duty by ~~the~~ a lawyer to ~~his~~ the client or by ~~the~~ a client to ~~his~~ the lawyer;

55 (4) Document Attested by a Lawyer. As to a communication relevant to an issue
56 concerning an attested document to which the lawyer is an attesting witness;

57 (5) Joint Clients. As to a communication relevant to a matter of common interest
58 between or among two or more clients if the communication was made by any of them to a
59 lawyer retained or consulted in common, when offered in an action between or among any
60 of the clients, ~~or~~.

61 (6) Public Officer or Agency. As to a communication between a public officer or
62 agency and its lawyers unless the communication concerns a pending investigation, claim,
63 or action and the court determines that disclosure will seriously impair the ability of the
64 public officer or agency to process the claim or conduct a pending investigation, litigation,
65 or proceeding in the public interest.

66

67

EXPLANATORY NOTE

68 ~~Rule 502 is derived from Rule 502 of the Uniform Rules of Evidence (1974). The~~
69 ~~rule represents no major change in the attorney-client privilege as established and developed~~
70 ~~under prior law, although it does expand the application of the privilege to include~~
71 ~~communications made to, and between, lawyers' representatives as well as those made to~~
72 ~~lawyers themselves.~~

73 ~~Subdivision (a)(2) deals with representatives of clients. If the client is a natural~~
74 ~~person, his representatives are, in most cases, easily defined. However, if the client is a~~
75 ~~corporation or other entity, defining its representative is more difficult.~~

76 ~~"When the client is a corporation, questions arise as to who 'speaks' for~~
77 ~~it for purposes of the privilege. Should a communication from any employee~~
78 ~~suffice? Or should the privilege apply only to communications from members~~
79 ~~of the 'control group,' i.e., those authorized to seek and act upon legal advice?"~~
80 ~~McCormick on Evidence § 87 at 178 (2d ed. 1972).~~

81 ~~Subdivision (a)(2) provides that a representative of a client is one "having authority~~
82 ~~to obtain professional legal services, or to act on advice rendered pursuant thereto, on behalf~~
83 ~~of the client." This authority normally would be vested in the "control group" faction of an~~
84 ~~organization, or in its delegates.~~

85 Rule 502 was amended, effective March 1, 2001, to follow the 1986 amendment to
86 Unif.R.Evid. 502. The amendment to subdivision (a)(2) expands the definition of who
87 constitutes a "representative of the client." The rule is no longer limited to the "control
88 group," i.e. people who have authority to obtain professional legal services, or to act on the
89 advice rendered on behalf of the client. A "representative of the client" now also includes
90 "any other person who, for the purpose of effectuating legal representation for the client,
91 makes or receives a confidential communication while acting in the scope of employment
92 for the client." See Upjohn Co. v. United States, 449 U.S. 383 (1981).

93 If the benefits this rule of privilege offers to the judicial system--that is, ~~a client's~~
94 ~~frank and open disclosure of facts to his attorney by a client--~~are to be realized, then a client
95 ~~need~~ needs to be assured that confidential communications made to those necessarily
96 involved in the performance of legal services will not be disclosed. Subdivision (a)(4)
97 achieves this by including, as privileged communications, those made to a lawyer's
98 representative. As used in this rule, the term "employed" is not limited to those employed
99 for compensation.

100 ~~Historically, to be privileged, a communication to an attorney must have been made~~
101 ~~with the intent that it not be disclosed to third parties. See O'Connor v. Immele, 77 N.D.~~

102 ~~346, 43 N.W.2d 649 (1950). Subdivision (a)(5), by its definition of "confidential,"~~
103 ~~continues this rule:~~

104 The general rule of privilege stated in subdivision (b) is intended to encompass all
105 communications necessarily made in the performance of legal services, not just those made
106 between a client and his attorney.

107 Subdivision (c) states, generally, that this privilege may be claimed by the client or
108 his representative of the client and that a lawyer and his representative of the lawyer are
109 presumed to have authority to claim the privilege. ~~It should be noted that Canon 4 of the~~
110 ~~Code of Professional Responsibility requires an attorney to claim this privilege.~~

111 As to the exception stated in subdivision (d)(1), it has been observed that

112 "Since the policy of the privilege is that of promoting the
113 administration of justice, it would be a perversion of the privilege to extend
114 it to the client who seeks advice to aid him in carrying out an illegal or
115 fraudulent scheme." McCormick on Evidence § 95 at 199 (2d ed. 1972).

116 The privilege afforded by this rule is the client's; all other claimants have only
117 derivative authority to assert the privilege. Thus, subdivision (d)(2) provides that, in an
118 action to determine which party shall take through a deceased client, the action is not
119 adverse to the deceased client and the justification for allowing the privilege is dissolved.
120 In such cases, "The interest of the estate as well as the interest of the deceased client demand
121 that the truth be determined." In re Graf's Estate, 119 N.W.2d 478 (N.D. 1963).

122 In cases of dispute between attorney and client, subdivision (d)(3) provides that the
123 privilege does not apply. As to these parties, the communication could not have been
124 intended to be confidential.

125 Subdivision (d)(4) states that, as an attesting witness, an attorney may testify relevant
126 to issues concerning the attested document, for as to these matters the attorney is not acting
127 in his professional capacity. Consider also, in this regard, the "scrivener" exception to the
128 privilege. *O'Neill v. Murray*, 6 Dak. 107, 50 N.W. 619 (1888).

129 It cannot be said that communications made between or among joint clients were
130 intended to be confidential as to those clients. Subdivision (d)(5) removes the privilege in
131 these instances.

132 Subdivision (d)(6) provides, in the usual instance, that communications between a
133 public agency and its attorneys are not privileged. Exception is made for those instances in
134 which the court determines that disclosure will "seriously impair" the listed functions of the
135 public agency.

136 SOURCES: Joint Procedure Committee Minutes: September 23-24, 1999, pages 6-7;
137 January 29, 1976, pages 2, 3. ~~Rule 502, Uniform Rules of Evidence~~ Unif. R. Evid. 502
138 (1974).

139 STATUTES AFFECTED:

140 SUPERSEDED: N.D.C.C. § 31-01-06(1).

141 CROSS REFERENCE: N.D.R. Prof. Conduct 1.6.