IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20130261

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

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[¶ 1] The Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rules of Civil Procedure 4, 5, 6, 11, 43, 45, and 65; North Dakota Rules of Appellate Procedure 26; North Dakota Rules of Criminal Procedure 11, 28, and 45; North Dakota Rules of Evidence 101-106, 201, 301-303, 401-412, 501-512, 601-615, 701-707, 801-807, 901-903, 1001-1008, and 1101, North Dakota Rules of Court 6.10, 8.2, and Appendix G - Rule 3.5; and North Dakota Supreme Court Administrative Rules 13. A synopsis and the proposed Amendments are available at http://www.ndcourts.gov/Court/Notices/Notices.htm. Individuals who do not have internet access may contact the Office of the Clerk of the Supreme Court to obtain a copy of the proposal.

[¶ 2] **ORDERED**, that North Dakota Rules of Civil Procedure 4, 5, 6, 11, 43, 45, and 65; North Dakota Rules of Appellate Procedure 26; North Dakota Rules of Criminal Procedure 11, 28, and 45; North Dakota Rules of Evidence 101-106, 201, 301-303, 401-412, 501-512, 601-615, 701-707, 801-807, 901-903, 1001-1008, and 1101, North Dakota Rules of Court 6.10, 8.2, and Appendix G - Rule 3.5; and North Dakota Supreme Court Administrative Rules 13, as further amended by the Court, are ADOPTED, effective March 1, 2014.

[¶ 3] The Supreme Court of the State of North Dakota convened this 10th day of December, 2013, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Mary Muehlen Maring, the Honorable Carol Ronning Kapsner, and the Honorable Daniel J. Crothers, Justices, directing the Clerk of the Supreme Court to enter the above order.

Penny Miller
Clerk
North Dakota Supreme Court

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:

(A) transacting any business in this state;

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

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

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

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

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

(G) acting as a director, manager, trustee, or officer of a corporation organized under the laws of, or having its principal place of business within, this state;

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

(I) engaging in any other activity, including cohabitation or sexual intercourse, within this state.

(3) Limitation on jurisdiction based on contacts. If jurisdiction over a person is based solely on paragraph (2) of this subdivision, only a claim for relief arising from bases enumerated in paragraph (2) may be asserted against that person.

(4) Acquisition of jurisdiction. A court of this state may acquire personal jurisdiction over any person through service of process as provided in this rule or by statute, or by voluntary general appearance in an action by any person either personally or through an attorney or any other authorized person.

(5) Inconvenient forum. If the court finds, in the interest of substantial justice the action should be heard in another forum, the court may stay or dismiss the action in whole or in part on any condition that may be just.

(c) Process.

(1) Contents of summons. The summons must:

(A) specify the venue of the court in which the action is brought;

(B) contain the title of the action specifying the names of the parties;

(C) be directed to the defendant;

(D) state the time within which these rules require the defendant to appear and defend;

(E) notify the defendant that, if the defendant fails to appear and defend, default judgment will be rendered against the defendant for the relief demanded in the complaint; and

(F) be dated and subscribed by the plaintiff or the plaintiff's attorney and include the post office address of the plaintiff or plaintiff's attorney.

(G) If the action involves real estate and service is by publication, include the additional information required by Rule 4(e)(8).

(2) Copy of Complaint. A copy of the complaint must be served with the summons, except when service is by publication under Rule 4(e).

(d) Personal service.

(1) By whom service of all process may be made:

(A) within the state by any person of legal age and not a party to nor interested in the action; and

(B) outside the state by any person who may make service under the law of this state or under the law of the place where service is made, or by a person who is designated by a court of this state.

(2) How service of process is made within the state.

(A) Serving an individual fourteen years of age and older. Service must be made on an individual 14 or more years of age by:

(i) delivering a copy of the summons to the individual personally;

(ii) leaving a copy of the summons at the individual's dwelling or usual place of residence in the presence of a person of suitable age and discretion who resides there;

(iii) delivering, at the office of the process server, a copy of the summons to the individual's spouse if the spouses reside together;

(iv) delivering a copy of the summons to the individual's agent authorized by appointment or by law to receive service of process; or

(v) any form of mail or third-party commercial delivery addressed to the individual to be served and requiring a signed receipt and resulting in delivery to that individual.

(B) Serving an individual under the age of fourteen. Service must be made on an individual under the age of 14 by delivering a copy of the summons to:

(i) the individual's guardian, if the individual has one within the state;

(ii) the individual's parent or any person or agency having the individual's care or control, or with whom the individual resides, if the individual does not have a guardian within the state; or

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

(C) Serving an incompetent individual or appointed guardian. Service must be made on an individual who has been judicially adjudged incompetent or for whom a guardian of the individual's person or estate has been appointed in this state, by delivering a copy of the

summons to the individual's guardian. If a general guardian and a guardian ad litem have been appointed, both must be served.

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

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

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

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

(E) Serving a municipal or public corporation. Service must be made on a city, township, school district, park district, county, or any other municipal or public corporation, by delivering a copy of the summons to any member of its governing board.

(F) Serving the state and its agencies.

(i) State. Service must be made on the state, by delivering a copy of the summons to the governor or attorney general or an assistant attorney general.

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

of North Dakota or the North Dakota Mill and Elevator Association, by delivering a copy of the summons to the managing head of the agency or to the attorney general or an assistant attorney general.

(G) Serving an agent not authorized to receive process. If service is made on an agent who is not expressly authorized by appointment or by law to receive service of process on behalf of the defendant, a copy of the summons and complaint must be mailed or delivered via a third-party commercial carrier to the defendant with return receipt requested not later than ten days after service by depositing a copy of the summons and complaint, with postage or shipping prepaid, in a post office or with a commercial carrier in this state and directed to the defendant to be served at the defendant's last reasonably ascertainable address.

(3) How service of process is made outside the state. Service on any person subject to the personal jurisdiction of the courts of this state may be made outside the state:

(A) in the manner as service within this state, with the force and effect as though service had been made within this state;

(B) under the law of the place where service is made for service in that place in an action in any of its courts of general jurisdiction; or

(C) as directed by court order.

(e) Service by publication.

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

(A) the claim for relief is based on one or more grounds for the exercise of personal

jurisdiction under paragraph (2) of subdivision (b) of this rule;

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

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

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

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

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

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

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

(F) the action is to determine parenting rights and responsibilities of an individual subject to the court's jurisdiction; or

(G) the action is to award, partition, condemn, or escheat real or personal property in this state.

(2) Filing of complaint and affidavit for service by publication. Before service of the summons by publication is authorized, a complaint and affidavit must be filed with the clerk of court where the action is venued. The complaint must set forth a claim in favor of the

plaintiff and against the defendant and be based on one or more of the situations specified in paragraph (e)(1). The affidavit must be executed by the plaintiff or the plaintiff's attorney and must state one or more of the following:

(A) that after diligent inquiry personal service of the summons cannot be made on the defendant in this state to the best knowledge, information, and belief of the affiant;

(B) that the defendant is a domestic corporation that has forfeited its charter or right to do business in this state or has failed to file its annual report as required by law;

(C) that the defendant is a domestic or foreign corporation and has no officer, director, superintendent, managing agent, business agent, or other agent authorized by appointment or by law on whom service of process can be made on its behalf in this state; or

(D) that all persons having or claiming an estate or interest in, or lien or encumbrance on, the real property described in the complaint, whether as heirs, devisees, legatees, or personal representative of a deceased person, or under any other title or interest, and not in possession, nor appearing of record in the office of the register of deeds, the clerk of the district court, or the county auditor of the county in which the real property is situated, to have a claim, title or interest in the property, are proceeded against as unknown persons defendant under N.D.C.C. Chs. 32-17 or 32-19 and stating facts necessary to satisfy the requirements of those chapters.

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

county.

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

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

(6) Time when first publication or service outside state must be made. The first publication of the summons, or personal service of the summons and complaint on the defendant outside the state, must be made within 60 days after the filing of the affidavit for publication. If not made, the action is considered discontinued as to any defendant not served within that time.

(7) When defendant served by publication is permitted to defend.

(A) The defendant who is served by publication, or the defendant's representative, on application and sufficient cause shown at any time before judgment, must be allowed to defend the action.

(B) Except in an action for divorce, the defendant who is served by publication, or the defendant's representative, on just terms, may be allowed to defend at any time within three years after entry of judgment if the defendant files an affidavit with the court that states:

(i) the defendant has a good and meritorious defense to the action; and

(ii) the defendant had no actual notice or knowledge of the action to enable the defendant to make application to defend before the entry of judgment.

(C) If the defense is successful and the judgment, or any part of the judgment, has been collected or otherwise enforced, restitution may be ordered by the court, but the title to property sold under the judgment to a purchaser in good faith may not be affected.

(D) A defendant is considered to have had notice of the action and of the judgment if the defendant:

(i) receives a copy of the summons in the action by mail or delivery under paragraph (e)(4); or

(ii) is personally served the summons outside the state under paragraph (e)(5).

(8) Additional information to be published for real property. In all cases in which publication of summons is made in an action that the title to, or an interest in or lien on, real property is involved, the publication must also contain a description of the real property and a statement of the object of the action.

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

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

(2) if there is no internationally agreed means, or if an international agreement allows

but does not specify other means, by a method that is reasonably calculated to give notice:

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

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

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

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

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

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

(4) Serving a minor or incompetent person. Unless otherwise provided by law, service must be made on a minor or an incompetent person in a place not within any judicial district of the United States in the manner prescribed by paragraphs (2)(A), (2)(B), and (3).

(5) Serving a foreign corporation, partnership, or association. Unless otherwise provided by law, service must be made on a foreign corporation, partnership or other unincorporated association, that is subject to suit under a common name, in a place not within any judicial district of the United States in the manner prescribed for individuals in this subdivision except personal delivery under paragraph (2)(C)(i).

(g) When service by publication or outside state is complete. Service by publication is complete fifteen days after the first publication of the summons. Personal service of the summons and complaint upon the defendant outside the state is complete fifteen days after

the date of service.

(h) Amendment of process or proof of service. The court may allow any process or proof of service to be amended at any time on notice and just terms, unless it clearly appears that the substantial rights of the party against whom the process was issued would be materially prejudiced.

(i) Proof of service. Proof of service of the summons and the complaint or notice, if any, accompanying the summons or of other process, must be made as follows:

(1) if served by the sheriff or other officer, by the officer's certificate of service;

(2) if served by any other person, by the server's affidavit of service;

(3) if served by publication, by an affidavit made as provided in N.D.C.C. § 31-04-06 and an affidavit of mailing or an affidavit of delivery via a third-party commercial carrier of a copy of the summons and complaint under paragraph (e)(4), if the summons and complaint has been deposited;

(4) in any other case of service by mail or delivery via a third-party commercial carrier resulting in delivery under paragraph (d)(2) or (d)(3), by an affidavit of mailing or an affidavit of delivery of a copy of the summons and complaint or other process, with return receipt attached; or

(5) by the written admission of the defendant.

(j) Contents of proof of service.

(1) The certificate, affidavit, or admission of service mentioned in subdivision (i) must state the date, time, place, and manner of service.

(2) If the process, pleading, order of court, or other paper is served personally by a

person other than the sheriff or person designated by law, the affidavit of service must also state that:

(A) the server is of legal age and not a party to the action nor interested in the action, and

(B) the server knew the person served to be the person named in the papers served and the person intended to be served.

(k) Contents of affidavit of mailing or delivery via a third-party commercial carrier. An affidavit of mailing or delivery required by this rule must:

(1) state a copy of the process, pleading, order of court, or other paper to be served was deposited by the affiant, with postage or shipping prepaid, in the mail or with a third-party commercial carrier and directed to the party shown in the affidavit to be served at the party's last reasonably ascertainable address;

(2) contain the date and place of deposit;

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

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

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

(m) Service under statute. If a statute requires service and does not specify a method of

service, service must be made under this rule.

EXPLANATORY NOTE

Rule 4 was amended, effective 1971; January 1, 1976; January 1, 1977; January 1, 1979; September 1, 1983; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1998; March 1, 1999; March 1, 2004; March 1, 2007; August 1, 2009; March 1, 2011; March 1, 2013. The explanatory note was amended, effective March 1, 2014.

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

Rule 4 was amended, effective March 1, 1999, to allow delivery via a third-party commercial carrier as an alternative to the Postal Service. The requirement for a "third-party" is consistent with the rule's requirement for personal service by a person not a party to nor interested in the action. The requirement for a "commercial carrier" means it must be the regular business of the carrier to make deliveries for profit. A law firm may not act as its own commercial carrier service for service of process. Finally, the phrase "commercial carrier" is not intended to include or authorize electronic delivery. Service via e-mail or facsimile transmission is not permitted by Rule 4.

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

Subdivision (c) was amended, effective March 1, 1998, to provide a defendant with

the means to compel the plaintiff to file the action.

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

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

Subdivision (d) was amended, effective March 1, 1998, to allow personal service by delivering a copy of the summons to an individual's spouse. The time of service for an item served by mail or third-party commercial carrier under subdivision (d) is the time the item is delivered to or refused by the recipient. Refusal of delivery is tantamount to receipt of the mail or delivery for purposes of service. On the other hand, if the mail or delivery is unclaimed, no service is made. Subdivision (l) was added in 1983, effective September 1, 1983, to make it clear that refusal of delivery by the addressee constitutes delivery.

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

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

A new subdivision (f) was added, effective March 1, 1996, to provide procedures for

service upon a person in a foreign country. The new procedures follow Rule 26(f), Fed.R.Civ.P.

Rule 4 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.

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

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, page 12; September 27, 2012, pages 7-8; January 26-27, 2012, pages 12-13; April 29-30, 2010, pages 5-6; May 21-22, 2009, pages 44-45; April 27-28, 2006, pages 11-14; January 30-31, 2003, pages 6-10; September 26-27, 2002, pages 15-18; April 30-May 1, 1998, pages 3, 8, and 11; January 29-30, 1998, pages 17-18; September 25-26, 1997, page 2; January 30, 1997, pages 6-7, 10-12; September 26-27, 1996, pages 14-16; January 26-27, 1995, pages 7-8; April 20, 1989, page 2; December 3, 1987, pages 1-4 and 11; May 21-22, 1987, page 5;

November 29, 1984, pages 3-5; September 30-October 1, 1982, pages 15-18; April 15-16, 1982, pages 2-5; December 11-12, 1980, page 2; October 30-31, 1980, page 31; January 17-18, 1980, pages 1-3; November 29-30, 1979, page 2; October 27-28, 1977, page 10; April 8-9, 1976, pages 5-9; Fed.R.Civ.P. 4.

Statutes Affected:

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; 39-01-11; 43-07-19; 52-04-12; 53-05-04.

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

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

RULE 5. SERVICE AND FILING OF PLEADINGS AND OTHER DOCUMENTS

(a) Service – When required.

(1) In general. Other than service of a summons and complaint under Rule 4, each of the following documents 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 document 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 document; and

(F) every document 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 it was seized.

(b) Service -- How made.

(1) Service in general. A document that is required to be filed must be served electronically under the procedure specified in N.D.R.Ct. 3.5. Electronic service on an attorney must be made to the designated e-mail service address posted on the N.D. Supreme Court website. Electronic service is complete on transmission~~, but is not~~. Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service is not effective if the serving party learns through any means that the document did not reach the person to be served.

(2) Persons Served.

(A) Service on a Party Represented by an Attorney. If a party is represented by an attorney, service under this rule must be made on the attorney unless the court orders service on the party. If an attorney is providing limited representation under Rule 11(e), service must be made on the party and on the attorney for matters within the scope of the limited representation.

(B) Persons Exempt from Electronic Service. Persons who are exempt from electronic service and filing under N.D.R.Ct. 3.5 must serve documents under Rule 5(b)(3).

(3) Other Service. A document that is not required to be filed, or that will be served on a person exempt from electronic service, is served under this rule by:

(A) handing it to the person;

(B) leaving it:

(i) at the person's office with a clerk or other person in charge, or, if no one is in charge, leaving it in a conspicuous place in the office; or

(ii) if the person has no office or the office is closed at the person's dwelling or usual

place of abode with someone of suitable age and discretion who resides there;

(C) mailing it to the person's last known address, in which event service is complete upon mailing;

(D) sending it by a third-party commercial carrier to the person's last known address, in which event service is complete upon deposit of the document to be served with the commercial carrier;

(E) if no address is known, on order of the court by leaving it with the clerk of the court;

(F) sending it by electronic means if the person consented in writing, in which event service is complete on transmission, but is not effective if the serving party learns that it did not reach the person to be served; or

(G) delivering it by any other means that the person consented to in writing.

(c) Serving numerous defendants.

(1) In general. If an action involves an unusually large number of defendants, the court may, on motion or on its own, order that:

(A) defendants' pleadings and replies to them need not be served on other defendants;

(B) any crossclaim, counterclaim, avoidance, or affirmative defense in those pleadings and replies to them will be treated as denied or avoided by all other parties; and

(C) filing any such pleading and serving it on the plaintiff constitutes notice of the pleading to all parties.

(2) Notifying parties. A copy of every such order must be served on the parties as the court directs.

(d) Filing.

(1) In general. Unless a statute, court rule, or court order provides otherwise, all documents in an action must be filed with the clerk electronically, through the Odyssey® system.

(2) Initiating pleading.

(A) The Summons and Complaint.

(i) The summons and complaint, or other initiating pleading, must be filed before a subpoena may be issued. Unless otherwise authorized by rule or statute, a party seeking to file an initiating pleading must provide proof that the pleading was served under Rule 4. The proof of service must be filed with the initiating pleading.

(ii) A party who files a complaint or other initiating pleading must serve notice of filing on the other parties.

(iii) The defendant may demand that the plaintiff file the complaint.

– Service of the demand must be made under Rule 5(b) on the plaintiff's attorney or under Rule 4(d) on the plaintiff if the plaintiff is not represented by an attorney.

– In cases with multiple defendants, service of a demand by one defendant is effective for all the defendants.

– If the plaintiff does not file the complaint within 20 days after service of the demand, service of the summons is void.

– The demand must contain notice that if the complaint is not filed within 20 days, service of the summons will be void, unless, after motion made within 60 days after service of the demand for filing, the court finds excusable neglect.

(iv) The defendant may file the summons and complaint, and the costs incurred on behalf of the plaintiff may be taxed as provided in Rule 54(e).

(B) The Answer. Within a reasonable time after service of the notice of filing the complaint or initiating pleading, the defendant or respondent must file the answer and notify the plaintiff of the filing.

(3) Discovery materials. A party must not file discovery materials with the clerk unless:

(A) the materials are being submitted to the court for disposition of a pending motion;

(B) the court orders them to be filed; or

(C) a party certifies that the filing is necessary for safekeeping of the documents or exhibits pending case completion, in which event the party must state the reasons safekeeping is necessary.

(4) Return of discovery materials.

(A) The clerk shall return the following documents to the filing party upon final disposition of an appeal or, if no appeal is filed, upon expiration of the time for appeal:

(i) depositions;

(ii) interrogatories;

(iii) requests for admission;

(iv) requests for interrogatories;

(v) requests for production of documents; and

(vi) answers and responses to the above documents.

(B) If the filing party does not claim a filed document within 60 days after notification

to do so, the clerk may dispose of the document as directed by court order.

(C) The clerk must take a receipt for all documents returned.

(5) Documents to be used on hearing. Unless otherwise directed by the court, all affidavits, notices, and other document designed to be used on the hearing of a motion or order to show cause must be filed at least 24 hours before the hearing.

(6) Failure to comply. If a party fails to comply with this subdivision, the court, on motion of any party or its own motion, may order the document to be filed. If the order is not obeyed, the court may order them to be regarded as stricken and their service to be ineffective.

(7) Rejection. Except as otherwise provided under Rules 13, 14, or 15, the clerk must reject for filing any document that adds a party to an action or proceeding without a court order. The clerk must endorse on the document a notation that it is rejected for filing under this rule and return the document to the person who tendered it for filing.

(e) Removal of pleadings for service. Upon a filing party's request, an original pleading or ~~paper~~ document in any civil action, which by law is required to be filed in the clerk of court's office where the action is pending, may be removed from the files for the purpose of serving it either inside or outside the state but must be returned without delay.

(f) Proof of service. Proof of service under this rule is made as provided in Rule 4 or by an attorney's or court personnel's certificate showing that service was made under subdivision (b).

EXPLANATORY NOTE

Rule 5 was amended effective 1971, July 1, 1981; March 1, 1986; January 1, 1988;

March 1, 1990; March 1, 1992, on an emergency basis; March 1, 1994; January 1, 1995; March 1, 1998; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2009; March 1, 2011; March 1, 2013; April 1, 2013; March 1, 2014.

Rule 5 applies to service of documents other than "process." In contrast, Rule 4 governs civil jurisdiction and service of process. When a statute or rule requiring service does not pertain to service of process, nor require personal service under Rule 4, nor specify how service is to be made, service may be made as provided in Rule 5(b). An example of a rule that requires a particular type of service is N.D.R.Ct. 11.2, which specifies that attorneys seeking to withdraw from representation must give notice to their client "by personal service, by registered or certified mail, or via a third-party commercial carrier providing a traceable delivery."

Subdivision (a) was amended, effective March 1, 2008, to improve organization and to make the subdivision easier to understand.

Paragraph (b)(1) was amended, effective March 1, 2009, to make it clear that, when an attorney has served notice of limited representation under Rule 11(e), service of documents on the attorney is not required except for documents within the scope of the limited representation. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to assist otherwise self-represented parties on a limited basis without undertaking full representation of the party.

Paragraph (b)(1) was amended, effective March 1, 2014, to require any electronic service on an attorney to be made to the attorney's designated e-mail address as posted on the North Dakota Supreme Court website.

Paragraph (b)(2) was amended, effective April 1, 2013, to specify that electronic service through the Odyssey® system under the procedure specified in N.D.R.Ct. 3.5 is required for most documents that will be filed with the court.

Paragraph (b)(3) was amended, effective March 1, 2009, to provide for service by electronic means and to improve organization. Parties seeking to serve documents by electronic means must consult N.D.R.Ct. 3.5 for electronic service instructions.

Paragraph (b)(3) was amended, effective April 1, 2013, to specify that the other means of service listed in the paragraph apply only when the document served is not required to be filed or when it will be served on a person exempt from electronic service.

Subdivision (b) was amended, effective March 1, 1999, to permit service via a third-party commercial carrier as an alternative to the Postal Service. The requirement for a "third-party commercial carrier" means the carrier may not be a party to nor interested in the action, and it must be the regular business of the carrier to make deliveries for profit. A law firm may not act as or provide its own commercial carrier service with service complete upon deposit. In addition, the phrase "commercial carrier" does not include electronic delivery services.

Paragraph (d)(1) was amended, March 1, 2008, to delete a reference to the note of issue and certificate of readiness.

Paragraph (d)(1) was amended, effective April 1, 2013, to specify that filing must be accomplished electronically through the Odyssey® system unless a statute, rule or order provides otherwise.

Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to require that proof

of service be provided and filed by a party seeking to file an initiating pleading. Under Rule 3, an action is commenced on service of the initiating pleading, not on filing. Unless a rule specifically provides otherwise, service under Rule 4 must be accomplished before any pleadings in an action may be filed.

Subparagraph (d)(2)(A) was amended, effective March 1, 2013, to include language allowing the defendant to demand filing of the complaint or to file the complaint itself. This language was transferred from Rule 4.

Subparagraph (d)(2)(A) was amended, effective April 1, 2013, to clarify that any party who files a complaint or other initiating pleading must serve notice on the other parties in the matter. Service of the summons must be made under Rule 4.

Subdivision (f) was amended, effective March 1, 2003, to permit proof of service to be made by court personnel as well as by an attorney. Proof of service may also be made in the same manner as provided by Rule 4(i).

Rule 5 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.

Rule 5 was amended, effective April 1, 2013, to replace the term "paper" with "document" throughout the rule.

Sources: Joint Procedure Committee Minutes of September 26, 2013, pages ; April 25-26, 2013, pages 15-16; January 31-February 1, 2013, pages 2-5, 15-18; January 26-27, 2012, pages 13-16; September 24-25, 2009, pages 12-13; April 24-25, 2008, pages 18-21;

January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-27; April 26-27, 2007, pages 19-22; September 27-28, 2001, pages 11-12; April 30-May 1, 1998, page 3; January 29-30, 1998, page 18; September 26-27, 1996, pages 16-17, 20; September 23-24, 1993, pages 19-20; April 29-30, 1993, pages 20-21; November 7-8, 1991, page 3; October 25-26, 1990, pages 10-12; April 20, 1989, page 2; December 3, 1987, page 11; May 21-22, 1987, pages 17-18; February 19-20, 1987, page 4; September 18-19, 1986, page 8; November 30, 1984, pages 26-27; October 18, 1984, pages 8-11; November 29-30, 1979, page 2; September 20-21, 1979, pages 4-5; Fed.R.Civ.P. 5.

Cross Reference: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction -- Process -- Service), N.D.R.Civ.P. 45 (Subpoena), and N.D.R.Civ.P. 77 (District Courts and Clerks); N.D.R.Crim.P. 49 (Service and Filing of Papers); N.D.R.Ct. 3.1 (Pleadings); N.D.R.Ct. 3.5 (Electronic Filing in the District Courts); N.D.R.Ct. 6.4 (Exhibits), N.D.R.Ct. 7.1 (Judgments, Orders and Decrees); N.D.R.Ct. 11.2 (Withdrawal of Attorneys).

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), 50(b) and (d), 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.

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; March 1, 2014.

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~~ clarify that there can be no extension of the times set by provisions in Rules 4(e)(7), 52(b), 59~~(c),~~ (i) and (j), and 60(b).

Paragraph (b)(2) was amended, effective March 1, 2014, to add a reference to Rule 50(b) and (d) and to delete a reference to Rule 50(c).

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. Under the amendment, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension, but applying the other time computation provisions of these rules. After the party has identified the date on which the prescribed period would expire but for the operation of subdivision (e), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

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 September 26, 2013, pages ___; April 25-26, 2013, pages 26-27; 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).

RULE 1001. DEFINITIONS THAT APPLY TO THIS ARTICLE

~~For purposes of this Article the following definitions are applicable:~~

In this article:

~~(1) Writings and recordings. "Writings" and "recordings" consist of letters, words, or numbers, or their equivalent, set down by handwriting, typewriting, printing, photostating, photographing, magnetic impulse, mechanical or electronic recording, or other forms of data compilation.~~

(a) A "writing" consists of letters, words, numbers, or their equivalent set down in any form.

(b) A "recording" consists of letters, words, numbers, or their equivalent recorded in any manner.

~~(2) Photographs. "Photographs" include still photographs, X-ray films, videotapes, and motion pictures.~~

(c) A "photograph" means a photographic image or its equivalent stored in any form.

~~(3) Original. An "original" of a writing or recording is the writing or recording itself or any counterpart intended to have the same effect by a person executing or issuing it. An "original" of a photograph includes the negative or any print therefrom. If data are stored in a computer or similar device, any printout or other output readable by sight, shown to reflect the data accurately is an "original".~~

(d) An "original" of a writing or recording means the writing or recording itself or any counterpart intended to have the same effect by the person who executed or issued it. For

electronically stored information, "original" means any printout, or other output readable by sight, if it accurately reflects the information. An "original" of a photograph includes the negative or a print from it.

~~(4) Duplicate. A "duplicate" is a counterpart produced by the same impression as the original, or from the same matrix, or by means of photography, including enlargements and miniatures, or by mechanical or electronic rerecording, or by chemical reproduction, or by other equivalent techniques which accurately reproduce the original.~~

(e) A "duplicate" means a counterpart produced by a mechanical, photographic, chemical, electronic, or other equivalent process or technique that accurately reproduces the original.

EXPLANATORY NOTE

Rule 1001 was amended, effective March 1, 2014.

Rule 1001 is based on Fed.R.Ev. 1001.

Article X is addressed to that aspect of the law of evidence traditionally termed the "best evidence" rule or, at times, more correctly, the rule requiring the production of original documents. The phrase, "best evidence," does not appear in any of the rules of this Article; its omission was intentional, meant to signify a departure from the interpretation often given the rule, if not from the true import of the rule itself.

Article X applies only to writings, recordings, and photographs. These items are defined, for purposes of this Article, in ~~Rule 1001~~ this rule.

~~Paragraph (1) expands~~ Subdivisions (a) and (b) expand the definitions of ~~"~~writings~~"~~ and ~~"~~recordings~~"~~ to include not only those documents produced by traditional methods, such

as handwriting, typing, and printing, but also to include data recorded ~~by means of~~ in any form or manner, including by photography, magnetic impulse, and mechanical or electronic recording. This definition ~~would bring~~ brings within the scope of these rules sound recordings as well as data ~~contained in computer banks~~ recorded digitally and stored electronically. The reason which gave birth to the "original documents" rule, i.e., the need for an accurate and honest presentation of written evidence, demands the expanded application of the rule to these later, modern methods of data ~~recordation~~ recording. The definition is ~~"~~open-ended,~~"~~ ~~encompassing "other form(s) of data compilation" that are generically similar to those listed. The definition~~ but it is not intended to include symbols which are not representative of words or numbers.

~~Paragraph (2)~~ Subdivision (c) defines photographs as photographic images in any form, which would include still photographs, X-rays, ~~videotapes~~ videos and motion pictures. This definition is included in a section apart from that defining writings and recordings, for there will be occasions when Rule 1002, requiring production of an original, will apply to photographs, not because they are duplicates of writings, but because the contents of the photographs will be sought to be proved. ~~See Rule 1002 and explanatory note, infra.~~

An "original," as defined in ~~paragraph (3)~~ subdivision (d) for the purposes of this Article may be, but will not necessarily be, that document or recording one would ordinarily label an original, if speaking in lay terms. One would ordinarily think of an original as being the document, recording, or photograph first made in point of time. But for purposes of this Article, the definition and existence of an "original" is not dependent upon the chronology of production. ~~As stated in 5 Weinstein's Evidence 1001-49 (1975):~~ Instead, it is ~~"The~~

~~'original' is~~ the document whose contents are to be proved~~. Its jural significance makes it the original,~~ whether or not it was written before or after another, was copied from another, or was itself used to copy from.~~"~~ ~~Thus, for~~ For example, in an action for libel, a ~~Xeroxed~~ photocopy of a letter, if published, would be the "original" for purposes of this rule.

The intent of the parties to a transaction will often bear upon the legal significance of a writing and~~, thus,~~ its status as an original under this rule. ~~Thus~~ For example, if the parties to a contract execute several copies, intending that each be legally effective, all copies are ~~deemed to be~~ "originals." ~~5 Weinstein, supra, at 1001-50.~~

The prints from a photographic negative or a digital image file are treated as originals, as they are ~~the first recognizable~~ the recognizable and tangible form of a photograph. The negative and the digital image file, of course, would also be ~~an original in the usual case~~ originals.

The last sentence of ~~paragraph (3)~~ subdivision (d) accords the status of original to computer printouts or other output "readable by sight," provided the printout is shown to accurately reflect the ~~data~~ information it contains. This is a necessary provision as the underlying data ~~is not~~ may not be readily comprehensible.

~~Paragraph (4)~~ Subdivision (e) defines "duplicate," as that term is used in this Article. The definition is broad enough to include carbon copies, printed items such as newspapers or other writings produced from a single matrix, ~~Xeroxed~~ photocopies, microfilms, tape records of material originally recorded on wire, or other techniques which accurately reproduce the original. Accurate reproduction of the original is the sole, essential feature of a duplicate under this rule. There is no requirement that the duplicates be made ~~"~~in the

regular course of business~~" as under prior statutes. See N.D.C.C. § 31-08-01.1~~. The duplicating process itself is ~~deemed~~ considered sufficient to assure accuracy.

It should be noted at this juncture that two main reasons have been advanced for the requirement that original documents be produced: (1) the prevention of inaccurate reproduction, and (2) the prevention of fraud. ~~McCormick on Evidence § 231 (2d ed. 1972).~~ ~~This paragraph~~ Subdivision (e) provides an assurance of accuracy in its definition; it does not deal with the possibility of fraudulent duplications. Rule 1003~~, infra,~~ is designed to require production of an original whenever the authenticity of an original is in issue.

Finally, it should be noted that although many nice questions may arise as to whether a document is an original or a duplicate, the end result will often be its admission regardless of its status. Under these rules, except when the authenticity of a writing is questioned or when it would be unfair to admit a duplicate, duplicates and originals are treated interchangeably. ~~See Rule 1003, infra.~~

Rule 1001 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, pages 26-27; January 29, 1976, page 14. ~~Rule~~ Fed.R.Ev.1001~~, Federal Rules of Evidence~~; Rule 1001, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-01.1.

Cross Reference: N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1003 (Admissibility of Duplicates).

RULE 1002. REQUIREMENT OF THE ORIGINAL

~~To prove the content of a writing, recording or photograph, the original writing, recording, or photograph is required, except as otherwise provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.~~

An original writing, recording, or photograph is required in order to prove its content unless these rules, another rule adopted by the North Dakota Supreme Court, or a statute provides otherwise.

EXPLANATORY NOTE

Rule 1002 was amended, effective March 1, 2014.

Rule 1002 is based on Fed.R.Ev. 1002.

~~Rule 1002 states the rule that "to prove the content of a writing, recording, or photograph" the original is required. This rule is a familiar one as applied to writings; it is expanded under this section to include recordings and photographs. Advisory Committee's Note to Rule 1002, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

The rule is intended to be one of preference, rather than one of rigid application. The definitions contained in Rule 1001 and the ensuing Rules 1003-1007 are designed to insure that the rule operates as an aid in the search for truth and not as a rule of needless exclusion of evidence.

Perhaps the most persistent problem in applying this rule lies in determining whether the rule should be applied at all. To phrase this in terms of the present section: When are the contents of a writing, recording, or photograph sought to be proved?

With respect to writings, there are certain instances in which it is clear that testimony is given, or a writing utilized, for purposes other than to prove the contents of a writing. For example, a witness may use a writing to refresh his memory without coming under this rule ~~(see, e.g., Kemmer v. Sunshine Mutual Ins. Co., 79 N.D. 518, 57 N.W.2d 856 (1953);~~ and evidence of payment made may be given without producing the written receipt. ~~McCormick on Evidence, § 233 at 564 (2d ed. 1972).~~

Conversely, where the writing has a legal, operative effect, as in the case of a deed, it must be produced if its terms are to be proved. For example, where the contents of a notice of tax sale are in issue, the ~~newspaper~~ document containing the notice must be produced; testimony as to the contents of the notice will not be admitted. ~~De Nault v. Hoerr, 66 N.D. 82, 262 N.W. 361 (1935).~~

~~Thus, the~~ The test may be said to be one of legal efficacy of the document in question. And, although this test has been criticized as one of difficult application, and one producing questionable results ~~(see, McCormick on Evidence, § 233 (2d ed. 1972))~~, it is retained, but with safeguards which should remove the bases for such criticism. Rule 1003~~(4)~~ provides a basis for the non-application of this rule in cases where a writing is not closely related to a material issue. Rules 611 and 614 allow the trial court to require written evidence, when available, even though oral testimony would be acceptable under this rule. ~~See, 5 Weinstein's Evidence Para 1002(12) (1975).~~

This rule has application to photographs as well as writings, although it is the rare case in which the contents of a photograph will be in issue. ~~Normally, a~~ A photograph will often be introduced to "illustrate" the testimony of a witness who has personally observed that

which is depicted in the photograph. ~~McCormick on Evidence § 214 (2d ed. 1972).~~ In these cases, this rule does not apply. There are instances, however, such as defamation cases in which the contents of the photograph are involved and are subject to this rule. Also, photographs taken by automatic means, such as those used in many banks, will be subject to the rule requiring production of the original.

Exception to this rule has been made in recognition of the many statutes which direct the admittance of certified copies of documents as if they were originals. See, e.g., N.D.C.C. ~~§§ 26-15-04 and~~ 28-23-12. These statutes, and those of similar import, are left undisturbed by this rule.

Rule 1002 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 27; January 29, 1976, page 14. ~~Rule~~ Fed.R.Ev.1002~~, Federal Rules of Evidence~~; Rule 1002, SBAND proposal.

Cross Reference: ~~Rule 1003, NDREv,~~ N.D.R.Ev. 1003 (Admissibility of Duplicates), statutes considered.

RULE 1003. ADMISSIBILITY OF DUPLICATES

~~A duplicate is admissible to the same extent as an original unless (1) a genuine question is raised as to the authenticity or continuing effectiveness of the original or (2) in the circumstances it would be unfair to admit the duplicate in lieu of the original.~~

A duplicate is admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate.

EXPLANATORY NOTE

Rule 1003 was amended, effective March 1, 2014.

Rule 1003 is based on Fed.R.Ev. 1003.

As was discussed in relation to Rule 1001, the primary reasons for requiring the production of original documents are to prevent inaccurate reproductions of evidence and to prevent fraud. Technological advances have rendered the inaccurate copy a rarity. Rule 1001, in its definition of a duplicate, insures that only accurate reproductions will be admitted in lieu of originals. In light of this, Rule 1003 provides that a duplicate is admissible to the same extent as an original except where there is a genuine question as to a document's authenticity or whenever it would be unfair to admit the duplicate.

The first exception is intended to cover those cases in which there is a genuine allegation of inaccuracy of reproduction or where the circumstances surrounding the case yield a substantial suggestion that the original document is not authentic. Possibilities of fraud may arise, for example, where a party in possession of an original document claims that

the document has been lost or destroyed. Of course, this factor alone should not preclude admission of a duplicate, but coupled with an allegation of fraud and an inadequate explanation of the loss or destruction, exclusion of a duplicate may be warranted. ~~5 Weinstein's Evidence Para 1003 (02) (1975).~~

The circumstances of unfairness ~~which~~ that would warrant exclusion of a duplicate cannot be set out with any precision. This exception is intended to prevent application of the general rule admitting duplicates whenever the circumstances are such that a party will be prejudiced by the absence of the original in evidence. For example, where only a part of the original is reproduced, and the remainder bears upon the part offered in evidence, fairness would require production of the original. ~~See Advisory Committee's Notes to Rule 1003, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

In the final analysis, it will be the responsibility of the courts to shape the parameters of this rule and its exceptions. The exceptions will necessarily be utilized in limited instances to insure fairness, but they should not be interpreted in a manner that undermines the policy of the general rule which is to further the use of duplicates as evidence of writings.

Rule 1003 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 27; January 29, 1976, page 15. ~~Rule~~ Fed.R.Ev.1003~~, Federal Rules of Evidence~~; Rule 1003,

SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 2-06-05, ~~4-09-05,~~ 4-10-03, ~~4-11-19,~~ 4-22-15, 6-08-10, ~~7-01-12, 7-08-02, 10-23-13, 10-28-09,~~ 11-11-38, 11-13-08, 11-18-09, ~~12-44-18,~~ 14-03-24, ~~15-29-10, 15-51-10,~~ 19-01-10, 19-03.1-37, 19-20.1-17, ~~23-02-40,~~ 24-02-11, 24-07-15, ~~26-08-07, 26-12-09, 26-12-15, 26-12-23, 26-15-04, 26-15-26,~~ 28-23-12, 31-04-10, 31-08-01.1, 31-08-06, 31-09-02, 31-09-03, 31-09-04, 31-09-05, 31-09-06, 31-09-10, ~~33-01-13,~~ 35-21-05, 35-22-11, 35-22-16, 37-01-34, 39-20-07, 40-04-06, 40-11-08, 40-16-09, 43-01-21, 43-07-13, 43-10-07, 43-13-12, 43-19.1-10, 43-28-08, 43-32-16, ~~44-06-08, 44-06-09,~~ 47-19-06, 47-19-45, ~~48-02-15,~~ 49-01-14, 54-46.1-03, ~~57-24-29,~~ 61-02-34, 61-03-06, 61-05-19, 61-16-06.

Cross Reference: N.D.R.Ev. 1001 (Definitions that Apply to this Article).

RULE 1004. ADMISSIBILITY OF OTHER EVIDENCE OF CONTENTS

~~The~~ An original is not required, and other evidence of the ~~contents~~ content of a writing, recording, or photograph is admissible if:

~~(1) Originals lost or destroyed. All originals are lost or have been destroyed, unless the proponent lost or destroyed them in bad faith;~~

(a) all the originals are lost or destroyed, and not by the proponent acting in bad faith;

~~(2) Original not obtainable. No original can be obtained by any available judicial process or procedure;~~

(b) an original cannot be obtained by any available judicial process;

~~(3) Original in possession of opponent. At a time when an original was under the control of the party against whom offered, that party was put on notice, by the pleadings or otherwise, that the contents would be a subject of proof at the hearing, and that party does not produce the original at the hearing; or~~

(c) the party against whom the original would be offered had control of the original; was at that time put on notice, by pleadings or otherwise, that the original would be a subject of proof at the trial or hearing; and fails to produce it at the trial or hearing; or

~~(4) Collateral matters. The~~ (d) the writing, recording, or photograph is not closely related to a controlling issue.

EXPLANATORY NOTE

Rule 1004 was amended, effective March 1, 2014.

Rule 1004 is based on Fed.R.Ev. 1004.

Rule 1004 excuses production of an original writing, recording, or photograph in four cases:

(1) Subject to a good faith requirement on the part of a proponent of evidence, ~~paragraph (1)~~ subdivision (a) continues the common law exception that secondary evidence is admissible whenever an original has been lost or destroyed.

Under ~~paragraph (1)~~ subdivision (a), the intentional destruction of an original does not automatically preclude admission of secondary evidence as to its contents. ~~As stated by Wigmore: "The view now generally accepted is that (1) a destruction~~ For example, destruction in the ordinary course of business~~, and, of course, a destruction~~ or by mistake~~,~~ is sufficient to allow the contents to be shown as in other cases of loss. ~~, and that (2) a destruction otherwise made will equally suffice, provided the proponent first removes, to the satisfaction of the judge, any reasonable suspicion of fraud." 4 Wigmore on Evidence § 1198 at 457-460 (Chadbourn rev. 1972).~~

The most common means of proving loss or destruction is by showing that a search has been made and that it did not produce the document in question. ~~5 Weinstein's Evidence Para 1004(1) (05) (1975).~~ It is difficult to describe with preciseness the type of search that will be sufficient to prove loss or destruction; perhaps nothing meaningful can be said other than that the search must be diligent. It is the function of the trial judge to determine whether proof of a search satisfactorily removes the possibility of fraud. See ~~Rule~~ N.D.R.Ev.104~~, NDREv~~.

(2) ~~Paragraph (2)~~ Subdivision (b) applies when the writing, recording, or photograph in question is in the possession or control of a person not a party to the litigation. In those

cases in which the original is in the possession of a party opponent, ~~paragraph (3)~~ subdivision (c) governs.

The fact that a subpoena duces tecum has been served upon a person within the state, ~~pursuant to Rule~~ under N.D.R.Civ.P. 45~~, NDRCivP,~~ or ~~Rule~~ N.D.R.Crim.P. 17~~, NDRCrimP~~, and has been dishonored will constitute a showing that an original is not obtainable, sufficient under this rule to permit the introduction of secondary evidence.

Documents may also be ordered produced in conjunction with the taking of depositions under ~~Rule~~ N.D.R.Civ.P. 28~~, NDRCivP,~~ and ~~Rule~~ N.D.R.Crim.P. 15~~,~~ ~~NDRCrimP~~. Again, failure to produce the documents will constitute a sufficient showing under this ~~paragraph~~ rule.

(3) In contrast to the showing required under ~~Rule 1004(2)~~ subdivision (b), whenever an original is in the possession of an opponent all that need be shown is that the opponent was "put on notice" that the contents of the original would be a subject of proof at the hearing. The notice may be held to be given by the pleadings in cases where it is clear that the document in possession of the opponent will be a subject of proof. An example would be a suit involving the terms of a contract or deed.

The safest way to insure that adequate notice is given is to provide written notice. This practice should become a matter of course under this paragraph.

(4) ~~Paragraph (4)~~ Subdivision (d) is intended to relieve the requirements of Rule 1002 whenever a writing in question "is not closely related to a controlling issue." The rule is necessary to the orderly conduct of a trial. As stated by McCormick:

"At nearly every turn in human affairs some writing – a letter, a bill of sale, a

newspaper, a deed – plays a part. Consequently any narration by a witness is likely to include many references to transactions consisting partly of written communications or other writings. A witness to a confession, for example, identifies the date as being the day after the crime because he read of the crime in the newspaper that day, or a witness may state that he was unable to procure a certain article because it was patented. It is apparent that it is impracticable to forbid such references except upon condition that the writings (e.g., the newspaper, and the patent) be produced in court. Recognition of an exception exempting 'collateral writings' from the operation of the basic rule has followed as a necessary concession to expedition of trials and clearness of narration, interests which outweigh, in the case of merely incidental references to documents, the need for perfect exactitude in the presentation of these documents' contents." McCormick on Evidence § 234 at 565 (2d ed. 1972).

Rule 1004 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 1004 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 28; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, page 15; ~~Rule~~ Fed.R.Ev.1004~~, Federal Rules of Evidence~~; Rule 1004, SBAND proposal.

Cross Reference: N.D.R.Ev. 104 (Preliminary Questions); N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken); N.D.R.Civ.P. 45 (Subpoena); N.D.R.Crim.P. 15 (Depositions); N.D.R.Crim.P. 17 (Subpoena).

RULE 1005. COPIES OF PUBLIC RECORDS TO PROVE CONTENT

~~The contents of an official record, or of a document authorized to be recorded or filed and actually recorded or filed, including data compilations, in any form, if otherwise admissible, may be proved by copy, certified as correct in accordance with Rule 902 or testified to be correct by a witness who has compared it with the original. If a copy complying with the foregoing cannot be obtained by the exercise of reasonable diligence, then other evidence of the contents may be given.~~

The proponent may use a copy to prove the content of an official record, or of a document that was recorded or filed in a public office as authorized by law, if these conditions are met: the record or document is otherwise admissible; and the copy is certified as correct in accordance with Rule 902(4) or is testified to be correct by a witness who has compared it with the original. If no such copy can be obtained by reasonable diligence, then the proponent may use other evidence to prove the content.

EXPLANATORY NOTE

Rule 1005 was amended, effective March 1, 2014.

Rule 1005 is based on Fed.R.Ev. 1005.

It is recognized under Rule 1005 that requiring production of original public records "would be attended by serious inconvenience to the public and to the custodian." ~~Advisory Committee's Note to Rule 1005, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~ Therefore, Rule 1005 is designed to provide a limited exception to Rule 1002 in those cases where official records or recorded documents are in issue.

Unlike the balance of the rules in Article X, Rule 1005 recognizes, to a limited extent, the existence of degrees of secondary evidence. Certified and compared copies are preferred over other evidence of the contents of original public records. Certification of a copy is to be accomplished ~~pursuant to~~ under Rule 902, which in turn incorporates the statutes of North Dakota. See Rule 902(4). ~~Thus, the~~ The methods of proving official documents contained in N.D.C.C. ch. 31-09, are permissible under Rule 1005.

The preference given to certified or compared copies precludes the use of duplicates unless, of course, the preferred copies are not available. Rule 1003 is therefore preempted by application of Rule 1005. It should be noted, however, that Rule 1005 applies to documents authorized to be recorded only if they are actually recorded or filed. In a case where the terms of a document are in issue, if a ~~photostat or other~~ copy is filed and the original returned to the owner, the original may be proved in any method permitted by Article X in general. ~~(~~However, if the contents of the document filed are in issue, e.g., to prove notice, the filed document is considered the "original" even if it is a ~~photostat.)~~ copy.

The question may arise whether an attempt must be made to produce the original if a certified or compared copy cannot be obtained by a reasonably diligent effort. The answer is ~~affirmative~~ yes. The original is the best proof of its contents; the admissibility of copies is allowed to accommodate public officials and others who may use official or recorded documents. This reasoning does not support the admissibility of oral evidence, for example, where the original document could be produced. ~~See, generally, 5 Weinstein's Evidence Para 1005(06); accord, Harmening v. Howland, 25 N.D. 38, 141 N.W. 131 (1913).~~

Rule 1005 was amended, effective March 1, 2014, in response to the December 1,

2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 28; January 29, 1976, page 16. ~~Rule~~ Fed.R.Ev.1005~~, Federal Rules of Evidence~~; Rule 1005, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 31-09.

Cross Reference: ~~Rule~~ N.D.R.Ev. 902 (Evidence that is Self-Authenticating), N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1103~~, NDREv, statutes considered~~(Admissibility of Duplicates).

RULE 1006. SUMMARIES TO PROVE CONTENT

~~The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.~~

The proponent may use a summary, chart, or calculation to prove the content of voluminous writings, recordings, or photographs that cannot be conveniently examined in court. The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. The court may order the proponent to produce them in court.

EXPLANATORY NOTE

Rule 1006 was amended, effective March 1, 2014.

Rule 1006 is based on Fed.R.Ev. 1006.

The admissibility of summaries of voluminous writings over the objection that such summaries are not the "best evidence" has long been permitted in North Dakota. ~~See Wishek v. United States Fidelity & Guaranty Co., 55 N.D. 321, 213 N.W. 488 (1927).~~ Rule 1006 continues this rule of convenience and expands it to include summaries of recordings and photographs.

It is a condition precedent to the invocation of the rule that the component parts of the summary be made available for examination or copying. This is intended to give the party

against whom the summary is offered a chance to analyze the underlying data and prepare any challenges to the summary he may wish to make. The court may direct that the original writings be produced at trial. This would be necessary, for example, should the opposing party wish to introduce the originals in an attack on the accuracy of the summary.

Rule 1006 does not permit the admissibility of summaries where the individual writings are themselves inadmissible. For example, where the original documents contain hearsay, summarizing the documents will not cure the hearsay objection.

It should be noted that not all summaries will come within the scope of Rule 1006. Computer printouts, which are summaries of stored data, are themselves originals. See Rule 1001~~(3)~~(d). Summaries of absent originals may be admitted under Rules 1004 or 1005 without reference to Rule 1006. ~~5 Weinstein's Evidence Para 1006(05) (1975).~~

Rule 1006 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 28; January 29, 1976, page 16. ~~Rule~~ Fed.R.Ev.1006~~, Federal Rules of Evidence~~; Rule 1006, SBAND proposal.

Cross Reference: N.D.R.Ev. 1001 (Definitions that Apply to this Article), N.D.R.Ev. 1004 (Admissibility of Other Evidence of Content), N.D.R.Ev. 1105 (Copies of Public Records to Prove Content).

RULE 1007. TESTIMONY OR ~~WRITTEN ADMISSION~~ STATEMENT OF A PARTY TO PROVE CONTENT

~~Contents of writings, recordings, or photographs may be proved by the testimony or deposition of the party against whom offered or by that party's written admission, without accounting for the nonproduction of the original.~~

The proponent may prove the content of a writing, recording, or photograph by the testimony, deposition, or written statement of the party against whom the evidence is offered. The proponent need not account for the original.

EXPLANATORY NOTE

Rule 1007 was amended, effective March 1, 1990; March 1, 2014.

Rule 1007 is based on Fed.R.Ev. 1007.

Rule 1007 operates as an exception to Rule 1002 by allowing the contents of a writing, recording, or photograph to be proved by the admission of the party against whom it is offered, without accounting for the nonproduction of the original. ~~To this extent, the rule is in accord with the common law. 4 Wigmore on Evidence § 1256 (Chadbourn rev. 1972). However, in a departure from the leading case on the subject (Slatterie v. Pooley, 6 M. & W. 664, 151 Eng. Rep. 579 (Exch. 1840)), not~~ Not all admissions are recognized for the purpose of proving the contents of a writing, but only those that are written or given as testimony or in a deposition. This limitation is designed to insure that the admission will be accurately related to the trier of facts and thus excludes extrajudicial, oral admissions because these are vulnerable to erroneous transmission. ~~See, generally, McCormick § 242 (2d ed. 1972).~~

Rule 1007 is not intended to prevent the use of an opponent's admission to directly prove a fact that may also be evidenced by a writing. Only where the admission is used to prove the contents of a writing will Rule 1007 come into play. The test is much the same as that utilized under Rule 1002 to determine whether the contents of a writing are in issue. Nor should Rule 1007 be held to bar the use of an adverse party's admission where secondary evidence becomes admissible under the other provisions of Article X. See Rules 1004 and 1005.

Rule 1007 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 1007 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 29; March 24-25, 1988, page 12; December 3, 1987, page 15; January 29, 1976, pages 16, 17. ~~Rule~~ Fed.R.Ev.1007~~, Federal Rules of Evidence~~; Rule 1007, SBAND proposal.

Cross Reference: N.D.R.Ev. 1002 (Requirement of the Original), N.D.R.Ev. 1004 (Admissibility of Other Evidence of Content), N.D.R.Ev. 1105 (Copies of Public Records to Prove Content).

RULE 1008. FUNCTIONS OF THE COURT AND JURY

~~Whenever the admissibility of other evidence of contents of writings, recordings, or photographs under these rules depends upon the fulfillment of a condition of fact, the question whether the condition has been fulfilled is ordinarily for the court to determine in accordance with the provisions of Rule 104. However, when an issue is raised whether (1) the asserted writing, recording, or photograph ever existed, (2) another writing, recording, or photograph produced at the trial is the original, or (3) other evidence of contents correctly reflects the contents, the issue is for the trier of fact to determine as in the case of other issues of fact.~~

Ordinarily, the court determines whether the proponent has fulfilled the factual conditions for admitting other evidence of the content of a writing, recording, or photograph under Rule 1004 or 1005. In a jury trial, the jury determines, in accordance with Rule 104(b), any issue about whether:

(a) an asserted writing, recording, or photograph ever existed;

(b) another one produced at the trial or hearing is the original; or

(c) other evidence of content accurately reflects the content.

EXPLANATORY NOTE

Rule 1008 was amended, effective March 1, 2014.

Rule 1008 is based on Fed.R.Ev. 1008.

Rule 1008 divides the functions of judge and jury with respect to preliminary questions of admissibility under the rules requiring or exempting the production of original

writings, recordings, or photographs. This rule is but a specific application of Rule 104, which separates the function of judge and jury with respect to preliminary questions of admissibility in general. As such, Rule 1008 has as its fundamental divider between the functions of judge and jury the same distinction between preliminary questions relating to the competence of evidence and those relating to conditional relevancy. See Rule 104 and Explanatory Note.

As explained in the explanatory note to Rule 104, preliminary questions of admissibility which involve the competence of proffered evidence are properly decided by the judge, as these are questions whose answers are based upon broad policy considerations and the fulfillment of technical legal standards. Conversely, questions which are of relevance conditioned on fact are normally questions of probative value of the proffered evidence, and are logically to be decided by the jury.

Applying this distinction to the questions which are likely to arise under the rules of this article, a division of duties becomes apparent. ~~Weinstein gives us examples of the preliminary~~ Preliminary questions of fact ~~which~~ may arise when determining whether secondary evidence should be admitted pursuant to the rules of this article, such as: "Is the original lost? Was a diligent search conducted for it? Is the original unobtainable because it is a public document? Is it outside the jurisdiction? Does the other party have possession or control over the original? Is the authenticating witness' testimony incompetent as hearsay or because of privilege?" ~~5 Weinstein's Evidence Para 1008(01) (1975).~~

Examination of these questions reveals that their answers depend upon consideration

of what the "best evidence" rule is intended to accomplish and also upon application of legal standards. The examples quoted are of questions to be decided by the judge under Rule 1008.

Contrast with these the questions which, under Rule 1008, are to be decided by the jury: Did the asserted writing ever exist? Is another writing the original? Does other evidence of contents correctly reflect the contents? These are questions which involve only the relevance of the proffered evidence and may be answered without application of legal standards or policy considerations. The jury may, after answering the question, simply accord the writing the appropriate probative value; it needn't ignore the evidence as if it were inadmissible as hearsay. ~~See 5 Weinstein's Evidence, supra, Para 1008(02) at 1008-9.~~

A further reason for distinguishing between questions involving competence and those involving conditional relevance is that the former are solely preliminary but the latter have a tendency to transcend the status of a preliminary question and become central issues of a case. Thus, the reason for distinguishing between the two becomes one of fairness to the parties. As stated by the Advisory Committee for the Federal Rules of Evidence:

"However, questions may arise which go beyond the mere administration of the rule preferring the original and into the merits of the controversy. For example, plaintiff offers secondary evidence of the contents of an alleged contract, after first introducing evidence of loss of the original, and defendant counters with evidence that no such contract was ever executed. If the judge decides that the contract was never executed and excludes the secondary evidence, the case is at an end without ever going to the jury on a central issue." Advisory Committee's Note to ~~Rule~~ Fed.R.Ev.1008~~, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975)~~.

This rule is designed to insure consideration by a jury of critical issues that also happen to be preliminary issues. It should be noted at this point that Rule 1008 is intended to apply to all questions of conditional relevance, not just those listed in the rule. ~~5 Weinstein's Evidence, supra, Para 1008(01) at 1008-5, 6.~~

Finally, as a matter of practice, notice should be taken that Rule 1008 incorporates the provisions of Rule 104 as to the procedure for determining preliminary questions of admissibility. Thus, even as to questions to be decided by the jury, the judge plays a part in the determination. The judge, under this rule, as under Rule 104, should admit asserted evidence if he believes the proponent will establish the conditional fact to the satisfaction of a reasonable juror, subject to an instruction to the jury to disregard the evidence if they ultimately find against the existence of the conditional fact. ~~1 Weinstein's Evidence, supra, Para 104(02) (5).~~

Rule 1008 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 29; January 29, 1976, page 17; October 1, 1975, page 9. ~~Rule~~ Fed.R.Ev.1008~~, Federal Rules of Evidence~~; Rule 1008, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ev. 104~~, NDREv~~ (Preliminary Questions).

RULE 101. SCOPE; DEFINITIONS

~~These rules govern proceedings in the courts of North Dakota, to the extent and with the exceptions stated in Rule 1101.~~

(a) Scope. These rules apply to proceedings in North Dakota courts. The specific courts and proceedings to which the rules apply, along with exceptions, are set out in Rule 1101.

(b) Definitions. In these rules:

(1) "civil case" means a civil action or proceeding;

(2) "criminal case" includes a criminal proceeding;

(3) "public office" includes a public agency;

(4) "record" includes a memorandum, report, or data compilation;

(5) a "rule prescribed by the Supreme Court" means a rule adopted by the Supreme Court under constitutional authority; and

(6) a reference to any kind of written material or any other medium includes electronically stored information.

EXPLANATORY NOTE

Rule 101 was amended, effective March 1, 2014.

Rule 101 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. A set of definitions applicable to the Rules of Evidence in

general is also added. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, page 27; April 8, 1976, page 14. Rule 101, Federal Rules of Evidence; Rule 101 SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 29-21-12.

~~Rules:~~

~~Considered: Rule 43(a), NDRCivP; Rule 26, NDRCrim.; N.D.R.Crim.P. 26.~~

Cross Reference: ~~Rule 1101,~~ N.D.R.Ev. 1101 (Applicability of Rules); N.D.R.Civ.P. 43 (Evidence); N.D.R.Crim.P. 26 (Taking Testimony).

RULE 102. PURPOSE ~~AND CONSTRUCTION~~

~~These rules shall be construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence, to the end that the truth may be ascertained and proceedings justly determined.~~

These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.

EXPLANATORY NOTE

Rule 102 was amended, effective March 1, 2014.

Rule 102 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of January 26-27, 2012, page 28; April 8, 1976, page 14; October 1, 1975, page 2. Rule 102, Federal Rules of Evidence; Rule 102, SBAND proposal.

~~Rules:~~

~~Considered: Rule 2, NDRCrimP; Rule 1, NDRCivP.~~

Cross Reference: N.D.R.Civ.P. 1 (Scope and Purpose of Rules); N.D.R.Crim.P. 1

22 (Scope and Exceptions).

RULE 103. RULINGS ON EVIDENCE

~~(a) Effect of erroneous ruling. Error may not be predicated upon a ruling which admits or excludes evidence unless a substantial right of the party is affected, and~~

(a) Preserving a Claim of Error. A party may claim error in a ruling to admit or exclude evidence only if the error affects a substantial right of the party and:

~~(1) Objection. In case the ruling is one admitting evidence, a timely objection or motion to strike appears of record, stating the specific ground of objection, if the specific ground was not apparent from the context; or~~

(1) if the ruling admits evidence, a party, on the record:

(A) timely objects or moves to strike; and

(B) states the specific ground, unless it was apparent from the context; or

~~(2) Offer of proof. In case the ruling is one excluding evidence, the substance of the evidence was made known to the court by offer or was apparent from the context within which questions were asked.~~

(2) if the ruling excludes evidence, a party informs the court of its substance by an offer of proof, unless the substance was apparent from the context.

(b) Not Needing to Renew an Objection or Offer of Proof. Once the court rules definitively on the record at trial, a party need not renew an objection or offer of proof to preserve a claim of error for appeal.

~~(b) Record of offer and ruling. The court may add any other or further statement which shows the character of the evidence, the form in which it was offered, the objection~~

~~made, and the ruling thereon. It may direct the making of an offer in question and answer form.~~

(c) Court's Statement About the Ruling; Directing an Offer of Proof. The court may make any statement about the character or form of the evidence, the objection made, and the ruling. The court may direct that an offer of proof be made in question-and-answer form.

~~(c) Hearing of jury. In jury cases, proceedings shall be conducted, to the extent practicable, so as to prevent inadmissible evidence from being suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.~~

(d) Preventing the Jury from Hearing Inadmissible Evidence. To the extent practicable, the court must conduct a jury trial so that inadmissible evidence is not suggested to the jury by any means, such as making statements or offers of proof or asking questions in the hearing of the jury.

~~(d) Errors affecting substantial rights. Nothing in this rule precludes taking notice of errors affecting substantial rights although they were not brought to the attention of the court.~~

(e) Taking Notice of Error. A court may take notice of an error affecting a substantial right, even if the claim of error was not properly preserved.

EXPLANATORY NOTE

Rule 103 was amended, effective March 1, 2014.

The purpose of subdivision (a) is to give the trial court an adequate basis for making a ruling, and to create a record ~~which~~ that will permit informed appellate review. ~~See generally Signal Drilling Co. v. Liberty Petroleum Co., 226 N.W.2d 148 (N.D. 1975). See~~

~~also State v. Haakenson, 213 N.W.2d 394 (N.D. 1973); Grenz v. Werre, 129 N.W.2d 681 (N.D. 1964). As to rulings made by a court in nonjury cases, the North Dakota Supreme Court has stated that "the~~ In a non-jury case, the introduction of allegedly inadmissible evidence ~~in a nonjury case~~ will rarely be reversible error~~." Signal Drilling, supra, at 153, quoting Schuh v. Allery, 210 N.W.2d 96, 99 (N.D. 1973)~~.

Subdivision (b) was added, effective March 1, 2014, to clarify that a party need not renew an objection or offer of proof once the court "rules definitively" on the record at trial. A definitive ruling is reviewed in light of the facts and circumstances before the trial court at the time of the ruling. If the relevant facts and circumstances change materially after the ruling has been made, those facts and circumstances cannot be relied upon on appeal unless they have been brought to the attention of the trial court by way of a renewed, and timely, objection, offer of proof, or motion to strike.

Subdivision ~~(b)~~ (c) encourages the trial court to add to the record any statement that may aid the appellate court in its review of evidentiary rulings. ~~See the related discussion of Rule 43(c), NDRCivP, in Signal Drilling, supra, at 153.~~

Subdivision ~~(d)~~ (e) is a statement of the doctrine of plain error, but omits the word "plain." The omission was meant to signify that errors affecting substantial rights should be corrected whether or not they are "plain" or "obvious." ~~Cf. Rule 52, NDRCrimP and Rule 61, NDRCivP .~~

Rule 103 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology

consistent throughout the rules.

Sources: Joint Procedure Committee Minutes~~:~~ of January 26-27, 2012, pages 28-30; April 8, 1976, page 14; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev.103~~, Federal Rules of Evidence~~; Rule 103, SBAND proposal.

~~Rules:~~

~~Considered: Rules 43(c) , 46, 51(c), and 61, NDRCivP; Rules 30(c), 51, and 52, NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 43 (Evidence); N.D.R.Civ.P. 46 (Objecting to a Ruling or Order); N.D.R.Civ.P. 51 (Instructions to Jury); N.D.R.Civ.P. 61 (Harmless Error); N.D.R.Crim.P. 30 (Jury Instructions); N.D.R.Crim.P. 51 (Preserving Claimed Error); N.D.R.Crim.P. 52 (Harmless and Obvious Error).

RULE 104. PRELIMINARY QUESTIONS

~~(a) Questions of admissibility generally. Preliminary questions concerning the qualification of a person to be a witness, the existence of a privilege, or the admissibility of evidence, shall be determined by the court, subject to the provisions of subdivision (b). In making its determination it is not bound by the rules of evidence except those with respect to privileges.~~

(a) In General. The court must decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible. In so deciding, the court is not bound by evidence rules, except those on privilege.

~~(b) Relevancy conditioned on fact. Whenever the relevancy of evidence depends upon the fulfillment of a condition of fact, the court shall admit it upon, or in the court's discretion subject to, the introduction of evidence sufficient to support a finding of the fulfillment of the condition.~~

(b) Relevance That Depends on a Fact. When the relevance of evidence depends on whether a fact exists, proof must be introduced sufficient to support a finding that the fact does exist. The court may admit the proposed evidence on the condition that the proof be introduced later.

~~(c) Hearing of jury. Hearings on the admissibility of confessions in criminal cases must be conducted out of the hearing of the jury. Hearings on other preliminary matters in all cases must be so conducted whenever the interests of justice require or, in criminal cases, whenever an accused is a witness and so requests.~~

(c) Conducting a Hearing So That the Jury Cannot Hear It. The court must conduct any hearing on a preliminary question so that the jury cannot hear it if:

(1) the hearing involves the admissibility of a confession;

(2) a defendant in a criminal case is a witness and so requests; or

(3) justice so requires.

~~(d) Testimony by accused. By testifying upon a preliminary matter, an accused does not become subject to cross-examination as to other issues in the case.~~

(d) Cross-Examining a Defendant in a Criminal Case. By testifying on a preliminary question, a defendant in a criminal case does not become subject to cross-examination on other issues in the case.

~~(e) Weight and credibility. This rule does not limit the right of a party to introduce before the jury evidence relevant to weight or credibility.~~

(e) Evidence Relevant to Weight and Credibility. This rule does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence.

EXPLANATORY NOTE

Rule 104 was amended, effective March 1, 1990; March 1, 2014.

Subdivision (a) continues the orthodox practice of placing with the court the responsibility of determining preliminary questions of admissibility of evidence. These determinations as to the competency of evidence involve deciding matters of both law and fact, and the two are often inextricably intertwined so as to render inappropriate a jury determination of the factual questions. A jury cannot be expected to view facts in terms of

the often technical legal standards of competency of evidence. The jury cannot be expected to look at certain evidence and determine whether it is hearsay and, if it is, whether it comes within a recognized hearsay exception. Nor can a jury be expected to ignore evidence which, after consideration, is found to be incompetent and properly excluded.

For these reasons, questions of the competency of evidence are for decision by the court. In making its determination, the court is not bound by rules of evidence, except by rules of privilege, which are given exceptional status because of the need to maintain, totally, the confidentiality they are designed to protect.

Subdivision (b) provides that whenever a preliminary question is one of conditional relevancy of evidence, rather than its competency, the jury is to determine whether the preliminary fact exists. Thus, if the relevancy of a statement depends on whether it was heard by a certain party, the jury may receive the statement subject to fulfillment of the condition that, in fact, it was heard by the appropriate party. This preliminary, conditional question is one of fact that should be determined by a jury. None of the problems which render preliminary questions of competency proper matters for the court's determination exist when questions of conditional relevancy are involved; the question is solely one of the probative value of evidence. Nor is there a need to shield from the jury evidence that is introduced and later found irrelevant because the conditional fact is found not to exist. The jury is likely to recognize the lack of probative force of the evidence once they have found that the condition has not been met and, after being instructed not to consider that evidence, may be assumed to be able to ignore it.

~~Subdivisions (c) and (d) were amended, effective March 1, 1990. The amendments~~

~~are technical in nature and no substantive change is intended.~~

Rule 104 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of January 26-27, 2012, pages 30-31; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 16; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev. 104~~, Federal Rules of Evidence~~; Rule 104(a), Uniform Rules of Evidence (1974); Rule 104, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 29-21-03, 29-21-04.

~~Rules:~~

~~Considered: Rule 43(c), NDRCivP.~~

Cross Reference: ~~Rule~~ N.D.R.Ev. 1008~~, NDREv.~~ (Functions of Court and Jury); N.D.R.Civ.P. 43 (Evidence).

RULE 105. ~~LIMITED ADMISSIBILITY~~ LIMITING EVIDENCE THAT IS NOT ADMISSIBLE AGAINST OTHER PARTIES OR FOR OTHER PURPOSES

~~Whenever evidence which is admissible as to one party or for one purpose but not admissible as to another party or for another purpose is admitted, the court, upon request, shall restrict the evidence to its proper scope and instruct the jury accordingly.~~

If the court admits evidence that is admissible against a party or for a purpose, but not against another party or for another purpose, the court, on timely request, must restrict the evidence to its proper scope and instruct the jury accordingly.

EXPLANATORY NOTE

Rule 105 was amended, effective March 1, 2014.

Evidence is often admissible for one purpose, but not for another. Whenever this occurs the trial judge may decide, under Rule 403, that the prejudicial effect of admitting the evidence outweighs its probative value and exclude the evidence entirely. But total exclusion of evidence which has some probative value is a harsh remedy ~~and, especially in civil cases, as McCormick has suggested, should be used only "where the danger of the jury's misuse of the evidence for the incompetent purpose is great, and its value for the legitimate purpose is slight or the point for which it is competent can readily be proved by other evidence. * * * " McCormick on Evidence 136. Normally, the decision made will be to admit the evidence. In these situations, this~~ This rule requires that a court restrict ~~the~~ use of evidence to its proper scope and instruct the jury accordingly.

Situations in which evidence is admissible as to one party but not to another usually

occur in a joint trial of criminal defendants. ~~Rule 105~~ This rule applies to these situations, but its use must be carefully considered in light of constitutional protections surrounding criminal defendants. ~~For example, it has been held that allowing the admission of statements made by a defendant who refused to testify, exculpating himself and incriminating a co-defendant, was a deprivation of the latter's right to cross-examination and, furthermore, that instructions restricting the use of the evidence were not sufficient to cure the problem of the jury's possible misuse of the evidence. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L. Ed. 2d 476 (1968). But see Harrington v. California, 395 U.S. 250, 89 S. Ct. 1726, 23 L. Ed. 2d 284 (1969), holding that not all violations of Bruton are reversible error.~~

Rule 105 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of January 26-27, 2012, page 31; Joint Procedure Committee Minutes: April 8, 1976, page 17; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev. 105, ~~Federal Rules of Evidence~~; Rule 105, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 45-06-03.

~~Rules:~~

~~Considered: Rules 8, 13, and 14, NDRCrimP.~~

Cross Reference: N.D.R.Ev. 403 (Exclusion of Relevant Evidence on Grounds of

Prejudice, Confusion, or Waste of Time); N.D.R.Crim.P. 8 (Joinder of Offenses or Defendants); N.D.R.Crim.P. 13 (Joint Trial of Separate Cases); N.D.R.Crim.P. 14 (Relief from Prejudicial Joinder).

RULE 106. REMAINDER OF OR RELATED WRITINGS OR RECORDED STATEMENTS

~~Whenever a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which in fairness ought to be considered contemporaneously with it.~~

If a party introduces all or part of a writing or recorded statement, an opposing party may require the introduction, at that time, of any other part, or any other writing or recorded statement, that in fairness ought to be considered at the same time.

EXPLANATORY NOTE

Rule 106 was amended, effective March 1, 1990; March 1, 2014.

Rule 106 ~~is an expression of what Wigmore has termed "the rules of completeness." VII Wigmore on Evidence § 2094, et seq. (3d ed. 1940). The rule~~ is not a rule of admissibility, but rather one dealing with order of proof and, as such, may be considered to be but a specific application of the general dictates of Rule 611.

~~According to the Advisory Committee's note to 106, FRE: "The rule is based on two considerations. The first is the misleading impression created by taking matters out of context. The second is the inadequacy of repair work when delayed to a point later in the trial." 1 Weinstein's Evidence 106-2.~~

~~To avoid these problems, Rule 106 requires that the remainder of or related writings or recordings be admitted at the same time as the principal evidence if the trial court determines, in fairness, that this ought to be done.~~ The standard of fairness gives the trial

court wide discretion under this rule, which accords with the powers of a trial court to regulate the mode and order of proof, generally, granted by Rule 611. ~~Thus, the court need not admit all evidence that may be related to the evidence sought to be introduced. Rules of relevancy, and other rules of admissibility, generally, should guide the trial court's decision.~~

~~Rule 106 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

Rule 106 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of January 26-27, 2012, page 31; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 17; October 1, 1975, page 2. ~~Rule~~ Fed.R.Ev. 106, ~~Federal Rules of Evidence~~; Rule 106, SBAND proposal.

~~Rules:~~

~~Considered: Rules 32(a)(4), NDRCivP; Rule 15(e), N.D.R.Crim.P.~~

Cross Reference: N.D.R.Ev. 611 (Mode and Order of Interrogation and Presentation); N.D.R.Civ.P. 32 (Using Depositions in Court Proceedings) N.D.R.Crim.P. 15 (Depositions).

RULE 11. SIGNING OF PLEADINGS, MOTIONS AND OTHER PAPERS; REPRESENTATION TO COURT; SANCTIONS

(a) Signature. Every pleading, written motion, and other paper must be signed by at least one attorney of record in the attorney's name or by a party personally if the party is self-represented. The paper must state the signer's address, electronic mail address for electronic service, and telephone number. If the signer is an attorney, the paper must contain the attorney's State Board of Law Examiners identification number. Unless a rule or statute specifically states otherwise, a pleading need not be verified or accompanied by an affidavit. The court must strike an unsigned paper unless the omission is promptly corrected after being called to the attorney's or party's attention.

(b) Representations to the court. By presenting to the court a pleading, written motion, or other paper, whether by signing, filing, submitting, or later advocating it, an attorney or self-represented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

(1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;

(2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;

(3) the factual contentions have evidentiary support or will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or are reasonably based on belief or a lack of information.

(c) Sanctions.

(1) In general. If, after notice and a reasonable opportunity to respond, the court determines that Rule 11(b) has been violated, the court may impose an appropriate sanction on any attorney, law firm, or party that violated the rule or is responsible for the violation. Absent exceptional circumstances, a law firm must be held jointly responsible for a violation committed by its partner, associate, or employee.

(2) Motion for sanctions. A motion for sanctions must be made separately from any other motion and must describe the specific conduct that allegedly violates Rule 11(b). The motion, brief, and other supporting papers must be served under Rule 5, but must not be filed or be presented to the court if the challenged paper, claim, defense, contention, or denial is withdrawn or appropriately corrected within 21 days after service or within another time the court sets. The respondent must have 10 days after a motion for sanctions is filed to serve and file and answer brief and other supporting papers. If warranted, the court may award to the prevailing party the reasonable expenses, including attorney's fees, incurred for the motion.

(3) On the court's initiative. On its own, the court may order an attorney, law firm, or party to show cause why conduct specifically described in the order has not violated Rule 11(b).

(4) Nature of a sanction. A sanction imposed under this rule must be limited to what suffices to deter repetition of the conduct or comparable conduct by others similarly situated. The sanction may include nonmonetary directives; an order to pay a penalty into court; or,

if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of part or all of the reasonable attorney's fees and other expenses directly resulting from the violation.

(5) Limitations on monetary sanctions. The court must not impose a monetary sanction:

(A) against a represented party for violating Rule 11(b)(2); or

(B) on its own, unless it issued the show-cause order under Rule 11(c)(3) before voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(6) Requirements for an order. An order imposing a sanction must describe the sanctioned conduct and explain the basis for the sanction.

(d) Inapplicability to discovery. This rule does not apply to disclosures and discovery requests, responses, objections, and motions under Rules 26 through 37.

(e) Limited representation.

(1) Notice. An attorney who assists an otherwise self-represented party on a limited basis must serve a notice of limited representation on each party involved in the matter. The notice must state precisely the scope of the limited representation. An attorney who seeks to act beyond the stated scope of the limited representation must serve an amended notice of limited representation. The attorney must also serve a notice of termination of limited representation on each party involved in the matter.

(2) Filing. If the action is filed, the party who received assistance of an attorney on a limited basis must file the notice of limited representation with the court.

(3) Scope of rule. The requirements of this rule apply to every pleading, written motion and other paper signed by an attorney acting within the scope of a limited representation.

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 1997; August 1, 2001; March 1, 2009; March 1, 2011; March 1, 2014.

Rule 11 governs to the extent Rule 11 and N.D.R.Ct. 3.2, conflict.

Rule 11 was revised, effective March 1, 1996, in response to the 1993 revision of Fed.R.Civ.P. 11. North Dakota's rule differs from the federal rule in the following respects: 1) North Dakota's rule requires attorneys to cite their State Board of Law Examiners identification number when signing papers; and 2) North Dakota's rule does not require allegations or denials to be specifically identified when immediate evidentiary support is lacking.

Subdivision (a) was amended, effective March 1, 2014, to specify that the e-mail address required in documents signed by an attorney or party is the signer’s e-mail address for electronic service.

Subdivision (e) was added, effective March 1, 2009, to permit an attorney to file a notice of limited representation indicating an intent to represent a party for one or more matters in a case, but not for all matters. An attorney must also serve a notice of termination of limited representation when the attorney's involvement ends. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to assist an otherwise self-represented party on a limited basis without undertaking full representation of the party. Under N.D.R.

Prof. Conduct 1.2(c) a lawyer may limit the scope of the representation if a client consents after consultation.

Rule 11 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 25-26, 2013, page 16; September 24-25, 2009, pages 13-14; January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-26; September 28-29, 1995, pages 2-3; April 27-28, 1995, pages 3-4; January 26-27, 1995, pages 8-10; September 29-30, 1994, pages 24-26; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 25-26; January 20, 1984, pages 16-18; September 20-21, 1979, page 7; Fed.R.Civ.P. 11.

Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers); N.D.R.Crt. 11.1 (Nonresident Attorneys), N.D.R.Ct.11.2 (Withdrawal of Attorneys); N.D.R.Prof. Conduct 1.2 (Scope of Representation); N.D.C.C. §§ 28-26-01 (Attorney's Fees by Agreement -- Exceptions -- Awarding Costs and Attorney's Fees to Prevailing Party), and 28-26-31 (Pleadings Not Made in Good Faith).

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 attendance of witnesses;

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

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

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

(H) any mandatory minimum penalty; and

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

(2) Ensuring that a plea is voluntary. Before accepting a plea of guilty, the court must address the defendant personally in open court, unless the defendant's presence is not required under Rule 43(c), and determine that the plea is voluntary and did not result from force, threats, or promises other than promises in a plea agreement. The court must also inquire whether the defendant's willingness to plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney.

(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.

(4) Acknowledgment by Defendant. Before entering judgment on a guilty plea, the court must determine that the defendant either:

(A) acknowledges facts exist that support the guilty plea; or

(B) while maintaining innocence, acknowledges that the guilty plea is knowingly, voluntarily and intelligently made by the defendant and that evidence exists from which the trier of fact could reasonably conclude that the defendant committed the crime.

(c) Plea agreement procedure.

(1) In general. The prosecuting attorney and the defendant's attorney, or the defendant when acting pro se, may discuss and reach a plea agreement. The court must not participate in these discussions. If the defendant pleads guilty to either a charged offense or a lesser or

related offense, the plea agreement may specify that the prosecuting attorney 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 is appropriate; or

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

(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:

(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.

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

(d) Withdrawing a guilty plea.

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

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

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

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

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

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

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

(e) 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 N.D.R.Ev. 410.

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

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

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2006; June 1, 2006; March 1, 2010; March 1, 2014.

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

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

Subdivision (a) provides for the various alternative pleas which the defendant may

enter. This subdivision does not permit a defendant to enter a plea of nolo contendere and differs from the federal rule in that respect.

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

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

Paragraph (b)(1) requires the court to determine if the defendant understands the nature of the charge and requires the court to inform the defendant of and determine that the defendant understands the mandatory minimum punishment, if any, and the maximum possible punishment. The objective is to insure that the defendant knows what minimum sentence the judge MUST impose and the maximum sentence the judge MAY impose and, further, to explain the consecutive sentencing possibilities when the defendant pleads to more than one offense. This provision is included so that the judicial warning effectively serves to overcome subsequent objections by the defendant that the defendant's counsel gave the defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the

defendant waives by a plea of guilty and ensures a knowing and intelligent waiver of counsel is made. A similar requirement is found in Rule 5(b) governing the initial appearance.

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

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

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

Paragraph (b)(4) was added to the rule, effective March 1, 2014, and requires the court to obtain an acknowledgment from the defendant on whether the defendant is admitting guilt or instead maintaining innocence, but pleading guilty because evidence exists from which the trier of fact could reasonably conclude the defendant committed the crime.

Subdivision (c) provides for a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements, provided they are disclosed in open court and subject to acceptance or rejection by the trial judge. It is believed that where the defendant by the defendant's 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. The procedure described in subdivision (c) is designed to prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

Paragraph (c)(1) specifies that both the attorney for the prosecution and the attorney for the defense, or the defendant when acting pro se, participate in plea discussions. It also makes clear that there are three 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 prosecution may agree not to recommend or not oppose the imposition of a particular sentence; or third, the attorney for the prosecution may promise to move for a dismissal of other charges. The court is not permitted to participate in plea discussions because of the possibility that the defendant would believe that the defendant would not receive a fair trial, if no agreement had been reached or the court rejected the agreement, and a subsequent trial ensued before the same judge.

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

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

Paragraph (c)(4) requires the court, if it accepts the plea agreement, to 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 provision serves the dual purpose of informing the defendant immediately that the agreement will be implemented.

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

Paragraph (c)(6) requires that 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 unless it can be shown that for good cause this was not done. 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 prosecution. 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.

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

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

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

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

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

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, page 12; September 27, 2012, pages 18-21; January 29-30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005, pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004, pages 28-30; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26, 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17, 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973, pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20, 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-16, 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-

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

Considered: N.D.C.C. § 31-13-03.

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

RULE 1101. APPLICABILITY OF RULES

(a) To Courts and Magistrates. These rules apply to all courts and magistrates of this state.

(b) To Cases and Proceedings ~~generally~~. These rules apply ~~generally to all~~ in:

(1) civil ~~actions~~ cases and proceedings,

(2) special proceedings, ~~and~~

(3) criminal ~~actions~~ cases and proceedings, and

(4) ~~to~~ contempt proceedings, except those in which the court may act summarily.

(c) Rules ~~of~~ on Privilege. The rules ~~with respect to privileges~~ on privilege apply ~~at~~ to all stages of ~~all actions, cases, and proceedings~~ a case or proceeding.

(d) ~~Rules inapplicable. The rules, other than those with respect to privileges,~~ Exceptions. These rules, except for those on privilege, do not apply ~~in~~ to the following ~~situations~~:

(1) ~~Preliminary questions of fact. The determination of questions of fact preliminary to admissibility of evidence when the issue is to be determined by the court under Rule 104.~~ the court's determination, under Rule 104(a), on a preliminary question of fact governing admissibility;

(2) ~~Grand jury. Proceedings before grand juries.~~ grand-jury proceedings; and

(3) miscellaneous proceedings~~:~~ such as:

~~Proceedings for~~ (A) extradition or rendition;

(B) issuing an arrest warrant, criminal summons, or search warrant;

(C) a preliminary ~~examinations~~ examination in a criminal ~~cases~~ case;

(D) sentencing~~,~~;

(E) ~~or~~ granting or revoking probation or parole; ~~issuance of warrants for arrest, criminal summonses, and search warrants; and~~

(F) ~~proceedings with respect to release on~~ considering whether to release on bail or otherwise~~,~~;

(G) detention hearings~~,~~;

(H) transfer and dispositional hearings in juvenile court~~,~~; ~~and~~

~~(I) pretrial proceedings conducted in accordance N.D.C.C. § 14-17-09, and ch. 27-05.1~~.

(e) Other Rules. A rule prescribed by the Supreme Court may provide for admitting or excluding evidence independently from these rules.

EXPLANATORY NOTE

Rule 1101 was amended, effective March 1, 1994; March 1, 2014.

This rule is patterned after Rule 1101 of the Federal Rules of Evidence. It was modified ~~in committee~~ by deleting reference to proceedings which are unique to the federal courts, and by adding ~~pretrial proceedings under the Uniform Parentage Act, N.D.C.C. § 14-17-09, proceedings before family court counselors under N.D.C.C. ch. 27-05.1~~; detention hearings; juvenile court transfer hearings, and dispositional hearings in juvenile court to the list of miscellaneous proceedings exempted from coverage by ~~subdivision~~ paragraph (d)(3). Dispositional hearings in juvenile court are the counterpart to sentencing of adults and require the same evidentiary treatment. A juvenile court

transfer hearing is equivalent to a preliminary examination in a criminal case which has relaxed standards for admission of evidence.

~~Subdivision~~ Paragraph (d)(3) was amended, effective March 1, 1994, in response to the 1991 amendment to N.D.C.C. § 28-32-06, and Madison v. North Dakota Dep't of Transp., 503 N.W.2d 243 (N.D. 1993). The amendment deletes the provision making the Rules of Evidence inapplicable to administrative proceedings.

Subdivision (e) was added, effective March 1, 2014, to account for situations in which a court rule outside the Rules of Evidence may exclude or admit evidence in a particular situation.

Rule 1101 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, page 35; October 30-31, 1980, pages 29-30; June 3, 1976, page 13; Rule 1101, Federal Rules of Evidence; Rule 1101, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 27-05.1, 27-20, 28-32, 29-10.1, 29-30, 29-30.1.

~~Rules:~~

~~Considered~~ Cross Reference: ~~Rules~~ N.D.R.Crim.P.4 (Arrest Warrant or Summons Upon Complaint), N.D.R.Crim.P. 5.1 (Initial Appearance Before the Magistrate), N.D.R.Crim.P. 32 (Sentencing and Judgment), N.D.R.Crim.P. 41 (Search and Seizure),

N.D.R.Crim.P. 46 (Release from Custody), ~~NDRCrimP~~; ~~Rule~~ N.D.R.App.P. 9~~,~~ ~~NDRAppP~~ (Release in Criminal Case).

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 the personnel system of the North Dakota Judicial System.

Section 5. Scope of Delegable Duties.

(a) A presiding judge, after consultation with the district court judges of the judicial district, may authorize a judicial referee to preside in any individual proceeding or class of proceedings under:

(1) N.D.C.C. ch. 12.1-31.2;

(2) N.D.C.C. title 14, except contested divorce trials;

(3) N.D.C.C. §§ 20.1-01-28 and 20.1-01-29;

(4) N.D.C.C. ch. 27-08.1;

~~(4)~~ (5) N.D.C.C. ch. 27-20;

~~(5)~~ (6) N.D.C.C. ch. 28-25; and

~~(6)~~ (7) N.D.C.C. §§ 50-09-08.6(6) and 50-09-14(2).

(b) A presiding judge, after consultation with the district court judges of the judicial district, may authorize a judicial referee, while serving and acting as a magistrate appointed under N.D. Sup. Ct. Admin. R. 20, to preside in any individual proceeding or class of proceedings under N.D.C.C. § 39-06.1-03.

~~(b)~~ (c) A judicial referee has such other authority of a district court judge as is necessary to carry out the delegated duties, including the issuance of orders to show cause, temporary restraining orders, temporary injunctions, and the power to impose remedial sanctions for contempt of court.

~~(c)~~ (d) The order issued under Subsection (a) of this section must be reduced to writing and signed by the presiding judge of the judicial district. The order must be filed with the clerk of district court of each county of the judicial district. The presiding judge must

send a copy of this document to the State Court Administrator. A copy must be made available to any party upon request.

~~(d)~~ (e) Within the limits set forth in the written order of the presiding judge, district court judges may refer individual cases or classes of cases to a judicial referee by written order.

~~(e)~~ (f) After July 1, 1987, a judicial referee who hears matters under N.D.C.C. ch. 27-20 may not exercise supervision of personnel who supervise juveniles.

Section 6. Geographical Jurisdiction.

Each judicial referee will have jurisdiction only within the judicial district of appointment and is expected to maintain an office as assigned by the presiding judge of the judicial district. A judicial referee may be appointed to temporary duty in another judicial district by the presiding judge of the judicial district, with the consent of the presiding judge of the receiving judicial district or by the Chief Justice under N.D. Const. art. VI, § 3.

Section 7. Proceedings on the Record.

~~Proceedings~~ Except in small claims court cases under N.D.C.C. ch. 27-08.1 and in traffic cases under N.D.C.C. § 39-06.1-03, proceedings must be heard on the record.

Section 8. Removal from Referee.

Any party to a proceeding before a judicial referee is entitled to have the matter heard by a district court judge, if written request is filed by the party within seven days after service of either the initiating documents or other notice informing the party of this right.

Section 9. Standard of Conduct.

The Rules of Judicial Conduct must be observed by each judicial referee.

Section 10. Findings and Order.

(a) The findings and order of the judicial referee have the effect of the findings and order of the district court until superseded by a written order of a district court judge.

(b) Copies of the findings and order together with written notice of the right of review must be promptly served on the parties under N.D.R.Civ.P. 5.

Section 11. Procedure for Review.

(a) Except in small claims court cases under N.D.C.C. ch. 27-08.1 and in traffic cases under N.D.C.C. § 39-06.1-03, ~~A~~ a review of the findings and order of a judicial referee may be ordered at any time by a district court judge and must be ordered if a party files a written request for review within seven days after service of the notice in Section 10(b). The request for review must state the reasons for the review. A party requesting review must give notice to all other parties. A party seeking to respond to a request for review must file a response within 14 days after service of notice of the request.

(b) The review by a district court judge must be a de novo review of the record. The district court may:

(1) adopt the referee's findings;

(2) remand to the referee for additional findings; or

(3) reject the referee's findings.

(c) If the district court judge rejects the referee's findings, the court shall issue its own findings of fact, with or without a hearing.

EXPLANATORY NOTE

Section 5 was amended, effective September 1, 2013, to reflect enactment of 2013

House Bill No. 1075 [2013 N.D. Sess. Laws ch. 241, § 1], which added three categories of cases to the statutory list of proceedings that may be delegated to a judicial referee by a presiding judge: disorderly conduct restraining order cases, noncriminal game and fish violations, and review of administrative license suspensions for nonpayment of child support.

Section 5 was amended, effective March 1, 2012, to allow a presiding judge to authorize a judicial referee to preside in proceedings involving disorderly conduct restraining orders.

Section 5 was amended, effective March 1, 2014, to allow a presiding judge to authorize a judicial referee to preside in small claims and traffic court proceedings.

Section 7 was amended, effective March 1, 2014, to clarify that small claims and traffic court matters decided by a judicial referee are not heard on the record.

Section 8 was amended, effective March 1, 2011, to increase the time to request a district court judge from five to seven days after service of initiating documents.

Section 11(a) was amended, effective March 1, 2011, to increase the time to request a review from a district court judge from five to seven days after service of the right to review. The time to respond to a request for review was increased from 10 to 14 days after service of notice of the request.

Section 11(a) was amended, effective March 1, 2014, to clarify that small claims and traffic court matters decided by a judicial referee are not reviewable or appealable.

Source: Joint Procedure Committee Meeting Minutes of September 26, 2013, pages ___; January 31-February 1, 2013, page 29; September 23-24, 2010, pages 14-15, 21; April 29-30, 2010, page 21; April 24-25, 2003, page 3; January 30-31, 2003, pages 21-23;

April 25-26, 2002, pages 16-17; May 6-7, 1999, pages 14-15; April 29-30, 1993, page 2. Court Services Administration Committee Meeting Minutes of May 17, 1985, pages 2-4. Family Caselaw Referee Study Subcommittee of Court Services Administration Committee Meeting Minutes of April 19, 1985, pages 3-8; March 15, 1985, pages 1-6; February 22, 1985, pages 1-9; January 11, 1985, pages 2-8; and December 17, 1984, page 5. N.D. Const. art. VI, § 3; and N.D.C.C. § 27-05-30.

[Adopted as emergency rule effective June 13, 1985; readopted September 17, 1985; amended effective March 1, 1994; January 1, 1995; March 1, 2000; March 1, 2003; March 1, 2004; March 1, 2011; March 1, 2012; June 1, 2012; September 1, 2013; March 1, 2014.]

RULE 201. JUDICIAL NOTICE OF ADJUDICATIVE FACTS

~~(a) Scope of rule. This rule governs only judicial notice of adjudicative facts.~~

(a) Scope. This rule governs judicial notice of an adjudicative fact only, not a legislative fact.

~~(b) Kinds of facts. A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.~~

(b) Kinds of Facts That May Be Judicially Noticed. The court may judicially notice a fact that is not subject to reasonable dispute because it:

(1) is generally known within the trial court's territorial jurisdiction; or

(2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.

~~(c) When discretionary. A court may take judicial notice, whether requested or not.~~

~~(d) When mandatory. A court shall take judicial notice if requested by a party and supplied with the necessary information.~~

(c) Taking Notice. The court:

(1) may take judicial notice on its own; or

(2) must take judicial notice if a party requests it and the court is supplied with the necessary information.

(d) Timing. The court may take judicial notice at any stage of the proceeding.

~~(e) Opportunity to be heard. A party is entitled upon timely request to an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed. In the absence of prior notification, the request may be made after judicial notice has been taken.~~

(e) Opportunity to Be Heard. On timely request, a party is entitled to be heard on the propriety of taking judicial notice and the nature of the fact to be noticed. If the court takes judicial notice before notifying a party, the party, on request, is still entitled to be heard.

~~(f) Time of taking notice. Judicial notice may be taken at any stage of the proceeding.~~

~~(g)~~ (f) Instructing jury. The court ~~shall~~ must instruct the jury to accept as conclusive any fact judicially noticed.

EXPLANATORY NOTE

Rule 201 was amended, effective March 1, 2014.

Rule 201 is the only rule dealing with the subject of judicial notice and, by the terms of subdivision (a) is limited in application to the judicial notice of adjudicative facts, i.e., the facts of the particular case before the courts, facts that are normally the subject of proof by formal introduction of evidence. Judicial notice of legislative facts, facts that aid the court in the interpretation and application of law and policy, is not governed by this or any other rule of evidence. ~~This represents a change in North Dakota law, for under N.D.C.C. ch. 31-10, both adjudicative and legislative facts were subject to the constraints of the doctrine of judicial notice. These rules contemplate that notice of legislative facts must be freely taken, without the requirement of first showing that the fact is one of common knowledge or capable of easy and accurate verification. To do otherwise would stifle the growth and~~

~~development of decisional law.~~

~~Subdivision (b) provides that the kinds of adjudicative facts which may be judicially noticed must be either (1) generally known or (2) capable of accurate and ready determination. The first basis for taking judicial notice, i.e., that a fact is one of common knowledge, is perhaps more familiar, but the second is clearly recognized by practice if not always by name. See, e.g., Boehm v. Burleigh County, 130 N.W.2d 170 (N.D. 1964). See also McCormick on Evidence § 330. If the function of judicial notice is to remove from the stricture of formal proof facts that are clearly beyond dispute, then either basis for the exercise of judicial notice is valid.~~

~~Subdivisions (c) and (d) provide that a court may take judicial notice on its own motion and must take judicial notice of a fact when requested by a party to do so, provided, of course, that the basic requirements for taking judicial notice are met.~~

~~It should be noted that although the taking of judicial notice, under subdivision (c), is discretionary if not requested by a party, the scope of appellate review of a trial court's decision is not limited to determining whether the trial court's decision was "clearly erroneous," the usual standard applied in reviewing discretionary decisions. As stated in 1 Weinstein's Evidence Para 201(04) at 201-33-34:~~

~~"The grant of discretionary authority does not mean, as it does in other situations, that the trial judge's determination is virtually insulated from appellate review. An appellate court is in as good a position as the trial court to ascertain the degree of probability of a judicially noticeable fact. There is no need for the appellate court to defer to the trial judge's feel for the case. Accordingly, subdivision (b) must be read in conjunction with subdivision (f)~~

authorizing judicial notice 'at any stage of the proceedings.' If the trial judge failed to notice a fact which the appellate court feels was a proper subject for judicial notice, the appellate court may notice the fact despite the grant of discretionary authority. This does not mean, however, that 'judicial notice * * * should be used as a device to correct on appeal an almost complete failure to present adequate evidence to the trial court.'

"Appellate courts have adequate power in the reverse situation where they disagree with the trial judge's recognition of a fact. The reviewing court may reverse if it finds that the fact was neither 'generally known' nor 'verifiable.'"

Subdivision (e) grants to parties the basic right to be heard concerning the taking of judicial notice. Whenever judicial notice is to be taken pursuant to a party's request, all parties will be notified of that fact and may exercise their right to be heard on the issue. Whenever a judge contemplates taking judicial notice of a fact on his own motion, he should clearly inform the parties of his intention and provide an opportunity for hearing of the issue. If the court fails to give proper notification, it must provide an opportunity for objection after judicial notice has been taken.

The object of this subdivision is to achieve procedural fairness. No special form of notice is required nor is there a need for a formal hearing. If the parties, in fact, are given notice and an opportunity to be heard, the requirements of this subdivision will have been satisfied.

Under subdivision (f), judicial notice may be taken at any stage of a proceeding. This is in accord with North Dakota law and practice under which the Supreme Court has traditionally taken judicial notice of certain facts. See, e.g., Wyldes v. Patterson, 31 N.D.

~~282, 153 N.W. 630 (1915).~~

~~It should be noted that the requirements of notice and an opportunity to be heard contained in subdivision (e) apply to appellate courts contemplating taking original judicial notice. A hearing of the issues may be afforded during oral argument or, if oral argument has been completed, supplemental briefs may be requested.~~

~~There has been a continuing debate as to whether parties should be allowed to controvert a judicially noticed fact through the introduction of adverse evidence. See 1 Weinstein's Evidence Para 201(07). The arguments advanced in favor of admitting contrary evidence are made by those who would treat judicial notice as a method of tentatively establishing facts that have not been challenged, but are not necessarily beyond dispute. Moreover, the proponents of admitting contrary evidence would include within the realm of judicial notice legislative facts, to which this rule does not apply. See, e.g., Thayer, A Preliminary Treatise on Evidence, 308 (1898).~~

~~Under this rule, a judicially noticed fact may not be controverted and the court is to instruct the jury that they shall accept those facts as conclusive.~~

~~The position that judicially noticed facts may not be controverted is taken under this rule primarily because of the narrow scope of application of the rule. The rule applies only to adjudicative facts that are not subject to reasonable dispute. Thus, the determination that a fact is beyond dispute is made before the fact is judicially noticed. It would serve no useful purpose to later admit evidence contrary to the noticed fact.~~

Rule 201 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of January 26-27, 2012, pages 31-32; April 8, 1976, pages 17, 18; October 1, 1975, page 3. Rule 201, Federal Rules of Evidence; Rule 201(g), Uniform Rules of Evidence (1974); Rule 201, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-10-01, 31-10-02.

Considered: N.D.C.C. §§ 28-29-06, 31-10-03, 31-10-04, 31-10-05, 32-25-04, 39-08-01, 40-01-03, 40-18-19.

~~Rules:~~

~~Considered: Rule 44.1, NDRCivP; Rule 26.1, NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 44.1 (Determining Foreign Law); N.D.R.CrimP. 26.1 (Foreign Law Determination).

RULE 26. COMPUTING AND EXTENDING TIME

(a) Computing time. The following rules apply in computing any period of time specified in these rules or in any local rule, court order, or in any 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 26(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 26(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;

(B) for filing by mail or third-party commercial carrier, at the latest time for the method chosen for delivery to the post office or third-party commercial carrier; and

(C) 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.

(6) As used in this rule, "legal holiday" means a day specified as a holiday in N.D.C.C.§ 1-03-01.

(b) Extending time. For good cause, the court may extend the time prescribed by these rules or by its order to perform any act, or may permit an act to be done after that time expires. The court may not extend the time to file a notice of appeal, except as authorized by law.

(c) Additional time after service by mail or third-party commercial carrier. When a

party may or must act within a specified time after service, three days must be added after the period would otherwise expire, unless the paper is delivered on the date of service stated in the proof of service. For purposes of this rule, a paper that is served electronically is not treated as delivered on the date of service stated in the proof of service.

EXPLANATORY NOTE

Rule 26 was amended, effective January 1, 1988; March 1, 1999; March 1, 2001; March 1, 2003; March 1, 2008; March 1, 2011. The explanatory note was amended, effective March 1, 2014.

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.

Under subdivision (b), amended, effective March 1, 2003, any request for an extension of time should be made within the time originally prescribed or within an extension previously granted.

Subdivision (c) was amended, effective March 1, 2008, to clarify that, unless a paper is delivered on the date of service as stated in the proof of service, three days are added to the prescribed period.

Subdivision (c) was amended, effective March 1, 2011, to clarify how to count the three-day extension for service by mail or commercial carrier. Under the amendment, a

party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension, but applying the other time computation provisions of these rules. After the party has identified the date on which the prescribed period would expire but for the operation of subdivision (c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

Rule 26 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 26. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 25-26, 2013, pages 26-27; April 29-30, 2010, page 20; January 25, 2007, pages 17-19; September 27-28, 2001, pages 4-5; January 27-28, 2000, pages 16-17; January 29-30, 1998, page 21; February 19-20, 1987, page 7; September 18-19, 1986, page 15; May 25-26, 1978, pages 11-12. Fed.R.App.P. 26.

Cross Reference: N.D.R.App.P. 25 (Filing and Service); N.D. Sup. Ct. Admin. Order 14 (Electronic Filing Pilot Project).

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.~~

If a person with limited English proficiency or a deaf person is involved in a proceeding as a defendant, witness, person with legal decision-making authority, or person with a significant legal interest in the matter, the court must provide an interpreter.

EXPLANATORY NOTE

Rule 28 was amended, effective March 1, 2006; March 1, 2014.

~~Rule 28 is an adaptation of F.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.~~

Rule 28 was amended, effective March 1, 2014, to reflect the American Bar Association Standards for Language Access in Courts.

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 or deaf defendants, witnesses, persons with legal decision-making authority, or persons with a significant legal interest in the matter 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 terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 25-26, 2013, pages 16-18; January 31-February 1, 2013, pages 12-15; January 27-28, 2005, pages 22-23; October 17-20, 1972, pages 32-33; February 20-21, 1969, pages 4-5; Fed.R.Crim.P. 28.

Statutes Affected:

Superseded ~~for criminal process only~~: N.D.C.C. § 31-01-11; 31-01-12

Considered: N.D.C.C. §§ 28-26-06, ~~31-01-11,~~ ch. ~~29-20~~ 28-33.

Cross References: N.D.R.Ev. 604 (Interpreters); N.D.R.Ev. 706 (Court Appointed Experts); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D. Sup. Ct. Admin. R. 50 (Court Interpreter Qualifications and Procedures).

RULE 301. PRESUMPTIONS IN ~~GENERAL IN~~ A CIVIL ~~ACTIONS AND PROCEEDINGS~~ CASE GENERALLY

(a) Effect. In ~~all civil actions and proceedings not otherwise provided for by statute or by these rules~~ a civil case, unless a statute or these rules provide otherwise, if facts giving rise to a presumption are established by credible evidence, the presumption substitutes for evidence of the existence of the fact presumed.

(b) Rebuttal. ~~until~~ If the trier of fact finds from credible evidence that the fact presumed does not exist, ~~in which event~~ the presumption is rebutted and ceases to operate. A party against whom a presumption is directed has the burden of proving that the nonexistence of the presumed fact is more probable than its existence.

~~(b)~~ (c) Inconsistent presumptions. If presumptions are inconsistent, the presumption applies that is founded upon weightier considerations of policy. If considerations of policy are of equal weight neither presumption applies.

EXPLANATORY NOTE

Rule 301 was amended, effective March 1, 2014.

Rule 301 deals with presumptions, prescribing their effect in all civil proceedings not otherwise provided for by law. It provides that a presumption imposes upon the party against whom it is directed the burden of proving its non existence. Rule 301 differs substantially from Fed.R.Ev. 301.

The term "presumption" has been ascribed various meanings, but in the last analysis it is found that very little may be said about presumptions that is agreeable to all. Given the

effect of presumptions under this rule, a presumption may be stated to be a rule of law that requires the trier of fact to draw a particular inference from a particular fact, or from particular evidence, unless and until the truth of the inference is disproved. ~~Compare the definition of presumption of law found in Black's Law Dictionary at 1349 (rev. 4th ed. 1968).~~

Thus, a presumption is not evidence, it is a legal method of dealing with evidence. Nor may a presumption be said to be a mere inference, for an inference always draws its force from the logical, probative value of facts. A presumption is given its effect because of legal considerations, which may be grounded in probability, but are as likely to be based upon trial expedience, access to evidence, or legal or social policies. For example, the presumption that a letter, duly posted, is received may be said to be based upon probability and also upon the inherent difficulty a party would have in proving receipt by other means. The presumption that a child born into a marriage is legitimate is based largely on the socially desirable policy of avoiding "the visitation upon the child of the sins of the parents." McCormick on Evidence, § 343 at 811 (2d ed. 1972).

The function of a presumption is often stated in terms of its effect upon the burden of proof at trial. According to one theory, espoused by Morgan (Morgan, Some Problems of Proof, 74-81 (1956)), a presumption operates to "shift" the original burden of proof to the opponent of the presumption.

Under another theory, espoused by Thayer and often called the "bursting bubble" theory, a presumption imposes upon its opponent a burden of going forward with evidence to rebut the presumption; once this is done, the presumption disappears.

The procedural consequences that result from the application of the two theories are

these: Under either theory, a presumption avoids a directed verdict against its proponent at the close of his case and, if no evidence is later introduced to rebut the presumption, entitles the proponent to a directed verdict at the close of all the evidence. The differences arise when some evidence is introduced that is contrary to the presumption.

If the burden of proof is said to be fixed upon the opponent of the presumption, then he must introduce enough evidence to carry his burden. If the trier of fact reaches the conclusion that the opposing "evidence" is equal, then a verdict must be rendered in favor of the proponent of the presumption.

If a presumption is said to impose a burden of going forward with evidence to rebut the presumption, the amount of evidence that must be introduced by the opponent to avoid a directed verdict against him is that amount which convinces the judge that reasonable jurors could find contrary to the presumption. Once this is accomplished, the presumption is of no force and the issue is decided on the probative force of the evidence itself. If the evidence is in even balance, then the party who had the burden of proof, originally, must lose, even though his case may have been initially aided by a presumption.

It should be noted that, in all cases, presumptions are disputable and may be overcome by contrary evidence. "Conclusive presumptions," as contained in N.D.C.C. § 31-11-02, are not presumptions at all, but rather legislative statements of substantive law.

Rule 301, as an expression of the theory expressed by Morgan, provides that a presumption imposes upon the party against whom it is directed the burden of proving its non existence. This comports with the effect given presumptions, by Rule 301, Uniform Rules of Evidence (1974); it gives presumptions a stronger effect than they are given under the

comparable Federal Rule of Evidence, which imposes only a burden of producing evidence to rebut a presumption. It was felt that this is desirable, in light of the important social considerations which give rise to presumptions.

By giving this effect to presumptions, Rule 301 comports with past interpretations of North Dakota law. See Dick v. New York Life Ins. Co., 359 U.S. 437, 79 S. Ct. 921, 3 L. Ed. 2d 935 (1959); Svihovec v. Woodmen Accident Co., 69 N.D. 259, 285 N.W. 447 (1939). But see Fancher v. North Dakota Workmen's Compensation Bureau, 123 N.W.2d 105 (N.D. 1963); Johnson v. Johnson, 104 N.W.2d 8 (N.D. 1960). See also North Dakota Jury Instruction 1030 (October 1, 1970).

Rule 301 was amended, effective March 1, 2014, to divide former subdivision (a) into two subdivisions, (a) and (b).

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 11-12; June 4, 1976, page 18; June 3, 1976, page 1; October 1, 1975, page 3. Rule 301, Uniform Rules of Evidence (1974); Rule 301, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 31-11-01.

Considered: N.D.C.C. §§ ~~4-09-05, 4-10-03, 4-10-12, 4-11-19, 4-14-03,~~ 4-14-04, 4-22-15, 6-01-31, 6-03-32, 6-09.4-21, ~~7-01-12, 7-08-02, 7-08-03,~~ 9-03-04, 9-05-10, 9-07-19, 9-10-04, 10-04-19, ~~10-07-03, 10-23-13, 10-24-31, 10-28-09,~~ 11-13-08, 11-15-16, 11-18-09, 11-20-01, 11-20-05, ~~12-44-18, 13-01-06,~~ 14-03-24, ~~14-07-17,~~ 14-05-16, 14-07-17, ~~14-17-04(2), 15-29-10, 15-51-10,~~ 19-01-10, 19-01-11, ~~19-02-17,~~ 20.1-13-13, ~~23-02-40,~~ 23-24-04, 24-07-15, ~~26-08-07, 26-12-09, 26-12-15, 26-15-04, 26-15-26, 26-29-12,~~ 28-01-07, 28-01-12, ~~28-20-31,~~

28-23-12, 31-09-08, 31-11-02, 31-11-03, 31-11-04, 31-11-04.1, 32-03-09.1, 32-04-09, 32-04-18, 32-18-03, 32-19-26, 32-25-03, ~~33-04-17,~~ 35-05-03, 35-21-05, 35-22-16, ~~36-09-08,~~ 36-21-12, ~~36-09-20,~~ 37-01-12, 39-03-15, 39-20-07, 40-01-10, 40-02-12, 40-04-06, ~~40-42-01, 40-58-08,~~ 41-03-53, 41-03-66, 41-08-05, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-11-10, 43-17-11, ~~43-17-23,~~ 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17, ~~45-07-06,~~ 47-09-06, 47-10-13, 47-11-10, 47-14-03, 47-16-05, 47-16-06, 47-19-06, 47-19-12, ~~47-19-14.2, 48-02-15,~~ 49-06-14, 49-19-16, 57-02-01, ~~57-24-29,~~ 57-38-46, 57-40.2-05, 57-40.3-08, ~~57-52-16, 57-53-06, 59-01-16,~~ 60-01-24, 61-02-34, 61-04-25, 61-05-19, 61-16-06~~, 62-03-04~~.

RULE 302. ~~APPLICABILITY OF FEDERAL LAW IN CIVIL ACTIONS AND PROCEEDINGS~~ APPLYING FEDERAL LAW TO PRESUMPTIONS IN CIVIL CASES

~~In civil actions and proceedings, the effect of a presumptions respecting a fact which is an element of a claim or defense as to which federal law supplies the rule of decision is determined in accordance with federal law.~~

In a civil case, federal law governs the effect of a presumption regarding a claim or defense for which federal law supplies the rule of decision.

EXPLANATORY NOTE

Rule 301 was amended, effective March 1, 2014.

~~"Parallel jurisdiction in state and federal courts exists in many instances. The modification of Rule 302 is made in recognition of this situation. The rule prescribes that when a federally created right is litigated in a state court, any prescribed federal presumption shall be applied." Comment, Rule 302, Uniform Rules of Evidence (1974).~~

Rule 302 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 12-13; June 4, 1976, page 28; April 8, 1976, page 19. Rule 302, Uniform Rules of Evidence (1974).

RULE 303. PRESUMPTIONS IN CRIMINAL CASES

[Reserved]

EXPLANATORY NOTE

~~(~~Presumptions in criminal cases are governed by N.D.C.C. § 12.1-01-03~~)~~.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 13; April 8, 1976, pages 19, 20; October 1, 1975, page 3.

Statutes Affected:

Considered: N.D.C.C. §§ 5-01-08.2, 12.1-01-03, 12.1-28-01, 12.1-29-02, 14-02.2-01, 16-20-08, 19-03.1-37, 19-05-04, 19-20.1-17, 20.1-01-14, 20.1-01-20, 20.1-05-05, 31-01-09, 34-07-04, 36-12-04, 37-01-12.

RULE 401. ~~DEFINITION OF "~~ TEST FOR RELEVANT EVIDENCE~~"~~

~~"Relevant evidence" means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.~~

Evidence is relevant if:

(a) it has any tendency to make a fact more or less probable than it would be without the evidence; and

(b) the fact is of consequence in determining the action.

EXPLANATORY NOTE

Rule 401 was amended, effective March 1, 2014.

~~This definition of "relevant evidence" has been adopted by the North Dakota Supreme Court. State v. Hendrickson, 240 N.W.2d 846, Syllabus Para2 (N.D. 1976). The definition presents no conceptual departures from traditional thoughts on the subject of relevancy.~~ The language of Rule 401 is intended to reflect the realization that stringent legal standards cannot be meaningfully applied to govern determinations of relevancy and, consequently, that the area is one best left to the wide discretion of the trial court.

~~One point merits attention, and that is that evidence may be relevant even though directed toward a fact that is not in dispute. As stated in the Advisory Committee's Note to Rule 401, Federal Rules of Evidence:~~

~~"While situations will arise which call for the exclusion of evidence offered to prove a point conceded by the opponent, the ruling should be made on the basis of such~~

~~considerations as waste of time and undue prejudice (see Rule 403), rather than under any general requirement that evidence is admissible only if directed to matters in dispute. Evidence which is essentially background in nature can scarcely be said to involve disputed matter, yet it is universally offered and admitted as an aid to understanding."~~

Rule 401 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 13; April 8, 1976, page 19; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 401~~, Federal Rules of Evidence~~; Rule 401, SBAND proposal.

RULE 402. GENERAL ADMISSIBILITY OF RELEVANT EVIDENCE ~~GENERALLY ADMISSIBLE; IRRELEVANT EVIDENCE INADMISSIBLE~~

~~All relevant evidence is admissible, except as otherwise provided by the constitutions of the United States or the state of North Dakota, by any applicable Act of Congress, by statutes of North Dakota, by these rules, or by other rules adopted by the supreme court of North Dakota. Evidence which is not relevant is not admissible.~~

Relevant evidence is admissible unless any of the following provides otherwise:

(a) the United States Constitution;

(b) the North Dakota Constitution;

(c) a federal statute;

(d) a North Dakota statute;

(e) these rules; or

(f) other rules prescribed by the Supreme Court of North Dakota.

Irrelevant evidence is not admissible.

EXPLANATORY NOTE

Rule 402 was amended, effective March 1, 2014.

The focal point of this rule is not the statement that all relevant evidence is admissible and irrelevant evidence is inadmissible, but rather that the many exceptions to this general statement are recognized and left undisturbed. Thus, for example, relevant evidence may be excluded to assure the continued recognition of a defendant's constitutional rights in a criminal action (such as Miranda); to further the socially desirable policies underlying the

privileges of Article V of these rules; or to avoid undue delay, prejudice, or confusion of the issues (Rule 403).

Rule 402 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 13-14; April 8, 1976, pages 19, 20; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev.402~~, Federal Rules of Evidence~~; Rule 402, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12-59-04, 12.1-04-05, 23-01-15, 25-13-04, 25-14-01, 27-20-54, 29-29.1-05, 39-06.1-03, 39-16-03, 39-16-11, 41-03-52, 50-09-13, 50-10-08, 50-24-31.1, 65-01-11.

RULE 403. ~~EXCLUSION OF~~ EXCLUDING RELEVANT EVIDENCE ~~ON GROUNDS OF~~ FOR PREJUDICE, CONFUSION, ~~OR~~ WASTE OF TIME, OR OTHER REASONS

~~Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.~~

The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following:

(a) unfair prejudice;

(b) confusing the issues;

(c) misleading the jury;

(d) undue delay;

(e) wasting time; or

(f) needlessly presenting cumulative evidence.

EXPLANATORY NOTE

Rule 403 was amended, effective March 1, 2014.

Rule 403 is an adaptation of Rule 403 of the Federal Rules of Evidence. ~~It does not change North Dakota law, but rather codifies it. Evidence has been traditionally excluded on grounds of remoteness, see, e.g., In re Graf's Estate, 119 N.W.2d 478 (N.D. 1963), and on grounds that its probative value is not commensurate with the time required for its use as evidence. See Jones v. Boeing Co., 153 N.W.2d 897 (N.D. 1967).~~ The rule vests wide

discretion in the trial court to control the introduction of evidence.

It should be noted that surprise is not listed as a ground for exclusion. ~~It has been stated that granting~~ Granting a continuance is the proper remedy for unfair surprise. ~~See Advisory Committee's Note to Rule 403, FRE.~~

Rule 403 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 14; April 8, 1976, page 20; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev.403~~, Federal Rules of Evidence~~; Rule 403, SBAND proposal.

RULE 404. CHARACTER EVIDENCE; ~~NOT ADMISSIBLE TO PROVE CONDUCT,~~ ~~EXCEPTIONS: OTHER~~ CRIMES OR OTHER ACTS

(a) Character Evidence ~~Generally~~. ~~Evidence of a person's character or a trait of character is not admissible for the purpose of proving action in conformity therewith on a particular occasion, except:~~

(1) Prohibited Uses. Evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait.

(2) Exceptions for a Defendant or Victim in a Criminal Case. The following exceptions apply in a criminal case:

~~(1) Character of accused. Evidence of a pertinent trait of character offered by an accused, or by the prosecution to rebut the same, or if evidence of a trait of character of the alleged victim of the crime is offered by an accused and admitted under Rule 404(a)(2), evidence of the same trait of character of the accused offered by the prosecution;~~

(A) a defendant may offer evidence of the defendant's pertinent trait, and if the evidence is admitted, the prosecutor may offer evidence to rebut it;

~~(2) Character of victim. Subject to the limitations imposed by Rule 412, evidence of a pertinent trait of character of the victim of the crime offered by an accused, or by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the victim offered by the prosecution in a homicide case to rebut evidence that the victim was the first aggressor;~~

(B) subject to the limitations in Rule 412, a defendant may offer evidence of an alleged victim's pertinent trait, and if the evidence is admitted, the prosecutor may:

(i) offer evidence to rebut it; and

(ii) offer evidence of the defendant's same trait; and

(C) in a homicide case, the prosecutor may offer evidence of the alleged victim's trait of peacefulness to rebut evidence that the victim was the first aggressor.

~~(3) Character of witness. Evidence of the character of a witness, as provided in Rules 607, 608, and 609.~~

(3) Exceptions for a Witness. Evidence of a witness's character may be admitted under Rules 607, 608, and 609.

(b) ~~Other~~ Crimes, Wrongs, or Other Acts. ~~Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. However, it may be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, provided that the prosecution in a criminal case shall provide reasonable notice in advance of trial, or during trial if the court excuses pretrial notice on good cause shown, of the general nature of any such evidence it intends to introduce at trial.~~

(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character.

(2) Permitted Uses; Notice in a Criminal Case. This evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge,

identity, absence of mistake, or lack of accident. The prosecutor must:

(A) provide reasonable notice of the general nature of any such evidence that the prosecutor intends to offer at trial; and

(B) do so before trial – or during trial if the court, for good cause, excuses lack of pretrial notice.

EXPLANATORY NOTE

Rule 404 was amended, effective March 1, 1990, March 1, 1994, March 1, 2008; March 1, 2014.

~~The general rule that character evidence may not be introduced to show that a person acted in conformity to character is compatible with present North Dakota case law.~~ Character evidence is not admissible when its purpose would be to prove circumstantially how a person acted on a particular occasion. Whenever the character of a person is in issue, as in a defamation case, this exclusion does not apply.

~~Subdivision (a)(1)~~ Paragraph (a)(2) allows the accused to offer circumstantial evidence of character. Traditionally, this has been allowed, for the objection to character evidence in general is not that it has no relevancy but that its probative value, when weighed against possible prejudice, does not warrant admission. If the accused offers such evidence, the issue of prejudice is no longer a factor.

~~Subdivision~~ Paragraph (a)~~(1)~~(2)(B) was amended, effective March 1, 2008, to add clarifying language on victim character evidence.

~~Except when Rule 412 applies, subdivision (a)(2) allows character evidence of the victim of a crime to be introduced by an accused and evidence of peacefulness of a homicide~~

~~victim by the prosecution to rebut evidence that the victim was the aggressor.~~

~~Subdivision~~ Paragraph (a)(3) provides that, in dealing with impeachment of a witness, Rules 607, 608, and 609 state the applicable rules. The present rule retains its force, and should be consulted whenever the witness is also a party whose actions are sought to be proved.

Subdivision (b) restates the general rule, but continues to provide that character evidence offered for other purposes, e.g., motive, intent, or identity, is admissible. But the mere labeling of such evidence does not automatically bring admission.

~~Rule 404 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

Subdivision (b) was amended, effective March 1, 1994, to follow the 1991 federal amendment, by adding a pretrial notice requirement in criminal cases. However, unlike the federal rule, North Dakota's amended rule does not place the burden of requesting notice upon the accused. Because the notice requirement serves as a condition precedent to admissibility of 404(b) evidence, the offered evidence is inadmissible if the court decides that the notice requirement has not been met. The amendment is not intended to redefine what evidence would otherwise be admissible under Rule 404(b).

Rule 404 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, page 14; January 25, 2007, pages 10-11; September 28-29, 2006, pages 13-14; April 29-30, 1993, page 10; January 28-29, 1993, pages 11-12; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 20, 21. Fed.R.Ev. 404; Rule 404, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-20-14, 12.1-20-15, 27-20-33, 27-20-52, 42-02-07.

Cross Reference: N.D.R.Ev. 412 (Admissibility of Alleged Victim's Sexual Behavior or Alleged Sexual Predisposition in Criminal Proceeding), 607 (Who May Impeach), 608 (Evidence of Character and Conduct of Witness), and 609 (Impeachment by Evidence of Conviction of Crime).

RULE 405. METHODS OF PROVING CHARACTER

~~(a) Reputation or opinion. In all cases in which evidence of character or a trait of character of a person is admissible, proof may be made by testimony as to reputation or by testimony in the form of an opinion. On cross-examination, inquiry is allowable into relevant specific instances of conduct.~~

(a) By Reputation or Opinion. When evidence of a person's character or character trait is admissible, it may be proved by testimony about the person's reputation or by testimony in the form of an opinion. On cross-examination of the character witness, the court may allow an inquiry into relevant specific instances of the person's conduct.

~~(b) Specific instances of conduct. In cases in which character or a trait of character of a person is an essential element of a charge, claim, or defense, proof may also be made of specific instances of the person's conduct.~~

(b) By Specific Instances of Conduct. When a person's character or character trait is an essential element of a charge, claim, or defense, the character or trait may also be proved by relevant specific instances of the person's conduct.

EXPLANATORY NOTE

Rule 405 was amended, effective March 1, 1990; March 1, 2014.

Rule 405 deals only with the method of proving character, once the admissibility of the character evidence has been determined. The three methods approved by this rule are (1) reputation, (2) opinion, and (3) specific instances of conduct.

~~Of these three, evidence of a person's general reputation has been admissible to prove~~

~~character in North Dakota, but there is some case law which implies that opinion evidence is not admissible. See State v. Nierenberg, 80 N.W.2d 104 (N.D. 1956). This rule abolishes the distinction between reputation and opinion evidence. Both are considered acceptable methods of proving character. This change has been advocated by commentators for some time, and is believed to reflect a more accurate view of the relative values of opinion and reputation evidence of character. As Wigmore has stated:~~

~~"The Anglo-American rules of evidence have occasionally taken some curious twistings in the course of their development; but they have never done anything so curious in the way of shutting out evidential light as when they decided to exclude the person who knows as much as humanly can be known about the character of another, and have still admitted the secondhand, irresponsible product of multiplied guesses and gossip which we term 'reputation.' " VII Wigmore on Evidence § 1986 at 167 (3d ed. 1940).~~

~~The third method of proving character, specific instances of conduct, is perhaps the most probative or revealing of the three, but it is also the most likely to create confusion or undue prejudice in the minds of triers of fact. For this reason, it is allowed only on cross-examination under subdivision (a), or under subdivision (b) in cases in which the character of a person is an essential element of a claim, charge, or defense. This use comports with present law. See McCormick on Evidence, § 187.~~

Subdivision (b) was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 405 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 15; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 22; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 405~~, Federal Rules of Evidence~~; Rule 405, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ev. 404~~, NDREv~~ (Character Evidence; Crimes or Other Acts).

RULE 406. HABIT~~:~~; ROUTINE PRACTICE

~~Admissibility. Evidence of the habit of a person or of the routine practice of an organization, whether corroborated or not and regardless of the presence of eyewitnesses, is relevant to prove that the conduct of the person or organization on a particular occasion was in conformity with the habit or routine practice.~~

Evidence of a person's habit or an organization's routine practice may be admitted to prove that on a particular occasion the person or organization acted in accordance with the habit or routine practice. The court may admit this evidence regardless of whether it is corroborated or whether there was an eyewitness.

EXPLANATORY NOTE

Rule 406 was amended, effective March 1, 1990; March 1, 2014.

Habit~~, which has been described by McCormick as "one's regular response to a repeated specific situation" (McCormick on Evidence, 196, p. 462 (2d ed. 1972)),~~ differs from character in its degree of specificity. Character is general, a summation of traits; habit is specific, an individual response to an individual stimulus. The distinction is important, for Rule 406 allows the use of evidence of habit to show that a person acted in conformity ~~therewith~~ with it, while Rule 404 denies a similar use of character evidence.

The rule does away with what has been termed the "eyewitness rule," which, as a general proposition, stated that evidence of habit was admissible only if there was no direct evidence of the act in question. As in other areas of these rules, it was felt that the admission of relevant evidence, rather than its exclusion, should be furthered. This represents a change

in North Dakota practice, for the Supreme Court, in Glatt v. Feist, 156 N.W.2d 819 (N.D. 1968), adopted a modified eyewitness rule, stating that in cases in which eyewitnesses were present, evidence of habit would be allowed only if the direct evidence was in conflict. This rule admits evidence of habit regardless of the type of direct evidence present in a case.

Adoption of this rule means another departure from past North Dakota practice. In Haider v. Finken, 239 N.W.2d 508 (N.D. 1976), the North Dakota Supreme Court held that:

"Where there is no eyewitness, evidence of habit for care is inadmissible to prove the plaintiff's care and freedom from carelessness. Thus, one cannot establish a standard of care for the measurement of his own conduct on the occasion in question by showing that he has used care under similar circumstances on former occasions." Syllabus 6, 239 N.W.2d 508.

Under this rule, evidence of habit is relevant to show that a person acted in conformity therewith, regardless of whether this evidence tends to prove care or lack of care. This is not to say that evidence of habit must be admitted whenever offered. The rule states only that such evidence is relevant; it may be excluded--as may other relevant evidence--under other of these rules. See, e.g., Rule 403.

Rule 406 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 15; April 8, 1976, page 22; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 406~~, Federal Rules of Evidence~~;

45 Rule 406, SBAND proposal.

RULE 407. SUBSEQUENT REMEDIAL MEASURES

~~Whenever, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove fault, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction. This rule does not require the exclusion of evidence of subsequent measures if offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.~~

When measures are taken that would have made an earlier injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove:

(a) fault;

(b) culpable conduct;

(c) a defect in a product or its design; or

(d) a need for a warning or instruction.

The court may admit this evidence for another purpose, such as impeachment or, if disputed, proving ownership, control, or the feasibility of precautionary measures.

EXPLANATORY NOTE

Rule 407 was amended, effective March 1, 2000; March 1, 1990; March 1, 2014.

Rule 407 was amended, effective March 1, 2000, to follow the 1997 federal amendment. The amendment clarifies~~: "Evidence~~ that evidence of measures taken by ~~the~~ a defendant prior to ~~the~~ an ~~'~~event~~'~~ causing 'injury or harm' do not fall within the exclusionary

scope of Rule 407 even if they occurred after the manufacture or design of ~~the~~ a product.~~"~~ ~~Rule 407, Fed.R.Evid., 1997 Advisory Committee Notes.~~ The amendment also extends the exclusionary principle of the rule to product~~s~~ liability actions.

Rule 407 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 15-16; September 24-25, 1998, pages 2-3; April 30-May 1, 1998, pages 14-15; April 8, 1976, pages 23, 25; October 1, 1975, page 3. ~~Rule~~ Fed.R.Ev. 407~~, Federal Rules of Evidence~~; Rule 407, SBAND proposal.

RULE 408. COMPROMISE ~~AND~~ OFFERS ~~TO COMPROMISE~~ AND NEGOTIATIONS

~~(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to validity or amount, or to impeach through a prior inconsistent statement or contradiction:~~

(a) Prohibited Uses. Evidence of the following is not admissible, on behalf of any party, either to prove or disprove the validity or amount of a disputed claim or to impeach by a prior inconsistent statement or a contradiction:

~~(1) furnishing, offering, or promising to furnish or accepting, offering, or promising to accept a valuable consideration in compromising or attempting to compromise the claim; and~~

(1) furnishing, promising, offering, accepting, promising to accept, or offering to accept a valuable consideration in compromising or attempting to compromise the claim; and

~~(2) conduct or statements made in compromise negotiations is likewise not admissible.~~

(2) conduct or a statement made during compromise negotiations.

~~Exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations is not required.~~

~~(b) Permitted Uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving a witness's bias or prejudice; disproving a contention of undue delay; proving an~~

~~effort to obstruct a criminal investigation or prosecution.~~

(b) Exceptions. The court may admit this evidence for another purpose, such as proving a witness's bias or prejudice, negating a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution. The court need not exclude evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

EXPLANATORY NOTE

Rule 408 was amended, effective March 1, 2008; March 1, 2014.

The policy underlying this rule is the furtherance of compromise and settlement of disputes among parties. ~~The general rule as to compromise finds support in North Dakota case law and similar~~ Similar objectives have been fostered in the North Dakota Rules of Civil Procedure and by statute. N.D.R.Civ.P. 68 provides that an unaccepted offer of judgment is inadmissible in a proceeding except to determine costs. N.D.C.C. ch. 32-39 provides that a voluntary partial payment of a claim is inadmissible for the purpose of determining either the amount of a judgment or the liability of a party.

Admissions of independent fact or other evidence of statements or conduct disclosed in the course of a compromise negotiation are likewise protected by this rule. It is thought that open and effective discussions of compromise may be held only if the parties know in advance that they will not jeopardize their case by fully discussing all aspects of a claim. This does not mean, however, that the mere recital of evidence during a compromise negotiation precludes the admission of that evidence. The rule does not require the exclusion of any

evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

Rule 408 was amended, effective March 1, 2008. Subdivision (a) was amended to prohibit the use of statements made in the course of settlement negotiations for impeachment of a witness through prior inconsistent statement or contradiction. A further amendment to subdivision (a) clarifies that a party cannot use its own statements and offers made in settlement negotiations to prove the validity, invalidity or amount of a claim.

Rule 408 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

As part of the March 1, 2014, amendments, subdivision (a) was amended to delete the reference to "liability" because "liability" is covered by the broader term "validity." No change in current practice or in the coverage of the rule is intended.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 16-17; September 28-29, 2006, pages 14-16; April 8, 1976, page 23; October 1, 1975, page 3. Fed.R.Ev. 408; Rule 408, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 11-26-07.

Considered: N.D.C.C. § 33-08-13.

Cross Reference: N.D.R.Civ.P. 12 (Defenses and Objections-When and How

Presented-By Pleading or Motion-Motion for Judgment on the Pleadings); N.D.R.Civ.P. 68 (Offer of Settlement or Confession of Judgment. Tender).

RULE 409. ~~PAYMENT OF~~ OFFERS TO PAY MEDICAL AND SIMILAR EXPENSES

~~Evidence of furnishing, offering, or promising to pay medical, hospital, or similar expenses occasioned by an injury is not admissible to prove civil or criminal liability for the injury.~~

Evidence of furnishing, promising to pay, or offering to pay medical, hospital, or similar expenses resulting from an injury is not admissible to prove liability for the injury.

EXPLANATORY NOTE

Rule 409 was amended, effective March 1, 2014.

The general underpinnings of this rule are the same as those dealt with in Rules 407 and 408. A salutary action, the furnishing of medical or similar expenses is not to be discouraged by attaching to it the liability that would ensue were the fact to be admitted into evidence.

Unlike Rule 408, which protects statements made during compromise even if unrelated to the offer, Rule 409 protects only the act of furnishing or offering or promising to pay medical expenses. Statements made apart from the actual offer are not covered by the rule. There is no need to protect all discussion because discussion is not a necessary part of furnishing medical expenses.

It is likely that admissions will at times be so intertwined with an offer to furnish medical expenses that the two cannot be severed. Whenever this occurs, a choice must be made between admitting the evidence, totally, or excluding it. Balance must be made of the social policy behind this rule and the need for such evidence.

Note should be made of N.D.C.C. § 32-39-01, which prohibits the use, as evidence of liability, of a voluntary partial payment of a claim. The statute is somewhat broader than this rule as it is not limited to the payment of medical or similar expenses, but applies to payment of any part of a claim.

Rule 409 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 17; April 8, 1976, pages 24, 25; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 409~~, Federal Rules of Evidence~~; Rule 409, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 32-39-01, 32-39-02, 32-39-03.

Cross Reference: N.D.R.Ev. 407 (Subsequent Remedial Measures); N.D.R.Ev. 408 (Compromise Offers and Negotiations).

RULE 410. ~~OFFER TO PLEAD GUILTY; NOLO CONTENDERE; WITHDRAWN PLEA OF GUILTY~~ PLEAS, PLEA DISCUSSIONS, AND RELATED STATEMENTS

~~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 and relevant to any of the foregoing withdrawn pleas or offers, is not admissible in any civil or criminal proceeding against the person who made the plea or offer.~~

(a) Prohibited Uses. In a civil or criminal case, evidence of the following is not admissible against the defendant who made the plea or participated in the plea discussions:

(1) a guilty plea that was later withdrawn;

(2) a nolo contendere plea;

(3) a statement made during a proceeding on either of those pleas under Fed.R.Crim.P. 11, N.D.R.Crim.P. 11, or comparable procedure in another state; or

(4) a statement made during plea discussions with an attorney for the prosecuting authority if the discussions did not result in a guilty plea or they resulted in a later-withdrawn guilty plea.

(b) Exceptions. This rule does not apply to the introduction of a voluntary and reliable ~~statements~~ statement made in court on the record in connection with ~~any of the foregoing pleas or offers where~~ a plea discussion or plea proceeding when the statement is offered for impeachment purposes or in a subsequent prosecution of the declarant for perjury or false statement, but only if ~~in any case~~ the statement was made under oath~~,~~ and on the record~~, and~~

~~in the presence of counsel~~.

EXPLANATORY NOTE

Rule 410 was amended, effective March 1, 2014.

Rule 410 governs the admissibility of withdrawn guilty pleas, pleas of nolo contendere, or offers to plead against the person making the plea or offer. The rule prohibits admission of the pleas and offers themselves, and of statements made in connection with and relevant to the withdrawn pleas or offers. ~~The emphasized language was added by the committee to insure that only~~ Only discussion necessary to negotiation is protected.

~~The~~ Rule 410 does not prohibit the use of plea-related statements when offered for impeachment purposes or in a subsequent prosecution against the defendant for perjury or false statement if the statement was made under oath and on the record.

~~It should be noted that the latest amendment to Rule 410, P.L. 94-149(9), 89 Stat. 805 (1975), does not allow use of plea-related evidence for impeachment purposes, and allows such evidence to be admitted in a subsequent prosecution for perjury or false statement only if the statement was made under oath, on the record, and in the presence of counsel.~~

Rule 410 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 17-18; June 4, 1976, page 37; April 8, 1976, page 24; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 410~~,~~

~~Federal Rules of Evidence~~; Rule 410, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 29-21-38, 33-12-24.

RULE 411. LIABILITY INSURANCE

~~Evidence that a person was or was not insured against liability is not admissible upon the issue of whether the person acted negligently or otherwise wrongfully. This rule does not require the exclusion of evidence of insurance against liability if offered for another purpose, such as proof of agency, ownership, or control, or bias or prejudice of a witness.~~

Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully. But the court may admit this evidence for another purpose, such as proving a witness's bias or prejudice or proving agency, ownership, or control.

EXPLANATORY NOTE

Rule 411 was amended, effective March 1, 1990; March 1, 2014.

~~This general prohibition against disclosure of the fact that a person is or is not insured against liability is a fair statement of present North Dakota law. See, Bischoff v. Koenig, 100 N.W.2d 159 (N.D. 1959); Beardsley v. Ewing, 40 N.D. 373, 168 N.W. 791 (1918). But, see, James v. Young, 77 N.D. 451, 43 N.W.2d 692 (1950), wherein a direct action by a third party against an insurance company was allowed on the grounds that municipal ordinance requiring insurance for the benefit of a public carrier passenger made insurer directly liable. See also, the discussion in Shermoen v. Lindsay, 163 N.W.2d 738 (N.D. 1968).~~

The reason for the rule is that the existence or nonexistence of liability insurance is of low probative value as to the issue of negligence, and may be prejudicial. ~~But see the criticism of this rule and the policy underlying it in McCormick on Evidence § 201 (2d ed.~~

~~1972).~~

The second sentence of the rule merely states that evidence of insurance need not be excluded if offered for another purpose to which it may be relevant.

Rule 411 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 411 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 19-20; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 411~~, Federal Rules of Evidence~~; Rule 411, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 39-16-03, 39-16-11, 49-18-33.

RULE 412. ~~ADMISSIBILITY OF ALLEGED VICTIM'S SEXUAL BEHAVIOR OR ALLEGED SEXUAL PREDISPOSITION IN CRIMINAL PROCEEDING~~ SEX-OFFENSE CASES: THE VICTIM'S SEXUAL BEHAVIOR OR PREDISPOSITION

~~(a) Evidence generally inadmissible. The following evidence is not admissible in any criminal proceeding involving alleged sexual misconduct except as provided in subdivisions (b) and (c):~~

~~(1) evidence offered to prove that any alleged victim engaged in other sexual behavior; and~~

~~(2) evidence offered to prove any alleged victim's sexual predisposition.~~

(a) Prohibited Uses. The following evidence is not admissible in a civil or criminal proceeding involving alleged sexual misconduct:

(1) evidence offered to prove that a victim engaged in other sexual behavior; or

(2) evidence offered to prove a victim's sexual predisposition.

(b) Exceptions. ~~In a criminal case, the following evidence is admissible, if otherwise admissible under these rules:~~

(1) Criminal Cases. The court may admit the following evidence in a criminal case:

~~(1) evidence of specific instances of sexual behavior by the alleged victim offered to prove that a person other than the accused was the source of semen, injury, or other physical evidence;~~

(A) evidence of specific instances of a victim's sexual behavior, if offered to prove that someone other than the defendant was the source of semen, injury, or other physical

evidence;

~~(2) evidence of specific instances of sexual behavior by the alleged victim with respect to the person accused of the sexual misconduct, offered by the accused to prove consent or by the prosecution; and~~

(B) evidence of specific instances of a victim's sexual behavior with respect to the person accused of the sexual misconduct, if offered by the defendant to prove consent or if offered by the prosecutor; and

~~(3) evidence the exclusion of which would violate the constitutional rights of the defendant.~~

(C) evidence whose exclusion would violate the defendant's constitutional rights.

(2) Civil Cases. In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition, if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.

(c) Procedure to Determine Admissibility.

~~(1) A party intending to offer evidence under subdivision (b) must:~~

~~(A) file a written motion at least 14 days before trial specifically describing the evidence and stating the purpose for which it is offered unless the court, for good cause requires a different time for filing or permits filing during trial; and~~

~~(B) serve the motion on all parties and notify the alleged victim or, when appropriate, the alleged victim's guardian or representative.~~

(1) Motion. If a party intends to offer evidence under Rule 412(b), the party must:

(A) file a motion that specifically describes the evidence and states the purpose for which it is to be offered;

(B) do so at least 14 days before trial unless the court, for good cause, sets a different time;

(C) serve the motion on all parties; and

(D) notify the victim or, when appropriate, the victim's guardian or representative.

~~(2) Before admitting evidence under this rule, the court must conduct a hearing in camera and afford the victim and parties a right to attend and be heard. The motion, related papers, and the record of the hearing must be sealed and remain under seal unless the court orders otherwise.~~

(2) Hearing. Before admitting evidence under this rule, the court must conduct an in camera hearing and give the victim and parties a right to attend and be heard. Unless the court orders otherwise, the motion, related materials, and the record of the hearing must be and remain sealed.

(d) Definition of "Victim." In this rule, "victim" includes an alleged victim.

EXPLANATORY NOTE

Rule 412 was adopted, effective March 1, 1998. Rule 412 was amended, effective March 1, 2014.

Rule 412 is derived from Fed.R.Ev. 412. As explained in the federal advisory committee notes, the rule is designed to safeguard a victim from invasion of privacy, potential embarrassment and sexual stereotyping associated with public disclosure of intimate sexual details and the infusion of sexual innuendo into the fact finding process. By

affording victims protection in most instances, the rule also encourages victims of sexual misconduct to institute and to participate in legal proceedings against alleged offenders.

Paragraph (b)(2) was added, effective March 1, 2014, to establish a standard for the admission of sexual behavior evidence in civil cases.

Subdivision (d) was added, effective March 1, 2014, to clarify that the definition of "victim" includes "alleged victim."

Rule 412 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 20-21; September 26-27, 1996, pages 2-5; April 25, 1996, pages 12-15. ~~Rule~~ Fed.R.Ev. 412~~; Federal Rules of Evidence~~.

Statutes Affected:

Superseded: N.D.C.C. §§ 12.1-20-14, 12.1-20-15, 12.1-20-15.1.

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. If a person with limited English proficiency or a deaf person is involved in a proceeding as a party, witness, person with legal decision-making authority, or person with a significant legal interest in the matter, the court must provide an interpreter.

EXPLANATORY NOTE

Rule 43 was amended, effective 1976; January 1, 1980; March 1, 1999; March 1, 2011; March 1, 2014.

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, effective March 1, 2011. These topics are covered in the Rules of Evidence. The federal rule

contains a subdivision entitled "Affirmation Instead of an Oath." Affirmations and oaths are governed by N.D.R.Ct. 6.10 (Courtroom Oaths).

~~The federal rule contains a subdivision (f) governing the appointment of interpreters. This is not needed in these rules, as it is adequately covered in N.D.C.C. § 31-01-11.~~

Subdivision (c) on interpreters was added, effective March 1, 2014. It is intended to to reflect the American Bar Association Standards for Language Access in Courts. N.D.Sup.Ct.Admin.R. 50 provides guidance on interpreter qualifications and requirements.

Rule 43 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes of April 25-26, 2013, pages 16-18; January 31-February 1, 2013, pages 12-15; January 29-30, 2009, pages 34-35; January 29-30, 1998, pages 11-13; September 25-26, 1997, pages 10-11; November 29-30, 1979, page 16; April 26-27, 1979, pages 17-18; September 23-24, 1976, page 79; June 3-4, 1976, pages 16-18; ~~Rule~~ Fed.R.Civ.P. 43~~, FRCivP~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-12.

Considered: N.D.C.C. ch. 28-33; § 31-01-11.

Cross Reference: N.D.R.Ev. 101 (Scope), N.D.R.Ev. 103 (Rules on Evidence), N.D.R.Ev. 104 (Preliminary Questions), N.D.R.Ev. 603 (Oath or Affirmation), N.D.R.Ev. 604 (Interpreters), N.D.R.Ev. 607 (Who May Impeach), and N.D.R.Ev. 611 (Mode and Order

of Interrogation and Presentation); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D.Sup.Ct.Admin.R. 50 (Court Interpreter Qualifications and Procedures).

RULE 45. SUBPOENA

(a) In General.

(1) Form and Contents.

(A) Requirements. Every subpoena must:

(i) state the title of the action, the court in which it is pending, and its civil-action number;

(ii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises; and

(iii) if the subpoena seeks only pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises , set out the text of the notice in Rule 45(f).

(B) Command to Attend a Deposition; Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a deposition, hearing or trial or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced. The phrase “electronically stored

information" includes reasonably accessible metadata that will enable the party seeking production 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 party seeking production and the subject of the subpoena agree otherwise or the court orders otherwise on motion and a showing of good cause for the production of certain metadata.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued by Whom. The clerk shall issue a subpoena in the name of the court for the county in which the action is filed, signed and sealed but otherwise blank, to a party who requests it. That party shall complete it before service. An attorney for a party also may issue a subpoena, which must be signed by the attorney, include the attorney's office address and identify the party the attorney represents.

(3) Subpoena in Out-of-State Action. N.D.R.Ct. 5.1 defines the procedure for discovery or depositions in an out-of-state action.

(b) Service; Notice.

(1) Service of Subpoena.

(A) A subpoena to a named person must be served under Rule 4(d). A subpoena may be served at any place within the state.

(B) If the subpoena requires the person's attendance, fees for one day's attendance, mileage and travel expense allowed by law must be tendered. If fees, mileage and travel expense are not tendered with the subpoena, the person need not obey the subpoena. Fees,

mileage and travel expense need not be tendered if they are to be paid by the state or a political subdivision.

(2) Service of Notices.

(A) Notice of Deposition. If the subpoena commands a person to attend, give testimony and produce documents, electronically stored information or tangible things at a pretrial deposition, then before the subpoena is served, a notice to take a deposition must be served on each party.

(B) Notice of Demand for Production or Inspection. If a deposition notice has not been served, and if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice of demand for production or inspection must be served on each party.

(C) Notice Mandatory Before Service of Subpoena. The notice required by Rule 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a subpoena for a pretrial deposition, for pretrial production of documents, electronically stored information, or tangible things or for the inspection of premises may be served.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises or to producing electronically stored information in the form or forms requested. The objection must be received before the earlier of 24 hours before the time specified for compliance or ten days after the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Location.

(A) Resident Witness. A subpoena may require a resident of this state to attend a deposition only in the county where the person resides, is employed or transacts business in person, or at a convenient place ordered by the issuing court. A resident may be required to attend a hearing or trial any place within this state.

(B) Nonresident Witness. A subpoena may require a nonresident of this state who is

served with a subpoena within this state to attend a deposition ,hearing or trial in any county of this state.

(4) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires attendance beyond the location requirements of Rule 45 (c)(3);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information.

(A) Documents. A person responding to a subpoena to produce documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information. 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 is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) 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 to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule ~~26(b)(2)(A)~~ 26(b)(1)(B). The court may specify conditions for discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

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

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3).

(f) Notice. All subpoenas commanding only pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises must contain the following notice:

"You may object to this subpoena by sending or delivering a written objection, stating your valid reason, to [Insert the name and address of the party, or attorney representing the party seeking production of documents, electronically stored information, or tangible things or the inspection of premises]. Any objection must be received within ten days after you receive the subpoena. If the time specified in the subpoena for compliance is less than ten days, any objection must be received at least 24 hours before the time specified for compliance.

If you make a timely objection, you do not need to comply with this subpoena unless the court orders otherwise. You will be notified if the party serving the subpoena seeks a court order compelling compliance with this subpoena. You will then have the opportunity to contest enforcement.

Failure to obey this subpoena, without making a timely objection, and stating a valid reason, may be contempt of court."

EXPLANATORY NOTE

Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1, 2012; March 1, 2013; March 1, 2014.

Rule 45 was revised, effective January 1, 1995, in response to the 1991 federal revision. Significant changes to North Dakota's rule include the following: (1) An action must be filed before a subpoena may issue; (2) A subpoena may compel a non-party to produce evidence independent of any deposition; (3) A subpoena may compel the inspection of premises in the possession of a non-party; and (4) Notice must be printed on a subpoena

advising of the right to object when pretrial or prehearing production or inspection is commanded. The scope of discovery under Rule 26 is not intended to be altered by the revision.

Rule 45 was amended, effective March 1, 2008, in response to the 2006 federal revision. Language was added to the rule to clarify that production of electronically stored materials may be demanded by subpoena and to provide guidance in dealing with requests for electronically stored materials.

Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments to Fed.R.Civ.P. 45. 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.

Subparagraph (a)(1)(A)(iii) was amended, effective March 1, 2013, to clarify that the notice required by subdivision (f) must be made part of the subpoena when the subpoena seeks only pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises.

Subparagraph (a)(1)(C) was amended, effective March 1, 2014, to explain that the phrase "electronically stored information" includes reasonably accessible metadata.

Paragraph (a)(3) was amended, effective March 1, 2013, to direct persons to N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in an action pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for interstate depositions and discovery.

Subdivision (b) was amended, effective March 1, 2007, to eliminate the requirement for parties to serve a separate notice for production when commanding a person to attend a

deposition to give testimony and produce documents or things.

Paragraph (b)(2) was amended, effective March 1, 2009, to make it clear that notice must be served on each party in a matter before a subpoena to take testimony or for production is served.

Subdivision (f) was amended, effective March 1, 1999, to allow an objection to a subpoena to be sent via a commercial carrier as an alternative to mail.

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, pages 24-25; September 27, 2012, pages 8-10; January 26-27, 2012, pages 3-7; September 30, 2011, pages 12-15; April 28-29, 2011, page 25; September 23-24, 2010, pages 32-33; April 24-25, 2008, pages 22-25; September 28-29, 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987, pages 3-4; October 30-31, 1980, pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P. 45.

Statutes Affected:

Superseded: N.D.C.C. § 31-05-22

Cross Reference: N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), and N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions); N.D.R.Crim.P. 17 (Subpoena); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure); N.D.R.Ct. 5.1 (Interstate Depositions and Discovery).

RULE 45. COMPUTING AND EXTENDING TIME

(a) Computing time. The following rules apply in computing any time period specified in these rules, in any local rule or court order, or in any 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 45(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 45(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.

(6) "Legal holiday" defined. As used in this rule, "legal holiday" means:

(A) a specific day set aside as a holiday under N.D.C.C. § 1-03-01; or

(B) any day declared a public holiday by the President of the United States or the Governor of North Dakota.

(b) Extending time.

(1) In general. When an act must or may be done within a specified time, the court on its own may extend the time, or for good cause may do so on a party's motion made:

(A) before the originally prescribed period or previously extended time expires; or

(B) after the time expires if the party failed to act because of excusable neglect.

(2) Exceptions. The court may not extend the time for taking any action under Rules 35 and 37, except as stated in those rules.

(c) Additional time after service made electronically, by mail or by commercial carrier.

Whenever a party must or may act within a prescribed period after service and service is made electronically, by mail or by third-party commercial carrier, three days are added after the prescribed period would otherwise expire under Rule 45(a). For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission.

EXPLANATORY NOTE

Rule 45 was amended, effective March 1, 1990; January 1, 1995; March 1, 1999; March 1, 2001; March 1, 2006; March 1, 2007; March 1, 2011. The explanatory note was amended, effective March 1, 2014.

Rule 45 is an adaptation of Fed.R.Crim.P. 45 with certain modifications. The rule is similar to N.D.R.Civ.P. 6, which also deals with computing time.

Rule 45 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

A subdivision referring to terms of court was deleted, effective March 1, 2006. The district courts of North Dakota are in continuous session and terms of court are not a

factor in computing or extending time. At the same time, and consistent with the federal rule, a subdivision dealing with motions and affidavits was transferred to Rule 47.

Subdivision (a) was amended, effective March 1, 2006, to include a paragraph defining the term "legal holiday".

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.

Subdivision (b) was amended, effective March 1, 2007, to delete Rules 29, 33 and 34 from the exceptions paragraph.

Subdivision (c) is an adaptation of N.D.R.Civ.P. 6(e). Under this subdivision, a party that is required or permitted to act within a prescribed period should first calculate that period, without reference to the 3-day extension, but applying the other time computation provisions of these rules. After the party has identified the date on which the prescribed period would expire but for the operation of subdivision (c), the party should add 3 calendar days. The party must act by the third day of the extension, unless that day is a Saturday, Sunday, or legal holiday, in which case the party must act by the next day that is not a Saturday, Sunday, or legal holiday.

Subdivision (c) was amended, effective March 1, 1999, to make the three-day extension for service by mail applicable when service is via commercial carrier. The proof of service must contain the date of mailing or deposit with the commercial carrier as

required by Rule 49(e) and N.D.R.Civ.P. 4(k) and 5(f).

Subdivision (c) was amended, effective March 1, 2011, to make the three-day extension applicable when service is made electronically.

Subdivisions (a) and (c) were amended, effective January 1, 1995, to clarify time computations when making service by facsimile transmission.

Sources: Joint Procedure Committee Minutes of April 25-26, 2013, pages 26-27; April 29-30, 2010, pages 24-25; April 27-28, 2006, pages 6-7; January 26, 2006, page 11; January 27-28, 2005, page 37; January 27-28, 2000, pages 16-17; January 29-30, 1998, page 20; April 28-29, 1994, pages 15-16; January 27-28, 1994, pages 24-25; September 23-24, 1993, pages 14-16 and 20; April 29-30, 1993, pages 20-22; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, page 31; December 11-15, 1972, pages 48-50; September 17-19, 1970, page 10; March 12-14, 1970, pages 16-18; Fed.R.Crim.P. 45.

RULE 501. PRIVILEGES RECOGNIZED ONLY AS PROVIDED

Except as otherwise provided by constitution or statute or by these or other rules promulgated by the supreme court of this state, no person has a privilege to:

(1) refuse to be a witness;

(2) refuse to disclose any matter;

(3) refuse to produce any object or ~~writing~~ record; or

(4) prevent another from being a witness or disclosing any matter or producing any object or ~~writing~~ record.

EXPLANATORY NOTE

Rule 501 was amended, effective March 1, 2014.

As a general principle, evidentiary privileges will be granted and applied in accordance with the provisions of these rules.

Certain statutory privileges, however, include matters beyond the proper scope of evidentiary rules, and others have been found to be in accordance with the philosophy of these rules. These statutes have been left undisturbed. Thus, for example, the privilege against self-incrimination (N.D.C.C. § 31-01-09), ~~and~~ the privilege relating to grand jury testimony (N.D.C.C. § 29-10.1-30) and the privileges afforded qualified school counselors (N.D.C.C. § 31-01-06.1) and ~~newsmen~~ journalists (N.D.C.C. § 31-01-06.2) all remain in effect under these rules.

Rule 501 was amended, effective March 1, 2014, to replace the term "writing" with the term "record" to account for electronic records and documents. The amendment is

consistent with the 1999 amendments to the Uniform Rules of Evidence.

Sources: Joint Procedure Committee Minutes: of April 25-26, 2013, pages 27-28; January 29, 1976, page 2. Rule 501, Uniform Rules of Evidence (1974).

Statutes Affected:

Superseded: N.D.C.C. §§ 14-12.1-22, 31-01-02, 31-01-06(1), 31-01-06(2), 31-01-06(3).

Considered: N.D.C.C. §§ 10-23-10, 10-28-06, 12-59-04, 12.1-29-04, 14-02.1-07, 14-16-02, 14-17-19, 14-17-22, 19-16.1-10, 23-01-15, 23-02-23, 23-07-01.1, 23-25-06, 26-17.1-49, 27-05.1-14, 29-10.1-30, 31-01-06(4), 31-01-06.1, 31-01-06.2, 31-01-09, 37-18-11(6)(b), 50-25.1-11, 65-13-10.

RULE 502. LAWYER-CLIENT PRIVILEGE

(a) Definitions. ~~As used in~~ In this rule:

(1) "Client" means a person, including a public officer, corporation, association, or other organization or entity, either public or private, ~~who is rendered~~ for whom a lawyer renders professional legal services ~~by a lawyer,~~ or who consults a lawyer with a view to obtaining professional legal services from the lawyer.

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

(3) "Lawyer" means a person authorized, or reasonably believed by the client to be authorized, to engage in the practice of law in any state or country.

~~(2) "Representative of the client" means:~~

~~(A) A person who has authority to obtain professional legal services, or to act on advice thereby rendered, on behalf of the client, or~~

~~(B) a person who is specifically authorized to provide the client's lawyer with, or receive from the lawyer, information relating to the legal services being rendered and that was acquired during the course of, or as a result of, such person's relationship with the client as principle, employee, officer or director, and is provided to, or received from, the lawyer for the purpose of obtaining for the client legal advice or other legal services of the lawyer.~~

~~(3) "Lawyer" means a person authorized, or reasonably believed by the client to be~~

~~authorized, to engage in the practice of law in any state or nation.~~

(4) "Representative of the client" means a person having authority to obtain professional legal services, or to act on legal advice rendered, on behalf of the client or a person who, for the purpose of effectuating legal representation for the client, makes or receives a confidential communication while acting in the scope of employment for the client.

~~(4)~~ (5) "Representative of the lawyer" means a person employed, or reasonably believed by the client to be employed, by the lawyer to assist the lawyer in rendering professional legal services.

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

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

(1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer,

(2) between the lawyer and a representative of the lawyer,

(3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another

party in a pending action and concerning a matter of common interest therein,

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

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

(c) Who may claim the privilege. The privilege under this rule may be claimed by the client, the client's guardian or conservator, the personal representative of a deceased client, or the successor, trustee, or similar representative of a corporation, association, or other organization, whether or not in existence. The person who was the lawyer or the lawyer's representative at the time of the communication is presumed to have the authority to claim the privilege, but only on behalf of the client.

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

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

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

(3) ~~Breach of duty by a lawyer or client. As~~ as to a communication relevant to an issue of breach of duty by a lawyer to the client or by a client to the lawyer~~.~~;

(4) as to a communication necessary for a lawyer to defend in a legal proceeding an accusation that the lawyer assisted the client in criminal or fraudulent conduct;

~~(4) Document attested by a lawyer. As~~ (5) as to a communication relevant to an issue

concerning an attested document to which the lawyer is an attesting witness.;

~~(5) Joint clients. As~~ (6) as to a communication relevant to a matter of common interest between or among two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between or among any of the clients.; or

~~(6) Public officer or agency. As~~ (7) as to a communication between a public officer or agency and its lawyers unless the communication concerns a pending investigation, claim, or action and the court determines that disclosure will seriously impair the ability of the public officer or agency to ~~process~~ act uponthe claim or conduct a pending investigation, litigation, or proceeding in the public interest.

EXPLANATORY NOTE

Rule 502 was amended, effective March 1, 2001; March 1, 2014.

~~The amendment to subdivision (a)(2)~~ Paragraph (a)(4) expands the definition of who constitutes a "representative of the client." The rule is no longer limited to the "control group," i.e. people who have authority to obtain professional legal services, or to act on the advice rendered on behalf of the client. See Upjohn Co. v. United States, 449 U.S. 383 (1981).

If the benefits this rule of privilege offers to the judicial system – that is, frank and open disclosure of facts by a client – are to be realized, then a client needs to be assured that confidential communications made to those necessarily involved in the performance of legal services will not be disclosed. ~~Subdivision~~ Paragraph (a)(~~4~~ 5) achieves this by including, as privileged communications, those made to a lawyer's representative. As used in this rule, the

term "employed" is not limited to those employed for compensation.

Paragraph (a)(5) was amended, effective March 1, 2014, to include the language “or reasonably believed by the client to be employed” to assure that the client does not lose the benefit of the privilege in situations where a representative of a lawyer is not in the employment of the lawyer, but is nevertheless reasonably believed by the client to be employed by the lawyer at the time of the communication intended by the client to be confidential. While the test in this subdivision, as in paragraph (a)(3), is partially subjective, it is not totally subjective since there must be some reasonable basis for the belief.

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

Subdivision (c) states, generally, that this privilege may be claimed by the client or representative of the client and that a lawyer and representative of the lawyer are presumed to have authority to claim the privilege.

As to the exception stated in ~~subdivision~~ paragraph (d)(1), it has been observed that "Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme." McCormick on Evidence § 95 at 199 (2d ed. 1972).

The privilege afforded by this rule is the client's; all other claimants have only derivative authority to assert the privilege. Thus, ~~subdivision~~ paragraph (d)(2) provides that, in an action to determine which party shall take through a deceased client, the action is not

adverse to the deceased client and the justification for allowing the privilege is dissolved. In such cases, "The interest of the estate as well as the interest of the deceased client demand that the truth be determined." In re Graf's Estate, 119 N.W.2d 478 (N.D. 1963).

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

A new paragraph (d)(4) was added, effective March 1, 2014, providing that there is no privilege under the rule "as to a communication necessary for a lawyer to defend in a legal proceeding a charge that the lawyer assisted the client in criminal or fraudulent conduct." Access to otherwise privileged communications seems essential if the lawyer is defending a charge of assisting a client in criminal or fraudulent conduct.

~~Subdivision~~ Paragraph (d)(~~4~~ 5) states that, as an attesting witness, an attorney may testify relevant to issues concerning the attested document, for as to these matters the attorney is not acting in his professional capacity. Consider also, in this regard, the "scrivener" exception to the privilege. O'Neill v. Murray, 6 Dak. 107, 50 N.W. 619 (1888); Bolyea v. First Presbyterian Church of Wilton, 196 N.W. 2d 149 (N.D. 1972).

It cannot be said that communications made between or among joint clients were intended to be confidential as to those clients. ~~Subdivision~~ Paragraph (d)(~~5~~ 6) removes the privilege in these instances.

~~Subdivision~~ Paragraph (d)(~~6~~ 7) provides, in the usual instance, that communications between a public agency and its attorneys are not privileged. Exception is made for those instances in which the court determines that disclosure will "seriously impair" the listed

functions of the public agency.

Sources: Joint Procedure Committee Minutes: of April 25-26, 2013, page 28; September 23-24, 1999, pages 6-7; January 29, 1976, pages 2, 3. Unif. R. Evid. 502 (1974).

Statutes Affected:

Superseded: N.D.C.C. § 31-01-06(1).

Cross Reference: N.D.R. Prof. Conduct 1.6 (Confidentiality of Information).

RULE 503. PHYSICIAN AND ~~PSYCHOTHERAPIST~~ MENTAL HEALTH PROFESSIONAL-PATIENT PRIVILEGE

(a) Definitions. ~~As used in~~ In this rule:

(1) A communication is "confidential" if it is not intended to be disclosed to third persons, except those present to further the interest of the patient in the consultation, examination, or interview, those reasonably necessary for the transmission of the communication, and persons who are participating in the diagnosis and treatment of the patient under the direction of a physician or mental health professional, including members of the patient's family.

(2) "Mental health professional" means:

(A) a psychologist with at least a master's degree who has been either licensed or approved for exemption by a state board;

(B) a registered nurse with a master's degree in psychiatric and mental health nursing from an accredited program;

(C) a registered nurse with a minimum of two years of psychiatric clinical experience under the supervision of a psychiatrist, psychologist, or registered nurse as defined by Rule 503(a)(2)(C);

(D) a licensed addiction counselor;

(E) a licensed professional counselor with a master's degree in counseling from an accredited program who has either successfully completed the advanced training beyond the master's degree as required by the national academy of mental health counselors or a

minimum of two years of clinical experience in a mental health agency or setting under the supervision of a psychiatrist or psychologist.

"Mental health professional" includes a person reasonably believed by the patient to be a mental health professional.

(~~1~~ 3) ~~A "patient" is a person~~ "Patient" means an individual who consults or is examined or interviewed by a physician or ~~psychotherapist~~ mental-health professional.

(~~2~~ 4) ~~A "physician" is~~ "Physician" means a person authorized ~~to~~ in any state or country, or reasonably believed by the patient to be authorized to practice medicine ~~in any state or nation, or reasonably believed by the patient so to be~~.

~~(3) A "psychotherapist" is (i) a person authorized to practice medicine in any state or nation, or reasonably believed by the patient so to be, while engaged in the diagnosis or treatment of a mental or emotional condition, including alcohol or drug addiction, or, (ii) a person licensed or certified as a psychologist under the laws of any state or nation, while similarly engaged.~~

~~(4) A communication is "confidential" if not intended to be disclosed to third persons, except persons present to further the interest of the patient in the consultation, examination, or interview, persons reasonably necessary for the transmission of the communication, or persons who are participating in the diagnosis and treatment under the direction of the physician or psychotherapist, including members of the patient's family.~~

(b) General rule of privilege. A patient has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of diagnosis or treatment of ~~his~~ the patient's physical, mental, or emotional condition,

including ~~alcohol or drugs addiction~~ chemical dependency, among ~~himself, his~~ the patient, the patient's physician or ~~psychotherapist~~ mental health professional, and persons, including members of the patient's family, who are participating in the diagnosis or treatment under the direction of the physician or ~~psychotherapist~~ or mental health professional~~, including members of the patient's family~~.

(c) Who may claim the privilege. The privilege under this rule may be claimed by the patient, ~~his~~ the patient's guardian or conservator, or the personal representative of a deceased patient. The person who was the physician or ~~psychotherapist~~ or mental health professional at the time of the communication is presumed to have authority to claim the privilege, but only on behalf of the patient.

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

(1) ~~Proceedings for hospitalization. There is no privilege under this rule for communications~~ relevant to an issue in proceedings to hospitalize the patient for mental illness~~, including alcohol or drug addiction~~ or chemical dependency, if the ~~psychotherapist~~ physician or mental health professional in the course of diagnosis or treatment has determined that the patient is in need of hospitalization~~.~~;

(2) ~~Examination by order of court. If the court orders an~~ made in the course of a court-ordered investigation or examination of the physical, mental, or emotional condition of a patient, whether a party or a witness, ~~communications made in the course thereof are not privileged under this rule~~ with respect to the particular purpose for which the examination is ordered, unless the court orders otherwise~~.~~;

(3) ~~Condition an element of claim or defense. There is no privilege under this rule as~~

~~to a communication~~ relevant to an issue of the physical, mental, or emotional condition of the patient in any proceeding in which ~~he~~ the patient relies upon the condition as an element of ~~his~~ the patient's claim or defense or, after the patient's death, in any proceeding in which any party relies upon the condition as an element of ~~his~~ the party's claim or defense~~.~~;

(4) if the services of the physician or mental health professional were sought or obtained to enable or aid anyone to commit or plan to commit what the patient knew, or reasonably should have known, was a crime or fraud or mental or physical injury to the patient or another individual;

(5) in which the patient has expressed an intent to engage in conduct likely to result in imminent death or serious bodily injury to the patient or another individual;

(6) relevant to an issue in a proceeding challenging the competency of the physician or mental health professional;

(7) relevant to a breach of duty by the physician or mental health professional; or

(8) that is subject to a duty to disclose under rule or statute.

EXPLANATORY NOTE

Rule 503 was amended, effective March 1, 2014.

Rule 503 is modeled after Rule 503 of the Uniform Rules of Evidence ~~(1974)~~. The rule retains the physician-patient privilege which has long been provided by statute in North Dakota. The rule also provides that certain communications made to a ~~psychotherapist or to a licensed psychologist~~ mental health professional are privileged.

Subdivision (a) contains the definitions of the parties to the privilege and of the term "confidential." It should be noted that members of a patient's family are expressly included

in that group of people to whom communications may be made without a waiver of the privilege, provided, of course, that the communications otherwise meet the requirements of the rule.

Subdivision (a) was amended, effective March 1, 2014, to replace the definition of "psychotherapist" with that of "mental health professional," a broader term that is based on the definition contained in N.D.C.C. § 25-03.1-02 (10). "Mental health professional" replaces "psychotherapist" throughout the rule.

As to the general rule of privilege contained in subdivision (b), note should be made of the fact that only those communications made "for the purpose of diagnosis or treatment" are privileged. This is a narrower privilege than under prior law, N.D.C.C. § 31-01-06, which covered "any communication made by the patient in the course of professional employment."

Subdivision (c) provides that the privilege may be claimed by the personal representative of a deceased patient. In an action where all parties are claiming through a deceased patient, the privilege has been held not to apply. Lembke v. Unke, 171 N.W.2d 837 (N.D. 1969).

~~Subdivision~~ Paragraph (d)(1) provides that there is no privilege for communications relevant to an issue in hospitalization proceedings. "Such an exception is essential if the psychiatrist is to perform his role which will, in some instances, require that he use the material supplied by the patient as a basis for hospitalization." Goldstein and Katz, Psychiatrist-Patient Privilege: The GAP Proposal and the Connecticut Statute, 36 Conn. Bar J. 175 at 187 (1962).

The exception applies only to communications ~~(1)~~ relevant to an issue ~~(2)~~ in

proceedings to hospitalize the patient for mental illness. As to communications not relevant to the subject of commitment, and in actions other than commitment proceedings, the privilege applies.

In a court-ordered examination of a party or witness, the purpose usually is not for treatment or for diagnosis with a view toward treatment. No professional relationship is created and, thus, under ~~subdivision~~ paragraph (d)(2), the privilege does not attach to communications made in the course of those examinations.

Whenever a patient brings ~~his~~ physical or mental condition into issue as an element of a claim or defense, there is no longer any reason to continue the privilege as the patient has voluntarily chosen to disclose certain aspects of the privileged communication. Nor is there justification for allowing the privilege to be used as a "sword," rather than a "shield." ~~Subdivision~~ Paragraph (d)(3) removes the privilege in these instances. ~~For a recent case holding that, under prior law, the privilege is waived by the initiation of a medical malpractice action, see~~ See Sagmiller v. Carlsen, 219 N.W.2d 885 (N.D. 1974).

Subdivision (d) was amended, effective March 1, 2014, to add paragraphs (4)-(8), which provide additional exceptions to the privilege allowed under this rule.

Rule 503 was amended, effective March 1, 2014, to follow the 1999 amendments to Rule 503 of the Uniform Rules of Evidence. The rule has been reorganized and gender specific language has been replaced with neutral language.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, pages 29-32; January 29, 1976, page 5. Rule 503, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-06(3).

Considered: N.D.C.C. §§ 14-17-13, 23-07-01.1, 25-03.1-02, 31-01-06.3, 31-01-06.4, 31-01-06.5, 31 -01-06.6, 37-18-11(6)(b), 50-25.1-10.

~~Rules:~~

~~Considered~~ Cross Reference: N.D.R.Civ.P. Rule 35~~(b)(2), NDRCivP~~ (Physical and Mental Examination).

RULE 504. ~~HUSBAND-WIFE~~ SPOUSAL PRIVILEGE

(a) ~~Definition~~. Confidential Communication. A communication is confidential if it is made privately by ~~any person~~ an individual to ~~his or her~~ the individual's spouse and is not intended for disclosure to any other person.

~~(b) General rule of privilege. An accused in a criminal proceeding has a privilege to prevent his spouse from testifying as to any confidential communication between the accused and the spouse.~~

(b) Marital Communications. An individual has a privilege to refuse to testify and to prevent the individual's spouse or former spouse from testifying as to any confidential communication made by the individual to the spouse during their marriage. The privilege may be waived only by the individual holding the privilege or by the holder's guardian, conservator, or personal representative if the individual is deceased.

~~(c) Who may claim the privilege. The privilege may be claimed by the accused or by the spouse on behalf of the accused. The authority of the spouse to do so is presumed.~~

(c) Spousal Testimony in Criminal Proceeding. The spouse of an accused in a criminal proceeding has a privilege to refuse to testify against the accused spouse.

(d) Exceptions. There is no privilege under this rule: ~~in a proceeding in which one spouse is charged with a crime against the person or property of (1) the other, (2) a child of either, (3) a person residing in the household of either, or (4) a third person, committed in the course of committing a crime against any of them.~~

(1) in any civil proceeding in which the spouses are adverse parties;

(2) in any criminal proceeding in which an unrefuted showing is made that the spouses acted jointly in the commission of the crime charged;

(3) in any proceeding in which one spouse is charged with a crime or tort against the person or property of the other, a minor child of either, an individual residing in the household of either, or a third person if the crime or tort is committed in the course of committing a crime or tort against the other spouse, a minor child of either spouse, or an individual residing in the household of either spouse; or

(4) in any other proceeding, in the discretion of the court, if the interests of a minor child of either spouse may be adversely affected by invocation of the privilege.

EXPLANATORY NOTE

Rule 504 was amended, effective March 1, 2014.

Rule 504 provides a husband-wife privilege, formerly provided by N.D.C.C. § 31-01-02. The rule ~~is substantially the same as~~ is derived from Rule 504 of the Uniform Rules of Evidence ~~(1974)~~.

~~By the terms of the definition contained in~~ Under subdivision (a), a communication is not "confidential" if it is intended to be disclosed to any person other than one's spouse. This would include one's children.

The intent with which a communication is made may determine whether it is confidential. If a communication is made privately, with the intent that it not be disclosed, it is confidential for the purposes of this rule even though it is overheard by an eavesdropper to the conversation. ~~But cf. § 82, McCormick on Evidence (2d ed. 1972).~~ See State v. McMorrow, 314 N.W. 2d 287 (N.D. 1982).

~~A major alteration in the husband-wife privilege, as it has existed in North Dakota, is occasioned by subdivision (b), which applies only to an accused in a criminal proceeding. Under prior law, the privilege was applicable, with certain exceptions, to criminal and civil actions.~~

~~Given the limited application of this rule, there can be no claim of privilege made by representatives of the holder of the privilege. Under subdivision (b), only the accused, or the spouse on behalf of the accused, may claim the privilege.~~

The exceptions listed in subdivision (d), or at least the instances in which one spouse commits a crime against the other or a child of either, have been said to be based upon necessity, i.e., a necessity to avoid the injustice which would occur should the privilege be granted in these instances. This is, however, an inadequate explanation, for injustice may be said to occur in any case in which evidence is suppressed by privilege.

The real basis for the exceptions, as Wigmore has cogently stated (VIII Wigmore on Evidence § 2239 (McNaughton rev. 1961)), is that in these instances the very reason for the privilege is lacking. The social policy behind the husband-wife privilege is to promote or, at least, to avoid disrupting marital harmony. In proceedings in which a spouse is accused on committing a crime against (1) the other, (2) a child of either, (3) a member of either household, or (4) a third person, in the course of committing a crime against any of them, it can hardly be said that allowing a spouse to testify against the other will disrupt an otherwise compatible relationship. In those cases, the theoretical basis for the privilege should not be blindly followed to the needless detriment of the administration of justice.

Rule 504 was amended, effective March 1, 2014, to incorporate the 1999 amendments

to Rule 504 of the Uniform Rules of Evidence. Under the amendments, spousal privilege is extended to civil cases and the term "person" is replaced by "individual," which is intended to mean a human being.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, pages 32-33; January 29, 1976, page 7. Rule 504, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-02.

Considered: N.D.C.C. §§ 12.1-29-04, 27-05.1-14.

RULE 505. RELIGIOUS PRIVILEGE

(a) Definitions. ~~As used in~~ In this rule:

(1) ~~A "clergyman" is~~ "Cleric" means a minister, priest, rabbi, accredited Christian Science practitioner, or other similar functionary of a religious organization, or an individual reasonably believed so to be by the person consulting ~~him~~ the cleric.

(2) A communication is "confidential" if it is made privately and not intended for further disclosure except to other persons present in furtherance of the purpose of the communication.

(b) General rule of privilege. ~~A person~~ An individual has a privilege to refuse to disclose and to prevent another from disclosing a confidential communication by the ~~person~~ individual to a ~~clergyman~~ cleric in ~~his~~ the cleric's professional character as spiritual adviser.

(c) Who may claim the privilege. The privilege under this rule may be claimed by ~~the person, by his~~ an individual or the individual's guardian or conservator, or ~~by his~~ the individual's personal representative if ~~he~~ the individual is deceased. The ~~person~~ individual who was the ~~clergyman~~ cleric at the time of the communication is presumed to have authority to claim the privilege but only on behalf of the communicant.

EXPLANATORY NOTE

Rule 505 was amended, effective March 1, 2014.

Rule 505 ~~follows the language of~~ is based on Rule 505 of the Uniform Rules of Evidence ~~(1974)~~. It provides the privilege that has been traditionally termed the "priest-penitent" privilege, although it does so in a form that gives the privilege a somewhat wider

scope.

Originally, this privilege was granted only to penitents and priests, and then only if the communication was made in confession, an institution of the Catholic Church which is cloaked with absolute secrecy. Gradually, the application of the privilege was broadened; before the promulgation of this rule, North Dakota statutory law protected communications made to a "clergyman or priest," but only if the communications were made in "confession."

~~Subdivision~~ Paragraph (a)(1) makes it clear that the privilege applies not only to certain named members of the clergy, but also to "other similar functionar(ies) of a religious organization." It will be the function of the courts to determine whether, in a given case, the status of the spiritual adviser is such that invocation of the privilege is warranted.

Under ~~subdivision~~ paragraph (a)(2), a communication may be ~~deemed~~ considered confidential even though other persons are present, but only if the person's presence is necessary to further the purpose of the communication.

The general rule of privilege contained in subdivision (b) protects from disclosure communications made to a ~~clergyman~~ cleric acting in a "~~in his~~ professional character as spiritual adviser." Thus, although the privilege is no longer confined to the confessional, it must be made to a ~~clergyman~~ cleric acting in ~~his~~ a professional capacity.

In keeping with the belief that there may be occasions in which it is appropriate for a guardian or personal representative to claim a privilege, subdivision (c) provides for these parties to make the claim on behalf of the holder. The ~~clergyman~~ cleric may, of course, claim the privilege on behalf of the communicant.

Rule 505 was amended, effective March 1, 2014, to follow the 1999 amendments to

Uniform Rule of Evidence 505. The gender specific term "clergyman" is replaced in the rule with the neutral term "cleric" and the term "person" is replaced with "individual," which is intended to mean a human being. The amendments to the rule's terminology are not intended to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, page 33; January 29, 1976, page 7. Rule 505, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-06(2).

RULE 506. POLITICAL VOTE

(a) General rule of privilege. ~~Every person~~ An individual has a privilege to refuse to disclose the tenor of ~~his~~ the individual's vote at a political election conducted by secret ballot.

(b) Exceptions. The privilege under N.D.R.Ev. 506(a) does not apply if the court finds that the vote was cast illegally or determines that disclosure should be compelled under the election laws of the state.

EXPLANATORY NOTE

Rule 506 was amended, effective March 1, 2014.

Rule 506 is taken from the Uniform Rules of Evidence ~~(1974)~~ and promotes the right of secrecy of the ballot which is secured by Article 2, § ~~129~~ 1 of the Constitution of North Dakota.

Subdivision (a)~~(1)~~ states the general rule of privilege. Because the privilege to refuse to disclose the tenor of a secret ballot confers a benefit to the institutions of government as well as to the individual elector, it has been argued that, as a matter of public policy, a party to litigation should be allowed to claim error if the privilege is denied. See, e.g., the dissenting opinion of Christianson, C.J., in Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134 at 142 (1937).

Despite this argument, it has generally been accepted that the rule is one of personal privilege, rather than one of exclusion. The distinction is material: As a personal privilege, the protection conferred may be waived by the holder; furthermore, it may be claimed only

by the elector. Rule 506 follows the generally accepted theory and grants a personal privilege to refuse to disclose the tenor of one's ballot. This is in accord with the case law of North Dakota. See Wehrung v. Ideal School District No. 10, 78 N.W.2d 68 (N.D. 1956), Torkelson v. Byrne, 68 N.D. 13, 276 N.W. 134 (1937).

Of course, if the privilege is erroneously granted, the adverse party may object in ~~his~~ the capacity as a litigant, but this is a claim apart from those made by the holder of the privilege.

Subdivision (b) states that if the vote was cast illegally, or if the court finds that disclosure is proper pursuant to the election laws of this state, then this privilege does not apply. This reaffirms the practice that has been developed and followed in this State. See Torkelson v. Byrne, supra.

Rule 506 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 506. Gender specific language and the term "person" have been replaced with the neutral term "individual," which is intended to mean a human being.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, page 33; January 29, 1976, page 7. Rule 506, Uniform Rules of Evidence ~~(1974)~~.

RULE 507. TRADE SECRETS

A person has a privilege, which may be claimed by ~~him~~ the person or ~~his~~ the person's agent or employee, to refuse to disclose and to prevent other persons from disclosing a trade secret owned by ~~him~~ the person, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice. If disclosure is directed, the court ~~shall~~ must take such protective measures as the interest of the holder of the privilege and of the parties and the interests of justice require.

EXPLANATORY NOTE

Rule 507 was amended, effective March 1, 2014.

Rule 507 is an adoption of its counterpart in the Uniform Rules of Evidence ~~(1974)~~. It provides a limited privilege to protect from disclosure that group of confidential facts necessary to the internal operation of a business entity.

The instances in which the invocation of this privilege is justified are few, given the comprehensive application of public registration, patent and copyright laws and given the nature of the lawsuits in which the privilege is likely to be asserted. There is no need to invoke the privilege in those cases in which public registration laws provide adequate protection of ideas or products; the privilege should not be allowed in those cases in which knowledge of business practices is essential to the determination of relevant issues being tried, for example, in cases involving unfair trade practices.

Therefore, the rule provides that the privilege may be claimed, but only "if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice." In so

framing this rule of privilege, the admonition of Dean Wigmore is heeded:

" * * * the occasional necessity of recognizing it (a trade secrets privilege) should not blind us to the danger of such a measure, or entice us into an unqualified sanction for such a demand." 8 Wigmore on Evidence § 2212(3) at 155 (McNaughton Rev. 1961).

Once the decision to require disclosure is made by the trial judge, the ultimate sentence of this rule gives the judge freedom to direct disclosure in a manner that recognizes the interest of the holder of the privilege and balances this interest against the interests of the parties and of justice. The rule does not prescribe any certain method to be utilized; the matter is one within the trial judge's discretion. It would seem that the variety of interests might often be served through the use of in camera disclosures in the presence of only those to whom the information is necessary to the conducting of the trial.

Rule 507 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 507, replacing gender specific language with the term "person." The term "person" includes individual human beings and also public officers, corporations, associations, and other organizations and entities, public and private. The amendments to the rule's terminology are not intended to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, pages 33-34; January 29, 1976, page 7. Rule 507, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Considered: N.D.C.C. §§ 19-16.1-10, 23-25-06.

~~Rules:~~

~~Considered:~~ Cross Reference: N.D.R.Civ.P. ~~Rule~~ 26~~(c)(7), NDRCivP~~ (General Provisions Governing Discovery).

RULE 508. SECRETS OF STATE AND OTHER OFFICIAL INFORMATION; GOVERNMENTAL PRIVILEGES

(a) Claim of privilege under law of United States. If the law of the United States creates a governmental privilege that the courts of this ~~State~~ state must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.

(b) Privileges created by laws of state. No other governmental privilege is recognized except as created by the ~~constitution or, statutes~~ laws of this state.

(c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court ~~shall~~ must make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action.

EXPLANATORY NOTE

Rule 508 was amended, effective March 1, 2014.

Rule 508 is taken from the Uniform Rules of Evidence ~~(1974)~~. The rule does not create a governmental privilege, but rather recognizes and incorporates such privileges as have been, or may be, provided by the laws of the United States or of North Dakota.

Subdivision (a) provides that privileges created by federal law, which must be recognized by state courts, may be claimed in North Dakota in the manner provided by federal law.

Of the federal privileges which must be recognized in North Dakota, the one of most importance to the law of evidence is that commonly known as the "executive privilege." This is not a general privilege on the part of executive officials to refuse to testify; that privilege does not exist, for, as Wigmore has stated of the chief executive of a state: "His temporary duties as an official cannot override his permanent and fundamental duty as a citizen and as a debtor to justice (to give evidence)." 8 Wigmore on Evidence § 2370 at 748 (McNaughton Rev. 1961). Rather, the application of the privilege is limited to two distinct instances: (1) secrets of state, which include military secrets and matters of national security; and (2) official communications, which encompass other matters and are privileged in certain instances because of the confidentiality necessary to the operation of a co-equal branch of government.

The privilege protecting secrets of ~~State~~ state is one "well established in the law of evidence." United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953). It is in this area that the greatest deference is given to the executive.

The privilege protecting official, confidential communications is somewhat more amorphous. Clearly, it applies to the confidential communications of the President and his close advisers, and as to these, at least, is said to have "constitutional underpinnings." United States v. Nixon, 418 U.S. 683, 94 S. Ct. 3090, 41 L. Ed. 2d 1039 (1974). And yet, even at this level, the claim of confidentiality does not afford the protection that encloses secrets of ~~State~~ state. There are instances in which the privilege must yield:

"We conclude that when the ground for asserting privilege as to subpoenaed materials sought for use in a criminal trial is based only on the generalized interest in confidentiality,

it cannot prevail over the fundamental demands of due process of law in the fair administration of criminal justice. The generalized assertion of privilege must yield to the demonstrated, specified need for evidence in a pending criminal trial." United States v. Nixon, supra, 418 U.S. 713.

The holding of the Nixon case was expressly limited to evidence for which a specified need in a criminal trial could be shown. What the decision would be in cases in which evidence was sought for use in a civil trial, or in cases in which lesser officials were involved, remains an open question. It may be stated with assurance, however, that the decision will be reached by balancing conflicting interests rather than by application of an absolute privilege.

The ultimate phrase of subdivision (a) provides that "the privilege may be claimed as provided by the law of the United States." This confronts the North Dakota courts with an attendant problem which has long troubled the federal judiciary: To what extent is the trial judge involved in the determination of whether certain information is privileged? As a basic premise, it may be stated that the courts have not departed from the philosophy inherent in Chief Justice Marshall's statement that "It is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 1 Cranch, 137, 177 (1803). This is certainly true with respect to communications claimed to be privileged on the basis of confidentiality. In these cases it is appropriate for the trial judge to review, in camera, the information asserted to be privileged, and to excise and protect from disclosure those portions deserving of privilege. United States v. Nixon, supra.

There may be cases, however, in dealing with secrets of state, in which the

information claimed to be privileged is so sensitive that even review of the information by a judge alone, in camera, would be inappropriate. United States v. Reynolds, supra. In those cases, the trial judge must decide the issue without the benefit of viewing the information itself.

If the court is satisfied, "from all the circumstances of the case, that there is a reasonable danger that compulsion of the evidence will expose military matters which, in the interests of national security, should not be divulged," the privilege should be granted without further inquiry. United States v. Reynolds, supra, at 10.

If the court decides that the privilege does not apply, any order requiring disclosure should allow for appeal to be taken so as to avoid possible injustice.

Subdivision (b) provides that the only privileges that will be recognized, other than those of federal origin, are those created by the North Dakota Constitution or by North Dakota statutes.

The North Dakota Constitution, like its federal counterpart, contains no provision for an executive privilege. Presumably, however, the "constitutional underpinnings" of the privilege (constitutional separation of powers and the implied power to carry out enumerated duties) which were recognized on the federal level in United States v. Nixon, supra, could be said to be present under North Dakota laws. The North Dakota Constitution does provide for a limited legislative privilege in Article 4, § ~~42~~ 15, which is known as the "speech and debate" clause. This provision, which operates as more of a means of insulating legislators from substantive liability than as an evidentiary privilege, states that: "~~For words used in any speech or debate in either house, they (the legislators) shall not be questioned in any place~~

Members of the legislative assembly may not be questioned in any other place for any words used in a speech or debate in legislative proceedings."

By statute in North Dakota, a public officer "cannot be examined as to communications made to him in official confidence when the public interests would suffer by the disclosure." N.D.C.C. § 31-01-06(4). ~~Although this statute has not been judicially construed in North Dakota, statutes~~ Statutes of similar wording have been said to create a privilege for "official information," those confidential communications made in the course of governmental operations which do not qualify as secrets of state. 8 Wigmore on Evidence § 2378 (McNaughton Rev. 1961).

In addition to the general privilege of N.D.C.C. § 31-01-06(4), the North Dakota legislature has shielded certain specific information from disclosure. For example, as to motor vehicle accident reports, it is stated in N.D.C.C. § 39-08-14(3): "No written reports or written information mentioned in this section shall be used as evidence in any trial, civil or criminal . . . . " In this and other "secrecy statutes," the legislature has made an express determination that the candor and accuracy of official reports which is gained by making those reports confidential outweighs the assistance to judicial proceedings disclosure might bring.

The privileges these statutes provide remain undisturbed under this rule.

Subdivision (c) directs the trial judge, in cases in which a sustained claim of privilege deprives a party of material evidence, to "make any further orders the interests of justice require. . . ." The balance of the subdivision lists, by way of example and not of limitation, some devices which may be involved. The particular order issued would depend, inter alia,

upon the nature of the case and the prejudice to a party occasioned by the exclusion of evidence. As stated in the Advisory Committee's Note to Federal Rule 509 (the Secrets of State rule which was deleted prior to passage of the Federal Rules):

"Reference to other types of cases serves to illustrate the variety of situations which may arise and the impossibility of evolving a single formula to be applied automatically to all of them. The privileged materials may be the statement of government witness, as under the Jencks statute, which provides that, if the government elects not to produce the statement, the judge is to strike the testimony of the witness, or that he may declare a mistrial if the interests of justice so require. 18 U.S.C. § 3500(d). Or the privileged materials may disclose a possible basis for applying pressure upon witnesses. United States v. Beekman, 155 F.2d 580 (2d Cir. 1946). Or they may bear directly upon a substantive element of a criminal case, requiring dismissal in the event of a successful claim of privilege. United States v. Andolschek, 142 F.2d 503 (2d Cir. 1944); and see United States v. Reynolds, 345 U.S. 1, 73 S. Ct. 528, 97 L. Ed. 727 (1953). Or they may relate to an element of a plaintiff's claim against the government, with the decision indicating unwillingness to allow the government's claim of privilege for secrets of state to be used as an offensive weapon against it. United States v. Reynolds, supra; Republic of China v. National Union Fire Ins. Co., 142 F. Supp. 551(D. Md. 1956.) "

As may be seen, the parties to a lawsuit and their roles as plaintiff or defendant will have an effect on the question of what remedial order, if any, should be issued.

In cases in which the government is a party, the considerations involved in issuing a remedial order under this section will vary according to the government's position in the case.

In a criminal prosecution, exclusion of privileged evidence may warrant dismissal, for the government should not be allowed to convict a defendant without full disclosure of potentially exculpatory evidence. In a case brought against the government, the claim of privilege should not operate as an "offensive weapon" against the government.

In cases in which the government is not a party, the considerations upon which a remedial order is based may be less clear. In fact, under the proposed federal rule, no remedial order could issue in cases in which the government was not a party. See Rule 509, Deleted and Superseded Materials, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975). Despite the argument made under the proposed federal rule that the excluded evidence should be treated as simply unavailable, as in the case of a successful claim of the self-incrimination privilege, it is felt that there is no reason to withhold a remedy if one can be reasonably afforded. However, this subdivision should be applied with caution in those cases in which the government is not a party; in attempting to remedy the injustice worked upon the proponent of such evidence, the rights of the opposing party should not be made to suffer unduly.

Rule 508 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 508, adding titles to subdivisions (a) and (b).

Sources: Joint Procedure Committee Minutes: of April 25-26, 2013, page 34; January 29, 1976, page 9. Rule 508, Uniform Rules of Evidence (1974).

RULE 509. IDENTITY OF INFORMER

(a) Rule of privilege. The United States or a state or subdivision ~~thereof~~ of a state has a privilege to refuse to disclose the identity of ~~a person~~ an individual who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who may claim. The privilege under this rule may be claimed by an appropriate representative of the ~~public entity~~ government to which the information was furnished.

(c) Exceptions~~:~~.

~~(1) Voluntary disclosure; informer a witness.~~ No privilege exists under this rule if the identity of the informer or ~~his~~ the informer's interest in the subject matter of ~~his~~ the informer's communication has been disclosed ~~to those~~ by a holder of the privilege or by the informer's own action to persons who would have cause to resent the communication ~~by a holder of the privilege or by the informer's own action,~~ or if the informer appears as a witness for the government.

~~(2) Testimony on relevant issue~~ (d) Procedures. If it appears ~~in the case~~ that an informer may be able to give testimony relevant to ~~any~~ an issue in a criminal case, or to a fair determination of a material issue on the merits in a civil case to which ~~a public entity~~ the government is a party, and the informed ~~public entity~~ government invokes the privilege, the court ~~shall~~ must give the ~~public entity~~ government an opportunity to show in ~~camera~~ chambers facts relevant to determining whether the informer can, in fact, supply ~~that~~ the

testimony. The showing will ordinarily be ~~in the form of affidavits~~ by affidavit, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the ~~public entity~~ government elects not to disclose ~~his~~ the informer's identity, in criminal cases the court on motion of the defendant or on its own motion ~~shall~~ must grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of ~~him~~ the defendant, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to the court ~~shall~~ must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents ~~shall~~ may not otherwise be revealed without consent of the informed ~~public entity~~ government. All counsel and parties ~~are permitted to~~ may be present at every stage of ~~proceedings~~ a proceeding under this subdivision except a showing in ~~camera at which~~ chambers, if the court has determined that no counsel or party ~~shall be permitted to~~ may be present.

~~(3)~~ (e) Legality of obtaining evidence. If information from an informer is relied upon to establish the legality of the means by which evidence was obtained and the court is not satisfied that the information was received from an informer reasonably believed to be reliable or credible, it may require the identity of the informer to be disclosed. The court ~~shall~~ must, on request of the government, direct that the disclosure be made in ~~camera~~ chambers. All counsel and parties concerned with the issue of legality ~~shall~~ must be permitted to be

present at every stage of ~~proceedings~~ a proceeding under this subdivision except a disclosure in ~~camera~~ chambers, at which no counsel or party ~~shall be permitted to~~ may be present. If disclosure of the identity of the informer is made in ~~camera~~ chambers, the record ~~thereof shall~~ must be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents ~~shall~~ may not otherwise be revealed without consent of the government.

EXPLANATORY NOTE

Rule 509 was amended, effective March 1, 2014.

Rule 509~~,~~ is modeled after Rule 509 of the Uniform Rules of Evidence ~~(1974),~~ and protects, in certain instances, the identity of one who furnishes information that aids the government in the investigation of violations of the law. The need for a privilege of this nature is clear. As McCormick has stated:

"Informers are shy and timorous folk, whether they are undercover agents of the police or merely citizens stepping forward with information about violations of law, and if their names were subject to be readily revealed, this enormously important aid to law enforcement would be almost cut off." McCormick on Evidence § 111 at 236 (2d ed. 1972).

Thus, subdivision (a) grants a privilege that protects the identity of an informer. Although often called the “informer’s privilege,” the true holder of the privilege is the governmental entity to which the information is furnished. The privilege protects only the identity of the informer and not ~~his~~ the informer’s communication, except to the extent that protection of the contents of the communication is necessary to preserve the informer's anonymity. 8 Wigmore on Evidence § 2374 at 765 (McNaughton Rev. 1961).

Invocation of the privilege is most likely to occur in the context of a criminal proceeding, but the privilege is not limited to those proceedings. Prosecutions of civil violations and investigations by legislative bodies may include the use of informers and the possibility of reprisal against them. The privilege is extended to protect the informer's identity in those situations.

Subdivision (b) provides that the privilege may be claimed by "an appropriate representative" of the entity to which the information was given. Normally, this representative will be counsel. However, in cases in which neither the United States nor the State of North Dakota is a party, other representatives should be accepted as proper claimants. See Advisory Committee's Note to Rule 510, Deleted and Superseded Material, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).

Subdivision (c)~~(1)~~ lists two instances in which the privilege does not apply. The first is whenever the identity of the informer or ~~his~~ the informer's interest in the subject matter of the communication ~~"~~has been disclosed to those "who would have cause to resent the communication." This language, taken from the landmark opinion of Roviaro v. United States, 353 U.S. 53, 60, 77 S. Ct. 623, 1 L. Ed. 2d 639 (1957), is designed to remove the privilege in those cases in which the identity of an informer is already known to those from whom it was to be shielded, and, at the same time, to leave the privilege intact whenever disclosure is otherwise made, e.g., to other enforcement authorities.

Disclosure may be made by the government or by the informer ~~himself~~. Allowing the informer, who is not the holder of the privilege, essentially to "waive" its protection is a minor departure from the law of privileges for, normally, only a holder or ~~his~~ representative

may effect a waiver. The nature of this particular privilege and the practical necessities involved dictate this result; the government could not reasonably restrain an informer's desire to disclose ~~his~~ the informer's identity.

The second exception stated in ~~this subsection~~ subdivision (c) is that the privilege is inapplicable whenever the informer appears as a witness for the government. This exception is of constitutional origin. A defendant may not be denied his rights to confrontation of witnesses and to due process of law on the basis of an informer's privilege. Smith v. Illinois, 390 U.S. 129, 88 S. Ct. 748, 19 L. Ed. 2d 956 (1968).

Subdivision ~~(c)(2)~~ (d) states that the general rule of privilege does not apply whenever it appears that the informer may be able to give testimony relevant to "any issue in a criminal case" or to "a fair determination of a material issue on the merits in a civil case." The doctrine supporting the exception is essentially one of fairness. In each case, or at least in criminal prosecutions, a balancing of the conflicting interests must be made:

"The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors." Roviaro v. United States, supra, 353 U.S. 62.

In Roviaro, the informer was also a participant in the crime. Since that decision, participation in the crime has been deemed to be a critical factor in the decision of whether disclosure of an informer's identity should be required. See United States v. Clark, 482 F.2d

103 (5th Cir. 1973). See generally, the cases collected in 2 Wright, Federal Practice and Procedure, § 406 (1969). An informer's participation in a crime will be a factor to consider under this rule, not in and of itself, but as it bears upon the relevancy and significance of the informer's potential testimony.

If it appears that an informer may be able to give relevant testimony and the government, when informed of this fact, invokes the privilege, this rule provides the procedure by which the validity of the claim is to be tested. The court shall review, in ~~camera~~ chambers, the facts relevant to determining whether relevant information may be obtainable from the informer. This limited intrusion into what may be privileged material is deemed to be the most equitable manner of balancing the conflicting interests involved.

If the court finds that disclosure is in order and the government refuses to reveal the informer's identity, the court, in its discretion, may grant appropriate relief, as delineated in the rule.

Subdivision (e) details the extent of the privilege under this rule when an informer is relied upon to establish the legality of the means by which evidence was obtained. This subdivision was derived from a rule of privilege that was proposed for, but never enacted as part of, the Federal Rules of Evidence.

Rule 509 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 509. Several occurrences of the term "person" have been replaced with the term "individual," which is intended to mean a human being. The amendments to the rule's terminology are not intended to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 25-26, 2013, page 34; January 29, 1976, pages 9, 10. Rule 509, Uniform Rules of Evidence (1974); Proposed Rule 509(c)(3), Federal Rules of Evidence (not enacted).

RULE 510. WAIVER OF PRIVILEGE ~~BY VOLUNTARY DISCLOSURE~~

(a) Voluntary disclosure. A person upon whom these rules confer a privilege against disclosure ~~is conferred by rule or by law~~ waives the privilege if ~~he~~ the person or ~~his~~ the person's predecessor, while holder of the privilege, voluntarily discloses or consents to disclosure of any significant part of the privileged matter. This rule does not apply if the disclosure itself is privileged or if N.D.R.Civ.P. 26 (b)(~~6~~ 5)(B) applies.

(b) Involuntary disclosure. A claim of privilege is not waived by a disclosure that was compelled erroneously or made without an opportunity to claim the privilege.

EXPLANATORY NOTE

Rule 510 was amended, effective March 1, 2008; March 1, 2014.

~~This rule~~ Subdivision (a) merely states in express terms that which is inherent in the preceding rules of privilege. The rules of privilege are designed to foster certain relationships or policies that are deemed important to our society. The rules seek to accomplish this end by enveloping selected communications with the necessary degree of confidentiality.

If the holder of a privilege voluntarily discloses that which is privileged, there remains no theoretical or practical basis for maintaining the privilege and thereby depriving the judicial system of what may be relevant evidence. The privilege, however, is not to be revoked automatically following any disclosure, however peripheral to the substance of the communications being protected. The disclosure must be of a "significant part of the privileged matter." The determination of what is significant must be made with a common sense approach. If the substance of the privileged material is disclosed, the privilege should

be revoked. Otherwise, it should remain intact.

~~Rule 510~~ Subdivision (a) was amended, effective March 1, 2008, to recognize that N.D.R.Civ.P. 26(b)(~~2~~ 5)(B)'s safe harbor provision protects claims of privilege under some circumstances when information is voluntarily produced in the course of discovery.

Under subdivision (a), a voluntary disclosure of privileged material operates as a waiver of a given privilege. Subdivision (b) provides for a contrary result whenever the disclosure is erroneously compelled or is made without opportunity by the holder to claim the privilege.

Subdivision (b) will most often operate as a rule of exclusion, i.e., it will render inadmissible evidence of the prior disclosure in a civil or criminal action to which the holder of the privilege is a party. But, the rule does more than prohibit the use of such evidence against the holder of the privilege, it provides that the privilege shall remain intact, to be treated as originally granted. Thus, the holder, as a witness, may claim the privilege, in an action to which he is not a party. Cf. The proposed Federal Rule 512, Deleted and Superseded Materials, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).

The need for a protective rule of this type is clear with respect to disclosures erroneously compelled. Whether the compulsion is judicial or comes from some other authority, the rules of privilege should not be left open to circumvention by their very breach.

The second basis for exclusion is meant to deal with those instances in which disclosure is made by someone other than the holder of the privilege. This would include disclosure by a recipient of privileged information (e.g. a lawyer), one allowed to transmit privileged information (e.g., a lawyer's representative), or an eavesdropper, among others.

It may be argued that once disclosure by a third party is made, the need for confidentiality ceases and, therefore, the privilege should not be maintained. However, with the increasing number and sophistication of intrusions into individual privacy, it is necessary to guard jealously those confidential communications deemed of such social importance as to warrant being privileged. This provision will maximize the effect of a given privilege, although, as may be argued, it cannot totally repair a breach of confidentiality.

Rule 510 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 510. The amendments incorporate the content of former Rule 511 so that both the voluntary and involuntary waiver of a privilege can be addressed in one comprehensive rule. In addition, gender specific language is replaced by the neutral term "person." The term "person" includes individual human beings and also public officers, corporations, associations, and other organizations and entities, public and private. The amendments to the rule's terminology are not intended to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, pages 34-35; January 25, 2007, pages 9-10; January 29, 1976, page 11. Rule 510, Uniform Rules of Evidence ~~(1974)~~.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-07.

RULE 511. ~~PRIVILEGED MATTER DISCLOSED UNDER COMPULSION OR WITHOUT OPPORTUNITY TO CLAIM PRIVILEGE~~ [TRANSFERRED]

~~A claim of privilege is not defeated by a disclosure which was (1) compelled erroneously or (2) made without opportunity to claim the privilege.~~

EXPLANATORY NOTE

Rule 511 was amended, effective March 1, 2014. The content of the rule was transferred to Rule 510 to create a single rule on waiver of privilege.

~~Under Rule 510, a voluntary disclosure of privileged material operates as a waiver of a given privilege. This rule provides for a contrary result whenever the disclosure is erroneously compelled or is made without opportunity by the holder to claim the privilege.~~

~~The rule will most often operate as a rule of exclusion, i.e., it will render inadmissible evidence of the prior disclosure in a civil or criminal action to which the holder of the privilege is a party. But, the rule does more than prohibit the use of such evidence against the holder of the privilege, it provides that the privilege shall remain intact, to be treated as originally granted. Thus, the holder, as a witness, may claim the privilege, in an action to which he is not a party. Cf. The proposed Federal Rule 512, Deleted and Superseded Materials, Federal Rules of Evidence Pamphlet (West Pub. Co. 1975).~~

~~The need for a protective rule of this type is clear with respect to disclosures erroneously compelled. Whether the compulsion is judicial or comes from some other authority, the rules of privilege should not be left open to circumvention by their very breach.~~

~~The second basis for exclusion is meant to deal with those instances in which disclosure is made by someone other than the holder of the privilege. This would include disclosure by a recipient~~

~~of privileged information (e.g. a lawyer), one allowed to transmit privileged information (e.g., a lawyer's representative), or an eavesdropper, among others.~~

~~It may be argued that once disclosure by a third party is made, the need for confidentiality ceases and, therefore, the privilege should not be maintained. However, with the increasing number and sophistication of intrusions into individual privacy, it is necessary to guard jealously those confidential communications deemed of such social importance as to warrant being privileged. This provision will maximize the effect of a given privilege, although, as may be argued, it cannot totally repair a breach of confidentiality.~~

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, page 35; January 29, 1976, page 12. Rule 511, Uniform Rules of Evidence.

RULE 512. COMMENT UPON OR INFERENCE FROM CLAIM OF PRIVILEGE; INSTRUCTION

(a) Comment or inference not permitted. ~~The~~ A claim of ~~a~~ privilege, whether in the present proceeding or upon a ~~prior~~ previous occasion, is not a proper subject of comment by ~~court~~ judge or counsel. No inference may be drawn ~~therefrom~~ from the claim.

(b) Claiming privilege without knowledge of jury. In jury cases, proceedings ~~shall~~ must be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury.

(c) Jury instruction. Upon request, any party against whom the jury might draw an adverse inference from a claim of privilege is entitled to an instruction that no inference may be drawn ~~therefrom~~ from the claim.

EXPLANATORY NOTE

Rule 512 was amended, effective March 1, 2014.

Subdivision (a) states the general policy of these rules, which is that no comment shall be made upon, nor any inference drawn from, a claim of privilege. This area of the law of privileges is one of dispute, with some courts holding that an inference may be drawn from a claim of privilege, presumably on the basis that the suppression of relevant evidence by a party should be noticed and considered by a jury. See McCormick on Evidence § 76 (2d ed. 1972). That this argument has some merit is recognized; however, it is believed that the position taken in this rule is based upon more weighty considerations, the essence of which have been stated by Lord Chelmsford:

" 'The exclusion of such (privileged) evidence is for the general interest of the community,

and therefore to say that when a party refuses to permit professional confidence to be broken, everything must be taken most strongly against him, what is it but to deny him the protection which, for public purposes, the law affords him, and utterly to take away a privilege which can thus only be asserted to his prejudice?' Wentworth v. Lloyd, 10 H.L.Cas. 589, 591 (1864)," quoted in McCormick on Evidence § 76 at 155, 156 (2d ed. 1972).

McCormick concludes his discussion of the subject by stating:

"It is submitted that the best solution is to recognize only privileges which are soundly based in policy and to accord those privileges the fullest protection." McCormick on Evidence, supra, at 156.

This is the approach taken by these rules, and the result is in accord with the case law of North Dakota. State v. Bell, 67 N.D. 382, 272 N.W. 334 (1937); Meyer v. Russell, 55 N.D. 546, 214 N.W. 857 (1927).

Subdivision (b) is an effort to further the announced policy of this rule by providing that claims of privilege should be made, where practicable, outside the hearing of the jury.

In most cases this will be easily accomplished, as it will often be known in advance of trial that a privilege will be claimed. (In this regard, note the case of State v. Bell, supra, in which the practice of forcing a holder to claim a privilege in the presence of the jury was, if not accepted, held not to constitute prejudicial error.)

Subdivision (c) provides that a party against whom the jury may draw an adverse inference from a claim of privilege may have, as a matter of right, an instruction that no inferences may be drawn. This is intended to provide a partial remedy in those instances in which disclosure to the jury of a claim of privilege cannot be reasonably avoided. The instruction may be requested by a party, whether the privilege is being claimed by him or by a witness, if the party will be the subject of an

adverse inference arising from the claim of privilege.

Rule 512 was amended, effective March 1, 2014, to follow the 1999 amendments to Uniform Rule of Evidence 512.

Sources: Joint Procedure Committee Minutes: of April 25-26, 2013, page 35; January 29, 1976, page 12. Rule 512, Uniform Rules of Evidence (1974).

Statutes Affected:

Considered: N.D.C.C. § 29-21-11.

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 conducted in your presence? So help you God.

(8) To a grand jury reporter. Do you solemnly swear you will keep secret the testimony taken and evidence considered by the grand jury except as you may be required by law to disclose? So help you God.

(9) To a grand jury bailiff. Do you solemnly swear to impartially perform the duties of your office to the best of your ability, to obey your instructions, and not to eavesdrop or communicate with the grand jurors regarding any matter being considered by them? So help you God.

(b) Affirmation. A person must be allowed to make an affirmation instead of taking an oath, by substituting the word "affirm" for the word "swear" and substituting the phrase "under the pains and penalties of perjury" for the phrase "so help you God."

EXPLANATORY NOTE

Rule 6.10 was adopted, effective March 1, 1999. The explanatory note was amended, effective March 1, 2014.

The intent of the rule is to modernize the language used in courtroom oaths and to consolidate the various oaths into one location.

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, pages 12-15; January 29-30, 1998, pages 3-10; September 25-26, 1997, pages 11-12.

Statutes Affected:

Superseded: ~~Sections~~ N.D.C.C. §§ 28-14-08; 28-33-04; 29-10.1-12; ~~and~~ 29-10.1-25; 29-17-14. In ~~Section~~ N.D.C.C. § 29-17-12, the language regarding an oath or affirmation. ~~Section 29-17-14.~~ In ~~Section~~ N.D.C.C. § 31-01-11, the oath or affirmation for an interpreter.

Cross Reference: N.D.R.Ev. 603 (Oath or Affirmation).

RULE 601. ~~GENERAL RULE OF~~ COMPETENCY TO TESTIFY IN GENERAL

~~Every person is competent to be a witness except as otherwise provided in these rules.~~

Every person is competent to be a witness unless these rules provide otherwise.

EXPLANATORY NOTE

Rule 601 was amended, effective March 1, 2014.

The essential thought underlying this rule is that, generally, the evaluation of a witness should be made by the trier of fact, through a determination of the weight and credibility of that witness' testimony, rather than by the prior imposition of standards of competency. Thus, there are no standards put forth relating to mental or moral competency in these rules. ~~(Cf. State v. Oliver, 78 N.D. 398, 49 N.W.2d 564 (1951), wherein it was held that competency is to be determined as a matter of law, considering the witness' intelligence, ability to discern truth and falsehood, and recognition of the obligation of his oath.) The trial judge will retain a certain amount of control over the "evaluation" of a witness in his review of the sufficiency of the evidence.~~

~~Neither this rule nor any of the rules of this code contain a "Dead Man's" statute. This represents a departure from former North Dakota law. The former "Dead Man's" statute, N.D.C.C. § 31-01-03, and by reference N.D.C.C. § 31-01-04 and N.D.C.C. § 31-01-05, are superseded by adoption of these rules.~~

Rule 601 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, pages 21-22; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 601~~, Federal Rules of Evidence~~; Rule 601, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-01-01, 31-01-03, 31-01-04, 31-01-05.

Cross Reference: ~~Rule~~ N.D.R.Ev. 501~~, NDREv~~ (Privilege in General).

RULE 602. ~~LACK OF~~ NEED FOR PERSONAL KNOWLEDGE

~~A witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may, but need not, consist of the witness' own testimony. This rule is subject to the provisions of Rule 703, relating to opinion testimony by expert witnesses.~~

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter. Evidence to prove personal knowledge may consist of the witness's own testimony. This rule does not apply to a witness's expert testimony under Rule 703.

EXPLANATORY NOTE

Rule 602 was amended, effective March 1, 1990; March 1, 2014.

This rule deals with the competency of a witness, but only in a most basic sense. The requirement of personal knowledge is deeply embedded in the common law ~~(See, generally, McCormick on Evidence, § 10 (2d ed. 1972)), and is established in North Dakota case law. See Teegarden v. Dahl, 138 N.W.2d 668, 46 A.L.R.3d 708 (N.D. 1965)~~.

The rule states that a witness may ~~not~~ testify ~~"unless evidence is introduced sufficient to support a finding"~~ "if evidence is introduced sufficient to support a finding" that the witness has personal knowledge. This gives the trial judge the power to reject testimony if the judge finds, as a matter of law, that no reasonable juror could believe that the witness perceived the event about which the witness is testifying.

The last sentence is intended to avoid any confusion which might otherwise arise

concerning the relative requirements of this rule and Rule 703. This rule is subordinate to Rule 703, which does not require that an expert opinion be based on the expert's own perception.

Rule 602 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 602 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 22; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 26. ~~Rule~~ Fed.R.Ev. 602~~, Federal Rules of Evidence~~; Rule 602, SBAND proposal.

RULE 603. OATH OR AFFIRMATION TO TESTIFY TRUTHFULLY

~~Before testifying, every witness must be required to declare that the witness will testify truthfully, by oath or affirmation administered in a form calculated to awaken the witness' conscience and impress the witness' mind with the duty to do so.~~

Before testifying, a witness must give an oath or affirmation to testify truthfully. It must be in a form designed to impress that duty on the witness's conscience.

EXPLANATORY NOTE

Rule 603 was amended, effective March 1, 1990; March 1, 2014.

Rule 603 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 603 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 22; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 603~~, Federal Rules of Evidence~~; Rule 603, SBAND proposal.

Cross Reference: ~~Rule~~ N.D.R.Ct. 6.10~~, N.D.R.Ct~~ (Courtroom Oaths).

RULE 604. INTERPRETERS~~S~~

~~An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation.~~

An interpreter must be qualified and must give an oath or affirmation to make a true translation.

EXPLANATORY NOTE

Rule 604 was amended, effective March 1, 1990; March 1, 2014.

This rule ~~merely~~ includes within the ~~evidence code~~ Rules of Evidence that which exists in North Dakota law. N.D.C.C. § 31-01-11 provides for the appointment of interpreters and for their oath while N.D.C.C. ch. 28-33 provides additional standards for interpreters for deaf persons~~; Rule 28(b), NDRCrimP provides for the appointment of interpreters~~.

Rule 604 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 604 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, pages 5-6; April 26-27, 2012, pages 22-23; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 604~~, Federal Rules of Evidence~~; Rule 604, SBAND

proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 28-33; §§ 31-01-11, 31-01-12.

Cross Reference: N.D.R.Civ.P. 43 (Evidence); N.D.R.Crim.P. 28 (Interpreters); N.D.R.Ct. 6.10 (Courtroom Oaths); N.D.Sup.Ct.Admin.R. 50 (Court Interpreter Qualifications and Procedures).

RULE 605. JUDGE'S COMPETENCY ~~OF JUDGE~~ AS A WITNESS

The judge presiding at the trial may not testify in that trial as a witness. ~~No objection need be made in order to preserve the point.~~ A party need not object to preserve the issue.

EXPLANATORY NOTE

Rule 605 was amended, effective March 1, 2014.

This rule provides that a judge is wholly incompetent to testify in a trial over which ~~he~~ the judge is presiding. ~~This changes the North Dakota practice, which allowed the judge to testify and gave the judge the discretion to order the trial to be held before another judge or jury. N.D.C.C. § 31-01-10. This concept of "discretionary" incompetency was rejected as involving practical problems in the conduct of a trial should the judge decide to continue hearing the case, e.g., can the judge rule on his own testimony? It was also felt that, in the words of McCormick, a judge's "role as a witness is manifestly inconsistent with his customary role of impartiality in the adversary system of trial." McCormick on Evidence § 68, p. 147 (2d ed. 1972).~~

Rule 605 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 23; January 29, 1976, page 12; October 1, 1975, page 4. ~~Rule~~ Fed.R.Ev. 605~~, Federal Rules of Evidence~~;

Rule 605, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. § 31-01-10.

RULE 606. JUROR'S COMPETENCY ~~OF JUROR~~ AS A WITNESS

~~(a) At the trial. A member of the jury may not testify as a witness before that jury in the trial of the case in which the juror is sitting. If the juror is called so to testify, the opposing party must be afforded an opportunity to object out of the presence of the jury.~~

(a) At the Trial. A juror may not testify as a witness before the other jurors at the trial. If a juror is called to testify, the court must give a party an opportunity to object outside the jury's presence.

~~(b) Inquiry into validity of verdict or indictment.~~

~~Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon the juror or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith.~~

(b) During an Inquiry into the Validity of a Verdict or Indictment.

(1) Prohibited Testimony or Other Evidence. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

~~However, a juror may testify about (1) whether extraneous prejudicial information was improperly brought to the jury's attention, (2) whether any outside influence was~~

~~improperly brought to bear upon any juror, (3) whether the verdict of the jury was arrived at by chance, or (4) whether there was a mistake in entering the verdict onto the verdict form. A juror's affidavit or evidence of any statement by the juror may not be received on a matter about which the juror would be precluded from testifying.~~

(2) Exceptions. A juror may testify about whether:

(A) extraneous prejudicial information was improperly brought to the jury's attention;

(B) an outside influence was improperly brought to bear on any juror;

(C) the verdict was arrived at by chance; or

(D) a mistake was made in entering the verdict on the verdict form.

EXPLANATORY NOTE

Rule 606 was amended, effective March 1, 1990, March 1, 2008; March 1, 2014.

Subdivision (a) prohibits a juror from testifying in a case in which that juror is sitting. Many of the practical and theoretical problems that are present when a judge testifies are also present when a juror does so. The impartiality with which the trier of fact should consider evidence is immeasurably damaged whenever a juror presents evidence for one of the parties to a lawsuit. ~~This rule represents a change from prior law which allowed a juror to testify (N.D.C.C. § 31-01-10), but will likely have little effect on practice, as the process of jury selection has kept out of the jury box those who possess information relative to the determination of a lawsuit.~~

Subdivision (b) ~~comports with existing North Dakota law by prohibiting~~ prohibits a juror from testifying as to the mental processes inherent in arriving at a verdict but ~~allowing~~ allows jurors to testify as to whether outside influences were brought to bear upon a juror,

or whether the verdict was arrived at by chance.

Subdivision (b) was amended, effective March 1, 2008, to allow juror testimony about mistakes in entering the verdict on the verdict form.

The rationale of this rule is to further free deliberation in the jury room by protecting from disclosure the manner in which a verdict was reached, and to promote finality of verdicts. At the same time considerations much be given to the arrival of a just result in each particular case. Where a verdict is reached because of extraneous, prejudicial information or outside influence, much of the reason for disallowing a juror to testify disappears, and the balance is weighted in favor of obtaining justice in the individual case. Justice also requires disclosure whenever a verdict is arrived at by chance, including a "quotient" verdict, in which the jurors agree in advance to be bound. Although the view has been criticized, it is felt that reaching a verdict by chance is an extreme irregularity which replaces deliberation rather than being a part of it and, as such, should be disclosed.

Rule 606 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 606 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of April 26-27, 2012, pages 23-24; September 28-29, 2006, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15;

January 29, 1976, page 13; October 1, 1975, page 4. Fed.R.Ev. 606; Rule 606, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 29-21-18, 31-01-10.

Cross Reference: N.D.R.Civ.P. 59 (New Trials-Amendment of Judgments).

RULE 607. WHO MAY IMPEACH A WITNESS

~~The credibility of a witness may be attacked by any party, including the party calling the witness.~~

Any party, including the party that called the witness, may attack the witness's credibility.

EXPLANATORY NOTE

Rule 607 was amended, effective March 1, 1990; March 1, 2014.

This rule does away with the prohibition against impeaching one's own witness. ~~The rule against impeaching one's own witness has long been criticized (see 3 Weinstein's Evidence Para 607(01) at 607-7, 607-8 (1975)) and was abandoned at the federal level as being "based on false premises. A party does not hold out his witness as worthy of belief, since he rarely has a free choice in selecting them." Advisory Committee Note to Rule 607, FRE. Furthermore, the abolition of the rule in criminal cases is probably constitutionally required. See Chambers v. Mississippi, 410 U.S. 284, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973).~~

~~Allowing a party to impeach its own witness represents a change from past North Dakota cases, although the Supreme Court has strongly indicated its disfavor with the "voucher" rule:~~

~~"While North Dakota has recognized the 'voucher rule' that one is presumed to vouch for the truthfulness of his own witness (George v. Triplett, 5 N.D. 50, 63 N.W. 891 (1895)) we have permitted cross-examination of one's own witnesses in case of surprise (George v.~~

~~Triplett, supra), and contradiction of one's own witnesses by other witnesses (Jacobson v. Mutual Benefit H. & A. Association, 70 N.D. 566, 296 N.W. 545 (1941)), as well as the calling of a witness as a court witness, thereby permitting cross-examination by both sides. See Hefty v. Aldrich, 220 N.W.2d 840 (N.D. 1974). The 'voucher rule' will be rejected entirely if the newly-proposed Federal Rules of Evidence are adopted. See 607. It should be. Wigmore calls it 'a primitive notion, resting on no reason whatever, but upon mere tradition * * * .' IIIA Wigmore on Evidence, Chadbourn Edition, Sec. 898.~~

~~"The true extent of the 'voucher rule' is probably simply that the party calling a witness is likely to be held responsible for the testimony of that witness in the eyes of the judge or jury, and jury arguments to that effect can be made, but the rule should never be used to prevent cross-examination of a witness who is adverse or hostile or one whom a party is required to call by the necessities of the case." State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974).~~

Rule 607 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 607 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 24; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27; January 29, 1976,

page 13. ~~Rule~~ Fed.R.Ev. 607~~, Federal Rules of Evidence~~; Rule 607, SBAND proposal.

~~Rules:~~

~~Considered: Rule 43(b), NDRCivP.~~

Cross Reference: ~~Rules~~ N.D.R.Ev. 404 (Character Evidence; Crimes or Other Acts), N.D.R.Ev. 608 (A Witness's Character for Truthfulness or Untruthfulness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), ~~NDREv~~; N.D.R.Civ.P. 43 (Evidence).

RULE 608. ~~EVIDENCE OF CHARACTER AND CONDUCT OF WITNESS~~

A WITNESS'S CHARACTER FOR TRUTHFULNESS OR UNTRUTHFULNESS

~~(a) Opinion and reputation evidence of character. The credibility of a witness may be attacked or supported by evidence in the form of opinion or reputation, but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.~~

(a) Reputation or Opinion Evidence. A witness's credibility may be attacked or supported by testimony about the witness's reputation for having a character for truthfulness or untruthfulness, or by testimony in the form of an opinion about that character. But evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked.

~~(b) Specific instances of conduct. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' character for truthfulness, other than conviction of crime as provided in N.D.R.Ev. 609, may not be proved by extrinsic evidence. However, in the discretion of the court, if probative of truthfulness or untruthfulness, they may be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.~~

(b) Specific Instances of Conduct. Except for a criminal conviction under Rule 609,

extrinsic evidence is not admissible to prove specific instances of a witness's conduct in order to attack or support the witness's character for truthfulness. But the court may, on cross-examination, allow them to be inquired into if they are probative of the character for truthfulness or untruthfulness of:

(1) the witness; or

(2) another witness whose character the witness being cross-examined has testified about.

(c) Privilege Against Self-incrimination. ~~The giving of testimony, whether by an accused or by any other witness, does not operate as a waiver of the accused's or the witness' privilege against self-incrimination when examined with respect to matters relating only to character for truthfulness.~~ A witness does not waive the privilege against self-incrimination by testifying about a matter that relates only to a character for truthfulness.

EXPLANATORY NOTE

Rule 608 was amended, effective March 1, 1990, March 1, 2005; March 1, 2014.

Rule 608 is taken from Rule 608, Federal Rules of Evidence. It develops the exception stated in Rule 404 to the general prohibition against use of character evidence by allowing evidence of a witness' truthful or untruthful character to support or attack the witness' character for truthfulness. ~~As stated in the explanatory note to Rule 405, allowing the use of opinion evidence of character represents a change in North Dakota practice.~~

Rule 608 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 608 was amended, effective March 1, 2005, to substitute the term "character for

truthfulness" for the term "credibility" in subdivisions (b) and (c).

Rule 608 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 24; January 29-30, 2004, page 21; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 27. ~~Rule~~ Fed.R.Ev. 608~~, Federal Rules of Evidence~~; Rule 608, SBAND proposal.

Cross Reference: ~~Rules~~ N.D.R.Ev. 404 (Character Evidence; Crimes or Other Acts), N.D.R.Ev. 607 (Who May Impeach a Witness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), ~~NDREv~~.

RULE 609. IMPEACHMENT BY EVIDENCE OF A CRIMINAL CONVICTION ~~OF CRIME~~

~~(a) General rule. For the purpose of attacking the character for truthfulness of a witness,~~

(a) In General. The following rules apply to attacking a witness's character for truthfulness by evidence of a criminal conviction:

~~(1) evidence that a witness other than an accused has been convicted of a crime must be admitted, subject to Rule 403, if the crime was punishable by death or imprisonment in excess of one year under the law under which the witness was convicted, and evidence that an accused has been convicted of such a crime must be admitted if the court determines that the probative value of admitting that evidence outweighs its prejudicial effect to the accused; and~~

(1) for a crime that, in the convicting jurisdiction, was punishable by death or by imprisonment for more than one year, the evidence:

(A) must be admitted, subject to Rule 403, in a civil case or in a criminal case in which the witness is not a defendant; and

(B) must be admitted in a criminal case in which the witness is a defendant, if the probative value of the evidence outweighs its prejudicial effect to that defendant; and

~~(2) evidence that any witness has been convicted of a crime must be admitted regardless of the punishment, if the elements of the crime required proof or admission of an act of dishonesty or false statement by the witness.~~

(2) for any crime regardless of the punishment, the evidence must be admitted if the elements of the crime required proving, or the witness's admitting, a dishonest act or false statement.

(b) Time limit. Evidence of a conviction under this rule is not admissible if a period of more than ten years has elapsed since the date of conviction or of the release of the witness from any confinement imposed for that conviction, whichever is the later date unless the witness is still in confinement for that conviction.

~~(c) Effect of pardon, annulment, or certificate of rehabilitation. Evidence of a conviction is not admissible under this rule if (1) the conviction is vacated or has been the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding of the rehabilitation of the person convicted, and that person has not been convicted of a subsequent crime that was punishable by death or imprisonment in excess of one year, or (2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.~~

(c) Effect of a Pardon, Annulment, or Certificate of Rehabilitation. Evidence of a conviction is not admissible if:

(1) the conviction has been vacated or is the subject of a pardon, annulment, certificate of rehabilitation, or other equivalent procedure based on a finding that the person has been rehabilitated, and the person has not been convicted of a later crime punishable by death or by imprisonment for more than one year; or

(2) the conviction has been the subject of a pardon, annulment, or other equivalent procedure based on a finding of innocence.

~~(d) Juvenile adjudications. Evidence of juvenile adjudications is generally not admissible under this rule. However, the court, in a criminal case, may allow evidence of a juvenile adjudication of a witness other than the accused if conviction of the offense would be admissible to attack the credibility of an adult and the court is satisfied that admission in evidence is necessary for a fair determination of the issue of guilt or innocence.~~

(d) Juvenile Adjudications. Evidence of a juvenile adjudication is admissible under this rule only if:

(1) it is offered in a criminal case;

(2) the adjudication was of a witness other than the defendant;

(3) an adult's conviction for that offense would be admissible to attack the adult's credibility; and

(4) admitting the evidence is necessary to fairly determine guilt or innocence.

(e) Pendency of an Appeal. A conviction that satisfies this rule is admissible even if an appeal is pending. Evidence of the pendency is also admissible.

EXPLANATORY NOTE

Rule 609 was amended, effective March 1, 1990, January 1, 1995, March 1, 2008; March 1, 2014.

Rule 609 is taken from the Uniform Rules of Evidence (1974) ~~and has been modified only for the purpose of clarification. In subdivision (b), the phrase "unless the witness is still in confinement for that conviction" was added to make it clear that where there is no release the expiration of the ten-year period will not bring a confined witness under this section.~~

Subdivision (c) was modified by adding the words "~~is~~ vacated" in paragraph (1). This

was done to assure that cases involving deferred imposition of sentences would be covered.

This rule varies from ~~Federal Rule~~ Fed.R.Ev. 609 in that the ~~Federal~~ federal rule gives a court discretion, in subdivision (b), to extend the ten-year period during which evidence of a conviction may be admitted. Under this rule, the court has no discretion in the matter.

Rule 609 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Subdivision (a) was amended, effective January 1, 1995, to track the 1990 federal amendment.

Subdivision (a) was amended, effective March 1, 2008. The amendment states the circumstances under which evidence of a conviction of a crime involving dishonesty or false statement may be admitted.

Subdivision (e) was added to the rule, effective March 1, 2014, to clarify that convictions pending appeal are admissible under this rule.

Rule 609 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 24-25; of September 28-29, 2006, pages 16-18; September 23-24, 1993, page 21; November 7-8, 1991, pages 4-5; October 25-26, 1990, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; April 26-27, 1979, page 9; April 8, 1976, pages 28-29; October 1, 1975, page 5. Fed.R.Ev. 609; Rule 609, SBAND proposal; Rule 609, Uniform Rules of Evidence (1974).

RULE 610. RELIGIOUS BELIEFS OR OPINIONS

~~Evidence of the beliefs or opinions of a witness on matters of religion is not admissible for the purpose of showing that by reason of their nature the witness' credibility is impaired or enhanced.~~

Evidence of a witness's religious beliefs or opinions is not admissible to attack or support the witness's credibility.

EXPLANATORY NOTE

Rule 610 was amended, effective March 1, 1990; March 1, 2014.

This rule is adopted from ~~Rule~~ Fed.R.Ev. 610 ~~of the Federal Rules of Evidence~~. ~~It should be noted that the~~ The rule prohibits admission of evidence of religious beliefs only if offered to affect credibility. Such evidence may be offered for other purposes, such as showing bias.

Rule 610 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 610 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 25-26;

March 24-25, 1988, page 12; December 3, 1987, page 15; June 3, 1976, page 2; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 610~~, Federal Rules of Evidence~~; Rule 610, SBAND proposal.

RULE 611. MODE AND ORDER OF ~~INTERROGATION AND PRESENTATION~~ EXAMINING WITNESSES AND PRESENTING EVIDENCE

~~(a) Control by court. The court shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment.~~

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

~~(b) Scope of cross-examination. Cross-examination should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness. The court, in the exercise of discretion, may permit inquiry into additional matters as if on direct examination.~~

(b) Scope of Cross-Examination. Cross-examination should not go beyond the subject matter of the direct examination and matters affecting the witness's credibility. The court may allow inquiry into additional matters as if on direct examination.

~~(c) Leading questions. Leading questions should not be used on the direct examination of a witness except as may be necessary to develop the witness' testimony. Ordinarily, leading questions should be permitted on cross-examination. Whenever a party calls a hostile~~

~~witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.~~

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

EXPLANATORY NOTE

Rule 610 was amended, effective March 1, 1990; March 1, 2014.

Rule 611 is substantially the same as ~~Rule~~ Fed.R.Ev. 611 ~~of the Federal Rules of Evidence~~. The rule gives the court wide discretion over the mode and order of presenting evidence. ~~This comports with established North Dakota case law. See Killmer v. Duchscherer, 72 N.W.2d 650 (N.D. 1955).~~

~~The trial judge may allow a child witness to use an anatomically correct doll if a proper foundation is laid. The doll may not be used in a suggestive manner and the nonverbal testimony must be relevant. See, State v. Jenkins, 326 N.W.2d 67 (N.D. 1982).~~

Subdivision (c) was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 611 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 26; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; May 21-22, 1987, pages 18-19; February 19-20, 1987, pages 10-12; June 3, 1976, page 2; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 611~~, Federal Rules of Evidence~~; Rule 611, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 31-04-01, 31-04-04, 31-04-05.

~~Rules:~~

~~Considered: Rules 30, 31, 32, 43(b), NDRCivP.~~

Cross Reference: N.D.R.Civ.P. 30 (Depositions by Oral Examination), N.D.R.Civ.P. 31 (Depositions by Written Questions), N.D.R.Civ.P. 43 (Evidence).

RULE 612. WRITING OR OBJECT USED TO REFRESH A WITNESS'S MEMORY

~~(a) While testifying. If, while testifying, a witness uses a writing or object to refresh memory, an adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition in which the witness is testifying.~~

~~(b) Before testifying. If, before testifying, a witness uses a writing or object to refresh memory for the purpose of testifying and the court in its discretion determines that the interests of justice so require, an adverse party is entitled to have the writing or object produced, if practicable, at the trial, hearing, or deposition in which the witness is testifying.~~

~~(c) Terms and conditions of production and use. A party entitled to have a writing or object produced under this rule is entitled to inspect it, to cross-examine the witness thereon, and to introduce in evidence those portions which relate to the testimony of the witness. If production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If it is claimed that the writing or object contains matters not related to the subject matter of the testimony, the court shall examine the writing or object in camera, excise any portions not so related, and order delivery of the remainder to the party entitled thereto. Any portion withheld over objections shall be preserved and made available to the appellate court in the event of an appeal. If a writing or object is not produced, made available for inspection, or delivered pursuant to order under this rule, the court shall make any order justice requires, but in criminal cases if the prosecution elects not to comply, the order shall be one striking the testimony or, if the court in its discretion determines that the interests of justice so require, declaring a mistrial.~~

(a) Scope. This rule gives an adverse party certain options when a witness uses a writing or object to refresh memory:

(1) while testifying; or

(2) before testifying, if the court decides that justice requires the party to have those options.

(b) Adverse Party's Options; Deleting Unrelated Matter. An adverse party is entitled to have the writing or object produced at the trial, hearing, or deposition to inspect it, to cross-examine the witness about it, and to introduce in evidence any portion that relates to the witness's testimony. But if production of the writing or object at the trial, hearing, or deposition is impracticable, the court may order it made available for inspection. If the producing party claims that a writing includes unrelated matter, the court must examine the writing in camera, delete any unrelated portion, and order that the rest be delivered to the adverse party. Any portion deleted over objection must be preserved for the record.

(c) Failure to Produce or Deliver the Writing or Object. If a writing or object is not produced or is not delivered as ordered, the court may issue any appropriate order. But if the prosecution does not comply in a criminal case, the court must strike the witness's testimony or, if justice so requires, declare a mistrial.

EXPLANATORY NOTE

Rule 612 was amended, effective March 1, 1990; March 1, 2014.

Rule 612 is identical to Rule 612 of the Uniform Rules of Evidence, (1974). The rule varies from its federal counterpart in ~~structure, and in~~ that it applies to objects as well as to writings. It was felt that objects used to refresh the memory of a witness, such as a recording

tape, should be subject to production. This rule also departs from the federal rule by explicitly providing for inspection of writing or object at its location if production of the writing or object at trial is impracticable.

Subdivisions (a) and (b) were amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 612 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 26; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 3. Fed.R.Ev. 612; Rule 612, Uniform Rules of Evidence (1974); Rule 612, SBAND proposal.

~~Rules:~~

~~Considered: Rule 16(h), NDRCrimP.~~

Cross Reference: N.D.R.Crim.P. 16 (Discovery and Inspection).

RULE 613. ~~PREVIOUS STATEMENTS OF WITNESSES~~ WITNESS'S PRIOR STATEMENT

~~(a) Examining witness concerning previous statement. In examining a witness concerning a previous statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same must be shown or disclosed to opposing counsel.~~

(a) Showing or Disclosing the Statement During Examination. When examining a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an adverse party's attorney.

~~(b) Extrinsic evidence of previous inconsistent statement of witness. Extrinsic evidence of a previous inconsistent statement by a witness is not admissible unless the witness is afforded an opportunity to explain or deny the same and the opposite party is afforded an opportunity to interrogate the witness thereon, or the interests of justice otherwise require. This provision does not apply to admission of a party-opponent as defined in Rule 801(d)(2).~~

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Extrinsic evidence of a witness's prior inconsistent statement is admissible only if the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it, or if justice so requires. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

EXPLANATORY NOTE

Rule 613 was amended, effective March 1, 1990; March 1, 2014.

Rule 613 is ~~an adoption of~~ based on ~~Rule~~ Fed.R.Ev. 613 ~~of the Federal Rules of Evidence. The rule has been specifically approved by the North Dakota Supreme Court:~~

~~"The rule requiring a predicate for impeachment by prior inconsistent statements, sometimes called the rule in Queen Caroline's Case, is gradually disappearing. See McCormick, § 37; 3 Weinstein, Evidence, p. 613-3 (1975). As we have stated, it does not apply to admissions by parties. As to other witnesses, the requirement has been eliminated in many recent revisions of the rules of evidence. The new Federal Rules of Evidence eliminate the requirement of prior opportunity to explain or deny. Instead, they provide that the witness must have the opportunity at some time to explain or deny, but that the judge may dispense with the requirement if the interests of justice require. Rule 613(b). They also provide that the witness need not be shown a contradictory statement, but it must be shown or disclosed to his counsel on request. Rule 613(a). We believe these rules represent the best available reconciliation of conflicting interests, and we specifically approve them." Starr v. Morsette, 236 N.W.2d 183, 188, n. 2 (N.D. 1975).~~

Rule 613 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 613 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on

evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 26-27; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 4; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 613~~, Federal Rules of Evidence~~; Rule 613, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-07.

~~Rules:~~

~~Considered: Rule 32(c), NDRCivP; Rule 15(e), NDRCrimP.~~

Cross Reference: ~~Rule~~ N.D.R.Ev. 801~~(d)(2), NDREv.~~ (Definitions the Apply to This Article; Exclusions from Hearsay); N.D.R.Civ.P. 32 (Using Depositions in Court Proceedings): N.D.R.Crim.P. 15 (Depositions).

RULE 614. COURT'S CALLING ~~AND INTERROGATION OF WITNESSES BY COURT~~ OR EXAMINING A WITNESS

~~(a) Calling by court. The court, on its own motion or at the suggestion of a party, may call witnesses, and all parties are entitled to cross-examine witnesses thus called.~~

(a) Calling. The court may call a witness on its own or at a party's request. Each party is entitled to cross-examine the witness.

~~(b) Interrogation by court. The court may interrogate witnesses, whether called by itself or by a party.~~

(b) Examining. The court may examine a witness regardless of who calls the witness.

~~(c) Objections. Objections to the calling of witnesses by the court or to interrogation by it or to specific questions by it may be made at the time or at the next available opportunity when the jury is not present.~~

(c) Objections. A party may object to the court's calling or examining a witness either at that time or at the next opportunity when the jury is not present.

EXPLANATORY NOTE

Rule 614 was amended, effective March 1, 2014.

This rule is ~~an adoption of~~ based on ~~Rule~~ Fed.R.Ev. 614 ~~of the Federal Rules of Evidence~~. ~~The calling by the court of a witness, who may then be cross-examined by both sides, is established in Rule 28, NDRCrimP (as to experts and interpreters), and is approved by the North Dakota Supreme Court. See State v. Hilling, 219 N.W.2d 164, 172 (N.D. 1974).~~

Rule 614 provides that objections to interrogation by the court or to the calling of a

witness by the court may be made out of the jury's presence so as to avoid any possible prejudice to the objecting party.

Rule 614 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 27; June 3, 1976, page 5; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 614~~, Federal Rules of Evidence~~; Rule 614, SBAND proposal.

Cross Reference: N.D.R.Crim.P. 28 (Interpreters).

RULE 615. ~~EXCLUSION OF~~ EXCLUDING WITNESSES

~~At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order on its own motion. This rule does not authorize exclusion of (i) a party who is a natural person, or (ii) an officer or employee of a party that is not a natural person designated as its representative by its attorney, or (iii) a person whose presence is shown by a party to be essential to the presentation of the party's cause.~~

At a party's request, the court must order witnesses excluded so that they cannot hear other witnesses' testimony, or the court may do so on its own. This rule does not authorize excluding:

(a) a party who is a natural person;

(b) an officer or employee of a party that is not a natural person, after being designated as the party's representative by its attorney;

(c) a person whose presence a party shows to be essential to presenting the party's claim or defense; or

(d) a person authorized by statute to be present.

EXPLANATORY NOTE

Rule 615 was amended, effective March 1, 1990; March 1, 2014.

Rule 615 is ~~taken from~~ based on ~~Rule~~ Fed.R.Ev. 614 ~~of the Federal Rules of Evidence~~. It provides that it is mandatory for a court to exclude witnesses when so requested by a party, subject to stated exceptions. ~~The mandatory demand of this rule marks a departure from prior~~

~~North Dakota law, which was that the exclusion of witnesses was a matter within the court's discretion. Tice v. Mandel, 76 N.W.2d 124 (N.D. 1956).~~

Rule 615 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 615 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 27-29; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 5; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 615~~, Federal Rules of Evidence~~; Rule 615, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-34-02, 29-07-13, 29-07-14.

RULE 65. INJUNCTIONS

(a) Temporary restraining order. A temporary restraining order is short-lived injunctive relief that the court may issue with less notice than required for a preliminary injunction. It prevents irreparable injury until the court decides whether to issue a preliminary injunction.

(1) Motion; Proposed complaint; Filing. The party moving for a temporary restraining order must submit a proposed complaint seeking injunctive relief with the motion. The moving party must file the motion, proposed complaint, and other supporting documents no later than the next court business day after submission. If the moving party does not timely file these documents, an issued temporary restraining order terminates at the end of that next business day.

(2) Notice. The party moving for a temporary restraining order must submit an affidavit reciting the efforts made to give the opposing party's attorney, if known, or if not known, the opposing party, reasonable notice of the motion or the reasons why notice should not be required. Reasonable notice means any form of notice reasonably calculated to give actual notice of the date and time of submission of the motion to the court, affording the opposing party an opportunity to be heard.

(3) Basis for relief. The court may issue a temporary restraining order only if it finds:

(A) appropriate injunction grounds;

(B) a clear need for immediate relief; and

(C) either:

(i) the moving party gave reasonable notice or made reasonable efforts to give reasonable notice to the opposing party's attorney, if known, or if not known, to the opposing party; or

(ii) a substantial reason exists for not giving notice.

(4) Preliminary injunction hearing date. Unless for good cause the court directs otherwise, a party that obtains a temporary restraining order must obtain a preliminary injunction hearing time no less than 21 days, and no more than 28 days, from the temporary restraining order date.

(5) Temporary restraining order expiration. A temporary restraining order expires at the end of the 28th day after issuance unless the court for good cause directs a shorter time or the opposing party consents to a longer time. If the party that obtained the temporary restraining order cannot obtain a preliminary-injunction hearing within 21 to 28 days of the temporary restraining order date, the court may extend the temporary restraining order until the earliest possible time the motion may be heard. At or after the preliminary injunction hearing, the court may extend the temporary restraining order for no more than 14 days if necessary for deciding the preliminary injunction motion, unless for good cause a longer time is necessary. The court must enter the reasons for any extension in the record.

(6) Temporary restraining order service. A party that obtains a temporary restraining order must serve the order and the notice for the preliminary injunction hearing on the opposing party as follows:

(A) Summons and complaint not served. If the summons and complaint have not yet been served under Rule 4, then with the summons and complaint under Rule 4.

(B) Summons and complaint served. If the summons and complaint have been served under Rule 4, then under Rule 5.

(7) Motion to dissolve or modify.

(A) Notice and hearing. If the opposing party received less than four days actual notice of the temporary restraining order motion before the temporary restraining order was issued, the opposing party may move to dissolve or modify the order on four days actual notice, or on shorter notice the court for good cause sets, to the party that obtained the order.

(B) Burden. The party that obtained the temporary restraining order has the burden of justifying its continuation.

(8) Not extended by implication. A temporary restraining order remains a temporary restraining order even if the opposing party appears in opposition to the temporary restraining order motion or the court denies a motion to dissolve or modify the temporary restraining order.

(b) Preliminary injunction. A preliminary injunction prevents irreparable injury until the court decides whether to issue a permanent injunction at trial. A court may issue a preliminary injunction only after the Rule 65(b)(1) required notice of hearing. The moving party must file and serve the summons and complaint under Rule 4 no later than the time the party serves and files the notice of motion and motion for a preliminary injunction.

(1) Notice and hearing. Unless for good cause the court directs otherwise, the court may issue a preliminary injunction only when the moving party serves the preliminary injunction motion, supporting brief, and supporting materials on the opposing party at least 14 days before the hearing date.

(2) Briefing schedule. Unless for good cause the court directs otherwise, the briefing schedule for a preliminary-injunction motion is as follows:

(A) Temporary restraining order in place. When the moving party moves for a preliminary injunction with a temporary restraining order in place, the moving party must serve the preliminary injunction motion, supporting brief, and supporting materials within seven days after the temporary restraining order date. The opposing party must serve the response brief and supporting materials within seven days after service of the moving party's brief. Only on order of the court, for good cause shown, may the moving party serve a reply brief. Unless good cause is shown, the court must dissolve the temporary restraining order if the party that obtained it does not timely serve the preliminary injunction motion, supporting brief, and supporting materials.

(B) Temporary restraining order not in place. When the moving party moves for a preliminary injunction without a temporary restraining order in place, the moving party must serve the preliminary-injunction motion, supporting brief, and supporting materials on the opposing party. The opposing party must serve the response brief and supporting materials within seven days after service of the moving party's brief. The moving party must serve any reply brief within five days after service of the opposing party's response brief.

(3) Interim relief. If at the hearing on a preliminary injunction motion brought without a temporary restraining order in place, the moving party shows appropriate injunction grounds and the clear need for immediate relief, the court may on its own motion issue a temporary restraining order effective for no more than 14 days. The court may extend this order for good cause, but must enter the reasons for any extension in the record.

(c) Unnamed parties. Any unnamed party that a temporary restraining order or preliminary injunction would or does directly affect may be heard at an injunction hearing.

(d) Evidence.

(1) Temporary restraining order evidence. Unless the court directs otherwise, evidence on a motion for a temporary restraining order, or a motion to dissolve or modify a temporary restraining order, must be by affidavit. An affidavit supporting or opposing a motion for a temporary restraining order or a motion to dissolve or modify a temporary restraining order may be based on information and belief. The affiant must identify those parts of the affidavit based on personal knowledge and those based on information and belief.

(2) Preliminary injunction evidence. Unless the court directs otherwise, evidence on a motion for a preliminary injunction may be by oral testimony. An affidavit supporting or opposing a preliminary injunction must be based on personal knowledge and served with the parties' briefs. The court may permit additional affidavits to be filed at or after the hearing.

(e) Trial on permanent injunction. If the court issues a preliminary injunction, the trial must be held within 180 days from the date a temporary restraining order or preliminary injunction was first issued unless the court for good cause extends the time or the opposing party consents to a longer time. The court should issue its decision within 60 days after the trial, unless for good cause a longer time is necessary. The court must enter the reasons for any extension in the record.

(f) Previous denial. A party moving for a temporary restraining order or preliminary injunction must state in the motion whether a judge previously denied the motion or a similar motion based on the same transaction or occurrence or series of transactions or occurrences,

and if so, the identity of the judge or judges who denied the motion.

(g) Findings; Contents and scope of injunction.

(1) Findings. The court must state its findings of fact and conclusions of law under Rule 52 supporting the denial, issuance, dissolution or modification of an injunction. If the court issues a temporary restraining order without reasonable notice to the opposing party's attorney or the opposing party, the court must state why it issued the order without that notice.

(2) Contents.

(A) In general. ~~A~~ Every temporary restraining order, ~~or~~ preliminary injunction, and permanent injunction must:

(i) state its terms specifically.

(ii) describe in reasonable detail, and not by referring to the complaint or other document, the acts restrained or required.

(B) Temporary restraining order. Unless the court specifically finds the opposing party received four day's actual notice of the temporary restraining order motion before the temporary restraining order was issued, the temporary restraining order must state that the opposing party may move to dissolve or modify the order under Rule 65(a)(7) on four day's actual notice, or on shorter notice the court for good cause sets, to the party that obtained the order.

(3) Persons bound. A temporary restraining order, ~~or~~ preliminary injunction, and permanent injunction binds only the following that 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 parties that are in active concert or participation with anyone described in Rule 65(g)(3)(A) or (B).

(4) Clarification. Any party subject to, or potentially subject to, a temporary restraining order, ~~or~~ preliminary injunction, or permanent injunction may move the court to clarify whether the order or injunction would apply to specified conduct.

(h) Security.

(1) In general. Except for good cause shown and recited in the record, a temporary restraining order or preliminary injunction does not become effective for enforcement until the moving party posts security in a form and amount that the court considers sufficient to pay the enjoined party's costs and damages if the court ultimately decides the moving party was not entitled to the order or injunction.

(2) No security required. The United States, the State of North Dakota, or an agency or political subdivision of either, or an officer of any of these acting in an official capacity, need not provide security.

(3) Form of security. The moving party may give the security in any form the court considers sufficient to secure the opposing party. Security may include a surety on a bond or other undertaking, a cashier's check, a certified check, a letter of credit, or a negotiable bond.

(4) Additional security. A party enjoined under a temporary restraining order or preliminary injunction may move the court for security if the court did not initially require

it, or additional or different security if the court did require it. If the court decides on motion that security, or different or additional security, is required, it must vacate the order or injunction unless the party that obtained it provides the form and amount of security that the court requires within a reasonable time established by the court.

(5) Not a cap. The amount of security does not limit the costs and damages a wrongfully-enjoined party may recover from the party that obtained the temporary restraining order or preliminary injunction.

(i) Contempt. The court may punish disobedience of a temporary restraining order, preliminary injunction, or permanent injunction as a contempt.

(j) Other laws not modified. This rule does not modify statutes or rules that prescribe specific procedures for obtaining injunctive relief in any of the following actions:

(1) actions affecting employer and employee;

(2) actions for divorce, child or spousal support, parental rights and responsibilities, or domestic violence; or

(3) actions involving disorderly conduct.

EXPLANATORY NOTE

Rule 65 was amended, effective July 1, 1981; July 1, 2012; March 1, 2014.

~~As amended,~~ Rule 65 is designed to provide a framework for injunction procedure in North Dakota. It integrates elements of the state's injunction procedure statutes, now superseded, with the federal rule on injunctions, Fed.R.Civ.P. 65, and concepts from injunction rules from other states.

Grounds for granting a permanent injunction are listed in N.D.C.C. § 32-05-04.

Grounds for granting a temporary restraining order or preliminary injunction are listed in N.D.C.C. § 32-06-02.

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

If the parties stipulate, the court may advance the trial and consolidate it with the preliminary injunction hearing. The parties and the court should take care, however, to preserve the right a party may have to a jury trial on issues separate from the issue of injunctive relief.

An opposing party may combine a Rule 65(h)(4) motion for security, or additional or different security, with a Rule 65(a)(7) motion to dissolve or modify a temporary restraining order.

Subdivision (g) was amended, effective March 1, 2014, to include references to permanent injunctions.

Sources: Joint Procedure Committee Minutes of January 31-February 1, pages 25-26; April 28-29, 2011, pages 2-8; January 27-28, 2011, pages 2-29; April 29-30, 2010, pages 27-28; January 28-29, 2010, page 14; January 17-18, 1980, pages 5-6.

Statutes Affected:

Superseded: N.D.C.C. §§ 32-06-03, 32-06-04, 32-06-05, 32-06-06, 32-06-07, 32-06-08, 32-06-09, 32-06-10, 32-06-11.

Considered: N.D.C.C. chs. 12.1-31.2, 14-07.1, 32-05; §§ 32-06-01, 32-06-02.

RULE 701. OPINION TESTIMONY BY LAY WITNESSES

~~If a witness is not testifying as an expert, the witness' testimony in the form of opinions or inferences is limited to those opinions or inferences that are (i) rationally based on the perception of the witness and (ii) helpful to a clear understanding of the witness' testimony or the determination of a fact in issue.~~

If a witness is not testifying as an expert, testimony in the form of an opinion is limited to one that is:

(a) rationally based on the witness's perception; and

(b) helpful to clearly understanding the witness's testimony or to determining a fact in issue.

EXPLANATORY NOTE

Rule 701 was amended, effective March 1, 1990; March 1, 2014.

Rule 701 is ~~an adoption of~~ based on Fed.R.Ev. ~~Rule~~ 701 ~~of the Federal Rules of Evidence. It presents no new practice to North Dakota.~~

Rule 701 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 701 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, pages 29-30; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6;~~Rule~~ Fed.R.Ev. 701~~, Federal Rules of Evidence~~; Rule 701, SBAND proposal.

RULE 702. TESTIMONY BY ~~EXPERTS~~ EXPERT WITNESSES

~~If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise.~~

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

EXPLANATORY NOTE

Rule 702 was amended, effective March 1, 2007; March 1, 2014.

Rule 702 states the general rule governing expert testimony.

Rule 702 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of April 26-27, 2012, pages 30-31; September 22-23, 2005, pages 2-6; June 3, 1976, page 6; ~~Rule~~ Fed.R.Ev. 702~~, Federal Rules of Evidence~~.

Cross Reference: N.D.R.Ev. 703 (Bases of Opinion Testimony by Experts).

RULE 703. BASES OF AN EXPERT'S OPINION TESTIMONY ~~BY EXPERTS~~

~~The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence in order for the opinion or inference to be admitted. Facts or data that are otherwise inadmissable shall not be disclosed to the jury by the proponent of the opinion or inference unless the court determines that their probative value in assisting the jury to evaluate the expert's opinion substantially outweighs their prejudicial effect.~~

An expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed. If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject, they need not be admissible for the opinion to be admitted. But if the facts or data would otherwise be inadmissible, the proponent of the opinion may disclose them to the jury only if their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect.

EXPLANATORY NOTE

Rule 703 was amended, effective March 1, 1990, March 1, 2007; March 1, 2014.

Rule 703 is based on Rule 703 of the Federal Rules of Evidence.

Rule 703 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 703 was amended, effective March 1, 2007, to incorporate the 2000 amendments to Fed.R.Ev. 703.

Rule 703 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes of April 26-27, 2012, page 31; September 22-23, 2005, pages 2-6; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 6. Rule 703, Federal Rules of Evidence.

Cross Reference: N.D.R.Ev. 702 (Testimony by Experts).

RULE 704. OPINION ON AN ULTIMATE ISSUE

~~Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.~~

An opinion is not objectionable just because it embraces an ultimate issue.

EXPLANATORY NOTE

Rule 704 was amended, effective March 1, 2014.

This rule is ~~taken from Rule~~ based on Fed.R.Ev. 704 ~~of the Federal Rules of Evidence~~. It should be noted that this rule applies to the opinions of lay witnesses, whenever admissible, as well as to opinions of experts.

This rule omits language found in Fed.R.Ev. 704 (b), which bars opinion testimony in a criminal case on whether the defendant had a "mental state or condition that constitutes an element of the crime charged or of a defense." This rule does not bar this type of testimony.

Rule 704 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. The term "inference" was deleted to make the rule flow better and because any "inference" is covered by the broader term "opinion." There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 6; April 26-27, 2012, page 32; June 3, 1976, page 7. ~~Rule~~ Fed.R.Ev. 704~~, Federal Rules of Evidence~~;

Rule 704, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-04.1-03, 12.1-04.1-04, 12.1-04.1-13.

RULE 705. ~~DISCLOSURE OF FACTS OR DATA UNDERLYING EXPERT OPINION~~ DISCLOSING THE FACTS OR DATA UNDERLYING AN EXPERT'S OPINION

~~The expert may testify in terms of opinion or inference and give reasons therefor without first testifying to the underlying facts or data, unless the court requires otherwise. The expert may in any event be required to disclose the underlying facts or data on cross-examination.~~

Unless the court orders otherwise, an expert may state an opinion, and give the reasons for it, without first testifying to the underlying facts or data. The expert may be required to disclose those facts or data on cross-examination.

EXPLANATORY NOTE

Rule 705 was amended, effective March 1, 1990; March 1, 1997; March 1, 2014.

Rule 705 is based on Fed.R.Ev. 705.

Rule 705 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 32; September 28-29, 1995, pages 18-19; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, page 7. ~~Rule~~ Fed.R.Ev. 705~~, Federal Rules of Evidence~~; Rule 705, SBAND proposal.

RULE 706. COURT-APPOINTED EXPERTS~~-~~ WITNESSES

~~(a) Appointment. The court, on motion of any party or its own motion, may enter an order to show cause why expert witnesses should not be appointed, and may request the parties to submit nominations. The court may appoint any expert witnesses agreed upon by the parties, and may appoint expert witnesses of its own selection. An expert witness may not be appointed by the court unless the witness consents to act.~~

(a) Appointment Process. On a party's motion or on its own, the court may order the parties to show cause why expert witnesses should not be appointed and may ask the parties to submit nominations. The court may appoint any expert that the parties agree on and any of its own choosing. But the court may only appoint someone who consents to act.

~~A witness so appointed must be informed of the witness' duties by the court in writing, a copy of which must be filed with the clerk, or at a conference in which the parties have opportunity to participate. A witness so appointed shall advise the parties of the witness' findings, if any; the witness' deposition may be taken by any party; and the witness may be called to testify by the court or any party. The witness is subject to cross-examination by each party, including a party calling the witness.~~

(b) Expert's Role. The court must inform the expert of the expert's duties. The court may do so in writing and have a copy filed with the clerk or may do so orally at a conference in which the parties have an opportunity to participate. The expert:

(1) must advise the parties of any findings the expert makes;

(2) may be deposed by any party;

(3) may be called to testify by the court or any party; and

(4) may be cross-examined by any party, including the party that called the expert.

~~(b) Compensation. Expert witnesses so appointed are entitled to a reasonable compensation in whatever sum the court may allow. The compensation thus fixed is payable from funds which may be provided by law. In civil actions where no funds are provided by law, the compensation shall be paid by the parties in such proportion and at such times as the court directs and thereafter charged in like manner as other costs.~~

(c) Compensation. The expert is entitled to a reasonable compensation, as set by the court. The compensation is payable as follows:

(1) in a criminal case, or in a civil case when the law allows it, from any funds that are provided by law; and

(2) in any other civil case, by the parties in the proportion and at the time that the court directs, and the compensation is then charged like other costs.

~~(c) Disclosure of appointment. In the exercise of its discretion, the court may authorize disclosure to the jury of the fact that the court appointed the expert witness.~~

(d) Disclosing the Appointment to the Jury. The court may authorize disclosure to the jury that the court appointed the expert.

~~(d) Parties' experts of own selection. Nothing in this rule limits the parties in calling expert witnesses of their own selection.~~

(e) Parties' Choice of Their Own Experts. This rule does not limit a party in calling its own experts.

EXPLANATORY NOTE

Rule 706 was amended, effective March 1, 1990; March 1, 2014.

~~With only a minor change, this rule is an adoption of Rule 706 of the Federal Rules of Evidence. It comports with present North Dakota practice, but is a more detailed statement of the procedure involved whenever a court appoints an expert than presently exists in North Dakota law. Cf. Rule 28, NDRCrimP.~~

Rule 706 is based on Fed.R.Ev. 706.

Subdivision (a) was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 706 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of April 26-27, 2012, page 32; March 24-25, 1988, page 12; December 3, 1987, pages 15-16; June 3, 1976, pages 7, 8; October 1, 1975, page 6. ~~Rule~~ Fed.R.Ev. 706~~, Federal Rules of Evidence~~; Rule 706, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 28-26-06(5).

~~Rules:~~

~~Considered: Rules 16(4), 26, 35, NDRCivP; Rule 28(a), NDRCrimP.~~

Cross Reference: N.D.R.Civ.P. 16 (Pretrial Conferences; Scheduling; Management), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 35 (Physical and

Mental Examination); N.D.R.Crim.P. 28 (Interpreters).

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 ~~30~~ 60 days before the date set for the trial.

(b) Objection. At least ~~14~~ 45 days before the date set for the trial, the defendant may object in writing to the introduction of the report and identify ~~the~~ by 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) Extension. The court may modify any of the deadlines under this rule on a showing of good cause.

~~(c)~~ (d) 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)~~ (e) 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 March 1, 2011; March 1, 2014.

Rule 707 requires the prosecution to notify a defendant if it intends to introduce an analytical report in a criminal trial. If the defendant objects to the admission of the report, the defendant must identify the witness it seeks to examine about the report at trial and the prosecution must produce the witness.

Some examples of analytical reports include: a certified copy of an analytical report of a blood, urine, or saliva sample from the director of the state crime laboratory or the director's designee; a certified copy of the checklist and test records from a certified breath test operator; or a certified copy of an analytical report signed by the director of the state crime laboratory or the director's designee of the results of the analytical findings involving the analysis of a controlled substance or sample.

Subdivision (a) was amended, effective March 1, 2014, to require the prosecution to serve a copy of the analytical report on the defendant at least 60 days before the date set for trial.

Subdivision (b) was amended, effective March 1, 2014, to require the defendant to object to introduction of the report at trial at least 45 days before the date set for trial. The subdivision was also amended to clarify that, if the defendant requests a person to testify about the report at trial, the person must be someone who made a testimonial statement in the report.

Subdivision (c) was added, effective March 1, 2014, to give the court discretion to modify the rule’s deadlines.

Under North Dakota law, if the person who prepared the report does not testify at trial, a certified copy of an analytical report must be accepted as prima facie evidence of the results

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), 39-20-07(8), and 39-24.1-08(6).

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, pages 20-23; September 27, 2012, pages 6-7; April 26-27, 2012, page 33; September 23-24, 2010, pages 10-13; Melendez-Diaz v. Massachusetts, 129 S.Ct. 2527 (2009)

Statutes Affected:

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), and 39-24.1-08(7).

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), and 39-24.1-08(6).

RULE 801. DEFINITIONS THAT APPLY TO THIS ARTICLE; EXCLUSIONS FROM HEARSAY

~~The following definitions apply under this Article:~~

~~(a) Statement. A "statement" is (1) an oral or written assertion or (2) nonverbal conduct of a person, if it is intended by the person as an assertion.~~

(a) Statement. "Statement" means a person's oral assertion, written assertion, or nonverbal conduct, if the person intended it as an assertion.

~~(b) Declarant. A "declarant" is a person who makes a statement.~~

(b) Declarant. "Declarant" means the person who made the statement.

~~(c) Hearsay. "Hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted.~~

(c) Hearsay. "Hearsay" means a statement that:

(1) the declarant does not make while testifying at the current trial or hearing; and

(2) a party offers in evidence to prove the truth of the matter asserted in the statement.

~~(d) Statements which are not hearsay. A statement is not hearsay if:~~

(d) Statements That Are Not Hearsay. A statement that meets the following conditions is not hearsay:

~~(1) Prior statement by witness. The declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is (i) inconsistent with the declarant's testimony but, if offered in a criminal proceeding, was given under oath and subject to the penalty of perjury at a trial, hearing, or other proceeding, or in a~~

~~deposition, or (ii) consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, or (iii) one of identification of a person made after perceiving the person; or~~

(1) A Declarant-Witness's Prior Statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) is inconsistent with the declarant's testimony and, if offered in a criminal proceeding, was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) identifies a person as someone the declarant perceived earlier.

~~(2) Admission by party-opponent. The statement is offered against a party and is (i) the party's own statement, in either an individual or a representative capacity, (ii) a statement of which the party has manifested an adoption or belief in its truth, (iii) a statement by a person authorized by the party to make a statement concerning the subject, (iv) a statement by the party's agent or servant concerning a matter within the scope of the agency or employment, made during the existence of the relationship, or (v) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.~~

(2) An Opposing Party's Statement. The statement is offered against an opposing party and:

(A) was made by the party in an individual or representative capacity;

(B) is one the party manifested that it adopted or believed to be true;

(C) was made by a person whom the party authorized to make a statement on the subject;

(D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed; or

(E) was made by the party's coconspirator during and in furtherance of the conspiracy.

The statement must be considered but does not by itself establish the declarant's authority under (C); the existence or scope of the relationship under (D); or the existence of the conspiracy or participation in it under (E).

EXPLANATORY NOTE

Rule 801 was amended, effective July 1, 1981; March 1, 1990; March 1, 2014.

The definition of hearsay contained in this rule is dependent, in part, upon the definition of a statement contained in subdivision (a). In this regard, it should be noted that nonverbal conduct, to be a statement, and thus hearsay, must be intended by the party to be an assertion. Nonassertive conduct is not a statement and therefore not objectionable as hearsay. Thus, pointing out a suspect in response to the question, "Who did it?" is assertive conduct and, if it otherwise falls within the definition, hearsay. Conversely, the act of opening an umbrella is not intended to be assertive, is not hearsay, and may be offered as substantive evidence that rain was falling at a certain place and time.

Hearsay is defined in subdivision (c) as a statement made by a declarant, other than one made at the trial or hearing offered to prove the truth of the matter asserted. This definition is of two distinct parts. The first is that the statement is one not made at the trial

in which it is offered. The second is that the statement must be offered to prove the truth of its content, i.e., the matter asserted in the statement. If offered for other purposes, e.g., to show that the declarant in fact made a statement – any statement – and, thus, was conscious at a particular time, the statement is not objectionable as hearsay. ~~See e.g., Chester v. Einarson, 76 N.D. 205, 34 N.W.2d 418 (1948).~~ The reason for this requirement is that it is only when a statement is offered to prove the truth of the matter asserted that there is a lack of the safeguards used to insure credibility of the declarant. It is this lack of an oath and cross-examination of the declarant that warrants the exclusion of evidence as hearsay.

~~It should be noted that subdivision (c) does not define as hearsay statements made out of the presence of a party against whom offered. The presence or absence of a party is not, nor has it ever been, a criterion by which hearsay is defined. It should be discarded as a "remarkably persistent bit of courthouse folklore." McCormick on Evidence, § 246 at 586 (2d ed. 1972).~~

Subdivision (d) exempts from the hearsay definition, and allows as substantive evidence, two types of statements which are technically hearsay. The reason for the exemptions are that the dangers normally attendant to receiving hearsay statements are at least partially removed in the exempted situations. In ~~subdivision~~ paragraph (d)(1), the opportunity to cross-examine the declarant is present. In ~~subdivision~~ paragraph (d)(2), the nature of the adversary system strengthens the reliability of ~~an admission by a party-opponent~~ a statement by an opposing party.

~~Subdivision~~ Paragraph (d)(1)~~(i)~~ follows Rule 801, Uniform Rules of Evidence, allowing prior inconsistent statements always to be used as substantive evidence in civil

cases and, if the prior statement was made under oath in criminal cases. This varies from Rule 801 of the Federal Rules of Evidence, which requires that the prior statement be made under oath in all cases. See the discussion of Rule 801, Federal Rules of Evidence, in State v. Igoe, 206 N.W.2d 291 (N.D. 1973).

~~Subdivision (d)(1)(iii)~~ Subparagraph (d)(1)(C) was added~~, [effective July 1, 1981],~~ to comply with the federal rule. This provision was omitted from the original promulgation of the Federal Rules of Evidence but was added soon thereafter.

~~Subdivision (d)(2), for the reasons stated above, exempts from the hearsay definition admissions of a party-opponent. This comports, generally, with the philosophy expressed by the North Dakota Supreme Court. See the discussion of the comparable federal rules in Starr v. Morsette, 236 N.W.2d 183 (N.D. 1975).~~

Rule 801 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Rule 801 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 21; March 24-25, 1988, pages 15-16; December 3, 1987, pages 6-7 and 15; May 21-22, 1987, pages 6-7; February 19-20, 1987, pages 10-17; September 18-19, 1980, pages 18-20; March 27-28, 1980, pages 11-12; January 29, 1976, page 18; October 1, 1975, page 6; ~~Rule~~

111 Fed.R.Ev. 801, ~~Federal Rules of Evidence~~; Rule 801, SBAND proposal.

RULE 802. THE RULE AGAINST HEARSAY ~~RULE~~

~~Hearsay is not admissible except as provided by these rules, by other rules adopted by the North Dakota supreme court, or by statute.~~

Hearsay is not admissible unless any of the following provides otherwise:

(a) a statute;

(b) these rules; or

(c) other rules prescribed by the North Dakota Supreme Court.

EXPLANATORY NOTE

Rule 802 was amended, effective March 1, 2014.

Rule 802 states the general rule excluding the admissibility of hearsay statements. Exception is made for those cases in which statutes or other rules allow the use of hearsay evidence.

Rule 802 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, pages 21-22; January 29, 1976, page 18; October 1, 1975, page 7. ~~Rule~~ Fed.R.Ev. 802~~, Federal Rules of Evidence~~; Rule 802, SBAND proposal.

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 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 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 the event or condition 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 the execution, identification, or terms of declarant's will.~~

(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) Statements for purposes of medical diagnosis or treatment. Statements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.~~

(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 memorandum or record concerning matter about which a witness once had knowledge but now has insufficient recollection to enable the witness to testify fully and accurately, shown to have been made or adopted by the witness when the matter was fresh in the witness' memory and to reflect that knowledge correctly. If admitted, the memorandum or record may be read into evidence but may not itself be received as an exhibit unless offered by an adverse party.~~

(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 regularly conducted business activity. A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstance of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph, includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.~~

(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); and

(E) neither the source of information nor the method or circumstances of preparation indicate

a lack of trustworthiness.

~~(7) Absence of entry in records kept in accordance with the provisions of paragraph (6). Evidence a matter is not included in the memoranda, reports, records, or data compilations, in any form, kept in accordance with the provisions of paragraph (6), to prove the nonoccurrence or nonexistence of the matter, if the matter was of a kind of which a memorandum, report, record, or data compilation was regularly made and preserved, unless the sources of information or other circumstances indicate 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 and reports. Records, reports, statements, or data compilations, in any form, of public offices or agencies, setting forth (i) the activities of the office or agency, or (ii) matters observed pursuant to duty imposed by law as to which matters there was a duty to report, excluding, however, in criminal cases matters observed by police officers and other law enforcement personnel, or (iii) in civil actions and proceedings and against the State in criminal cases, factual findings resulting from an investigation made pursuant to authority granted by law, unless the sources of information or other circumstances indicate lack of trustworthiness. However, factual findings may not be admitted under this exception unless the proponent furnishes to the party against whom they are offered a copy of the factual findings, or portion thereof as relates to the controversy, sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity~~

~~to prepare. The adverse party may cross-examine under oath any person making the report or factual findings or any person furnishing information contained therein, but the lack of availability of that testimony does not affect admissibility of the report or factual findings unless, in the opinion of the court, the adverse party would be prejudiced unfairly.~~

(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, in a criminal case, not including 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.

Before offering factual findings in evidence under this exception, a party must provide the opposing party a copy of the findings, or the portion that relates to the controversy. The opposing party may cross-examine under oath the person who prepared a record, statement or factual findings submitted under this exception, or any person furnishing information recorded in the record, statement or findings. If the person is unavailable for cross-examination, the record, statement, or findings may be admitted under this exception unless the court decides the opposing party would be prejudiced unfairly.

~~(9) Records of vital statistics. Records or data compilations, in any form, of births, fetal deaths, deaths, or marriages, if the report was made to a public office under requirements of law.~~

(9) Public Records of Vital Statistics. A record of a birth, fetal death, death, or marriage, if

reported to a public office in accordance with a legal duty.

~~(10) Absence of public record or entry. To prove the absence of a record, report, statement or data compilation, in any form, or the nonoccurrence or nonexistence of a matter of which a record, report, statement, or data compilation, in any form, was regularly made and preserved by a public office or agency, evidence in the form of a certification in accordance with Rule 902, or testimony, that diligent search failed to disclose the record, report, statement or data compilation, or entry.~~

(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. Statements of births, marriages, divorces, deaths, parentages, ancestry, relationship by blood or marriage, or other similar facts of personal or family history, contained in a regularly kept record of a religious organization.~~

(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) Marriage, baptismal, and similar certificates. Statements of fact, contained in a certificate that the maker performed a marriage or other ceremony or administered a sacrament, made by a clergyman, public official, or other person authorized by the rules or practices of a~~

~~religious organization or by law to perform the act certified, and purported to have been issued at the time of the act or within a reasonable time thereafter.~~

(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. Statements of fact concerning personal or family history contained in family Bibles, genealogies, charts, engravings on rings, inscriptions on family portraits, engravings on urns, crypts, or tombstones, or the like.~~

(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 affecting an interest in property. The record of a document purporting to establish or affect an interest in property, as proof of the content of the original recorded document and its execution and delivery by each person by whom it purports to have been executed, if the record is a record of the public office and an applicable statute authorizes the recording of documents of that kind in that office.~~

(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 affecting an interest in property. A statement contained in a document purporting to establish or affect an interest in property if the matter stated was relevant to the purpose of the document, unless dealings with the property since the document was made have been inconsistent with the truth of the statement or the purport of the document.~~

(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. Statements in a document in existence twenty years or more the authenticity of which is established.~~

(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, commercial publications. Market quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations.~~

(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) Learned treatises. To the extent called to the attention of an expert witness upon cross-examination or relied upon by the expert witness in direct examination, statements contained in~~

~~published treatises, periodicals or pamphlets on a subject of history, medicine, or other science or art, established as a reliable authority by the testimony or admission of the witness or by other expert testimony or by judicial notice. If admitted, the statements may be read into evidence but may not be received as exhibits.~~

(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. Reputation among members of a person's family by blood, adoption, or marriage, or among a person's associates, or in the community, concerning a person's birth, adoption, marriage, divorce, death, parentage, relationship by blood, adoption, or marriage, ancestry, or other similar fact of a person's personal or family history.~~

(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. Reputation in a community, arising before the controversy, as to boundaries of or customs affecting lands in the community, and reputation as to events of general history important to the community or State or nation in which~~

~~located.~~

(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 as to character. Reputation of a person's character among associates or in the community.~~

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

~~(22) Judgment of previous conviction. Evidence of a final judgment, entered after a trial or upon a plea of guilty, adjudging a person guilty of a felony, to prove any fact essential to sustain the judgment, but not including, when offered by the prosecution in a criminal prosecution for purposes other than impeachment, judgments against people other than the accused. The pendency of an appeal or post-conviction proceeding may be shown but does not affect admissibility.~~

(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;

(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 or post-conviction proceeding may be shown but does not affect admissibility.

~~(23) Judgment as to personal, family, or general history, or boundaries. Judgments as matters~~

~~of proof of matters of personal, family, or general history, or boundaries, essential to the judgment, if the same would be provable by evidence reputation.~~

(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) Child's statement about sexual abuse. ~~An out-of-court~~ A statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child ~~is admissible as evidence (when not otherwise admissible under another hearsay exception)~~ if:

~~(a) The~~ (A) the trial court finds, after hearing ~~upon~~ on notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

~~(b) The~~ (B) the child either:

(i) ~~Testifies~~ testifies at the ~~proceedings~~ trial; or

(ii) ~~Is~~ is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(25) [Other Exceptions.] [Transferred to Rule 807]

EXPLANATORY NOTE

Rule 803 was amended, effective March 1, 1990; March 1, 2000; March 1, 2014.

Rule 803 is ~~an adoption of Rule 803 of the Federal Rules of Evidence~~ is based on Fed.R.Ev. 803.

Paragraph (6)(D) was amended, effective March 1, 2014, to allow the foundation for admission of a record of a regularly conducted activity to be established by a certification that

complies with Rule 902 (11) or (12).

The last two sentences in ~~803(8)~~ paragraph (8) ~~are~~ were derived from N.D.C.C. §§ 31-09-11 and 31-09-12, which ~~are~~ were superseded by these rules.

The excepted situations listed in this rule traditionally have been deemed to have circumstantial guarantees of trustworthiness which render hearsay evidence reliable and admissible, even though the declarant may be available to testify.

~~The first three exceptions listed comprise what has been loosely termed the "res gestae" exception. That phrase is not used in this rule. The use of the specific exceptions, rather than the vague and elusive "res gestae" is felt to depict a clearer picture of which statements are within the exception, and the justification for their admissibility.~~

~~Subdivision~~ Paragraph (22) provides in certain instances, evidence of a previous final judgment comes within a hearsay exception. The ~~subdivision~~ paragraph differs from its federal counterpart. The federal exception for pleas of nolo contendere has been deleted as that plea is not used in the ~~State~~ state courts of North Dakota. ~~Rules 11 and 12, NDRCrimP.~~ The ~~subdivision~~ paragraph also was changed by adding post-conviction proceedings, like appeals, do not affect the admissibility of previous convictions.

It should also be noted these exceptions remove only the hearsay objection to evidence. Evidence of a past conviction sought to be introduced under paragraph (22) ~~sought to be introduced~~ must also meet the requirements of Rule 609~~, NDREv~~.

Rule 803 was amended, effective March 1, 1990, to provide a hearsay exception for a child victim of sexual abuse and is modeled in part after the Colorado and Utah statutes on a child victim's out-of-court statement regarding sexual abuse. Former paragraph (24) was renumbered to paragraph (25) and all other amendments are technical in nature and no substantive change is intended.

Rule 803 was amended, effective March 1, 2000, to follow the December 1, 1997, federal amendment. The contents of Rule 803(25) are transferred to new Rule 807.

Rule 803 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Supreme Court Conference Minutes~~: Rule 803(24);~~ of October 23 and ~~October~~ 25, 1989 [Rule 803 (24)]. Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, pages 18-21; January 31-February, 2013, pages 23-24; September 27, 2012, page 22; Rule 803(25), September 24-25, 1998, page 4; April 30-May 1, 1998, page 16; Rule 803(24), April 20, 1989, pages 6-8; March 24, 1988, pages 2-6 and 15-16; December 3, 1987, pages 6-7; May 21, 1987, pages 6-7; Rule 803(5), (18), (19), (21), (25), December 3, 1987, pages 15-16; Rule 803, June 3, 1976, page 15; Rule 803(1), (2), January 29, 1976, page 19; Rule 803(3), January 29, 1976, page 19; October 1, 1975, page 7; Rule 803(4), (5), January 29, 1976, page 19; Rule 803(6), January 29, 1976, page 20; Rule 803(7), January 29, 1976, page 20; October 1, 1975, page 7; Rule 803(8), January 29, 1976, page 21; October 11, 1975, page 7; Rule 803(9), (10), (12), (13), (14), (15), (16), (17), (18), (20), (21), January 29, 1976, pages 21-23; Rule 803(11), June 3, 1976, page 15; January 29, 1976, page 22; Rule 803(19), June 3, 1976, page 15; January 29, 1976, page 23; Rule 803(22), January 29, 1976, page 23, 24; October 1, 1975, page 7; Rule 803(23), January 29, 1976, page 24; Rule 803(24), April 8, 1976, pages 8a, 9; January 29, 1976, page 24. ~~Rule~~ Fed.R.Ev. 803~~, Federal Rules of Evidence~~; Rule 803, SBAND proposal.

Statutes Affected:

Superseded: N.D.C.C. §§ 31-09-11, 31-09-12.

Considered: N.D.C.C. §§ 2-06-05, 4-09-05, 4-09-07, 4-10-03, 4-10-12, 4-11-15, 4-11-19, 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, 10-19-55, 10-23-13, 10-24-31, 10-28-09, 11-11-38, 11-13-08, 11-15-16, 11-18-09, 11-20-01, 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, 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, 26-12-15, 26-15-04, 26-15-26, 26-29-12, 28-20-31, 28-23-12, 31-04-05, 31-04-06, 31-08-01, 31-08-02, 31-08-05, 32-19-26, 32-25-03, 32-25-04, 33-01-13, 33-04-17, 35-21-05, 35-22-11, 35-22-16, 36-09-08, 36-09-20, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-11-08, 40-16-09, 40-42-01, 40-58-08, 41-03-66, 42-02-07, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 43-10-07, 43-11-10, 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, 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, 49-06-14, 49-19-16, 57-24-29, 57-38-46, 61-03-06, 61-04-25, 61-05-19, 61-16-06.

Cross Reference: N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction; N.D.R.Ev. 807 (Residual Exception); N.D.R.Crim.P. 11 (Pleas); N.D.R.Crim.P 12 (Pleadings and Pretrial Motions).

RULE 804. ~~HEARSAY EXCEPTIONS; DECLARANT UNAVAILABLE~~

EXCEPTIONS TO THE RULE AGAINST HEARSAY--WHEN THE DECLARANT IS UNAVAILABLE AS A WITNESS

~~(a) Definition of unavailability.~~

~~"Unavailability as a witness" includes situations in which the declarant =~~

(a) Criteria for Being Unavailable. A declarant is considered to be unavailable as a witness if the declarant:

~~(1) is exempted by ruling of the court on the ground of privilege from testifying concerning the subject matter of the declarant's statement;~~

(1) is exempted from testifying about the subject matter of the declarant's statement because the court rules that a privilege applies;

~~(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so;~~

(2) refuses to testify about the subject matter despite a court order to do so;

~~(3) testifies to a lack of memory of the subject matter of the declarant's statement;~~

(3) testifies to not remembering the subject matter;

~~(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity; or~~

(4) cannot be present or testify at the trial or hearing because of death or a then-existing infirmity, physical illness, or mental illness; or

~~(5) is absent from the hearing and the proponent of a statement has been unable to~~

~~procure the declarant's attendance (or in the case of a hearsay exception under subdivision (b) (2), (3), or (4), the declarant's attendance or testimony) by process or other reasonable means.~~

(5) is absent from the trial or hearing and the statement's proponent has not been able, by process or other reasonable means, to procure:

(A) the declarant's attendance, in the case of a hearsay exception under Rule 804(b)(1) or (6); or

(B) the declarant's attendance or testimony, in the case of a hearsay exception under Rule 804(b)(2), (3), or (4).

~~A declarant is not unavailable as a witness if the declarant's exemption, refusal, claim of lack of memory, inability, or absence is due to the procurement or wrongdoing of the proponent of a statement for the purpose of preventing the witness from attending or testifying.~~

This subdivision (a) does not apply if the statement's proponent procured or wrongfully caused the declarant's unavailability as a witness in order to prevent the declarant from attending or testifying.

~~(b) Hearsay exceptions. The following are not excluded by the hearsay rule if the declarant is unavailable as a witness:~~

(b) The Exceptions. The following are not excluded by the rule against hearsay if the declarant is unavailable as a witness:

~~(1) Former testimony. Testimony given as a witness at another hearing of the same or a different proceeding, or in a deposition taken in compliance with law in the course of the~~

~~same or another proceeding, if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.~~

(1) Former Testimony. Testimony that:

(A) was given as a witness at a trial, hearing, or lawful deposition, whether given during the current proceeding or a different one; and

(B) is now offered against a party who had, or, in a civil case, whose predecessor in interest had, an opportunity and similar motive to develop it by direct, cross-, or redirect examination.

~~(2) Statement under belief of impending death. A statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of the declarant's belief in impending death.~~

(2) Statement Under the Belief of Imminent Death. A statement that the declarant, while believing the declarant's death to be imminent, made about its cause or circumstances.

~~(3) Statement against interest. A statement that was at the time of its making so far contrary to the declarant's pecuniary or proprietary interest, or so far tended to subject the declarant to civil or criminal liability or to render invalid a claim by the declarant against another or to make the declarant an object of hatred, ridicule, or disgrace, that a reasonable person in the declarant's position would not have made the statement without believing it to be true. A statement tending to expose the declarant to criminal liability and offered to exculpate the accused is not admissible unless corroborating circumstances clearly indicate the trustworthiness of the statement. A statement or confession offered against the accused~~

~~in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.~~

(3) Statement Against Interest. A statement that:

(A) a reasonable person in the declarant's position would have made only if the person believed it to be true because, when made, it was so contrary to the declarant's proprietary or pecuniary interest or had so great a tendency to invalidate the declarant's claim against someone else or to expose the declarant to civil or criminal liability; and

(B) if it is offered in a criminal case to exculpate the accused, is supported by corroborating circumstances that clearly indicate its trustworthiness as a statement that tends to expose the declarant to criminal liability.

A statement or confession offered against the accused in a criminal case, made by a codefendant or other person implicating both the declarant and the accused, is not within this exception.

~~(4) Statement of personal or family history.~~

(4) Statement of Personal or Family History. A statement about:

~~(i) A statement concerning the declarant's own birth, adoption, marriage, divorce, parentage, relationship by blood, adoption, or marriage, ancestry, or other similar fact of personal or family history, even though declarant had no means of acquiring personal knowledge of the matter stated; or~~

(A) the declarant's own birth, adoption, legitimacy, ancestry, marriage, divorce, relationship by blood, adoption, or marriage, or similar facts of personal or family history, even though the declarant had no way of acquiring personal knowledge about that fact; or

~~(ii) a statement concerning the foregoing matters, and death also, of another person, if the declarant was related to the other by blood, adoption, or marriage or was so intimately associated with the other's family as to be likely to have accurate information concerning the matter declared.~~

(B) another person concerning any of these facts, as well as death, if the declarant was related to the person by blood, adoption, or marriage or was so intimately associated with the person's family that the declarant's information is likely to be accurate.

(5) [Other Exceptions.] [Transferred to Rule 807]

~~(6) Forfeiture by wrongdoing. A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness.~~

(6) Statement Offered Against a Party That Wrongfully Caused the Declarant's Unavailability. A statement offered against a party that wrongfully caused, or acquiesced in wrongfully causing, the declarant's unavailability as a witness, and did so intending that result.

EXPLANATORY NOTE

Rule 804 was amended, effective March 1, 1990; March 1, 2000; March 1, 2014.

Rule 804 is ~~taken in the main from the Uniform Rules of Evidence (1974)~~ based on Fed.R.Ev. 804.

~~Subdivision~~ Paragraph (b)(3) differs from ~~the comparable federal rule~~ Fed.R.Ev. 804 by excluding from this exception statements made by a codefendant or other person ~~which~~ implicate both the ~~codefendant~~ other person and the accused. Such statements may not be

against interest, and the area is one in which constitutional rights of the defendant may preclude their admission. Rather than proceed on a case-by-case basis, it was decided to preclude admission of such statements entirely.

Rule 804 was amended, effective March 1, 2000, to follow the December 1, 1997, federal amendment. The contents of Rule 804(b)(5) are transferred to new Rule 807. The addition of Rule 804(b)(6) provides for forfeiture of the right to object on hearsay grounds due to a party's own wrongdoing.

Rule 804 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, pages 24-25; September 24-25, 1998, page 4; April 30-May 1, 1999, page 16; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, pages 9, 10, 11, 12; October 1, 1975, page 8. ~~Rule 804(a), (b)(4), Federal Rules of Evidence~~ Fed.R.Ev. 804; Rule 804(b)(1), (b)(2), (b)(3), (b)(6), Uniform Rules of Evidence (1974); Rule 804, SBAND proposal.

Cross Reference: N.D.R.Ev. 807 (Residual Exception).

RULE 805. HEARSAY WITHIN HEARSAY

~~Hearsay included within hearsay is not excluded under the hearsay rule if each part of the combined statements conforms with an exception to the hearsay rule provided in these Rules.~~

Hearsay within hearsay is not excluded by the rule against hearsay if each part of the combined statements conforms with an exception to the rule.

EXPLANATORY NOTE

Rule 805 was amended, effective March 1, 2014.

Rule 805 provides that double or multiple hearsay statements are not to be excluded if each step is admissible under a hearsay exception. Thus, a dying declaration containing another declarant's statement of his present sense impression ~~would~~ could be admissible.

Rule 805 was amended, effective March 1, 2014 , in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 25; April 8, 1976, page 13. ~~Rule 805, Federal Rules of Evidence~~ Fed.R.Ev. 805; Rule 805, SBAND proposal.

RULE 806. ATTACKING AND SUPPORTING ~~CREDIBILITY OF DECLARANT~~ THE DECLARANT'S CREDIBILITY

~~If a hearsay statement, or a statement defined in Rule 801(d)(2)(iii), (iv), or (v), is admitted in evidence, the credibility of the declarant may be attacked, and if attacked may be supported, by any evidence which would be admissible for those purposes if declarant had testified as a witness. Evidence of a statement or conduct by the declarant at any time, inconsistent with the declarant's hearsay statement, is not subject to any requirement that the declarant may have been afforded an opportunity to deny or explain. If the party against whom a hearsay statement has been admitted calls the declarant as a witness, the party is entitled to examine the declarant on the statement as if under cross-examination.~~

When a hearsay statement, or a statement described in Rule 801(d)(2)(C), (D), or (E), has been admitted in evidence, the declarant's credibility may be attacked, and then supported, by any evidence that would be admissible for those purposes if the declarant had testified as a witness. The court may admit evidence of the declarant's inconsistent statement or conduct, regardless of when it occurred or whether the declarant had an opportunity to explain or deny it. If the party against whom the statement was admitted calls the declarant as a witness, the party may examine the declarant on the statement as if on cross-examination.

EXPLANATORY NOTE

Rule 806 was amended, effective March 1, 1990; March 1, 2014.

Rule 806 treats a declarant of hearsay evidence as any other witness by allowing the

declarant's credibility to be attacked in accordance with the rules ~~of Article VI~~. One deviation is required, however, and that is a declarant need not have been given an opportunity to deny or explain a statement inconsistent with the hearsay statement. ~~Compare Rule 613(b), NDREv.~~ This is because the inconsistent statement may well have been subsequent to the hearsay statement offered in evidence, precluding bringing it to the declarant's attention.

Rule 806 was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.

Rule 806 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 26; March 24-25, 1988, page 12; December 3, 1987, page 15; April 8, 1976, page 13; October 1, 1975, page 8. ~~Rule 806, Federal Rules of Evidence~~ Fed.R.Ev. 806; Rule 806, SBAND proposal.

Cross Reference: N.D.R.Ev. 607 (Who May Impeach a Witness), N.D.R.Ev. 608 (A Witness's Character for Truthfulness or Untruthfulness), N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction), N.D.R.Ev. 613 (Witness's Prior Statement).

RULE 807. RESIDUAL EXCEPTION

~~A statement not specifically covered by Rule 803 or 804 but having equivalent circumstantial guarantees of trustworthiness, is not excluded by the hearsay rule, if the court determines (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 which 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.~~

(a) In General. Under the following circumstances, a hearsay statement is not excluded by the rule against hearsay even if the statement is not specifically covered by a hearsay exception in Rule 803 or 804:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

(2) it is offered as evidence of a material fact;

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

(4) admitting it will best serve the purposes of these rules and the interests of justice.

~~However, a statement may not be admitted under this exception unless the proponent of it makes known to the adverse party and to the court in writing sufficiently in advance of its offer in evidence to provide the adverse party with a fair opportunity to prepare to meet it, the proponent's intention to offer the statement and the particulars of it, including the name and address of the declarant.~~

(b) Notice. The statement is admissible only if, before the trial or hearing, the

proponent gives an adverse party reasonable notice of the intent to offer the statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

EXPLANATORY NOTE

Rule 807 was adopted, March 1, 2000. Rule 807 was amended, effective March 1, 2014.

Rule 807 contains the contents of former Rules 803(25) and 804(5).

Rule 807 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes: of September 27, 2012, page 26; September 24-25, 1998, page 4; April 30-May 1, 1998, page 16. ~~Rule 807, Federal Rules of Evidence~~ Fed.R.Ev. 807.

RULE 901. ~~REQUIREMENT OF AUTHENTICATION OR IDENTIFICATION~~ AUTHENTICATING OR IDENTIFYING EVIDENCE

~~(a) General provision. The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.~~

(a) In General. To satisfy the requirement of authenticating or identifying an item of evidence, the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is.

~~(b) Illustrations. By way of illustration only, and not by way of limitation, the following are examples of authentication or identification conforming with the requirements of this rule:~~

(b) Examples. The following are examples only, not a complete list, of evidence that satisfies the requirement:

~~(1) Testimony of witness with knowledge. Testimony of a witness with knowledge that a matter is what it is claimed to be.~~

(1) Testimony of a Witness with Knowledge. Testimony that an item is what it is claimed to be.

~~(2) Nonexpert opinion on handwriting. Nonexpert opinion as to the genuineness of handwriting, based upon familiarity not acquired for purposes of the litigation.~~

(2) Nonexpert Opinion About Handwriting. A nonexpert's opinion that handwriting is genuine, based on a familiarity with it that was not acquired for the current litigation.

~~(3) Comparison by trier or nonexpert witness. Comparison by the trier of fact or by expert witnesses with specimens which have been authenticated.~~

(3) Comparison by an Expert Witness or the Trier of Fact. A comparison with an authenticated specimen by an expert witness or the trier of fact.

~~(4) Distinctive characteristics and the like. Appearance, contents, substance, internal patterns, or other distinctive characteristics, taken in conjunction with circumstances.~~

(4) Distinctive Characteristics and the Like. The appearance, contents, substance, internal patterns, or other distinctive characteristics of the item, taken together with all the circumstances.

~~(5) Voice identification. Identification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.~~

(5) Opinion About a Voice. An opinion identifying a person's voice, whether heard firsthand or through mechanical or electronic transmission or recording, based on hearing the voice at any time under circumstances that connect it with the alleged speaker.

~~(6) Telephone conversations. Telephone conversations, by evidence that a call was made to the number assigned at the time by the telephone company to a particular person or business, if (i) in the case of a person, circumstances, including self-identification, show the person answering to be the one called, or (ii) in the case of a business, the call was made to a place of business and the conversation related to business reasonably transacted over the telephone.~~

(6) Evidence About a Telephone Conversation. For a telephone conversation,

evidence that a call was made to the number assigned at the time to:

(A) a particular person, if circumstances, including self-identification, show that the person answering was the one called; or

(B) a particular business, if the call was made to a business and the call related to business reasonably transacted over the telephone.

~~(7) Public records or reports. Evidence that a writing authorized by law to be recorded or filed and in fact recorded or filed in a public office, or a purported public record, report, statement, or data compilation, in any form, is from the public office where items of this nature are kept.~~

(7) Evidence About Public Records. Evidence that:

(A) a document was recorded or filed in a public office as authorized by law; or

(B) a purported public record or statement is from the office where items of this kind are kept.

~~(8) Ancient documents or data compilations. Evidence that a document or data compilation in any form, (i) is in such condition as to create no suspicion concerning its authenticity, (ii) was in a place where it, if authentic, would likely be, and (iii) has been in existence twenty years or more at the time it is offered.~~

(8) Evidence About Ancient Documents or Data Compilations. For a document or data compilation, evidence that it:

(A) is in a condition that creates no suspicion about its authenticity;

(B) was in a place where, if authentic, it would likely be; and

(C) is at least 20 years old when offered.

~~(9) Process or system. Evidence describing a process or system used to produce a result and showing that the process or system produces an accurate result.~~

(9) Evidence About a Process or System. Evidence describing a process or system and showing that it produces an accurate result.

~~(10) Methods provided by statute or rule. Any method of authentication or identification complying with these rules, or other rules adopted by the North Dakota supreme court, or as provided by statute.~~

(10) Methods Provided by a Statute or Rule. Any method of authentication or identification allowed by a statute or a rule prescribed by the North Dakota Supreme Court.

EXPLANATORY NOTE

Rule 901 was amended, effective March 1, 2014.

~~Article IX is taken from the Federal Rules of Evidence and has been the subject of only minor revision.~~ Rule 901 is based on Fed.R.Ev. 901.

~~The Article deals with the method of authenticating evidence. Authentication has been said by Wigmore to be a matter of "logical necessity":~~

~~"In short, when a claim or offer involves impliedly or expressly any element of personal connection with a corporal object, that connection must be made to appear, like the other elements, else the whole fails in effect." VII Wigmore, Evidence, § 2129 at 564 (3d ed. 1940).~~

~~Thus, authentication~~ Authentication is merely a preliminary question of conditional relevancy and, as such, is to be determined according to the standards and requirements of N.D.R.Ev. 104(b)~~, NDREv~~. A determination that evidence is authentic does not render it

admissible. It may be hearsay, e.g., and excluded on that ground.

The ~~illustrations~~ examples listed in subdivision (b) are derived from traditional methods of authentication. They should be read in light of the general requirement of subdivision (a), which is satisfied by evidence sufficient to support a finding that the matter is what its proponent claims.

Rule 901 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 26 June 3, 1976, pages 8-10; October 1, 1975, page 8. ~~Rule 901, Federal Rules of Evidence~~ Fed.R.Ev. 901; Rule 901, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. §§ 47-19-23, 47-19-24.

~~Rules:~~

~~Considered: Rule 44(a), NDRCivP; Rule 27, NDRCrimP.~~

Cross Reference: N.D.R.Ev. 104 (Preliminary Questions); N.D.R.Civ.P. 44 (Proving an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

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 or political subdivision of the officer or employee certifies under seal that the~~

~~signer has the official capacity and that the signature is genuine.~~

(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 purporting to be executed or attested in an official capacity by a person authorized by the laws of a foreign country to make the execution or attestation, and accompanied by a final certification as to the genuineness of the signature and official position (i) of the executing or attesting person, or (ii) of any foreign official whose certificate of genuineness of signature and official position relates to the execution or attestation or is in a chain of certificates of genuineness of signature and official position relating to the execution or attestation. A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of official documents, the court, for good cause shown, may order that they be treated as presumptively authentic without final certification or permit them to be evidenced by an attested summary with or without final certification.~~

(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 report or entry therein, or of a document authorized by law to be recorded or filed and actually recorded or filed in a public office, including data compilations in any form, certified as correct by the custodian or other person authorized to make the certification, by certificate complying with paragraph (1), (2), or (3) or complying with any law of the United States or of this state.~~

(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 statute, or a rule

prescribed by the North Dakota Supreme Court.

~~(5) Official publications. Books, pamphlets, or other publications purporting to be issued by public authority.~~

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

~~(6) Newspapers and periodicals. Printed materials purporting to be newspapers or periodicals.~~

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

~~(7) Trade inscriptions and the like. Inscriptions, signs, tags, or labels purporting to have been affixed in the course of business and indicating ownership, control, or origin.~~

(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. Documents accompanied by a certificate of acknowledgement executed in the manner provided by law by a notary public or other officer authorized by law to take acknowledgements.~~

(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, signatures thereon, and documents relating thereto to the extent provided by general commercial law.~~

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it,

and related documents, to the extent allowed by general commercial law.

~~(10) Matters declared by statute. Any signature, document, or other matter declared by statute to be presumptively or prima facie genuine or authentic.~~

(10) Presumptions Under a Statute. A signature, document, or anything else that a 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 in the form of an affidavit made under penalty of perjury. Not less than 14 days 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 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).

EXPLANATORY NOTE

Rule 902 was amended, effective March 1, 1990; March 1, 2014.

Rule 902 is based on Fed.R.Ev. 902. It represents a relaxation of the common law requirement of authentication by creating a presumption that certain documents and records are authentic and ~~thereby~~ placing the burden of showing lack of genuineness on the party

opposing introduction of the offered evidence. ~~This has been done by statute for certain public documents, records, and certified copies. Rule 902 extends the benefits of this presumption to private documents in which the risk of falsification is slight.~~

Rule 902 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Paragraphs (11) and (12) were added to the rule, effective March 1, 2014. The intent of these provisions is to allow the foundation for admission of a record of a regularly conducted activity to be established by a certificate made under penalty of perjury rather than by live testimony. Paragraphs (11) and (12) also establish a notice requirement, which is intended to provide an opposing party a fair opportunity to test the adequacy of the foundation provided in the certification.

Rule 902 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Sources: Joint Procedure Committee Minutes~~:~~ of April 25-26, 2013, pages 18-21; January 31-February, 2013, pages 23-24; September 27, 2012, page 22-24; March 24-25, 1988, pages 15-16; December 3, 1987, page 15; June 3, 1976, pages 10-12, 14; October 1, 1975, pages 8, 9. ~~Rule 902, Federal Rules of Evidence~~ Fed.R.Ev. 902; Rule 902, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. ch. 31-09; N.D.C.C. §§ 11-18-11, 16-13-11, 31-04-10, 31-08-

02, 31-08-02.1, 31-08-06, ~~Ch. 31-09, 4~~3-13-12~~, NDCC~~.

~~Rules:~~

~~Considered: Rule 44(a), NDRCivP;Rule 27, NDRCrimP.~~

Cross Reference: N.D.R.Ev. 803 (Exceptions to the Rule Against Hearsay – Regardless of Whether the Declarant is Available as a Witness); N.D.R.Civ.P. 44 (Proving an Official Record); N.D.R.Crim.P. 27 (Proof of Official Record).

RULE 903. SUBSCRIBING WITNESS'S TESTIMONY ~~UNNECESSARY~~

~~The testimony of a subscribing witness is not necessary to authenticate a writing unless required by the laws of the jurisdiction whose laws govern the validity of the writing.~~

A subscribing witness's testimony is necessary to authenticate a writing only if required by the law of the jurisdiction that governs its validity.

EXPLANATORY NOTE

Rule 903 was amended, effective March 1, 2014.

~~By statute~~ Under N.D.C.C. § 31-08-02, the common law requirement that subscribing witnesses testify to the authenticity of a document ~~has been~~ was abrogated~~. N.D.C.C. § 31-08-02.~~ This rule continues the statutory practice, but provides that those witnesses must testify if required by the laws governing the validity of the writing.

Rule 903 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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. There is no intent to change any result in any ruling on evidence admissibility.

Sources: Joint Procedure Committee Minutes~~:~~ of September 27, 2012, page 26; June 3, 1976, page 12. ~~Rule 903, Federal Rules of Evidence~~ Fed.R.Ev. 903; Rule 903, SBAND proposal.

Statutes Affected:

Considered: N.D.C.C. § 31-08-02, ch. 31-09, §§ 47-19-23, 47-19-24.