IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20130410

Proposed Amendments to the North Dakota Rules of Appellate Procedure

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[¶ 1] The Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rules of Appellate Procedure 2.1, 2.2, 3, 4, 10, 11, 12, 21, 24, 25, 27, 28, 29, 30, 31, 32 and 40. 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. The Court considered the matter, and

[¶ 2] **ORDERED**, that as further amended, North Dakota Rules of Appellate Procedure 2.1, 2.2, 3, 4, 10, 11, 12, 21, 24, 25, 27, 28, 29, 30, 31, 32 and 40 are ADOPTED, effective October 1, 2014.

[¶ 3] **IT IS FURTHER ORDERED**, that on the Court's own motion, amendments to North Dakota Rules of Appellate Procedure 5, 8, 9, 26, 34, 36, 39, 41, 42, 43, 45, and 47 are ADOPTED, effective October 1, 2014.

[¶ 4] Entered this 24th day of June, 2014 at the direction of the Supreme Court of the State of North Dakota, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Carol Ronning Kapsner, the Honorable Daniel J. Crothers, and the Honorable Lisa Fair McEvers, Justices.

Penny Miller
Clerk
North Dakota Supreme Court

RULE 2.1. MENTAL HEALTH APPEALS UNDER CHAPTER 25-03.1, NORTH DAKOTA CENTURY CODE

(a) Filing Notice of Expedited Appeal. An expedited appeal from an order under N.D.C.C. § 25-03.1-29 may be taken by filing a notice of appeal with the clerk of the supreme court ~~clerk of district court~~ within 30 days after entry of the order.

(b) Content of Notice of Appeal. The notice of appeal must:

(1) specify the party or parties taking the appeal;

(2) designate the order being appealed; and

(3) name the court to which the appeal is taken.

(c) Motion for Temporary Stay and Specifications of Error. Any motion for a temporary stay of the order appealed from while the appeal is pending must be served and filed with the notice of appeal along with specifications of error specifying the grounds for appeal. Any stay granted by the district court prior to appeal remains valid only if a temporary stay request is filed with the supreme court with the notice of appeal. Once the supreme court acts on the stay request, any district court stay terminates.

(d) Record on Appeal. The record on appeal consists of the record required by Rule 10(a). A ~~tape~~ recording of the proceedings or an agreed statement of the case may substitute for the transcript.

(e) Briefs. Unless the appellant moves for a temporary stay of the order of the district court, the appellant's brief and appendix must be filed with the notice of appeal and must be served upon the opposing party at the time of filing. The appellee's brief

must be served and filed no later than seven days after service of the appellant's brief. If the appellant moves for a temporary stay of the order of the district court, the appellant's brief must be served and filed no later than five days after the notice of appeal is filed and the appellee's brief must be served and filed no later than five days after service of the appellant's brief.

(f) Notice of Appellant's Presence at Hearing. If the appellant intends to be present at the hearing, notice of the intention must accompany the notice of appeal. Any party may file a proposed interim order for issuance by the supreme court which will ensure the appellant the opportunity to be present at the hearing on appeal while protecting the interest sought to be served by the order being appealed. The plans for implementing the proposed interim order must be stated with particularity.

(g) Motions. Any motion, other than a motion for temporary stay, must be filed within seven days after service of the notice of appeal. Any party may file a response in opposition to a motion within seven days after service of the motion.

(h) Application of Other Rules. To the extent they are not inconsistent with N.D.C.C. § 25-03.1-29 or this rule, all other rules of appellate procedure apply.

EXPLANATORY NOTE

Rule 2.1 was adopted, effective April 1, 1983; amended, effective March 1, 1998; March 1, 2003; March 1, 2008; March 1, 2011; October 1, 2014.

Rule 2.1 provides special procedures to accommodate the requirement in N.D.C.C. § 25-03.1-29 for a hearing within 14 days after the notice of appeal is filed in a mental health proceeding.

Subdivision (a) was amended, effective October 1, 2014, to provide for the filing of the notice of appeal in the supreme court.

Subdivision (c) was amended, effective March 1, 2008, to make it clear that a party who seeks to stay an order that is appealed must request a temporary stay from the supreme court when the notice of appeal is filed. Under N.D.C.C. § 25-03.1-29, only the supreme court can stay an order once an appeal is commenced.

Subdivision (e) was amended, effective March 1, 2011, to increase the time to serve and file an appellee's brief from five to seven days after service of the appellant's brief. If the appellant moves for a temporary stay of the order of the district court, the time to serve and file briefs was increased from three to five days.

Subdivision (g) was amended, effective March 1, 2011, to increase the time to file a motion from five to seven days.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 12-13; April 29-30, 2010, pages 22, 24; April 26-27, 2007, pages 27-28; September 23-24, 1999, pages 9-10; September 26-27, 1996, page 18; February 17-18, 1983, pages 33-34.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 25-03.1-29.

RULE 2.2. TERMINATION OF PARENTAL RIGHTS - EXPEDITED APPEALS

(a) Filing Notice of Expedited Appeal. An appeal from an order terminating parental rights must be taken by filing a notice of expedited appeal with the clerk of the supreme court ~~clerk of district court~~ within 30 days after entry of the order.

(b) Content of Notice of Appeal. The notice of appeal must:

(1) specify the party or parties taking the appeal;

(2) designate the order being appealed;

(3) name the court to which the appeal is taken; and

(4) indicate that an expedited appeal is requested.

(c) Motion for Temporary Stay and Specifications of Error. Any motion for a temporary stay of the order appealed from while the appeal is pending must be served and filed with the notice of appeal along with specifications of error specifying the grounds for appeal. Any stay granted by the district court remains valid only if a temporary stay request is filed with the supreme court with the notice of appeal. Once the supreme court acts on the stay request, any district court stay terminates.

(d) Record on Appeal. The record on appeal consists of the record required by Rule 10(a). A recording of the proceedings or an agreed statement of the case may substitute for the transcript.

(e) Briefs.

(1) Filing Time. The appellant's brief must be filed with the notice of appeal and must be served upon the opposing party at the time of filing. The appellee's brief must be

served and filed no later than 21 days after service of the appellant's brief.

(2) Extensions. Extensions of time for filing briefs may not be granted except in the most unusual circumstances and only for the most compelling reasons in the interest of justice.

(f) Motions. Any motion, other than a motion for temporary stay, must be filed within seven days after service of the notice of appeal. Any party may file a response in opposition to a motion within seven days after service of the motion.

(g) Expedited Review. The supreme court must give priority to appeals under this rule.

(h) Application of Other Rules. To the extent they are not inconsistent with this rule, all other rules of appellate procedure apply.

EXPLANATORY NOTE

Rule 2.2 was adopted, effective March 1, 2009; March 1, 2011; October 1, 2014.

All appeals from orders terminating parental rights must be made under this rule.

Subdivision (a) was amended, effective October 1, 2014, to provide for the filing of the notice of appeal in the supreme court.

Paragraph (e)(1) was amended, effective March 1, 2011, to increase the time to serve and file an appellee's brief from 15 to 21 days after service of the appellant's brief.

Subdivision (f) was amended, effective March 1, 2011, to increase the time to file a motion from five to seven days.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 13-14; April 29-30, 2010, page 20; April 24-25, 2008, pages 9-11.

RULE 3. APPEAL AS OF RIGHT -- HOW TAKEN

(a) Filing the Notice of Appeal.

(1) An appeal permitted by law as of right from a district court to the supreme court may be taken only by filing a notice of appeal with the clerk of the supreme court ~~of district court~~ within the time allowed by Rule 4.

(2) An appellant's failure to take any step other than the timely filing of a notice of appeal and payment of any required docket fee does not affect the validity of the appeal, but is ground only for the supreme court to act as it considers appropriate, including dismissing the appeal.

(b) Joint or Consolidated Appeals.

When two or more parties are entitled to appeal from a district court judgment or order, and their interests make joinder practicable, they may file a joint notice of appeal. They may then proceed on appeal as a single appellant. Appeals may be consolidated by order of the supreme court upon its own motion or upon motion of a party, or by stipulation of the parties to the several appeals.

(c) Content of the Notice of Appeal.

The notice of appeal must:

(1) specify the party or parties taking the appeal;

(2) designate the judgment, order, or part thereof being appealed;

(3) name the court to which the appeal is taken; and

(4) in an appeal from a civil case or a post-conviction relief proceeding, include a

preliminary statement of issues.

(d) Serving the Notice of Appeal.

(1) ~~The~~ When a notice of appeal is filed, the clerk of ~~district court~~ the supreme court must promptly ~~serve notice of the filing of a notice of appeal by mailing or sending by third-party commercial carrier a copy of the notice of appeal to the supreme court clerk~~ file notice of filing with the district court clerk using the Odyssey® system and serve notice of the filing by sending a copy of the notice of appeal and any attachments by mail, third-party commercial carrier, or electronic means to each party's counsel of record -- excluding the appellant's counsel -- or, if a party is ~~proceeding pro se~~ self-represented and does not have an e-mail address, to the party's last known address. The clerk of ~~district court~~ the supreme court must note on each copy the date when the notice of appeal was filed.

(2) ~~In criminal cases, habeas corpus proceedings, or post-conviction proceedings, the clerk of district court must also send a copy of the docket entries to the supreme court clerk with the copy of the notice of appeal.~~

~~(3)~~ The clerk of ~~district court's~~ the supreme court's failure to serve a copy of the notice of appeal does not affect the validity of the appeal. The clerk of ~~district court~~ the supreme court must note on the docket the names of the parties to whom the clerk sends copies, and the date they were sent. Service is sufficient despite the death of a party or the party's counsel.

~~(4)~~ (3) The title of the action is not to be changed as a consequence of the appeal.

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1988; March 1, 1999; March 1, 2003;

March 1, 2007; October 1, 2014.

Rule 3 is patterned after Fed.R.App.P. 3.

Subdivision (a) was amended, effective October 1, 2014, to require ~~Nothing other than the timely~~ filing of the notice of appeal ~~in the trial~~ with the clerk of the supreme court ~~is required~~ rather than the clerk of district court. Timely filing of the notice of appeal is required to give the supreme court jurisdiction over the appeal. Any required docket fee must be paid before the appeal will be filed. After a party files a notice of appeal, ~~the clerk of district court sends copies to~~ the ~~supreme court~~ clerk of the supreme court sends notice to the district court clerk and to each of the parties. For the service of other ~~papers~~ documents, these rules place the responsibility of service on counsel rather than the clerk of ~~district court~~ the supreme court.

It should be noted, Rule 10(b) requires proof of service of the order for transcript and a copy of the stipulation of excluded portions, if any, to be filed with the notice of appeal, Rule 12(a) requires the docket fee to accompany the filing of the notice of appeal, and Rule 7 requires a bond for costs or equivalent security be filed with the notice of appeal in civil cases.

Subdivision (a) provides failure to follow any rule may result in dismissal of the appeal, an award of costs, or other appropriate action.

Subdivision (c) was amended, effective October 1, 2014, to require the appellant in a civil action or post-conviction proceeding to include a preliminary list of the issues on appeal with the notice of appeal. The purpose of the requirement is to provide the court information to make a preliminary determination whether oral argument is unnecessary. In

this list, the appellant is expected to provide the court notice of the issues of which the appellant is aware at the time the notice of appeal is filed.

Subdivision (d) was amended, effective March 1, 1999, to allow copies to be sent via a third-party commercial carrier as an alternative to mail.

Subdivision (d) was amended, effective October 1, 2014, to require the clerk of the supreme court to notify the clerk of district court of the filing of the notice of appeal and to send a copy of the notice of appeal to counsel of record and any self-represented parties.

Paragraph (d)(4) requires the title of the action to remain the same on appeal. Consistent with N.D.R.App.P. 1(c), the party who first files the notice of appeal must be designated as the appellant in the title and the responding party must be designated as the appellee.

Rule 3 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 3. 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 3 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

Sources: Joint Procedure Committee Minutes of September 26, 2013, pages 14-15; September 22-23, 2005, page 25; September 23-24, 1999, pages 9-10; January 29-30, 1998, page 21; February 19-20, 1987, pages 4-5; September 18-19, 1986, pages 12-13; May 25-26, 1978, page 3; March 16-17, 1978, page 1; January 12-13, 1978, pages 2-3; September 15-16, 1977, pages 4-5. Fed.R.App.P. 3; § 3.13(b) ABA Standards Relating to Appellate Courts

(Approved Draft, 1977).

Statutes Affected:

Superseded: N.D.C.C. §§ 28-18-09, 28-27-05, 28-27-26, 29-28-05, 29-28-20, 29-28-21.

Cross Reference: N.D.R.App.P. 1 (Scope of Rules), N.D.R.App.P. 7 (Bond for Cost on Appeal in Civil Cases), N.D.R.App.P. 10 (The Record on Appeal), N.D.R.App.P. 11 (Transmission and Filing of the Record), N.D.R.App.P. 12 (Docketing the Appeal), and N.D.R.App.P. 31 (Filing and Service of Briefs), N.D.R.Civ.P. 54(b) (Judgment Upon Multiple Claims or Involving Multiple Parties).

RULE 4. APPEAL - WHEN TAKEN

(a) Appeal in civil case.

(1) Time for filing notice of appeal. In a civil case, except as provided in paragraph (a)(4), the notice of appeal required by Rule 3 must be filed with the clerk of ~~district court~~ the supreme court within 60 days from service of notice of entry of the judgment or order being appealed.

(2) Multiple appeals. If one party timely files a notice of appeal, any other party may file a notice of appeal within 14 days after the date when the first notice was filed, or within the time otherwise prescribed by this subdivision, whichever period ends later.

(3) Effect of motion on notice of appeal.

(A) If a party timely files with the clerk of district court any of the following motions under the North Dakota Rules of Civil Procedure, however titled, the full time to file an appeal runs for all parties from service of notice of the entry of the order disposing of the last such remaining motion:

(i) for judgment under Rule 50(b);

(ii) to amend or make additional factual findings under Rule 52(b), whether or not granting the motion would alter the judgment;

(iii) for attorney's fees under Rule 54;

(iv) to alter or amend the judgment under Rule 59;

(v) for a new trial under Rule 59; or

(vi) for relief under Rule 60 if the motion is served and filed no later than 28 days

after notice of entry of judgment.

(B)

(i) If a party files with the clerk of district court any motion listed in subparagraph (a)(3)(A) after a notice of appeal is filed, the party filing the motion must notify the clerk of the supreme court ~~clerk~~ in writing, and the court may remand the case to the district court for disposition of the motion.

(ii) A party intending to challenge an order disposing of any motion listed in subparagraph (a)(3)(A), or a judgment's altered or amended alteration or amendment upon such a motion, must file a notice of appeal, or an amended notice of appeal, in compliance with Rule 3(c), within the time prescribed by this rule measured from the service of notice of the entry of the order disposing of the last such remaining motion.

(iii) No additional fee is required to file an amended notice.

(4) Motion for Extension of Time.

(A) The ~~district~~ supreme court may extend the time to file a notice of appeal if:

(i) a party so moves no later than 30 days after the time prescribed by subdivision (a) expires; and

(ii) that party shows excusable neglect or good cause.

(B) If a motion for extension of time is filed, notice must be given to the other parties.

(C) No extension under paragraph (a)(4) may exceed 30 days after the prescribed time.

(b) Appeal in Criminal Case.

(1) Time for Filing Notice of Appeal.

(A) In a criminal case, a defendant's notice of appeal must be filed with the clerk of ~~district court~~ the supreme court within 30 days after the entry of the judgment or order being appealed.

(B) If an appeal by the state is authorized by statute, the notice of appeal must be filed with the clerk of ~~district court~~ the supreme court within 30 days after the entry of the judgment or order being appealed.

(2) Filing Before Entry of Judgment. A notice of appeal filed after the district court announces a decision, sentence, or order, but before the entry of the judgment or order, is treated as filed on the date of and after the entry.

(3) Effect of Motion on Notice of Appeal.

(A) If a defendant timely makes any of the following motions under the North Dakota Rules of Criminal Procedure, the notice of appeal from a judgment of conviction must be filed within 30 days after the entry of the order disposing of the last such remaining motion, or within 30 days after the entry of the judgment of conviction, whichever period ends later:

(i) for a new trial under Rule 33, but if based on newly discovered evidence, only if the motion is made no later than 30 days after the entry of the judgment; or

(ii) for arrest of judgment under Rule 34.

(B) If the defendant files with the clerk of district court any motion listed in subparagraph (b)(3)(A) after a notice of appeal is filed, the defendant must notify the ~~supreme court~~ clerk the supreme court in writing, and the court may remand the case to

the district court for disposition of the motion.

(C) A notice of appeal filed after the district court announces a decision, sentence, or order, but before it disposes of any of the motions referred to in subparagraph (b)(3)(A), becomes effective upon the later of the following:

(i) the entry of the order disposing of the last such remaining motion;

(ii) the entry of the judgment of conviction.

(D) A valid notice of appeal is effective, without amendment, to appeal from an order disposing of any of the motions referred to in subparagraph (b)(3)(A).

(4) Motion for Extension of Time. Upon a finding of excusable neglect or good cause, the ~~district~~ supreme court may -- before or after the time has expired, with or without motion and notice -- extend the time to file a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(5) Jurisdiction. The filing of a notice of appeal under this subdivision does not divest a district court of jurisdiction to correct a sentence under Rule 35(a), nor does the filing of a motion under Rule 35(a) affect the validity of a notice of appeal filed before entry of the order disposing of the motion. The filing of a motion under N.D.R.Crim.P. 35(a) does not suspend the time for filing a notice of appeal from a judgment of conviction.

(6) Entry Defined. A judgment or order is entered for purposes of this subdivision when it is entered on the criminal docket.

(c) Appeal in Contempt Case. A notice of appeal must be filed with the clerk of ~~district court~~ the supreme court within 60 days after entry of the judgment or order being

appealed. Upon a finding of excusable neglect or for good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(d) Appeal in Post-Conviction Proceeding. A notice of appeal must be filed with the clerk of ~~district court~~ the supreme court within 60 days of service of notice of entry of the judgment or order being appealed. Upon a finding of excusable neglect or good cause, the district court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(e) Appeal in Proceeding Under Uniform Juvenile Court Act. Except for an appeal in a termination of parental rights proceeding, a notice of appeal in a proceeding under the Uniform Juvenile Court Act must be filed with the clerk of ~~district court~~ the supreme court within 30 days of service of notice of entry of the judgment, order or decree being appealed. Upon a finding of excusable neglect or good cause, the supreme court may, before or after the time has expired, with or without motion and notice, extend the time for filing a notice of appeal for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision.

(f) Mistaken Filing in ~~Supreme~~ District Court. If a notice of appeal in either a civil or a criminal case is mistakenly filed in the ~~supreme~~ district court, the ~~supreme court~~ clerk of district court must note on the notice the date when it was received and send it to the clerk of ~~district court~~ the supreme court. The notice is then considered filed in the ~~district~~

supreme court on the date so noted.

EXPLANATORY NOTE

Rule 4 was amended, effective March 1, 1986; March 1, 1994; March 1, 1997; March 1, 1998; March 1, 1999; August 1, 2001; March 1, 2003; March 1, 2007; March 1, 2008: March 1, 2011; May 4, 2011; October 1, 2014.

The time for civil appeals runs from "service of notice of entry" of the order or judgment. However, service of notice of entry of judgment is not necessary to start the time running for filing a post-judgment motion or appeal if the record clearly evidences actual knowledge of entry of judgment by the affirmative action of the moving or appealing party. See N.D.R.Civ.P. 58(b).

The responsibility under subdivision (a) is shifted to counsel to serve the notice and commence the period for appeal. This differs from the federal rule, which provides the time for appeal is to run from "the date of entry."

The time limit for taking an appeal does not prevent the taking of an appeal at any time after the entry of the judgment or order and before service of notice of entry.

Rule 4 was amended, effective October 1, 2014, to conform the rule for filing of the notice of appeal in the supreme court.

Subdivision (a) was amended, effective March 1, 1999, to provide the 30 day extension for excusable neglect is to be added to the time for appeal provided by the statute or rule setting the time for appeal. A party seeking an extension of time to appeal should file a notice of appeal with the motion for extension.

Subparagraph (a)(3)(A) was amended, effective October 1, 2014, to add the words

"however titled" to the language authorizing extension of the appeal period for the filing of certain motions. This amendment is intended to make clear that the substance and not the title of the motion should control. Therefore, a post-judgment motion under any of the listed rules, whether titled as a motion to alter, amend, or vacate, for relief from judgment, or for reconsideration, will toll the time period to file a notice of appeal.

Subparagraph (a)(3)(A)(vi) was amended, effective March 1, 2011, to increase the time to file a Rule 60 motion from 15 to 28 days after notice of entry of judgment.

Subparagraph (a)(3)(B)(ii) was amended, effective March 1, 2011, to track the 2009 amendments to Fed.R.App.P. 4. The amendment changed the phrase "judgment altered or amended" to "judgment's alteration or amendment."

Subdivision (b) was amended, effective March 1, 2003, to increase the time for a criminal defendant to appeal from 10 days to 30 days.

Subdivision (b) was amended, effective March 1, 2008, to clarify that the time for appeal continues to run even if a motion to correct a sentence under N.D.R.Crim.P. 35 is filed.

Subdivision (d) was adopted, effective August 1, 2001, to provide a time for appeal in a post-conviction proceeding.

Subdivision (e) was adopted, effective March 1, 2007, to clarify the time for appeal in a proceeding under the Uniform Juvenile Court Act. Requests for extension of time in juvenile cases must be directed to the supreme court.

Subdivision (e) was amended, effective May 4, 2011, to specify that appeals in termination of parental rights proceedings are not governed by the appeal deadlines in this

rule. Appeals in termination of parental rights proceedings are expedited under Rule 2.2.

Subdivision (f) was ~~adopted, effective March 1, 2003~~ amended, effective October 1, 2014, to provide a procedure to be used when a notice of appeal is mistakenly filed in ~~the supreme~~ district court.

Rule 4 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 4. 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 4 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Joint Procedure Committee Minutes of September 26, 2013, pages 15-16, 29-30; January 25, 2007, page 16; September 22-23, 2005, pages 25-26; April 26-27, 2001, pages 4-5; September 28-29, 2000, pages 10-13; January 27-28, 2000, pages 4-9; September 23-24, 1999, pages 10-12; April 30-May 1, 1998, page 13; January 30, 1997, page 8; January 25-26, 1996, pages 7-10; April 29-30, 1993, pages 2-3, 16-18; November 29, 1984, pages 19-20; April 26, 1984, pages 23-24; January 20, 1984, pages 10-15; September 18-19, 1980, page 20; January 12-13, 1978, page 25; Fed.R.App.P. 4.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 28-27-04.

CROSS REFERENCE: N.D.R.App.P. 2.2 (Termination of Parental Rights - Expedited Appeals).

RULE 5. POST-JUDGMENT MEDIATION

(a) Purpose.

(1) The purpose of post-judgment mediation is to improve the lives of families who appear before the courts by trying to resolve disputes through mediation in order to minimize family conflict, encourage shared decision-making, and support healthy relationships and communication among family members.

(2) The objectives of post-judgment mediation are to:

(A) support improved family decision-making and to promote agreement and compromise instead of further litigation and competition;

(B) improve access to mediation by providing funding;

(C) improve post-litigation family problem-solving and communication capacities by reestablishing communication through mediation;

(D) decrease litigation costs for litigants;

(E) create incentives to pursue mediation including flexibility to negotiate critical issues without judicial intervention;

(F) determine best practices for family mediation in North Dakota;

(G) improve rural access to post-litigation mediation services, as well as access by underprivileged and minority persons;

(H) work with the domestic violence services community in order to assess risk and provide services where appropriate; and to ensure proper protections are put in place and mediators are well-trained in signposts, risks, and exit planning strategies;

(I) reduce post-judgment litigation and conflict in family cases; and

(J) help the public, judiciary, and bar become more aware of the benefits and nature of the mediation process.

(b) Program management. The family mediation program administrator will manage and oversee the operation of the program under the supervision of the Supreme Court.

(c) Research and evaluation. The program will include evaluation components

(d) Mediation process.

(1) Request for mediation. Any party contemplating an appeal may forward a request for post-judgment mediation to the program administrator no later than 60 days after the service of notice of entry of judgment or order, or seven days after service of the notice of appeal, in any eligible case. The request must be simultaneously served on every party under N.D. R. App. P. 25. The time for filing a notice of appeal under N.D. R. App. P. 4 is not affected by any request or assignment for mediation.

(2) Eligible cases. Only final and appealable judgments and orders in the following types of cases are eligible for participation in appellate mediation:

(A) divorce cases involving property or spousal support;

(B) any case involving parenting rights, except for termination of parental rights cases;

(C) any case involving residential responsibilities or support of minor children;

(D) any case involving grandparent visitation; and

(E) any case under the Uniform Probate Code or the Uniform Trust Code.

(3) Exemption from mediation. Any party may request referral of an eligible case to post-judgment mediation. Referral must be granted unless a party requests an order from the court exempting the case from post-judgment mediation by filing a motion and an affidavit with the clerk of the supreme court ~~clerk~~ within seven days of service of the mediation request. The court may exempt the case if:

(A) the issues raised are limited to a question of law; or

(B) prior post-judgment mediation has been attempted and the issues are substantially similar; or

(C) other good cause is shown.

(4) Exclusion from mediation. The program administrator may not refer proceedings where a current domestic violence protection order or other order for protection between the parties exists. In these cases, the court may not proceed with mediation except in unusual cases where:

(A) mediation is requested by the victim of the domestic violence or sexual abuse, and an exception to the order of protection is made by the court;

(B) the mediation is provided by a mediator trained to address the needs and safety of victims where domestic violence is at issue;

(C) the victim of domestic violence is provided the opportunity for separate meetings during the mediation, and to mediate using separate rooms;

(D) the mediation takes place in a courthouse or other building where security measures are in place; and

(E) the victim has an attorney or other advocate or support person of their choice

in the mediation.

The Rule 5 (d)(4) exclusion and exceptions are intended to comply with the N.D.C.C. § 14-09.1-02 standards for family mediation.

(5) Screening and assignment of mediator. On receipt of a request for post-judgment mediation, the program administrator must determine whether a case meets the requirements for eligibility and appropriateness for mediation. Once a case has been approved for post-judgment mediation, the program administrator must assign a mediator eligible under Rule 5(e). The program administrator must send a notice of mediation to counsel, any unrepresented party, and the clerk of the supreme court ~~clerk~~. The notice of mediation must identify the mediator who has been assigned, and a deadline for completion of the mediation. The mediation must be completed within 45 days of the assignment of a post-judgment mediator.

(6) Ordering of transcript and filing of briefs. To expedite the mediation process and spare the parties as much initial expense as possible, the ordering of the transcript in cases assigned for mediation is extended to 21 days after the filing of the notice of appeal. The time for filing briefs is not automatically tolled pending mediation. In cases in which mediation has been requested, any motions for enlargement of time for briefs must be filed with the clerk of the supreme court ~~clerk~~ under Rule 26(b).

(7) Mediation orientation. The post-judgment mediation program will provide up to six hours of combined pre-mediation orientations and mediation. Mediators will be compensated at a rate set annually by the state court administrator. The post-judgment mediation program requires the parties to individually attend a pre-mediation orientation

and screening with a designated mediator, and at least one joint mediation session. The program will provide up to six hours of mediation without charge to the parties. Should the parties require additional sessions, they may purchase mediation from the mediator. Parties may also apply to the program administrator for additional mediation sessions and may apply for a fee waiver or sliding scale fee should they qualify based on economic factors. The program administrator will determine whether a party is eligible for a fee waiver or fee reduction based on party income according to a schedule adopted by the Supreme Court. If the parties qualify for a fee reduction and have been approved for additional mediation, any "gap" between the set rate and their ability to pay will be paid to the mediator by the court under this program.

(8) Mediation statement. On request of the mediator, the parties should each supply to the mediator, at least two days before the scheduled conference, a mediation statement no more than four pages in length. The statement should include:

(A) a brief history of the litigation;

(B) a brief statement of facts;

(C) the history of any efforts to settle the case, including any offers or demands;

(D) a summary of the parties' legal positions;

(E) the present posture of the case, including any related litigation; and

(F) any proposals for settlement.

The mediation statement may not be filed in the office of the clerk of the supreme court ~~clerk~~. Mediation by telephone or other electronic means may be used if all parties and the mediator agree.

(e) Selection of mediators.

(1) Eligibility. Any lawyer qualified as a post-judgment mediator under N.D.R.Ct. 8.9 may apply to be added to the roster of post-judgment mediators and will be approved by the program administrator. Mediators must carry malpractice insurance that covers their mediation practice.

(2) Mediation assignment. Mediators will be assigned cases by the program administrator and will manage cases assigned to them from orientation and screening through conclusion of mediation.

(3) Conflicts of interest and bias. A mediator may not be removed unless the mediator and/or the parties' petition the program administrator based on bias or conflicts of interest. Parties and attorneys may not request a change of mediator unless they present clear evidence of bias or conflict of interest.

(f) Mediation outcome.Within seven days after completion of the mediation decision summary in appeals settled in whole or in part under Rule 5, the parties must file a copy of the decision summary and a request for the Supreme Court to take appropriate action, such as dismissal of the appeal under Rule 43 or remand to the district court. If a matter is remanded, the parties must file the appropriate ~~papers~~ documents with the district court to obtain an amended judgment, which must incorporate all terms of the decision summary. On entry of an amended judgment, the parties must request the Supreme Court to enter an appropriate order. In appeals not settled and terminated from mediation, briefing and oral argument will proceed under the rules. In cases settled by post-judgment mediation prior to the filing of a notice of appeal, the requesting party is

responsible for obtaining an amended judgment incorporating all terms of the decision summary from the district court.

(g) Closing.

(1) Mediation decision summary. At the close of every mediation case, the mediator and parties must create a written decision summary for the parties that notes any and all agreements made and uses the parties' own language. The parties will have seven days to reconsider the decisions made in mediation. If neither party files a written request to reconsider within seven days, the mediator must immediately send a copy of the decision summary to the parties and their attorneys, along with the Mediation Case Closing Form. (N.D.R.Ct. Appendix I, Form G).

(2) Evaluation. At the close of every mediation case, the mediator and the parties must complete the required evaluation forms and the mediator must submit those to the program administrator along with closing form, and the mediator's invoice form. The mediator is responsible for collecting fees from the parties if appropriate.

(3) Case closing/Notification. The mediator must notify program administrator when a mediation case has concluded for any reason, and offer the following reasons:

(A) agreement has been reached in whole or part; or

(B) the parties were unable to reach agreement.

(h) Confidentiality. Statements and comments made during mediation conferences and in related discussions, and any record of those statements, are confidential and may not be disclosed by anyone (including the program administrator, counsel, or the parties; and their agents or employees) to anyone not participating in the post-judgment mediation

process. Mediators may not be called as witnesses, and the information and records of the program administrator may not be disclosed to judges, staff, or employees of any court.

EXPLANATORY NOTE

Rule 5 was adopted, effective January 1, 2014; amended effective October 1, 2014.

Rule 5 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

Sources: Joint Procedure Committee Minutes of January 31-February 1, 2013, pages 5-10; Joint Alternative Dispute Resolution Committee Minutes of June 25, 2012; October 25, 2012; September 7, 2011; June 29, 2011; June 10, 2011; December 9, 2010..

Statutes Affected:

Considered: N.D.C.C. § 14-09.1-02.

Cross Reference: N.D.R.App.P. 26 (Computing and Extending Time), N.D.R.App.P. 43 (Substitution of Parties); N.D.R.Ct. 8.1 (Family Mediation Program), N.D.R.Ct. 8.9 (Roster of Alternative Dispute Resolution Neutrals).

RULE 8. STAY OR INJUNCTION PENDING APPEAL

(a) Motion for stay.

(1) Initial motion in the district court. A party must ordinarily move first in the district court for the following relief:

(A) a stay of the judgment or order of a district court pending appeal.

(B) approval of a supersedeas bond.

(C) an order suspending, modifying, restoring, or granting an injunction while an appeal is pending.

(2) Motion in the supreme court; Conditions on relief. A motion for the relief mentioned in paragraph (a)(1) may be made to the supreme court or to one of its justices.

(A) The motion must:

(i) show that moving first in the district court would be impracticable; or

(ii) state that, a motion having been made, the district court denied the motion or failed to afford the relief requested and state any reasons given by the district court for its action.

(B) The motion must also include:

(i) the reasons for granting relief requested and the facts relied on.

(ii) originals or copies of affidavits or other sworn statements supporting facts subject to dispute.

(iii) relevant parts of the record.

(C) The moving party must give reasonable notice of the motion to all parties.

(D) A motion under paragraph (a)(2) must be filed with the clerk of the supreme court ~~clerk~~ and normally will be considered by the court. But in an exceptional case in which time requirements make that procedure impracticable, the motion may be made to and considered by a single justice.

(E) The court may condition relief on a party's filing a bond or other appropriate security in the district court.

(b) Proceeding against a surety. If a party gives security in the form of a bond or stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the district court and irrevocably appoints the clerk of district court as the surety's agent on whom any ~~papers~~ documents affecting the surety's liability on the bond or undertaking may be served. On motion, a surety's liability may be enforced in the district court without the necessity of an independent action. The motion and any notice the district court prescribes may be filed with the clerk of district court, who must promptly mail or send by third-party commercial carrier a copy of each surety whose address is known.

(c) Stay in a criminal case. Rule 38(a) of the North Dakota Rules of Criminal Procedure governs a stay in a criminal case.

EXPLANATORY NOTE

Rule 8 was amended, effective January 1, 1988; March 1, 1999; March 1, 2003; October 1, 2014.

Rule 8 provides the procedure for obtaining a stay or similar relief with respect to the action of the court, pending appeal.

Subdivision (b) was amended, effective March 1, 1999, to allow copies of the motion to be sent via a commercial carrier as an alternative to mail.

Subdivision (c) assures the procedure for a stay in a criminal matter is consistent with N.D.R.Crim.P. 38.

The authority of a single justice to act on procedural matters is first mentioned in this rule. This rule contemplates that many applications for procedural relief may be handled by a single justice, with substantial savings in time and reduction of the actions requiring a quorum of the court.

Rule 8 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 8. 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 8 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

Sources: Joint Procedure Committee Minutes of September 23-24, 1999, page 18; January 29-30, 1998, page 21; February 19-20, 1987, pages 5-6; September 18-19, 1986, pages 13-14; May 25-26, 1978, page 5; March 16-17, 1978, page 16. Fed.R.App.P. 8.

Statutes Affected:

Superseded: N.D.C.C. § 28-27-22.

Cross Reference: N.D.R.App.P. 9 (Release in Criminal Cases). N.D.R.Crim.P. 38 (Stay of Execution and Relief Pending Appeal).

RULE 9. RELEASE IN CRIMINAL CASE

(a) Motion to district court. Any motion for release, modification of the conditions of release or revocation of release, after a notice of appeal from a judgment of conviction has been filed must first be made to the district court before the motion may be made to the supreme court. If the district court refuses release pending appeal, or imposes conditions of release, or revokes release, the court must state in writing the reasons for the action taken.

(b) Motion to supreme court. After having first been made to the district court, a motion for release, or for modification of the conditions of release, or for revocation of release pending review may be made to the supreme court or to one of its justices. After reasonable notice to the appellee, the motion must be determined promptly upon such ~~papers~~ documents, affidavits, and portions of the record as the parties present. The court or one of its justices may order the release of the appellant pending disposition of the motion.

EXPLANATORY NOTE

Rule 9 was amended, effective March 1, 1986; March 1, 2003; October 1, 2014.

This rule incorporates a procedure for release pending appeal in a criminal case but omits the federal procedure in Fed.R.App.P. 9 for appeal of an order refusing pre-conviction release, because there is no authority or precedent for these appeals under North Dakota practice.

This rule and N.D.R.Crim.P. 46(c) are identical. This rule regulates the procedure for release of a defendant when the jurisdiction of the appellate court has attached by virtue of the filing of an appeal from a judgment of conviction.

This rule was amended, effective March 1, 1986, to permit modification or revocation of the release of a defendant who was initially released pending appeal, and to clarify that a motion for release after a notice of appeal is filed must be made in the first instance in the trial court and thereafter in the supreme court.

Rule 9 was amended, effective March 1, 2003. The language and organization of the rule were changed to make the rule more easily understandable and to make style and terminology consistent throughout the rules.

Rule 9 was amended, effective October 1, 2014, to replace "paper" with "document."

Sources: Joint Procedure Committee Minutes of September 23-24, 1999, pages 18-19; November 29, 1984, pages 14-15; April 26, 1984, pages 11-17; May 25-26, 1978, pages 6-7.

Cross Reference: N.D.R.Crim.P. 46 (Release from Custody).

RULE 10. THE RECORD ON APPEAL

(a) Composition of Record on Appeal. The following items constitute the record on appeal:

(1) the ~~original papers~~ documents and exhibits filed in the district court, including the notice of appeal as filed in Odyssey® by the clerk of the supreme court;

(2) an electronic copy of the transcript ~~two copies of the transcript~~, if any; and

(3) a ~~certified copy of the docket entries~~ certification prepared by the clerk of district court ~~constitute~~ stating what constitutes the record filed in the district court.

(b) Order for Transcript of Proceeding.

(1) Appellant's Duty to Order. If an appeal is taken in a case in which an evidentiary hearing was held, the appellant must order a transcript of the proceedings as follows:

(A) ~~two copies~~ an electronic copy of the transcript must be ordered for the supreme court;

(B) one copy of the transcript must be ordered for each self-represented party and each party separately represented;

(C) a complete transcript must be ordered, unless a stipulation is obtained from all affected parties specifying the portions that are not required for the purposes of the appeal;

(D) a transcript of any record of jury voir dire is not required, unless specifically requested by a party; and

(E) the order for a transcript, and a copy of the stipulation of excluded portions, if applicable, must be filed with the clerk of ~~district court~~ the supreme court with the notice of appeal.

(2) Information for Order. An order for a transcript must include the following information:

(A) the caption of the case;

(B) the date or dates of trial;

(C) the number of copies required; and

(D) the names and addresses or e-mail addresses of the parties to be served with copies.

(3) Unreasonable Refusal to Stipulate. If a party affected by the appeal unreasonably refuses to stipulate to exclude from the transcript portions of the record not necessary to the resolution of the issues raised by the appellant, the party proposing the stipulation may apply to the district court for an order requiring the refusing party to pay for the unnecessary portions of the transcript and reasonable attorney's fees for making the application.

(4) Clerk of District Court to Transmit Order. Within seven days after an order for transcript is filed and any required docket fee is paid, the clerk of the supreme court must electronically transmit the order to the clerk of district court. The clerk of district court must promptly electronically transmit the order to the person designated by the district court to prepare the transcript.

(c) Preparation of Transcript.

(1) Time for Furnishing Transcript. Within ~~50~~ 60 days after the date the order for transcript is electronically transmitted by the clerk of district court ~~filed with the supreme court clerk of district court~~, the person preparing the transcript must complete ~~and file the transcript in Odyssey®~~ the transcript and file it electronically with the ~~supreme court~~ clerk of the supreme court unless an extension of time is received under subdivision (d). In expedited appeals, when a transcript is ordered, the person preparing the transcript must promptly complete the transcript and file it electronically with the clerk of the supreme court unless otherwise directed by the supreme court.

(2) Submission of Transcript.

(A) The person preparing the transcript must serve and file the transcript as follows:

(i) a copy of the transcript must be served on each party designated in the order for transcript;

(ii) proof of service of the transcript must be filed by electronic means with the ~~supreme court~~ clerk of the supreme court; and

(iii) ~~two copies of the transcript must be filed with the supreme court clerk; and~~

~~(iv)~~ an electronic copy of the transcript must be ~~filed with, or the transcript must be~~ electronically transmitted to~~;~~ the ~~supreme court~~ clerk of the supreme court. All electronic transcripts must contain in a single file all the information contained in the paper transcript, including the cover, table of contents, and certifications, in the same order as in the paper transcript. The electronic transcript must include fixed line number and page numbers corresponding to those in the paper transcript.

(B) In an appeal of the determination of an administrative agency, the agency must file an electronic copy of the transcript or electronically transmit the transcript to the ~~supreme court~~ clerk of the supreme court unless the agency certifies the transcript was not prepared on a computer or word processor.

(3) Financial Arrangements. The appellant, or a party obligated under paragraph (b)(3) to pay transcription costs, must provide advance payment for the estimated cost of preparing the transcript, provided:

- (A)the person preparing the transcript serves a written estimate of the cost and a demand for payment on the appellant within 14 days after receipt of the order for transcript; or

- (B)the person preparing the transcript serves a written estimate of the cost and a demand for payment on a party obligated by court order to pay transcription costs within 14 days after receipt of the order.

If the person preparing the transcript fails to serve a timely written estimate and a timely demand for payment, the right to demand advance payment is waived. Advance payment is not required if transcription costs are to be paid by the state or an agency or subdivision of the state. If the appellant or obligated party fails to make the advance payment within 14 days after service of the demand, the person preparing the transcript may suspend preparation of the transcript until paid.

(d) Extension of Time.

(1) Good Cause. If the person preparing the transcript is unable to complete and file the transcript within ~~50~~ 60 days after the order for transcript is ~~filed~~ electronically

transmitted to the preparer, the district court for good cause shown may extend the time for completion of the transcript. If preparation of the transcript has been suspended for failure of any party to make a timely advance payment upon demand, the district court for good cause shown by the party responsible for the delay, may extend the time for completion of the transcript, on such terms as the court may order.

(2) Request for Extension. A request for an extension of time must be made within the time originally prescribed or within an extension previously granted for completion of the transcript. A district court may not extend the time for more than 90 days ~~from the date when the first notice of appeal was filed~~ after the order for transcript is electronically transmitted to the preparer. If the district court is without authority to grant the relief sought or has denied a request for an extension of time, the supreme court may on motion for good cause shown extend the time for completion of the transcript beyond the time allowed or fixed. If a request for an extension of time has been previously denied, the motion must set forth the denial and state the reasons for the denial, if any were given by the district court.

(e) Form of Transcript. Each transcript must conform to the requirements of Rules 31(b)(2) and 32 except as otherwise provided:

- (1) lines must be numbered on the left margin;
- (2) each page may not contain more than 27 lines or less than 25 lines;
- (3) the left margin may not be more than 1 3/4 inches wide;
- (4) the right margin may not be more than 3/8 inches wide;
- (5) each question and answer must begin on a new line;

= (6) an indentation for a new speaker or paragraph may not be more than 10 spaces from the left margin;

= (7) each volume must be indexed as to every witness and exhibit;

= (8) each page must be numbered consecutively; and

= (9) the accuracy of the transcript must be certified by the person preparing the transcript.

(f) Statement of Evidence When Proceedings Not Recorded or When Transcript Unavailable. If a transcript of a hearing or trial is unavailable, the appellant may prepare a statement of the evidence or proceedings from the best available means, including the appellant's recollection. The statement must be served on the appellee, who may serve objections or proposed amendments within 14 days after being served. The statement and any objections or proposed amendments must then be ~~submitted to~~ filed with the district court for settlement and approval. As settled and approved, the statement must be filed with the ~~supreme court~~ clerk of the supreme court by the appellant within 60 days after the notice of appeal is filed.

(g) Agreed Statement as Record on Appeal. In place of the record on appeal as defined in subdivision (a), the parties may prepare, sign, and ~~submit to~~ file with the district court a statement of the case showing how the issues presented by the appeal arose and were decided in the district court. The statement must set forth only those facts averred and proved or sought to be proved that are essential to the supreme court's resolution of the issues. If the statement is truthful, it, ~~--~~ together with any additions that the district court may consider necessary to a full presentation of the issues on appeal, ~~--~~

must be approved by the district court and must then be certified to the supreme court as the record on appeal. The clerk of district court must then ~~send~~ file the statement ~~to~~ with the supreme court within the time provided by Rule 11.

(h) Correction or Modification of Record.

(1) If any difference arises about whether the record truly discloses what occurred in the district court, the difference must be submitted to and settled by the district court and the record conformed accordingly.

(2) If anything material to either party is omitted from or misstated in the record by error or accident, the omission or misstatement may be corrected and a supplemental record may be certified and forwarded:

- (A) on stipulation of the parties; or
- (B) by the district court before or after the record has been forwarded.

The supreme court, on proper suggestion or of its own initiative, may direct that an omission or misstatement be corrected, and, if necessary, that a supplemental record be certified and transmitted. All other questions as to the form and content of the record must be presented to the supreme court.

EXPLANATORY NOTE

Rule 10 was amended, effective 1978; March 1, 1986; January 1, 1995; March 1, 1998; March 1, 1999; March 1, 2001; technical amendments effective August 1, 2001; March 1, 2003; March 1, 2004; March 1, 2005; March 1, 2008; March 1, 2011; October 1, 2014.

Rule 10 was amended, effective January 1, 1995. The amendment allows a transcript to be prepared and certified from an electronic recording by someone other than the operator

of recording equipment or a court reporter.

Rule 10 was amended, effective March 1, 2003. The language and organization of the rule were changed to make the rule more easily understandable and to make style and terminology consistent throughout the rules.

~~Subdivisions (a) and (c) were amended, effective March 1, 2005, to require only two copies of the transcript to be ordered and submitted to the supreme court.~~

Subdivisions (a), (b), and (c) were amended, effective October 1, 2014, to require that an electronic copy of the transcript be filed in the supreme court. When the mandate of the supreme court is issued, an electronic copy of the transcript will be filed in Odyssey®.

Subdivision (b) was amended, effective March 1, 2004, to eliminate any requirement to obtain a transcript of the voir dire record, unless such a transcript is specifically requested by a party.

Subdivision (b) was amended, effective March 1, 2008, to require that a copy of the transcript be ordered for each self-represented party.

Paragraph (b)(4) was amended, effective March 1, 2011, to increase the time for a clerk to transmit the order for transcript from three to seven days.

Subdivision (c) was amended, effective March 1, 2008, to eliminate references to computer diskettes.

Paragraph (c)(1) was amended, effective October 1, 2014, to allow 60 days after the order for transcript is transmitted to the preparer for the transcript to be prepared.

Paragraph (c)(3) was amended, effective March 1, 2011, to increase the time periods regarding transcription costs from 10 to 14 days.

Subdivision (d) was amended, effective October 1, 2014, to indicate that the time begins to run on the transcript preparation period when the order for transcript is transmitted to the preparer.

Subdivision (f) was amended, effective March 1, 2011, to increase the time for an appellee to serve objections or propose amendments to a statement of the proceedings from 10 to 14 days.

Rule 10 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 16-20; April 29-30, 2010, page 20; January 25, 2007, page 16; January 30-31, 2003, pages 3-4; September 26-27, 2002, pages 14-15; April 26-27, 2001, pages 8-9; January 27-28, 2000, pages 9-12; September 23-24, 1999, pages 19-21; January 30, 1997, pages 9-10; September 26-27, 1996, page 18; April 28-29, 1994, pages 3-4; January 27-28, 1994, page 18; September 23-24, 1993, pages 20-21; March 28-29, 1985, pages 13-14; November 29, 1984, pages 5-6; May 25-26, 1978, pages 7-8; March 16-17, 1978, pages 1, 2, 9-13; January 12-13, 1978, pages 14-15; October 27-28, 1977, pages 2-3; September 15-16, 1977, pages 5-8, 16-18; June 2-3, 1977, pages 2-4. Fed.R.App.P. 10.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 28-18-04, 28-18-05, 28-18-06, 28-18-07, 28-18-08, 28-27-07, 28-27-33, 29-23-01, 29-23-02, 29-23-03, 29-23-04, 29-23-08, 29-23-09.

CROSS REFERENCE: N.D.R.App.P. 3 (Appeal as of Right--How Taken), N.D.R.App.P. 7 (Bond for Costs on Appeal in Civil Cases), N.D.R.App.P. 11 (Transmission

and Filing of the Record), and N.D.R.App.P. 12 (Docketing the Appeal).

RULE 11. FORWARDING AND FILING THE RECORD

(a) Time for Forwarding; Duty of Appellant.

(1) Except in expedited appeals, ~~The~~ the clerk of district court must forward the exhibits necessary for determination of the appeal and the record on appeal, excluding the transcript, to the supreme court not less than 25 nor more than 30 days after the filing of the notice of appeal unless otherwise directed by the supreme court~~, or by a party or the person preparing the transcript, as provided in subdivision (c)~~.

(2) After filing the notice of appeal, the appellant must do what is necessary to enable the clerk of district court to assemble and forward the record.

(3) In expedited appeals, the clerk of district court must promptly forward the exhibits necessary for determination of the appeal and the record on appeal, excluding the transcript, to the supreme court unless otherwise directed by the supreme court.

(b) Method of Forwarding Record.

(1) Documents Numbered and Listed. The clerk of district court must ~~number the documents constituting the record and send them to the supreme court clerk, together with~~ create a numbered list of the documents constituting the record ~~correspondingly numbered and~~ that reasonably ~~identified~~ identifies the documents. The clerk of district court must certify to the supreme court that the list constitutes the record on appeal.

(2) Unusual Bulk or Weight. Unless directed to do so by a party or by the ~~supreme court~~ clerk of the supreme court, the clerk of district court must not forward to the court documents of unusual bulk or weight, or physical exhibits other than documents. If the

exhibits are unusually bulky or heavy, a party must arrange with the clerks in advance for their transportation and receipt.

(3) ~~Mail or Other Means; Endorsement~~ Certification of the Record. The ~~clerk of district court may forward the~~ record is considered forwarded to the ~~supreme court~~ clerk of the supreme court ~~by mail or other means~~ upon filing of a certification of the record. The clerk of district court must indicate~~, by endorsement on the face of the record or otherwise,~~ the date the record is forwarded to the court.

~~(c) Temporary Retention of Record in District Court for Use in Preparing Briefs and Transcript.~~

~~(1) A party or the person preparing the transcript may retain the record in the district court by sending a written request to the clerk of district court within the earliest time stated in subdivision (a) for forwarding the record. Copies of the request must be sent to all counsel of record and to the supreme court clerk.~~

~~(2) If the record is retained by a party under this subdivision, the appellant, upon receipt of the appellee's brief, must request the clerk of district court to forward the record, unless forwarding of the record at an earlier time is agreed upon by the parties or directed by the supreme court.~~

~~(3) If the record is retained by the person preparing the transcript under this subdivision, upon filing the transcript, that person must request the clerk of district court to forward the record, unless the supreme court directs the record to be forwarded at an earlier time.~~

~~(d) Retaining the Record by Court Order.~~

~~(1) The supreme court may order that a certified copy of the docket entries be forwarded instead of the entire record. But a party may at any time during the appeal request that designated parts of the record be forwarded.~~

~~(2) The district court may order the record or some part of it retained if the court needs it while the appeal is pending, subject to call by the supreme court.~~

~~(3) If part or all of the record is ordered retained, the clerk of district court must send to the supreme court a copy of the order and the docket entries, together with the parts of the original record allowed by the district court and copies of any parts of the record designated by the parties.~~

~~(e) Retaining Parts of Record in District Court by Stipulation of Parties. The parties may agree, by written stipulation filed in the district court, that designated parts of the record be retained in the district court, subject to call by the supreme court or request by a party. The parts of the record so designated remain a part of the record on appeal.~~

~~(f) Record for Preliminary Motion in Supreme Court. If, before the record is forwarded, a party makes any of the following motions in the supreme court:~~

~~--for dismissal;~~

~~--for release;~~

~~--for a stay pending appeal;~~

~~--for additional security on the bond on appeal or on a supersedes bond; or~~

~~--for any other immediate order --~~

~~the clerk of district court must send the supreme court any parts of the record designated by any party.~~

~~(g) Filing of Record. Upon receipt of the record, or of the parts of the record authorized to be filed under the provisions of subdivision (d) , the supreme court clerk must file the record. The clerk must give notice immediately to all parties of the date on which the record is filed.~~

~~(h)~~(c) ~~Dismissal for Failure to Timely~~ Appellant's Duty to Forward Record. ~~If~~ It is the ~~appellant fails~~ the appellant's duty to ensure that the record is accurate and complete and to cause timely forwarding of the record, ~~any appellee may file a motion in the supreme court to dismiss the appeal. The motion must be supported by the following~~ including:

~~-- a certificate of the clerk of district court showing the date and substance of the judgment or order from which the appeal was taken;~~

~~-- the date on which the notice of appeal was filed;~~

~~-- the expiration date of any order or request extending the time for forwarding the record; and~~

~~-- proof of service.~~

(1) a certification by the clerk of district court as required by this rule; and

(2) any transcripts necessary for the appeal.

~~The appellant may respond within 14 days after service of the motion.~~

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 2003; October 1, 2014.

The duty to forward the record to the supreme court is imposed upon the clerk of district court. However, the appellant's counsel has the primary responsibility for assuring

timely forwarding of the record.

Rule 11 separates the responsibilities of the clerk of district court and the person preparing the transcript. The clerk of district court has the duty of forwarding the record, excluding the transcript, to the ~~supreme court~~ clerk of the supreme court. The person preparing the transcript is responsible for filing the transcript under Rule 10(c) .

Under subdivision (a) the record is forwarded to the supreme court 25-30 days after the notice of appeal is filed~~, unless the court requests it at another time or a party or the person preparing the transcript wishes to retain the record as provided in subdivision (c)~~. In an expedited appeal, the record is promptly forwarded to the supreme court.

Subdivisions (a) - (c) were amended October 1, 2014, to conform the rule to electronic filing.

~~Subdivision (c) contains a streamlined procedure whereby an attorney or party may retain the record in the district court for the purpose of preparing briefs, or the person preparing the transcript may retain the record in the district court for reference while completing the transcript. A person wishing to retain the record must send a written request to the clerk of district court within 25 days after the notice of appeal is filed, with copies to other counsel and the supreme court clerk.~~

It should be noted that for purposes of these rules, the transcript continues to be a part of the record, but is handled differently than the remainder of the record.

Rule 11 was amended, effective March 1, 2003, in response to the December 1, 1998, amendment to Fed.R.App.P. 11. The language and organization of the rule were changed to make the rule more easily understandable and to make style and terminology consistent

throughout the rules.

Rule 11 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 20-21; April 26-27, 2001, page 9; May 25-26, 1978, pages 8-9; March 16-17, 1978, pages 2, 13-15; October 27-28, 1977, pages 3-6, 8-9; September 15-16, 1977, pages 13, 14-16; June 2-3, 1977, page 4. Fed.R.App.P. 11.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 28-27-06, 28-27-08 and 29-28-18.

CROSS REFERENCE: N.D.R.App.P. 10 (The Record on Appeal).

RULE 12. DOCKETING THE APPEAL

(a) Time for Docketing Appeal and Payment of Docket Fee. On receipt of the notice of appeal and any required docket fee, the ~~supreme court~~ clerk of the supreme court must docket the appeal. ~~The appellant must deposit the docket fee with the clerk of district court at the time the notice of appeal is filed.~~ A check or money order in the amount of the docket fee ~~should~~ must be sent to and made payable to the ~~supreme court~~ clerk of the supreme court with the notice of appeal. Notice by the clerk of the supreme court under Rule 3 of the filing of a notice of appeal will not be made until any required docket fee is paid. If the docket fee is paid within 14 days of receipt of the notice of appeal by the supreme court, the appeal will be filed as of the date of initial receipt. If the docket fee is not paid within 14 days of receipt of the notice of appeal by the supreme court, the notice of appeal is void; if timely, a new notice of appeal may be submitted with the docket fee. If two or more parties file separate notices of appeal, the first to file must pay the docket fee. A docket fee is not required in the following cases:

(1) criminal cases;

(2) post-conviction relief;

(3) writs of habeas corpus filed by indigent defendants;

(4) mental health commitments in which the appellant is indigent;

(5) juvenile cases ~~i~~n which counsel is court-appointed;

(6) other civil cases in which an indigent party is entitled to court-appointed counsel as a result of the indigency;

(7) in any other case in which an appellant has been declared indigent by order of any state court for the purpose of any action relating to the appeal; and

(8) by order of the supreme court.

~~(b) Dismissal for Failure of Appellant to Pay Docket Fee. If the appellant fails to pay the docket fee as required, the appellee may file a motion in the supreme court to dismiss the appeal. The motion, accompanied by proof of service, must be supported by a certified copy of the judgment or order from which the appeal was taken, and a certified copy of the notice of appeal with the date of filing. The appellant may respond within 14 days after service of the motion.~~

(b) Petition to Waive Docket Fee. If a party files a verified petition in a form approved by the supreme court to waive the docket fee on appeal with the notice of appeal, the clerk of the supreme court may provisionally file the notice of appeal. If waiver of the docket fee is denied, the clerk of the supreme court must withdraw the notice of appeal if the docket fee is not received within 14 days of the denial of the petition to waive the docket fee. Notice by the clerk of the supreme court under Rule 3 of the filing of a notice of appeal will not be made until the fee is waived or, if the fee is not waived, until the fee is paid.

EXPLANATORY NOTE

Rule 12 was amended, effective September 1, 1983; January 1, 1988; March 1, 1996; March 1, 2003; March 1, 2011; October 1, 2014.

The docket fee must be paid only once and is to be paid by the first to file a notice of appeal if two or more parties file separate notices of appeal. The fee charged is found in

N.D.C.C. § 27-03-05.

Subdivision (a) was amended, effective October 1, 2014, to require payment of the docket fee at the time the notice of appeal is filed with the clerk of the supreme court.

~~Subdivision (b) was amended, effective March 1, 2011, to increase the time for an appellant to respond to an appellee's motion to dismiss from 10 to 14 days.~~

Subdivision (b) was added, effective October 1, 2014, to establish a procedure for provisionally filing a notice of appeal when a petition to waive the docket fee is filed.

Rule 12 was amended, effective March 1, 2003. The language and organization of the rule were changed to make the rule more easily understandable and to make style and terminology consistent throughout the rules.

Rule 12 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 21-22; April 29-30, 2010, page 20; April 26-27, 2001, page 10; September 29-30, 1994, pages 9-12; February 19-20, 1987, page 6; September 18-19, 1986, page 14; February 17-18, 1983, pages 1-3; November 18-19, 1982, page 14; May 25-26, 1978, pages 9-10, 34-35; March 16-17, 1978, pages 4-5; October 27-28, 1977, pages 7-8; September 15-16, 1977, page 19.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 28-31-01.

CROSS REFERENCE: N.D.R.App.P. 3 (Appeal as of Right--How Taken), N.D.R.App.P. 7 (Bond for Costs on Appeal in Civil Cases), and N.D.R.App.P. 10 (The Record on Appeal); N.D.C.C. §§ 27-01-07 (Civil action fees--waiver), 27-03-05 (Docket

fee).

RULE 21. ~~SUPERVISORY~~ WRITS

(a) Petition, Filing, and Service.

(1) A party seeking a ~~supervisory~~ writ must file a petition with the ~~supreme court~~ clerk of the supreme court and serve the petition on all parties to the proceeding in the district court. The party must also provide a copy to the district court judge.

(2) The petition must state:

(A) the relief sought;

(B) the issues presented;

(C) the facts necessary to understand the issues presented; and

(D) the reasons why a writ should issue.

(3) The petition must be accompanied by a copy of any order or opinion and other parts of the record that are necessary to understand the matters set forth in the petition.

(A) If a petition is supported by briefs, affidavits, or other ~~papers~~ documents, they must be served and filed with the petition.

(B) Supporting ~~papers~~ documents must be contained in a separately bound appendix in the format specified in Rule 25, Rule 30(d), and Rule 32(b).

(b) Action; Response to Petition; Briefs.

(1) The court may act on a petition without a response. Otherwise, the court will fix a time for a response and may set a hearing.

(2) Two or more parties may respond jointly to a petition.

(3) The court may invite or order the district court judge to respond to a petition or

may invite an amicus curiae to do so.

(c) Form of ~~Papers~~ Documents; Number of Copies. A petition and any response must contain all applicable items listed in Rule 28(b). All ~~papers~~ documents must conform to Rule 25, if applicable, and Rule 32. ~~An~~ If filed by mail or third-party commercial carrier, an original and seven copies must be filed unless the court requires the filing of a different number in a particular case. If filed electronically, one electronic copy of all documents must be filed.

(d) Fees. A docket fee is due at the time of filing, unless exempted under Rule 12. Any reproduction fee is due within seven days of filing.

EXPLANATORY NOTE

Rule 21 was adopted, effective March 1, 2004. It ~~is~~ was designed to clarify supervisory writ procedure in the supreme court.

Rule 21 was amended, effective October 1, 2014, to make the rule applicable to all writs filed in the supreme court and to clarify that fees apply to filing.

The supreme court has power under art. VI, § 2, of the North Dakota Constitution to issue original and remedial writs. Under N.D.C.C. § 27-02-04, the supreme court has supervisory power over inferior courts and may issue writs in the exercise of this power.

A petition for a supervisory writ is not an alternative to an appeal. The supreme court will issue a supervisory writ only to rectify errors and prevent injustice when no adequate alternative remedy exists.

This rule does not limit the supreme court's authority to exercise its supervisory power.

Other extraordinary writs are set out in the North Dakota Century Code. See N.D.C.C. 32-22, for writ of habeas corpus; N.D.C.C. ch. 32-34, for writ of mandamus; N.D.C.C. ch. 32-35, for writ of prohibition; N.D.C.C. ch. 32-33, for writ of certiorari; and N.D.C.C. ch. 32-06, for writ of injunction.

Subdivision (a) and (c) were amended, effective October 1, 2014, to conform the rule to electronic filing.

Subdivision (c) requires that a supervisory writ petition or any petition response must contain the elements specified in Rule 28(b) that apply to the given document. For example, a petition that cites legal authorities must include a table of authorities as described in Rule 28(b)(2).

Subdivision (d) was added, October 1, 2014, to clarify that a docket fee must be paid when a writ petition is filed with the supreme court.

Rule 21 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page 22; April 24-25, 2003, page 14; January 30-31, 2003, pages 16-18.

CROSS REFERENCE: N.D. Const. art. VI, § 2; N.D.C.C. § 27-02-04; N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 30 (Appendix to the Briefs); N.D.R.App.P. 32 (Form of Briefs, Appendices and Other ~~Papers~~ Documents).

RULE 24. SUPPLEMENTAL ~~BRIEF~~ STATEMENT OF INDIGENT DEFENDANT

(a) In General.

(1) Statement Permitted. In a criminal case in which counsel representing an indigent defendant has submitted a brief, the indigent defendant may file a statement of additional grounds for review to identify and discuss matters that the indigent defendant believes were not adequately addressed in the brief filed by counsel.

(2) Length and Legibility The statement may not exceed 16 pages and may be handwritten so long as it is legible.

(3) Identification of Errors. The court will not consider an indigent defendant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Reference to the record and citation to authority is required.

(b) Filing; Response.

(1) Time for Filing. The statement of additional grounds for review must be filed within 30 days after service on the indigent appellant of the brief prepared by indigent appellant's counsel. The indigent defendant must serve all parties with the statement of additional grounds for review.

(2) Additional Briefing; Oral Argument by Indigent Defendant. The court may, in the exercise of its discretion, allow additional briefing to address issues raised in the indigent defendant's statement. Participation in oral argument by the indigent defendant is permitted only by order of the court on its own motion in exceptional cases.

EXPLANATORY NOTE

Rule 24 was adopted, effective March 1, 2010; amended March 1, 2013; October 1, 2014.

The title of this rule was amended, effective October 1, 2014, to clarify that an indigent defendant may file a statement of additional grounds for review.

Paragraph (a)(2) was amended, effective March 1, 2013, to decrease the page volume allowed in a supplemental brief.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page 22; January 26-27, 2012, pages 8-9; September 30, 2011, pages 11-12; April 28-29, 2011, page 18-20; September 25, 2008, pages 7-12; Wash.R.App.P. 10.10, 18.3.

RULE 25. FILING AND SERVICE

(a) Filing.

(1) Filing with the Clerk. A ~~paper~~ document required or permitted to be filed in the supreme court must be filed with the ~~supreme court~~ clerk of the supreme court.

(2) Filing: Method and Timeliness.

(A) In general. Filing may be accomplished by mail or delivery addressed to the clerk or by electronic means as provided in these rules, but filing is not timely unless the clerk receives the ~~papers~~ documents within the time fixed for filing. If a document submitted for filing is rejected, the time for filing is tolled from the time of submission to the time the rejection notice is sent. A corrected document will be considered timely filed if submitted and served within three days after the notice of rejection is sent.

(B) Brief, appendix, transcript or petition for rehearing. A brief, appendix, transcript, or petition for rehearing is ~~deemed~~ considered filed on the day of electronic filing, or mailing or deposit with a third-party commercial carrier.

(C) Electronic filing. ~~Papers~~ Documents may be filed by electronic means to the extent provided and under procedures established in ~~the court's administrative~~ these rules. A ~~paper~~ document filed by electronic means in compliance with these ~~court's administrative~~ rules constitutes a written ~~paper~~ document for the purpose of applying these rules.

(i) Documents, except an appendix, may be filed electronically with the clerk of the supreme court by facsimile only if e-mail submission is not possible.

(ii) The typed attorney or party name or facsimile signature on a document filed electronically has the same effect as an original manually affixed signature.

(iii) A document in compliance with these rules and submitted electronically to the clerk of the supreme court by 11:59 p.m. Bismarck, North Dakota, time is considered filed on the date submitted. Upon receiving an electronic document, the clerk of the supreme court will issue an e-mail confirmation that the document has been received.

(iv) A party filing a document electronically must pay any docket fee, fee to file electronically, or any surcharge for internal reproduction of the document by the supreme court.

a. No payment is required for motions, comments, and other documents less than 20 pages in length, including appendices or attachments. A party electronically filing a motion, comment, or other document must pay $0.50 per page for each page in excess of 20 pages. The charges under this subparagraph apply to any attachments, exhibits, or appendices that are electronically filed with a motion.

b. A party electronically filing any brief, whether in an appeal, request for supervision, or request for a writ, must pay $25. No payment is required for a reply brief or a petition for rehearing.

c. No payment is required for an appendix filed 100 pages or less in length. A party must pay $.50 per page for each appendix page in excess of 100 pages.

(vi) A party must pay all required fees and payments within seven days of submitting a document filed electronically. If fees and payments are not paid within seven

days of submission, the document will be returned by the clerk of the supreme court and the party will be required to refile the document.

(3) Electronic Document Formats. All documents submitted to the court in electronic form must be in approved word processing format or portable document format (.pdf).

(A) Approved word processing formats for documents submitted in electronic form are WordPerfect, Word, and ASCII. Parties must obtain permission from the clerk of the supreme court in advance if they seek to submit documents in another word processing format.

(B) Hard page breaks must separate the cover, table of contents, table of cases, and body of approved word processing format briefs.

(C) An appendix may be filed electronically in portable document format (.pdf). Except for limited excerpts showing a court's reasoning, district court transcripts that have been filed electronically with the supreme court may not be included in an appendix filed electronically.

~~(3)~~(4) Filing Motion with Justice. If a motion requests relief that may be granted by a single justice, the justice may receive the motion for filing; the justice must note the filing date on the motion and give it to the clerk.

(5) Filing with the Clerk. Any document filed with the clerk of the supreme court by e-mail by the district court or counsel must be sent to the following e-mail address: supclerkofcourt@ndcourts.gov.

(b) Service of All ~~Papers~~ Documents Required. Unless a rule requires service by

the clerk, a party must, at or before the time of filing a ~~paper~~ document, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a clerk or a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within three days; or

(D) by electronic means.

(2) When reasonable, considering such factors as the immediacy of the relief sought, distance and cost, service on a party must be by a manner at least as expeditious as the manner used to file the ~~paper~~ document with the court. If a party files a ~~paper~~ document by electronic means, the party must serve the ~~paper~~ document by electronic means unless the recipient of service cannot accept electronic service.

(3) Service by mail is complete upon mailing. Service via a third-party commercial carrier is complete upon deposit of the ~~paper~~ document to be served with the commercial carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the ~~paper~~ document was not received by the party served.

(4) Electronic Service.

(A) If a party files a document by electronic means, the party must serve the document by electronic means unless the recipient of service cannot accept documents

served electronically.

(B) Attorneys appearing before or filing with the supreme court must provide an e-mail address to the court and must accept electronic service. Attorneys may designate a law firm e-mail address as their e-mail address for the purpose of accepting electronic service. If the recipient's e-mail address is published on the supreme court's website or known to a party, the document must be served by electronic means to that e-mail address.

(C) Documents served electronically may be served by facsimile only if e-mail service is not possible and only if prior permission to serve by facsimile is granted by the recipient.

(D) If a recipient cannot accept electronic service of a document, service under another means specified by N.D.R.App.P. 25(c) is required.

(d) Proof of Service. A ~~paper~~ document presented for filing must contain an acknowledgment of service by the person served or proof of service by the person who made service. Proof of service may appear on or be affixed to the ~~paper~~ document filed. The clerk may permit a ~~paper~~ document to be filed without acknowledgment or proof of service but must require acknowledgment or proof of service to be filed promptly.

EXPLANATORY NOTE

Rule 25 was amended, effective January 1, 1988; on an emergency basis, September 5, 1990; on an emergency basis, November 16, 1994; March 1, 1996; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2011; October 1, 2014.

This rule is derived from Fed.R.App.P. 25. Rule 25 was amended, effective March 1,

1999, to allow the use of a third-party commercial carrier as an alternative to the Postal Service. The phrase "commercial carrier" is not intended to encompass electronic delivery services.

Subdivision (a) provides ~~papers~~ document are not considered filed until they are received by the ~~supreme court~~ clerk of the supreme court. Briefs, appendices, transcripts, and petitions for rehearing are exceptions to this general rule.

Subparagraph (a)(2)(C), effective March 1, 2003, allows the court to accept ~~papers~~ documents filed by electronic means. ~~Parties seeking to file papers by electronic means must consult N.D. Sup. Ct. Admin. Order 14 for electronic filing instructions.~~

Subdivisions (a) and (c) were amended, effective October 1, 2014, to incorporate N.D. Sup. Ct. Admin. Order 14 and to conform the rule to electronic filing. N.D. Sup. Ct. Admin. Order 14 was repealed, effective October 1, 2014.

Subdivision (c) was amended, effective March 1, 2008, to provide for service by electronic means. ~~Parties seeking to serve papers by electronic means must consult N.D. Sup. Ct. Admin. Order 14 for electronic service instructions.~~

Subparagraph (c)(1)(C) was amended, effective March 1, 2011, to change the reference from "calendar days" to "days."

Subdivision (d) allows proof of service by admission of service, affidavit of service, or certificate of an attorney.

Rule 25 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 25. 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 25 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 22-24; April 29-30, 2010, page 20; January 25, 2007, page 17; April 25-26, 2002, pages 3-5; April 26-27, 2001, page 10; April 30-May 1, 1998, page 3; January 29-30, 1998, page 21; January 26-27, 1995, pages 6-7; September 29-30, 1994, page 12; February 19-20, 1987, pages 6-7; September 18-19, 1986, pages 14-15; May 25-26, 1978, page 10; March 16-17, 1978, pages 3-4. Fed.R.App.P. 25.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 28-27-05.

CROSS REFERENCE: N.D.R.App.P. 10 (The Record on Appeal); N.D.R.App.P. 26(c) (Computing and Extending Time)~~; N.D. Sup. Ct. Admin. Order 14 (Electronic Filing Pilot Project)~~.

Appendices and Other ~~Papers~~Documents).

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~~ document is delivered on the date of service stated in the proof of service. For purposes of this rule, a ~~paper~~ documentthat 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; October 1, 2014. 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~~ document 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.

Rule 26 was amended, effective October 1, 2014, to replace "paper" with "document."

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 27. MOTIONS

(a) Content of Motions. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief must be made by filing a motion for the order or relief with proof of service on all other parties. The motion must:

(1) contain or be accompanied by any matter required by a specific provision of these rules governing that motion;

(2) state with particularity the grounds on which it is based; and

(3) set forth the order or relief sought.

If a motion is supported by briefs, affidavits, or other ~~papers~~ documents, they must be served and filed with the motion.

(b) Response to Motion. Any party may file a response in opposition to a motion other than one for a procedural order (see subdivision (c)) within 14 days after service of the motion, but motions authorized by Rules 8, 9, and 41 may be acted upon after reasonable notice. The court may shorten or extend the time for responding to any motion.

(c) Determination of Motions for Procedural Orders. Notwithstanding the provisions of subdivision (b), the court may act upon motions for procedural orders, including any motion under Rule 26(b), without awaiting a response. Any party adversely affected by action on the motion may request reconsideration, vacation, or modification of the action.

(d) Power of a Single Justice to Entertain Motions. In addition to the authority

expressly conferred by these rules or by law, a single justice of the court may entertain and grant or deny any request for relief which may properly be sought by motion under these rules, with the following exceptions:

(1) a single justice may not dismiss or otherwise determine an appeal or other proceeding; and

(2) the court may provide by order or rule that any motion or class of motions must be acted upon by the court.

The action of a single justice may be reviewed by the court.

(e) Form of ~~Papers~~ Documents; Number of Copies. The form of all ~~papers~~ documents relating to motions must comply with the requirements of Rule 25, if applicable, and Rule 32. ~~Seven~~ If filed by mail or third-party commercial carrier, seven copies of all ~~papers~~ documents relating to motions must be filed with the original, but the court may require that additional copies be furnished. One electronic copy of all documents relating to a motion must be filed if the motion is filed electronically.

(f) Motion to Dismiss Based on Ground Appeal Not Authorized by Law. Unless otherwise ordered by the court, the filing of a motion to dismiss based on the ground that the appeal is not authorized by law tolls the time for filing briefs on the merits. If the motion is denied, the running of the time for filing briefs on the merits resumes upon ~~service of the~~ notice of entry of the order.

EXPLANATORY NOTE

Rule 27 was amended, effective March 1, 1986; March 1, 2003; March 1, 2011; October 1, 2014.

This rule is taken from Fed.R.App.P. 27. It contemplates that most procedural matters will be determined by a single justice of the court.

Rule 27 was revised, effective March 1, 2003. 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 (b) was amended, effective March 1, 2011, to increase the time for a party to respond to a motion from 10 to 14 days.

Subdivision (e) was amended, effective October 1, 2014, to conform the rule to electronic filing.

Subdivision (f) was adopted, effective March 1, 1986.

Rule 27 was amended, effective October 1, 2014, to replace "paper" with "document."

SOURCES: Supreme Court Conference Minutes of September 10, 1985. Joint Procedure Committee Minutes of September 26, 2013, pages 24-25; April 29-30, 2010, page 20; November 29, 1984, page 2; May 25-26, 1978, pages 12-13. Fed.R.App.P. 27.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 29-28-20.

CROSS REFERENCE: N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other ~~Papers~~ Documents).

RULE 28. BRIEFS

(a) Form of Briefs. All briefs must comply with Rule 25 and Rule 32.

(b) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a table of contents, with page references;

(2) a table of authorities -- cases (alphabetically arranged), statutes, and other authorities -- with references to the pages of the brief where they are cited;

(3) in an application for the exercise of original jurisdiction, a concise statement of the grounds on which the jurisdiction of the supreme court is invoked, including citations of authorities;

(4) a statement of the issues presented for review;

(5) a statement of the case briefly indicating the nature of the case, the course of the proceedings, and the disposition below;

(6) a statement of the facts relevant to the issues submitted for review, which identifies facts in dispute and includes appropriate references to the record (see Rule 28(f));

(7) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the

discussion of the issues); and

(C) if the appeal is from a judgment ordered under N.D.R.Civ.P. 54(b), whether the certification was appropriate; and

(8) a short conclusion stating the precise relief sought.

(c) Appellee's Brief. The appellee's brief must conform to the requirements of subdivision (b), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(d) Reply Brief. The appellant may file a single brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with page references, and a table of authorities -- cases (alphabetically arranged), statutes, and other authorities -- with references to the pages of the reply brief where they are cited.

(e) References to Parties. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the purchaser."

(f) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed or if references are made in the briefs to parts of the record not reproduced in the appendix, the references must be to the docket number of that part of the record. A party referring to evidence for which admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(g) Reproduction of Statutes, Rules, Regulations, and Other Sources. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end of the brief.

(h) [Reserved].

(i) Briefs in a Case Involving a Cross-Appeal.

(1) An appellee and cross-appellant must file a single brief at the time the appellee's brief is due. This brief must contain the issues and argument involved in the cross-appeal as well as the answer to the appellant's brief.

(2) The appellant's answer to the cross-appeal must be included in the reply brief, but without duplication of statements, arguments, or authorities contained in the appellant's principal brief. To avoid duplication, references may be made to the appropriate portions of the appellant's principal brief.

(3) The cross-appellant may file a reply brief confined strictly to the arguments raised in the cross-appeal. This brief is due within 14 days after service of the appellant's reply brief; however, if there is less than 14 days before oral argument, the reply brief

must be filed at least ~~3~~ 5 days before argument.

(j) Briefs In a Case Involving Multiple Parties. Any number of parties may join in a single brief or adopt by reference any part of another's brief. Parties may similarly join in reply briefs.

(k) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed -- or after oral argument but before decision -- a party may promptly advise the court by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

(l) Requirements. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings, and free from burdensome, irrelevant or immaterial matters.

EXPLANATORY NOTE

Rule 28 was amended, effective March 1, 1986; January 1, 1988; March 1, 1994; March 1, 1996; March 1, 2003; March 1, 2008; March 1, 2010; March 1, 2011: October 1, 2014.

Under paragraph (b)(4), each legal issue should be stated as a question of law sufficiently specific to allow the court to understand the precise issue presented. Generalized statements such as, "Is the verdict supported by the evidence?" are not sufficient.

Under subdivision (f), references may be made to the docket number of parts of the record not reproduced as in the examples following: Answer, docket No. 2, p. 7; Motion for

Judgment, docket No. 15, p. 2; Transcript p. 231.

Rule 28 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 28. 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. Substantive changes were made to conform this rule with the changes made in Rule 32.

Subdivision (a) was added to inform parties that all briefs must comply with Rule 32 and amended effective October 1, 2014, to conform the rule to electronic filing.

Subdivision (b):

Paragraphs (1) and (2) were amended, effective March 1, 2003, to separate the table of contents and the table of authorities into two distinct items in a brief.

Paragraphs (5) and (6) were amended, effective March 1, 2003, to require two separate statements -- a statement of the case (the procedural history) and a statement of the facts.

Paragraph (7) was amended, effective March 1, 2010, to require a party to brief the appropriateness of a district court's grant of a certification under N.D.R.Civ.P. 54(b).

Subdivision (c) was amended, effective March 1, 2003, to conform the appellee's brief with the appellant's brief, and to expand the items that need not be included in the appellee's brief.

Subdivision (h) was amended, effective March 1, 2003, to delete length limitations, which have been moved to Rule 32.

Paragraph (i)(3) was amended, effective March 1, 2011, to change the deadline for a

cross-appellant to serve and file a reply brief if there is less than 14 days before argument from 3 to 5 days before argument.

Subdivision (k) was added, effective March 1, 2003, to provide a means for parties to inform the court of authorities that come to a party's attention after a brief has been filed or after oral argument.

Subdivision (l) was added, effective March 1, 2008, to explain requirements for briefs filed under Rule 28.

Rule 28 was amended, effective October 1, 2014, to replace "paper" with "document."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page 25; April 29-30, 2010, pages 23-24; September 24-25, 2009, pages 11-12; April 26-27, 2007, pages 29-31; September 27-28, 2001, pages 7-9; April 27-28, 1995, pages 15-17; January 26-27, 1995, pages 6-7; September 29-30, 1994, pages 13-16; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 15-16; November 30, 1984, pages 32-33; October 19, 1984, pages 23-26; March 16-17, 1978, page 4; January 12-13, 1978, pages 15-18. ~~Rule 28,~~ Fed.R.App.P. 28.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 28-18-06, 28-18-09, 28-27-33, 29-23-01, 29-23-02, 29-23-03, 29-23-04, 29-23-08, and 29-23-09.

CROSS REFERENCE: N.D.R.App.P. 25 (Filing and Service), N.D.R.App.P. 30 (Appendix), N.D.R.App.P. 31 (Filing and Service of Briefs), and N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other ~~Papers~~ Documents).

RULE 29. BRIEF OF AN AMICUS CURIAE

(a) When Permitted. An amicus curiae brief may be filed only with leave of court or at the court's request. An amicus brief must be limited to issues raised on appeal by the parties.

(b) Motion for Leave to File. The motion may be accompanied by the proposed brief. The motion must state:

(1) the movant's interest; and

(2) the reasons why an amicus brief is desirable and why the matters asserted are relevant to the disposition of the case.

(c) Contents and Form. An amicus brief must comply with Rule 25 and Rule 32. In addition to the requirements of Rule 25 and Rule 32, the cover must identify the party or parties supported, if any, and indicate whether the brief supports affirmance or reversal. An amicus brief need not comply with Rule 28, but must include the following:

(1) a table of contents, with page references;

(2) a table of authorities -- cases (alphabetically arranged), statutes and other authorities -- with references to the pages of the brief where they are cited;

(3) a concise statement of the identity of the amicus curiae, and its interest in the case; and

(4) a statement that indicates whether:

(A) a party's counsel authored the brief in whole or in part;

(B) a party or a party's counsel contributed money that was intended to fund

preparing or submitting the brief; and

(C) a person -- other than the amicus curiae, its members, or its counsel -- contributed money that was intended to fund preparing or submitting the brief and, if so, identifies each such person; and

(5) an argument, which may be preceded by a summary and which need not include a statement of the applicable standard of review.

(d) Length. Except by the court's permission, an amicus brief may be no more than one-half the maximum length authorized by these rules for a party's principal brief (see Rule 32(a)(7)). If the court grants a party permission to file a longer brief, that extension does not affect the length of an amicus brief.

(e) Time for Filing. An amicus curiae must file its brief within the time allowed for filing the principal brief of the party being supported. An amicus curiae that does not support either party must file its brief within the time allowed for filing the appellant's principal brief. The court may grant leave for later filing, specifying the time within which an opposing party may answer.

(f) Reply Brief. Except by the court's permission, an amicus curiae may not file a reply brief.

(g) Oral Argument. An amicus curiae may participate in oral argument only with the court's permission.

EXPLANATORY NOTE

Rule 29 was amended, effective March 1, 1996; March 1, 2003; March 21, 2007; October 1, 2014.

Rule 29 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 29. 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 21, 2007. New language was added to clarify that an amicus brief may deal only with issues raised on appeal by the parties.

Subdivision (b) was amended, effective March 1, 2003. New language in paragraph (2) was added to require that the motion state the relevance of the matters asserted to the disposition of the case.

Subdivision (c) was adopted, effective March 1, 2003, to eliminate any confusion as to contents and form and to require compliance with Rule 32, and amended effective October 1, 2014, to conform the rule to electronic filing.

Subdivision (c) was amended, March 1, 2012, to include a new paragraph (c)(4) establishing disclosure requirements concerning the authorship and funding of an amicus brief. The disclosure requirements are derived from Fed.R.App.P. 29.

Subdivision (d) was adopted, effective March 1, 2003, to establish a shorter page limit for an amicus brief than for a party's principal brief. The rationale for this limitation is that an amicus brief is supplemental--it need not address all issues or facets of a case, but only matters not adequately addressed by a party.

Subdivision (f) was adopted, effective March 1, 2003, to prohibit the filing of a reply brief by an amicus curiae without the permission of the court.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page 25;

September 27-28, 2001, pages 19-22; September 29-30, 1994, page 16; May 25-26, 1978, pages 13-14. Fed.R.App.P. 29.

CROSS REFERENCE: N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other ~~Papers~~ Documents).

RULE 30. APPENDIX TO THE BRIEFS

(a) Appellant's Responsibility.

(1) Contents of the Appendix. Only items in the record may be included in the appendix. The author's signature on the brief, under Rule 32, certifies compliance with this rule. The appellant must prepare and file an appendix to the briefs containing only the following relevant portions of the lower court record:

(A) the docket sheet of the lower court, and agency docket sheet when an appeal is taken under the Administrative Agencies Practice Act;

(B) the indictment, information, or complaint, as amended;

(C) the answer, counterclaim, crossclaim, and replies;

(D) parts of any pre-trial order relevant to the issues on appeal;

(E) any supporting memorandum of decision, findings of fact and conclusions of law filed by the court;

(F) any supporting reasoning, findings of fact or conclusions of law delivered orally by the court;

(G) the judgment, order, or decision in question;

(H) any other orders to be reviewed;

(I) the instruction in question, if the correctness of a jury instruction is in issue, and any other relevant part of the jury charge;

(J) ~~the notice of appeal~~ any other relevant parts of the record, including portions of the transcript, to which the particular attention of the court is invited; and

(K) ~~any other relevant parts of the record, including portions of the transcript, to which the particular attention of the court is invited~~ the notice of appeal.

(2) Excluded Material. Except for relevant short transcripts or short excerpts showing the court's reasoning, district court transcripts filed in electronic form under Rule 10(c) may not be included in an appendix. District court briefs of the parties may not be included in the appendix unless they have independent relevance. Parts of the record may be relied on by the court or the parties even though not included in the appendix.

(3) Time to File; Number of Copies. ~~Unless~~ If filed by mail or third-party commercial carrier and unless filing is deferred under Rule 30(c), the appellant must file eight copies of the appendix with the brief and must serve one copy on counsel for each party separately represented. If filed electronically and unless filing is deferred under Rule 30(c), the appellant must file one electronic copy of the appendix with the brief and must serve one copy on counsel for each party separately represented. The court may in a particular case require the filing or service of a different number.

(b) Option of Appellee or Cross-Appellant to Serve and File Appendix; Cost of Producing. The parties are encouraged to agree as to the contents of a single appendix. If an appellee or cross-appellant considers it necessary to direct the attention of the court to parts of the record not included in the appellant's appendix, a separate appendix may be served and filed with the appellee's brief. If an appellee or cross-appellant prepares an appendix and it is filed by mail or third-party commercial carrier, eight copies must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court by rule or order directs otherwise. If an appellee or cross-

appellant prepares an appendix and it is filed electronically, one electronic copy must be filed with the clerk, and one copy must be served on counsel for each party separately represented, unless the court by rule or order directs otherwise. Only items specified in subdivision (a) that have not been included in the appellant's appendix may be included in the appellee's or cross-appellant's appendix.

(c) Deferred Filing. The court, on motion, may defer preparation of the appendix until after service and filing of the appellee's brief. If a deferred appendix is authorized, references in the briefs must be to the docket number for the parts of the record involved. If preparation and filing of the appendix is thus deferred, the appellant must prepare the appendix. The appendix must contain the documents required under Rule 30(a) and other parts of the record cited in the appellant's or appellee's brief. The appendix must be served and filed within 14 days after service of the appellee's brief.

(d) Format of the Appendix. The appendix must begin with a table of contents identifying the page at which each part begins. The table of contents must be arranged in the same order as parts of the record appear in the appendix. The docket sheet of the lower court must immediately follow the table of contents. The remainder of the appendix must be arranged in the same order as the docket entries. When pages from the transcript of proceedings are placed in the appendix, the table of contents must indicate the transcript page numbers in brackets. Immaterial formal matters (captions, subscriptions, acknowledgments, etc.) should be omitted. The appendix may be prepared with double-sided pages. The appendix must be separately bound. An electronically filed appendix must comply with Rule 25.

EXPLANATORY NOTE

Rule 30 was amended, effective September 1, 1983; January 1, 1988; March 1, 1994; March 1, 1996; March 1, 1998; March 1, 2003; March 1, 2005; March 1, 2011; October 1, 2014.

The March 1, 1996, amendment eliminates the need to designate parts of the record for inclusion in the appendix. Each party may file an appendix as long as there is no duplication. However, the parties are encouraged to agree on the contents of a single appendix. More than one appendix should be filed only in those cases where an agreement as to the contents of the appendix cannot be reached.

The cost of producing an appendix may not be taxed under Rule 39. A party should also be mindful that under Rule 13, the court may award appropriate sanctions.

Rule 30 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 30. 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.

Paragraph (a)(1) was amended, effective March 1, 2011, to clarify that any supporting reasoning, findings of fact or conclusions of law delivered orally by the court must be included in the appendix. Oral pronouncements included in the appendix should be extracted from the transcript.

Paragraph (a)(2) was amended, effective March 1, 2005, to restrict inclusion in an appendix of district court transcripts already filed electronically with the supreme court, except when a transcript excerpt shows the district court's reasoning.

Paragraph (a)(3) and subdivisions (b) and (d) were amended, effective October 1, 2014, to conform the rule to electronic filing.

Subdivision (c) was amended, effective March 1, 2005, to decrease the time allowed for filing a deferred appendix from 21 days to 11 days after service of the appellee's brief.

Subdivision (c) was amended, March 1, 2011, to increase the time allowed for filing a deferred appendix from 11 to 14 days after service of the appellee's brief.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page 25; April 29-30, 2010, page 20; January 24-25, 2002, pages 8-9; September 27-28, 2001, page 22; September 26-27, 1996, page 19; April 27-28, 1995, pages 4-5; January 26-27, 1995, pages 6-7; September 29-30, 1994, pages 14, 16-18; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 8-10, 16-19; January 23, 1986, page 4; October 15-16, 1981, pages 2-5; May 25-26, 1978, pages 14-17; January 12-13, 1978, pages 19-20; September 15-16, 1977, pages 19-21. Rule 22, Rules of the 11th Circuit Court. Fed.R.App.P. 30.

CROSS REFERENCE: N.D.R.App.P. 10 (The Record on Appeal); N.D.R.App.P. 13 (Sanctions); N.D.R.App.P. 25 (Filing and Service); N.D.R.App.P. 31 (Serving and Filing Briefs); N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other ~~Papers~~ Documents); N.D.R.App.P. 39 (Costs).

RULE 31. FILING AND SERVICE OF BRIEFS

(a) Time to Serve and File a Brief; Where Filed. The appellant must serve and file a brief within 40 days after the date on which the transcript is filed but, if no transcript is ordered, within 40 days after the notice of appeal is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief; however, if there is less than 14 days before oral argument the reply brief must be filed at least 5 days before argument. All briefs must be filed with the supreme court clerk.

(b) Number of Copies to Be Filed and Served.

(1) Each brief must be served and filed as follows:

(A) one copy of each brief must be served on each self-represented party and on counsel for each party separately represented;

(B) one electronic copy of each brief must be filed with, or electronically transmitted to, the supreme court clerk, unless the filing party certifies the brief was not prepared on a computer or word processor;

(C) for briefs filed in person, by mail or third-party commercial carrier, seven bound copies and an unbound original of each brief must be filed with the supreme court clerk~~; and~~

~~(C) one electronic copy of each brief must be filed with, or electronically transmitted to, the supreme court clerk, unless the filing party certifies the brief was not prepared on a computer or word processor~~.

(2) All electronic copies of briefs must contain in a single file all information contained in the paper brief, including cover, table of contents, and certifications, in the same order as in the paper brief. The electronic copy of a brief must be formatted in WordPerfect; or, if WordPerfect is not available, Microsoft Word; or, if Microsoft Word is not available, ASCII; or other compatible electronic language authorized by the supreme court clerk.

(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule or within a time extended by the court, the court on its own motion may dismiss the appeal or an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument.

EXPLANATORY NOTE

Rule 31 was amended, effective January 1, 1988; March 1, 1997; March 1, 1999; March 1, 2001; technical amendments effective August 1, 2001; March 1, 2003; March 1, 2008; March 1, 2011; October 1, 2014.

Rule 31 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 31. The language and organization of subdivisions (a) and (c) were changed to make the rule more easily understood and to make terminology and style consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 2011, to change the deadline for an appellant to serve and file a reply brief if there is less than 14 days before argument from 3 to 5 days before argument.

Subdivision (b) was amended, effective March 1, 2008, to require that a copy of each

brief be served on each self-represented party. The subdivision was also amended to update requirements for filing an electronic copy with paper briefs. ~~Information on electronic transmission of documents to the supreme court clerk can be found in N.D. Sup. Ct. Admin. Order 14.~~

Subdivision (b) was amended, effective October 1, 2014, to conform the rule to electronic filing. All parties, whether filing electronically or in paper, must file an electronic copy of the brief unless the party certifies that the brief was not prepared on a computer or word processor.

Subdivision (c) was amended, effective March 1, 2008, to clarify extension and dismissal procedure.

Rule 31 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 26-27; April 29-30, 2010, page 24; January 25, 2007, page 19; September 27-28, 2001, page 23; April 26-27, 2001, page 9; September 28-29, 1995, page 12; May 21-22, 1987, page 17; February 19-20, 1987, page 8; September 18-19, 1986, pages 2, 20; May 25-26, 1978, page 17; October 27-28, 1977, pages 6-7; September 15-16, 1977, pages 13-14. Fed.R.App.P. 31.

CROSS REFERENCE: N.D.R.App.P. 26(b) (Extending Time), N.D.R.App.P. 28 (Briefs), N.D.R.App.P. 30 (Appendix to the Briefs), N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other ~~Papers~~ Documents), ~~N.D. Sup. Ct. Admin. Order 14 (Electronic Filing Pilot Project)~~.

RULE 32. FORM OF BRIEFS, APPENDICES, AND OTHER ~~PAPERS~~ DOCUMENTS

(a) Form of a Brief.

(1) Reproduction.

(A) A brief must be typewritten, printed, or reproduced by any process that yields a clear black image on white paper. Only one side of a paper may be used.

(B) Photographs, illustrations, and tables may be reproduced by any method that results in a good copy of the original. If filed electronically, documents must be submitted in the same form as if submitted by mail, by third-party commercial carrier, i.e. color. Notice to the clerk of the supreme court must be given of anything other than black and white printed documents.

(2) Cover. The cover of the appellant's brief must be blue; the appellee's red; an intervenor's or amicus curiae's green; a cross-appellee's and any reply brief gray. Covers of petitions for rehearing must be the same color as the petitioning party's principal brief. If the brief is filed electronically, the supreme court will affix the correct color cover. The front cover of a brief must contain:

(A) the number of the case;

(B) the name of the court;

(C) the title of the case (see Rule 3(d)) ;

(D) the nature of the proceeding (e.g., Appeal from Summary Judgment) and the name of the court, agency, or board below;

(E) the title of the brief, identifying the party or parties for whom the brief is filed;

and

(F) the name, bar identification number, office address, and telephone number of counsel representing the party for whom the brief is filed.

(3) Binding. The brief must be bound at the left in a secure manner that does not obscure the text and permits the brief to lie reasonably flat when open. If the brief is filed electronically, the supreme court will bind the brief.

(4) Paper Size, Line Spacing, and Margins. The brief must be on 8 1/2 by 11 inch paper. Margins must be at least one and one-half inch at the left and at least one inch on all other sides. Pages must be numbered at the bottom, either centered or at the right side.

(5) Typeface. Either a proportionally spaced or a monospaced face may be used.

(A) A proportionally spaced face must be 12 point or larger with no more than 16 characters per inch. The text must be double-spaced, except quotations may be single-spaced and indented. Headings and footnotes may be single-spaced and must be in the same typeface as the text.

(B) A monospaced face must be a 12-point font having ten characters per inch. The text, including quotations and footnotes, must be double-spaced with no more than 27 lines of type per page. Headings and footnotes must be in the same typeface as the text.

(6) Type Styles. A brief must be set in a plain, roman style, although italics or boldface may be used for emphasis. Case names must be italicized or underlined.

(7) Paragraph Numbers. Paragraphs must be numbered in briefs. Reference to material in any document that contains paragraph numbers must be to the paragraph

number.

~~(7)~~(8) Page and Type-Volume Limitations.

(A) Word Limit for Proportional Typeface. If proportionately spaced typeface is used, a principal brief may not exceed 10,500 words, and a reply brief may not exceed 2,500 words, excluding words in the table of contents, the table of citations, and any addendum. Footnotes must be included in the word count.

(B) Page Limit for Monospaced Typeface. If monospaced typeface is used, a principal brief may not exceed 40 pages, and a reply brief may not exceed ten pages, excluding the table of contents, the table of citations, and any addendum.

(C) one electronic copy of each brief must be filed with, or electronically transmitted to, the clerk of the supreme court ~~clerk~~, unless the filing party certifies the brief was not prepared on a computer or word processor.

(b) Form of an Appendix. An appendix must comply with Rule 25 and paragraphs (a)(1), (2), (3), and (4), with the following exceptions:

(1) the cover of a separately bound appendix must be white;

(2) an appendix may include a legible photocopy of any document found in the record of a printed judicial or agency decision;

(3) pages in the appendix must be consecutively numbered;

(4) an appendix may be prepared with double sided pages.

The appendix must be 8 1/2 by 11 inches in size. Documents of a size other than 8 1/2 by 11 inches may be included in the appendix but must be folded or placed in a file or folder within the 8 1/2 by 11 inch appendix.

(c) Form of Other ~~Papers~~ Documents.

(1) All paragraphs must be numbered in documents filed with the court except for exhibits, documents prepared before the action was commenced, or documents not prepared by the parties or court. Reference to material in any document that contains paragraph numbers must be to the paragraph number.

(~~1~~ 2) Motion. Rule 27 governs motion content. The form of all motion ~~papers~~ documents must comply with the requirements of paragraph (c)(~~3~~ 4) below.

(~~2~~ 3) Petition for Rehearing. Rule 40 governs petition for rehearing content.

(~~3~~ 4) Other ~~Papers~~ Documents. Any other ~~paper~~ document must be reproduced in the manner prescribed by subdivision (a), with the following exceptions:

(A) a cover is not necessary if the caption and signature page together contain the information required by subdivision (a); and

(B) paragraph (a)(~~7~~ 8) does not apply.

(d) Non-compliance. Documents not in compliance with this rule will not be filed.

EXPLANATORY NOTE

Rule 32 was amended, effective March 1, 1996; amended effective September 11, 1996, subject to comment; final adoption on October 23, 1996; amended effective August 1, 2001; March 1, 2003; March 1, 2007; March 1, 2008; March 1, 2010; October 1, 2014.

Rule 32 was amended, effective September 11, 1996, with respect to the allowable characters per inch with proportionally spaced typeface in subparagraph (a)(5)(A).

Rule 32 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 32. 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.

Paragraph (a)(2) was amended, effective March 1, 2007, to specify the cover color for a petition for rehearing.

Paragraph (a)(3), effective March 1, 2003, requires a brief to be bound in a secure manner, however, this is not intended to allow staples or slide-lock or slide-grip bindings.

Paragraphs (a)(6) and (a)(7), which include type style requirements and page and type-volume limitations, were adopted, effective March 1, 2003. These limitations were moved to this rule from Rule 28 and generally do not follow the federal format requirements. As used in paragraph (a)(6), "plain, roman style" does not include italicized, bold, or cursive type-styles.

Paragraph (a)(7), effective March 1, 2003, limits the length of a brief. A person may rely on the word or line count of the word-processing system used to prepare the brief.

Subparagraph (a)(7)(C) was adopted, effective March 1, 2010, to limit the length of an argument on the appropriateness of N.D.R.Civ.P. 54(b) certification.

Subdivision (a) was amended, effective October 1, 2014, to conform the rule to electronic filing.

Paragraph (b)(3), effective March 1, 2003, provides an exception to the size requirement for odd-sized documents in an appendix. This exception is intended to allow inclusion of technical or other documents, such as maps or charts, which may not be clear or legible if reduced to meet the size requirement.

Paragraph (c)(2), was amended, effective March 1, 2008, to transfer length

requirements for petitions for rehearing to Rule 40.

Subdivision (c) was amended, effective October 1, 2014, to clarify that paragraph numbers are required in all documents submitted to the court unless a specified exception applies.

Rule 21 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 27-28; April 26-27, 2007, page 18; January 25, 2007, page 19; September 22-23, 2005, page 27; January 24-25, 2002, pages 7-9; September 27-28, 2001, pages 23-25; April 26-27, 2001, page 9; April 27-28, 1995, pages 15-17; May 25-26, 1978, pages 17-18; January 12-13, 1978, pages 20-22. Fed.R.App.P. 32,3.13(e) and 3.31, ABA Standards Relating to Appellate Courts (Approved Draft, 1977).

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 29-28-19.

CROSS REFERENCE: N.D.R.App.P. 27 (Motions); N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 29 (Brief of an Amicus Curiae); N.D.R.App.P. 30 (Appendix to the Briefs); N.D.R.App.P. 40 (Petition for Rehearing).

RULE 34. ORAL ARGUMENT

(a) In general.

(1) Party's statement. Any party may file, or the court may require, a statement explaining why oral argument should, or need not, be permitted.

(2) Standards. Oral argument may be denied if a party fails to file a brief or if the court, upon examination of the briefs and record, decides that oral argument is unnecessary.

(3) Notice. The clerk of the supreme court ~~clerk~~ must advise all parties whether oral argument will be scheduled and, if so, the date, time, and place for argument.

(b) Time allowed for argument; Postponement. Regardless of the number of counsel on each side, the appellant will be allowed 30 minutes and the appellee will be allowed 20 minutes to present argument. Arguments on motions will be granted only in extraordinary circumstances. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date. A party is not obliged to use all of the time allowed, and the court may terminate the argument at any time.

(c) Order and content of argument. The appellant opens and may reserve time to conclude the argument. The opening argument may include a fair statement of the case. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and separate appeals. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Parties should not duplicate arguments.

(e) Non-appearance of a party. If the appellee fails to appear for argument, the court must hear appellant's argument. If the appellant fails to appear for argument, the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on briefs. Any party may submit its argument on the briefs, but the court may direct that the case be argued.

EXPLANATORY NOTE

Rule 34 was amended, effective July 1, 1981; January 1, 1988; March 1, 1994; March 1, 1997; March 1, 2003; October 1, 2014.

Under subdivision (b), in the case of multiple appellants or appellees, each side must divide the time accorded unless additional time has been requested and granted. The omission of subdivision (g) of the Federal Rule is not intended to prevent the use of any exhibits at oral argument.

Rule 34 was revised, effective March 1, 2003, in response to December 1, 1998, amendments to Fed.R.App.P. 34. 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, 2003, to make clear that the court has discretion to determine whether oral argument should or should not be permitted.

Rule 34 was amended, effective October 1, 2014, to replace “supreme court clerk” with “clerk of the supreme court.”

Sources: Joint Procedure Committee Minutes of April 25-26, 2002, pages 12-13;

January 24-25, 2002, pages 19-21; September 28-29, 1995, page 13; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 20-21; April 26, 1984, page 30; January 12-13, 1978, pages 22-23. Fed.R.App.P. 34.

Statutes Affected:

Superseded: N.D.C.C. §§ 28-31-04, 28-31-05, 29-28-23, 29-28-24, and 29-28-25.

Cross Reference: N.D.R.App.P. 28(i) (Cross-Appeals).

RULE 36. ENTRY OF JUDGMENT

(a) Entry. A judgment is entered when it is noted on the docket. The clerk of the supreme court ~~clerk~~ must prepare, sign and enter the judgment:

(1) after receiving the court's opinion; or

(2) if a judgment is rendered without an opinion, as the court instructs.

(b) Notice. The clerk of the supreme court ~~clerk~~ must send all parties a copy of the opinion, or of the judgment if no opinion was written, and notice of the date the judgment was entered. The opinion or judgment may be sent by mail, by third-party commercial carrier, or by electronic means.

EXPLANATORY NOTE

Rule 36 as amended, effective March 1, 1999; March 1, 2003; March 1, 2007; October 1, 2014.

This rule is derived from Fed.R.App.P. 36. It is intended to clarify what constitutes entry of a judgment or order.

Rule 36 was amended, effective March 1, 1999, to allow the clerk of the supreme court ~~clerk~~ to send a copy of the opinion by commercial carrier as an alternative to the Postal Service.

Rule 36 was amended, effective March 1, 2003. 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 (b) was amended, effective March 1, 2007, to allow the clerk of the

supreme court to send the opinion or judgment by electronic means.

Rule 36 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Joint Procedure Committee Minutes of April 25-26, 2002, pages 18-19; January 27-30, 1998, page 21. Fed.R.App.P. 36.

Statutes Affected:

Superseded: N.D.C.C. §§ 28-27-30 and 29-28-32.

RULE 39. COSTS

(a) Against whom assessed. Unless the law provides or the court orders otherwise:

(1) if an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;

(2) if a judgment is affirmed, costs are taxed against the appellant;

(3) if a judgment is reversed, costs are taxed against the appellee;

(4) if a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

(b) [Reserved for Future Use].

(c) [Reserved for Future Use].

(d) [Reserved for Future Use].

(e) Costs on appeal in civil cases taxable in district court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs:

(1) the preparation and transmission of the record;

(2) the transcript, if necessary to determine the appeal;

(3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal;

(4) the fee for filing the notice of appeal.

(f) Costs in supreme court.

(1) Taxable costs. In original proceedings before the court, costs as applicable under subdivision (e) may be taxed by the clerk of the supreme court ~~clerk~~ in favor of the

party entitled to costs.

(2) Execution for costs. An execution signed by the clerk of the supreme court ~~clerk~~ may issue upon direction of the court to enforce any judgment for costs made and entered in an original proceeding before the court. The execution may issue and be directed to the sheriff of any county, and may be enforced in any county in the state in which a transcript of the judgment for costs is filed and docketed.

(g) Costs on appeal in criminal actions. Costs incurred in the appeal of a criminal action may be taxed in the district court upon motion of a party to the appeal and order of the supreme court.

EXPLANATORY NOTE

Rule 39 was amended, effective March 1, 2003; October 1, 2014.

Although derived from Fed.R.App.P. 39, this rule is revised to simplify taxation of costs in the appellate court and the district court. It provides for taxation of all costs by the clerk of district court, except in proceedings initiated in the supreme court.

Subdivision (f) generally restates N.D.C.C. § 28-31-11, which has been superseded and deleted from the century code. It provides a method for execution on a judgment for costs incurred in an action originating in the supreme court.

Subdivision (e) was amended, effective March 1, 2003, to delete a provision allowing for the recovery of appellate brief preparation costs.

If costs are not to be assessed as specified in subdivision (a), the supreme court must enter an appropriate order, either in the decision or in the judgment.

The judgment used by the supreme court is signed by the chief justice and contains

a provision for awarding costs. If costs are awarded, the party receiving costs is designated by the clerk. The action by the clerk and the signature by the chief justice are under the direction of the entire court.

Rule 39 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 39. 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 39 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Joint Procedure Committee Minutes of April 25-26, 2002, pages 22-24; June 21, 1984, page 8; May 25-26, 1978, page 19; March 16-17, 1978, pages 7-8. Fed.R.App.P. 39.

Statutes Affected:

Superseded: N.D.C.C. §§ 28-31-10 and 28-31-11.

RULE 40. PETITION FOR REHEARING

(a) Time to File; Content; Answer; Action by Court if Granted.

(1) Time. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for rehearing is granted the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b) Form of Petition; Length. A petition for rehearing must comply in form with Rules 25 and 32. A petition for rehearing must contain all applicable items listed in Rule 28(b). Petitions for rehearing must comply with the following length requirements:

(1) Word Limit for Proportional Typeface. If proportionately spaced typeface is used, a petition for rehearing may not exceed 2,500 words, excluding words in the table of contents, the table of citations, and any addendum. Footnotes must be included in the word count.

(2) Page Limit for Monospaced Typeface. If monospaced typeface is used, a petition for rehearing may not exceed ten pages, excluding the table of contents, the table of citations, and any addendum.

(c) Service and Filing. Copies of a petition for rehearing must be served and filed as prescribed by Rule 25 and Rule 31(b).

EXPLANATORY NOTE

Rule 40 was amended, effective March 1, 2003; March 1, 2004; March 1, 2008; October 1, 2014.

This rule is derived from Fed.R.App.P. 40.

Subdivision (b) was amended, effective March 1, 2003, to specify that a petition for rehearing must comply with the requirements of Rule 32.

Subdivision (b) was amended, effective March 1, 2004, to specify that a petition for rehearing must contain the elements specified in Rule 28(b) that apply to the given petition. For example, a petition for rehearing that cites legal authorities must include a table of authorities as described in Rule 28(b)(2).

Subdivision (b) was amended, effective March 1, 2008, to include length requirements for a petition for rehearing.

Subdivision (c) was added, effective March 1, 2003, to clarify petition service and filing requirements and amended effective October 1, 2014, to conform the rule to electronic filing.

Rule 40 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 40. 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 26, 2013, page 28; January 25, 2007, page 19; April 24-25, 2003, page 14; April 25-26, 2002, page 25; May 25-26, 1978, pages 19-20; March 16-17, 1978, pages 8-9. Fed.R.App.P. 40.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 28-27-30.

CROSS REFERENCE: N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 31 (Filing and Service of Briefs); N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other ~~Papers~~ Documents).

RULE 41. MANDATE; CONTENTS; ISSUANCE; EFFECTIVE DATE; STAY

(a) Contents. The mandate consists of a certified copy of the judgment, a copy of the court's opinion, if any, and any direction about costs.

(b) When issued. The court's mandate must issue 21 days after the entry of judgment or 7 days after entry of an order denying a timely petition for rehearing. The court may shorten or extend the time.

(c) Effective date. The mandate is effective when issued

(d) Staying the mandate.

(1) On petition for rehearing or motion. The timely filing of a petition for rehearing or a motion for stay of the mandate pending an appeal or a petition to the United States Supreme Court for a writ of certiorari will stay the mandate until disposition of the petition or motion, unless the court orders otherwise.

(2) Pending appeal or petition for certiorari. A stay of the mandate pending an appeal or a petition to the United States Supreme Court for a writ of certiorari may be granted upon motion. The stay may not exceed thirty days unless the period is extended for cause shown. If, while the stay is in effect, the party who has been granted a stay files a copy of the petition for the writ with the clerk of the supreme court ~~clerk~~, the stay continues until final disposition by the United States Supreme Court. The court must issue the mandate immediately when a copy of an order of the United States Supreme Court affirming the judgment or denying the petition for writ of certiorari is filed. A bond or other security may be required as a condition to the grant or continuance of a stay of the

mandate.

EXPLANATORY NOTE

Rule 41 was amended, effective March 1, 2003; October 1, 2014.

This rule is derived from Fed.R.App.P. 41. A motion to the supreme court for a stay pending appeal or petition to the United States Supreme Court for writ of certiorari should be made pursuant to Rule 27.

The party obtaining the stay must file a copy of the notice of appeal or the petition for writ of certiorari with the supreme court in order to continue the stay until the case is disposed of by the United States Supreme Court.

Subdivision (c) was added, effective March 1, 2003. The amendment is intended to clarify that a mandate is effective when issued, not when received by the district court.

Rule 41 was amended, effective March 1, 2003. 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 41 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Joint Procedure Committee Minutes of April 25-26, 2002, pages 25-26; May 25-26, 1978, pages 20-21. Fed.R.App.P. 41.

Statutes Affected:

Superseded: N.D.C.C. § 28-27-30.

Cross Reference: N.D.R.App.P. 27 (Motions); 28 U.S.C. § 1257 (State Courts); (Appeal; Certiorari).

RULE 42. DISMISSAL

(a) Voluntary dismissal. The clerk of the supreme court ~~clerk~~ may dismiss an appeal if the parties file a signed dismissal agreement specifying how costs are to be paid and pay any fees that are due. An appeal may be dismissed on motion of the appellant upon terms agreed to by the parties or fixed by the court.

(b) Involuntary dismissal. When an appellant is in violation of any appellate rule and no motion to dismiss has been filed by the appellee, the clerk of the supreme court ~~clerk~~ must notify the appellant that the case will be dismissed unless the appellant gives reason within ten days why the case should not be dismissed.

(c) Dismissal of moot issue. When an issue before the court may have become moot due to a change in circumstance, the parties shall advise the court in writing and explain why appeal of the issue should or should not be dismissed.

EXPLANATORY NOTE

Rule 42 was amended, effective March 1, 1990; March 1, 1999; March 1, 2002; March 1, 2003; October 1, 2014.

This rule is derived from Fed.R.App.P. 42, although subdivision (a) of the federal rule, relating to dismissal in the trial court before the appeal is docketed, has been deleted. All stipulations and motions for dismissal must be filed in the supreme court.

Subdivision (b) was added, effective March 1, 1990, to allow involuntary dismissal when an appellant fails to comply with the appellate rules.

Subdivision (c) was added, effective March 1, 1999, because generally the

supreme court will not consider a moot issue. See Ashley Education Association v. Ashley Public School, 556 N.W.2d 666 (N.D. 1996).

Rule 42 was amended, effective March 1, 2003. The language and organization of the rule were changed to make the rule easily understood and to make style and terminology consistent throughout the rules.

Rule 42 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Supreme Court Conference Minutes of October 23, 1989. Joint Procedure Committee Minutes of April 25-26, 2002, page 26; September 28-28, 2000, page 9; September 25-26, 1997, pages 6-7; January 30, 1997, pages 13-14; April 20, 1989, pages 17-18; May 25-26, 1978, page 21; March 16-17, 1978, page 14. Fed.R.App.P. 42.

RULE 43. SUBSTITUTION OF PARTIES

(a) Death of a party.

(1) After notice of appeal is filed. If a party dies after a notice of appeal has been filed or while a proceeding is pending in the supreme court, the decedent's personal representative may be substituted as a party on motion filed with the clerk of the supreme court ~~clerk~~ by the representative or by any party. A party's motion must be served upon the personal representative in accordance with Rule 25. If the deceased party has no personal representative, any party may seek appointment of a personal representative or move to substitute another appropriate party. If no action is taken to substitute the decedent's personal representative or other appropriate party, the appeal must be dismissed unless otherwise ordered by the court.

(2) Before notice of appeal is filed -- Potential appellee. If a party against whom an appeal may be taken dies after entry of a judgment or order in the district court but before a notice of appeal is filed, an appellant may proceed as if death had not occurred. After the notice of appeal is filed, substitution must be in accordance with paragraph (a)(1).

(3) Before notice of appeal is filed -- Potential appellant. If a party entitled to appeal dies before filing a notice of appeal, the decedent's personal representative, or, if there is not personal representative, the decedent's attorney of record, may file a notice of appeal within the time prescribed by these rules. After the notice of appeal is filed, substitution must be in accordance with paragraph (a)(1).

(b) Substitution for a reason other than death. If a party needs to be substituted for any reason other than death, the procedure prescribed in paragraph (a)(1) applies.

(c) Public officers; Substitution; Identification.

(1) Automatic substitution of officeholder. When a public officer who is a party to an appeal or other proceeding in the supreme court in an official capacity dies, resigns, or otherwise ceases to hold office, the action does not abate. The officer's successor is automatically substituted as a party. Proceedings following the substitution must be in the name of the substituted party, but any misnomer that does not affect the substantial rights of the parties must be disregarded. An order of substitution may be entered at any time, but failure to enter an order does not affect the substitution.

(2) Identification of party. A public officer who is a party to an appeal or other proceeding in the supreme court in an official capacity may be described as a party by the officer's official title rather than by name, but the court may require the officer's name to be added.

EXPLANATORY NOTE

Rule 43 was amended, effective January 1, 1988; March 1, 2003; March 1, 2004; October 1, 2014.

This rule is derived from Fed.R.App.P. 43. Subdivisions (a) and (c) were amended, effective January 1, 1988, to track the 1986 amendments to the federal rule. The amendments are technical in nature with no substantive changes.

Rule 43 was amended, effective March 1, 2003, to track the December 1, 1998

amendments to the federal rule. 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, 2004, to provide a procedure for parties to use when a deceased party has no personal representative.

Rule 43 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Joint Procedure Committee Minutes of April 24-25, 2003, pages 14-15; April 25-26, 2002, page 26; February 19-20, 1987, pages 8-9; September 18-19, 1986, pages 21-23. Fed.R.App.P. 43.

Cross Reference: N.D.R.App.P. 25.

RULE 45. DUTIES OF CLERK

(a) General provisions.

(1) Qualifications. The clerk of the supreme court ~~clerk~~ must take the oath and give the bond required by law. Neither the clerk nor any deputy clerk may practice as an attorney or as counselor in any court while in office.

(2) When court is open; Deadlines. The supreme court is deemed always open for filing any proper ~~paper~~ document, issuing and returning process, making a motion, and entering an order. The clerk's office, with the clerk or a deputy in attendance, must be open during business hours on all days except Saturdays, Sundays, and legal holidays. The clerk is under no obligation to give notice to the parties of time deadlines.

(b) Records.

(1) The docket. The clerk must maintain a docket and an index of all docketed cases. Cases must be assigned consecutive file numbers. All ~~papers~~ documents filed with the clerk and all process, orders, and judgments must be entered chronologically on the docket. Entries must show the nature of each ~~paper~~ documents filed or judgment or order entered. The entry of an order or judgment must show the date the entry is made.

(2) The calendar. Under the court's direction, the clerk must prepare a calendar of cases awaiting argument. In placing cases on the calendar for argument, the clerk must give preference to habeas corpus proceedings, appeals in criminal cases, and appeals and other proceedings entitled to preference by law.

(3) Other records. The clerk must keep records required by the court.

(c) Notice of orders or judgments.Upon the entry of an order or judgment, the clerk must immediately serve a notice of entry on each party to the proceeding, with a copy of the order, judgment or opinion. The clerk must note the service on the docket. Service may be by mail, third-party commercial carrier, or electronic means. Service on a party represented by counsel must be made on counsel.

(d) Custody of records and ~~papers~~ documents.The clerk has custody of the records and ~~papers~~ documents of the court. The clerk must not permit an original record or ~~paper~~ document to be taken from the clerk's office unless the court orders. Upon disposition of a case, original ~~papers~~ document transmitted as the record on appeal or review must be returned to the court or agency from which they were received. The clerk must preserve records as required by the court.

EXPLANATORY NOTE

Rule 45 was amended, effective January 1, 1988; March 1, 1999; March 1, 2003; March 1, 2007; October 1, 2014.

This rule is derived from Fed.R.App.P. 45.

Paragraph (a)(2) provides, in part, that the clerk has no obligation to notify counsel of approaching deadlines. Conversely, neither counsel nor parties have the right to require or rely on notification from the clerk.

Subdivision (c) was amended, effective March 1, 1999, to allow the clerk to send the notice and opinion via commercial carrier as an alternative to mail. Subdivision (c)

was amended, effective March 1, 2007, to allow service by electronic means.

As noted in paragraph (b)(2), the clerk prepares the court calendar under the direction of the court. Presently, a case is assigned to the next court term at least 17 days after the brief of the appellee or cross-appellee is filed. For example, if an appellee's brief is filed on March 25, the case will be heard during the May term of court.

Rule 45 was amended, effective March 1, 2003. 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 45 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court" and "paper" with "document."

Sources: Joint Procedure Committee Minutes of April 25-26, 2002, page 27; January 29-30, 1998, page 22; February 19-20, 1987, page 9; September 18-19, 1986, pages 23-25; January 12-13, 1978, pages 24-25. Fed.R.App.P. 45.

Statutes Affected:

Superseded: N.D.C.C. §§ 28-27-30, 28-31-02, 28-31-03, and 29-28-22.

RULE 47. UNIFORM CERTIFICATION OF QUESTIONS OF LAW

(Federal Courts and Other Appellate Courts)

(a) Power to answer. The supreme court may answer questions of law certified to it by the United States Supreme Court, a court of appeals of the United States, a United States district court, or the highest appellate or intermediate appellate court of any other state, when requested by the certifying court and the following conditions are met:

(1) questions of law of this state are involved in any proceeding before the certifying court which may be determinative of the proceeding:

(2) it appears to the certifying court there is no controlling precedent in the decisions of the supreme court of this state.

(b) Method of invoking. This rule may be invoked by an order of any of the courts referred to in subdivision (a) upon the court's own motion or upon the motion of any party to the proceeding.

(c) Contents of certification order. A certification order must contain:

(1) a question of law formulated in a manner allowing the question to be answered by a "yes" or "no";

(2) a statement of all facts relevant to the question certified, showing fully the nature of the controversy in which the question arose;

(3) a statement demonstrating there is no controlling precedent in the decisions of the supreme court.

(d) Preparation of certification order. The certification order must be prepared by

the certifying court, signed by the judge presiding at the hearing, and forwarded to the supreme court by the clerk of the certifying court. The supreme court may require the original or a copy of the record, or of any portion of the record, before the certifying court to be filed with the certification order if, in the opinion of the court, the record or a portion of the record may be necessary in answering the questions.

(e) Fees and costs. Fees and costs are the same as in civil appeals docketed before the supreme court and must be equally divided among the parties unless the certifying court orders otherwise in its certification order.

(f) Briefs and argument. Unless the certifying court specifies the order and time within which the briefs must be filed and served, all proceedings, including oral argument, in the supreme court will be governed by these rules and the plaintiff will be deemed to be the appellant.

(g) Opinion. The written opinion of the supreme court stating the law governing the questions certified must be sent by the clerk of the supreme court ~~clerk~~ to the certifying court and to the parties.

(h) Power to certify. The supreme court, on its own motion or the motion of any party, may order certification of questions of law to the highest court of any state when the following conditions are met:

(1) it appears to the court that there are questions of law of the receiving state involved in any proceeding before the court which may be determinative of the proceeding;

(2) it appears to the court that there are no controlling precedents in the decisions

of the highest court of the receiving state.

(i) Procedure for certifying. The procedure for certification from this state to the receiving state is that provided in the laws of the receiving state.

(j) Severability. If any provision of this rule or the application of this rule is held invalid, the invalidity does not affect other provisions or applications of the rule which can be given effect without the invalid provision or application.

(k) Construction. This rule must be construed to effectuate its general purpose, which is to make uniform the law of those states which enact the Uniform Certification of Questions of Law Rule.

(l) Withdrawal of order. A certification order may be withdrawn by subsequent order of the certifying court before issuance of the written opinion of the supreme court.

(m) Short title. This rule may be cited as the Uniform Certification of Questions of Law Rule.

EXPLANATORY NOTE

Rule 47 was amended, effective March 1, 1996; March 1, 2003; October 1, 2014.

Rule 47 is substantially the same as the 1967 Uniform Certification of Questions of Law Act as drafted by the National Conference of Commissioners on Uniform State Laws.

Rule 47 was revised, effective March 1, 2003. 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 following comments are based upon the official Comments to the Uniform

Certification of Questions of Law Act.

This rule provides that the supreme court has the right to answer questions certified to it; it is not mandatory that the court answer certified questions. See, for example, Atlas Life Insurance Co. v. W. I. Southern, Inc., 306 U.S. 563, 59 S. Ct. 657, 83 L. Ed. 987 (1939) and NLRB v. White Swan Co., 313 U.S. 23, 61 S. Ct. 751, 85 S. Ct. 751, 85 L. Ed. 1165 (1941) (in both cases the Supreme Court of the United States refused to answer certified questions).

The courts listed as the court which may certify questions are the United States Supreme Court, the federal Courts of Appeals and the federal District Courts, which would include three-judge District Courts under 28 U.S.C. 2281 and 2284. Also included are "the highest appellate court or the intermediate appellate court" of other states. This provision allows certification of questions in conflicts cases.

The statement of facts in a certification order should present all of the relevant facts. The purpose is to give the answering court a complete picture of the controversy so that the answer will not be given in a vacuum. The certifying court could include exhibits, excerpts from the record, a summary of the facts found by the court, and any other document which will be of assistance to the answering court.

Subdivision (f) provides for incorporation by reference of the local rules or statutes governing briefs and arguments.

Subdivisions (h) and (i) allow certifications from the supreme court to the highest court of another state. This could prove to be very useful in the case of conflicts of laws where the supreme court wishes to apply the law of another state. If the law of that state is

unclear on the point, a question could be certified. This is the reciprocal provision of subdivision (a).

Subdivision (l) is not part of the uniform rule. It was added in 1996 to formalize the procedure for withdrawal of the certification order when the case pending in the certifying court is settled prior to the issuance of the opinion by the supreme court.

Rule 3 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

Sources: Joint Procedure Committee Minutes of April 25-26, 2002, page 27.

Statutes Affected:

Considered: N.D.C.C. §§ 32-24-01 through 32-24-04.