

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20150239

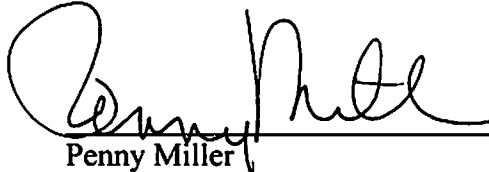
Proposed Amendments to the North Dakota Rules of Civil Procedure, North Dakota Rules of Criminal Procedure, North Dakota Rules of Evidence, North Dakota Rules of Court, and North Dakota Supreme Court Administrative Rules

[¶ 1] On August 12, 2015, the Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rules of Civil Procedure; North Dakota Rules of Criminal Procedure; North Dakota Rules of Evidence; North Dakota Rules of Court; and North Dakota Supreme Court Administrative Rules. On December 14, 2015, amended rules were adopted, except North Dakota Rules of Court 8.10 and North Dakota Rules of Evidence 513. The proposed rules are available at <http://www.ndcourts.gov/Court/Notices/Notices.htm>. The Court further considered North Dakota Rules of Court 8.10 and North Dakota Rules of Evidence 513, and

[¶ 3] **ORDERED**, that as further amended, proposed amendments to North Dakota Rules of Court 8.10 and North Dakota Rules of Evidence 513 are ADOPTED effective March 1, 2016; and

[¶ 5] The Supreme Court of the State of North Dakota convened the 19th day of February, 2016, with the Honorable Gerald W. VandeWalle, Chief Justice, and the Honorable Dale V. Sandstrom, the Honorable Carol Ronning Kapsner, the Honorable Daniel J. Crothers, Justices, and the Honorable Lisa Fair McEvers, Justices, directing the Clerk of the Supreme Court to enter the above order.




Penny Miller
Clerk
North Dakota Supreme Court

RULE 513. COLLABORATIVE LAW PRIVILEGE

1 (a) Privilege Against Disclosure for Collaborative Law Communication;

2 Admissibility; Discovery.

3 (1) “Collaborative law communication” is defined in N.D.R.Ct. 8.10

4 (b)(1).

5 (2) A collaborative law communication is privileged, not subject to
6 discovery, and not admissible in evidence.

7 (3) In a proceeding, the following privileges apply:

8 (A) A party may refuse to disclose, and may prevent any other person from
9 disclosing, a collaborative law communication.

10 (B) A nonparty participant may refuse to disclose, and may prevent any
11 other person from disclosing, a collaborative law communication of the nonparty
12 participant.

13 (4) Evidence or information that is otherwise admissible or subject to
14 discovery does not become inadmissible or protected from discovery solely
15 because of its disclosure or use in a collaborative law process.

16 (b) Waiver and Preclusion of Privilege.

17 (1) A privilege under Rule 513(a) may be waived in a record document or
18 orally during a proceeding if it is expressly waived by all parties and, in the case
19 of the privilege of a nonparty participant, it is also expressly waived by the
20 nonparty participant.

21 (2) A person that makes a disclosure or representation about a collaborative
22 law communication which prejudices another person in a proceeding may not
23 assert a privilege under Rule 513(a), but this preclusion applies only to the extent
24 necessary for the person prejudiced to respond to the disclosure or representation.

25 (c) Limits of Privilege.

26 (1) There is no privilege under Rule 513 (a) for a collaborative law
27 communication that is:

28 (A) available to the public under N.D. Sup. Ct. Admin.R. 41 or made
29 during a session of a collaborative law process that is open, or is required by
30 law to be open, to the public;

31 (B) a threat or statement of a plan to inflict bodily injury or commit a crime
32 of violence;

33 (C) intentionally used to plan a crime, commit or attempt to commit a
34 crime,
or conceal an ongoing crime or ongoing criminal activity; or

35 (D) in an agreement resulting from the collaborative law process, evidenced
36 by a document signed by all parties to the agreement.

37 (2) The privileges under Rule 513(a) for a collaborative law communication
38 do not apply to the extent that a communication is:

39 (A) sought or offered to prove or disprove a claim or complaint of
40 professional misconduct or malpractice arising from or related to a collaborative
41 law process; or

42 (B) sought or offered to prove or disprove abuse, neglect, abandonment, or
43 exploitation of a child or adult, unless the child protective services agency or adult
44 protective services agency is a party to or otherwise participates in the process.

45 (3) There is no privilege under Rule 513(a) if a tribunal finds, after a
46 hearing in camera, that the party seeking discovery or the proponent of the
47 evidence has shown the evidence is not otherwise available, the need for the
48 evidence substantially outweighs the interest in protecting confidentiality, and the
49 collaborative law communication is sought or offered in:

50 (A) a court proceeding involving a crime; or

51 (B) a proceeding seeking rescission or reformation of a contract arising out
52 of the collaborative law process or in which a defense to avoid liability on the
53 contract is asserted.

54 (4) If a collaborative law communication is subject to an exception under
55 Rule 513(c)(2) or (3), only the part of the communication necessary for the
56 application of the exception may be disclosed or admitted.

57 (5) Disclosure or admission of evidence excepted from the privilege under
58 paragraph Rule 513(c)(2) or (3) does not make the evidence or any other
59 collaborative law communication discoverable or admissible for any other
60 purpose.

61 (6) The privileges under Rule 513(a) do not apply if the parties agree in
62 advance in a signed document, or if a record of a proceeding reflects
63 agreement by the parties, that all or part of a collaborative law process is not

64 privileged. This paragraph does not apply to a collaborative law communication
65 made by a person that did not receive actual notice of the agreement before the
66 communication was made.

67 EXPLANATORY NOTE

68 Rule 513 was adopted, effective March 1, 2016.

69 Sources: Joint Procedure Committee Minutes of January 29-30, 2015, page
70 6; September 25-26, 2014, pages 2-3; April 24-25, 2014, pages 4-10; April 25-26,
71 2013, pages 23-26.

72 Cross Reference: N.D.R.Ct . 8.10 (Collaborative Law); N.D. Sup. Ct.

73 Admin. R. 41 (Access to Court Records).

RULE 8.10. COLLABORATIVE LAW

1 (a) Purpose.

2 Collaborative law is a process in which parties and their respective
3 collaborative lawyers and other professionals contract in writing to resolve
4 a civil action without court action other than approval of a stipulated settlement.
5 The process requires collaborative lawyers and other nonparty participants to
6 be discharged if the collaborative law process is unsuccessful. The process may
7 include the use of alternative dispute resolution neutrals as defined in N.D.R.Ct.
8 8.9, depending on the circumstances of the particular case.

9 (b) Definitions.

10 (1) “Collaborative law communication” means a statement, whether oral or
11 in a document, or verbal or nonverbal, that:

12 (A) is made to conduct, participate in, continue, or reconvene a
13 collaborative law process; and

14 (B) occurs after the parties sign a collaborative law participation agreement
15 and before the collaborative law process is concluded.

16 (2) “Collaborative matter” means a dispute, transaction, claim, problem, or
17 issue for resolution in a civil action, which is described in a collaborative law
18 participation agreement.

19 (3) “Nonparty participant” means a person, other than a party and the
20 party’s collaborative lawyer, that participates in a collaborative law process.

21 (4) “Document” means information inscribed on a tangible medium or
22 stored in an electronic or other medium that is retrievable in perceivable form.

23 (c) Deferral from Scheduling.

24 Parties seeking to resolve a civil action using a collaborative law process
25 must request deferral from scheduling under N.D.R.Civ.P. 16 or N.D.R.Ct. 8.3.
26 If the court grants deferral, the court may not set any deadlines for the period
27 specified in the order approving deferral.

28 (d) Collaborative Law Participation Agreement.

29 (1) A collaborative law participation agreement must:

30 (A) be in a document;

31 (B) be signed by the parties;

32 (C) state the parties’ intention to resolve a collaborative matter through a
33 collaborative law process under these rules;

34 (D) describe the nature and scope of the matter;

35 (E) identify the collaborative lawyer representing each party; and

36 (F) contain a statement by each collaborative lawyer confirming the
37 lawyer’s representation of a party in the collaborative law process.

38 (2) Parties may agree to include in a collaborative law participation
39 agreement additional provisions consistent with these rules.

40 (e) Beginning and Concluding Collaborative Law Process.

41 (1) A collaborative law process begins when the parties sign a collaborative
42 law participation agreement.

43 (2) A court may not order a party to participate in a collaborative law
44 process over that party's objection.

45 (3) A collaborative law process is concluded by a:

46 (A) resolution of a collaborative matter as evidenced by a signed
47 document;

48 (B) resolution of a part of the collaborative matter, evidenced by a signed
49 document, in which the parties agree that the remaining parts of the matter
50 will not be resolved in the process; or

51 (C) termination of the process.

52 (4) A collaborative law process terminates:

53 (A) when a party gives notice to other parties in a document that the
54 process is ended;

55 (B) when a party:

56 (i) begins a proceeding related to a collaborative matter without the
57 agreement of all parties; or

58 (ii) in a pending proceeding related to the matter:

59 – initiates a pleading, motion, order to show cause, or request for a
60 conference with the court;

61 – requests that the proceeding be put on the court's active calendar; or

62 – takes similar action requiring notice to be sent to the parties; or

63 (C) except as otherwise provided by Rule 8.10(d)(7), when a party

64 discharges a collaborative lawyer or a collaborative lawyer withdraws from further

65 representation of a party.

66 (5) A party's collaborative lawyer must give prompt notice to all other
67 parties in a discharge or withdrawal document.

68 (6) A party may terminate a collaborative law process with or without
69 cause.

70 (7) Notwithstanding the discharge or withdrawal of a collaborative lawyer,
71 a collaborative law process continues, if not later than 30 days after the date that
72 the notice of the discharge or withdrawal of a collaborative lawyer required by
73 Rule 8.10(d)(5) is sent to the parties:

74 (A) the unrepresented party engages a successor collaborative lawyer; and

75 (B) in a signed document:

76 (i) the parties consent to continue the process by reaffirming the
77 collaborative law participation agreement;

78 (ii) the agreement is amended to identify the successor collaborative lawyer;
79 and

80 (iii) the successor collaborative lawyer confirms the lawyer's representation
81 of a party in the collaborative process.

82 (8) A collaborative law process does not conclude if, with the consent of the
83 parties, a party requests a court to approve a resolution of the collaborative matter
84 or any part of it as evidenced by a signed document.

85 (9) A collaborative law participation agreement may provide additional
86 methods of concluding a collaborative law process.

87 (f) Disqualification of Collaborative Lawyer and Lawyers in Associated
88 Law Firm.

89 (1) Except as provided in Rule 8.10(e)(3), a collaborative lawyer
90 is disqualified from appearing before a court to represent a party in a proceeding
91 substantially related to the collaborative matter.

92 (2) Any disqualification of a lawyer in a law firm with which the
93 collaborative lawyer is associated is governed under N.D.R. Prof. Conduct 1.10.

94 (3) A collaborative lawyer may represent a party:

95 (A) to ask a court to approve an agreement resulting from the collaborative
96 law process; or

97 (B) to seek or defend an emergency order to protect the health, safety,
98 welfare, or interest of a party or family member if a successor lawyer is not
99 immediately available to represent that person.

100 (4) If Rule 8.10(e)(3)(B) applies, a collaborative lawyer may represent a
101 party or family member only until the person is represented by a successor lawyer
102 or reasonable measures are taken to protect the health, safety, welfare, or interest
103 of the person.

104 (g) Disclosure of Information.

105 Except as otherwise provided by law, during the collaborative law process,
106 on the request of another party, a party must make timely, full, candid, and
107 informal disclosure of information related to the collaborative matter without
108 formal discovery. A party also must update promptly previously disclosed

109 information that has materially changed. The parties may define the scope of
110 disclosure during the collaborative law process.

111 (h) Additional Alternative Dispute Resolution Following Collaborative
112 Law.

113 When a case has been deferred under N.D.R.Ct. 8.10(b) and is reinstated
114 with new counsel or a collaborative law process has resulted in withdrawal of
115 counsel prior to the filing of the case, the court should not ordinarily order the
116 parties to engage in further ADR proceedings without the agreement of the parties.
117 Participation in the collaborative law process constitutes ADR participation for
118 reporting in the N.D.R.Ct. 8.8 statement.

119 EXPLANATORY NOTE

120 Rule 8.10 took effect March 1, 2016.

121 Rule 8.10 is designed to facilitate use of collaborative law in North Dakota
122 and is derived from the Uniform Collaborative Law Act and Minn. Gen. R.
123 Prac.111.05 (Collaborative Law).

124 Sources: Joint Procedure Committee Minutes of January 29-30, 2015, pages
125 3-6; September 25-26, 2014, pages 2-3; April 24-25, 2014, pages 4-10; April 25-
126 26, 2013, pages 23-26.

127 Cross Reference: N.D.R.Ev. 513 (Collaborative Law Privilege); N.D.R.
128 Prof. Conduct 1.9 (Duties to Former Client), N.D.R. Prof. Conduct 1.10 (Imputed
130 Disqualification: General Rule).