

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

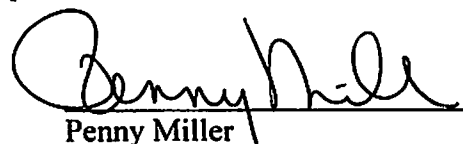
Supreme Court No. 20160273

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

[¶ 1] On July 27, 2016, the Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rules of Civil Procedure 1, 16, 26, 34, 45, 55, and 64; North Dakota Rules of Criminal Procedure 3, 4, 5, 5.1, 7, 9, 11, 23.1, Form 10, and Form 12; North Dakota Rules of Juvenile Procedure 20 and 21; North Dakota Rules of Appellate Procedure 5 and 32; North Dakota Rules of Court 3.5, 8.4, and 11.2; and North Dakota Supreme Court Administrative Rule 41; and proposed North Dakota Supreme Court Administrative Rule 58. On October 5, 2016, the Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rule of Criminal Procedure 41 and North Dakota Supreme Court Administrative Rule 41. A synopsis of the original petition and the proposed amendments to North Dakota Rule of Criminal Procedure 41 and North Dakota Supreme Court Administrative Rule 41 are available at <http://www.ndcourts.gov/Court/Notices/Notices.htm>. A comment period was provided and a hearing was held October 12, 2016. The Court considered the matter.

[¶ 2] **ORDERED**, that as amended by the Court, proposed amendments to North Dakota Rule of Criminal Procedure 41 is **ADOPTED**, effective December 15, 2016.

[¶ 3] The Supreme Court of the State of North Dakota, convened on December 6, 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, and the Honorable Lisa Fair McEvers, Justices, and directed the Clerk of the Supreme Court to enter the above order.



Penny Miller
Clerk
North Dakota Supreme Court

RULE 41. SEARCH AND SEIZURE

1 (a) In General

2 (1) Definition. A search warrant is an order in writing, made in the name of
3 the state, signed by the magistrate, directed to a peace officer, commanding the
4 peace officer to search for property, evidence or a person.

5 (2) Authority to Issue a Warrant. A state or federal magistrate acting within
6 or for the territorial jurisdiction where the property, evidence or person sought is
7 located, or from which it has been removed, may issue a search warrant authorized
8 by this rule.

9 (b) Property, Evidence or Persons or Property Subject to Search and
10 Seizure. A warrant may be issued for any of the following:

11 (1) property that constitutes evidence of a crime;

12 (2) contraband, the fruits of crime, or things criminally possessed;

13 (3) property designed or intended for use, or which is or has been used as
14 the means of, committing a crime;

15 (4) a person for whose arrest there is probable cause, or who is unlawfully
16 restrained.

17 (c) Issuing the Warrant.

18 (1) Warrant on Affidavit or Sworn Recorded Testimony.

19 (A) In General. A warrant other than a warrant on oral testimony under

20 Rule 41 (c)(2) may issue only on when the grounds for issuing the warrant are
21 established in:

22 (i) a written declaration by a licensed peace officer made and subscribed
23 under penalty of perjury, or

24 (ii) an affidavit or affidavits sworn to or sworn recorded testimony taken
25 before a state or federal magistrate ~~and establishing the grounds for issuing the~~
26 ~~warrant.~~

27 (B) Examination. Before ruling on a request for a warrant, the magistrate
28 may require the licensed peace officer, affiant or other witnesses to appear
29 personally and may examine under oath the licensed peace officer, affiant and any
30 witnesses the affiant may produce. This examination must be recorded and made
31 part of the proceedings.

32 (C) Probable Cause. If the state or federal magistrate is satisfied that
33 grounds for the application exist or that there is probable cause to believe they
34 exist, the magistrate must issue a warrant identifying the property, evidence or
35 person to be seized and naming or describing with particularity the person or place
36 to be searched. The finding of probable cause may be based upon hearsay evidence
37 in whole or in part.

38 (D) Command to Search. The warrant must be directed to a peace officer
39 authorized to enforce or assist in enforcing any law of this state. It must command
40 the officer to search, within a specified period of time not to exceed ten days, the

41 person or place named for the property, evidence or person specified.

42 (E) Service and Return. The warrant must be served in the daytime, unless
43 the issuing authority, by appropriate provision in the warrant, and for reasonable
44 cause shown, authorizes its execution at times other than daytime. It may designate
45 a state or federal magistrate to whom it must be returned.

46 (2) Warrant by Telephonic or Other Reliable Electronic Means. In
47 accordance with Rule 4.1, the magistrate may issue a warrant based on information
48 communicated by telephone or other reliable electronic means.

49 (3) Warrant Seeking Electronically Stored Information. A warrant under
50 Rule 41(c) may authorize the seizure of electronic storage media or the seizure or
51 copying of electronically stored information. Unless otherwise specified, the
52 warrant authorizes a later review of the media or information consistent with the
53 warrant. The time for executing the warrant refers to the seizure or on-site copying
54 of the media or information, and not to any later off-site copying or review.

55 (d) Execution and Return With Inventory.

56 (1) Execution. The person who executes the warrant must enter the date and
57 time of the execution on the face of the warrant.

58 (2) Inventory. An officer present during the execution of the warrant must
59 prepare and verify an inventory of any property or evidence seized. The officer
60 must do so in the presence of the applicant for the warrant and the person from
61 whom, or from whose premises, the property or evidence was taken. If either one

62 is not present, the officer must prepare and verify the inventory in the presence of
63 at least one other credible person. In a case involving the seizure of electronic
64 storage media or the seizure or copying of electronically stored information, the
65 inventory may be limited to describing the physical storage media that were seized
66 or copied. The officer may retain a copy of the electronically stored information
67 that was seized or copied.

68 (3) Receipt. The officer taking property or evidence under the warrant must:

69 (A) give a copy of the warrant and a receipt for the property or evidence
70 taken to the person from whom or from whose premises the property or evidence
71 was taken; or

72 (B) leave a copy of the warrant and receipt at the place from which the
73 officer took the property or evidence.

74 (C) preserve the property or evidence taken until the court directs its proper
75 disposition.

76 (4) Return. The officer executing the warrant must promptly return
77 it—together with a copy of the inventory—to the magistrate designated on the
78 warrant. The officer may do so by reliable electronic means. The magistrate on
79 request must give a copy of the inventory to the person from whom, or from whose
80 premises, the property or evidence was taken and to the applicant for the warrant.

81 (e) Motion for Return of Property or Evidence. A person aggrieved by an
82 unlawful search and seizure of property or evidence or by the deprivation of

83 property may move the trial court for the property's return of the property or
84 evidence. The court must receive evidence on any factual issue necessary to decide
85 the motion. If it grants the motion, the court must return the property or evidence
86 to the moving party, although the court may impose reasonable conditions to
87 protect access and use of the property or evidence in later proceedings. If a motion
88 for return of property or evidence is made or heard after an indictment,
89 information, or complaint is filed, it must be treated also as a motion to suppress
90 under Rule 12.

91 (f) Motion to Suppress. A motion to suppress evidence may be made in the
92 trial court as provided in Rule 12.

93 (g) Return of Papers to Clerk. The magistrate to whom the warrant is
94 returned must attach to the warrant a copy of the return, inventory and all other
95 related papers and must file them with the clerk of the trial court.

96 (h) Scope and Definitions.

97 (1) Scope. This rule does not modify any statute regulating search or
98 seizure, or the issuance and execution of a search warrant in special circumstances.

99 (2) Definitions. The following definitions apply under this rule:

100 (A) "Property" includes documents, books, papers and any other tangible
101 objects.

102 (B) "Daytime" means the hours from 6:00 a.m. to 10:00 p.m. according to
103 local time.

104 EXPLANATORY NOTE

105 Rule 41 was amended, effective September 1, 1983; March 1, 1990; March
106 1, 1992 January 1, 1995; March 1, 2006; March 1, 2011; March 1, 2012; March 1,
107 2013; December 15, 2016.

108 Rule 41 is an adaptation of Fed.R.Crim.P. 41 and is designed to implement
109 the provisions of Article I, Section 8, of the North Dakota Constitution and the
110 Fourth Amendment to the United States Constitution, which guarantee, "The right
111 of the people to be secure in their persons, houses, papers and effects against
112 unreasonable searches and seizures shall not be violated; and no warrant shall issue
113 but upon probable cause, supported by oath or affirmation, particularly describing
114 the place to be searched and the persons and things to be seized." To implement
115 this constitutional protection, an illegal search and seizure will bar the use of such
116 evidence in a criminal prosecution. The suppression sanction is imposed in order
117 to discourage abuses of power by law enforcement officials in conducting searches
118 and seizures.

119 Subdivision (a) provides that a search warrant be issued by a magistrate,
120 either state or federal, acting within or for the territorial jurisdiction. The provision
121 which permits a federal magistrate to issue a search warrant is the reciprocal of the
122 federal rule, which permits a state magistrate to issue a search warrant pursuant to
123 a federal matter. It is contemplated that a search warrant will be issued by a federal
124 magistrate only on the nonavailability of a state magistrate.

125 Subdivision (a) does not require that the individual requesting the search warrant
126 be a law enforcement officer. There appears to be common-law support for the use
127 of the search warrant as a means of getting an owner's property back. The primary
128 purpose of the rule, however, is the authorization of a search in the interest of law
129 enforcement and as a practical matter the request for issuance of a search warrant
130 by someone other than a law enforcement officer is virtually nonexistent.

131 Subdivision (a) was amended, effective December 15, 2016, to add
132 language defining a search warrant.

133 Subdivision (b) describes the property, evidence or persons which may be
134 seized with a lawfully issued search warrant. Issuance of a search warrant to search
135 for items of solely evidential value is authorized. There is no intention to limit the
136 protection of the Fifth Amendment against compulsory self-incrimination, so items
137 that are solely "testimonial" or "communicative" in nature might well be
138 inadmissible on those grounds.

139 Paragraph (c)(1) follows the federal rule except that North Dakota's rule
140 permits the issuance of a warrant on sworn recorded testimony without an
141 affidavit. Probable cause for the issuance of a search warrant should be assessed
142 under the totality-of-circumstances test.

143 Paragraph (c)(1) was amended, effective December 15, 2016, to allow
144 grounds for issuance of a search warrant to be established in a written declaration
145 by a licensed peace officer made and subscribed under penalty of perjury. This

146 amendment facilitates submission of electronic documents to establish the grounds
147 for search warrants. Any electronic signature on a document submitted under this
148 rule by a licensed peace officer is considered to be that of the officer.

149 The provision for examination of the affiant before the magistrate is
150 intended to assure the magistrate an opportunity to make a careful decision as to
151 whether there is probable cause based on legally obtained evidence. The
152 requirement that the testimony be recorded is to insure an adequate basis for
153 determining the sufficiency of the evidentiary grounds for the issuance of the
154 search warrant if a motion to suppress is later filed.

155 The language of subparagraph (c)(1)(E), "for reasonable cause shown," is
156 intended to explain the necessity for executing the warrant at a time other than the
157 daytime. This provision is intended to be a substantive prerequisite to the issuance
158 of a warrant that is to be executed at a time other than daytime, although it is not
159 necessary that the quoted language ("for reasonable cause shown") be defined in
160 subdivision (h).

161 Former paragraphs (c)(2) and (c)(3) were deleted and a new paragraph
162 (c)(2) was added, effective March 1, 2013, to allow the magistrate to issue a
163 warrant based on information communicated by telephone or other reliable
164 electronic means under the procedure set out in Rule 4.1.

165 Paragraph (c)(3) was added and paragraph (d)(1) was amended, effective
166 March 1, 2012, to provide guidelines for warrants authorizing the seizure of

167 electronic storage media and electronically stored information and for the
168 inventory of seized electronic material. The amendments were based on the
169 December 1, 2009, amendments to Fed.R.Crim.P. 41.

170 Subdivision (d) is intended to make clear that a copy of the warrant and an
171 inventory receipt for property or evidence taken shall be left at the premises at the
172 time of the lawful search or with the person from whose premises the property is
173 taken if he is present.

174 Paragraph (d)(3) was amended, effective December 15, 2016, to require the
175 officer taking property or evidence under a warrant to preserve it until the court
176 directs its disposition.

177 Paragraph (d)(4) was amended, effective March 1, 2013, to allow an officer
178 to make a return by reliable electronic means.

179 Subdivision (e) requires that the motion for return of property or evidence
180 be made in the trial court rather than in a preliminary hearing before the magistrate
181 who issued the warrant. It further provides for a return of the property or evidence
182 if: (1) the person is entitled to lawful possession, and (2) the seizure is illegal.
183 However, property or evidence which is considered contraband does not have to be
184 returned even if seized illegally. The last sentence of subdivision (e) provides that
185 a motion for return of property or evidence, made in the trial court, shall be treated
186 as a motion to suppress under N.D.R.Crim.P. 12. The purpose of this provision is
187 to have a series of pretrial motions disposed of in a single appearance, such as at a

188 Rule 17.1 (Omnibus Hearing), rather than in a series of pretrial motions made on
189 different dates causing undue delay in administration.

190 Subdivisions (a), (b), and (c) were amended in 1983, effective September 1,
191 1983, to add persons as permissible objects of search warrants. These amendments
192 follow 1979 amendments to Fed.R.Crim.P. 41 and are intended to make it possible
193 for a search warrant to issue to search for a person if there is probable cause to
194 arrest that person; or that person is being unlawfully restrained.

195 Subdivisions (c) and (d) were amended, effective March 1, 1990. The
196 amendments are technical in nature and no substantive change is intended.

197 Subdivision (e) was amended, effective March 1, 1992, to track the federal
198 rule.

199 Rule 41 was amended, effective March 1, 2006, in response to the
200 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
201 language and organization of the rule were changed to make the rule more easily
202 understood and to make style and terminology consistent throughout the rules.

203 SOURCES: Joint Procedure Committee Minutes of September 29-30, 2016,
204 pages 2-5; January 26-27, 2012, pages 26-27; April 28-29, 2011, page 17;
205 September 23-24, 2010, page 32; April 29-30, 2010, page 20, 25-26; April 28-29,
206 2005, pages 5-8; January 27-27, 2005, pages 33-34; April 28-29, 1994, pages
207 22-23; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20,
208 1989, page 4; December 3, 1987, page 15; October 15-16, 1981, pages 12-15;

209 December 7-8, 1978, pages 23-26; October 12-13, 1978, pages 15-19; April 24-26,
210 1973, page 14; December 11-15, 1972, pages 31-37; November 18-20, 1971, pages
211 3-9; September 16-18, 1971, pages 11-32; March 12-13, 1970, page 3; November
212 20-21, 1969, pages 19-24; May 15-16, 1969, pages 21-23; Fed.R.Crim.P. 41.

213 STATUTES AFFECTED:

214 SUPERSEDED: N.D.C.C. §§ 29-29-01, 29-29-02, 29-29-03, 29-29-04,
215 29-29-05, 29-29-06, 29-29-07, 29-29-10, 29-29-11, 29-29-12, 29-29-13, 29-29-14,
216 29-29-15, 29-29-16, 29-29-17.

217 CONSIDERED: N.D.C.C. §§ 12-01-04(12), 12-01-04(13), 29-01-14(3),
218 ~~29-29-01~~, 29-29-08, 29-29-09, 29-29-18, 29-29-19, 29-29-20, 29-29-21, 31-04-02.
219 N.D.C.C. ch. 28-29.1. N.D.C.C. ch.19-03.1.

220 CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or
221 Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 12
222 (Pleadings and Pretrial Motions); N.D.R.Crim.P. 17.1 (Omnibus Hearing and
223 Pretrial Conference); N.D.R.Ct. 2.2 (Facsimile Transmission); N.D. Sup. Ct.
224 Admin. R. 52 (Interactive Television).