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

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[¶ 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. On December 6, 2016, North Dakota Rule of Criminal Procedure 41 was adopted effective December 15, 2016. 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] **IT IS FURTHER ORDERED**, that as amended by the Court, 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 are ADOPTED, effective March 1, 2017.

[¶ 3] 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, and directed the Clerk of the Supreme Court to enter the above order.

Dated: December 22, 2016

Penny Miller
Clerk
North Dakota Supreme Court

RULE 1. SCOPE OF RULES

These rules govern the procedure in all civil actions and proceedings in district court, except as stated in Rule 81. They should be construed, ~~and~~ administered and employed by the court and the parties to secure the just, speedy, and inexpensive determination of every action and proceeding.

EXPLANATORY NOTE

Rule 1 was amended, effective March 1, 1996; March 1, 2011; March 1, 2017.

Rule 1 is an adaptation of Fed.R.Civ.P. 1 with changes made only to conform to the court system of North Dakota.

Rule 1 was amended, effective March 1, 1996, to track the 1993 federal amendment.

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

Rule 1 was amended, effective March 1, 2017, in response to the December 1, 2015, revision of the Federal Rules of Civil Procedure.

These rules are the Federal Rules of Civil Procedure adapted to state practice. These explanatory notes attempt to point out the deviations from the

federal rules. Where there is no significant deviation, annotations to the federal rules may be useful.

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, pages 11-12; January 24, 2008, page 14; September 29-30, 1994, page 23; April 26, 1984, page 29; September 20-21, 1979, pages 2-3; Fed.R.Civ.P. 1.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 30.1-02-04.

CROSS REFERENCE: N.D.R.Civ.P. 81 (Applicability In General); N.D.R.Ev. 102 (Purpose and Construction).

RULE 16. PRETRIAL CONFERENCES; SCHEDULING; MANAGEMENT

(a) Purposes of a Pretrial Conference. In any action, the court may, and when any of the triggering events specified in Rule 16(b) occur must, order the attorneys and any self-represented parties to appear in person, telephonically, or by other electronic means, for one or more pretrial conferences for such purposes as:

(1) expediting disposition of the action;

(2) establishing early and continuing control so that the case will not be protracted because of lack of management;

(3) discouraging wasteful pretrial activities;

(4) improving the quality of the trial through more thorough preparation;

(5) facilitating settlement; and

(6) discussing the desirability of using alternative dispute resolution.

(b) Scheduling; Triggering Events.

(1) Triggering Events. The court must conduct a pretrial conference for the purpose of entering a scheduling order if:

(A) more than six months have passed since filing of the summons and complaint or answer without final disposition of the case or filing of a dispositive motion;

(B) the summons and complaint or answer was served more than six months before filing and ninety days have passed since filing without final disposition of

the case or filing or a dispositive motion;

(C) a Rule 40 (e) notice has been issued and any response to the notice contained a request that the case be left open; or

(D) any party makes a written request for a pretrial conference to enter a scheduling order.

(2) When Conference Held. The pretrial conference must be held within 60 days of the triggering event.

(c) Attendance and Matters for Consideration at a Pretrial Conference.

(1) Attendance. A represented party must authorize at least one of its attorneys to make stipulations and admissions about all matters that can reasonably be anticipated for discussion at a pretrial conference. If appropriate, the court may require that a party or its representative be present or reasonably available by telephone or other means to consider possible settlement.

(2) Matters for Consideration. At any pretrial conference, the court may consider and take appropriate action on the following matters:

(A) formulating and simplifying the issues, and eliminating claims or defenses;

(B) joining other parties and amending the pleadings, if necessary or desirable;

(C) obtaining admissions and stipulations about facts and documents to avoid unnecessary proof, and ruling in advance on the admissibility of evidence;

(D) avoiding unnecessary proof and cumulative evidence, and determining limitations or restrictions on the use of testimony under N.D.R.Ev. 702;

(E) determining the appropriateness and timing of summary adjudication under Rule 56 and other motions;

(F) controlling and scheduling discovery;

(G) resolving issues relating to disclosure, ~~or~~ discovery, or preservation of electronically stored information, including the form or forms in which it should be produced;

(H) scheduling the identification of witnesses and documents, scheduling the filing and exchange of any pretrial briefs, and setting dates for further conferences and for trial;

(I) referring issues to a master;

(J) settling the case and using special procedures to assist in resolving the dispute;

(K) determining the form and content of the pretrial order;

(L) disposing of pending motions;

(M) adopting special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions, or unusual proof problems;

(N) ordering a separate trial under Rule 42(b) of a claim, counterclaim, crossclaim, third-party claim, or particular issue;

(O) ordering the presentation of evidence early in the trial on a manageable issue that could, on the evidence, be the basis for a judgment as a matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

(P) establishing a reasonable limit on the time allowed to present evidence;

(Q) allocating peremptory challenges; and

(R) facilitating in other ways the just, speedy, and inexpensive disposition of the action.

(d) Pretrial Orders. After any conference under this rule, the court must issue an order reciting the action taken. This order controls the course of the action unless the court modifies it.

(e) Final Pretrial Conference. The court may hold a final pretrial conference to formulate a trial plan, including a plan to facilitate the admission of evidence. The conference must be held as close to the time of trial as is reasonable, and must be attended by at least one attorney who will conduct the trial for each party and by any self-represented party. The court may modify the order issued after a final pretrial conference only to prevent manifest injustice.

(f) Sanctions.

(1) In General. On motion or on its own, the court may issue any just orders, including those authorized by Rule 37, if a party or its attorney:

(A) fails to appear at a pretrial conference;

(B) is substantially unprepared to participate, or does not participate in good

faith, in the conference; or

(C) fails to obey a scheduling or other pretrial order.

(2) Imposing Fees and Costs. Instead of or in addition to any other sanction, the judge must order the party, its attorney, or both to pay the reasonable expenses, including attorney fees, incurred because of any noncompliance with this rule, unless the noncompliance was substantially justified or that other circumstances make an award of expenses unjust.

EXPLANATORY NOTE

Rule 16 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2000; August 1, 2004; March 1, 2008; March 1, 2011; December 1, 2011; March 1, 2017.

Rule 16 was amended, effective March 1, 2000, to add a new subdivision (a)(6) relating to alternative dispute resolution. Under N.D.R.Ct. 8.8, all parties in civil cases are required to discuss early alternative dispute resolution and must file a statement with the district court regarding participation in ADR.

Rule 16 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) was amended and new subdivisions (b), (c) and (e) were added, effective August 1, 2004, to incorporate a mechanism to trigger a pretrial

conference when certain events occur in an action.

Subdivision ~~(d)~~ (c) was amended, effective March 1, 2008, to add issues related to electronically stored information to the list of possible subjects for discussion at a pretrial conference.

Subdivision (c) was amended, effective March 1, 2017, to add preservation of electronically stored information to the list of possible subjects for discussion at a pretrial conference.

Subdivision (d) was amended, effective March 1, 1996, to follow the 1993 amendment to Fed.R.Civ.P. 16(c).

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

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, pages 12-13; September 30, 2011, page 17; September 25, 2008, page 7; April 24-25, 2008, pages 25-26; October 11-12, 2007, page 3; September 18-19, 2003, pages 11-18; April 24-25, 2003, pages 26-30; May 6-7, 1999, pages 7-8; January 28-29, 1999, pages 7-12; January 26-27, 1995, page 10; September 29-30, 1994, pages 22-23; April 20, 1989, page 2; December 3, 1987, page 11; April 26-27, 1984, pages 26-28; January 19-20, 1984, pages 18-23; September 18-19, 1980, pages 12-13; September 20-21, 1979, page 11; Fed.R.Civ.P. 16.

CROSS REFERENCE: N.D.R.Civ.P. 15 (Amended and Supplemental Pleadings), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure),

N.D.R.Civ.P. 36 (Requests for Admission), N.D.R.Civ.P. 40 (Assignment of Cases for Trial), N.D.R.Civ.P. 41 (Dismissal of Actions), N.D.R.Ct. 8.4 (Summons in Action for Divorce or Separation), N.D.R.Ct. 8.8 (Alternative Dispute Resolution).

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods:

(1) depositions on oral examination or written questions;

(2) written interrogatories;

(3) production of documents or things or permission to enter on land or other property, for inspection and other purposes;

(4) physical and mental examinations; and

(5) requests for admission.

(b) Discovery Scope and Limits.

(1) In General.

(A) Scope. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense, including the existence, description, nature, custody, condition, and location of any documents, electronically stored information, or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order the discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. ~~For the~~

~~purposes of the discovery rules, the phrase "electronically stored information" includes reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata.~~ All discovery is subject to the limitations imposed by Rule 26(b)(1)(B)(i).

(B) Limitations on Frequency and Extent.

(i) When Required. On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules if it determines that:

– discovery sought is unreasonably cumulative or duplicative, or it can be obtained from some other source that is more convenient, less burdensome, or less expensive;

–the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or

–the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

(ii) Specific Limitations on Electronically Stored Information. <u>For the</u>

purposes of the discovery rules, the phrase "electronically stored information" includes reasonably accessible metadata that will enable the discovering party to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the parties agree otherwise or the court orders otherwise upon motion of a party and a showing of good cause for the production of certain metadata. A party need not provide discovery of electronically stored information from sources that the party identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the party from whom discovery is sought must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(B). The court may specify conditions for the discovery.

(2) Insurance Agreements. If a person carrying on an insurance business might be liable to satisfy part or all of a judgment in an action or to indemnify or reimburse for payments made to satisfy the judgment, a party may obtain discovery of the existence and contents of the insurance agreement. Disclosure of the insurance agreement is not reason for its admission in evidence at trial. An application for insurance may not be treated as part of an insurance agreement.

(3) Trial Preparation Materials.

(A) Documents and Tangible Objects. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(5), these materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need of the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

(C) Previous Statement. Any party or other person may, on request and without the required showing, obtain the person's own previous statement about the action or its subject matter. If the request is refused, the person may move for a court order and Rule 37(a)(5) applies to the award of expenses. A previous statement is:

(i) a written statement that the person has signed or otherwise adopted or approved; or

(ii) a contemporaneous stenographic, mechanical, electrical, or other

recording, or a transcription of it, that recites substantially verbatim the person's oral statement.

(4) Trial Preparation Experts.

(A) Expert Who May Testify. Discovery of facts known and opinions held by experts, otherwise discoverable under Rule 26(b)(1) and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(i) a party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial; to state:

– the subject matter on which the expert is expected to testify;

– ~~and to state~~ the substance of the facts and opinions to which the expert is expected to testify; and

– ~~and~~ a summary of the grounds for each opinion;

(ii) a party may depose any person who has been identified as an expert witness whose opinions may be presented at trial unless the court finds, on motion, that the deposition is unnecessary, overly burdensome, or unfairly oppressive.

(B) Expert Employed Only for Trial Preparation. Ordinarily, a party may not, by interrogatories or deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or to prepare for trial and who is not expected to be called as a witness at trial. But a party may do so only:

(i) as provided in Rule 35(b); or

(ii) on showing exceptional circumstances under which it is impracticable for the party to obtain facts or opinions on the same subject by other means.

(C) Payment. Unless manifest injustice would result, the court must require that the party seeking discovery:

(i) pay the expert a reasonable fee for time spent in responding to discovery under Rule 26(b)(4)(A) or (B); and

(ii) for discovery under Rule 26(b)(4)(A) the court may require, and for discovery under Rule 26(b)(4)(B) the court must require the party seeking discovery to pay the other party a fair portion of the fees and expenses it reasonably incurred in obtaining the expert's facts and opinions.

(5) Claiming Privilege or Protecting Trial Preparation Materials.

(A) Information Withheld. When a party withholds information otherwise discoverable by claiming that the information is privileged or subject to protection as trial-preparation material, the party must:

(i) expressly make the claim; and

(ii) describe the nature of the documents, communications, or tangible things not produced or disclosed, and do so in a matter that, without revealing information itself privileged or protected, will enable other parties to assess the claim.

(B) Information Produced. If information is produced in discovery that is

subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has and may not use or disclose the information until the claim is resolved. A receiving party may promptly present the information to the court under seal for determination of the claim. If the receiving party disclosed the information before being notified, it must take reasonable steps to retrieve it. The producing party must preserve the information until the claim is resolved.

(c) Protective Orders.

(1) In General. A party or any person from whom discovery is sought may move for a protective order in the court where the action is pending, or as an alternative on matters relating to a deposition, in the court in the district where the deposition will be taken. The court may, for good cause shown, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following:

(A) forbidding the discovery;

(B) specifying terms and conditions, including time or place for the discovery;

(C) prescribing a discovery other than the one selected by the party seeking discovery;

(D) forbidding inquiry into certain matters, or limiting the scope of discovery to certain matters;

(E) designating the persons who may be present while the discovery is conducted;

(F) requiring that a deposition be sealed and opened only on court order;

(G) requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way; and

(H) requiring that the parties simultaneously file specified sealed documents or information to be opened as the court directs.

(2) Ordering Discovery. If a motion for a protective order is wholly or partially denied, the court may, on just terms, order that any party or person provide or permit discovery.

(3) Awarding Expenses. Rule 37(a)(5) applies to the award of expenses.

(d) Sequence and Timing of Discovery. Unless, on motion, the court orders otherwise for the parties' and witnesses' convenience and in the interests of justice, methods of discovery may be used in any sequence and discovery by one party does not require any other party to delay its discovery.

(e) Supplementing Responses.

(1) In General. A party who has responded to an interrogatory, request for production, or request for admission, must supplement or correct its response:

(A) in a timely manner if the party learns that in some material respect the response is incomplete or incorrect, and if the additional or corrective information has not otherwise been made known to the parties during the discovery process or in writing; or

(B) as ordered by the court.

(2) Witnesses. A party has a duty to timely supplement a response about:

(A) the identity and location of persons having knowledge of discoverable matters, and

(B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which the person is expected to testify, and the substance of the person's testimony.

(f) Discovery Meeting, Discovery Conference, Discovery Plan.

(1) Discovery Meeting. No earlier than 40 days after the complaint is filed in an action, any party's attorney or a self-represented party may request in writing a meeting on the subject of discovery, including the discovery of electronically stored information. If such a request is made, the parties must meet within 21 days, unless agreed otherwise by the parties or their attorneys or another time for the meeting is ordered by the court. Even if the parties or their attorneys do not seek to have a discovery meeting, at any time after the complaint is filed the court may direct the parties or their attorneys to appear before it for a discovery conference.

(2) Matters for Consideration. During a discovery meeting held under Rule

26(f)(1), the attorneys and any self-represented parties must:

(A) consider the nature and basis of the parties' claims and defenses and the possibilities for promptly settling or resolving the case, and

(B) discuss the preparation of a discovery plan as set forth in Rule 26 (f)(3).

(3) Conduct of Meeting. Attorneys for the parties, and any self-represented parties, that have appeared in the case are jointly responsible for arranging the meeting, for being prepared to discuss a discovery plan, and for attempting in good faith to agree on a discovery plan. The meeting may be held by telephone, by videoconference, or in person, or by a combination of methods, unless the court, on motion, orders the attorneys and the self-represented parties to attend in person.

(4) Discovery Plan or Report.

(A) In General. If a discovery plan is agreed on, it must be submitted to the court within 14 days after the meeting, and the parties may request a conference with the court regarding the plan. If the parties do not agree on a discovery plan, they must submit to the court within 14 days after the meeting a joint report containing those parts of a discovery plan on which they agree and the position of each of the parties on the parts upon which they disagree. Unless the parties agree otherwise, the attorney for the first plaintiff listed on the complaint is responsible for submitting the discovery plan or joint report.

(B) Discovery Plan Contents. A discovery plan must contain the following:

(i) a statement of the issues as they then appear;

(ii) a proposed plan and schedule of discovery, including the discovery of electronically stored information;

(iii) with respect to electronically stored information, and if appropriate under the circumstances of the case, a reference to the preservation of such information, the media form, format, or procedures by which such information will be produced, the allocation of the costs of preservation, production, and, if necessary, restoration, of such information, the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation materials if different from that provided in Rule 26 (b)(5), the method for asserting or preserving confidentiality and proprietary status, and any other matters addressed by the parties;

(iv) any limitations proposed to be placed on discovery, including, if appropriate under the circumstances of the case, that discovery be conducted in phases or be limited to or focused on particular issues;

(v) when discovery should be completed; and

(vi) if appropriate under the circumstances of the case, any limitations or conditions under Rule 26 (c) regarding protective orders.

(5) Discovery Conference. If the parties are unable to agree to a discovery plan at a meeting held under Rule 26 (f)(1), they must, on motion of any party, appear before the court for a discovery conference at which the court must order the entry of a discovery plan after consideration of the report required to be

submitted under Rule 26 (f)(4)(A) and the position of the parties. The order may address other matters, including the allocation of discovery costs, as are necessary for the proper management of discovery in the action. An order may be altered or amended as justice may require. The court may combine the discovery conference with a pretrial conference authorized by Rule 16.

(g) Signing Discovery Request, Responses, and Objections.

(1) Signature Required; Effect of Signature. Every discovery request, response, or objection must be signed by at least one attorney of record in the attorney's individual name, or by the party personally, if self-represented, state the signer's address, electronic mail address for electronic service, telephone number, and State Board of Law Examiners identification number, if applicable. By signing, the attorney or party certifies that the signer has read the request, response, or objection, and that to the best of the signer's knowledge, information, and belief formed after a reasonable inquiry it is:

(A) consistent with these rules and warranted by existing law or by a good faith argument for extending, modifying or reversing existing law;

(B) not interposed for any improper purpose, such as to harass, cause unnecessary delay or needlessly increase the cost of litigation; and

(C) neither unreasonable nor unduly burdensome or expensive, considering the needs of the case, prior discovery in the case, the amount in controversy, and the importance of the issues at stake in the litigation.

(2) Failure to Sign. Other parties have no duty to act on an unsigned request, response, or objection until it is signed, and the court, on motion or on its own, must strike it unless a signature is promptly supplied after the omission is called to the attorney's or party's attention.

(3) Sanction for Improper Certification. If a certification violates this rule, without substantial justification, the court, on motion or its own, must impose an appropriate sanction on the signer, the party on whose behalf the signer was acting, or both. The sanction may include an order to pay the reasonable expenses, including attorney's fees, caused by the violation.

EXPLANATORY NOTE

Rule 26 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2008; March 1, 2011; March 1, 2013; March 1, 2015; March 1, 2017.

Rule 26 is derived from Fed.R.Civ.P. 26

As amended, effective March 1, 1996, a party deposing another party's expert witness under subdivision (b)(4)(A)(ii) must pay the expert a reasonable fee under subdivision (b)(4)(C), even though a court order has not been obtained authorizing the deposition or commanding payment of expert witness fees.

Rule 26 was amended, effective March 1, 2008, to implement changes related to discovery of electronically stored information. The changes reflect the 2006 amendments to Fed.R.Civ.P. 26. Subdivision (b) was amended to incorporate

a new subparagraph (b)(2)(B) on limitations to discovery of electronic information. A new paragraph (b)(6) was also added to address claims of privilege or protection of trial preparation materials.

Rule 26 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subparagraph (b)(1)(A) was amended, effective March 1, 2013, to include a definition of "electronically stored information" and to designate what types of metadata may be discovered. Effective March 1, 2017, this language was transferred to subparagraph (b)(1)(B)(ii).

Subparagraph (c)(1)(H) was amended, effective March 1, 2015, to remove a reference to filing documents in a sealed paper envelope. Items are filed with the court electronically, and may be designated as sealed when submitted.

Subdivision (f) was amended, effective March 1, 2013, to provide a procedure for discovery meetings and conferences and for the formulation of discovery plans and reports, with an emphasis on discussing and planning for the discovery of electronic information.

Paragraph (g)(1) was amended, effective March 1, 2015, to specify that the attorney's electronic mail address for electronic service must be included with the signature.

SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016, pages 10-15; January 28-29, 2016, pages 13-14; April 24-25, 2014, page 25; January 26-27, 2012, page 17-19; January 29-30, 2009, page 6; September 25, 2008, pages 21-22; January 25, 2007, pages 9-10; September 28-29, 2006, pages 18-20; January 26-27, 1995, pages 10-12; September 29-30, 1994, pages 21-22; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, page 28; January 20, 1984, pages 23-31; December 11-12, 1980, page 2; October 30-31, 1980, pages 9-10; September 20-21, 1979, page 19; Fed.R.Civ.P. 26.

CROSS REFERENCE: N.D.R.Civ.P. 16 (Pretrial Procedure-Formulating Issues), N.D.R.Civ.P. 28 (Persons Before Whom Depositions May Be Taken), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedure), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), N.D.R.Civ.P. 30.1 (Uniform Audio-Visual Deposition Rule), N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions), N.D.R.Civ.P. 33 (Interrogatories to Parties), N.D.R.Civ.P. 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), N.D.R.Civ.P. 35 (Physical and Mental Examination of Persons), N.D.R.Civ.P. 36 (Requests for Admission), and N.D.R.Civ.P. 37 (Failure to Make Discovery-Sanctions); N.D.R.Ev. 507 (Trade Secrets), N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure), and N.D.R.Ev. 706 (Court-Appointed Experts).

RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION AND TANGIBLE THINGS, OR ENTERING ONTO LAND FOR INSPECTION AND OTHER PURPOSES

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information - including writings, drawings, graphs, charts, photographs, sound recordings, images, and other data or data compilations - stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) Contents of the Request. The request:

(A) must describe with reasonable particularity each item or category of items to be inspected;

(B) must specify a reasonable time, place and manner for the inspection and for performing the related acts; and

(C) may specify the form or forms in which electronically stored information is to be produced.

(2) Responses and Objections.

(A) Time to Respond. The party to whom the request is directed must respond in writing within 30 days after being served, but a defendant is not required to serve its response until 45 days after being served with the summons and complaint. A shorter or longer time may be stipulated to under Rule 29 or be ordered by the court.

(B) Responding to Each Item. For each item or category, the response must either state that inspection and related activities will be permitted as requested or state ~~an objection~~ with specificity the grounds for objecting to the request~~,~~ ~~including the reasons~~. The responding party may state that it will produce copies of documents or of electronically stored information instead of permitting inspection.

(C) Objections. An objection must state whether any responsive materials are being withheld on the basis of that objection. An objection to part of a request must specify the part and permit inspection of the rest.

(D) Responding to a Request for Production of Electronically Stored

Information. The response may state an objection to a requested form for producing electronically stored information. If the responding party objects to a requested form - or if no form was specified in the request - the party must state the form or forms it intends to use.

(E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;

(ii) If the request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it ordinarily maintained or in a reasonably usable form or forms; and

(iii) a party need not produce the same electronically stored information in more than one form.

(c) ~~Persons not parties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.~~ Signature. The person who responds to the request must sign the response, and the person who objects must sign any objections.

(d) Nonparties. As provided in Rule 45, a nonparty may be compelled to produce documents and tangible things or to permit an inspection.

EXPLANATORY NOTE

Rule 34 was amended, effective July 1, 1981; March 1, 1990; January 1, 1995; March 1, 1997; March 1, 2008; March 1, 2011; March 1, 2017.

An objection must be served within the time for serving a response or the objection is waived. Any extension must be in writing and should specify whether the extension includes responses, objections, or both.

Paragraph (b)(2) was amended, effective March 1, 2017, in response to the December 1, 2015, revision of Fed.R.Civ.P. 34. The amendments allow copies of documents or electronically stored information to be produced rather than permitting inspection and to require an objection to specify whether anything is being withheld on the basis of the objection.

Subdivision (c) was amended, effective March 1, 2017, to require the person who responds to a request for production to sign the response document and for a lawyer or self-represented person who makes objections to sign the objections. The former text of subdivision (c) on nonparties became new subdivision (d).

Rule 34 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 34 was amended, effective March 1, 2008, in response to the 2006

federal revision. The amendments provide guidance regarding requests for electronically stored information.

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, pages 15-18; January 29-30, 2009, pages 28-29; September 28-29, 2006, pages 20-22;January 25-26, 1996, page 6; September 28-29, 1995, page 14; April 20, 1989, page 2; December 3, 1987, page 11; October 30-31, 1980, pages 20-22; November 29-30, 1979, page 7; Fed.R.Civ.P. 34.

CROSS REFERENCE: N.D.R.Civ.P. 16 (Pre-Trial Procedure Formulating Issues), N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 29 (Stipulations Regarding Discovery Procedures), N.D.R.Civ.P. 37 (Failure to Make Discovery Sanctions), N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure).

RULE 45. SUBPOENA

(a) In General.

(1) Form and Contents.

(A) Requirements. Every subpoena must:

(i) state the title of the action, the court in which it is pending, and its civil-action number;

(ii) command each person to whom it is directed to do the following at a specified time and place: attend and testify; produce designated documents, electronically stored information, or tangible things in that person's possession, custody or control; or permit the inspection of premises; and

(iii) if the subpoena seeks only pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises, set out the text of the notice in Rule 45(f).

(B) Command to Attend a Deposition; Notice of the Recording Method. A subpoena commanding attendance at a deposition must state the method for recording the testimony.

(C) Combining or Separating a Command to Produce or Permit Inspection; Specifying the Form for Electronically Stored Information. A command to produce documents, electronically stored information, or tangible things or to permit the inspection of premises may be included in a subpoena commanding attendance at a

deposition, hearing or trial or may be set out in a separate subpoena. A subpoena may specify the form or forms in which electronically stored information is to be produced. The phrase "electronically stored information" includes reasonably accessible metadata that will enable the party seeking production to have the ability to access such information as the date sent, date received, author, and recipients. The phrase does not include other metadata unless the party seeking production and the subject of the subpoena agree otherwise or the court orders otherwise on motion and a showing of good cause for the production of certain metadata.

(D) Command to Produce; Included Obligations. A command in a subpoena to produce documents, electronically stored information, or tangible things requires the responding party to permit inspection, copying, testing, or sampling of the materials.

(2) Issued by Whom. The clerk ~~shall~~ must issue a subpoena in the name of the court for the county in which the action is filed, signed ~~and sealed~~ but otherwise in blank, to a party who requests it. That party ~~shall~~ must complete it before service. An attorney authorized to practice in North Dakota ~~for a party~~ also may issue a subpoena, which must be signed by the attorney, include the attorney's office address and identify the party the attorney represents.

(3) Subpoena in Out-of-State Action. N.D.R.Ct. 5.1 defines the procedure for discovery or depositions in an out-of-state action.

(b) Service; Notice.

(1) Service of Subpoena.

(A) A subpoena to a named person must be served under Rule 4(d). A subpoena may be served at any place within the state.

(B) If the subpoena requires the person's attendance, fees for one day's attendance, mileage and travel expense allowed by law must be tendered. If fees, mileage and travel expense are not tendered with the subpoena, the person need not obey the subpoena. Fees, mileage and travel expense need not be tendered if they are to be paid by the state or a political subdivision.

(2) Service of Notices.

(A) Notice of Deposition. If the subpoena commands a person to attend, give testimony and produce documents, electronically stored information or tangible things at a pretrial deposition, then before the subpoena is served, a notice to take a deposition must be served on each party.

(B) Notice of Demand for Production or Inspection. If a deposition notice has not been served, and if the subpoena commands the production of documents, electronically stored information, or tangible things or the inspection of premises before trial, then before it is served, a notice of demand for production or inspection must be served on each party.

(C) Notice Mandatory Before Service of Subpoena. The notice required by Rule 45(b)(2)(A) and (B) must be served on each party under Rule 5(b) before a

subpoena for a pretrial deposition, for pretrial production of documents, electronically stored information, or tangible things or for the inspection of premises may be served.

(c) Protecting a Person Subject to a Subpoena.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena ~~shall~~ must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction, which may include lost earnings and reasonable attorney's fees, on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) Appearance Not Required. A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing or trial.

(B) Objections. A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises or to producing electronically stored information in the form or forms requested. The objection must be received before the earlier of 24 hours before the time specified for compliance or ten days after

the subpoena is served. If an objection is made, the following rules apply:

(i) At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

(ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Location.

(A) Resident Witness. A subpoena may require a resident of this state to attend a deposition only in the county where the person resides, is employed or transacts business in person, or at a convenient place ordered by the issuing court. A resident may be required to attend a hearing or trial any place within this state.

(B) Nonresident Witness. A subpoena may require a nonresident of this state who is served with a subpoena within this state to attend a deposition ,hearing or trial in any county of this state.

(4) Quashing or Modifying a Subpoena.

(A) When Required. On timely motion, the issuing court must quash or modify a subpoena that:

(i) fails to allow a reasonable time to comply;

(ii) requires attendance beyond the location requirements of Rule 45 (c)(3);

(iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

(iv) subjects a person to undue burden.

(B) When Permitted. To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) Specifying Conditions as an Alternative. In the circumstances described in Rule 45 (c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

(i) shows a substantial need for the testimony or material that cannot otherwise be met without undue hardship; and

(ii) ensures that the subpoenaed person will be reasonably compensated.

(d) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information.

(A) Documents. A person responding to a subpoena to produce documents ~~shall~~ must produce them as they are kept in the ordinary course of business or ~~shall~~ must organize and label them to correspond to the categories in the demand.

(B) Form for Producing Electronically Stored Information. If a subpoena

does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) Electronically Stored Information Produced in Only One Form. The person responding need not produce the same electronically stored information in more than one form.

(D) Inaccessible Electronically Stored Information. The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or to quash, the person from whom discovery is sought must show that the information sought is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(1)(B). The court may specify conditions for discovery.

(2) Claiming Privilege or Protection.

(A) Information Withheld. A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial preparation material must:

(i) expressly make the claim; and

(ii) describe the nature of the withheld documents, communications, or

tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) Information Produced. If information is produced in response to a subpoena that is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a receiving party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the receiving party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(e) Contempt. The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3).

(f) Notice. All subpoenas commanding only pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises must contain the following notice:

"You may object to this subpoena by sending or delivering a written objection, stating your valid reason, to [Insert the name and address of the party, or

attorney representing the party seeking production of documents, electronically stored information, or tangible things or the inspection of premises]. Any objection must be received within ten days after you receive the subpoena. If the time specified in the subpoena for compliance is less than ten days, any objection must be received at least 24 hours before the time specified for compliance.

If you make a timely objection, you do not need to comply with this subpoena unless the court orders otherwise. You will be notified if the party serving the subpoena seeks a court order compelling compliance with this subpoena. You will then have the opportunity to contest enforcement.

Failure to obey this subpoena, without making a timely objection, and stating a valid reason, may be contempt of court."

EXPLANATORY NOTE

Rule 45 was amended, effective July 1, 1981; January 1, 1988; January 1, 1995; March 1, 1997; March 1, 1999; March 1, 2007; March 1, 2008; March 1, 2009; March 1, 2012; March 1, 2013; March 1, 2014; March 1, 2017.

Rule 45 was revised, effective January 1, 1995, in response to the 1991 federal revision. Significant changes to North Dakota's rule include the following: (1) An action must be filed before a subpoena may issue; (2) A subpoena may compel a non-party to produce evidence independent of any deposition; (3) A subpoena may compel the inspection of premises in the possession of a non-party; and (4) Notice must be printed on a subpoena advising of the right to object when

pretrial or prehearing production or inspection is commanded. The scope of discovery under Rule 26 is not intended to be altered by the revision.

Rule 45 was amended, effective March 1, 2008, in response to the 2006 federal revision. Language was added to the rule to clarify that production of electronically stored materials may be demanded by subpoena and to provide guidance in dealing with requests for electronically stored materials.

Rule 45 was amended, effective March 1, 2009, in response to the 2007 amendments to Fed.R.Civ.P. 45. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subparagraph (a)(1)(A)(iii) was amended, effective March 1, 2013, to clarify that the notice required by subdivision (f) must be made part of the subpoena when the subpoena seeks only pretrial or prehearing production of documents, electronically stored information, or tangible things or the inspection of premises.

Subparagraph (a)(1)(C) was amended, effective March 1, 2014, to explain that the phrase "electronically stored information" includes reasonably accessible metadata.

Paragraph (a)(2) was amended, effective March 1, 2017, to remove the requirement that a subpoena issued by a clerk have a seal affixed.

Paragraph (a)(3) was amended, effective March 1, 2013, to direct persons to

N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in an action pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for interstate depositions and discovery.

Subdivision (b) was amended, effective March 1, 2007, to eliminate the requirement for parties to serve a separate notice for production when commanding a person to attend a deposition to give testimony and produce documents or things.

Paragraph (b)(2) was amended, effective March 1, 2009, to make it clear that notice must be served on each party in a matter before a subpoena to take testimony or for production is served.

Subdivision (f) was amended, effective March 1, 1999, to allow an objection to a subpoena to be sent via a commercial carrier as an alternative to mail.

SOURCES: Joint Procedure Committee Minutes of September 24-25, 2016, page 26; January 31-February 1, 2013, pages 24-25; September 27, 2012, pages 8-10; January 26-27, 2012, pages 3-7; September 30, 2011, pages 12-15; April 28-29, 2011, page 25; September 23-24, 2010, pages 32-33; April 24-25, 2008, pages 22- 25; September 28-29, 2006, pages 25-27; April 27-28, 2006, pages 14-15; January 29-30, 1998, page 20; January 25-26, 1996, page 20; January 27-28, 1994, pages 11-16; April 29-30, 1993, pages 4-8, 18-20; January 28-29, 1993, pages 2-7; May 21-22, 1987, page 3; February 19-20, 1987, pages 3-4; October 30-31, 1980,

pages 26-29; November 29-30, 1979, page 12; Fed.R.Civ.P. 45.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 31-05-22

CROSS REFERENCE: N.D.R.Civ.P. 26 (General Provisions Governing Discovery), N.D.R.Civ.P. 30 (Depositions Upon Oral Examination), and N.D.R.Civ.P. 31 (Depositions of Witnesses Upon Written Questions); N.D.R.Crim.P. 17 (Subpoena); N.D.R.Ev. 510 (Waiver of Privilege by Voluntary Disclosure); N.D.R.Ct. 5.1 (Interstate Depositions and Discovery).

RULE 55. DEFAULT; DEFAULT JUDGMENT

(a) Entry. If a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise appear and the failure is shown by affidavit or otherwise, the court may direct the clerk to enter an appropriate default judgment in favor of the plaintiff and against the defendant as follows:

(1) If the plaintiff's claim against a defendant is for a sum certain or a sum that can be made certain by computation, the court, on affidavit of the amount due and on production of the written instrument, if any, on which the claim is based, may direct the entry of judgment.

(2) In all other cases, the court, before directing the entry of judgment, must require the necessary proof to enable it to determine and grant any relief to the plaintiff. To this end, the court may:

(A) Hear evidence and assess damages;

(B) Direct a reference for an accounting or for taking testimony or for a determination of the facts; or

(C) Submit any issue of fact to a jury.

(3) A default judgment may be entered against a minor or incompetent person only if represented by a general guardian or other representative who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served

with a motion for judgment. Notice must be served with the motion and must comply with N.D.R.Ct. 3.2(a).

(4) When service of the summons has been made by published notice, or by delivery of a copy outside the state, default judgment must not be entered until the plaintiff, if required by the court, has filed a court-approved bond that conforms to a court order regarding the restitution of property obtained from the judgment if a defense is later permitted and sustained. A bond is not required in actions involving the title to real estate or to foreclose mortgages or other liens.

(b) Judgment Against the State. A default judgment may be entered against the state, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

EXPLANATORY NOTE

Rule 55 was amended, effective March 1, 1990; March 1, 2003; March 1, 2011. The explanatory note was amended, effective March 1, 2017.

Rule 55 is derived from Fed.R.Civ.P. 55, with several changes.

The federal rule contains a two-step process:entry of default and then entry of judgment. The first step is not specifically required in this rule. Subdivision (a) is a combination of the first two subdivisions of the federal rule, but specifies that the clerk cannot enter a default judgment without being directed to do so by the court, unlike the federal rule where the clerk can enter judgment in certain cases without court direction. Paragraph (2) authorizes the court to require proof before

directing the default judgment. Paragraph (4), derived partly from N.D.R.C. § 28-0906 (1943), authorizes the court to require a bond before judgment is entered when service of the summons has been made by publication or delivery out of the state, with certain exceptions.

Former subdivision (b) was deleted from the rule effective March 1, 2011. The subdivision included two provisions. The first recognized that Rule 55 applies to described claimants. The list was incomplete and unnecessary; Rule 55(a) applies Rule 55 to any party against whom a judgment for affirmative relief is requested. The second provision was a redundant reminder that Rule 54(c) limits the relief available by default judgment.

Subdivision (b) is identical to subdivision (d) of the federal rule, with the substitution of the state for United States.

The federal provision [subdivision (c)] for setting aside default was not adopted. See Rule 60(b) regarding relief from a judgment or order.

The operation of this rule is also directly affected by the ~~Soldiers' and Sailors' Civil Relief Act of 1940~~ Servicemember's Civil Relief Act, 50 U.S.C. ~~Appendix~~ §§ ~~501~~ 3901, et seq. Section ~~520~~ 3931 imposes specific requirements that must be fulfilled before a default judgment can be ordered or entered. If a default judgment is entered against a person in military service without compliance with the requirements of § ~~520~~ 3931, the judgment may be vacated.

Rule 55 was amended, effective March 1, 1990. The amendments were

technical in nature and no substantive change was intended.

Rule 55 was amended, effective March 1, 2003.Paragraph (a)(3) was changed to substitute the term "motion" for the term "application" and to require that a motion for a default judgment must comply with N.D.R.Ct. 3.2(a).

Rule 55 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, page 22; September 24-25, 2009, page 23; September 27-28, 2001, pages 15-17; April 20, 1989, page 2; December 3, 1987, page 11; November 29-30, 1979, page 15; Fed.R.Civ.P. 55.

CROSS REFERENCE: N.D.R.Civ.P. 5(a) (Service—When Required), N.D.R.Civ.P. 6(d) (For Motions—Affidavits), N.D.R.Civ.P. 7(b) (Motions and Other Papers), N.D.R.Civ.P. 37 (Failure to Make Discovery Sanctions), N.D.R.Civ.P. 54 (Judgment Costs), and N.D.R.Civ.P. 60 (Relief from Judgment or Order).

RULE 64. SEIZING PROPERTY

At the commencement of and throughout an action, every remedy is available that, under the law of this state, provides for seizing property to secure satisfaction of the potential judgment.

EXPLANATORY NOTE

Rule 64 was amended, effective March 1, 2011. The explanatory note was amended, effective March 1, 2017.

Rule 64 is derived from Fed.R.Civ.P. 64.

The principal departure from the federal rule is the authorization for the use of the remedies only for the seizure of property, not persons as in Fed.R.Civ.P. 64. Qualifications to the federal rule do not apply to the North Dakota court system and were not included. Also, the listing of remedies available has been omitted. These are found in the North Dakota Century Code.

The remedies available in this state include attachment (N.D.C.C. Chapter 32-08.1), replevin (N.D.C.C. Chapter 32-07), garnishment (N.D.C.C. Chapter 32-09), and others. Some state laws authorizing prejudgment remedies but not providing for prior notice and hearing have been struck down. See, Sniadach v. Family Finance Corporation of Bay View, 89 S.Ct. 1820, 395 U.S. 337, 23 L.Ed.2d 349 (1969); Fuentes v. Shevin, 92 S.Ct. 1983, 407 U.S. 67, 32 L.Ed.2d 556 (1972); Mitchell v. W. T. Grant Co., 416 U.S. 600, 94 S.Ct. 1895, 40 L.Ed.2d

406 (1974); Shaffer v. Heitner, 433 U.S. 186, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977); and Guzeman v. Western State Bank, 516 F.2d 125 (8th Cir. 1974). The latter case ruled that the North Dakota attachment statute (N.D.C.C. Chapter 32-08) violated due process. That statute was subsequently repealed and replaced by N.D.C.C. Chapter 32-08.1.

It is also possible some federal laws may take precedence in this area. For example, Sections ~~203 and 204~~ 3933 and 3934 of the ~~Soldiers' and Sailors' Civil Relief Act of 1940~~ Servicemember's Civil Relief Act, 50 U.S.C. ~~Appendix, 523 and 524~~ §§ 3901, et seq., provide under certain circumstances for the vacation or stay of any attachment or garnishment directed against the serviceman's property, money, or debts in the hands of another.

Rule 64 was amended, effective March 1, 2011, in response to the December 1, 2007, revision of the Federal Rules of Civil Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, page 22; January 28-29, 2010, pages 13-14; November 29-30, 1979, pages 20-21;Fed.R.Civ.P. 64.

CROSS REFERENCE: ~~Rule~~ N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction Process Service)~~; N.D.R.Civ.P~~.

RULE 3. THE COMPLAINT

(a) General. The complaint is a written statement of the essential facts constituting the elements of the offense charged. The complaint must be sworn to and subscribed before an officer authorized by law to administer oaths within this state, or if made by a licensed peace officer, must contain a written declaration that it is made and subscribed under penalty of perjury, and be presented to a magistrate. The complaint may be presented as provided in Rule 4.1.

(b) Magistrate Review. The magistrate may examine on oath the complainant and other witnesses and receive any affidavit filed with the complaint. If the magistrate examines the complainant or other witnesses on oath, the magistrate shall cause their statements to be reduced to writing and subscribed by the persons making them or to be recorded.

(c) Amendment. The magistrate may permit a complaint to be amended at any time before a finding or verdict if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced. If the prosecuting attorney chooses not to pursue a charge contained in the initial complaint, a written dismissal of that charge must be filed with the amended complaint.

EXPLANATORY NOTE

Rule 3 was amended, effective January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007; August 1, 2011; March 1, 2013; March 1, 2016; March 1,

2017.

Subdivision (a) was amended, effective January 1, 1995, to allow a complaint to be subscribed and sworn to outside the presence of a magistrate. An effect of this amendment is to allow facsimile transmission of the complaint. For a listing of officers authorized to administer oaths, see N.D.C.C. § 44-05-01. The amendment does not preclude a magistrate from examining a complainant or other witnesses under oath when making the probable cause determination.

Subdivision (a) was amended, effective March 1, 1996, to clarify that the complaint is the initial document for charging a person with a misdemeanor or felony.

Subdivision (a) was amended, effective March 1, 2007, to specify that the complaint must contain a statement of the facts that establish the elements of the offense charged.

Subdivision (a) was amended, effective August 1, 2011, to eliminate language about the complaint being the initial charging document for all criminal offenses. N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned."

Subdivision (a) was amended, effective March 1, 2013, to allow the complaint to be presented to the magistrate by telephone or other reliable electronic means under Rule 4.1.

Subdivision (a) was amended, March 1, 2017, to allow a licensed peace officer to make a complaint in a written declaration that it is made and subscribed under penalty of perjury. This amendment facilitates submission of electronic documents to establish the grounds for a complaint. Any electronic signature on a document submitted under this rule by a licensed peace officer is considered to be that of the officer.

Subdivision (c) is similar to Rule 7(e).

Subdivision (c) was amended, effective March 1, 2016, to require a written dismissal to be filed with the amended complaint if the prosecuting attorney chooses not to pursue charges raised in the initial complaint.

Rule 3 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of September 24-25, 2015, pages 14-15, 29; January 26-27, 2012, page 25; April 28-29, 2011, pages 17-18; April 24-25, 2003, pages 25-26; January 26-27, 1995, pages 3-5; April 28-29, 1994, pages 20-22; January 27-29, 1972, pages 4-7 September 27-28, 1968, pages 1-2; November 17-18, 1967, page 2.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-01-13(1), 29-05-01 to the extent that it

requires a complaint to be sworn, 29-05-02 to the extent that it requires a complaint to be subscribed and sworn to before a magistrate, 29-05-03, 33-12-03, 33-12-04, 33-12-05, 33-12-16, 33-12-25.

CONSIDERED: N.D.C.C. §§ 29-04-05, 12-01-04(12), 29-01-14, 29-02-06, 29-02-07, 29-04-05, 29-05-01, 29-05-05.

CROSS REFERENCE: N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 7 (The Indictment and the Information).

RULE 4. ARREST WARRANT OR SUMMONS UPON COMPLAINT

(a) Issuance.

(1) Warrant. If it appears from the complaint, ~~and any~~ an affidavit filed with the complaint, or from a written declaration made and subscribed under penalty of perjury by a licensed peace officer, that there is probable cause to believe that a criminal offense has been committed by the defendant, the magistrate must issue an arrest warrant to an officer authorized by law to execute it. [Except as provided in subdivision (a)(2).] The finding of probable cause must be based upon evidence, which may be hearsay in whole or in part, provided there is a substantial basis for believing the source of the hearsay to be credible and for believing that there is a factual basis for the information furnished. Before ruling on a request for a warrant, the magistrate may examine under oath the complainant and any other witnesses produced, in which case the proceedings must be recorded. A magistrate who has not been admitted to practice law in this state may not issue a warrant until the complaint has been approved by the prosecuting attorney. If it appears to the magistrate from the complaint or other written evidence that the accused is likely to abscond before the prosecuting attorney can approve the complaint, and the magistrate so certifies on the complaint, the magistrate may issue a warrant without approval of the prosecuting attorney.

(2) Summons. The magistrate may issue a summons in lieu of a warrant if

the magistrate has reason to believe that the defendant will appear in response to it or if the defendant is a corporation.

(3) Failure of Defendant to Appear After Summons. If a defendant fails to appear in response to a summons or there is reasonable cause to believe that the defendant will fail to appear, a magistrate must issue an arrest warrant. If a defendant corporation fails to appear in response to a summons, a magistrate who is empowered to try the offense for which the summons was issued must enter a plea of not guilty and may proceed to trial and judgment without further process; a magistrate who is not so empowered must proceed as though the defendant had appeared.

(4) Additional Warrants or Summonses. A magistrate may issue more than one warrant or summons on the same complaint.

(5) Warrant or Summons by Telephone or Other Reliable Electronic Means. In accordance with Rule 4.1, the magistrate may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

(b) Form.

(1) Warrant. A warrant must:

(A) be in writing, in the name of the State of North Dakota;

(B) be signed by the issuing magistrate with the title of the magistrate's office;

(C) state the date of issuance and the municipality or county where issued;

(D) contain the defendant's name or, if it is unknown, a name or description by which the defendant can be identified with reasonable certainty;

(E) describe the offense charged against the defendant; and

(F) command the defendant be arrested and brought before the nearest available magistrate.

The warrant may also have endorsed upon it the recommended or acceptable amount of bail if the offense is bailable.

(2) Summons. A summons must be in the same form as the warrant except that it must require the defendant to appear before a magistrate at a stated time and place and must inform the defendant that if the defendant fails to appear, an arrest warrant will issue.

(c) Execution; Service.

(1) Execution of Warrant. The warrant is directed to all peace officers of this state and may be executed only by a peace officer. It is executed by the arrest of the defendant and may be executed in any county of the state by any peace officer of this state. Upon arrest, an officer possessing the original or a duplicate original warrant must show it to the defendant immediately upon request. If the officer does not possess the warrant at the time of the arrest, the officer must inform the defendant of the warrant's existence and of the offense charged and, at the defendant's request must show the original or a duplicate original warrant or a copy to the defendant as soon as possible.

(2) Service of Summons. The summons must be served in the manner provided for service of a summons in a civil action. Any person authorized to serve a summons in a civil action may serve a summons.

(d) Return.

(1) After executing a warrant, the officer must return it to the magistrate before whom the defendant is brought in accordance with Rule 5. The officer may do so by reliable electronic means. At the request of the prosecuting attorney, an unexecuted warrant must be returned to and canceled by the magistrate who issued it.

(2) The person to whom a summons is delivered for service must return it to the magistrate before whom the summons is returnable on or before the return day.

(3) At the request of the prosecuting attorney made while a complaint is pending, a magistrate may deliver an unexecuted warrant, an unserved summons, or a copy of the warrant or summons to a peace officer for execution or service.

(e) Defective Warrant or Summons; Amendment. No person arrested under a warrant or appearing in response to a summons may be discharged from custody or dismissed because of any informality in the warrant or summons, but the warrant or summons may be amended to remedy the informality.

EXPLANATORY NOTE

Rule 4 was amended, effective March 1, 2006; March 1, 2013; March 1, 2017.

Subdivision (a) is derived from the Fed.R.Crim.P. 4. The most important aspect of subdivision (a) is the provision that a warrant for arrest may issue under this rule only if it appears from the complaint, from an examination under oath, or from any affidavit filed with the complaint, that there is probable cause for the magistrate to believe that a criminal offense has been committed by the defendant.

Subdivision (a) was amended, effective March 1, 2017, to allow a magistrate, in determining probable cause, to rely on a written declaration made and subscribed under penalty of perjury by a licensed peace officer. This amendment facilitates submission of electronic documents to establish the grounds for a warrant or summons. Any electronic signature on a document submitted under this rule by a licensed peace officer is considered to be that of the officer.

Subdivision (a) further provides that a warrant or summons may issue on the basis of hearsay evidence provided the magistrate has adequate reason to believe that the hearsay information is both credible (truthful) and reliable (accurate). These provisions are deemed to be declaratory of existing law. The probable-cause provision must be read in light of the Fourth Amendment. The provision for hearsay merely prescribes the standard of credibility and reliability. It does not attempt to identify the situations in which evidence in the complaint is in fact adequate to meet the twin tests of credibility and reliability. This is an issue which must be dealt with on a case-to-case basis, taking into account the unlimited variations and sources of information and the opportunity of the informant to

perceive accurately the factual data which the informant furnishes.

Subdivision (a) makes clear that the magistrate may require the complainant to appear personally and may examine the complainant or witnesses to determine whether probable cause exists. If the magistrate does hear from the complainant or witnesses, the testimony must be recorded. This is to insure that there exists an adequate basis for reviewing the propriety of the issuance of the warrant, if, for example, its issuance should be attacked upon a subsequent motion to suppress evidence seized incident to the arrest. Subdivision (a) is also intended to make it possible for the magistrate to issue a summons in lieu of an arrest warrant even though not requested to do so by the prosecuting attorney.

Subdivision (a) also provides that where the magistrate is someone other than a person admitted to practice law in this state, the magistrate shall not issue a warrant until the complaint has been approved by the prosecuting attorney. This provision is intended to guard against non-law-trained magistrates, who because of their lack of legal expertise may have a problem with the requirement of probable cause. Subdivision (a), however, does provide that a warrant may be issued by such magistrate without the approval of the prosecuting attorney where the magistrate reasonably believes that the accused is likely to abscond the jurisdiction before the prosecuting attorney can approve the complaint, provided the magistrate so certifies on the complaint.

Paragraph (a)(2) provides the magistrate with some latitude in the exercise

of discretion to issue the summons in cases where the magistrate reasonably believes that the defendant will appear in response to the summons. Paragraph (a)(2) also provides for the magistrate to issue a summons rather than a warrant where the defendant is a corporation. It provides that a summons will issue to a corporate defendant because as a practical matter it is not literally possible to make an arrest. Furthermore, the probability is that the corporation will appear and that the crime is not one of violence.

Paragraph (a)(3) provides a remedy in cases where the defendant fails to answer the summons. It follows the provisions of both Fed.R.Crim.P. 4 (a) and the Model Code of Pre-Arraignment Procedure. This paragraph also provides for anticipatory remedy where there is failure of the ~~summonee~~ person summoned to appear.

Paragraph (a)(4) provides for the issuance of more than one warrant or summons on the same complaint. The provision for issuance of additional warrants on the same complaint embodies the practice provided in Fed.R.Crim.P. 4(a). When a complaint names several defendants, it may be desirable to issue separate warrants to each defendant in order to facilitate service and return, especially if the defendants are apprehended at different times and places.

Paragraph (a)(5) was added, effective March 1, 2013, to allow the magistrate to issue a warrant or summons based on information communicated by telephone or other reliable electronic means under the procedure set out in Rule

4.1.

Paragraph (b)(1) describes the form of the warrant. This paragraph requires that the warrant be in writing, that it be in the name of the State of North Dakota, and that it be signed by the issuing magistrate with the title of the magistrate's office. This differs from Fed.R.Crim.P. 4(b), in that the federal rule does not provide for the warrant to be in writing nor does it provide that it be in the name of the jurisdiction. The federal rule further differs in that it does not require that the signature of the issuing officer bear that officer's title, nor does it state the date when issued and the municipality or county where issued. The provision for the issuance of a warrant contemplates that the warrant will be issued in counties other than where the offense occurred.

The provision that the warrant be in the name of the State of North Dakota or in the name of a municipality, if the violation of a municipal ordinance is charged, is consistent with these rules in providing for the issuance of a warrant for violations of municipal ordinances which are deemed criminal in nature. The provision for description of the offense charged satisfies the constitutional requirement that notice be given to the defendant of the offense charged.

The final provision of paragraph (b)(1) indicates that bail may be endorsed upon the warrant. The provision that a recommendation of an amount of bail acceptable be included in the warrant reflects the notion that the magistrate issuing the warrant is in a better position to determine the bail requirement than would be

the nearest available magistrate to whom the defendant is brought, if not the issuing magistrate. The requirement that upon arrest the defendant be brought before the nearest available magistrate is adapted from the criminal rules of Alaska.

Paragraph (b)(2) provides that a summons will be in the same form as a warrant (in writing signed by the magistrate who issued it, etc.) and that it contain a warning that failure to respond to it will establish grounds for the issuance of a warrant.

Subdivision (c) directs that the warrant shall be directed to all peace officers of this State and further provides for its execution. The provision that the arresting officer need not have the warrant in possession at the time of the arrest is rendered necessary by the fact that a fugitive may be discovered and apprehended by any officer. It is impossible for a warrant to be in the possession of every officer who is searching for a fugitive or who unexpectedly might be in a position to apprehend a fugitive.

Paragraph (c)(2) provides for service of summons in substantially the same manner as civil actions under N.D.R.Civ.P. 4. This rule provides essentially the same requirements as Fed.R.Civ.P. 4(c)(1). Provisions for ease of service in the case of a summons reflect the fact that the individual's right to remain at liberty is not infringed.

Subdivision (d) governs the return of the warrant or summons and is

essentially the same as Fed.R.Crim.P. 4(c)(4). The return is not conclusive and an error in the return does not void the warrant, where no one was misled thereby, and facts stated in the return will not be accepted where testimony shows them to be untrue. This subdivision provides that in the case of an unexecuted warrant and upon request of the prosecuting attorney, the warrant shall be returned to the magistrate who issued it for cancellation. It further provides that a person to whom the summons was delivered shall appear on or before the return date stated on the face of the summons. Finally, subdivision (d) permits reissuance, upon request of the prosecuting attorney, of warrants which have been initially returned unexecuted but which have not been canceled, to be delivered to a peace officer for execution or service.

Subdivision (d) was amended, effective March 1, 2013, to allow the officer to return the warrant to the magistrate by reliable electronic means.

Subdivision (e) provides a remedy in cases where the warrant or summons is defective. It permits the prosecution to cure a defect which is deemed an informality in the warrant. There shall, however, be dismissal where the warrant is not sufficient on its face.

Rule 4 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of September 24-25, 2016, page 28; January 26-27, 2012, page 25-26; January 29-30, 2004, pages 21-22; January 27-29, 1972, pages 7-17; November 20-21, 1969, pages 15-16; May 3-4, 1968, pages 3-4; January 26-27, 1968, pages 4-7; Fed.R.Crim.P. 4.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-05-06, 29-05-07, 29-05-08, 29-05-09, 29-05-28, 29-05-29, 29-05-30, 33-12-06, 40-18-07, 40-18-08.

CONSIDERED: N.D.C.C. §§ 29-05-10, 29-05-23, 29-05-24, 29-05-25, 29-05-26, 29-05-27, 29-05-31, 40-11-11, 40-18-18.

CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction—Process—Service); N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means).

RULE 5. INITIAL APPEARANCE BEFORE THE MAGISTRATE

(a) General.

(1) Appearance Upon an Arrest. An officer or other person making an arrest must take the arrested person without unnecessary delay before the nearest available magistrate.

(2) Arrest Without a Warrant. If an arrest is made without a warrant, the magistrate must promptly determine whether probable cause exists under Rule 4(a). If probable cause exists to believe that the arrested person has committed a criminal offense, a complaint or information must be filed in the county where the offense was allegedly committed. A copy of the complaint or information must be given within a reasonable time to the arrested person and to any magistrate before whom the arrested person is brought, if other than the magistrate with whom the complaint or information is filed.

(b) Statement by the Magistrate at the Initial Appearance.

(1) In All Cases. The magistrate must inform the defendant of the following:

(A) the charge against the defendant and any accompanying affidavit;

(B) the defendant's right to remain silent; that any statement made by the defendant may later be used against the defendant;

(C) the defendant's right to the assistance of counsel before making any

statement or answering any questions;

(D) the defendant's right to be represented by counsel at each and every stage of the proceedings;

(E) if the offense charged is one for which counsel is required, the defendant's right to have legal services provided at public expense to the extent that the defendant is unable to pay for the defendant's own defense without undue hardship; and

(F) the defendant's right to be admitted to bail under Rule 46.

(2) Felonies. If the defendant is charged with a felony, the magistrate must inform the defendant also of:

(A) the defendant's right to a preliminary ~~examination~~ hearing;

(B) the defendant's right to the assistance of counsel at the preliminary ~~examination~~ hearing;

(C) that a defendant who is not a United States citizen may request that an attorney for the state or a law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested.

(3) Misdemeanors. If the defendant is charged with a misdemeanor, the magistrate must inform the defendant also of the defendant's right to trial by jury in all cases as provided by law and of the defendant's right to appear and defend in person or by counsel.

(c) Right to Preliminary ~~Examination~~ Hearing.

(1) Waiver.

(A) If the offense charged is a felony, the defendant has the right to a preliminary ~~examination~~ hearing. The defendant may waive the right to preliminary ~~examination~~ hearing at the initial appearance if assisted by counsel.

(B) If the defendant is assisted by counsel and waives preliminary ~~examination~~ hearing and the magistrate is a judge of the district court, the defendant may be permitted to plead to the offense charged in the complaint or information at the initial appearance.

(C) If the defendant waives preliminary ~~examination~~ hearing and does not plead at the initial appearance, an arraignment must be scheduled.

(D) The magistrate must admit the defendant to bail under the provisions of Rule 46.

(2) Non-waiver. If the defendant does not waive preliminary ~~examination~~ hearing, the defendant may not be called upon to plead to a felony offense at the initial appearance. A magistrate of the county in which the offense was allegedly committed must conduct the preliminary ~~examination~~ hearing. The magistrate must admit the defendant to bail under the provisions of Rule 46.

(d) Reliable Electronic Means. Contemporaneous audio or audiovisual transmission by reliable electronic means may be used to conduct an appearance under this rule as permitted by N.D. Sup. Ct. Admin. R 52.

(e) Uniform Complaint and Summons.

(1) In General. Notwithstanding Rule 5(a), a uniform complaint and summons may be used in lieu of a complaint and appearance before a magistrate, whether an arrest is made or not, for an offense that occurs in an officer's presence or for a motor vehicle or game and fish offense. An individual held in custody must be brought before a magistrate for an initial appearance without unnecessary delay.

(2) Duty of Prosecuting Attorney. When a uniform complaint and summons is issued for a felony offense, the prosecuting attorney must also subsequently file a complaint or information that complies with Rule 5(a). If the prosecuting attorney after review declines to prosecute a charge that has been filed with the court on a uniform complaint and summons, a dismissal of the charge must be stated on the complaint or information or filed separately with the court.

EXPLANATORY NOTE

Rule 5 was amended effective March 1, 1990; January 1, 1995; March 1, 2006; June 1, 2006; March 1, 2010; August 1, 2011; March 1, 2016; March 1, 2017.

Rule 5 is derived from Fed.R.Crim.P. 5. Rule 5 is designed to advise the defendant of the charge against the defendant and to inform the defendant of the defendant's rights. This procedure differs from arraignment under Rule 10 in that the defendant is not called upon to plead.

Subdivision (a) provides that an arrested person must be taken before the

magistrate "without unnecessary delay." Unnecessary delay in bringing a person before a magistrate is one factor in the totality of circumstances to be considered in determining whether incriminating evidence obtained from the accused was given voluntarily.

Subdivision (a) was amended, effective January 1, 1995, to clarify that a "prompt" judicial determination of probable cause is required in warrantless arrest cases.

Subdivision (b) is designed to carry into effect the holding of Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694, 10 A.L.R.3d 974 (1966). Because the Miranda rule is constitutionally based, it applies to all officers whether state or federal. One should note that the protections required by Miranda apply as soon as a person "has been taken into custody or otherwise deprived of his freedom of action in any significant way," while the requirement that an accused be taken before a magistrate is applicable only to an "arrested person." The Miranda decision is based upon the Fifth Amendment privilege against self-incrimination, and holds that no statement obtained by interrogation of a person in custody is admissible, unless, before the interrogation begins, the accused has been effectively warned of the accused's rights, including the right not to answer questions and the right to have counsel present.

Subdivision (b) specifies the action which must be taken by the magistrate. Subparagraphs (b)(1)(A), (b)(1)(B), and (b)(1)(C) are stated by Miranda to be

absolute prerequisites to interrogation and cannot be dispensed with on even the strongest showing that the person in custody was aware of those rights.

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

Paragraph (b)(2) provides an additional requirement to the instructions given by the magistrate in paragraph (b)(1) when the charge is a felony. It requires the magistrate to inform the defendant of the right to a preliminary ~~examination~~ hearing. The Sixth Amendment right to counsel applies to a preliminary ~~examination~~ hearing granted under state law because the preliminary ~~examination~~ hearing is a critical stage of the state's criminal process.

Paragraph (b)(2) was amended, effective March 1, 2016, to require the defendant in a felony case to be informed at the initial appearance of the right of a defendant who is not a U.S. citizen to request that a consular officer be informed of the defendant's arrest. This amendment was based on the December 1, 2014 amendment to Fed.R.Crim.P. 5.

Subdivisions (b) and (c) were amended, effective March 1, 1990. The amendments track the 1987 amendments to Fed.R.Crim.P. 5, which are technical in nature, and no substantive change is intended.

Subdivision (c) was amended, effective January 1, 1995, in response to

elimination of county courts and to ensure that a defendant is not called upon to waive the preliminary ~~examination~~ hearing or to plead without the assistance of counsel at the initial appearance.

Subdivision (d) was amended, effective March, 1, 2004, to permit the use of interactive television to conduct initial proceedings. Subdivision (d) was amended, effective March 1, 2006, to reference N.D.Sup.Ct.Admin.R. 52, which governs proceedings conducted by interactive television. Subdivision (d) was further amended, March 1, 2016, to allow the use of contemporaneous audio or audiovisual transmission by reliable electronic means to conduct initial proceedings.

Subdivision (e) was added, effective March 1, 2010, to provide a procedure for using the uniform complaint and summons. Statutory provisions governing the uniform complaint and summons, which is commonly referred to as the "uniform citation," are in N.D.C.C. §§ 20.1-02-14.1 and 29-05-31.

Subdivision (e) was amended, effective March 1, 2016, to require the prosecuting attorney to file a written dismissal if the prosecuting attorney decides not to pursue a charge filed with the court on a uniform complaint and summons.

Rule 5 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 5 was amended, effective August 1, 2011, to include new language indicating that either "the complaint or information" can be used as a charging document. N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned."

Rule 5 was amended, effective March 1, 2017, to replace the term "preliminary examination" with "preliminary hearing" throughout the rule.

SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016, page 29; September 24-25, 2015, page 15; April 23-24, 2015, pages 14-15; April 28-29, 2011, pages 17-18; May 21-22, 2009, pages 2-10; April 27-28, 2006, pages 2-5, 15-17; January 29-30, 2004, pages 22-23; September 26-27, 2002, pages 12-13; January 27-28, 1994, pages 3-5; September 23-24, 1993, pages 4-7; April 20, 1989, page 4; December 3, 1987, page 15;February 22-23, 1973, page 18; March 23-24, 1972, pages 2-3, 11-12; January 27, 1972, pages 17-22; November 21-22, 1969, pages 2, 8-9, 17-19; May 3-4, 1968, pages 1-2; January 26-27, 1968, pages 7-9.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-05-04, 9-05-11, 29-05-17, 29-05-19, 29-07-01, 29-07-02, 29-07-04, 29-07-05, 29-07-07, 29-07-08, 29-07-09, 29-07-10, 33-12-07, 33-12-09.

CONSIDERED: N.D.C.C. §§ 20.1-02-14.1, 29-04-05, 29-05-31, 29-07-03,

29-07-06, 40-18-15, 40-18-16, 40-18-18.

CROSS REFERENCES: N.D.R.Crim.P. 5.1 (Preliminary ~~examination~~ hearing); N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 35 (Correcting or Reducing a Sentence); N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Assignment of Counsel); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous Transmission by Reliable Electronic Means).

RULE 5.1 PRELIMINARY ~~EXAMINATION~~ HEARING

(a) Probable Cause Finding. If the magistrate finds probable cause to believe an offense has been committed and the defendant committed the offense, an arraignment must be scheduled. The finding of probable cause may be based on hearsay evidence in whole or in part. The defendant may cross-examine adverse witnesses and may introduce evidence. The magistrate may receive evidence that would be inadmissible at the trial.

(b) Discharge of the Defendant. If the magistrate hears evidence on behalf of the respective parties in a preliminary ~~examination~~ hearing, and finds either a public offense has not been committed or there is not sufficient cause to believe the defendant guilty of the offense, the magistrate must discharge the defendant and dismiss the charge.

(c) Record. A verbatim record of the proceedings in the preliminary hearing must be made. Upon request of either party, a copy of the transcript of the record of proceedings must be furnished to the defendant and to the state. If a transcript is requested by the defendant, the cost of the transcript and related costs must be borne by the state if the magistrate finds the defendant is financially unable to pay for the transcript without undue hardship.

EXPLANATORY NOTE

Rule 5.1 was amended, effective February 12, 1982 on an emergency basis;

May 20, 1982, March 1, 1990; January 1, 1995; March 1, 1998; March 1, 2006; March 1, 2016; March 1, 2017.

The function of the preliminary ~~examination~~ hearing is to determine whether there is probable cause to hold the accused for further action.

Subdivision (c) was amended, effective March 1, 2006, to require a verbatim record of preliminary hearing proceedings.

Rule 5.1 was amended, effective January 1, 1995, to conform with the structure of the state judiciary and the elimination of county courts.

Rule 5.1 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 5.1 was amended, effective March 1, 2017, to replace the term "preliminary examination" with "preliminary hearing" throughout the rule.

Subdivision (b) was amended, effective March 1, 2016, to require the magistrate to dismiss the charge if the defendant is discharged.

SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016, page 29; September 24-25, 2015, page 15; January 29-30, 2004, pages 23-24; January 30, 1997, page 12; January 27-28, 1994, pages 5-8; September 23-24, 1993, pages 3-4 and 7-8; April 20, 1989, page 4;December 3, 1987, page 15; March 23-25, 1972, pages 3, 13-15; November 20-21, 1969, pages 8-9, 17-19; May 3-4, 1968,

page 2.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-07-11, 29-07-12, 29-07-15, 29-07-16, 29-07-17, 29-07-18, 29-07-19, 29-07-20, 29-07-21, 29-07-22, 29-07-23, 29-07-24, 29-07-25, 29-07-26, 29-07-27, 29-07-28, 29-07-29, 29-07-30, 29-07-31, 29-07-32.

CONSIDERED: N.D.C.C. §§ 29-07-01.1, 29-07-13, 29-07-14.

CROSS REFERENCES: N.D.R.Crim.P. 5 (Initial Appearance Before the Magistrate); N.D.R.Crim.P. 10 (Arraignment); N.D.R.Crim.P. 12 (Pleadings and Motions Before Trial; Defenses and Objections).

RULE 7. THE INDICTMENT AND THE INFORMATION

(a) When Used.

(1) Felony. All felony prosecutions in the district court must be by indictment after grand jury inquiry or by information.

(2) Misdemeanor. All misdemeanor and other prosecutions in the district court, including appeals, must be by indictment, information, or complaint.

(b) Waiver of Indictment. [Intentionally omitted].

(c) Nature and Contents.

(1) In General. The indictment or the information must name or otherwise identify the defendant, and must be a plain, concise, and definite written statement of the essential facts constituting the elements of the offense charged. It must be signed by the prosecuting attorney. Except for appeals from municipal court and municipal ordinance cases transferred under N.D.C.C. § 40-18-06.2, all prosecutions must be carried on in the name and by the authority of the State of North Dakota and must conclude "against the peace and dignity of the State of North Dakota." Except as required by this rule, the indictment or information need not contain a formal commencement, a formal conclusion, or any other matter not necessary to the statement. A count may incorporate by reference an allegation made in another count. A count may allege that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or

more specific means. For each count, the indictment or information must give the official or customary citation of the statute, rule, regulation, or other provision of law which the defendant is alleged to have violated.

(2) Citation Error. Unless the defendant was prejudicially misled, neither an error in the citation nor its omission is a ground to dismiss the indictment or information or to reverse a conviction.

(d) Surplusage. On motion of either party or on its own motion, the court may strike surplusage from the information or indictment.

(e) Amending an Information. Unless an additional or different offense is charged or a substantial right of the defendant is prejudiced, the court may permit an information to be amended at any time before the verdict or finding. If the prosecuting attorney chooses not to pursue a charge contained in the initial information, a dismissal of that charge must be stated in the amended information.

(f) Bill of Particulars. The court may direct the filing of a bill of particulars. The defendant may move for a bill of particulars before arraignment or within one day after arraignment or at a later time if the court permits. The motion must be in writing and must specify the particulars sought by the defendant. A bill of particulars must be granted if the court finds it necessary to protect the defendant against a second prosecution for the same offense or to enable the defendant to adequately prepare for trial. A bill of particulars may be amended at any time subject to such conditions as justice requires.

(g) Names of Witnesses to Be Endorsed on Indictment or Information. When an indictment or information is filed, the names of all the witnesses on whose evidence the indictment or information was based must be endorsed on it before it is presented. The prosecuting attorney, at a time the court prescribes by rule or otherwise, must endorse on the indictment or information the names of other witnesses the prosecuting attorney proposes to call. A failure to endorse those names does not affect the validity or sufficiency of the indictment or information, but the court in which the indictment or information was filed must direct the names of those witnesses to be endorsed on application of the defendant. The court may not allow a continuance because of the failure to endorse any of those names unless the application was made at the earliest opportunity and then only if a continuance is necessary in the name of justice.

EXPLANATORY NOTE

Rule 7 was amended effective March 1, 1990; January 1, 1995; March 1, 1996; March 1, 2006; March 1, 2007; August 1, 2011; March 1, 2013; March 1, 2016. The explanatory note was amended effective March 1, 2017.

Rule 7 is an adaptation of Fed.R.Crim.P. 7 and controls all indictments and informations. Although North Dakota provides that a defendant may be prosecuted by indictment or information, indictments are seldom used.

Subdivision (a) was amended, effective January 1, 1995, in response to county court elimination. The amendment allows misdemeanors to be charged by

complaint in district court, and for the inclusion of misdemeanor charges with felony charges in an indictment or information.

Subdivision (a) was amended, effective March 1, 1996, to clarify that even though a felony is initially charged by complaint, the subsequent prosecution must be by indictment or information.

Subdivision (a) was amended, effective August 1, 2011, to delete language indicating that a preliminary ~~examination~~ hearing was required before commencing a prosecution on an information. N.D.C.C. § 29-04-05 was amended in 2011 to specify that "A prosecution is commenced when a uniform complaint and summons, a complaint, or an information is filed or when a grand jury indictment is returned."

Subdivision (b) entitled "Waiver of Indictment" is retained in title and number only to conform with the outline and form of Fed.R.Crim.P. 7. Article I, Section 10 of the North Dakota Constitution provides that an individual must be prosecuted by indictment in cases of felony unless otherwise provided by the legislature, but in all cases either by information or indictment. Since the legislature has provided the state with an alternative to a prosecution by indictment in N.D.C.C. § 29-09-02, it follows that under the state constitution, there is no right in the accused to demand prosecution by indictment.

The language of subdivision (c), "must be carried on in the name * * * of the State of North Dakota," does not mandate a change in the style of prosecution

before municipal courts. The purpose of the indictment or information is to inform the defendant of the precise offense of which the defendant is accused so that the defendant may prepare the defendant's defense and further that a judgment will safeguard the defendant from subsequent prosecution for the same offense. The language employed in subdivision (c) is intended to provide the defendant with the Sixth Amendment protection to "be informed of the nature and the cause of the accusation * * * ." With this view in mind, subdivision (c) is established for the benefit of the defendant and is intended simply to provide a means by which the defendant can be properly informed of the proceedings without jeopardy to the prosecution.

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

Subdivision (c) was amended, effective March 1, 2007, to specify that the indictment or information must contain a statement of the facts that establish the elements of the offense charged.

Subdivision (c) was amended, effective March 1, 2013, to clarify that municipal ordinance cases transferred to district court under N.D.C.C. § 40-18-06.2 are not prosecuted in the name of the State. When a municipal court case is appealed to district court, Rule 37 governs procedure.

The purpose of subdivision (d) is to protect the defendant against prejudicial allegations of irrelevant or immaterial facts.

Subdivision (e) was amended, effective March 1, 2016, to require a dismissal to be stated in the amended information if the prosecuting attorney chooses not to pursue charges raised in the initial information.

Rule 7 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016, page 29; September 30, 2011, pages 18-19; April 28-29, 2011, pages 17-18; January 26, 2006, page 3;January 29-30, 2004, pages 24-25; January 26-27, 1995, pages 3-5; January 27-28, 1994, pages 8-9; September 23-24, 1993, pages 8-10; April 20, 1989, page 4; December 3, 1987, page 15; March 23-25, 1972, pages 3-11; December 11-12, 1968, pages 1-2; July 25-26, 1968, pages 1-4.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-09-01, 29-09-03, 29-09-04, 29-09-05, Chapter 29-11.

CONSIDERED: N.D.C.C. §§ 29-09-02, 29-09-06, 29-09-07; 40-18-06.2.

CROSS REFERENCES: N.D.C.C. ch. 29-10.1 (Grand Jury); N.D.R.Crim.P. 37 (Appeal as of Right to District Court; How Taken).

RULE 9. WARRANT OR SUMMONS UPON INDICTMENT OR INFORMATION

(a) Issuance. The court must issue an arrest warrant for each defendant named in the indictment or information, if it is supported by a showing of probable cause as required in Rule 4(a). The court need not issue a warrant for any defendant who has been held to answer for any offense charged. After a showing of probable cause, the court may issue a summons instead of a warrant on its own motion or at the request of the prosecuting attorney. On like request or on its own motion, the court may issue more than one warrant or summons for the same defendant. The court must issue the arrest warrant or summons to the sheriff or other person authorized by law to execute or serve it. If a defendant fails to appear in response to a summons, the court must issue a warrant.

(b) Form.

(1) Warrant. The warrant must conform to Rule 4(b)(1), describe the offense charged in the indictment or information, and command that the defendant be arrested and brought before the court. The court may fix the amount of bail and endorse it on the warrant.

(2) Summons. The summons must be in the same form as a warrant except that it must require the defendant to appear before the court at a stated time and place.

(c) Execution or Service; and Return.

(1) Execution or Service. The warrant must be executed or the summons served as provided in Rule 4(c)(1) and (2).

(2) Return. A warrant or summons must be returned in accordance with Rule 4(d).

(d) Warrant or Summons by Telephone or Other Means. In accordance with Rule 4.1, the magistrate may issue a warrant or summons based on information communicated by telephone or other reliable electronic means.

EXPLANATORY NOTE

Rule 9 was amended, effective March 1, 2006; March 1, 2013. The explanatory note was amended effective March 1, 2017.

Rule 9 is an adaptation of Fed.R.Crim.P. 9, and provides for the issuance of a warrant or summons upon indictment or information. The Fourth Amendment provides that "no Warrants shall issue, but upon probable cause supported by oath or affirmation, and particularly describing * * * persons * * * to be seized." If an indictment has been returned, the Fourth Amendment is satisfied and the warrant can issue on request without more, since the indictment is made on the oath of the grand jury. The provision for showing of the "probable cause" as required in Rule 4(a) makes explicit the fact that a warrant or summons can issue on the basis of an information only if the information or affidavit filed with the information shows probable cause for the arrest warrant or summons. Generally, prosecution on information has as a prerequisite a determination of probable cause at a

preliminary ~~examination~~ hearing. Exceptions are listed in N.D.C.C. § 29-09-02.

Subdivision (b) incorporates by reference the provisions of Rule 4(b) concerning the form of the warrant or summons. The minor additional requirements of this rule reflect the different stage in the proceeding at which the warrant or summons is being issued. The amount of bail may be fixed by the court and endorsed on the warrant. See Rule 46 (Release from Custody).

Paragraph (c)(1) incorporates by reference portions of Rule 4(c) dealing with the execution of a warrant and service of a summons.

Paragraph (c)(2), dealing with return, is virtually the same as Rule 4(d), providing for return of a warrant or summons issued on the complaint. At the request of the prosecuting attorney, any unexecuted warrant must be returned and canceled. On or before the return day, the person to whom a summons was delivered for service must make a return to the court.

Subdivision (d) was added, effective March 1, 2013, to allow the magistrate to issue a warrant or summons based on information communicated by telephone or other reliable electronic means under the procedure set out in Rule 4.1.

Rule 9 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016, page

29; April 26-27, 2012, pages 9-10; January 26-27, 2012, page 26; January 29-30, 2004, page 26; March 23-25, 1972, pages 16-20; May 15-16, 1969, page 7; May 3-4, 1968, page 7; Fed.R.Crim.P. 9.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-12-03, 29-12-04, 29-12-06, 29-12-08.

CROSS REFERENCES: N.D.R.Crim.P. 4 (Arrest Warrant or Summons Upon Complaint); N.D.R.Crim.P. 4.1 (Complaint, Warrant, or Summons by Telephone or Other Reliable Electronic Means); N.D.R.Crim.P. 46 (Release from Custody); N.D.C.C. § 29-09-02 (Prosecution on Information—In what cases).

RULE 11. PLEAS

(a) Entering a Plea.

(1) In General. A defendant may plead not guilty or guilty.

(2) Conditional Plea. With the consent of the court and the prosecuting attorney, a defendant may enter a conditional plea of guilty, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion. The defendant, any defendant's attorney, and the prosecuting attorney must consent in writing to a conditional plea filed with the court. If the court accepts the conditional plea, it must enter an order. The resulting judgment must specify it is conditional. A defendant who prevails on appeal must be allowed to withdraw the plea.

(3) Failure to Enter a Plea. If a defendant refuses to enter a plea, the court must enter a plea of not guilty.

(b) Advice to defendant.

(1) The court may not accept a plea of guilty without first, by addressing the defendant personally [except as provided in Rule 43(b)] in open court, informing the defendant of and determining that the defendant understands the following:

(A) the right to plead not guilty, or having already so pleaded, to persist in that plea;

(B) the right to a jury trial;

(C) the right to be represented by counsel at trial and at every other stage of the proceeding and, if necessary, the right to have the counsel provided under Rule 44;

(D) the right at trial to confront and cross-examine adverse witnesses, to be protected from compelled self-incrimination, to testify and present evidence, and to compel the attendance of witnesses;

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

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

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

(H) any mandatory minimum penalty;

(I) the court's authority to order restitution; and

(J) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

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

plead guilty results from discussion between the prosecuting attorney and the defendant or the defendant's attorney.

(3) Determining the Factual Basis for a Plea. Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.

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

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

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

(c) Plea Agreement Procedure.

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

(A) not bring, or will move to dismiss, other charges;

(B) recommend, or agree not to oppose the defendant's request, that a particular sentence is appropriate; or

(C) agree that a specific sentence or sentencing range is the appropriate

disposition of the case.

(2) Disclosing a Plea Agreement. The parties must disclose the plea agreement in open court when the plea is offered, unless the court for good cause allows the parties to disclose the plea agreement in camera.

(3) Judicial Consideration of a Plea Agreement.

(A) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the court may accept the agreement, reject it, or defer a decision until the court has reviewed the presentence report.

(B) To the extent the plea agreement is of the type specified in Rule 11(c)(1)(B), the court must advise the defendant that the defendant has no right to withdraw the plea if the court does not follow the recommendation or request.

(4) Accepting a Plea Agreement. If the court accepts the plea agreement, it must inform the defendant that, to the extent the plea agreement is of the type specified in Rule 11(c)(1)(A) or (C), the agreed disposition will be included in the judgment.

(5) Rejecting a Plea Agreement. If the court rejects a plea agreement containing provisions of the type specified in Rule 11(c)(1)(A) or (C), the court must do the following on the record and in open court:

(A) inform the parties that the court rejects the plea agreement;

(B) advise the defendant personally that the court is not required to follow the plea agreement and give the defendant an opportunity to withdraw the plea;

and

(C) advise the defendant personally that if the plea is not withdrawn, the court may dispose of the case less favorably toward the defendant than the plea agreement contemplated.

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

(d) Withdrawing a Guilty Plea.

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

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

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

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

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

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

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

(e) Admissibility or Inadmissibility of a Plea, Plea Discussions, and Related Statements. The admissibility or inadmissibility of a plea, a plea discussion, and

any related statement is governed by N.D.R.Ev. 410.

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

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

EXPLANATORY NOTE

Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1, 1996; March 1, 2006; June 1, 2006; March 1, 2010; March 1, 2016; March 1, 2017.

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

Rule 11 was amended, effective March 1, 2006, in response to the

December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Subdivision (a) provides for the various alternative pleas which the defendant may enter. This subdivision does not permit a defendant to enter a plea of nolo contendere and differs from the federal rule in that respect.

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

Paragraph (a)(2) was amended, effective March 1, 2017, to clarify the procedure for entering a conditional plea of guilty.

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

Paragraph (b)(1) requires the court to determine if the defendant

understands the nature of the charge and requires the court to inform the defendant of and determine that the defendant understands the mandatory minimum punishment, if any, and the maximum possible punishment. The objective is to insure that the defendant knows what minimum sentence the judge MUST impose and the maximum sentence the judge MAY impose and, further, to explain the consecutive sentencing possibilities when the defendant pleads to more than one offense. This provision is included so that the judicial warning effectively serves to overcome subsequent objections by the defendant that the defendant's counsel gave the defendant erroneous information. Paragraph (b)(1) also specifies the constitutional rights the defendant waives by a plea of guilty and ensures a knowing and intelligent waiver of counsel is made. A similar requirement is found in Rule 5(b) governing the initial appearance.

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

Paragraph (b)(1) was amended, effective March 1, 2016, to include a new subparagraph (J) requiring the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere. The amendment, which is based on an amendment to Fed.R.Crim.P. 11, mandates a generic

warning, not specific advice concerning the defendant's individual situation.

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

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

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

Subdivision (c) provides for a plea agreement procedure. In doing so it gives recognition to the propriety of plea discussions and plea agreements, provided they are disclosed in open court and subject to acceptance or rejection by the trial judge. It is believed that where the defendant by the defendant's plea aids in insuring prompt and certain application of correctional measures, the proper ends of the criminal justice system are furthered because swift and certain punishment serves the ends of both general deterrence and the rehabilitation of the individual defendant. The procedure described in subdivision (c) is designed to

prevent abuse of plea discussions and agreements by providing appropriate and adequate safeguards.

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

Paragraph (c)(2) provides that the parties must disclose any plea agreement in open court or, for good cause, in camera. Paragraph (c)(3) gives the court, upon notice of the plea agreement, the option of accepting or rejecting the agreement or deferring its decision until receipt of the presentence report. The court must inform the defendant that it may choose not to accept a sentence recommendation made as part of a plea agreement. Decisions on plea agreements are left to the discretion of the individual trial judge.

Paragraph (c)(4) requires the court, if it accepts the plea agreement, to

inform the defendant that it will embody in the judgment and sentence the disposition provided in the plea agreement, or one more favorable to the defendant. This provision serves the dual purpose of informing the defendant immediately that the agreement will be implemented.

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

Paragraph (c)(6) requires that the court be notified of the existence of a plea agreement at the arraignment or at another time prior to trial fixed by the court unless it can be shown that for good cause this was not done. Having a plea entered at this stage provides a reasonable time for the defendant to consult with counsel and for counsel to complete any plea discussions with the attorney for the prosecution. The objective of the provision is to make clear that the court has authority to require a plea agreement to be disclosed sufficiently in advance of trial so as not to interfere with the efficient scheduling of criminal cases.

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

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

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

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

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

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, page 7; April 23-24, 2015, page 14; January 29-30, 2015, page 23; January 31-February 1, 2013, page 12; September 27, 2012, pages 18-21; January 29-30, 2009, pages 11-13, 19-20; April 27-28, 2006, pages 2-5, 15-17; September 22-23, 2005, pages 17-18; September 23-24, 2004, pages 5-9; April 29-30, 2004,

pages 28-30; January 26-27, 1995, pages 5-6; September 29-30, 1994, pages 2-4; April 28-29, 1994, pages 10-12; April 20, 1989, page 4; December 3, 1987, page 15; June 22, 1984, pages 11-16; April 26, 1984, pages 2-3; April 26-27, 1979, pages 4-7; May 25-26, 1978, pages 31-34; March 16-17, 1978, page 20; January 12-13, 1978, pages 5-6; January 10, 1977, page 4; April 24-26, 1973, pages 8-9; December 11-15, 1972, page 43; May 11-12, 1972, pages 2-6; November 18-20, 1971, pages 34-38; September 17-18, 1970, pages 1-6; May 3-4, 1968, page 9.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-13-02, 29-14-01, 29-14-02, 29-14-14, 29-14-15, 29-14-16, 29-14-17, 29-14-18, 29-14-19, 29-14-20, 29-14-21, 29-14-22, 29-14-23, 29-14-24, 29-14-26, 29-14-27, 33-12-17, 33-12-18.

CONSIDERED: N.D.C.C. § 31-13-03.

CROSS REFERENCE: N.D.R.Crim.P. 43 (Defendant's Presence); N.D.R.Crim.P. 44 (Right to and Appointment of Counsel); N.D.R.Ev. 410 (Offer to Plead Guilty; Nolo Contendere; Withdrawn Plea of Guilty); N.D.Sup.Ct.Admin.R. 52 (Contemporaneous Transmission by Reliable Electronic Means).

RULE 23.1 JURY EXPENSES

Jury expenses may not be assessed in a criminal case unless, without justifiable or reasonable excuse, a defendant fails to appear for a jury trial.

EXPLANATORY NOTE

Rule 23.1 was amended, effective March 1, 2006; March 1, 2017.

This rule is intended to assure a defendant in a criminal case that the assessment of jury expense need not be a factor in deciding whether a trial by jury should be demanded. The assessment of jury expense in a criminal case may tend to "chill" the constitutional right to a jury trial.

Rule 23.1 was amended, effective March 1, 2006, in response to the December 1, 2002, revision of the Federal Rules of Criminal Procedure. The language and organization of the rule were changed to make the rule more easily understood and to make style and terminology consistent throughout the rules.

Rule 23.1 was amended, effective March 1, 2017, to allow assessment of jury expenses when, without justifiable or reasonable excuse, a defendant fails to appear for a jury trial.

SOURCES: Joint Procedure Committee Minutes of September 24-25, 2015, page 21; January 27-28, 2005, page 19; March 16-17, 1978, page 16.

FORM 10. (RULE 41, N.D.R.Crim.P.)

STATE OF NORTH DAKOTA IN_____

(name of court)

County of _____. _____ Judicial District

SEARCH WARRANT

To any peace officer of this State:

Affidavit having been made before me by [name of affiant] that he has reason to believe that on [premises known as] [the person of] [name or describe with particularity] City of _____ in the County of _____, State of North Dakota, there is now being concealed property or evidence, namely [describe the property or evidence with particularity] which [was stolen or embezzled] [was used in the commission of a crime] [is in the possession of a person with the intent to use it as a means of committing a public offense] [constitutes or may constitute evidence of a criminal offense in violation of the laws of this state] [indicate other basis or grounds for seizure]; and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the [premises] [person] above-described.

*City of _____

**Before _____

(name of Judge)

SEARCH WARRANT

YOU ARE HEREBY COMMANDED, To search, within ten [10] days after receiving this warrant, the [premises] [person] named for the property or evidence specified; serving this warrant and making the search [in the daytime] [at any time, day or night (indicate reason for search at a time other than daytime)], and if the property or evidence is found there, to seize it, leaving a copy of this warrant and a receipt for the property or evidence seized, and prepare a written inventory of the property or evidence seized and bring the ~~property~~ inventory before me.

~~Given under my hand, with the seal of said court affixed, this _____ day of _____, 19__~~

Dated (Month) (Day), (Year).

_____

Magistrate

FORM 12. (N.D.R.Crim.P.)

STATE OF NORTH DAKOTA

In _____

(Name of Court)

County of _____.

_____ Judicial District

The State of North Dakota

vs.

Criminal No. _____

_____

BENCH WARRANT

Defendant

To: any peace officer of this state

An Order of the _____ Court having been entered on the _____ day of _____, 19__, ordering the said Defendant to be arrested and brought before the Court,

YOU ARE THEREFORE COMMANDED, To arrest forthwith [name of person to be arrested] and bring him before this Court for further disposition.

~~Given under my hand, with the seal of said court affixed, this _____ day of _____, 19—~~ Dated (Month) (Day), (Year).

_____

Magistrate or Clerk

*Before _____

(name of Judge)

**City of _____.

RULE 20. ~~TITLE AND CITATION~~ USE OF RESTRAINTS IN COURTROOM

~~These rules are titled, "North Dakota Rules of Juvenile Procedure," and may be cited as "N.D.R.Juv.P."~~

(a) Definition. “Restraint” means an instrument of physical restraint, including handcuffs, chains, irons and straight jackets.

(b) In General. Restraints must be removed prior to a courtroom proceeding unless a party or the detention, transport or juvenile court office staff request a finding by the court that the child poses an immediate and serious risk of dangerous or disruptive behavior or of escape or flight.

(c) Evidence. The party requesting the use of restraints in the courtroom must provide the court and the parties with facts to support a finding requiring use of restraints. The child must be given an opportunity to be heard regarding the use of restraints.

(d) Restraint Factors. Factors that may be considered by the court in reviewing a request for the child to remain in restraints during a courtroom proceeding include:

(1) the child’s record;

(2) the child’s temperament;

(3) the desperateness of the child’s situation;

(4) the security situation at the courtroom and courthouse, including special

security needs or escape risks;

(5) the child's physical condition; and

(6) whether there is an alternate means of providing security that would be less prejudicial to the child.

(e) Findings Required. If the court orders the use of restraints, the court must make case-specific findings of fact on the record in support of the order.

EXPLANATORY NOTE

Rule 20 was adopted effective March 1, 2017.

SOURCES: Joint Procedure Committee Minutes of September 24-25, 2015, pages 24-25.

RULE 21. TITLE AND CITATION

These rules are titled, "North Dakota Rules of Juvenile Procedure," and may be cited as "N.D.R.Juv.P."

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 that are final and appealable to the Supreme Court in the following types of cases are eligible for participation in ~~appellate~~ post-judgment 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 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. 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 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. 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 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 Oct 1, 2014; March 1, 2017.

Rule 5 was amended, effective Oct 1, 2014, to replace "Supreme Court clerk" with "clerk of the Supreme Court" and "paper" with "document."

Paragraph (d)(2) was amended, effective March 1, 2017, to clarify that Supreme Court judgments are not eligible for post-judgment mediation.

Sources: Joint Procedure Committee Minutes of September 24-25, 2016, page 24; January 31-February 1, 2013, pages 5-10; Joint Alternative Dispute Resolution Committee Minutes of June 25, 2012; October 25, 2011; 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 32. FORM OF BRIEFS, APPENDICES, AND OTHER 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;

(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 8½ 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.

(8) Page and Type-Volume Limitations.

(A) Word Limit for Proportional Typeface. If proportionately spaced typeface is used,a principal brief may not exceed 8,000 words, and a reply brief may not exceed 2,000 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 32 pages, and a reply brief may not exceed eight pages, excluding the table of contents, the table of citations, and any addendum.

(C) Word and Page Limit for N.D.R.Civ.P. 54(b) Certification. If proportionately spaced typeface is used, an argument on the appropriateness of N.D.R.Civ.P. 54(b) certification may not exceed 1,250 words. If monospaced typeface is used, an argument may not exceed five pages. Word and page limits for Rule 54(b) certification are in addition to the limits set forth in (7)(A) and (7)(B).

(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 ~~or 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 ½ by 11 inches in size. Documents of a size other than 8 ½ by 11 inches may be included in the appendix but must be folded or placed in a file or folder within the 8 ½ by 11 inch appendix.

(c) Form of Other 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.

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

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

(4) Other Documents. Any other 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) (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; March 1, 2013; October 1, 2014; March 1, 2017.

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) was amended, effective March 1, 2013, to decrease the page and type volume allowed in a primary brief and a response brief.

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) (2) was amended, March 1, 2017, to clarify that an appendix may include copies of documents found in the record.

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 32 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 28-29, 2016, page 8; September 26, 2013, pages 27-28; January 26-27, 2012, pages 8-9; September 30, 2011, pages 11-12; April 28-29, 2011, page 18-20; September 24-25, 2009, pages 15-16; 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 3.5 ELECTRONIC FILING IN DISTRICT COURTS

(a) Electronic Filing.

(1) Documents filed electronically in the district courts must be submitted through the Odyssey® electronic filing system.

(2) All documents filed after the initiating pleadings in criminal and juvenile cases must be filed electronically. All documents in civil, non-juvenile, cases must be filed electronically. A party who files a complaint in a civil case must electronically serve notice of filing on the other parties or their attorneys.

(3) Self-represented litigants and prisoners are exempt from the electronic filing requirement and may file paper documents in person, by mail, or by third party commercial carrier. Self-represented litigants and prisoners who wish to file documents by electronic means must use the Odyssey® system.

(4) On a showing of exceptional circumstances in a particular case, anyone may be granted leave of court to file paper documents. Original wills, codicils and other documents of independent legal significance may be filed as paper documents. Colored or shaded documents may be filed as paper documents if necessary to ensure legibility.

(5) A document filed electronically has the same legal effect as a paper document.

(6) Any signature on a document filed electronically is considered that of

the officer of the court or party it purports to be for all purposes. If it is established that the documents were transmitted without authority, the court must strike the filing.

(7) A party who electronically files a proposed order must identify the filing party in the Odyssey® ~~comments~~ filing description field.

(b) Filing Formats.

(1) Approved formats for documents filed electronically are WordPerfect (.wpd), Tagged Image File (.tif), Portable Document File (.pdf) and ASCII (.txt).

(2) All paragraphs must be numbered in documents filed electronically. Reference to material in such documents must be to paragraph number, not page number. Paragraph numbering is not required in exhibits, documents prepared before the action was commenced, or in documents not prepared by the parties or court.

(c) Time of Filing.

(1) A document in compliance with the rules and submitted electronically to the district court clerk by 11:59 p.m. local time is considered filed on the date submitted. A document electronically signed by the court is considered filed when the e-signature is affixed.

(2) After reviewing an electronically filed document, the district court clerk must inform the filer, through an e-mail generated by the Odyssey® system, whether the document has been accepted or rejected.

(3) If a document submitted for electronic filing is rejected, the time for filing is tolled from the time of submission to the time the e-mail generated by the Odyssey® system notifying the filer of rejection is sent. The document will be considered timely filed if resubmitted within three days after the notice of rejection. A party seeking to take advantage of this tolling provision must file and serve a separate document providing notice that the rejected document is being resubmitted under N.D.R.Ct. 3.5(c)(3).

(4) Any required filing fee must be paid by credit card or debit card at the time the document is filed.

(d) Confidentiality. In documents prepared for filing with the court, information that would otherwise be included in the document but required by N.D.R.Ct. 3.4 to be redacted in court documents must be separately filed in a reference sheet (confidential information form, see appendix) and may be included in those documents only by reference. Any document not complying with this order is subject to N.D.R.Ct. 3.4(g).

(e) Electronic Service.

(1) All documents filed electronically after the initiating pleadings must be served electronically through the Odyssey® system except for documents served on or by self-represented litigants and prisoners. On a showing of exceptional circumstances in a particular case, anyone may be granted leave of court to serve paper documents or to be exempt from receiving electronic service. Attorneys who

are required by rule or statute to serve documents on their own clients may serve paper documents.

(2) Except as provided in N.D.R.Ct. 3.5(e)(4), electronic service of a document is not effective if the party making service learns through any means that the document did not reach the person to be served.

(3) All attorneys must provide at least one e-mail address to the State Board of Law Examiners for accepting electronic service. Designated e-mail service addresses will be posted on the North Dakota Supreme Court website.

(4) For purposes of computation of time, any document electronically served must be treated as if it were mailed on the date of transmission. If an attorney who is not exempt from electronic service fails to provide an e-mail address for service or fails to accept or open electronically served e-mail, the server's attempt at electronic service constitutes delivery. Service made impossible due to an attorney's failure to provide an e-mail address must be shown by an affidavit or certificate of attempted service.

(f) Technical Issues; Relief. On a showing of good cause, the court may grant appropriate relief if electronic filing or electronic service was not completed due to technical problems.

(g) Filed Electronic Documents. An electronic document filed, accepted and docketed in the Odyssey® electronic filing system is a court record. No further proof that the document is a court record is required when the record is distributed

between courts or files using the Odyssey® system.

EXPLANATORY NOTE

Adopted effective January 15, 2013; amended effective April 15, 2013; June 1, 2013; June 1, 2015; March 1, 2016; March 1, 2017.

Rule 3.5 was originally adopted as N.D.Sup.Ct.Admin.O. 16 on March 1, 2006. Order 16 was later amended, effective March 1, 2008; March 1, 2009; August 1, 2010; March 1, 2011; July 1, 2012.

Order 16 was amended, effective July 1, 2012, to incorporate the provisions of the Order 16 Addendum (Filing in the District Court where Odyssey® Electronic Filing is Available) and N.D.Sup.Ct.Admin.O. 18 (Filing in Counties Using the Odyssey® Case Management System). The Order 16 Addendum and Order 18 were repealed, effective July 1, 2012.

In an appeal from an agency determination under N.D.C.C. § 28-32-42, the notice of appeal must be served on all the entities listed in the statute, some of whom may not be subject to electronic service through the Odyssey® system.

Subdivision (a) was amended, effective March 1, 2016, to clarify that self-represented litigants and prisoners who wish to file documents electronically must use the Odyssey® system and to require a party filing a proposed order to identify the party in the Odyssey® ~~comments~~ filing description field.

Paragraph (b)(1) was amended, effective June 1, 2015, to remove Word documents from the list of approved formats for electronic filing in the Odyssey®

system. If a court requests that parties submit editable documents such as proposed findings or orders, Word or other editable format documents still may be e-mailed to the court for that purpose but only after e-filing the documents in Odyssey in an approved format.

Subdivision (c) was amended, effective March 1, 2016, to clarify that a document electronically signed by the court is considered filed when the e-signature is affixed.

Subdivision (g) was added, effective March 1, 2017, to explain that once a document is accepted into the Odyssey® system, the document is a court record and no further proof that the document is a court record is needed when the record is distributed between courts or files using the Odyssey® system.

Sources: Joint Procedure Committee Minutes of May 12-13, 2016, pages 15-22; January 28-29, 2016, pages 8-11; April 23-24, 2015, pages 2-3; January 29-30, 2015, pages 13-14; April 25-26, 2013, pages 3-16; January 31-February 1, 2013, pages 2-5, 15-18; September 27, 2012, pages 14-21; April 29-30, 2010, page 21; April 24-25, 2008, pages 12-16; October 11-12, 2007, pages 3-5; April 26-27, 2007, pages 16-18; January 25, 2007, pages 15-16; September 23-24, 2004, pages 18-27.

Statutes Affected:

Considered: N.D.C.C. § 28-32-42.

Cross References: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with

the Court); N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction; Process; Service); N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Documents); N.D. Admission to Practice R. 1 (General Requirements for Admission).

RULE 8.4 SUMMONS IN ACTION FOR DIVORCE, SEPARATION OR TO DETERMINE PARENTAL RIGHTS AND RESPONSIBILITIES

(a) Restraining Provisions -- Divorce or Separation. A summons in a divorce or separation action must be issued by the clerk ~~under the seal of the court,~~ or by an attorney for a party to the action, and include the following restraining provisions:

(1) Neither spouse may dispose of, sell, encumber, or otherwise dissipate any of the parties' assets, except:

(A) For necessities of life or for the necessary generation of income or preservation of assets; or

(B) For retaining counsel to carry on or to contest the proceeding;

If a spouse disposes of, sells, encumbers, or otherwise dissipates assets during the interim period, that spouse shall provide to the other spouse an accounting within 30 days.

(2) Neither spouse may harass the other spouse.

(3) All currently available insurance coverage must be maintained and continued without change in coverage or beneficiary designation.

(4) Except for temporary periods, neither spouse may remove any of their minor children from North Dakota without the written consent of the other spouse or order of the court.

(5) Each summons must include the following statement in bold print:

If either spouse violates any of these provisions, that spouse may be in contempt of court.

(b) Restraining Provisions—Action to Determine Parental Rights and Responsibilities. A summons in an action to determine parental rights and responsibilities must be issued by the clerk ~~under seal of the court~~, or by an attorney for a party to the action, and include the following restraining provisions:

(1) Except for temporary periods, neither party may remove any of their minor children from North Dakota without the written consent of the other party or order of the court.

(2) Each summons must include the following statement in bold print:

If a party violates any of these provisions, that party may be in contempt of court.

(c) Applicability of Restraining Provisions. The restraining provisions contained in the summons apply to both parties upon service of the summons. The provisions are effective until otherwise provided by court order or by written stipulation of the parties filed with the court.

(d) Service by Publication. If a summons is served by publication under N.D.R.Civ.P. 4(e), the Rule 8.4 restraining provisions may be omitted from the published summons. A complete summons, including the Rule 8.4 restraining provisions, must be filed with the complaint and affidavit for service by

publication in the manner set out in N.D.R.Civ.P. 4(e)(2) and mailed under N.D.R.Civ.P. 4(e)(4).

EXPLANATORY NOTE

Rule 8.4 was amended, effective March 1, 2007; August 1, 2009; March 1, 2014; March 1, 2017.

Rule 8.4 was adopted, effective March 1, 1996.

Subdivisions (a) and (b) were amended, effective March 1, 2017, to eliminate the requirement that the clerk issue a summons "under the seal of the court."

Subdivision (c) was added, effective March 1, 2007, to require restraining provisions to be included in a summons in an action to determine parental rights and responsibilities.

Subdivision (d) was added, effective March 1, 2014, to allow omission of this rule's restraining provisions from the published version of a summons served under N.D.R.Civ.P. 4(e).

SOURCES: Joint Procedure Committee Minutes of September 24-25, 2015, pages 27-28; September 26, 2013, page 30; May 21-22, 2009, pages 44-45; April 27-28, 2006, pages 9-10; January 26, 2006, page 13; April 27-28, 1995, pages 17-21.

CROSS REFERENCE: N.D.R.Ct. Appendix A (Summons in Action for Divorce or Separation); N.D.R.Civ.P. 4 (Commencement of Action – Service of

Process, Pleadings, Motions and Orders).

RULE 11.2 WITHDRAWAL OF ATTORNEYS

(a) Notice of Withdrawal. An attorney's appearance for a party may only be withdrawn upon leave of court. Reasonable notice of the motion for leave to withdraw must be given by personal service, by registered or certified mail, or via a third-party commercial carrier providing a traceable delivery, directed to the party at the party's last known business or residence address. If the notice is undeliverable, the attorney must submit an affidavit to the court reciting the efforts made to give notice.

(b) Motion to Withdraw. The motion for leave to withdraw must be in writing and, unless another attorney is substituted, must state the last known address, e-mail addresses and telephone numbers of the party represented.

(c) Withdrawal on Appeal. If a notice of appeal is filed in a matter, any attorney seeking leave to withdraw must file the motion with the supreme court clerk.

(d) Limited Appearance. Rule 11.2 (a), (b), and (c) do not apply to attorneys representing a party under a notice of limited appearance served under N.D.R.Civ.P. 11(e) unless the attorney seeks to withdraw from the limited appearance prior to its completion. Upon completion of the limited appearance, the attorney must within 14 days file a “Certificate of Completion of Limited Appearance” with the court. Copies of the certificate must be provided to the client

and served upon opposing counsel or opposing party if unrepresented. After the filing, the attorney has no further obligation to represent the client. The filing of the certificate is considered to be the attorney's withdrawal of appearance and does not require court approval.

(e) Unfiled Cases. This rule does not apply to attorneys representing parties in civil actions that have not been filed with the court.

EXPLANATORY NOTE

Rule 11.2 was amended, effective March 1, 1999; March 1, 2000; March 1, 2006; March 1, 2009; March 1, 2015; August 1, 2016; March 1, 2017.

The March 1, 1999, amendments allow notice via a commercial carrier providing a traceable delivery service.

The March 1, 2000, amendments are stylistic.

Subdivision (a) was amended, effective March 1, 2015, to require the attorney, when notice of withdrawal cannot be delivered, to submit an affidavit regarding the efforts made to provide notice.

Subdivision (b) was amended, effective March 1, 2015, to require the attorney to provide the court with any known party e-mail addresses or telephone numbers.

Subdivision (c) was added, effective March 1, 2006, to make it clear that an attorney seeking to withdraw from representation in a matter that is on appeal must file a motion for leave to withdraw with the supreme court clerk. The supreme

court clerk will refer withdrawal motions involving court appointed attorneys to the trial court for decision and appointment of new counsel.

Subdivision (d) was added, effective March 1, 2009, to make it clear that an attorney who serves a notice of limited representation to represent a party for one or more matters in a case is not required to formally withdraw upon completion of activity covered by the notice. Under N.D.R.Civ.P. 11(e), however, the attorney must serve a notice of termination of limited representation when the attorney's involvement ends. Rule 11.2 and N.D.R.Civ.P. 5 and 11 were amended to permit attorneys to assist otherwise unrepresented parties on a limited basis without undertaking full representation of the party.

Subdivision (d) was amended, effective August 1, 2016, to clarify the attorney's responsibilities upon completing a limited appearance and to clarify that court approval is not required when the attorney completes the limited appearance and withdraws.

Subdivision (e) was added, effective , to clarify that an attorney is not required to seek leave to withdraw under this rule if the action has not been filed. Subdivision (e) does not modify an attorney's obligations under N.D. Rule of Prof. Conduct 1.16.

SOURCES: Joint Procedure Committee Minutes of January 28-29, 2016, page 24; September 24-25, 2015, pages 11-12; April 23-24, 2015, pages 16-25; January 29-30, 2015, page 22; September 25-26, 2014, pages 3-4; April 24-25,

2014, pages 26-27; January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-26; September 23-24, 2004, page 29; May 6-7, 1999, pages 15-16; January 29-30, 1998, page 22.

Cross Reference: N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other Papers), N.D.R.Civ.P. 11 (Signing of Pleadings, Motions and Other Papers; Representation to Court; Sanctions); N.D.R. Prof. Conduct 1.2 (Scope of Representation); N.D. Rule of Prof. Conduct 1.16 (Declining or Terminating Representation).

RULE 41. ACCESS TO COURT RECORDS

Section 1. Purpose.

The purpose of this rule is to provide a comprehensive framework for public access to court records. Every member of the public will have access to court records as provided in this rule.

Section 2. Definitions.

(a) "Court record," regardless of the form, includes:

(1) any document, information, or other thing that is collected, received, or maintained by court personnel in connection with a judicial proceeding;

(2) any index, calendar, docket, register of actions, official record of the proceedings, order, decree, judgment, minute, and any information in a case management system created by or prepared by court personnel that is related to a judicial proceeding; and

(3) information maintained by court personnel pertaining to the administration of the court or clerk of court office and not associated with any particular case.

(b) "Court record" does not include:

(1) other records maintained by the public official who also serves as clerk of court;

(2) information gathered, maintained or stored by a governmental agency or

other entity to which the court has access but which is not part of the court record as defined in this rule; and

(3) a record that has been disposed of under court records management rules.

(c) "Public access" means that the public may inspect and obtain a copy of the information in a court record, except as excluded under Section 5.

(d) "Remote access" means the ability to electronically search, inspect, or copy information in a court record without the need to physically visit the court facility where the court record is maintained.

(e) "Bulk distribution" means the distribution of all, or a significant subset, of the information in court records, as is and without modification or compilation.

(f) "Compiled information" means information that is derived from the selection, aggregation or reformulation by the court of some of the information from more than one individual court record.

(g) "Electronic form" means information in a court record that exists as:

(1) electronic representations of text or graphic documents;

(2) an electronic image, including a video image, of a document, exhibit or other thing;

(3) data in the fields or files of an electronic database; or

(4) an audio or video recording, analog or digital, of an event or notes in an electronic file from which a transcript of an event can be prepared.

Section 3. General Access Rule.

(a) Public Access to Court Records.

(1) Court records are accessible to the public except as prohibited by this rule.

(2) There must be a publicly accessible indication of the existence of information in a court record to which access has been prohibited, which indication may not disclose the nature of the information protected.

(3) A court may not adopt a more restrictive access policy or otherwise restrict access beyond that provided for in this rule, nor provide greater access than that provided for in this rule or as governed by N.D. Sup. Ct. Admin. R. 40 with respect to recordings of trial court proceedings.

(b) When Court Records May Be Accessed.

(1) Court records in a court facility must be available for public access during normal business hours. Court records in electronic form to which the court allows remote access will be available for access subject to technical systems availability.

(2) Upon receiving a request for access to a court record, the clerk of court must respond as promptly as practical. If a request cannot be granted promptly, or at all, an explanation must be given to the requestor as soon as possible. The requestor has a right to at least the following information: the nature of any problem preventing access and the specific statute, federal law, or court or

administrative rule that is the basis of the denial. The explanation must be in writing if desired by the requestor.

(3) The clerk of court is not required to search within a court record for specific information that may be sought by a requestor.

(c) Access to Court Records Filed Before March 1, 2009. Court records filed before the adoption of N.D.R.Ct. 3.4 may contain protected information listed under N.D.R.Ct. 3.4(a). This rule does not require the review and redaction of protected information from a court record that was filed before the adoption of N.D.R.Ct. 3.4 on March 1, 2009.

(d) Fees for Access. The court may charge a fee for access to court records in electronic form, for remote access, for bulk distribution or for compiled information. To the extent that public access to information is provided exclusively through a vendor, the court will ensure that any fee imposed by the vendor for the cost of providing access is reasonable.

Section 4. Methods of Access to Court Records.

(a) Access to Court Records at Court Facility.

(1) Public Access Terminal. A terminal will be available at each county courthouse for public access to court records stored statewide in the Odyssey system.

(~~1~~ 2) Request for Access to Other Records. Any person desiring ~~to inspect, examine, or copy~~ public access to a court record that is not available on the public

access terminal must make an oral or written request to the clerk of court. If the request is oral, the clerk may require a written request if the clerk determines that the disclosure of the record is questionable or the request is so involved or lengthy as to need further definition. The request must clearly identify the record requested so that the clerk can locate the record without doing extensive research. Continuing requests for a document not yet in existence may not be considered.

(~~2~~ A) Response to Request. The clerk of court is not required to allow access to more than ten files per day per requestor but may do so in the exercise of the clerk's discretion if the access will not disrupt the clerk's primary function. If the request for access and inspection is granted, the clerk may set reasonable time and manner of inspection requirements that ensure timely access while protecting the integrity of the records and preserving the affected office from undue disruption. The inspection area must be within full view of court personnel whenever possible. The person inspecting the records may not leave the court facility until the records are returned and examined for completeness.

(~~3~~ B) Response by Court. If a clerk of court determines there is a question about whether a record may be disclosed, or if a written request is made under Section 6(b) for a ruling by the court after the clerk denies or grants an access request, the clerk must refer the request to the court for determination. The court must use the standards listed in Section 6 to determine whether to grant or deny the access request.

(b) Remote Access to Court Records.

(1) In General. The following information in court records must be made remotely accessible to the public if it exists in electronic form, unless public access is restricted under this rule:

(~~1~~ A) litigant/party indexes to cases filed with the court;

(~~2~~ B) listings of new case filings, including the names of the parties;

(~~3~~ C) register of actions showing what documents have been filed in a case;

(~~4~~ D) calendars or dockets of court proceedings, including the case number and caption, date and time of hearing, and location of hearing; and

(~~5~~ E) reports specifically developed for electronic transfer approved by the state court administrator and reports generated in the normal course of business, if the report does not contain information that is excluded from public access under Section 5 or 6.

(2) Access Regulation.

(A) The Supreme Court may adopt and implement policies to regulate remote access to court records. These policies must be posted publicly on the Court's website.

(B) Attorneys licensed in North Dakota may apply to obtain remote access to court records stored in the Odyssey system.

(C) A record of a closed criminal case for which there is no conviction may not be remotely accessed through a name search except by an attorney granted

remote access to the Odyssey system.

(c) Requests for Bulk Distribution of Court Records.

(1) Bulk distribution of information in the court record is permitted for court records that are publicly accessible under Section 3(a).

(2) A request for bulk distribution of information not publicly accessible can be made to the court for scholarly, journalistic, political, governmental, research, evaluation or statistical purposes when the identification of specific individuals is ancillary to the purpose of the inquiry. Prior to the release of information under this subsection the requestor must comply with the provisions of Section 6.

(3) A court may allow a party to a bulk distribution agreement access to birth date, street address, and social security number information if the party certifies that it will use the data for legitimate purposes as permitted by law.

(d) Access to Compiled Information From Court Records.

(1) Any member of the public may request compiled information that consists solely of information that is publicly accessible and that is not already in an existing report. The court may compile and provide the information if it determines, in its discretion, that providing the information meets criteria established by the court, that the resources are available to compile the information and that it is an appropriate use of public resources. The court may delegate to its staff or the clerk of court the authority to make the initial determination to provide

compiled information.

(2) Requesting compiled restricted information.

(A) Compiled information that includes information to which public access has been restricted may be requested by any member of the public only for scholarly, journalistic, political, governmental, research, evaluation, or statistical purposes.

(B) The request must:

(i) identify what information is sought,

(ii) describe the purpose for requesting the information and explain how the information will benefit the public interest or public education, and

(iii) explain provisions for the secure protection of any information requested to which public access is restricted or prohibited.

(C) The court may grant the request and compile the information if it determines that doing so meets criteria established by the court and is consistent with the purposes of this rule, the resources are available to compile the information, and that it is an appropriate use of public resources.

(D) If the request is granted, the court may require the requestor to sign a declaration that:

(i) the data will not be sold or otherwise distributed, directly or indirectly, to third parties, except for journalistic purposes,

(ii) the information will not be used directly or indirectly to sell a product or

service to an individual or the general public, except for journalistic purposes, and

(iii) there will be no copying or duplication of information or data provided other than for the stated scholarly, journalistic, political, governmental, research, evaluation, or statistical purpose.

The court may make such additional orders as may be needed to protect information to which access has been restricted or prohibited.

Section 5. Court Records Excluded From Public Access.

The following information in a court record is not accessible to the public:

(a) information that is not accessible to the public under federal law;

(b) information that is not accessible to the public under state law, court rule, case law or court order, including:

(1) affidavits or sworn testimony and records of proceedings in support of the issuance of a search or arrest warrant pending the return of the warrant;

(2) information in a complaint and associated arrest or search warrant to the extent confidentiality is ordered by the court under N.D.C.C. §§ 29-05-32 or 29-29-22;

(3) documents filed with the court for in-camera examination pending disclosure;

(4) case information and documents in Child Relinquishment to Identified Adoptive Parent cases brought under N.D.C.C. ch. 14-15.1;

(5) domestic violence protection order files and disorderly conduct

restraining order files when the restraining order is sought due to domestic violence, except for orders of the court;

(6) documents in domestic violence protection order and disorderly conduct restraining order cases in which the initial petition was dismissed summarily by the court without a contested hearing;

(7) names of qualified or summoned jurors and contents of jury qualification forms if disclosure is prohibited or restricted by order of the court;

(8) records of voir dire of jurors, unless disclosure is permitted by court order or rule;

(9) records of deferred impositions of sentences or pretrial diversions resulting in dismissal;

(10) records of a case in which the magistrate finds no probable cause for the issuance of a complaint;

~~(10)~~ (11) unless exempted from redaction by N.D.R.Ct. 3.4(c), protected information:

(A) except for the last four digits, social security numbers, taxpayer identification numbers, and financial account numbers,

(B) except for the year, birth dates, and

(C) except for the initials, the name of an individual known to be a minor, unless the minor is a party, and there is no statute, regulation, or rule mandating nondisclosure;

~~(11)~~ (12) judge and court personnel work material, including personal calendars, communications from law clerks, bench memoranda, notes, work in progress, draft documents and non-finalized documents;

~~(12)~~ (13) party, witness and crime victim contact information gathered and recorded by the court for administrative purposes, including telephone numbers and e-mail, street and postal addresses~~.~~;

(14) the name of a patron of the North Dakota Legal Self Help Center or information sufficient to identify a patron or the subject about which a patron requested information.

(c) This rule does not preclude access to court records by the following persons in the following situations:

(1) federal, state, and local officials, or their agents, examining a court record in the exercise of their official duties and powers~~.~~;

(2) parties to an action and their attorneys examining the court file of the action, unless restricted by order of the court, but parties and attorneys may not access judge and court personnel work material in the court file.

(d) A member of the public may request the court to allow access to information excluded under Section 5 as provided in Section 6.

Section 6. Requests to Prohibit Public Access to Information in Court Records or to Obtain Access to Restricted Information.

(a) Request to Prohibit Access.

(1) A request to the court to prohibit public access to information in a court record may be made by any party to a case, by the individual about whom information is present in the court record, or on the court's own motion on notice as provided in Section 6(c).

(2) The court must decide whether there are sufficient grounds to overcome the presumption of openness of court records and prohibit access according to applicable constitutional, statutory and case law.

(3) In deciding whether to prohibit access the court must consider that the presumption of openness may only be overcome by an overriding interest. The court must articulate this interest along with specific findings sufficient to allow a reviewing court to determine whether the closure order was properly entered.

(4) The closure of the records must be no broader than necessary to protect the articulated interest. The court must consider reasonable alternatives to closure, such as redaction or partial closure, and the court must make findings adequate to support the closure. The court may not deny access only on the ground that the record contains confidential or closed information.

(5) In restricting access the court must use the least restrictive means that will achieve the purposes of this rule and the needs of the requestor.

(6) If the court concludes, after conducting the balancing analysis and making findings as required by paragraphs (1) through (5), that the interest of justice will be served, it may prohibit public Internet access to an individual

defendant's electronic court record in a criminal case:

(A) if the charges against the defendant are dismissed; or

(B) if the defendant is acquitted.

If the court grants a request to prohibit public Internet access to an electronic court record in a criminal case, the search result for the record must display the words "Internet Access Prohibited under N.D.Sup.Ct. Admin.R 41."

(b) Request to Obtain Access.

(1) A request to obtain access to information in a court record to which access is prohibited under Section 4(a), 5 or 6(a) may be made to the court by any member of the public or on the court's own motion on notice as provided in Section 6(c).

(2) In deciding whether to allow access, the court must consider whether there are sufficient grounds to overcome the presumption of openness of court records and continue to prohibit access under applicable constitutional, statutory and case law. In deciding this the court must consider the standards outlined in Section 6(a).

(c) Form of Request.

(1) The request must be made by a written motion to the court.

(2) The requestor ~~shall~~ must give notice to all parties in the case.

(3) The court may require notice to be given by the requestor or another party to any individuals or entities identified in the information that is the subject

of the request. When the request is for access to information to which access was previously prohibited under Section 6(a), the court must provide notice to the individual or entity that requested that access be prohibited.

Section 7. Obligations Of Vendors Providing Information Technology Support To A Court To Maintain Court Records.

(a) If the court contracts with a vendor to provide information technology support to gather, store, or make accessible court records, the contract will require the vendor to comply with the intent and provisions of this rule. For purposes of this section, "vendor" includes a state, county or local governmental agency that provides information technology services to a court.

(b) By contract the vendor will be required to notify the court of any requests for compiled information or bulk distribution of information, including the vendor's requests for such information for its own use.

EXPLANATORY NOTE

Adopted on an emergency basis effective October 1, 1996; Amended and adopted effective November 12, 1997; March 1, 2001; July 1, 2006; March 1, 2009; March 15, 2009; March 1, 2010; March 1, 2012; March 1, 2015; March 1, 2016; October 1, 2016; March 1, 2017. Appendix amended effective August 1, 2001, to reflect the name change of State Bar Board to State Board of Law Examiners.

Section 2(c) was amended, effective March 1, 2017, to clarify that the

public may have access to information in a court record except when access is excluded under Section 5.

Section 3(a)(1) was amended, effective October 1, 2016, to reference N.D. Sup. Ct. Admin. R. 40, which governs access to recordings of trial court proceedings.

Section 3(b)(3) was added, effective March 1, 2016, to clarify that the clerk of court is not required to search within a court record for specific information that may be sought by a requestor.

Section 3(c) was adopted, effective March 1, 2010, to state that protected information may be contained in court records filed before the adoption of N.D.R.Ct. 3.4.

Section 4(a) was amended, effective March 1, 2017, to specify that a terminal will be available at each county courthouse for public access to court records stored in the Odyssey system.

Section 4(b) was amended, effective March 1, 2017, to allow the Supreme Court to enact and implement policies to regulate remote access to court records and to limit remote access by name search to pre-conviction records in criminal cases. An additional amendment allows attorneys to apply for remote access to public court records stored in the Odyssey system.

Section 4(c) was amended, effective March 15, 2009, to allow parties who enter into bulk distribution agreements with the courts to have access to birth date,

street address, and social security number information upon certifying compliance with laws governing the security of protected information. Such laws include the Federal Fair Credit Reporting Act, the Gramm Leach Bliley Act, the USA Patriot Act and the Driver's Privacy Protection Act.

Section 5(b)(6) was amended, effective March 1, 2015, to clarify that the restriction on public access to documents in domestic violence protection order and disorderly conduct restraining order cases under this paragraph is limited to cases that were dismissed summarily.

Section 5(b)(8) was amended, effective March 15, 2009, to list types of protected information open to the public. The term "financial-account number" in Section 5(b)(8) includes any credit, debit or electronic fund transfer card number, and any other financial account number.

Section 5(b)(8) was amended, effective March 1, 2010, to incorporate the exemptions from redaction contained in N.D.R.Ct. 3.4(b). A document containing protected information that is exempt from redaction under N.D.R.Ct. 3.4(b) is accessible to the public.

Section 5(b)(9) was amended, effective March 1, 2017, to exclude pretrial diversion cases resulting in dismissal from public access.

Section 5(b)(10) was added, effective March 1, 2017, to exclude cases in which a magistrate finds no probable cause for the issuance of a complaint from public access.

Section 5(b)(12) was added, effective March 1, 2016, to exclude party, witness and crime victim contact information gathered and recorded by the court for administrative purposes from public access.

Section 5(b)(13) was added, effective March 1, 2017, to exclude information about patrons of the North Dakota Legal Self Help Center from public access.

Section 6(a)(6) was added, effective March 1, 2012, to provide a method for the court to prohibit public Internet access to an electronic case record when charges against a defendant are dismissed or the defendant is acquitted. A request under Section 6(a)(1) is required before the court can act to prohibit access under Section 6(a)(6).

Nothing in this rule or N.D.R.Ct. 3.4 precludes a clerk of court or the electronic case management system from identifying non-confidential records that match a name and date of birth or a name and social security number.

Joint Procedure Committee Minutes of September 29-30, 2016, pages 6-9; May 12-13, 2016, pages 22-25; January 28-29, 2016, pages 2-7; September 24-25, 2015, pages 15-16, 20-21; April 23-24, 2015, pages 8-10; April 24-25, 2014, page 27; April 28-29, 2011, pages 9-12; September 23-24, 2010, pages 16-20; September 24-25, 2009, pages 8-9; May 21-22, 2009, pages 28-44; January 29-20, 2009, pages 3-4; September 25, 2008, pages 2-6; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23,

2005, pages 6-16; April 28-29, 2005, pages 22-25; April 29-30, 2004, pages 6-13, January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12. Court Technology Committee Minutes of June 18, 2004; March 19, 2004; September 12, 2003; Conference of Chief Justices/Conference of State Court Administrators: Guidelines for Public Access to Court Records.

Cross Reference: N.D.R.Ct. 3.4 (Privacy Protection for Filings Made With the Court).

RULE 58. VEXATIOUS LITIGATION

Section 1. Purpose.

This rule addresses vexatious litigation, which impedes the proper functioning of the courts, while protecting reasonable access to the courts.

Section 2. Definition.

(a) Litigation means any civil or disciplinary action or proceeding, including any appeal from an administrative agency, any review of a referee order by the district court, and any appeal to the Supreme Court.

(b) Vexatious litigant means a person who habitually, persistently, and without reasonable grounds engages in conduct that:

(1) serves primarily to harass or maliciously injure another party in litigation;

(2) is not warranted under existing law and cannot be supported by a good faith argument for an extension, modification, or reversal of existing law;

(3) is imposed solely for delay;

(4) hinders the effective administration of justice;

(5) imposes an unacceptable burden on judicial personnel and resources; or

(6) impedes the normal and essential functioning of the judicial process.

(c) Presiding judge means the presiding judge of a district under N.D. Sup. Ct. Admin. R. 2.

Section 3. Pre-filing Order.

(a) The presiding judge may enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation or any new documents in existing litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court in the district where the litigation is proposed to be filed. A pre-filing order must contain an exception allowing the person subject to the order to file an application seeking leave to file.

(b) A district judge or referee may, on the judge's own motion or the motion of any party, refer the consideration of whether to enter a pre-filing order to the presiding judge. The presiding judge may also consider whether to enter such a pre-filing order on the judge's own motion or the motion of a party if the litigant with respect to whom the pre-filing order is to be considered is a party to an action before the presiding judge.

Section 4. Finding.

A presiding judge may find a person to be a vexatious litigant based on a finding that:

(a) in the immediately preceding seven-year period the person has commenced, prosecuted or maintained as a self-represented party at least three litigations, other than in small claims court, that have been finally determined adversely to that person; or

(b) after a litigation has been finally determined against the person, the

person has repeatedly relitigated or attempted to relitigate, as a self-represented party, either

(1) the validity of the determination against the same defendant or defendants as to whom the litigation was finally determined; or

(2) the cause of action, claim, controversy, or any of the issues of fact or law, determined or concluded by the final determination against the same defendant or defendants as to whom the litigation was finally determined; or

(c) in any litigation while acting as a self-represented party, the person repeatedly files unmeritorious motions, pleadings, or other papers, conducts unnecessary discovery, or engages in other tactics that are frivolous or solely intended to cause unnecessary burden, expense or delay; or

(d) the person has previously been declared to be a vexatious litigant by any state or federal court of record in any action or proceeding.

Section 5. Notice.

If the presiding judge finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the presiding judge must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If a response is filed, the presiding judge may, in the judge's discretion, grant a hearing on the proposed order. If no response is

filed within 14 days, or if the presiding judge concludes following a response and any subsequent hearing that there is a basis for issuing the order, the presiding judge may issue the pre-filing order.

Section 6. Appeal. A pre-filing order entered by a presiding judge designating a person as a vexatious litigant may be appealed to the Supreme Court under N.D.C.C. § 28-27-02 and N.D.R.App.P. 4.

Section 7. Supreme Court Order.

The Supreme Court may, on the Court's own motion or the motion of any party to an appeal, enter a pre-filing order prohibiting a vexatious litigant from filing any new litigation in the courts of this state as a self-represented party without first obtaining leave of a judge of the court where the litigation is proposed to be filed. If the Supreme Court finds that there is a basis to conclude that a person is a vexatious litigant and that a pre-filing order should be issued, the Court must issue a proposed pre-filing order along with the proposed findings supporting the issuance of the pre-filing order. The person who would be designated as a vexatious litigant in the proposed order will have 14 days to file a written response to the proposed order and findings. If no response is filed within 14 days, or if the Supreme Court concludes following a response and any subsequent hearing that there is a basis for issuing the order, the pre-filing order may be issued.

Section 8. Sanctions; New Litigation.

(a) Disobedience of a pre-filing order entered pursuant to this rule may be

punished as a contempt of court.

(b) A judge may permit the filing in the courts of this state of new litigation or any documents in existing litigation by a vexatious litigant subject to a pre-filing order only if it appears that the litigation or document has merit and has not been filed for the purpose of harassment or delay.

(c) If a vexatious litigant subject to a pre-filing order files any litigation without first obtaining the required leave of a judge to file the litigation, the court may dismiss the action. In addition, any party named in the litigation may file a notice stating that the plaintiff is a vexatious litigant subject to a pre-filing order. The filing of such notice stays the litigation. The litigation must be dismissed by the court unless the plaintiff, within 14 days of the filing of the notice, obtains an order from the judge permitting the litigation to proceed. If the judge issues an order permitting the litigation to proceed, the time for the defendants to answer or respond to the litigation will begin to run when the defendants are served with the order of the judge.

Section 9. Roster.

The clerk of court must provide a copy of any pre-filing order issued under this rule to the State Court Administrator, who will maintain a list of vexatious litigants subject to pre-filing orders.

EXPLANATORY NOTE

Rule 58 was adopted, effective March 1, 2017.

SOURCES: Joint Procedure Committee Minutes of May 12-13, 2016, pages 25-29. Idaho Ct. Admin. R. 59.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. §§ 27-05-06, 27-05-22, 27-05-23, 28-27-02.