

IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

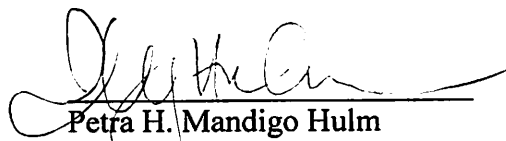
Supreme Court No. 20170288

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

[¶ 1] On July 24, 2017, the Joint Procedure Committee submitted a petition to approve proposed amendments to North Dakota Rules of Civil Procedure 6, 11, and 36; North Dakota Rules of Criminal Procedure 17 and 45; North Dakota Rules of Appellate Procedure 4, 26, 29 and 32; North Dakota Rule of Juvenile Procedure 21; and North Dakota Rules of Court 3.1, 3.5, 8.3.1, Appendix C of Rule 8.3, Appendix K of Rule 3.5, Appendix L and M of 8.3.1. A comment period was provided through September 15, 2017. On October 16, 2017, the Joint Procedure Committee submitted additional proposed amendments to North Dakota Rule of Court 3.5 and Appendix K, and North Dakota Rules of Civil Procedure 7 and 10. A synopsis of the proposal and additional proposed amendments are available at <http://www.ndcourts.gov/Court/Notices/Notices.htm>. The Court considered the matter, and

[¶ 2] **ORDERED**, that as further amended by the Court, North Dakota Rules of Civil Procedure 6, 7, 10, 11, and 36; North Dakota Rules of Criminal Procedure 17 and 45; North Dakota Rules of Appellate Procedure 4, 26, 29, and 32; North Dakota Rule of Juvenile Procedure 21; and North Dakota Rules of Court 3.1, 3.5, 8.3.1, Appendix C of Rule 8.3, Appendix K of Rule 3.5, and Appendix L and M of 8.3.1. are ADOPTED, effective March 1, 2018.

[¶ 3] The Supreme Court of the State of North Dakota, convened on December 7, 2017, with the Honorable Gerald W. Vandewalle, Chief Justice, and the Honorable Daniel J. Crothers, the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, and the Honorable Jon J. Jensen, Justices, and directed the Chief Deputy Clerk of the Supreme Court to enter the above order.


Petra H. Mandigo Hulm
Chief Deputy Clerk
North Dakota Supreme Court

RULE 6. COMPUTING AND EXTENDING TIME; TIME FOR MOTION PAPERS

1 (a) Computing Time. The following rules apply in computing any time
2 period specified in these rules, or in any local rule, court order, or statute that does
3 not specify a method of computing time.

4 (1) Period Stated in Days or a Longer Unit. When the period is stated in
5 days or a longer unit of time:

6 (A) exclude the day of the event that triggers the period;

7 (B) count every day, including intermediate Saturdays, Sundays, and legal
8 holidays; and

9 (C) include the last day of the period, but if the last day is a Saturday,
10 Sunday, or legal holiday, the period continues to run until the end of the next day
11 that is not a Saturday, Sunday, or legal holiday.

12 (2) Period Stated in Hours. When the period is stated in hours:

13 (A) begin counting immediately on the occurrence of the event that triggers
14 the period;

15 (B) count every hour, including hours during intermediate Saturdays,
16 Sundays, and legal holidays; and

17 (C) if the period would end on a Saturday, Sunday, or legal holiday, the
18 period continues to run until the same time on the next day that is not a Saturday,
19 Sunday, or legal holiday.

20 (3) Inaccessibility of the Clerk's Office. Unless the court orders otherwise,

21 if the clerk's office is inaccessible:

22 (A) on the last day for filing under Rule 6(a)(1), then the time for filing is
23 extended to the first accessible day that is not a Saturday, Sunday, or legal holiday;

24 or

25 (B) during the last hour for filing under Rule 6(a)(2), then the time for filing
26 is extended to the same time on the first accessible day that is not a Saturday,
27 Sunday, or legal holiday.

28 (4) "Last Day" Defined. Unless a different time is set by a statute, local rule,
29 or court order, the last day ends:

30 (A) for electronic filing, at midnight in the court's time zone; and

31 (B) for filing by other means, when the clerk's office is scheduled to close.

32 (5) "Next Day" Defined. The "next day" is determined by continuing to
33 count forward when the period is measured after an event and backward when
34 measured before an event.

35 (6) "Legal Holiday" Defined. As used in this rule, "legal holiday" means a
36 day set aside as a holiday under N.D.C.C. §§ 1-03-01, 1-03-02 and 1-03-02.1.

37 (b) Extending Time.

38 (1) In General. When an act may or must be done within a specified time,
39 the court may, for good cause, extend the time;

40 (A) with or without motion or notice if the court acts, or if a request is
41 made, before the original time or its extension expires; or

42 (B) on motion made after the time has expired if the party failed to act

43 because of excusable neglect.

44 (2) Exceptions. A court cannot extend the time to act under Rules 4(e) (7),
45 50(b) and (d), 52(b), 59(i) and (j), and 60(b).

46 (c) [Rescinded]

47 (d) Motions and Notices of Hearing.

48 (1) In General. If an evidentiary hearing is requested, the written motion
49 and notice of the motion must be served at least 21 days before the time specified
50 for the hearing, with the following exceptions:

51 (A) when the motion be heard ex parte;

52 (B) when these rules set a different period; or

53 (C) when a court order—which a party may, for good cause, apply for ex
54 parte—sets a different period.

55 (e) ~~Service Made Electronically~~, Additional Time After Service Made by
56 Mail or Third-Party Commercial Carrier.

57 (1) Whenever a party must or may act within a prescribed period after
58 service and service is made ~~electronically~~, by mail or third-party commercial
59 carrier under Rule 5, three days are added after the prescribed period would
60 otherwise expire under N.D.R.Civ.P. 6(a).

61 (2) If service is made by mail or third-party commercial carrier under Rule
62 4, the prescribed period begins running upon delivery.

63 (3) ~~For purposes of computation of time, any document electronically~~
64 ~~served must be treated as if it were mailed on the date of transmission.~~

65 EXPLANATORY NOTE

66 Rule 6 was amended, effective 1971; March 1, 1990; on an emergency
67 basis, March 1, 1992; January 1, 1995; March 1, 1997; March 1, 1999; March 1,
68 2001; March 1, 2004; March 1, 2007; March 1, 2009; March 1, 2011; March 1,
69 2014; March 1, 2016; March 1, 2018.

70 ~~Legal holidays in North Dakota are listed in N.D.C.C. ch. 1-03.~~

71 Rule 6 was amended, effective March 1, 2011, in response to the December
72 1, 2007, revision of the Federal Rules of Civil Procedure. The language and
73 organization of the rule were changed to make the rule more easily understood and
74 to make style and terminology consistent throughout the rules.

75 Subdivision (a) was amended, effective March 1, 2011, to simplify and
76 clarify the provisions that describe how deadlines are computed. Under the
77 previous rule, intermediate weekends and holidays were omitted when computing
78 short periods but included when computing longer periods. Under the amended
79 rule, intermediate weekends and holidays are counted regardless of the length of
80 the specified period.

81 Subdivision (a) was amended, effective March 1, 2018, to add a new
82 paragraph (a)(6) defining “legal holiday”.

83 Paragraph (b)(2) was amended, effective March 1, 2011, to clarify that there
84 can be no extension of the times set by provisions in Rules 4(e)(7), 52(b), 59(i) and
85 (j), and 60(b).

86 Paragraph (b)(2) was amended, effective March 1, 2014, to add a reference

87 to Rule 50(b) and (d) and to delete a reference to Rule 50(c).

88 Subdivision (d) was amended, effective March 1, 1997, because Rule 3.2,
89 N.D.R.Ct., governs when papers supporting or opposing a motion must be served.
90 The March 1, 2001 amendment changed from 14 to 18 days when a motion must
91 be served before it may be heard.

92 Paragraph (d)(1) was amended, effective March 1, 2011, to change from 18
93 to 21 days when a motion must be served before the time specified for the hearing.

94 Paragraph (d)(1) was amended, effective March 1, 2016, to clarify that, if
95 an evidentiary hearing is requested, the written motion and notice of motion must
96 be served 21 days before the time specified for the hearing.

97 Subdivision (e) was amended, effective March 1, 1999, to make the
98 three-day extension for service by mail applicable when service is via third-party
99 commercial carrier. The proof of service must contain the date of mailing or
100 deposit with the third-party commercial carrier.

101 Subdivision (e) was amended, effective March 1, 2004, to restrict
102 applicability of the three-day extension for service by mail or third-party
103 commercial carrier to items served under Rule 5. The time of service for an item
104 served by mail or third-party commercial carrier under Rule 4 is the time the item
105 is delivered to or refused by the recipient.

106 Subdivision (e) was amended, effective March 1, 2007, to clarify how to
107 count the three-day extension for service by mail or third-party commercial carrier.
108 Under the amendment, a party that is required or permitted to act within a

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

116 ~~Subdivision (e) was amended, effective March 1, 2009, to provide that a~~
117 ~~document served by electronic means is treated as if it were mailed on the date of~~
118 ~~transmission. Service by electronic means includes service by facsimile~~
119 ~~transmission.~~

120 Subdivision (e) was amended, effective March 1, 2018, to remove
121 service by electronic means from the modes of service that allow three added days
122 to act after being served. Electronic service after business hours, or just before or
123 during a weekend or holiday, may result in a practical reduction in the time
124 available to respond. Extensions of time may be warranted to prevent prejudice.

125 SOURCES: Joint Procedure Committee Minutes of April 27, 2017, pages 5-
126 7; January 26-27, 2017, pages 28-29; April 23-24, 2015, page 6; January 29-30,
127 2015, pages 17-19; September 26, 2013, page 11; April 25-26, 2013, pages 26-27;
128 April 29-30, 2010, pages 4-5; April 24-25, 2008, January 24, 2008, page 15; page
129 21; April 27-28, 2006, pages 6-7; January 26, 2006, page 11; January 30-31, 2003,
130 pages 4-6; September 26-27, 2002, pages 15-18; January 27-28, 2000, pages

131 16-17; September 23-24, 1999, pages 20-21; January 29-30, 1998, page 18; April
132 25, 1996, pages 8-11; April 28-29, 1994, pages 15-17; January 27-28, 1994, pages
133 24-25; September 23-24, 1993, pages 14-16 and 20; April 29-30, 1993, page 20;
134 November 7-8, 1991, page 3; October 25-26, 1990, page 12; April 20, 1989, page
135 2; December 3, 1987, page 11; June 22, 1984, pages 30-31; September 20-21,
136 1979, pages 5-6; Fed.R.Civ.P. 6.

137 STATUTES AFFECTED:

138 CONSIDERED: N.D.C.C. ch. 1-03.

139 CROSS REFERENCE: N.D.R.Civ.P. 4 (Persons Subject to Jurisdiction
140 Process Service), N.D.R.Civ.P. 5 (Service and Filing of Pleadings and Other
141 Papers), N.D.R.Civ.P. 52 (Findings by the Court), N.D.R.Civ.P. 59 (New Trials
142 Amendment of Judgments), N.D.R.Civ.P. 60 (Relief From Judgment or Order);
143 N.D.R.Crim.P. 45 (Time); N.D.R.Ct. 3.2 (Motions).

RULE 7. PLEADINGS ALLOWED—FORM OF MOTIONS ~~AND OTHER PAPERS~~

- 1 (a) Pleadings. Only these pleadings are allowed:
- 2 (1) a complaint;
- 3 (2) an answer to a complaint;
- 4 (3) an answer to a counterclaim designated as a counterclaim;
- 5 (4) an answer to a crossclaim;
- 6 (5) a third-party complaint;
- 7 (6) an answer to a third-party; and
- 8 (7) if the court orders one, a reply to an answer or a third-party answer.

9 (b) ~~Motions and Other Papers.~~

10 (1) In General. A request for a court order must be made by motion. The

11 motion must:

- 12 (A) be in writing, unless made during a hearing or trial;
- 13 (B) state with particularity the grounds for seeking the order,
- 14 (C) state the relief sought.

15 ~~The writing requirement is fulfilled if the motion is stated in a written~~

16 ~~notice of the hearing of the motion.~~

17 (2) Form. The rules governing captions and other matters of form in

18 pleadings apply to motions and other ~~papers~~ documents.

19 EXPLANATORY NOTE

20 Rule 7 was amended, effective March 1, 1986; March 1, 2011; March 1, 2018.

21 This rule is derived from Fed.R.Civ.P. 7.

22 Under paragraph (a)(7), a reply to an answer or third-party answer is
23 allowed only on court order.

24 Subdivision (b) was amended, effective March 1, 2018, to eliminate
25 language allowing a motion to be stated as part of a notice of motion.

26 Rule 7 was amended, effective March 1, 2011, in response to the December
27 1, 2007, revision of the Federal Rules of Civil Procedure. The language and
28 organization of the rule were changed to make the rule more easily understood and
29 to make style and terminology consistent throughout the rules.

30 SOURCES: Joint Procedure Committee Minutes of September 28, 2017,
31 pages 11-12; January 24, 2008, page 15; April 26, 1984, page 25; January 20,
32 1984, page 15; September 20-21, 1979, page 6; Fed.R.Civ.P. 7.

33 CROSS REFERENCE: N.D.R.Civ.P. 8 (General Rules of Pleading), 10
34 (Form of Pleadings), 11 (Signing of Pleadings), 13 (Counterclaim and
35 Cross-Claim), 14 (Third-Party Practice), and 15 (Amended and Supplemental
36 Findings); N.D.R.Crim.P. 47 (Motions), N.D.R.Ct. 3.2 (Submission on Briefs and
37 Filing).

RULE 10. FORM OF PLEADINGS

1 (a) Caption; Names of Parties. Every pleading must have a caption with the
2 court's name and the county in which the action is brought, a title that names the
3 parties, and a Rule 7(a) designation. The title of the complaint must name all the
4 parties; the title of other pleadings may name the first party on each side and refer
5 generally to other parties. If the State of North Dakota is a real party in interest in
6 an action and was not named as a party in the original title, its name must be added
7 to the title.

8 (b) Paragraphs; Separate Statements. A party must state its claims or
9 defenses in numbered paragraphs, each limited as far as practicable to a single set
10 of circumstances. A later pleading may refer by number to a paragraph in an earlier
11 pleading. If doing so would promote clarity, each claim founded on a separate
12 transaction or occurrence—and each defense other than a denial—must be stated
13 in a separate count or defense.

14 (c) Adoption by Reference; ~~Attached Instruments~~. A statement in a pleading
15 may be adopted by reference elsewhere in the same pleading or in any other
16 pleading or motion. A ~~copy of a written instrument attached to~~ document filed in
17 conjunction with a pleading is a part of the pleading for all purposes.

EXPLANATORY NOTE

18 Rule 10 was amended, effective July 1, 1980; March 1, 2007; March 1,
19 2011; March 1, 2018.
20

21 Rule 10 is adapted from Fed.R.Civ.P. 10.

22 Rule 10 was amended, effective March 1, 2011, in response to the
23 December 1, 2007, revision of the Federal Rules of Civil Procedure. The language
24 and organization of the rule were changed to make the rule more easily understood
25 and to make style and terminology consistent throughout the rules.

26 Subdivision (a) was amended, effective March 1, 2007, to specify that, if
27 the State of North Dakota is a real party in interest to an action, or if it becomes a
28 real party in interest, it must be named as a party in the title, regardless of whether
29 it was named as a party originally. In some cases, the state may become a real
party
30 in interest by action of law. See, e.g., N.D.C.C. § 14-09-09.26.

31 Subdivision (c) was amended, effective March 1, 2018, to allow a
32 document filed in conjunction with a pleading to become part of the pleading.

33 SOURCES: Joint Procedure Committee Minutes of September 28, 2017,
34 page 12; November 29-30, 1979, page 4; September 20-21, 1979, pages 7 and
35 19; Fed.R.Civ.P. 10.

36 STATUTES AFFECTED:

37 Considered: N.D.C.C. § 14-09-09.26

38 CROSS REFERENCE: N.D.R.Civ.P. 7 (Pleadings Allowed-Form of
39 Motions), N.D.R.Civ.P. 8 (General Rules of Pleading), and N.D.R.Civ.P. 25
40 (Substitution of Parties); N.D.R.Ct. 3.1 (Pleadings).

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

1 (a) Signature.

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

11 (2) Notarization Not Required. Unless specifically required by court rule, a
12 document filed with the court in a civil action is not required to be notarized.
13 When any matter is required or permitted to be supported, evidenced, established,
14 or proved by the sworn declaration, verification, certificate, statement, oath, or
15 affidavit, in writing of the person making the same (other than a deposition, or an
16 oath of office, or an oath required to be taken before a specified official other than
17 a notary public), such matter may, with like force and effect, be supported,
18 evidenced, established, or proved by the unsworn declaration, certificate,
19 verification, or statement, subscribed by the maker as true under penalty of

perjury.

20 and dated, in substantially the following form: "I declare (or certify, verify, or
21 state) under penalty of perjury that the foregoing is true and correct." In addition to
22 the signature, the date of signing and the county and state where the document was
23 signed shall be noted on the document.

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

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

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

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

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

39 (c) Sanctions.

40 (1) In General. If, after notice and a reasonable opportunity to respond, the

41 court determines that Rule 11(b) has been violated, the court may impose an
42 appropriate sanction on any attorney, law firm, or party that violated the rule or is
43 responsible for the violation. Absent exceptional circumstances, a law firm must
44 be held jointly responsible for a violation committed by its partner, associate, or
45 employee.

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

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

59 (4) Nature of a Sanction. A sanction imposed under this rule must be
60 limited to what suffices to deter repetition of the conduct or comparable conduct
61 by others similarly situated. The sanction may include nonmonetary directives; an
62 order to pay a penalty into court; or, if imposed on motion and warranted for

63 effective deterrence, an order directing payment to the movant of part or all of the
64 reasonable attorney's fees and other expenses directly resulting from the violation.

65 (5) Limitations on Monetary Sanctions. The court must not impose a
66 monetary sanction:

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

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

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

73 (e) Limited Representation.

74 (1) Preparation of Pleadings. An attorney who complies with Rule 1.2 of the
75 N.D. Rules of Prof. Conduct, may prepare pleadings, briefs, and other documents
76 to be filed with the court by a self-represented party. The attorney's preparation of
77 pleadings, briefs, or other documents does not constitute an appearance by the
78 attorney in the case and no notice under Rule 11(e)(2) is required. Any filing
79 prepared under this paragraph must be signed by the party designated as
80 "self-represented."

81 (2) Limited Appearance.

82 (A) In General. An attorney who complies with Rule 1.2 of the N.D. Rules
83 of Prof. Conduct, may make a "limited appearance" on behalf of an otherwise
84 self-represented party involved in a proceeding to which these rules apply.

85 (B) Notice. An attorney who makes a limited appearance on behalf of an
86 otherwise self-represented party must serve a notice of limited appearance on each
87 party involved in the matter. The notice must state precisely the scope of the
88 limited appearance. An attorney who seeks to act beyond the stated scope of the
89 limited appearance must serve an amended notice of limited appearance. Upon
90 completion of the limited appearance, the attorney must file and serve a
91 "Certificate of Completion of Limited Appearance" as required by N.D.R.Ct.
92 11.2(d).

93 (C) Filing. If the action is filed, the party who received assistance of an
94 attorney on a limited basis must file the notice of limited appearance with the
95 court.

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

99 EXPLANATORY NOTE

100 Rule 11 was amended, effective March 1, 1986; March 1, 1990; March 1,
101 1996; March 1, 1997; August 1, 2001; March 1, 2009; March 1, 2011; March 1,
102 2014; August 1, 2016; March 1, 2018.

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

104 Rule 11 was revised, effective March 1, 1996, in response to the 1993
105 revision of Fed.R.Civ.P. 11. North Dakota's rule differs from the federal rule in the
106 following respects: 1) North Dakota's rule requires attorneys to cite their State

107 Board of Law Examiners identification number when signing papers; and 2) North
108 Dakota's rule does not require allegations or denials to be specifically identified
109 when immediate evidentiary support is lacking.

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

113 Subdivision (a) was amended, effective March 1, 2018, to state that
114 notarization is not generally required for documents filed in civil actions and to
115 provide a method for using unsworn statements made under a penalty or perjury.

116 Subdivision (e) was added, effective March 1, 2009, to permit an attorney
117 to file a notice of limited representation indicating an intent to represent a party for
118 one or more matters in a case, but not for all matters. An attorney must also serve a
119 notice of termination of limited representation when the attorney's involvement
120 ends. Rule 5, Rule 11 and N.D.R.Ct. 11.2, were amended to permit attorneys to
121 assist an otherwise self-represented party on a limited basis without undertaking
122 full representation of the party. Under N.D.R. Prof. Conduct 1.2 (c) a lawyer may
123 limit the scope of the representation if a client consents after consultation.

124 Subdivision (e) was amended, effective August 1, 2016, to add new
125 paragraphs (1) and (2) providing additional details on the services an attorney may
126 perform while assisting a self-represented party on a limited basis and indicating
127 when notice of these services must be provided to other parties and the court. The
128 new paragraphs are based on language from Neb. R. Prof. Conduct 3-501.2.

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

133 SOURCES: Joint Procedure Committee Minutes of September 29-30, 2016,
134 pages 20-22; September 24-25, 2015, pages 2-11; April 23-24, 2015, pages 16-25;
135 January 29-30, 2015, page 22; April 25-26, 2013, page 16; September 24-25, 2009,
136 pages 13-14; January 24, 2008, pages 2-7; October 11-12, 2007, pages 20-26;
137 September 28-29, 1995, pages 2-3; April 27-28, 1995, pages 3-4; January 26-27,
138 1995, pages 8-10; September 29-30, 1994, pages 24-26; April 20, 1989, page 2;
139 December 3, 1987, page 11; April 26, 1984, pages 25-26; January 20, 1984, pages
140 16-18; September 20-21, 1979, page 7; Fed.R.Civ.P. 11.

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

RULE 17. SUBPOENA

1 (a) Content.

2 (1) A subpoena must state the court's name and the title of the action, and
3 command the witness to attend and testify at the time and place the subpoena
4 specifies. The clerk or magistrate shall issue a signed blank subpoena, or a signed
5 blank subpoena for the production of documentary evidence or objects, to the party
6 requesting it, and that party must fill in the blanks before the subpoena is served.

7 (2) The attorney for a party to any proceeding may issue a subpoena, or a
8 subpoena for the production of documentary evidence or objects, in the court's
9 name. A subpoena issued by an attorney has the same effect as a subpoena issued
10 under Rule 17(a)(1). The subpoena must state the attorney's name, office address,
11 and the party for whom the attorney appears.

12 (b) [Deleted].

13 (c) Producing Documents and Objects.

14 (1) In General. A subpoena may order the witness to produce any books,
15 papers, documents, data, or other objects the subpoena designates. The court may
16 direct the witness to produce the designated items in court before trial or before
17 they are to be offered in evidence. When the items arrive, the court may permit the
18 parties and their attorneys to inspect all or part of them.

19 (2) Quashing or Modifying the Subpoena. On motion made promptly, the
20 court may quash or modify the subpoena if compliance would be unreasonable or

21 oppressive.

22 (d) Service. A peace officer or any nonparty who is at least 18 years old
23 may serve a subpoena. The server must deliver a copy of the subpoena to the
24 witness and must tender to the witness one day's witness attendance fee and the
25 legal mileage allowance. The server need not tender the attendance fee or mileage
26 allowance when the prosecution or an indigent defendant has requested the
27 subpoena.

28 (e) Place of service.

29 (1) In North Dakota. A subpoena requiring a witness to attend a hearing or
30 trial may be served anywhere within North Dakota.

31 (2) Witness Outside State. Service on a witness outside this state may be
32 made only as provided by law.

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

35 (f) Issuing a Deposition Subpoena.

36 (1) Issuance. An attorney for a party to the proceeding may issue a
37 subpoena for any witness to appear or produce documentary evidence at a
38 deposition. An order to take a deposition authorizes the clerk of court or a
39 magistrate to issue a subpoena for any witness named or described in the order.

40 (2) Place. After considering the convenience of the witness and the parties,
41 the court may order—and the subpoena may require—the witness to appear
42 anywhere the court designates.

43 (g) Contempt. Failure by any witness without adequate excuse to obey a
44 subpoena served upon that witness may be a contempt of the court from which the
45 subpoena issued.

46 (h) Information Not Subject to Subpoena. No party may subpoena a
47 statement of a witness or of a prospective witness under this rule. Rule 16 governs
48 the production of a statement.

49 EXPLANATORY NOTE

50 Rule 17 was amended September 1, 1983; March 1, 1990; March 1, 2006;
51 June 1, 2006; March 1, 2008; March 1, 2013; March 1, 2018.

52 Rule 17 follows Fed.R.Crim.P. 17 in substance and controls with respect to
53 all subpoenas in criminal cases issued by the courts of this state.

54 Rule 17 is not limited to subpoena for the trial. A subpoena may be issued
55 for a preliminary hearing, in aid of a grand jury investigation, for a deposition, or
56 for a determination of an issue of fact raised by a pretrial motion. Rule 17 is also
57 intended to obtain witnesses and documents for use as evidence, although it is not
58 a discovery device.

59 Rule 17 was amended, effective March 1, 2006, in response to the
60 December 1, 2002, revision of the Federal Rules of Criminal Procedure. The
61 language and organization of the rule were changed to make the rule more easily
62 understood and to make style and terminology consistent throughout the rules.

63 Paragraph (a)(1) follows Fed.R.Crim.P. 17(a) except that subpoenas may be
64 issued by the magistrate as well as the clerk of court. The fact that some of the

65 lesser state courts are without the benefit of a clerk necessitates this requirement.

66 Paragraph (a)(2) was amended, effective September 1, 1983, to provide that
67 an attorney for a party may issue subpoenas with the same effect as the clerk or
68 magistrate.

69 Subdivision (b), which provided assistance for indigent defendants seeking
70 to subpoena persons, was deleted, effective June 1, 2006. As of January 1, 2006,
71 the North Dakota Commission on Legal Counsel for Indigents became responsible
72 for providing defense services, including subpoenas, to indigent defendants.

73 Subdivision (c) follows Fed.R.Crim.P. 17(c) and authorizes issuance of a
74 subpoena duces tecum. Rule 17 generally is available to any "party" and this is no
75 less true of subdivision (c). Thus the prosecution as well as the defendant may use
76 subdivision (c), subject to the limitations imposed by the Fourth and Fifth
77 Amendments.

78 Subdivision (d) was amended, effective March 1, 2006, to simplify service
79 instructions for a subpoena and to eliminate outmoded methods of service.

80 Subdivision (d) was amended, effective March 1, 2008, to eliminate an obsolete
81 cross-reference.

82 A subpoena will ordinarily be served by a peace officer although
83 subdivision (d) permits service by any person who is not a party and who is 18 or
84 more years old. Service of a subpoena under Fed.R.Crim.P. 17 has been held
85 effective only if the fee for one day's attendance and the mileage allowed by law
86 are tendered to the witness when the subpoena is delivered. Fees and mileage need

87 not be tendered if the subpoena is issued in behalf of the state or on behalf of a
88 defendant unable to pay.

89 Subdivision (e) is an adaptation of the Colorado Rules of Criminal
90 Procedure. Under N.D.C.C. ch. 31-03 (Means of Compelling Attendance of
91 Witnesses), North Dakota has adopted a Uniform Act to secure the attendance of
92 witnesses from another state in criminal proceedings. Under paragraph (e)(2)
93 service of subpoenas on witnesses out-of-state is governed by N.D.C.C. ch. 31-03.

94 Subdivision (e) was amended, effective March 1, 2013, to direct persons to
95 N.D.R.Ct. 5.1 for information about how to proceed with discovery in this state in
96 an action pending in an out-of-state court. N.D.R.Ct. 5.1 outlines procedure for
97 interstate depositions and discovery.

98 Subdivision (f) follows Fed.R.Crim.P. 17(f), with appropriate changes to
99 satisfy the requirements of North Dakota. Paragraph (f)(1) provides that a court
100 order for the taking of depositions gives authority to the clerk of court ~~or~~
101 magistrate or an attorney for a party to the proceeding to issue subpoenas for the
102 persons named or described therein.

103 Paragraph (f)(2) provides the court with discretion in determining where the
104 deposition is to be taken.

105 Subdivision (g) follows N.D.R.Civ.P. 45(e). This provision merely restates
106 existing law.

107 Subdivision (h) was adopted, effective September 1, 1983, to provide that
108 statements made by witnesses or prospective witnesses are not subject to subpoena

109 under Rule 17 but are subject to production in accordance with Rule 16. This
110 correlates to Rule 16's provisions relating to production of statements.

111 SOURCES: Joint Procedure Committee Minutes of September 29-30, 2016,
112 pages 27-28; January 26-27, 2012, pages 3-7; September 30, 2011, pages 12-15;
113 April 28-29, 2011, page 25; April 26-27, 2007, pages 22-23; April 27-28, 2006,
114 pages 2-5, 15-17; January 27-28, 2005, pages 13-14; April 20, 1989, page 4;
115 December 3, 1987, page 15; November 18-19, 1982, pages 10-13; October 15-16,
116 1981, pages 6-10; October 12-13, 1978, page 8; June 26-27, 1972, pages 14-20;
117 July 25-26, 1968, pages 6-10; Fed.R.Crim.P. 17.

118 STATUTES AFFECTED:

119 SUPERSEDED: N.D.C.C. § § 31-03-04, 31-03-07, 31-03-08, 31-03-09,
120 31-03-13, 31-06-07, 40-18-09.

121 CONSIDERED: N.D.C.C. § § 29-10.1-19, 31-03-01, 31-03-15, 31-03-16,
122 31-03-17, 31-03-18, 31-03-25, 31-03-26, 31-03-27, 31-03-28, 31-03-29, 31-03-30,
123 31-03-31.

124 CROSS REFERENCE: N.D.R.Civ.P. 45 (Subpoena); N.D.R.Ct. 5.1
125 (Interstate Depositions and Discovery).