

**Supreme Court Clerk's Office - Keller, Heather**

---

**From:** Ariston Johnson <ari@dakotalawdogs.com>  
**Sent:** Wednesday, August 9, 2017 1:01 PM  
**To:** (SUP) Clerk of Court Office  
**Subject:** Comments on Proposed Amendments to the North Dakota Rules of Civil Procedure et al., Sup. Ct. No. 20170288

Ms. Miller:

I am writing to submit comments, as solicited by the Court, on the proposed rule amendments, as follows. Thank you for filing these comments with the proposed amendments so that they can be considered by the Court as it addresses this important step forward in refining the great electronic filing experiment that we have been going through for the past 7 years.

The proposed amendment to N.D.R.Ct. 3.5(c)(3) is missing a step. Documents must comply with Appendix K. However, there is apparently no requirement that only documents that do not comply with Appendix K be rejected. It is a frequent occurrence that clerks of court and their deputies will reject proper documents due to incorrect or varying interpretations of the E-Filing Rejection Guidelines, which it appears will be supplanted by Appendix K. Moreover, in my conversations with court administrators, I have been consistently informed that clerks of court are prohibited from interpreting or enforcing rules (such as the requirement that documents have paragraph numbers (N.D.R.Ct. 3.5(b)(2)) or that a certificate of service be signed by an attorney (N.D.R.Civ.P. 5(f)). By moving the e-filing requirements to an appendix of the rules, attorneys will actually have a rule requiring them to comply with these requirements, which has been missing from the beginning of Odyssey electronic filing being rolled out in North Dakota. But clerks of court may remain not only unbound by the rules but prohibited from following them. This is an opportunity to rectify that problem by providing clearly that clerks of court must accept proper documents, must reject improper documents, and must make the decision of whether a document is proper or not according to Appendix K and no other source.

The addition of Rule 3.5(e)(5), which requires counsel to use the Attorney Subscription Management System "for notice of filing in the Odyssey system," is confusing. If filers and clerks correctly use the Odyssey software, this additional requirement is superfluous. If they do not correctly use Odyssey, this additional requirement is at best a bandage over a problem better addressed by training. (This has, for years, been a common theme in my complaints about the implementation of Odyssey in North Dakota: The lack of required training leads to grossly inconsistent results on both sides of the system.) The proposed amendment is also entirely silent on the consequences for an attorney who does not use the Attorney Subscription Management System. For example, if I do not use ASMS and another attorney electronically files a document but forgets to select electronic service of that document, is it deemed served on me even though the other attorney's error prevented me from receiving the Notification of Electronic Service that Odyssey would have sent but for that error? The lack of explicit consequences for what happens to counsel who disobey proposed Rule 3.5(e)(5) is very problematic because of such implied consequences.

Another thing missing from the proposed amendments to Rule 3.5 is an update to the never-accurate list of approved formats in 3.5(b)(1), which includes WordPerfect, TIFF, PDF, and ASCII text. This subparagraph should probably simply be removed and the formatting requirements for electronically filed documents kept in Appendix K.

While I am on Rule 3.5, I note that the tolling provision in 3.5(c)(3) has, from the beginning, required that parties taking advantage of it file and serve a separate document giving notice of resubmission. This requirement is, in my observation, rarely obeyed and never enforced. It seems to be a vestige of early notions of how Odyssey electronic filing should work, rather than a reflection of anything about how Odyssey electronic filing does work.

Next, I turn to Appendix K. While this appears to supplant the rejection guidelines, it omits many of the guidelines and therefore it raises the concern that my inference is wrong and we will now have two separate lists of document formatting requirements, one in a rule (which, as noted above, the clerks of court are supposedly prohibited from enforcing) and one in the guidelines. I hope that my inference is correct and that the omission of guidelines from Appendix K reflects a streamlining of document formatting requirements.

There are also some problems with Appendix K, as follows:

(a)(2) There are some types of filings which require a filing fee but for which Odyssey has no filing code available. The fees provided for in N.D.C.C. 27-05.2-03(1)(c) through (e) were not allowed by Odyssey at the last time I checked.

(a)(3) The requirement to file exhibits as separate documents should (and, under (c)(1) below, appears to) apply to all court papers, not only to the pleadings.

(a)(4) It is unclear why addresses are required for admitted attorneys (who are all listed with up-to-date contact information in the lawyer directory). In any event, there is no way to input an attorney's address when initiating an action through the Odyssey electronic filing system. Regarding addresses for parties, it is unclear why a party represented by counsel must have its address put into Odyssey when initiating an action. The purpose of the address is for the clerk of court to know where to send notices. If the party is represented by counsel, notices should go only to counsel. If the party's counsel later withdraws and other counsel is not immediately substituted, N.D.R.Ct. 11.2(b) requires that the party's last known address, e-mail address, and telephone number be provided with the motion to withdraw. There is no reason to require a represented party's address be provided when initiating an action.

(a)(4)(A) There is no "filing comments field" applicable to filing an action. The only comments field I am aware of is per-document. This requirement is either impossible to comply with or very ambiguous. Does a filer have to input "defendant address unknown" in the Comments to Court for each of the documents being filed with the initiation of the action, or just one? This is an example of trying to use a hammer to drive a screw: The tool selected is inappropriate for the task at hand and the solution is to obtain a better tool or re-examine the task, rather than forcing the use of the inappropriate tool.

(a)(4)(B) This requirement appears to be unrelated to the filing of documents and is impossible to comply with. While the statement is true, that failure to provide or update an address may result

in that party not receiving notices from the court, it is unclear what a filer should do about it. Moreover, Odyssey does not allow filers to update a party's address after the action has been initiated. To the extent this subparagraph states a rule, it is a rule that cannot be complied with.

(a)(7) This requirement should apply to the filing descriptions for all documents filed in a case, not only to case initiation.

(b)(1) This should be enforced. It is very common for users unfamiliar with and untrained in the use of Odyssey to use Memorandum rather than Brief despite the document this requirement refers to explicitly saying not to do that, and clerks routinely accept such filings. Also, the document that this refers to needs to be updated. There are codes for Sheriff's Return Served and Sheriff's Return Not Served, but the spreadsheet "What Filing Code Do I Use" says to use Service document or Service Document – Defendant Not Found for sheriffs' returns. There is the statement to use Response for "responses to motions" along with competing statement to use Brief for "response to motion." There are also, of course, missing filing codes such as a Reply to an Answer under N.D.R.Civ.P. 7(a)(7), although having a Reply filing code would probably just invite more confusion when filers use it for reply briefs. This is also a serious training issue to address.

(b)(2) There remain clerks who require the service document filing description to indicate what was served either instead of or in addition to whom was served.

(c)(1) The reference to N.D.R.Civ.P. 7(b) is confusing here, because the text here goes on to refer to a combined Motion and Notice of Motion being filed as one document. Rule 7(b) only has this to say about combined motion documents: "The writing requirement is fulfilled if the motion is stated in a written notice of the hearing of the motion." That is distinct from N.D.R.Ct. 3.2(a)(1), which relates to the notice of motion (as opposed to the notice of hearing, which is required under Rule 3.2(a)(3)). Appendix K needs to be revised to reflect what the rules of court and of civil procedure actually allow. That being said, the guidance to use the Motion filing code for a combined notice of motion and motion is a welcome improvement.

(c)(4) My first comment relates more to Rule 3.5(a)(4) and Rule 3.1(a), which should allow for the filing of oversized documents such as plats. Reducing such documents to 8-1/2x11-inch size under Rule 3.1(a) often results in their being illegible for the court. There is also a gap in the guidance here, which is how to serve documents that are filed in paper form to ensure legibility. Using Odyssey to electronically serve (but not file) such documents is a workable solution in most cases, but not all. For instance, I can serve a PDF containing an 11x17-inch color document and it will be perfectly legible for the recipient. However, if I reduce the document to 8-1/2x11 black and white format for service it will be illegible for the recipient even though the court receives the legible original.

(c)(5) It should be made clear that the case number must be placed at the upper righthand portion of the first page of the document filed, as required by the referenced Rule 3.1(g).

(c)(8) It should be made explicit that the attorney's service e-mail address and other contact information listed with his or her signature be the same as that designated through the lawyer directory. At a minimum, the service e-mail address must not be capable of re-designation on a case-by-case basis through signature blocks, which this paragraph of Appendix K implies is possible.

(c)(9) It should be made explicit that the Confidential setting for Security is the correct way to file a confidential information form. I do not know of any information made available to filers that actually says this. Similarly, Appendix K appears to lack any reference to the use of the Proposed setting for Security. These should both be addressed with section (b) regarding event codes.

(c)(11) It is good that the paragraph numbering rule is now a document formatting requirement for electronic filing. I believe that all of the rules regarding document formatting should be given similar treatment, such as double-spacing under Rule 3.1(c). Otherwise, the inclusion of one is likely to imply the exclusion of the others and Rule 3.1(j)(1) (requiring that non-conforming documents not be filed) will be stripped of any effect when clerks of court follow Appendix K rather than the Court's rules.

(d)(1) This actually represents a general change in common practices, which should be made explicit. Presently, many filers use the filing description field as a continuation of the filing code. For example, one finds filing code "Motion" and description "In Limine," code "Transcript" and description "on Appeal," code "Exhibit" and description "A (Photograph of Accident Scene)," code "Affidavit" and description "of John Doe," or code "Sheriff's Return Served" and description "on Jane Roe." The wording of this paragraph of Appendix K implies that the filing code should never be assumed as part of the filing description and should thus be reproduced in the filing description." Either method is perfectly reasonable, but if one is mandatory then the mandate should be clear.

**Ariston E. Johnson**

Attorney at Law  
Johnson & Sundeen  
P.O. Box 1260  
Watford City, ND 58854  
701-444-2211