IN THE SUPREME COURT
STATE OF NORTH DAKOTA

ORDER OF ADOPTION

Supreme Court No. 20180289

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

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[¶1] On July 23, 2018, the Joint Procedure Committee filed a Petition with the Supreme Court proposing amendments to North Dakota Rules of Civil Procedure 56; North Dakota Rules of Criminal Procedure 11, 24, 32, 32.1, 32.2, and 35; North Dakota Rules of Appellate Procedure 25, 32, and 35.1; North Dakota Rules of Evidence 803, and 902; North Dakota Rules of Court 3.1, 3.5, Appendix K; and North Dakota Administrative Rules 50 and 52. Subsequently, the Clerk of the Supreme Court submitted proposed amendments to North Dakota Rules of Appellate Procedure 2.1, 3, 14, 24, 28, 31, 32, 34, and 40, which include alternate or additional amendments to North Dakota Rule of Appellate Procedure 32.

The proposals are available at http://www.ndcourts.gov/Court/Notices/Notices.htm. The Court considered the matter, and

[¶2] **IT IS ORDERED**, that the proposed amendments to N.D.R.Crim.P. 11, 24, 32, 32.1 and 32.2; N.D.R.App.P. 2.1 and 35.1; N.D.R.Ev. 803 and 902; N.D.R.Ct. 3.1, 3.5 and Appendix K; and, N.D. Sup. Ct. Admin. R. 50 are ADOPTED as submitted, effective March 1, 2019.

[¶3] IT IS FURTHER ORDERED, that the proposed amendments to N.D.R.Civ.P. 56; N.D.R.Crim.P. 35; N.D.R.App.P. 3, 14, 24, 25, 28, 31, 32, 34 and 40; and N.D. Sup. Ct. Admin. R. 52, as further amended by the Court are ADOPTED effective March 1, 2019.

[¶4] Entered by the Clerk of the Supreme Court at the direction of the Honorable Gerald W. VandeWalle, Chief Justice, the Honorable Daniel J. Crothers, the Honorable Lisa Fair McEvers, the Honorable Jerod E. Tufte, and the Honorable Jon J. Jensen. Justices.

[¶5] Dated: December 11, 2018.

Penny Miller
Clerk
North Dakota Supreme Court

RULE 56. SUMMARY JUDGMENT

(a) By a Claiming Party. A party claiming relief may move, with or without supporting affidavits, for summary judgment on all or part of the claim. The motion may be filed at any time after:

(1) 21 days have passed from commencement of the action; or

(2) the opposing party serves a motion for summary judgment.

(b) By a Defending Party. A party against whom relief is sought may move at any time, with or without supporting affidavits, for summary judgment on all or part of the claim.

(c) Serving the Motion; Proceedings.

(1) Time for Service. The motion and supporting ~~papers must be served at least 34 days~~ documents must be filed at least 90 days before the day set for trial and 45 days before the day set for the hearing unless otherwise ordered. An opposing party ~~must have~~ has 30 days after service of a brief to serve and file an answer brief and supporting ~~papers~~ documents. The moving party has 14 days to serve and file a reply brief.

(2) Length of Brief.

(A) Page Limit. A principal brief or answer brief may not exceed 38 pages and a reply brief may not exceed 12 pages. Footnotes must be included in the page count.

(B) Typeface. The typeface 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.

(C) Request to Exceed Volume Limitations. Upon written application and good cause shown, the court may enlarge the page volume limits provided in this rule. The application may not exceed two pages and must be filed no later than seven days prior to the deadline for filing the brief.

(3) Judgment. The judgment sought shall be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Summary judgment, when appropriate, may be rendered against the moving party.

(d) Case Not Fully Adjudicated on the Motion.

(1) Establishing Facts. If summary judgment is not rendered on the whole action, the court shall, to the extent practicable, determine what material facts are not genuinely at issue. The court shall so determine by examining the pleadings and evidence before it and by interrogating the attorneys. It shall then issue an order specifying what facts, including items of damages or other relief, are not genuinely at issue. The facts so specified must be treated as established in the action.

(2) Establishing Liability. An interlocutory summary judgment may be rendered on liability alone, even if there is a genuine issue on the amount of damages.

(e) Affidavits; Further Testimony.

(1) In General. A supporting or opposing affidavit must be made on personal

knowledge, set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated. If a ~~paper~~ document or part of a ~~paper~~ document is referred to in an affidavit, a sworn or certified copy must be attached to or served with the affidavit. The court may permit an affidavit to be supplemented or opposed by depositions, answers to interrogatories, or additional affidavits.

(2) Opposing Party's Obligation to Respond. When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must, by affidavits or as otherwise provided in this rule, set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment shall, if appropriate, be entered against that party.

(f) When Affidavits Are Unavailable. If a party opposing the motion shows by affidavit that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) deny the motion;

(2) order a continuance to enable affidavits to be obtained, depositions to be taken, or other discovery to be undertaken; or

(3) issue any other just order.

(g) Affidavit Submitted in Bad Faith. If satisfied that an affidavit under this rule is submitted in bad faith or solely for delay, the court must order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result.

An offending party or attorney may also be held in contempt.

EXPLANATORY NOTE

Rule 56 was amended, effective March 1, 1990; March 1, 1996; March 1, 1997; March 1, 2011; March 1, 2019.

~~Under subdivision (e) a party resisting a motion for summary judgment has the responsibility to draw the court's attention to the page and line of a deposition or other document containing the competent admissible evidence raising a material factual issue, or from which the trier of fact may draw an inference creating a material factual issue. First National Bank v. Clark, 332 N.W.2d 264 (N.D. 1983).~~

Paragraph (a)(1) was amended, effective March 1, 2011, to increase the time to move for summary judgment from 20 to 21 days after commencement of the action.

Subdivision (c) was amended, effective March 1, 2019, to establish a deadline for serving a motion, a deadline for a reply brief and length limits for principal, answer, and reply briefs.

Under subdivision (e) a party resisting a motion for summary judgment has the responsibility to draw the court's attention to the page and line of a deposition or other document containing the competent admissible evidence raising a material factual issue, or from which the trier of fact may draw an inference creating a material factual issue. First National Bank v. Clark, 332 N.W.2d 264 (N.D. 1983).

Rule 56 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 April 27, 2018, pages 4-6; January 25, 2018, pages 4-6; September 28, 2017, pages 17-19; April 29-30, 2010, page 15; September 24-25, 2009, pages 23-24; April 25, 1996, pages 11-12; April 27-28, 1995, page 21; April 20, 1989, page 2; December 3, 1987, page 11; November 29, 1984, page 19; November 29-30, 1979, page 17; Fed.R.Civ.P. 56.

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(b)(2) or (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; March 1, 2019.

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)(2) was amended, effective March 1, 2019, to reference Rule 43(b)(2), which allows misdemeanor defendants to be absent from a plea proceeding.

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 25, 2018, page 8; 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 24. TRIAL JURORS

(a) Examination of Jurors.

(1) Prospective Jurors. When a 12-person jury is to be impaneled, the court must call for examination not more than the number of prospective jurors that equals the number of jurors necessary for the jury plus the number of peremptory challenges available to the parties, unless otherwise stipulated by the parties and approved by the court. When a six-person jury is to be impaneled, the court may call for examination a number of prospective jurors equal to the number of jurors necessary for the jury plus the number of peremptory challenges available to the parties. If, after the parties have exercised their challenges, there are more jurors than required by Rule 23, the excess jurors must be excused in the inverse order in which they were called.

(2) Examination. The court must permit the defendant or the defendant's attorney and the prosecuting attorney to participate in the examination of prospective jurors. The court may allow individual examination of prospective jurors in chambers.

(b) Challenges.

(1) Challenges for Cause.

(A) By the Court. If the court, after examination of any prospective juror, finds grounds for challenge for cause, the court must excuse that prospective juror.

(B) By a Party. If the court does not excuse a prospective juror for cause, any party may make a challenge for cause. A challenge to a prospective juror must be made before

the juror is sworn to try the case~~, unless the court permits it to be made after the prospective juror is sworn but before jeopardy has attached~~.

(2) Peremptory Challenges. Each side is entitled to:

(A) 4 peremptory challenges when a 6-person jury is to be impaneled; and

(B) 6 peremptory challenges when a 12-person jury is to be impaneled, except when the offense charged is a AA felony, each side is entitled to 10 peremptory challenges.

If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors.

(1) In General. The court may impanel up to four alternate jurors to replace any jurors who are unable to perform or who are disqualified from performing their duties.

(2) Procedure.

(A) Alternate jurors must have the same qualifications and be selected and sworn in the same manner as any other jurors.

(B) Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror has the same authority as the other jurors.

(3) ~~Release of Alternate Jurors. An alternate juror who does not replace a juror must be discharged after the jury retires to consider its verdict, unless the parties otherwise agree.~~ Retaining Alternate Jurors. The court may retain alternate jurors after

the jury retires to deliberate. The court must ensure that a retained alternate does not discuss the case with anyone until that alternate replaces a juror or is discharged. If an alternate replaces a juror after deliberations have begun, the court must instruct the jury to begin its deliberations anew.

(4) Peremptory Challenges. Each side is entitled to the number of additional peremptory challenges to prospective alternate jurors specified below. These additional challenges may be used only to remove alternate jurors.

(A) One or Two Alternates. One additional peremptory challenge is permitted when one or two alternate jurors are impaneled.

(B) Three or Four Alternates. Two additional peremptory challenges are permitted when three or four alternate jurors are impaneled.

EXPLANATORY NOTE

Rule 24 was amended, effective January 1, 1988; March 1, 1990; March 1, 2006; March 1, 2011; March 1, 2019.

Rule 24 is an adaptation of Fed.R.Crim.P. 24, and is modified to conform to existing state practice. Rule 24 is intended to ensure that a defendant's Sixth Amendment guarantee of an "impartial jury" is protected. To implement this right to an impartial jury, subdivision (a) permits an examination of prospective jurors to determine whether any juror is biased for or against either party, or whether any juror's status or views are such that bias may be inferred. Others may be challenged peremptorily, but the number of those challenges is limited by subdivision (b).

~~Subdivision (b) was amended, effective March 1, 1990. The amendments are technical in nature and no substantive change is intended.~~

Subdivision (a) was modified to allow the continuance of the present practice permitting the examination of jurors by opposing parties or their attorneys and by the court. This differs from the federal rule, which gives the court discretion in determining whether it alone should examine prospective jurors or also allow the opposing parties to do so.

Subdivision (a) was amended, effective January 1, 1988, to provide for a uniform jury selection process. However, this procedure is discretionary with the court.

Paragraph (a)(1) was amended, effective March 1, 2011, to provide a uniform jury selection process for a 12-person jury, unless otherwise stipulated by the parties and approved by the court.

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

Subdivision (b) was amended, effective March 1, 2011, to interchange paragraphs (b)(1) and (b)(2). Former paragraph (b)(1) became paragraph (b)(2), and former paragraph (b)(2) became (b)(1).

Paragraph (b)(1), formerly paragraph (b)(2), regarding challenges for cause, is not in the federal rules. This subsection is necessary to preclude any question that challenges for cause are a definite part of the examination of prospective jurors. This rule also obligates the judge to dismiss a prospective juror if grounds for cause exist, thereby

avoiding prejudicing other prospective jurors against the attorneys.

Paragraph (b)(1) was amended, effective March 1, 2019, to allow a challenge for cause to be made only prior to a juror being sworn.

Paragraph (b)(2), formerly paragraph (b)(1), follows existing state law and maintains the number of peremptory challenges historically allowed. The provision of subdivision (b) that allows additional peremptory challenges in trials with multiple defendants was an innovation of former practice.

Under paragraph (b)(2), a peremptory challenge is exercised by a party not in the selection but rather in the rejection of prospective jurors. A peremptory challenge is not aimed at disqualification, but is exercised against a qualified trial juror as a matter of grace to the challenger. The right to peremptory challenges is afforded in aid of securing a fair and impartial jury.

Subdivision (c) is taken from the federal rule and replaced superseded statutes. ~~This procedure avoids a mistrial whenever an alternate juror is substituted for a juror who has become disqualified by illness or otherwise before submission of the case to the jury.~~

Paragraph (c)(3) was amended, effective March 1, 2019, to allow retention of alternate jurors after the jury retires to deliberate.

Rule 24 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: Supreme Court Conference Minutes of January 17, 1990; September 28, 1987; Joint Procedure Committee Minutes of April 27, 2018, page 6; September 28, 2017, page 19; April 29-30, 2010, page 27; January 28-29, 2010, pages 16-19; January 27-28, 2005, pages 19-20; April 20, 1989, page 4; December 3, 1987, page 15; May 21-22, 1987, pages 16-17; February 19-20, 1987, pages 19-20; October 17-20, 1972, pages 12-18; September 26-27, 1968, pages 11-13; Fed.R.Crim.P. 24.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 29-17-27 to 29-17-29, 29-17-31, 29-17-32, 29-17-39, 29-17-40, 29-17-41, 29-17-42, 29-17-43, 29-17-47, 29-17-48, 29-21-35, 33-12-21.

CONSIDERED: N.D.C.C. §§ 27-09.1-01 to 27-09.1-22, 29-17-01 to 29-17-15, 29-17-30, 29-17-33, 29-17-35, 29-17-36, 29-17-38, 29-17-44 to 29-17-46.

CROSS REFERENCE: N.D.R.Crim.P. 23 (Trial by Jury or by Court).

RULE 32. SENTENCING AND JUDGMENT

(a) Sentence.

(1) Time of Sentencing. The court must impose sentence or other authorized disposition without unnecessary delay. Until disposition, the court may continue or alter bail or require the defendant to be held without bail.

(2) Presentence Requirements. Before imposing sentence, the court must:

(A) determine whether the defendant and the defendant's counsel had an opportunity to read and discuss the presentence investigation report, if made available under Rule 32(c)(4)(B), or a summary made available under Rule 32(c)(4)(D);

(B) give counsel an opportunity to speak on behalf of the defendant; and

(C) determine whether the defendant wishes to make a statement on the defendant's own behalf or wishes to present information in mitigation of punishment or information that would require the court to withhold judgment and sentence.

The court must give the prosecution an opportunity to be heard on any matter material to the imposition of sentence.

(3) Notification of Right to Appeal. After imposing sentence in a case that has gone to trial, the court must advise the defendant of the defendant's right to appeal and of the right of a person who is unable to pay the costs of an appeal to apply for appointment of counsel for purposes of appeal. The court is under no duty to advise the defendant of any right of appeal when sentence is imposed following a plea of guilty.

(b) Judgment. A judgment of conviction must include the plea, the verdict, and the sentence imposed. If the defendant is found not guilty or for any reason is entitled to be discharged, the court must enter judgment accordingly. The judge must sign and the clerk must enter the judgment.

(c) Presentence Investigation.

(1) When Made. The court may order a presentence investigation and report at any time. Except when the defendant consents in writing, the report may not be submitted to the court or its contents disclosed unless the defendant has pleaded guilty or has been found guilty.

(2) Presence of Counsel. The defendant's counsel is entitled to notice and a reasonable opportunity to attend any interview of the defendant conducted by parole and probation staff in the course of a presentence investigation.

(3) Report.

(A) Contents of Report. The presentence report may contain the defendant's previous criminal record and information about the defendant's characteristics, including:

(i) family, educational, and social history;

(ii) employment history and financial condition;

(iii) circumstances affecting the defendant's behavior that may be helpful in imposing sentence or in the correctional treatment of the defendant; and

(iv) any information required by the court.

(B) Information Excluded from Report. The following types of information may

not be included in a presentence report, but may be submitted to the court as an addendum to the report:

(i) any diagnostic or prognostic opinion that, if disclosed, might seriously disrupt a program of rehabilitation;

(ii) information or sources of information obtained confidentially, but subject to disclosure by the court as provided in Rule 32(c)(4)(A);

(iii) any sentence recommendation by parole and probation staff or the victim;

(iv) any victim impact statement; or

(v) any other information, including medical, psychiatric, or psychological information, information relating to the victim or victims, and other matters the court may consider confidential, that if disclosed, might result in harm, physical or otherwise, to the defendant, to a victim, or to other persons.

(4) Disclosure of Presentence Report.

(A) Confidentiality. The presentence report and any addendum are confidential. Neither the public nor the parties may read or copy the presentence report or any addendum, unless the court, in its discretion, gives permission.

(B) Disclosure to Defendant. If the court allows the defendant to examine any part of the presentence report or any addendum, this disclosure must be made at least 14 days before sentence is imposed, unless the defendant waives the 14-day requirement. The court must provide the defendant and the defendant's counsel a copy of the disclosed material and give them an opportunity to comment. The court may allow the defendant

and the defendant's counsel to introduce testimony or other information relating to any alleged factual inaccuracy in the disclosed material. Any material disclosed to the defendant and the defendant's counsel must also be disclosed to the prosecuting attorney who must disclose it to the victim if requested to do so. Material from a presentence report and any addendum disclosed under this provision must remain confidential and may not be read or copied by anyone else except as allowed by Rule 32(c) or federal law.

(C) Disclosure to Attorney General. The court may disclose the presentence report and any addendum to the Attorney General or the Attorney General's designee only for purposes of the individual risk assessment required by N.D.C.C. § 12.1-32-15 (12) and (13). A presentence report and addendum disclosed to the Attorney General or the Attorney General's designee must remain confidential and may not be read or copied by anyone else except as allowed by Rule 32(c) or federal law.

(D) Disclosure to Department of Corrections and Rehabilitation. The presentence report and any addendum is available to the Department of Corrections and Rehabilitation for use in providing assessment and treatment services to the person when in the Department's custody, on parole from the Department, or under the supervision and management of the Department. The Department may share the presentence report and any addendum with a public treatment or transition facility or licensed private treatment or transition facility providing assessment and treatment services to the person when in the Department's custody, on parole from the Department, or under the supervision and management of the Department. The Department may share the presentence report and

any addendum with the compact administrator of a supervising state in accordance with the Interstate Compact for Adult Offender Supervision, N.D.C.C. ch. 12-65. A presentence report and any addendum disclosed under this provision must remain confidential and may not be read or copied by anyone else except as allowed by Rule 32(c) or federal law.

(E) Harmful Information. If the court finds there is information in the presentence report or any addendum that would be harmful to the defendant or to other persons if disclosed, the court must not permit the public or the parties to read or copy that portion of the report or the addendum. The court must give an oral or written summary of any non-disclosed information it will rely on in determining sentence and must give the defendant or the defendant's counsel an opportunity to comment. The court may give its summary to the parties in camera.

(F) Defendant's Comments. If the comments of the defendant and the defendant's counsel, or testimony or other information introduced by them, allege any factual inaccuracy in the presentence report or any addendum, or in any of the information summarized, the court, for each matter controverted, must:

(i) make a finding on the allegation, or

(ii) make a determination that no finding is necessary because the matter controverted will not be taken into account in sentencing.

A written record of the court's findings and determinations must be appended to and accompany any copy of the presentence report later made available to the parole

board or the pardon clerk.

(d) ~~[Transferred]~~ Sentencing of Violent Offenders. In determining the sentence imposed upon a violent offender in accordance with N.D.C.C. § 12.1-32-09.1, the trial court must compute the remaining life expectancy of the offender by reference to N.D. Sup. Ct. Admin. R. 51.

(e) Probation. After conviction of an offense, the defendant may be placed on probation as provided by law.

(f) Revocation of Probation When Court Retains Jurisdiction Under Law.

(1) Taking into Custody. If there is probable cause to believe a probationer has violated a condition of probation, the court that originally placed the probationer on probation may conduct a hearing on the alleged violation. Any state parole and probation officer or any peace officer directed by a state parole and probation officer or directed by an order of the court having jurisdiction may take the probationer into custody and bring the probationer before the court. Costs incurred in bringing the probationer before the court must be borne by the county in which the probation was granted. The probationer may be admitted to bail pending the hearing.

(2) Transfer. If the probationer does not contest the violation, the hearing may be transferred, under the procedure set out in Rule 20, to the county where the probationer is arrested, held or present. This procedure is available only upon the consent of the court that placed the probationer on probation.

(3) Hearing.

(A) In General. The hearing must be in open court with:

(i) the probationer present;

(ii) a prior written notice of the alleged violation given to the probationer; and

(iii) representation by retained or appointed counsel unless waived.

The probationer must be given an opportunity to make a statement and present evidence in mitigation.

(B) Resolution. If the probationer contests the violation, the prosecution must establish the violation by a preponderance of the evidence. After the hearing and subject to limitations imposed by law, the court may:

(i) revoke an order suspending a sentence or an order suspending the imposition of sentence; or

(ii) continue probation on the same or different conditions.

A record of the proceedings must be made.

EXPLANATORY NOTE

Rule 32 was amended, effective January 1, 1980; March 1, 1986; March 1, 1990; March 1, 1992, on an emergency basis; July 14, 1993; March 1, 1999; October 31, 2001, on an emergency basis; April 1, 2002; March 1, 2006; March 1, 2007; March 1, 2008; March 1, 2010; March 1, 2011; May 1, 2017; March 1, 2019.

Rule 32 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.

Paragraph (c)(4) was amended, effective March 1, 1999, to allow the court to decide, in its discretion, whether a presentence investigation report and any addendum may be inspected by the public or the parties.

Parole and probation staff conducting a presentence investigation must be mindful that they cannot make a binding promise of complete confidentiality regarding information included in the addendum to a presentence report. Under paragraph (c)(4), the promise of confidentiality is subject to the court's discretion to allow the parties to inspect the addendum.

Paragraph (c)(4) was amended, effective October 31, 2001, to allow disclosure of the presentence report and any addendum to the Attorney General or the Attorney General's designee to enable the Attorney General to comply with subsections 12 and 13 of N.D.C.C. § 12.1-32-15. Disclosure to the Attorney General or the Attorney General's designee must comply with all applicable state and federal statutes, rules and regulations governing drug and alcohol records, and private medical information.

Paragraph (c)(4) was amended, effective March 1, 2008, to allow disclosure of the presentence report and any addendum to the Department of Corrections and Rehabilitation or its designees so that the Department can obtain assessment and treatment services. Disclosure to the Department or its designees must comply with all applicable state and federal statutes, rules and regulations governing drug and alcohol records, and private medical information.

Subparagraph (c)(4)(B) was amended, effective March 1, 2011, to change the time to disclose a presentence report from 10 to 14 days before sentence is imposed.

Subparagraph (c)(4)(B) was amended, effectiveMay 1, 2017, to allow the prosecutor to disclose to the victim, on request, any material from the presentence report disclosed to the defendant and the defendant's counsel. "Victim" is defined in N.D. Const. Art. I, § 25(4).

Subdivision (d) was adopted, effective March 1, 2019, to provide guidance for the sentencing of violent offenders.

Former subdivision (d) on withdrawal of guilty pleas was transferred to Rule 11 effective March 1, 2010.

Paragraph (f)(2) was added, effective March 1, 2006, to allow transfer of a revocation hearing to the county where the probationer is present. Rule 20 (Transfer from the County for Plea and Sentence) sets out the procedure for obtaining a transfer.

Paragraph (f)(3) is adapted in part from the A.B.A. Standards for Criminal Justice, Standards Relating to Probation, § 5.4 at 65 (Approved Draft, 1970). Paragraph (f)(3) was amended, effective, March 1, 2007, to clarify that a probationer must be given the opportunity to make a statement and present mitigating information at a revocation hearing.

SOURCES: Joint Procedure Committee Minutes of September 28, 2017, pages 19-21; January 26-27, 2017, pages 11-14; April 29-30, 2010, page 20; January 29-30, 2009, pages 11-13, 19-20; January 24, 2008; January 26, 2006, page 9; April 28-29, 2005, pages

3-5; January 27-28, 2005, pages 28-29; January 24-25, 2002, pages 9-14; January 29-30, 1998, pages 10-11; September 25-26, 1997, pages 3-6; January 30, 1997, pages 2-6; September 26-27, 1996, pages 6-8; April 25, 1996, pages 16-18; November 7-8, 1991, page 4; October 25-26, 1990, pages 15-16; April 20, 1989, page 4; December 3, 1987, page 15; November 29, 1984, pages 15-18; April 26, 1984, page 6; December 7-8, 1978, pages 15-23; October 12-13, 1978, pages 10-14; December 11-15, 1972, pages 5-16; November 20-21, 1969, pages 5-6; May 15-16, 1969, pages 1-2; February 20-21, 1969, pages 5-14; Fed.R.Crim.P. 32.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 12-53-15, 29-14-22, 29-26-01, 29-26-02, 29-26-15, 29-26-19, 33-12-26, 33-12-27, 33-12-29.

CONSIDERED: N.D. Const. Art. I, § 25; N.D.C.C. §§ 1-01-41, 12-53-03, 12-53-04, 12-53-05, 12-53-06, 12-53-10, 12-53-11, 12-53-12, 12-53-13, 12-53-14, 12-53-17, 12-53-20, 12-55-30, 12.1-32-09.1, 12.1-32-15, 29-26-03, 29-26-11, 29-26-12, 29-26-13, 29-26-14, 29-26-16, 29-26-17, 29-26-18, 29-26-20, 29-26-23, 33-12-28.

CROSS REFERENCE: N.D.R.Crim.P. 20 (Transfer from the County for Plea and Sentence); N.D.C.C. §§ 12.1-32-09.1; 12.1-32-15.

RULE 32.1. DEFERRED IMPOSITION OF SENTENCE

An order deferring imposition of sentence ~~for an infraction or a misdemeanor~~ must require that, 61 days after expiration or termination of probation:

(a) the defendant's guilty plea be withdrawn, or the guilty verdict be set aside;

(b) the case be dismissed; and

(c) the file be sealed.

The court may, by order, modify an order deferring imposition of sentence no later than 60 days after expiration or termination of probation.

EXPLANATORY NOTE

Rule 32.1 was amended, effective March 1, 2006; March 1, 2012; March 1, 2019.

Rule 32.1 was adopted, effective March 1, 1999. The purpose of the rule is to provide uniformity in the processing of deferred impositions of sentence, and to prevent the disparity of treatment received by defendants depending upon their county of venue in misdemeanor cases.

When deferring imposition of sentence, the judge should advise the defendant if the defendant fulfills the conditions of probation the guilty plea will be withdrawn, or the guilty verdict set aside, the case dismissed, and the file sealed.

An order deferring imposition of sentence is not a judgment. However, for purpose of appeal, an order deferring imposition of sentence is equivalent to a judgment under N.D.R.Crim.P. 32(b).

This rule does not follow Fed.R.Crim.P. 32.1, which deals with revoking or modifying probation or supervised release.

Rule 32.1 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 32.1 was amended, effective March 1, 2012, to clarify that any modification of an order deferring imposition of sentence must take place no later than 60 days after the expiration or termination of probation.

Rule 32.1 was amended, effective March 1, 2019, to delete language that made the rule applicable only in misdemeanor and infraction cases. Under the amendment, the rule applies in all cases in which an order deferring imposition of sentence was entered.

SOURCES: Joint Procedure Committee Minutes of April 27, 2018, pages 6-7; September 23-24, 2010, pages 23-24; January 27-28, 2005, page 29; January 29-30, 1998, pages 14-17; September 25-26, 1997, pages 8-10.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. §§ 12.1-32-02, 12.1-32-07.1, 12.1-32-07.2.

CROSS REFERENCE: N.D.R.Crim.P. Form 8 (Order Deferring Imposition of Sentence).

RULE 32.2. PRETRIAL DIVERSION

(a) Agreements Permitted.

(1) Generally. After due consideration of the victim's views and subject to the court's approval, the prosecuting attorney and the defendant may agree that the prosecution will be suspended for a specified period after which it will be dismissed under Rule 32.2(f) on condition that the defendant not commit a felony, misdemeanor or infraction during the period. The agreement must be in writing and signed by the parties. It must state that the defendant waives the right to a speedy trial. It may include stipulations concerning the existence of specified facts or the admissibility into evidence of specified testimony, evidence, or depositions if the suspension of prosecution is terminated and there is a trial on the charge.

(2) Additional Conditions. Subject to the court's approval after due consideration of the victim's views and upon a showing of substantial likelihood that a conviction could be obtained and that the benefits to society from rehabilitation outweigh any harm to society from suspending criminal prosecution, the agreement may specify additional conditions to be observed by the defendant during the period, including:

(A) that the defendant not engage in specified activities, conduct, and associations;

(B) that the defendant participate in, and if appropriate successfully complete, a rehabilitation program, which may include treatment, counseling, training, and education;

(C) that the defendant make restitution in a specified manner for harm or loss

caused by the crime charged;

(D) that the defendant pay ~~specified~~ to the court fees or costs allowed by law;

(E) that the defendant pay to others additional amounts as agreed upon by the parties;

~~(E)~~ (F) that the defendant perform specified community service.

(3) Limitations on Agreements. The agreement may not specify a period longer or any condition other than could be imposed upon probation after conviction of the crime charged.

(b) Filing of Agreement; Release. Promptly after the agreement is made and approved by the court, the prosecuting attorney shall file the agreement together with a statement that under the agreement the prosecution is suspended for a period specified in the statement. Upon the filing, the defendant must be released under Rule 46 from any custody.

(c) Modification of Agreement. Subject to Rule 32.2 (a) and (b) and with the court's approval, the parties by mutual consent may modify the terms of the agreement at any time before its termination.

(d) Termination of Agreement; Resumption of Prosecution.

The court may order the agreement terminated and the prosecution resumed if, upon motion of the prosecuting attorney stating facts supporting the motion and upon hearing, the court finds:

(1) the defendant or defense counsel misrepresented material facts affecting the

agreement, if the motion is made within six months after the date of the agreement; or

(2) the defendant has committed a violation of the agreement, if the motion is made not later than one month after the expiration of the period of suspension specified in the agreement.

(e) Emergency Order. The court by warrant may direct any officer authorized by law to bring the defendant before the court for the hearing of the motion if the court finds from affidavit or testimony:

(1) there is probable cause to believe the defendant committed a violation of the agreement; and

(2) there is a substantial likelihood that the defendant otherwise will not attend the hearing. In any case the court may issue a summons instead of a warrant to secure the appearance of the defendant at the hearing.

(f) Termination of Agreement; Dismissal. If no motion by the prosecuting attorney to terminate the agreement is pending, the agreement is terminated and the complaint, indictment, or information must be dismissed by order of the court 60 days after expiration of the period of suspension specified by the agreement. If such a motion is then pending, the agreement is terminated and the complaint, indictment, or information must be dismissed by order of the court upon entry of a final order denying the motion. Following a dismissal under Rule 32.2(f) the defendant may not be further prosecuted for the offense involved.

(g) Modification or Termination and Dismissal upon Defendant's Motion. If, upon

motion of the defendant and hearing, the court finds that the prosecuting attorney obtained the defendant's consent to the agreement as a result of a material misrepresentation by a person covered by the prosecuting attorney's obligation under Rule 16, the court may:

(1) order appropriate modification of the terms resulting from the misrepresentation; or

(2) if the court determines that the interests of justice require, order the agreement terminated, dismiss the prosecution, and bar further prosecution for the offense involved.

(h) Pre-Charge Diversion. This rule does not preclude the prosecuting attorney and defendant from agreeing to diversion of a case without court approval if charges are not pending before the court.

EXPLANATORY NOTE

~~Rule 32.2 was amended, effective March 1, 2013.~~

Rule 32.2 was adopted March 1, 2009. Amended effective March 1, 2013; March 1, 2019.

Rule 32.2 is patterned after Minn.R.Crim.P. 27.05.

~~Subdivision~~ Paragraph(a)(2)(D) was amended, effective March 1, 2013, to include payment of fees or costs as ~~an additional~~ a condition to a pretrial diversion agreement. The paragraph was further amended, effective March 1, 2019, to specify that fees or costs allowed under the law are to be paid to the court.

A new paragraph (a)(2)(E) was added, effective March 1, 2019, to allow the

parties to agree that the defendant pay additional amounts to others as a condition of a pretrial diversion agreement.

Sources: Joint Procedure Committee Minutes of January 25, 2018, pages 8-11; September 30, 2011, pages 19-20; October 11-12, 2007, pages 15-20; April 26-27, 2007, pages 23-27.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. ch. 29-01

CROSS REFERENCE: N.D.Sup.Ct.Admin.R. 41 (Access to Court Records).

RULE 35. CORRECTING OR REDUCING A SENTENCE

(a) Correction of Sentence.

(1) Illegal Sentence. The sentencing court ~~may~~ shall correct an illegal sentence at any time and may correct a sentence imposed in an illegal manner within the time provided for reduction of sentence in Rule 35(b)(1).

(2) Clear Error. After giving any notice it considers appropriate, the sentencing court may correct a sentence that resulted from arithmetical, technical, or other clear error.

(b) Reduction of Sentence.

(1) Time for Reduction. The sentencing court may reduce a sentence:

(A) within 120 days after the court imposes sentence or revokes probation; or

(B) within 120 days after the court receives the mandate issued upon affirmance of the judgment or dismissal of the appeal; or

(C) within 120 days after the Supreme Court of the United States enters any order or judgment denying review of, or having the effect of upholding a judgment of conviction or probation revocation.

(2) Motion for Reduction. On a party's motion or on its own, and with notice to the parties, the court may grant a sentence reduction. Changing a sentence from a sentence of incarceration to a grant of probation is a permissible sentence reduction. If the sentencing court grants a sentence reduction, it must state its reasons for the reduction in writing.

EXPLANATORY NOTE

Rule 35 was amended, effective January 1, 1979; September 1, 1983; March 1, 1986; March 1, 2006; March 1, 2019.

Rule 35 is derived from Fed.R.Crim.P. 35. One modification in language is the addition of the word "sentencing" to modify court. This clarifies that only the court which rendered judgment may correct an illegal sentence.

The rule encompasses two forms of relief: reduction of sentence, and correction of sentence illegal in form or manner of imposition or given in error. Under the rule: (1) it is presupposed that the conviction upon which the sentence has been imposed is valid; (2) the court is empowered to act on its own motion; and (3) the court is prohibited from acting during the pendency of an appeal.

A motion under the rule is essentially a plea for leniency and presupposes a valid conviction. Rule 35 motion presupposes a valid conviction only for purposes of a hearing on that motion and does not preclude an appeal by a defendant from the conviction. A motion under this rule is addressed to the discretion of the sentencing court and may be granted if the court decides that the sentence originally imposed, for any reason, was unduly severe.

Ordinarily a court is not required to hear testimony or arguments on a motion for reduction of sentence. This is discretionary with the court. If the court does decide to reduce the sentence, the defendant need not be present nor need he be allowed to make a statement in his behalf before the reduced sentence is imposed. A motion for reduction of

sentence must comply with Rule 47, but in the case of pro se requests by prisoners, the court will entertain the request although contained in an informal letter from the prisoner to the sentencing judge.

The clearest instance of illegality in a sentence is where the court imposes a sentence in excess of the maximum term authorized under the statute violated. An excessive sentence is void only as to the excess and is to be corrected, not by absolute discharge of or new trial for the prisoner, but by an appropriate amendment to the invalid sentence by the court of original jurisdiction. A sentence by a court having jurisdiction of the person and the offense committing a person to an authorized penal institution but for a term in excess of what the law permits is not void as to the period of lawful imposition, but void only as to the excess beyond that which could have been lawfully imposed.

It should be noted that the period is not defined as the time in which the motion may be made, but is rather the time in which the court may act. If a court fails to act upon a motion in the allotted time, this precludes relief. The trial court is not required to state its reason for denying a motion for reduction of sentence.

Rule 35 was amended, effective January 1, 1979, to require that notice of a motion for correction or reduction of sentence be given to the parties in accordance with Rule 49, whether the court acts on its own motion or a motion filed by a party. If the court grants relief under this rule, it must give its reasons in writing.

Rule 35 was amended, effective September 1, 1983, to track amendments to the federal rule creating two subdivisions and inserting a new sentence in subdivision (b)

providing that "changing a sentence from a sentence of incarceration to a grant of probation constitutes a permissible reduction of sentence under this subdivision."

Subdivision (a) was amended, effective March 1, 2006, to add a new paragraph (2) giving the sentencing court discretion to correct a clear error in a sentence.

Subdivision (a) was amended, effective March 1, 2019, to clarify that a court shall correct an illegal sentence at any time.

Subdivision (b) was amended, effective March 1, 1986, to follow the 1983 amendment to the federal rule and clarify that the sentencing court may reduce a sentence within 120 days after either the sentence is imposed or probation is revoked.

Rule 35 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 28, 2017, pages 21-22 ; January 27-28, 2005, pages 31-32; June 22, 1984, page 26; April 26, 1984, page 10; October 15-16, 1981, page 11; January 12-13, 1978, pages 9-11; October 27-28, 1977, pages 9-11; September 15-16, 1977, pages 26-27; June 2-3, 1977, pages 11-12; December 11-15, 1972, pages 20-24; September 26-27, 1968, page 18; Fed.R.Crim.P. 35.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 12-06-08, ch. 12-53 except section 12-53-15, which is superseded by N.D.R.Crim.P. 32; N.D.C.C. §§ 12.1-32-06(2), 29-26-03, 29-26-05,

29-26-06, 29-26-07, 29-26-09, 29-26-10, 29-26-11, 29-26-12, 29-26-13, 29-26-14, 29-26-16, 29-26-17, 29-26-18, 29-26-20, 29-26-21, 29-26-22, 29-26-22.1, 29-26-22.2, 29-26-23, 29-26-24, 40-18-13.

CROSS REFERENCE: N.D.R.Crim.P. 47 (Motions); N.D.R.Crim.P. 49 (Serving and Filing Documents).

RULE 25. FILING AND SERVICE

(a) Filing.

(1) Filing with the Clerk. A document required or permitted to be filed in the supreme court must be filed with the clerk of the supreme court.

(2) Filing: Method and Timeliness.

(A) In general. Filing may be accomplished by mail or delivery addressed to the clerk or by electronic means as provided in these rules, but filing is not timely unless the clerk receives the documents within the time fixed for filing. If a document submitted for filing is rejected, the time for filing is tolled from the time of submission to the time the rejection notice is sent. A corrected document will be considered timely filed if submitted and served within three days after the notice of rejection is sent.

(B) Brief, appendix, transcript or petition for rehearing. A brief, appendix, transcript, or petition for rehearing is considered filed on the day of electronic filing, or mailing or deposit with a third-party commercial carrier.

(C) Electronic filing. Documents ~~may~~ must be filed by electronic means to the extent provided and under procedures established in these rules. 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. A document filed by electronic means in compliance with these rules constitutes a written document for the purpose of applying these rules.

(i) Documents, except an appendix, may be filed electronically with the clerk of the supreme court by facsimile only if e-mail submission is not possible.

(ii) The typed attorney or party name or facsimile signature on a document filed electronically has the same effect as an original manually affixed signature.

(iii) A document in compliance with these rules and submitted electronically to the clerk of the supreme court by 11:59 p.m. Bismarck, North Dakota, time is considered filed on the date submitted. Upon receiving an electronic document, the clerk of the supreme court will issue an e-mail confirmation that the document has been received.

~~(iv) A party filing a document electronically must pay any docket fee, fee to file electronically, or any surcharge for internal reproduction of the document by the supreme court.~~

~~a. No payment is required for motions, comments, and other documents less than 20 pages in length, including appendices or attachments. A party electronically filing a motion, comment, or other document must pay $0.50 per page for each page in excess of 20 pages. The charges under this subparagraph apply to any attachments, exhibits, or appendices that are electronically filed with a motion.~~

~~b. A party electronically filing any brief, whether in an appeal, request for supervision, or request for a writ, must pay $25. No payment is required for a reply brief or a petition for rehearing.~~

~~c. No payment is required for an appendix filed 100 pages or less in length. A party must pay $.50 per page for each appendix page in excess of 100 pages.~~

~~(v) A party must pay all required fees and payments within seven days of submitting a document filed electronically. If fees and payments are not paid within seven days of submission, the document will be returned by the clerk of the supreme court and the party will be required to refile the document.~~

(3) Electronic Document Formats. All documents submitted to the court in electronic form must be in approved word processing format or portable document format (~~.pdf~~ PDF). Documents filed in PDF format must be directly converted from a word processing file, rather than scanned if possible. Documents or parts of documents not available in electronic form may be converted to PDF from scanned images. To the extent practicable, PDF documents converted from scanned images should be text-searchable. Electronically filed documents may not be locked, password protected, or contain embedded files or scripts.

(A) Approved word processing formats for documents submitted in electronic form are WordPerfect, Word, and ASCII. Parties must obtain permission from the clerk of the supreme court in advance if they seek to submit documents in another word processing format.

(B) Hard page breaks must separate the cover, table of contents, table of cases, and body of approved word processing format briefs.

(C) An appendix may be filed electronically in portable document format (~~.pdf~~ PDF). Except for limited excerpts showing a court's reasoning, district court transcripts that have been filed electronically with the supreme court may not be included in an

appendix filed electronically.

(4) Filing Motion with Justice. If a motion requests relief that may be granted by a single justice, the justice may receive the motion for filing; the justice must note the filing date on the motion and give it to the clerk.

(5) Filing with the Clerk. Any document filed with the clerk of the supreme court by e-mail by the district court or counsel must be sent to the following e-mail address: supclerkofcourt@ndcourts.gov.

(b) Service of All Documents Required. Unless a rule requires service by the clerk, a party must, at or before the time of filing a document, serve a copy on the other parties to the appeal or review. Service on a party represented by counsel must be made on the party's counsel.

(c) Manner of Service.

(1) Service may be any of the following:

(A) personal, including delivery to a clerk or a responsible person at the office of counsel;

(B) by mail;

(C) by third-party commercial carrier for delivery within three days; or

(D) by electronic means.

(2) When reasonable, considering such factors as the immediacy of the relief sought, distance and cost, service on a party must be by a manner at least as expeditious as the manner used to file the document with the court. If a party files a document by

electronic means, the party must serve the document by electronic means unless the recipient of service cannot accept electronic service.

(3) Service by mail is complete upon mailing. Service via a third-party commercial carrier is complete upon deposit of the document to be served with the commercial carrier. Service by electronic means is complete on transmission, unless the party making service is notified that the document was not received by the party served.

(4) Electronic Service.

(A) ~~If a party files a document by electronic means, the party must serve the document by electronic means unless the recipient of service cannot accept documents served electronically~~ All documents filed electronically must be served electronically except paper documents must be served when a self-represented litigant or prisoner cannot accept electronic service.

(B) Attorneys appearing before or filing with the supreme court must provide an e-mail address to the court and must accept electronic service. Attorneys may designate a law firm e-mail address as their e-mail address for the purpose of accepting electronic service. If the recipient's e-mail address is published on the supreme court's website or known to a party, the document must be served by electronic means to that e-mail address.

(C) Documents served electronically may be served by facsimile only if e-mail service is not possible and only if prior permission to serve by facsimile is granted by the recipient.

(D) If a recipient cannot accept electronic service of a document, service under another means specified by N.D.R.App.P. 25(c) is required.

(d) Proof of Service. A document presented for filing must contain an acknowledgment of service by the person served or proof of service by the person who made service. Proof of service may appear on or be affixed to the document filed. The clerk may permit a document to be filed without acknowledgment or proof of service but must require acknowledgment or proof of service to be filed promptly.

EXPLANATORY NOTE

Rule 25 was amended, effective January 1, 1988; on an emergency basis, September 5, 1990; on an emergency basis, November 16, 1994; March 1, 1996; March 1, 1999; March 1, 2003; March 1, 2008; March 1, 2011; October 1, 2014; March 1, 2019.

This rule is derived from Fed.R.App.P. 25. Rule 25 was amended, effective March 1, 1999, to allow the use of a third-party commercial carrier as an alternative to the Postal Service. The phrase "commercial carrier" is not intended to encompass electronic delivery services.

Subdivision (a) provides documents are not considered filed until they are received by the clerk of the supreme court. Briefs, appendices, transcripts, and petitions for rehearing are exceptions to this general rule.

Subparagraph (a)(2)(C), effective March 1, 2003, allows the court to accept documents filed by electronic means.

Subparagraph (a)(2)(C) was amended, effective March 1, 2019, to require

electronic filing by all parties other than self-represented litigants and prisoners and to eliminate fees that applied specifically to electronic filing.

Paragraph (a)(3) was amended, effective March 1, 2019, to add requirements for documents filed electronically.

Subdivisions (a) and (c) were amended, effective October 1, 2014, to incorporate N.D. Sup. Ct. Admin. Order 14 and to conform the rule to electronic filing. N.D. Sup. Ct. Admin. Order 14 was repealed, effective October 1, 2014.

Subdivision (c) was amended, effective March 1, 2008, to provide for service by electronic means.

Subparagraph (c)(1)(C) was amended, effective March 1, 2011, to change the reference from "calendar days" to "days."

Subparagraph (c)(4)(A) was amended, effective March 1, 2019, to require electronic service of documents filed electronically except when a self-represented litigant or prisoner cannot accept electronic service.

Subdivision (d) allows proof of service by admission of service, affidavit of service, or certificate of an attorney.

Rule 25 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed. R. App. P. 25. 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 25 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 April 27, 2018, pages 2-4; January 25, 2018, pages 11-12; September 26, 2013, page 22-24; April 29-30, 2010, page 20; January 25, 2007, page 17;April 25-26, 2002, pages 3-5; April 26-27, 2001, page 10; April 30-May 1, 1998, page 3; January 29-30, 1998, page 21; January 26-27, 1995, pages 6-7; September 29-30, 1994, page 12; February 19-20, 1987, pages 6-7; September 18-19, 1986, pages 14-15; May 25-26, 1978, page 10; March 16-17, 1978, pages 3-4.

Fed.R.App.P. 25.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 28-27-05.

CROSS REFERENCE: N.D.R.App.P. 10 (The Record on Appeal); N.D.R.App.P. 26(c) (Computing and Extending Time).

Amended Effective ~~March 1, 2018~~ March 1, 2019

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. Page numbering must begin on the cover page with the arabic number 1 and continue consecutively to the end of the document.

(5) Typeface. ~~Either a proportionally spaced or a monospaced face may be used.~~

~~(A) A proportionally spaced face~~ The typeface 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 using arabic numerals 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) Page ~~Word~~ Limit ~~for Proportional Typeface. If proportionately spaced typeface is used,a~~ A principal brief may not exceed 38 pages ~~8,000 words~~, and a reply brief may not exceed 12 pages~~2,000 words~~, excluding ~~words in the table of contents, the table of citations, and~~ any addendum. Footnotes or endnotes must be included in the page~~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)~~(B) ~~Word and~~ Page Limit for N.D.R.Civ.P. 54(b) Certification. ~~If proportionately spaced typeface is used, a~~An argument on the appropriateness of N.D.R.Civ.P. 54(b) certification may not exceed ~~1,250 words~~ 5 pages. ~~If monospaced typeface is used, an argument may not exceed five pages. Word and page~~ 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;

(3) pages in the appendix must be consecutively numbered beginning on the cover page with the arabic number 1;

(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.

(e) Certificate of Compliance. A brief must include a certificate by the attorney, or a self-represented party, that the document complies with the page limitation. The person preparing the certificate must rely on the page count of the filed electronic document. The certificate must state the number of pages in the document. An inaccurate certification may subject the filer to sanctions.

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; March 1, 2018; March 1, 2019.

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, 2018, to specify that paragraphs must be numbered using arabic numerals.

Paragraph (a) (8) was amended, effective March 1, 2013, to decrease the page and type volume allowed in a primary brief and a response brief.

Paragraph (a)(8) was amended, effective March 1, 2019, to use only page counts for filings.

Paragraph (a) (8) , 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) (8) (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.

Subdivision (e) was amended, effective March 1, 2019, to require certification of the page count by filers.

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 26-27, 2017, page 30; 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 35.1 SUMMARY DISPOSITION

(a) Affirmance by Summary Opinion. The court may issue a summary affirmance in any case in which the court determines after argument, unless waived, that no reversible error of law appears and if:

(1) the appeal is frivolous and completely without merit;

(2) the judgment of the district court is ~~based on~~ supported by findings ~~of fact that are not clearly erroneous~~ meeting the required standard of proof;

(3) the verdict or the judgment is supported by substantial evidence;

(4) the district court did not abuse its discretion;

(5) the order of an administrative agency is supported by a preponderance of the evidence;

(6) the summary judgment, directed verdict, or judgment on the pleadings is supported by the record; or,

(7) a previous controlling appellate decision is dispositive of the appeal.

The court may affirm by an opinion citing this rule and indicating which one or more of the above criteria apply and, for Rule 35.1(a)(7), citing any previous controlling appellate decision. The opinion may be in the following form: "Affirmed under N.D.R.App.P. 35.1(a) (1), (2), (3), (4), (5), (6), or (7)."

(b) Reversal by Summary Opinion. In any case in which the court determines after argument, unless waived, that a previous controlling appellate decision is dispositive of

the appeal, the court may reverse by an opinion citing this rule and the controlling appellate decision.

EXPLANATORY NOTE

Rule 35.1, N.D.R.App.P. , was adopted effective March 1, 1986; and amended, effective March 1, 1998; March 1, 2003; May 10, 2017; March 1, 2018; March 1, 2019.

Subdivision (a) was amended, effective March 1, 2018, to restate the requirements for summary affirmance.

Paragraph (a)(2) was amended, effective March 1, 2019, to allow the court to affirm the judgment of the district court based on findings of fact that meet the required standard of proof.

Paragraph (a)(3) was amended, effective March 1, 2003, to allow the court to affirm the judgment of a district court, as well as the verdict of a jury, supported by substantial evidence.

Subdivision (c) was deleted, effective May 10, 2017, to reflect the new practice of publishing summary decisions in the regular manner rather than a list or table as was the prior practice.

SOURCES: Supreme Court Conference Minutes of September 10, 1985; Joint Procedure Committee Minutes of April 27, 2018, pages 10-11; September 27-28, 2001, pages 12-13; January 30, 1997, page 13; November 29, 1984, pages 9-11.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. § 27-02-23; N. D. Const. Art. VI, § 5.

CROSS REFERENCES: N.D.R.App.P. 27 (Motions) ; N.D.R.App.P. 35 (Scope of Review).

RULE 803. EXCEPTIONS TO THE RULE AGAINST HEARSAY -- REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:

(1) Present Sense Impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived the event or condition.

(2) Excited Utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that the event or condition caused.

(3) Then-Existing Mental, Emotional, or Physical Condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

(4) Statement Made for Medical Diagnosis or Treatment. A statement that:

(A) is made for, and is reasonably pertinent to, medical diagnosis or treatment; and

(B) describes medical history; past or present symptoms or sensations; their inception; or their general cause.

(5) Recorded Recollection. A record that:

(A) is on a matter the witness once knew about but now cannot recall well enough to testify fully and accurately;

(B) was made or adopted by the witness when the matter was fresh in the witness's memory; and

(C) accurately reflects the witness's knowledge.

If admitted, the record may be read into evidence but may be received as an exhibit only if offered by an adverse party.

(6) Records of a Regularly Conducted Activity. A record of an act, event, condition, opinion, or diagnosis if:

(A) the record was made at or near the time by, or from information transmitted by, someone with knowledge;

(B) the record was kept in the course of a regularly conducted activity of a business, organization, occupation, or calling, whether or not for profit;

(C) making the record was a regular practice of that activity;

(D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12); and

(E) the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.

(7) Absence of a Record of a Regularly Conducted Activity. Evidence that a matter is not included in a record described in paragraph (6) if:

(A) the evidence is admitted to prove that the matter did not occur or exist;

(B) a record was regularly kept for a matter of that kind; and

(C) the opponent does not show that the possible source of the information or other

circumstances indicate a lack of trustworthiness.

(8) Public Records. A record or statement of a public office if:

(A) it sets out:

(i) the office's activities;

(ii) a matter observed while under a legal duty to report, but, in a criminal case, not including a matter observed by law-enforcement personnel; or

(iii) in a civil case or against the government in a criminal case, factual findings from a legally authorized investigation; and

(B) the opponent does not show that the source of information or other circumstances indicate a lack of trustworthiness.

Before offering factual findings in evidence under this exception, a party must provide the opposing party a copy of the findings, or the portion that relates to the controversy. The opposing party may cross-examine under oath the person who prepared a record, statement or factual findings submitted under this exception, or any person furnishing information recorded in the record, statement or findings. If the person is unavailable for cross-examination, the record, statement, or findings may be admitted under this exception unless the court decides the opposing party would be prejudiced unfairly.

(9) Public Records of Vital Statistics. A record of a birth, fetal death, death, or marriage, if reported to a public office in accordance with a legal duty.

(10) Absence of a Public Record. Testimony, or a certification under Rule 902,

that a diligent search failed to disclose a public record or statement if:

(A) the testimony or certification is admitted to prove that:

(i) the record or statement does not exist; or

(ii) a matter did not occur or exist, if a public office regularly kept a record or statement for a matter of that kind; and

(B) in a criminal case, a prosecutor who intends to offer a certification provides written notice of that intent at least 14 days before trial, and the defendant does not object in writing within 7 days of receiving the notice, unless the court sets a different time for the notice or the objection.

(11) Records of Religious Organizations Concerning Personal or Family History. A statement of birth, legitimacy, ancestry, marriage, divorce, death, relationship by blood or marriage, or similar facts of personal or family history, contained in a regularly kept record of a religious organization.

(12) Certificates of Marriage, Baptism, and Similar Ceremonies. A statement of fact contained in a certificate:

(A) made by a person who is authorized by a religious organization or by law to perform the act certified;

(B) attesting that the person performed a marriage or similar ceremony or administered a sacrament; and

(C) purporting to have been issued at the time of the act or within a reasonable time after it.

(13) Family Records. A statement of fact about personal or family history contained in a family record, such as a Bible, genealogy, chart, engraving on a ring, inscription on a portrait, or engraving on an urn or burial marker.

(14) Records of Documents That Affect an Interest in Property. The record of a document that purports to establish or affect an interest in property if:

(A) the record is admitted to prove the content of the original recorded document, along with its signing and its delivery by each person who purports to have signed it;

(B) the record is kept in a public office; and

(C) a statute authorizes recording documents of that kind in that office.

(15) Statements in Documents That Affect an Interest in Property. A statement contained in a document that purports to establish or affect an interest in property if the matter stated was relevant to the document's purpose, unless later dealings with the property are inconsistent with the truth of the statement or the purport of the document.

(16) Statements in Ancient Documents. A statement in a document that ~~is at least 20 years old~~ was prepared before January 1, 1998, and whose authenticity is established.

(17) Market Reports and Similar Commercial Publications. Market quotations, lists, directories, or other compilations that are generally relied on by the public or by persons in particular occupations.

(18) Statements in Learned Treatises, Periodicals, or Pamphlets. A statement contained in a treatise, periodical, or pamphlet if:

(A) the statement is called to the attention of an expert witness on

cross-examination or relied on by the expert on direct examination; and

(B) the publication is established as a reliable authority by the expert's admission or testimony, by another expert's testimony, or by judicial notice.

If admitted, the statement may be read into evidence but not received as an exhibit.

(19) Reputation Concerning Personal or Family History. A reputation among a person's family by blood, adoption, or marriage, or among a person's associates or in the community, concerning the person's birth, adoption, legitimacy, ancestry, marriage, divorce, death, relationship by blood, adoption, or marriage, or similar facts of personal or family history.

(20) Reputation Concerning Boundaries or General History. A reputation in a community, arising before the controversy, concerning boundaries of land in the community or customs that affect the land, or concerning general historical events important to that community, state, or nation.

(21) Reputation Concerning Character. A reputation among a person's associates or in the community concerning the person's character.

(22) Judgment of a Previous Conviction. Evidence of a final judgment of conviction if:

(A) the judgment was entered after a trial or guilty plea;

(B) the conviction was for a crime punishable by death or by imprisonment for more than a year;

(C) the evidence is admitted to prove any fact essential to the judgment; and

(D) when offered by the prosecutor in a criminal case for a purpose other than impeachment, the judgment was against the defendant.

The pendency of an appeal or post-conviction proceeding may be shown but does not affect admissibility.

(23) Judgments Involving Personal, Family, or General History, or a Boundary. A judgment that is admitted to prove a matter of personal, family, or general history, or boundaries, if the matter:

(A) was essential to the judgment; and

(B) could be proved by evidence of reputation.

(24) Child's statement about sexual abuse. A statement by a child under the age of 12 years about sexual abuse of that child or witnessed by that child if:

(A) the trial court finds, after hearing on notice in advance of the trial of the sexual abuse issue, that the time, content, and circumstances of the statement provide sufficient guarantees of trustworthiness; and

(B) the child either:

(i) testifies at the trial; or

(ii) is unavailable as a witness and there is corroborative evidence of the act which is the subject of the statement.

(25) [Other Exceptions.] [Transferred to Rule 807]

EXPLANATORY NOTE

Rule 803 was amended, effective March 1, 1990; March 1, 2000; March 1, 2014;

March 1, 2016; March 1, 2019.

Rule 803 is based on Fed.R.Ev. 803.

The last two sentences in paragraph (8) were derived from Sections 31-09-11 and 31-09-12, NDCC, which were superseded by these rules.

The excepted situations listed in this rule traditionally have been deemed to have circumstantial guarantees of trustworthiness which render hearsay evidence reliable and admissible, even though the declarant may be available to testify.

Paragraph (22) provides in certain instances, evidence of a previous final judgment comes within a hearsay exception. The paragraph differs from its federal counterpart. The federal exception for pleas of nolo contendere has been deleted as that plea is not used in the state courts of North Dakota. The paragraph also was changed by adding post-conviction proceedings, like appeals, do not affect the admissibility of previous convictions.

It should also be noted these exceptions remove only the hearsay objection to evidence. Evidence of a past conviction sought to be introduced under paragraph (22) must also meet the requirements of N.D.R.Ev. 609.

Rule 803 was amended, effective March 1, 1990, to provide a hearsay exception for a child victim of sexual abuse and is modeled in part after the Colorado and Utah statutes on a child victim's out-of-court statement regarding sexual abuse. Former paragraph (24) was renumbered to paragraph (25) and all other amendments are technical in nature and no substantive change is intended.

Rule 803 was amended, effective March 1, 2000, to follow the December 1, 1997, federal amendment. The contents of Rule 803(25) are transferred to new Rule 807.

Rule 803 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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 (6)(D) was amended, effective March 1, 2014, to allow the foundation for admission of a record of a regularly conducted activity to be established by a certification that complies with Rule 902 (11) or (12).

Paragraphs (6), (7), and (8) were amended, effective March 1, 2016, to specifically place the burden of showing untrustworthiness of a record on the opponent of admission. The change is based on the December 2014 amendment to Fed.R.Ev. 803.

Paragraph (10) was amended, effective March 1, 2016, to follow the December 2013 amendments to Fed.R.Crim.P. 803. The amendment is intended to require a "notice and demand" procedure in criminal cases if the prosecution intends to introduce evidence by certificate.

Paragraph (16) was amended, effective March 1, 2019, to limit application of the ancient document exception to documents prepared before January 1, 1998. A document is "prepared" when the statement proffered was recorded in that document. For example, if a hardcopy document is prepared in 1995, and a party seeks to admit a scanned copy of that document, the date of preparation is 1995 even though the scan was made long after

that – the subsequent scan does not alter the document. The relevant point is the date on which the information is recorded, not when the information is prepared for trial. However, if the content of the document is itself altered after the cut-off date, then the hearsay exception will not apply to statements that were added in the alteration.

SOURCES: Supreme Court Conference Minutes of October 23 and 25, 1989 [Rule 803 (24)]. Joint Procedure Committee Minutes of January 25, 2018, pages 12-13; April 23-24, 2015, pages 27-28; January 29-30, 2015, pages 23-24;April 25-26, 2013, pages 18-21; January 31-February, 2013, pages 23-24; September 27, 2012, page 22; Rule 803(25), September 24-25, 1998, page 4; April 30-May 1, 1998, page 16; Rule 803(24), April 20, 1989, pages 6-8; March 24, 1988, pages 2-6 and 15-16; December 3, 1987, pages 6-7; May 21, 1987, pages 6-7; Rule 803(5)(18)(19)(21)(25), December 3, 1987, pages 15-16; Rule 803, June 3, 1976, page 15; Rule 803(1), (2), January 29, 1976, page 19; Rule 803(3), January 29, 1976, page 19; October 1, 1975, page 7; Rule 803(4), (5), January 29, 1976, page 19; Rule 803(6), January 29, 1976, page 20; Rule 803(7), January 29, 1976, page 20; October 1, 1975, page 7; Rule 803(8), January 29, 1976, page 21; October 1, 1975, page 7; Rule 803(9), (10), (12), (13), (14), (15), (16), (17), (18), (20), (21), January 29, 1976, pages 21-23; Rule 803(11), June 3, 1976, page 15; January 29, 1976, page 22; Rule 803(19), June 3, 1976, page 15; January 29, 1976, page 23; Rule 803(22), January 29, 1976, pages 23, 24; October 1, 1975, page 7; Rule 803(23), January 29, 1976, page 24; Rule 803(24), April 8, 1976, pages 8a, 9; January 29, 1976, page 24. Fed.R.Ev. 803; Rule 803, SBAND proposal.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 31-09-11, 31-09-12.

CONSIDERED: N.D.C.C. §§ 2-06-05, 4-22-15, 6-03-32, 6-08-10, 10-04-19, 10-15-08, 11-11-38, 11-13-08, 11-15-16, 11-18-09, 11-20-01, 11-20-05, 11-20-13, 14-03-24, 19-01-10, 19-03.1-37, 19-20.1-17, 23-24-04, 24-07-15, 28-23-12, 31-04-05, 31-04-06, 31-08-01, 31-08-02, 31-08-05, 32-19-26, 32-25-03, 32-25-04, 35-21-05, 35-22-11, 35-22-16, 39-20-07, 40-01-10, 40-02-12, 40-04-06, 40-11-08, 40-16-09, 41-03-66, 42-02-07, 43-01-21, 43-01-22, 43-06-07, 43-07-13, 40-10-07, 43-11-10, 43-13-12, 43-17-11, 43-19.1-10, 43-19.1-20, 43-28-08, 43-28-16, 43-29-04, 43-36-17, 47-19-06, 47-19-12, 47-19-23, 47-19-24, 47-19-45, 49-01-14, 49-06-14, 49-19-16, 57-38-46, 61-03-06, 61-04-25, 61-05-19, 61-16-06.

Cross Reference: N.D.R.Ev. 609 (Impeachment by Evidence of a Criminal Conviction); N.D.R.Ev. 807 (Residual Exception); N.D.R.Crim.P. 11 (Pleas); N.D.R.Crim.P. 12 (Pleadings and Pretrial Motions).

RULE 902. EVIDENCE THAT IS SELF-AUTHENTICATING

The following items of evidence are self-authenticating; they require no extrinsic evidence of authenticity in order to be admitted:

(1) Domestic Public Documents That Are Sealed and Signed. A document that bears:

(A) a seal purporting to be that of the United States; any state, district, commonwealth, territory, or insular possession of the United States; the former Panama Canal Zone; the Trust Territory of the Pacific Islands; a political subdivision of any of these entities; or a department, agency, or officer of any entity named above; and

(B) a signature purporting to be an execution or attestation.

(2) Domestic Public Documents That Are Not Sealed but Are Signed and Certified. A document that bears no seal if:

(A) it bears the signature of an officer or employee of an entity named in Rule 902(1)(A); and

(B) another public officer who has a seal and official duties within that same entity certifies under seal, or its equivalent, that the signer has the official capacity and that the signature is genuine.

(3) Foreign Public Documents. A document that purports to be signed or attested by a person who is authorized by a foreign country's law to do so. The document must be accompanied by a final certification that certifies the genuineness of the signature and

official position of the signer or attester, or of any foreign official whose certificate of genuineness relates to the signature or attestation or is in a chain of certificates of genuineness relating to the signature or attestation. The certification may be made by a secretary of a United States embassy or legation; by a consul general, vice consul, or consular agent of the United States; or by a diplomatic or consular official of the foreign country assigned or accredited to the United States. If all parties have been given a reasonable opportunity to investigate the document's authenticity and accuracy, the court may, for good cause, either:

(A) order that it be treated as presumptively authentic without final certification; or

(B) allow it to be evidenced by an attested summary with or without final certification.

(4) Certified Copies of Public Records. A copy of an official record, or a copy of a document that was recorded or filed in a public office as authorized by law, if the copy is certified as correct by:

(A) the custodian or another person authorized to make the certification; or

(B) a certificate that complies with Rule 902(1), (2), or (3), a statute, or a rule prescribed by the North Dakota Supreme Court.

(5) Official Publications. A book, pamphlet, or other publication purporting to be issued by a public authority.

(6) Newspapers and Periodicals. Printed material purporting to be a newspaper or periodical.

(7) Trade Inscriptions and the Like. An inscription, sign, tag, or label purporting to have been affixed in the course of business and indicating origin, ownership, or control.

(8) Acknowledged Documents. A document accompanied by a certificate of acknowledgment that is lawfully executed by a notary public or another officer who is authorized to take acknowledgments.

(9) Commercial Paper and Related Documents. Commercial paper, a signature on it, and related documents, to the extent allowed by general commercial law.

(10) Presumptions Under a Statute. A signature, document, or anything else that a statute declares to be presumptively or prima facie genuine or authentic.

(11) Certified Domestic Records of a Regularly Conducted Activity. The original or a copy of a domestic record that meets the requirements of Rule 803(6)(A)-(C), as shown by a certification of the custodian or another qualified person in the form of an affidavit made under penalty of perjury. Not less than 14 days before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record, and must make the record and certification available for inspection, so that the party has a fair opportunity to challenge them.

(12) Certified Foreign Records of a Regularly Conducted Activity. In a civil case, the original or a copy of a foreign record that meets the requirements of Rule 902(11), modified as follows: the certification must be signed in a manner that, if falsely made, would subject the maker to a criminal penalty in the country where the certification is signed. The proponent must also meet the notice requirements of Rule 902(11).

(13) Certified Records Generated by an Electronic Process or System. A record generated by an electronic processor system that produces an accurate result, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902(11) or (12). The proponent must also meet the notice requirements of Rule 902(11).

(14) Certified Data Copied from an Electronic Device, Storage Medium, or File. Data copied from an electronic device, storage medium, or file, if authenticated by a process of digital identification, as shown by a certification of a qualified person that complies with the certification requirements of Rule 902 (11) or (12). The proponent also must meet the notice requirements of Rule 902 (11).

EXPLANATORY NOTE

Rule 902 was amended, effective March 1, 1990; March 1, 2014; March 1, 2019.

Rule 902 is based on Fed.R.Ev. 902. It represents a relaxation of the common law requirement of authentication by creating a presumption that certain documents and records are authentic and thereby placing the burden of showing lack of genuineness on the party opposing introduction of the offered evidence. This has been done by statute for certain public documents, records, and certified copies. Rule 902 extends the benefits of this presumption to private documents in which the risk of falsification is slight.

Rule 902 was amended, effective March 1, 1990. The amendment is technical in nature and no substantive change is intended.

Paragraphs (11) and (12) were added to the rule, effective March 1, 2014. The

intent of these provisions is to allow the foundation for admission of a record of a regularly conducted activity to be established by a certificate made under penalty of perjury rather than by live testimony. Paragraphs (11) and (12) also establish a notice requirement, which is intended to provide an opposing party a fair opportunity to test the adequacy of the foundation provided in the certification.

Paragraphs (13) and (14) were added to the rule, effective March 1, 2019, to provide a means for self-authentication of designated electronic material.

Rule 902 was amended, effective March 1, 2014, in response to the December 1, 2011, revision of the Federal Rules of Evidence. 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 25, 2018, page 13; April 25-26, 2013, pages 18-21; January 31-February, 2013, pages 23-24; September 27, 2012, page 22-24; March 24-25, 1988, pages 15-16; December 3, 1987, page 15; June 3, 1976, pages 10-12, 14; October 1, 1975, pages 8, 9. Fed.R.Ev. 902; Rule 902, SBAND proposal.

STATUTES AFFECTED:

CONSIDERED: N.D.C.C. ch. 31-09; N.D.C.C. §§ 11-18-11, 16-13-11, 31-08-02, 31-08-02.1, 31-08-06, 43-13-12.

Cross Reference: N.D.R.Ev. 301 (Presumptions in a Civil Case Generally) N.D.R.Ev. 803 (Exceptions to the Rule Against Hearsay Regardless of Whether the

Declarant is Available as a Witness); N.D.R.Civ.P. 44 (Proving an Official Record);

N.D.R.Crim.P. 27 (Proof of Official Record).

RULE 3.1 PLEADINGS AND OTHER DOCUMENTS

(a) Legibility ~~and Numbering~~. All pleadings and other documents must be typewritten, printed, ~~or~~ reproduced, or in electronic form and easily readable. ~~Each sheet must be separately numbered. Pleadings and other documents filed with the court, except as otherwise permitted by the court, must be prepared on 8 1/2 x 11 inch white paper.~~

(b) Signature. All pleadings and other documents of a party represented by an attorney must be signed by at least one attorney of record in the attorney's individual name and contain beneath the signature the attorney's name, address, telephone number, e-mail address for electronic service, and State Board of Law Examiners identification number. All pleadings and other documents of a party who is not represented by an attorney must be signed by the party and contain beneath the signature the party's name, address and telephone number.

(c) ~~Spacing and Names. Writing must appear on one side of the sheet only and must be double-spaced, except for quoted material. Names must be typed or printed beneath all signatures.~~

~~(d) Binding. All pleadings and other documents in an action or proceeding must be filed by the clerk flat and unfolded and each set of papers firmly fastened together.~~

~~(e)~~ Filing of Documents. A party seeking to file a pleading or other document must submit it to the clerk. The first submitted version of a pleading or document will be treated as the original unless otherwise ordered by the court. A party need only file a

single copy of any pleading or document.

~~(f)~~ (d) Lost ~~Papers~~ Documents. If any original document is lost or withheld by any person, the court may authorize a copy to be filed.

~~(g)~~ (e) File Numbers. The clerk, at the time of the filing of a case and at the time of the filing of any responsive pleading, must assign a file number to the case and immediately notify the attorney of record of the assigned file number. Thereafter, all documents and pleadings to be filed must bear the assigned file number on the front or title page in the upper righthand portion of the document to be filed.

~~(h)~~ (f) Filing After Service. After the complaint is filed, all documents required to be served on a party, together with certificate of service, must be filed with the court within a reasonable time after service. Discovery documents may only be filed as allowed by N.D.R.Civ.P. 5(d)(3).

~~(i)~~ (g) Privacy Protection. Parties must follow privacy protection instructions in N.D.R.Ct. 3.4 when making filings with the court. Court personnel have no duty to review documents for compliance with N.D.R.Ct. 3.4.

~~(j)~~ (h) Non-Conforming Documents.

(1) Documents and pleadings that do not conform to this rule may not be filed.

(2) If a non-conforming document is filed by mistake, the court on motion or on its own may order the pleading or other document reformed. If the order is not obeyed, the court may order the document stricken.

(3) If a document is stricken, the time for filing is tolled from the time of

submission to the time the order striking the document is filed. The document will be considered timely filed if resubmitted in corrected form within three days after the order striking the document is filed.

(i) Paper Documents. Paper documents may be filed only as allowed under Rule 3.5(a). Except as otherwise permitted by the court, paper documents must be prepared on 8 1/2 x 11 inch white paper. Each sheet must be separately numbered and in the proper sequence. Writing may appear on one side of the sheet only and must be double-spaced, except for quoted material. Paper documents must be filed by the clerk flat and unfolded with each set of papers firmly fastened together.

EXPLANATORY NOTE

Rule 3.1 was amended, effective January 1, 1988; March 1, 1996; March 1, 1999; August 1, 2001; March 1, 2005; March 1, 2007; March 1, 2009; May 1, 2012; March 1, 2013; April 15, 2013; March 1, 2014; March 1, 2018; March 1, 2019.

Rule 3.1 was reorganized, effective May 1, 2012, to make it clear that all documents presented for filing must conform to all applicable requirements of the rule.

A new subdivision (b) was added, effective March 1, 1996, which contains signature requirements. The letter designation of each existing subdivision was amended accordingly.

Subdivision (b) was amended, effective April 15, 2013, to require the e-mail address for electronic service under Rule 3.5 to be provided in filed documents.

A new subdivision ~~(c)~~ (c) was added, effective March 1, 2005, to clarify that

documents must be filed with the clerk. Submitting a document to a judge or to court personnel other than the clerk does not constitute filing. The first version of a given document submitted to the clerk, regardless of what form it is in, will be filed and treated as the original. A party seeking to correct the original or have another document treated as the original must obtain an order from the court.

Subdivision ~~(c)~~ (c) was amended, effective March 1, 2014, to clarify that only a single copy of any pleading or document need be filed with the court. This provision supersedes the requirement in N.D.C.C. § 29-15-21 that a demand for change of judge be filed in triplicate and the requirements in N.D.C.C. §§ 14-12.2-36 and 14-14.1-25 for the filing of two copies of an order. This provision should be interpreted as superseding any statutory requirement that multiple copies of a document be filed with the court.

Subdivision ~~(h)~~ (f) was amended, effective March 1, 2014, to require, once the complaint has been filed, filing of all documents that must be served, along with a certificate of service, within a reasonable time after service. This provision is modeled after Minn. R. Civ. P. 5.04.

Subdivision ~~(i)~~ (g) was amended, effective March 1, 2007, to specify that court personnel have no duty to review documents for compliance with privacy protection rules.

Subdivision ~~(i)~~ (g) was amended, effective March 1, 2009, to reflect the addition of document privacy protection requirements to N.D.R.Ct. 3.4.

Subdivision ~~(j)~~ (h) was amended, effective March 1, 2018 to provide that the time

of filing is tolled pending resubmission of a stricken document.

Subdivision (i) was added, effective March 1, 2019, to consolidate the rule's requirements related to the preparation and filing of paper documents in a single place. The letter designations of the rule's subdivisions were amended accordingly.

SOURCES: Joint Procedure Committee Minutes of April 27, 2018, pages 11-12; September 29-30, 2016, page 29; September 26, 2013, pages 7-11; April 25-26, 2013, pages 13-15; September 27, 2012, page 14; January 26-27, 2012, pages 16-17; January 24, 2008, pages 9-12; October 11-12, 2007, pages 28-30; April 26-27, 2007, page 31; September 22-23, 2005, pages 16-17; September 23-24, 2004, pages 3-5; April 29-30, 2004, pages 6-13, 17-25; January 29-30, 2004, pages 3-8; September 16-17, 2003, pages 2-11; April 24-25, 2003, pages 6-12; January 29-30, 1998, page 22; September 29-30, 1994, pages 6-7.

STATUTES AFFECTED:

Superseded: N.D.C.C. §§ 14-12.2-36 (in part), 14-14.1-25 (in part), and 29-15-21 (in part).

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; Representations to Court; Sanctions); N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court); N.D.R.Ct. 3.5 (Electronic Filing in the District Courts); N.D.R.Ct. Appendix K (Electronic Filing Requirements); N.D.Sup.Ct.Admin.R. 41 (Access to Judicial Records).

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 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 using arabic numerals 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 that consist of a single paragraph, documents prepared before the action was commenced, or in documents not prepared by the parties or court.

(3) A document submitted for electronic filing must comply with published guidelines (N.D.R.Ct. Appendix K Rule 3.5 Electronic Filing Requirements).

(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. A notice of rejection must state all provisions of Appendix K or other statute, rule or case relied upon.

(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.

(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 delivered 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.

(5) Counsel are required to use the Attorney Subscription Management System for notice of filing by the court in the Odyssey system.

(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; March 1, 2019.

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; March 1, 2018.

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 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.

Paragraph (b)(2) was amended, effective March 1, 2018, to specify that paragraphs

must be numbered using arabic numerals.

Paragraph (b)(2) was amended, effective March 1, 2019, to except documents that consist of a single paragraph from the paragraph numbering requirement.

Paragraph (b)(3) was added, effective March 1, 2018, to add a reference to Appendix K, which contains document guidelines.

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 (c) was amended, effective March 1, 2018, to require a notice of document rejection to state all provisions of Appendix K or other statute, rule or case relied upon for the rejection and to delete the requirement to file a notice of resubmission.

Paragraph (e)(4) was amended, effective March 1, 2018, to provide that documents served electronically are treated as delivered on the day of transmission.

Paragraph (e)(5) was added, effective March 1, 2018, to require counsel to use the Attorney Subscription Management System for notice of filing by the court.

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 April 27, 2018, pages 13-14; September 28, 2017, pages 2-10; April 27, 2017, pages 14-19; January 26-27, 2017, page 30; 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. 3.1 (Pleadings); N.D.R.Ct. 3.4 (Privacy Protection for Filings Made with the Court); N.D.R.Ct. Appendix K (Electronic Filing Requirements); 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).

APPENDIX K. RULE 3.5 ELECTRONIC FILING REQUIREMENTS

The filing will be rejected if these guidelines are not followed:

(a) Case Initiation

(1) The document caption and case number must relate to the correct county.

(2) The filing fee must be included with document/proceedings that require a filing fee. The filer must submit with the filing code that includes the proper fee.

(3) Exhibits to pleadings must be filed as separate documents.

(4) All party information, i.e., names of parties and addresses (including attorneys), must be entered within the "Parties" section of File & Serve.

(A) If the information is unknown, specify what is unknown in the filing comments field within the filing details. For example, "Defendant address unknown."

(B) Failure to provide or update a party's address may result in a party not receiving notices from the court, which could result in a delay or possible dismissal of your case. Note - Attorney address information must be updated with the State Board of Law Examiners.

(5) Aliases, such as AKA, DBA, should be included in the caption of the document and must be entered as separate parties in File & Serve. In order to achieve accurate search results in Public Search and Odyssey, when entering a party name, put in only the name of the person or business - do not include "AKA," "FKA," "DBA," "Assignee of __" as part of the name. The Clerk of Court will update the record to reflect the use of

"AKA," "FKA," "DBA," "Assignee of __".

(6) The initiating documents must be filed using the correct case type.

(7) The data entry fields for descriptions, party, and attorney information may not be entered in all capital letters.

(b) Event Codes/Service

(1) Correct event codes must be used. See "What Filing Code Do I Use?" on the File & Serve website for a list of Event Codes and description of when to use them.

(2) The Service Document must indicate who was served in the additional filing description. If serving more than three persons, a brief summary of those being served may be used, e.g. all plaintiffs, all defendants, all parties.

(3) The Proof of Service documents must be filed as separate documents with complete case heading and case number.

(c) Documents

(1) Individual documents must be filed separately. For example, documents may not be combined such as Motion & Service Document, Stipulation & Proposed Order, Brief & Exhibits, and Plea Agreement & Proposed Orders.

(2)The Notice of Entry of Judgment must identify the docket number and the date the judgment was signed. A copy of the judgment may be attached to the notice of entry of judgment (as one document). See N.D.R.Civ.P. 58(b).

(3) The signature line may not be blank. See N.D.R.Ct. 3.5(a)(6).

(4) The document must be legible, complete, of adequate quality, and in black and

white. Colored or shaded documents may be filed as paper documents if necessary to ensure legibility. See N.D.R.Ct. 3.5(a)(4).

(5) The case number must be on the document (leading zeroes are not required). See N.D.R.Ct. 3.1~~(g)~~ (e).

(6) The document description must correspond to the document filed. Avoid unnecessary abbreviations or acronyms.

(7) Correspondence requesting action from the clerk's office (e.g., cover letters indicating documents are enclosed for filing, requests for certified copies, requests for executions.) may not be included.

(8) The attorney signature block must include all of the following: the attorney's individual name, address, phone number, service email address, and State Board of Law Examiners Bar identification number. See N.D.R.Ct. 3.1(b).

(9) A confidential information form must be filed when a redacted document is filed. See N.D.R.Ct. 3.4(f).

(10) All pages in the document must be included and be in the proper sequence. ~~See N.D.R.Ct. 3.1(a).~~

(11) All paragraphs must be numbered in documents. Paragraph numbering is not required in exhibits, documents that consist of a single paragraph, documents prepared before the action was commenced, or in documents not prepared by the parties or court. See N.D.R.Ct. 3.5(b)(2).

(d) Exhibits

(1) The Filing Description field must include a description of what each exhibit contains in addition to the word "Exhibit" and any enumeration such as A or 1. For example, "Exhibit A--Drug Laboratory Report."

RULE 50. COURT INTERPRETER QUALIFICATIONS AND PROCEDURES

SECTION 1. POLICY.

The Judicial System's policy is to ensure that adequate court interpreter services are provided for those persons who are unable to readily understand or communicate in the English language because of a disability or a non-English speaking background. This rule establishes court interpreter qualifications and general procedures to assist in ensuring that effective interpreter services are provided.

SECTION 2. PROVIDING INTERPRETERS.

A. Interpreter at No Cost. A limited English proficiency individual is one whose first language is other than English and who has a limited ability to speak, read, write or understand English. Interpreters will be provided at no cost to a limited English proficiency individual or deaf individual under the following circumstances:

1. for deaf or hearing impaired individuals who are a ~~litigant~~ party or witness in any type of case;

2. for limited English proficiency ~~litigants~~ parties and witnesses in criminal, administrative traffic, or infraction cases;

3. for limited English proficiency ~~litigants~~ parties and witnesses in juvenile hearings;

4. for limited English proficiency ~~litigants~~ parties and witnesses in Mental Health cases under N.D.C.C. ch. 25-03.1;

5. for limited English proficiency ~~litigants~~ parties and witnesses in Sexually Dangerous Commitment cases under N.D.C.C. ch. 25-03.3;

6. for limited English proficiency ~~litigants~~ parties and witnesses in Guardianship cases under N.D.C.C. ch. 30.1-27 (minors) and 30.1-28 (incapacitated person);

7. for limited English proficiency ~~litigants~~ parties and witnesses in Conservatorship cases under N.D.C.C. ch. 30.1-29;

8. for limited English proficiency ~~litigants~~ parties and witnesses in Domestic Violence Protection Order cases under N.D.C.C. ch. 14-07.1;

9. for limited English proficiency parties and witnesses in Sexual Assault Restraining Order cases under N.D.C.C. § 12.1-31-01.2;

~~9~~ 10. for limited English proficiency ~~litigants~~ parties and witnesses in Disorderly Conduct Restraining Order cases under N.D.C.C. ch. 12.1-31.2;

~~10~~ 11. for limited English proficiency ~~litigants~~ parties and witnesses in Annulment of Marriage cases under N.D.C.C. ch. 14-04;

~~11~~ 12. for limited English proficiency ~~litigants~~ parties and witnesses in Divorce cases under N.D.C.C. ch. 14-05;

~~12~~ 13. for limited English proficiency ~~litigants~~ parties and witnesses in Paternity cases under N.D.C.C. ch. 14-20;

~~13~~ 14. for limited English proficiency ~~litigants~~ parties and witnesses in Contempt of Court cases under N.D.C.C. ch. 27-10.

B. Appointment under Rule. An interpreter will be appointed for a person with

limited English proficiency who does not qualify for a free interpreter under Section 2 (A) but who meets the standards of N.D.R.Civ.P. 43 or N.D.R.Crim.P. 28. A party in a civil case may be required to reimburse the court for interpreter costs based upon ability to pay.

C. Payment for Interpreters. Payment for interpreter services on behalf of law enforcement, counsel for indigents, prosecutors or corrections agents, other than at court appearances, is the responsibility of the agency that requested the services or the political subdivision that appointed counsel. Interpreter services required for evaluations, treatment, classes, or other similar services is the responsibility of the agency providing the service.

D. Exclusions. Payment for interpreter services for discussions or meetings with an attorney, depositions, discovery process, or other legal process outside of a court appearance is the responsibility of the party requesting the service.

SECTION 3. COURT INTERPRETER QUALIFICATIONS.

Except as otherwise provided in this rule, in order to provide court interpreter services in a judicial proceeding as required by statute, rule, or order of the court, a person must have the following qualifications:

A. If providing interpreter services for a person who is deaf or hearing impaired, certification by the Registry of Interpreters for the Deaf, certification by the National or North Dakota Association for the Deaf, or approval by the superintendent for the state school for the deaf.

B. If providing interpreter services for a non-English speaking person, certification

by a recognized interpreter certification program in another jurisdiction and presence on a statewide roster of interpreters, if any, maintained by that jurisdiction.

SECTION 4. QUALIFICATIONS EXCEPTION.

If a court interpreter satisfying the requirements of Section 2 is not available, a court may obtain the services of any other interpreter whose actual qualifications have been determined by examination or other appropriate means. For purposes of this section, "actual qualifications" means the ability to readily communicate with a non-English speaking person and orally transfer the meaning of statements to and from English and the language spoken by the non-English speaking person, or the ability to communicate with a hearing-impaired or otherwise disabled person, interpret the proceedings, and accurately repeat and interpret the statements of the hearing-impaired or otherwise disabled person.

SECTION 5. GENERAL PROCEDURES - REQUIREMENTS

A. Interpreter Oath. Before commencing duties, an interpreter shall take an oath that the interpreter will make a true, complete, and impartial interpretation in an understandable manner to the person requiring interpretation services and that the interpreter will truly, completely, and impartially repeat the statements of the person to the best of the interpreter's skills and judgment.

B. Conflicts of Interest - Bias. An interpreter shall disclose to the court any actual or perceived conflicts of interest that may impair the interpreter's ability to adequately interpret the proceedings. An interpreter shall be impartial and unbiased and shall refrain

from conduct that may give the appearance of bias.

C. Objection to Interpreter. An objection regarding any circumstances that may render an interpreter unqualified to interpret in the proceeding must be made in a timely manner. The court shall consider the objection and make a ruling on the record.

D. Method of Interpretation. As the circumstances require, the court shall consult with the interpreter and the parties regarding the method of interpretation to be used to ensure that a complete and accurate interpretation of the testimony of a witness or party is obtained.

E. Recording of Proceeding. The court on its own motion or on the motion of a party may order that the testimony of the person for whom interpretation services are provided and the interpretation be recorded for use in verifying the official transcript of the proceeding. If an interpretation error is believed to have occurred based on review of the recording, a party may file a motion requesting that the court direct that the official transcript be amended.

F. Additional Interpreter. As circumstances may require, the court may provide an additional interpreter to afford relief and reduce fatigue if the time period of interpretation exceeds [2] continuous hours.

G. Removal of Interpreter. The court may remove an interpreter if the interpreter:

(1) is unable to adequately interpret the proceedings;

(2) knowingly makes a false interpretation;

(3) knowingly discloses confidential or privileged information obtained while

serving as an interpreter;

(4) knowingly fails to disclose a conflict of interest that impairs the ability to provide complete and accurate interpretation; or

(5) fails to appear as scheduled without good cause.

SECTION 6. EFFECTIVE DATE.

This rule is effective March 1, 2005. This rule was amended, effective August 1, 2015; March 1, 2019.

RULE 52 - CONTEMPORANEOUS TRANSMISSION BY RELIABLE ELECTRONIC MEANS

Section 1. Purpose and Definition.

This rule provides a framework for the use of contemporaneous audio or audiovisual transmission by reliable electronic means in North Dakota's district and municipal courts. This rule is intended to enhance the current level of judicial services available within the North Dakota court system through the use of reliable electronic means and not in any way to reduce the current level of judicial services.

Section 2. In General.

(A) Subject to the limitations in Sections 3, 4 and 5, a district or municipal court may conduct a proceeding by reliable electronic means on its own motion or on a party's motion.

(B) A party wishing to use reliable electronic means must obtain prior approval from the court after providing notice to other parties.

(C) Parties must coordinate approved reliable electronic means proceedings with the court to facilitate scheduling and ensure equipment compatibility.

(D) Each site where reliable electronic means are used in a court proceeding must provide equipment or facilities for confidential attorney-client communication.

(E) A method for electronic transmission of documents must be available at each site where reliable electronic means are used in a court proceeding for use in conjunction

with the proceeding.

Section 3. Civil Action.

In a civil action, a district or municipal court may conduct a hearing, conference, or other proceeding, or take testimony, by reliable electronic means.

Section 4. Criminal Action.

(A) In a criminal action, a district or municipal court may conduct a hearing, conference, or other proceeding by reliable electronic means, except as otherwise provided in Section 4 (B).

(B) Exceptions.

(1) A defendant may not plead guilty nor be sentenced by reliable electronic means unless the parties consent.

(2) A witness may not testify by reliable electronic means unless the defendant knowingly and voluntarily waives the right to have the witness testify in person.

(3) An attorney for a defendant must be present at the site where the defendant is located unless the attorney's participation by reliable electronic means from another location is approved by the court with the consent of the defendant. In a guilty plea proceeding, the court may not allow the defendant's attorney to participate from a site separate from the defendant unless:

(a) the court makes a finding on the record that the attorney's participation from the separate site is necessary;

(b) the court confirms on the record that the defendant has knowingly and

voluntarily consented to the attorney's participation from a separate site; and

(c) the court allows confidential attorney-client communication, if requested.

Section 5. Revocation of Probation Proceedings for Out of State Offenders.

(A) When a petition for revocation of probation has been issued for a probationer who is in another state and who has been sentenced by a court having jurisdiction in the other state to a period of incarceration, a North Dakota district court may conduct the revocation of probation hearing by reliable electronic means. Before a district court may conduct a revocation of probation hearing by reliable electronic means for a probationer serving a sentence of incarceration in another state, the district court shall:

(1) confirm on the record that the probationer has knowingly and voluntarily consented to a revocation of probation hearing by reliable electronic means; and

(2) confirm on the record that the probationer has knowingly and voluntarily consented to the probationer's attorney's representation from a site separate from the probationer; and

(3) allow the probationer opportunity for confidential attorney-client representation.

(B) If the district court orders probation be revoked, the district court shall state on the record whether the period of incarceration imposed by the other state fully or partially satisfies the sentence imposed by the district court.

Section ~~5~~ 6. Mental Health Proceeding.

(A) In a mental health proceeding, a district court may conduct a proceeding by reliable electronic means and allow the following persons to appear or present testimony:

(1) the respondent or patient;

(2) a witness;

(3) legal counsel for a party.

(B) Notice, Objection, and Waiver.

(1) Notice. Before holding any mental health proceeding by reliable electronic means, the court must give notice to the petitioner and the respondent. The notice must:

(a) advise the parties of their right to object to the use of reliable electronic means;

(b) inform the respondent that the proceedings may be recorded on video and that, if there is an appeal, the video recording may be made part of the appendix on appeal and is part of the record on appeal.

(2) Objection.

(a) Reliable electronic means may not be used in a mental health proceeding if any party objects. The respondent must be given the opportunity to consult with an attorney about the right to object to the use of reliable electronic means.

(b) If the respondent fails to make an objection or fails to make a timely objection to the use of reliable electronic means, the court may nevertheless continue the proceeding for good cause.

(c) If the proceeding is continued, the respondent will continue to be held at the facility where the respondent was receiving treatment or, at the choice of the treatment provider in a less restrictive setting, until a face-to-face hearing can be completed.

(d) A face-to-face hearing must be scheduled to occur within four days, exclusive of weekends and holidays, of the date the objection was made, unless good cause is shown for holding it at a later time.

(3) Waiver. Upon mutual consent of the parties, and with the approval of the court, notice requirements in a mental health proceeding may be waived to allow for the conduct of proceedings without prior notice or with notice that does not conform to Section 5 (B) (1).

~~Section 6. Effective Date.~~

~~This rule is effective June 1, 2005, and remains in effect until further order of the supreme court. This rule was amended to extend to proceedings conducted by contemporaneous audio or audiovisual transmission using reliable electronic means effective March 1, 2015.~~

~~[Adopted effective May 1, 2005; amended effective June 1, 2005; March 1, 2015.]~~

EXPLANATORY NOTE

This rule was adopted effective May 1, 2005. Amended effective June 1, 2005; March 1, 2015; March 1, 2019.

This rule was amended, effective March 1, 2015, to extend the application of the rule to proceedings conducted by contemporaneous audio or audiovisual transmission using reliable electronic means.

A new Section 5 was added, effective March 1, 2019, to establish a procedure for the use of contemporaneous audio or audiovisual transmission using reliable electronic means in proceedings to revoke probation for probationers who are in another state.

SOURCES Joint Procedure Committee Minutes of January 25, 2018, pages 15-16; April 24-25, 2014, pages 15-16; April 27-28, 2006, pages 22-24; April 28-29, 2005, pages 21-22; April 24-25, 2003, pages 20-23; September 26-27, 2002, pages 4-12.

Amendments Effective ~~October 1, 2014~~ March 1, 2019

RULE 2.1 MENTAL HEALTH APPEALS UNDER CHAPTER 25-03.1, NORTH DAKOTA CENTURY CODE

(a) Filing Notice of Expedited Appeal. An expedited appeal from an order under N.D.C.C. § 25-03.1-29 may be taken by filing a notice of appeal with the clerk of the supreme court within 30 days after entry of the order. Extensions of time to file a notice of appeal under this rule are not permitted.

(b) Content of Notice of Appeal. The notice of appeal must:

(1) specify the party or parties taking the appeal;

(2) designate the order being appealed; and

(3) name the court to which the appeal is taken.

(c) Motion for Temporary Stay and Specifications of Error. Any motion for a temporary stay of the order appealed from while the appeal is pending must be served and filed with the notice of appeal along with specifications of error specifying the grounds for appeal. Any stay granted by the district court prior to appeal remains valid only if a temporary stay request is filed with the supreme court with the notice of appeal. Once the supreme court acts on the stay request, any district court stay terminates.

(d) Record on Appeal. The record on appeal consists of the record required by Rule 10(a) . A recording of the proceedings or an agreed statement of the case may substitute for the transcript.

(e) Briefs. Unless the appellant moves for a temporary stay of the order of the district court, the appellant's brief must be filed with the notice of appeal and must be served upon the opposing party at the time of filing. The appellee's brief must be served and filed no later than seven days after service of the appellant's brief. If the appellant moves for a temporary stay of the order of the district court, the appellant's brief must be served and filed no later than five days after the notice of appeal is filed and the appellee's brief must be served and filed no later than five days after service of the appellant's brief.

(f) Notice of Appellant's Presence at Hearing. If the appellant intends to be present at the hearing, notice of the intention must accompany the notice of appeal. Any party may file a proposed interim order for issuance by the supreme court which will ensure the appellant the opportunity to be present at the hearing on appeal while protecting the interest sought to be served by the order being appealed. The plans for implementing the proposed interim order must be stated with particularity.

(g) Motions. Any motion, other than a motion for temporary stay, must be filed within seven days after service of the notice of appeal. Any party may file a response in opposition to a motion within seven days after service of the motion.

(h) Application of Other Rules. To the extent they are not inconsistent with N.D.C.C. § 25-03.1-29 or this rule, all other rules of appellate procedure apply.

EXPLANATORY NOTE

Rule 2.1 was adopted, effective April 1, 1983; amended, effective March 1, 1998; March 1, 2003; March 1, 2008; March 1, 2011; Oct 1, 2014; March 1, 2019.

Rule 2.1 provides special procedures to accommodate the requirement in N.D.C.C. § 25-03.1-29 for a hearing within 14 days after the notice of appeal is filed in a mental health proceeding.

Subdivision (a) was amended, effective Oct 1, 2014, to provide for the filing of the notice of appeal in the supreme court.

Subdivision (a) was amended, effective March 1, 2019, to clarify that extensions of time to file the notice of appeal are not permitted.

Subdivision (c) was amended, effective March 1, 2008, to make it clear that a party who seeks to stay an order that is appealed must request a temporary stay from the supreme court when the notice of appeal is filed. Under N.D.C.C. § 25-03.1-29, only the supreme court can stay an order once an appeal is commenced.

Subdivision (e) was amended, effective March 1, 2011, to increase the time to serve and file an appellee's brief from five to seven days after service of the appellant's brief. If the appellant moves for a temporary stay of the order of the district court, the time to serve and file briefs was increased from three to five days.

Subdivision (g) was amended, effective March 1, 2011, to increase the time to file a motion from five to seven days.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 12-13; April 29-30, 2010, pages 22, 24; April 26-27, 2007, pages 27-28; September 23-24, 1999, pages 9-10; September 26-27, 1996, page 18; February 17-18, 1983, pages 33-34.

STATUTES AFFECTED:

63 CONSIDERED: 25-03.1-29, N.D.C.C.

Effective ~~December 15, 2011~~ March 1, 2019

RULE 14. IDENTITY PROTECTION

(a) Form of Confidential References. In appellate briefs, at oral argument and in opinions, the following individuals may not be referred to by name but may be referred to by the individual's initials:

(1) the respondent in a mental health proceeding;

(2) the respondent and members of the respondent's family in a conservatorship or guardianship proceeding;

(3) the respondent in a juvenile proceeding;

(4) the child and members of the child's family ~~parents~~ in a proceeding to terminate parental rights;

(5) a minor child;

(6) a victim or alleged victim of a sexual offense.

(b) Modification of Electronic Opinions.

(1) Individual Names. On request, if the name of an individual eligible for protection under subdivision (a) appears in the electronic version of a specific appellate opinion, it must be replaced by the individual's initials and the opinion annotated with the words "Modified under N.D.R.App.P. 14."

(2) Birth Dates. On request, if the full birth date of any individual appears in the

electronic version of a specific appellate opinion, it may be replaced by the individual's birth year and the opinion annotated with the words "Modified under N.D.R.App.P. 14."

EXPLANATORY NOTE

Rule 14 was adopted effective March 1, 2008; March 1, 2009; December 15, 2011; March 1, 2019.

This rule is not intended to create a separate cause of action.

Paragraph (a)(4) was amended, effective March 1, 2019, to require all references to a child or members of a child's family in appellate material to be by the individual child's initials in termination of parental rights proceedings. As an alternative to using initials, family members may be referred to by descriptive terms such as "father" or "mother" or by terms indicating their role in the appeal such as "appellant." Questions as to whether a person is a member of a family should be resolved in favor of protecting the person's identity.

Paragraph (a)(5) was amended, effective March 1, 2009, to require all references to minor children in appellate material to be by the individual child's initials.

Paragraph (b)(2) was added, effective December 15, 2011, to allow persons to request removal of a full birth date from an electronic version of an appellate opinion.

Sources: Joint Procedure Committee Minutes of September 30, 2011, pages 17-18; April 26-27, 2007, pages 28-29.

Statutes Affected:

Considered: N.D.C.C. §§ 12.1-34-02, 12.1-35-03, 14-15-16, 14-20-54, 25-03.1-43, 27-20-51.

Effective ~~October 1, 2014~~

RULE 24. SUPPLEMENTAL STATEMENT OF INDIGENT ~~DEFENDANT~~ PARTY

(a) In General.

(1) Statement Permitted. In a criminal or post-conviction case in which counsel representing an indigent defendant has submitted a brief, the indigent defendant or applicant may file a statement of additional grounds for review to identify and discuss matters that the indigent defendant or applicant believes were not adequately addressed in the brief filed by counsel.

(2) Length and Legibility The statement may not exceed 16 pages and may be handwritten so long as it is legible.

(3) Identification of Errors. The court will not consider an indigent defendant's or applicant's statement of additional grounds for review if it does not inform the court of the nature and occurrence of alleged errors. Reference to the record and citation to authority is required.

(b) Filing; Response.

(1) Time for Filing. The statement of additional grounds for review must be filed within 30 days after service on the indigent appellant of the brief prepared by indigent appellant's counsel. The indigent defendant or applicant must serve all parties with the statement of additional grounds for review.

(2) Additional Briefing; Oral Argument by Indigent Defendant or Applicant . The court may, in the exercise of its discretion, allow additional briefing to address issues

raised in the indigent defendant's or applicant's statement. Participation in oral argument by the indigent defendant or applicant is permitted only by order of the court on its own motion in exceptional cases.

EXPLANATORY NOTE

Rule 24 was adopted, effective March 1, 2010; amended March 1, 2013; October 1, 2014; amended March 1, 2019.

The title of this rule was amended, effective October 1, 2014, to clarify that an indigent defendant may file a statement of additional grounds for review.

Paragraph (a)(1) was amended, effective March 1, 2019, to allow supplemental statements to be filed in post-conviction relief cases.

Paragraph (a)(2) was amended, effective March 1, 2013, to decrease the page volume allowed in a supplemental brief.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page 22; January 26-27, 2012, pages 8-9; September 30, 2011, pages 11-12; April 28-29, 2011, page 18-20; September 25, 2008, pages 7-12; Wash.R.App.P. 10.10, 18.3.

Amended Effective ~~December 1, 2014~~ March 1, 2019

RULE 28. BRIEFS

(a) Form of Briefs. All briefs must comply with Rule 25 and Rule 32.

(b) Appellant's Brief. The appellant's brief must contain, under appropriate headings and in the order indicated:

(1) a table of contents, with paragraph references;

(2) a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the paragraphs in the brief where they are cited;

(3) in an application for the exercise of original jurisdiction, a concise statement of the grounds on which the jurisdiction of the supreme court is invoked, including citations of authorities;

(4) a statement of the issues presented for review;

(5) a statement of the case briefly indicating the nature of the case, the course of the proceedings, and the disposition below;

(6) a statement of the facts relevant to the issues submitted for review, which identifies facts in dispute and includes appropriate references to the record (see Rule 28(f));

(7) the argument, which must contain:

(A) appellant's contentions and the reasons for them, with citations to the authorities and parts of the record on which the appellant relies; and

(B) for each issue, a concise statement of the applicable standard of review (which may appear in the discussion of the issue or under a separate heading placed before the

discussion of the issues); and

(C) if the appeal is from a judgment ordered under N.D.R.Civ.P. 54(b), whether the certification was appropriate; and

(D) a short conclusion stating the precise relief sought.

(c) Appellee's Brief. The appellee's brief must conform to the requirements of subdivision (b), except that none of the following need appear unless the appellee is dissatisfied with the appellant's statement:

(1) the jurisdictional statement;

(2) the statement of the issues;

(3) the statement of the case;

(4) the statement of the facts; and

(5) the statement of the standard of review.

(d) Reply Brief. The appellant may file a single brief in reply to the appellee's brief. Unless the court permits, no further briefs may be filed. A reply brief must contain a table of contents, with paragraph references, and a table of authorities—cases (alphabetically arranged), statutes, and other authorities—with references to the paragraphs in the reply brief where they are cited.

(e) References to Parties. ~~In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear~~ Except as required under Rule 14, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the purchaser."

(f) References to the Record. References to the parts of the record contained in the appendix filed with the appellant's brief must be to the pages of the appendix. If the appendix is prepared after the briefs are filed or if references are made in the briefs to parts of the record not reproduced in the appendix, the references must be to the docket number of that part of the record. A party referring to evidence for which admissibility is in controversy must cite the pages of the appendix or of the transcript at which the evidence was identified, offered, and received or rejected.

(g) Reproduction of Statutes, Rules, Regulations, and Other Sources. If the court's determination of the issues presented requires the study of statutes, rules, regulations, etc., the relevant parts must be set out in the brief or in an addendum at the end of the brief.

(h) ~~[Reserved].~~ Oral Arguments Requested. Any party who desires oral argument must place the words “ORAL ARGUMENT REQUESTED” conspicuously on the cover page of the appellant’s, appellee’s or cross-appellee’s reply brief. Any party requesting oral argument must include in their brief a short statement explaining why oral argument would be helpful to the court.

(i) Briefs in a Case Involving a Cross-Appeal.

(1) An appellee and cross-appellant must file a single brief at the time the appellee's brief is due. This brief must contain the issues and argument involved in the cross-appeal as well as the answer to the appellant's brief.

(2) The appellant's answer to the cross-appeal must be included in the reply brief, but without duplication of statements, arguments, or authorities contained in the appellant's principal brief. To avoid duplication, references may be made to the

appropriate portions of the appellant's principal brief.

(3) The cross-appellant may file a reply brief confined strictly to the arguments raised in the cross-appeal. This brief is due within 14 days after service of the appellant's reply brief; however, if there is less than 14 days before oral argument, the reply brief must be filed at least 5 days before argument.

(j) Briefs In a Case Involving Multiple Parties. Any number of parties may join in a single brief or adopt by reference any part of another's brief. Parties may similarly join in reply briefs.

(k) Citation of Supplemental Authorities. If pertinent and significant authorities come to a party's attention after the party's brief has been filed—or after oral argument but before decision—a party may promptly advise the court by letter, with a copy to all other parties, setting forth the citations. The letter must state without argument the reasons for the supplemental citations, referring either to the page of the brief or to a point argued orally. Any response must be made promptly and must be similarly limited.

(l) Requirements. All briefs under this rule must be concise, presented with accuracy, logically arranged with proper headings, and free from burdensome, irrelevant or immaterial matters.

EXPLANATORY NOTE

Rule 28 was amended, effective March 1, 1986; January 1, 1988; March 1, 1994; March 1, 1996; March 1, 2003; March 1, 2008; March 1, 2010; March 1, 2011; October 1, 2014; December 1, 2014; March 1, 2019.

Under paragraph (b) (4), each legal issue should be stated as a question of law

sufficiently specific to allow the court to understand the precise issue presented. Generalized statements such as, "Is the verdict supported by the evidence?" are not sufficient.

Under subdivision (f), references may be made to the docket number of parts of the record not reproduced as in the examples following: Answer, docket No. 2, p. 7; Motion for Judgment, docket No. 15, p. 2; Transcript p. 231.

Rule 28 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 28. 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. Substantive changes were made to conform this rule with the changes made in Rule 32.

Subdivision (a) was added to inform parties that all briefs must comply with Rule 32 and amended effective October 1, 2014, to conform the rule to electronic filing.

Subdivision (b) :

Paragraphs (1) and (2) were amended, effective March 1, 2003, to separate the table of contents and the table of authorities into two distinct items in a brief.

Paragraphs (5) and (6) were amended, effective March 1, 2003, to require two separate statements—a statement of the case (the procedural history) and a statement of the facts.

Paragraph (7) was amended, effective March 1, 2010, to require a party to brief the appropriateness of a district court's grant of a certification under N.D.R.Civ.P. 54(b).

Subdivision (c) was amended, effective March 1, 2003,to conform the appellee's

brief with the appellant's brief, and to expand the items that need not be included in the appellee's brief.

Subdivision (e) was amended, effective March 1, 2019, to reference Rule 14, which provides for identity protection for certain individuals.

Subdivision (h) was amended, effective March 1, 2003, to delete length limitations, which have been moved to Rule 32.

Subdivision (h) was amended, effective March 1, 2019, to require a party to request oral argument and provide a short statement explaining why oral argument would be helpful to the court.

Paragraph (i)(3) was amended, effective March 1, 2011, to change the deadline for a cross-appellant to serve and file a reply brief if there is less than 14 days before argument from 3 to 5 days before argument.

Subdivision (k) was added, effective March 1, 2003, to provide a means for parties to inform the court of authorities that come to a party's attention after a brief has been filed or after oral argument.

Subdivision (l) was added, effective March 1, 2008, to explain requirements for briefs filed under Rule 28.

Rule 28 was amended, effective October 1, 2014, to replace "paper" with "document."

Rule 28 was amended, effective December 1, 2014, to require references to paragraph numbers in tables of contents and tables of authorities.

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, page

25; April 29-30, 2010, pages 23-24; September 24-25, 2009, pages 11-12; April 26-27, 2007, pages 29-31; September 27-28, 2001, pages 7-9; April 27-28, 1995, pages 15-17; January 26-27, 1995, pages 6-7; September 29-30, 1994, pages 13-16; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 15-16; November 30, 1984, pages 32-33; October 19, 1984, pages 23-26; March 16-17, 1978, page 4; January 12-13, 1978, pages 15-18. Fed.R.App.P. 28.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. §§ 28-18-06, 28-18-09, 28-27-33, 29-23-01, 29-23-02, 29-23-03, 29-23-04, 29-23-08, and 29-23-09.

CROSS REFERENCE: N.D.R.App.P. 14 (Identity Protection), N.D.R.App.P. 25 (Filing and Service), N.D.R.App.P. 30 (Appendix), N.D.R.App.P. 31 (Filing and Service of Briefs) and N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Documents).

Amended Effective ~~October 1, 2014~~_____

RULE 31. FILING AND SERVICE OF BRIEFS

(a) Time to Serve and File a Brief; Where Filed. The appellant must serve and file a brief within 40 days after the date on which the transcript is filed but, if no transcript is ordered, within 40 days after the notice of appeal is filed. The appellee must serve and file a brief within 30 days after the appellant's brief is served. The appellant may serve and file a reply brief within 14 days after service of the appellee's brief; however, if there is less than 14 days before oral argument the reply brief must be filed at least 5 days before argument. All briefs must be filed with the clerk of the supreme court.

(b) Number of Copies to Be Filed and Served.

(1) Each brief must be served and filed as follows:

(A) one electronic copy of each brief must be served on ~~each self-represented party and on~~ counsel for each party separately represented and on each self-represented party or prisoner;

(B) if a self-represented party or prisoner cannot accept electronic service, a paper copy of each brief must be served;

~~(B)~~ (C) one electronic copy of each brief must be filed with, or electronically transmitted to, the clerk of the supreme court ~~unless the filing party certifies the brief was not prepared on a computer or word processor~~; and

~~(C)~~ (D) for briefs filed in person, by mail or third-party commercial carrier, seven

bound copies and an unbound original of each brief must be filed with the clerk of the supreme court.

(2) All electronic copies of briefs must comply with Rule 25(a)(3). If a paper brief is filed or served, it must contain all the parts of the electronic brief and be in the same order as in the electronic brief. ~~must contain in a single file all information contained in a paper brief, including cover, table of contents, and certifications, in the same order as in the paper brief. The electronic copy of a brief must be formatted in WordPerfect; or, if WordPerfect is not available, Microsoft Word; or, if Microsoft Word is not available, ASCH; or other compatible electronic language authorized by the clerk of the supreme court.~~

(c) Consequence of Failure to File. If an appellant fails to file a brief within the time provided by this rule or within a time extended by the court, the court on its own motion may dismiss the appeal or an appellee may move to dismiss the appeal. An appellee who fails to file a brief will not be heard at oral argument.

EXPLANATORY NOTE

Rule 31 was amended, effective January 1, 1988; March 1, 1997; March 1, 1999; March 1, 2001; technical amendments effective August 1, 2001; March 1, 2003; March 1, 2008; March 1, 2011; October 1, 2014, March 1, 2019.

Rule 31 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 31. The language and organization of subdivisions (a) and (c) were changed to make the rule more easily understood and to make terminology

and style consistent throughout the rules.

Subdivision (a) was amended, effective March 1, 2011, to change the deadline for an appellant to serve and file a reply brief if there is less than 14 days before argument from 3 to 5 days before argument.

Subdivision (b) was amended, effective March 1, 2008, to require that a copy of each brief be served on each self-represented party. The subdivision was also amended to update requirements for filing an electronic copy with paper briefs.

Subdivision (b) was amended, effective October 1, 2014, to conform the rule to electronic filing. All parties, whether filing electronically or in paper, must file an electronic copy of the brief unless the party certifies that the brief was not prepared on a computer or word processor.

Paragraphs (b)(1) and (b)(2) were amended, effective March 1, 2019, to eliminate filing of a word processing version of a brief with the clerk of the supreme court and to clarify requirements for service on self-represented parties or prisoners.

Subdivision (c) was amended, effective March 1, 2008, to clarify extension and dismissal procedure.

Rule 31 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

SOURCES: Joint Procedure Committee Minutes of September 26, 2013, pages 26-27; April 29-30, 2010, page 24; January 25, 2007, page 19; September 27-28, 2001, page 23; April 26-27, 2001, page 9; September 28-29, 1995, page 12; May 21-22, 1987,

page 17; February 19-20, 1987, page 8; September 18-19, 1986, pages 2, 20; May 25-26, 1978, page 17; October 27-28, 1977, pages 6-7; September 15-16, 1977, pages 13-14. Fed.R.App.P. 31.

CROSS REFERENCE: N.D.R.App.P. 26(b) (Extending Time) , N.D.R.App.P. 28 (Briefs) , N.D.R.App.P. 30 (Appendix to the Briefs), N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Documents).

Amended Effective ~~October 1, 2014~~ March 1, 2019

RULE 34. ORAL ARGUMENT

(a) ~~In General.~~ Request for Oral Argument.

~~(1) Party's Statement. Any party may file, or the court may require, a statement explaining why oral argument should, or need not, be permitted.~~

(1) Oral argument generally will be scheduled unless:

(a) a party has failed to file a timely brief;

(b) a party has challenged the sufficiency of the findings of fact or the adequacy of the evidence supporting a finding of fact but has failed to provide the court with the related transcripts;

(c) no request for oral argument has been made by any party as required by Rule 28(h);

(d) the parties have agreed to waive oral argument; or

(e) the court, in the exercise of its discretion, determines oral argument is unnecessary.

~~(2) Standards. Oral argument may be denied if a party fails to file a brief or if the court, upon examination of the briefs and record, decides that oral argument is unnecessary.~~

~~(3)~~ (2) Notice. The clerk of the supreme court must advise all parties whether oral argument will be scheduled and, if so, the date, time, and place for argument.

(b) Time Allowed for Argument; Postponement. Regardless of the number of counsel on each side, the appellant will be allowed 30 minutes and the appellee will be allowed 20 minutes to present argument. Arguments on motions will be granted only in extraordinary circumstances. A motion to postpone the argument or to allow longer argument must be filed reasonably in advance of the hearing date. A party is not obliged to use all of the time allowed, and the court may terminate the argument at any time.

(c) Order and Content of Argument. The appellant opens and may reserve time to conclude the argument. The opening argument may include a fair statement of the case. Counsel must not read at length from briefs, records, or authorities.

(d) Cross-Appeals and Separate Appeals. Unless the court directs otherwise, a cross-appeal or separate appeal must be argued when the initial appeal is argued. Parties should not duplicate arguments.

(e) Nonappearance of a Party. If oral argument is scheduled and the appellee fails to appear ~~for argument~~, the court must hear appellant's argument. If the appellant fails to appear the court may hear the appellee's argument. If neither party appears, the case will be decided on the briefs, unless the court orders otherwise.

(f) Submission on Briefs. ~~Any party may submit its argument~~ If no oral argument is scheduled under Rule 34(a)(1), the case will be submitted to the court on the briefs, ~~but~~ unless the court ~~may~~ directs otherwise ~~that the case be argued~~.

EXPLANATORY NOTE

Rule 34 was amended, effective July 1, 1981; January 1, 1988; March 1, 1994; March 1, 1997; March 1, 2003; October 1, 2014; March 1, 2019.

Under subdivision (b), in the case of multiple appellants or appellees, each side must divide the time accorded unless additional time has been requested and granted. The omission of subdivision (g) of the Federal Rule is not intended to prevent the use of any exhibits at oral argument.

Rule 34 was revised, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 34. 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, effective March 1, 2003, to make clear that the court has discretion to determine whether oral argument should or should not be permitted.

Subdivision (a) was amended, March 1, 2019, to outline when oral argument will or will not be scheduled.

Rule 34 was amended, effective October 1, 2014, to replace "supreme court clerk" with "clerk of the supreme court."

SOURCES: Joint Procedure Committee Minutes of April 25-26, 2002, pages 12-13; January 24-25, 2002, pages 19-21; September 28-29, 1995, page 13; January 28-29, 1993, page 11; February 19-20, 1987, page 8; September 18-19, 1986, pages 20-21; April 26, 1984, page 30; January 12-13, 1978, pages 22-23. Fed.R.App.P. 34.

STATUTES AFFECTED:

Superseded: N.D.C.C. §§ 28-31-04, 28-31-05, 29-28-23, 29-28-24, and 29-28-25.

CROSS REFERENCE: N.D.R.App.P. 28(h) (Cross-Appeals).

Amended Effective ~~October 1, 2014~~ March 1, 2019

RULE 40. PETITION FOR REHEARING

(a) Time to File; Content; Answer; Action by Court if Granted.

(1) Time. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened or enlarged by order.

(2) Contents. The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) Answer. Unless the court requests, no answer to a petition for rehearing is permitted. Ordinarily, rehearing will not be granted in the absence of such a request.

(4) Action by the Court. If a petition for rehearing is granted the court may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission;

(C) issue any other appropriate order.

(b) Form of Petition; Length. A petition for rehearing must comply in form with Rule 32. A petition for rehearing must contain all applicable items listed in Rule 28(b). ~~Petitions for rehearing must comply with the following length requirements:~~

~~(1) Word Limit for Proportional Typeface. If proportionately spaced typeface is used, a~~ A petition for rehearing may not exceed ~~2,000 words~~10 pages, excluding ~~words in the table of contents, the table of citations, and~~ any addendum. Footnotes or endnotes

must be included in the ~~word~~ page count.

~~(2) Page Limit for Monospaced Typeface. If monospaced typeface is used, a petition for rehearing may not exceed eight pages, excluding the table of contents, the table of citations, and any addendum.~~

(c) Service and Filing. Copies of a petition for rehearing must be served and filed as prescribed by Rule 25 and Rule 31(b).

EXPLANATORY NOTE

Rule 40 was amended, effective March 1, 2003; March 1, 2004; March 1, 2008; March 1, 2013; October 1, 2014; March 1, 2019.

This rule is derived from Fed.R.App.P. 40.

Subdivision (b) was amended, effective March 1, 2003, to specify that a petition for rehearing must comply with the requirements of Rule 32.

Subdivision (b) was amended, effective March 1, 2004, to specify that a petition for rehearing must contain the elements specified in Rule 28 (b) that apply to the given petition. For example, a petition for rehearing that cites legal authorities must include a table of authorities as described in Rule 28 (b)(2).

Subdivision (b) was amended, effective March 1, 2008, to include length requirements for a petition for rehearing.

Subdivision (b) was amended, effective March 1, 2013, to decrease the page and type volume allowed in a petition for rehearing.

Subdivision (b) was amended, effective, March 1, 2019, to use only page counts

for filings.

Subdivision (c) was added, effective March 1, 2003, to clarify petition service and filing requirements and amended effective October 1, 2014, to conform the rule to electronic filing.

Rule 40 was amended, effective March 1, 2003, in response to the December 1, 1998, amendments to Fed.R.App.P. 40. 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 26, 2013, page 28; January 26-27, 2012, pages 8-9; September 30, 2011, pages 11-12; April 28-29, 2011, page 18-20; January 25, 2007, page 19; April 24-25, 2003, page 14; April 25-26, 2002, page 25; May 25-26, 1978, pages 19-20; March 16-17, 1978, pages 8-9. Fed.R.App.P. 40.

STATUTES AFFECTED:

SUPERSEDED: N.D.C.C. § 28-27-30.

CROSS REFERENCE: N.D.R.App.P. 28 (Briefs); N.D.R.App.P. 31 (Filing and Service of Briefs) ; N.D.R.App.P. 32 (Form of Briefs, Appendices, and Other Documents).