

State of North Dakota

JOINT PROCEDURE COMMITTEE

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SUPREME COURT
STATE CAPITOL
BISMARCK, NORTH DAKOTA 58505
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October 16, 2007

20070205
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IN THE OFFICE OF THE
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OCT 16 2007

STATE OF NORTH DAKOTA

Honorable Gerald W. VandeWalle, Chief Justice
North Dakota Supreme Court
600 East Boulevard Avenue
Bismarck, ND 58505-0530

Re: Proposed Amendments to North Dakota Rules
Supreme Court No. 20070205

Dear Chief Justice:

On July 13, 2007, the Joint Procedure Committee submitted proposed rule amendments to the Supreme Court. The Committee reviewed and discussed its rule proposals at a meeting on October 11-12, 2007, and decided to suggest two additional rule changes.

The Committee's proposal to amend N.D.R.App.P. 10 (The Record on Appeal) is currently before the Court. The Committee proposed a minor amendment intended to ensure that unrepresented parties to an appeal receive copies of the transcript. After reviewing the proposal, the Committee determined that additional amendments to Rule 10 would be appropriate. Specifically, the Committee suggests that references in the rule to "computer diskettes," which are an obsolete form of technology, be removed. A copy of the Committee's suggested changes to Rule 10 is attached.

The Committee's proposals to amend N.D.R.Civ.P. 26 (General Provisions Governing Discovery), 33 (Interrogatories to Parties), 34 (Production of Documents and Things and Entry Upon Land for Inspection and Other Purposes), and 37 (Failure to Make or Cooperate in Discovery; Sanctions) are currently before the Court. Most of the proposed amendments to these rules deal with the discovery of electronically stored information.

After reviewing the proposed amendments to the discovery rules, the Committee

concluded that a complementary amendment to N.D.R.Civ.P. 16 (Pretrial Conferences, Scheduling, Management) would be useful. The Committee suggests that Rule 16 be amended to include a reference to discovery of electronically stored information in Rule 16's list of "subjects for consideration at pretrial conferences." A copy of the Committee's suggested change to Rule 16 is attached.

The Committee respectfully requests that the Court consider adoption of the attached amendment suggestions.

Sincerely,

A handwritten signature in black ink, appearing to read "Dale V. Sandstrom". The signature is fluid and cursive, with a large initial "D" and a long, sweeping underline.

Dale V. Sandstrom
Chair, Joint Procedure Committee

MH:kh
attachment

RULE 10. THE RECORD ON APPEAL

(a) Composition of record on appeal. The following items constitute the record on appeal:

- (1) the original papers and exhibits filed in the district court;
- (2) two copies of the transcript, if any; and
- (3) a certified copy of the docket entries prepared by the clerk of district court.

(b) Order for transcript of proceeding.

(1) Appellant's duty to order. If an appeal is taken in a case in which an evidentiary hearing was held, the appellant must order a transcript of the proceedings as follows:

(A) two copies of the transcript must be ordered for the supreme court;

(B) one copy of the transcript must be ordered for each unrepresented party and each party separately represented;

(C) a complete transcript must be ordered, unless a stipulation is obtained from all affected parties specifying the portions that are not required for the purposes of the appeal;

(D) a transcript of any record of jury voir dire is not required, unless specifically requested by a party;

(E) the order for a transcript, and a copy of the stipulation of excluded portions, if applicable, must be filed with the clerk of district court with the notice of appeal.

(2) Information for order. An order for a transcript must include the following information:

- 22 (A) the caption of the case;
- 23 (B) the date or dates of trial;
- 24 (C) the number of copies required; and
- 25 (D) the names and addresses of the parties to be served with copies.

26 (3) Unreasonable refusal to stipulate. If a party affected by the appeal unreasonably
27 refuses to stipulate to exclude from the transcript portions of the record not necessary to the
28 resolution of the issues raised by the appellant, the party proposing the stipulation may apply
29 to the district court for an order requiring the refusal party to pay for the unnecessary
30 portions of the transcript and reasonable attorney's fees for making the application.

31 (4) Clerk of district court to transmit order. Within 3 days after an order for transcript
32 is filed, the clerk must transmit the order to the person designated by the district court to
33 prepare the transcript.

34 (c) Preparation of transcript.

35 (1) Time for furnishing transcript. Within 50 days after the order for transcript is filed
36 with the clerk of district court, the person preparing the transcript must complete and file the
37 transcript with the supreme court clerk unless an extension of time is received under
38 subdivision (d).

39 (2) Submission of transcript.

40 (A) The person preparing the transcript must serve and file the transcript as follows:

41 (i) a copy of the transcript must be served on each party designated in the order for
42 transcript;

43 (ii) proof of service of the transcript must be filed with the supreme court clerk;
44 (iii) two copies of the transcript must be filed with the supreme court clerk;
45 (iv) ~~a 3.5 inch computer diskette~~ an electronic copy of the transcript must be filed
46 with, or the transcript must be electronically transmitted to, the supreme court clerk. All
47 electronic transcripts must contain in a single file all the information contained in the paper
48 transcript, including the cover, table of contents, and certifications, in the same order as in
49 the paper transcript. The electronic transcript must include fixed line number and page
50 numbers corresponding to those in the paper transcript.

51 (B) In an appeal of the determination of an administrative agency, the agency must
52 file ~~a diskette~~ an electronic copy of the transcript or electronically transmit the transcript to
53 the supreme court clerk unless the agency certifies the transcript was not prepared on a
54 computer or word processor.

55 (3) Financial arrangements. The appellant or a party obligated under paragraph (b)(3)
56 to pay transcription costs must provide advance payment for the estimated cost of preparing
57 the transcript, provided:

58 - the person preparing the transcript serves a written estimate of the cost and a
59 demand for payment on the appellant within 10 days after receipt of the order for transcript;

60 or

61 - the person preparing the transcript serves a written estimate of the cost and a
62 demand for payment on a party obligated by court order to pay transcription costs within 10
63 days after receipt of the order.

64 If the person preparing the transcript fails to serve a timely written estimate and a
65 timely demand for payment, the right to demand advance payment is waived. Advance
66 payment is not required if transcription costs are to be paid by the state or an agency or
67 subdivision of the state. If the appellant or obligated party fails to make the advance
68 payment within 10 days after service of the demand, the person preparing the transcript may
69 suspend preparation of the transcript until paid.

70 (d) Extension of time.

71 (1) Good cause. If the person preparing the transcript is unable to complete and file
72 the transcript within 50 days after the order for transcript is filed, the district court for good
73 cause shown may extend the time for completion of the transcript.

74 If preparation of the transcript has been suspended for failure of any party to make
75 a timely advance payment upon demand, the district court for good cause shown by the party
76 responsible for the delay, may extend the time for completion of the transcript, on such terms
77 as the court may order.

78 (2) Request for extension. A request for an extension of time must be made within
79 the time originally prescribed or within an extension previously granted for completion of
80 the transcript. A district court may not extend the time for more than 90 days from the date
81 when the first notice of appeal was filed. If the district court is without authority to grant
82 the relief sought or has denied a request for an extension of time, the supreme court may on
83 motion for good cause shown extend the time for completion of the transcript beyond the
84 time allowed or fixed. If a request for an extension of time has been previously denied, the

85 motion must set forth the denial and state the reasons for the denial, if any were given by the
86 district court.

87 (e) Form of transcript. Each transcript must conform to the requirements of Rule
88 31(b)(2) and 32 except as otherwise provided:

- 89 - lines must be numbered on the left margin;
- 90 - each page may not contain more than 27 lines or less than 25 lines;
- 91 - the left margin may not be more than 1 3/4 inches wide;
- 92 - the right margin may not be more than 3/8 inches wide;
- 93 - each question and answer must begin on a new line;
- 94 - an indentation for a new speaker or paragraph may not be more than 10 spaces from
95 the left margin;
- 96 - each volume must be indexed as to every witness and exhibit;
- 97 - each page must be numbered consecutively;
- 98 - the accuracy of the transcript must be certified by the person preparing the
99 transcript.

100 (f) Statement of evidence when proceedings not recorded or when transcript
101 unavailable. If a transcript of a hearing or trial is unavailable, the appellant may prepare a
102 statement of the evidence or proceedings from the best available means, including the
103 appellant's recollection. The statement must be served on the appellee, who may serve
104 objections or proposed amendments within 10 days after being served. The statement and
105 any objections or proposed amendments must then be submitted to the district court for

106 settlement and approval. As settled and approved, the statement must be filed with the
107 supreme court clerk by the appellant within 60 days after the notice of appeal is filed.

108 (g) Agreed statement as record on appeal. In place of the record on appeal as defined
109 in subdivision (a), the parties may prepare, sign, and submit to the district court a statement
110 of the case showing how the issues presented by the appeal arose and were decided in the
111 district court. The statement must set forth only those facts averred and proved or sought
112 to be proved that are essential to the supreme court's resolution of the issues. If the
113 statement is truthful, it, - together with any additions that the district court may consider
114 necessary to a full presentation of the issues on appeal - must be approved by the district
115 court and must then be certified to the supreme court as the record on appeal. The clerk of
116 district court must then send the statement to the supreme court within the time provided by
117 Rule 11.

118 (h) Correction or modification of record.

119 (1) If any difference arises about whether the record truly discloses what occurred in
120 the district court, the difference must be submitted to and settled by the district court and the
121 record conformed accordingly.

122 (2) If anything material to either party is omitted from or misstated in the record by
123 error or accident, the omission or misstatement may be corrected and a supplemental record
124 made by certified and forwarded;

125 - on stipulation of the parties; or

126 - by the district court before or after the record has been forwarded.

127 The supreme court, on proper suggestion or of its own initiative, may direct an
128 omission or misstatement be corrected, and, if necessary, that a supplemental record be
129 certified and transmitted. All other questions as to the form and content of the record must
130 be presented to the supreme court.

131 EXPLANATORY NOTE

132 Rule 10 was amended, effective 1978; March 1, 1986; January 1, 1995; March 1,
133 1998; March 1, 1999; March 1, 2001; technical amendments effective August 1, 2001;
134 March 1, 2003; March 1, 2004; March 1, 2005; _____.

135 Rule 10 was amended, effective January 1, 1995. The amendment allows a transcript
136 to be prepared and certified from an electronic recording by someone other than the operator
137 of recording equipment or a court reporter.

138 Rule 10 was amended, effective March 1, 2003. The language and organization of
139 the rule were changed to make the rule more easily understandable and to make style and
140 terminology consistent throughout the rules.

141 Subdivisions (a) and (c) were amended, effective March 1, 2005, to require only two
142 copies of the transcript to be ordered and submitted to the supreme court.

143 Subdivision (b) was amended, effective March 1, 2004, to eliminate any requirement
144 to obtain a transcript of the voir dire record, unless such a transcript is specifically requested
145 by a party.

146 Subdivision (b) was amended, effective _____, to require that a copy of
147 the transcript be ordered for each unrepresented party.

148 Subdivision (c) was amended, effective _____, to eliminate references
149 to computer diskettes.

150 Sources: Joint Procedure Committee Minutes of _____; January 25,
151 2007, page 16; January 30-31, 2003, pages 3-4; September 26-27, 2002, pages 14-15; April
152 26-27, 2001, pages 8-9; January 27-28, 2000, pages 9-12; September 23-24, 1999, pages 19-
153 21; January 30, 1997, pages 9-10; September 26-27, 1996, page 18; April 28-29, 1994,
154 pages 3-4; January 27-28, 1994, page 18; September 23-24, 1993, pages 20-21; March 28-
155 29, 1985, pages 13-14; November 29, 1984, pages 5-6; May 25-26, 1978, pages 7-8; March
156 16-17, 1978, pages 1, 2, 9-13; January 12-13, 1978, pages 14-15; October 27-28, 1977,
157 pages 2-3; September 15-16, 1977, pages 5-8, 16-18; June 2-3, 1977, pages 2-4.
158 Fed.R.App.P. 10.

159 Statutes Affected:

160 Superseded: N.D.C.C. §§ 28-18-04, 28-18-05, 28-18-06, 28-18-07, 28-18-08, 28-27-
161 07, 28-27-33, 29-23-01, 29-23-02, 29-23-03, 29-23-04, 29-23-08, 29-23-09.

162 Cross Reference: N.D.R.App.P. 3 (Appeal as of Right - How Taken), N.D.R.App.P.
163 7 (Bond for Costs on Appeal in Civil Cases), N.D.R.App.P. 11 (Transmission and Filing of
164 the Record), and N.D.R.App.P. 12 (Docketing the Appeal).

RULE 16. PRETRIAL CONFERENCES, SCHEDULING, MANAGEMENT

(a) Pretrial conferences; objectives.

The court in its discretion may, and upon the occurrence of any of the triggering events specified in subdivision (b), must, direct the attorneys for the parties and any unrepresented parties to appear before it in person, telephonically, or by other electronic means, for a conference or conferences in advance of trial for such purposes as:

(1) expediting the disposition of the action;

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

(3) discouraging wasteful pretrial activities;

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

(5) facilitating the settlement of the case; and

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

(b) Scheduling and planning; triggering events.

The court must conduct a conference and enter an order to schedule and manage the case under the following circumstances:

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

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

22 of a dispositive motion;

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

25 (4) if any party makes a written request for a scheduling and planning conference.

26 (c) When conference held.

27 The scheduling and planning conference must be held within 60 days of the
28 triggering event.

29 (d) Subjects for consideration at pretrial conferences.

30 At any conference under this rule consideration may be given, and the court may take
31 appropriate action, with respect to the following:

32 (1) the formulation and simplification of the issues, including the elimination of
33 frivolous claims or defenses;

34 (2) the necessity or desirability and the time for joinder of other parties and of
35 amendments to the pleadings;

36 (3) the possibility of obtaining admissions of fact and documents which will avoid
37 unnecessary proof, stipulations regarding the authenticity of documents, and advance rulings
38 from the court on the admissibility of evidence;

39 (4) the avoidance of unnecessary proof and of cumulative evidence, and limitations
40 or restrictions on the use of testimony under Rule 702 of the North Dakota Rules of
41 Evidence;

42 (5) the appropriateness and timing of motions for summary adjudication under Rule

43 56 and any other motions;

44 (6) the control and scheduling of discovery;

45 (7) any issues relating to disclosure or discovery of electronically stored information,

46 including the form or forms in which it should be produced;

47 ~~(7)~~ (8) the appropriateness and timing of disclosure of witnesses and documents, the
48 need and schedule for filing and exchanging pretrial briefs, and the date or dates for further
49 conferences and for trial;

50 ~~(8)~~ (9) the advisability of a preliminary reference of issues to a master for findings to
51 be used as evidence when the trial is to be by jury;

52 ~~(9)~~ (10) settlement and the use of special procedures to assist in resolving the dispute;

53 ~~(10)~~ (11) the form and substance of the pretrial order;

54 ~~(11)~~ (12) the disposition of pending motions;

55 ~~(12)~~ (13) the need for adopting special procedures for managing potentially difficult
56 or protracted actions that may involve complex issues, multiple parties, difficult legal
57 questions, or unusual proof problems;

58 ~~(13)~~ (14) an order for a separate trial under Rule 42(b) with respect to a claim,
59 counterclaim, cross-claim, or third-party claim, or with respect to any particular issue in the
60 case;

61 ~~(14)~~ (15) an order directing a party or parties to present evidence early in the trial with
62 respect to a manageable issue that could, on the evidence, be the basis for a judgment as a
63 matter of law under Rule 50(a) or a judgment on partial findings under Rule 52(c);

64 ~~(15)~~ (16) an order establishing a reasonable limit on the time allowed for presenting
65 evidence;

66 ~~(16)~~ (17) the allocation of peremptory challenges; and

67 ~~(17)~~ (18) such other matters as may facilitate the just, speedy, and inexpensive
68 disposition of the action.

69 At least one of the attorneys for each party participating in any conference before trial
70 must have authority to enter stipulations and to make admissions regarding all matters that
71 the participants may reasonably anticipate may be discussed. If appropriate, the court may
72 require that a party or its representative be present or reasonably available by telephone in
73 order to consider possible settlement of the dispute.

74 (e) Modification.

75 A scheduling order issued under this rule may be modified by leave of court or as
76 permitted by Rule 29.

77 (f) Final pretrial conference.

78 Any final pretrial conference must be held as close to the time of trial as reasonable
79 under the circumstances. The participants at any such conference shall formulate a plan for
80 trial, including a program for facilitating the admission of evidence. The conference must
81 be attended by at least one of the attorneys who will conduct the trial for each of the parties
82 and by any unrepresented parties.

83 (g) Pretrial orders.

84 After any conference held under this rule, an order must be entered reciting the action

85 taken. This order controls the subsequent course of the action unless modified by a
86 subsequent order. The order following a final pretrial conference may be modified only to
87 prevent manifest injustice.

88 (h) Sanctions.

89 If (i) a party or party's attorney fails to obey a pretrial order, (ii) no appearance is
90 made on behalf of a party at a pretrial conference, (iii) a party or party's attorney is
91 substantially unprepared to participate in the conference, or (iv) a party or party's attorney
92 fails to participate in good faith, the court, upon motion of a party or its own motion, may
93 make such orders with regard thereto as are just, and among others any of the orders
94 provided in Rules 37(b)(2)(B), (C), (D). In lieu of or in addition to any other sanction, the
95 judge shall require the party or the attorney representing the party or both to pay the
96 reasonable expense incurred because of any noncompliance with this rule, including
97 attorney's fees, unless the judge finds that the noncompliance was substantially justified or
98 that other circumstances make an award of expenses unjust.

99 EXPLANATORY NOTE

100 Rule 16 was amended, effective July 1, 1981; March 1, 1986; March 1, 1990; March
101 1, 1996; March 1, 2000; August 1, 2004;_____.

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

106 Subdivision (a) was amended and new subdivisions (b), (c) and (e) were added,
107 effective August 1, 2004, to incorporate a mechanism to trigger scheduling and planning
108 conferences when certain events occur in an action.

109 Subdivision (d) was amended, effective _____, to add issues related to
110 electronically stored information to the list of possible subjects for discussion at a pretrial
111 conference.

112 Subdivision (d) was amended, effective March 1, 1996, to follow the 1993
113 amendment to Rule 16(c), ~~FRCivP~~: Fed.R.Civ.P.

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

116 Sources: Joint Procedure Committee Minutes of _____; September
117 18-19, 2003, pages 11-18; April 24-25, 2003, pages 26-30; May 6-7, 1999, pages 7-8;
118 January 28-29, 1999, pages 7-12; January 26-27, 1995, page 10; September 29-30, 1994,
119 pages 22-23; April 20, 1989, page 2; December 3, 1987, page 11; April 26, 1984, pages 26-
120 28; January 20, 1984, pages 18-23; September 18-19, 1980, pages 12-13; September 20-21,
121 1979, page 11; Rule 16, ~~FRCivP~~: Fed.R.Civ.P.